Saskatchewan
Labour Relations Board

**UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES of the PLUMBING & PIPEFITTING INDUSTRY of the UNITED STATES and CANADA, LOCAL 179, Applicant v. RELIANCE GREGG'S HOME SERVICES, a DIVISION OF RELIANCE COMFORT LIMITED PARTNERSHIP, Respondent**

LRB File No. 250-17, December 31, 2018

Vice-Chairperson, Kenneth G. Love Q.C.; Members: Jim Holmes and Allan Parenteau

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| For the Applicant: | Greg Fingas |
| For the Respondent: | Eileen v. Libby, Q.C. |

**Section 6-62(1)(a)** of *The Saskatchewan Employment Act*. Unfair Labour Practice application by Union alleging that Employer made improper communications with employees during organizing campaign. Board reviews communications and finds that they do not constitute an unfair labour practice.

**Section 6-62(1)(g)** of *The Saskatchewan Employment Act*. Unfair Labour Practice application by Union alleging that Employer improperly refused to indenture employee who wished to apprentice in the plumbing trades. Board reviews facts and finds that they do not constitute an unfair labour practice.

**Section 6-62(1)(g)** of *The Saskatchewan Employment Act*. Unfair Labour Practice application by Union alleging that Employer provided secret top up to employee to induce that employee not to support union organizing drive. Board reviews facts and finds that they do not constitute an unfair labour practice.

**Section 6-62(1)(i)** of *The Saskatchewan Employment Act*. Union alleges that employer improperly interfered with the selection of a trade union by its employees. Board reviews facts and finds that they do not constitute an unfair labour practice.

**Section 6-62(1)(j)** of *The Saskatchewan Employment Act*. Union alleges that employer improperly spied upon its employees. Union alleges that manager met with an employee for the purpose of determining who was supporting organizing drive by Union. Board reviews facts and finds that they do not constitute an unfair labour practice.

**Section 6-62(1)(p)** of *The Saskatchewan Employment Act*. Union alleges that employer improperly questioned employees with respect to their support for a trade union. Union alleges that manager met with an employee for the purpose of determining who was supporting organizing drive by Union. Board reviews facts and finds that they do not constitute an unfair labour practice.

## REASONS FOR DECISION

**Background:**

**[1]** The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 ("U.A. 179" or the "Union") brought 4 applications involving Reliance Gregg's Home Services, a Division of Reliance Comfort Limited Partnership (Gregg's"). 3 of those were applications[1] to be certified as the bargaining agent for various groups of employees of Gregg's. The fourth[2] was an Unfair Labour Practice Application. Gregg's also filed an Unfair Labour Practice application[3] against U.A. 179.

**[2]** All of the files were dealt with in a single hearing by the Board. The hearing commenced with Vice-chairperson Mitchell acting as the Chairperson of the hearing panel. However, between the time the evidence had been heard, but before final argument was made by the parties, he was appointed as a Justice of the Court of Queen's Bench. By the agreement of the parties, Kenneth G. Love Q.C., the former Chairperson of the Board, and newly appointed as the Vice-chairperson of the Board, to assist with the transition of matters such as this, undertook to review the Board's recordings of the proceedings, to hear final argument and to replace now Justice Mitchell as the Chairperson of the panel charged with making the decision with respect to each of the 5 matters under consideration by the Board.

**[3]** The 5 matters before the Board can be neatly placed into 3 overall categories. The first is the certification applications by U.A. 179 (3), the second is the Unfair Labour Practice application by U.A. 179, and the last is the Unfair Labour Practice application by

[1] LRB File Nos. 234- 236-17
[2] LRB File No. 250-17
[3] LRB File No. 254-17

Gregg's. The facts and Board's jurisprudence with respect to these 3 categories is somewhat different and for that reason, the Board has determined to provide 3 separate decisions with respect to each of the 3 overall categories. These reasons are in respect to the Unfair Labour Practice application brought by U.A. 179.

**[4]** The Union's Unfair Labour Practice Application alleged violations of sections 6-62(1)(a), 6-62(1)(g), 6-62(1)(i), 6-62(1)(j), and 6-62(1)(p). Each of these allegations relies upon discrete facts and arguments. We will, therefore, deal with each allegation separately in these reasons.

**Allegations under Section 6-62(1)(a)**

**Statutory Provision:**

> ***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;*
>
> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

**Facts:**

**[5]** The following is an outline of the facts heard from the Applicant and Union witnesses and numerous documents filed by the parties. Other material facts will be referred to as necessary during the analysis portion of these reasons.

**[6]** On November 23, 2107, Gregg's held an "all employee" meeting at its offices in Saskatoon. The meeting was in two segments. The first was a mandatory employee meeting for a business update where Gregg's CEO, Sean O'Brien, the western vice-president, Joe Gallo and Rahim Shamji, Gregg's head of Human Resources were present. The second segment of the meeting was a voluntary meeting. At the close of the business update, Sean O'Brien told those in attendance that further participation in the meeting was voluntary. No employees left the meeting at that time.

**[7]** The second meeting began with Mr. O'Brien reading a prepared statement[4]. Following his prepared remarks, he asked if there were any questions from employees. Only one question was asked by an employee. At that meeting, Gregg's also provided the employees with a letter which contained questions and answers prepared by Gregg's.

**[8]** Mr. Shamji also spoke to the meeting. He told the meeting that he had found what he understood was the wage schedule from the provincial collective agreement for plumbers/pipefitters. He handed that wage schedule out to those at the meeting.[5] Mr. Whalen also provided a letter[6] to the meeting in a frequently asked questions that related to the organizational campaign by U.A. 179.

**[9]** On November 24, 2017, Gregg's provided another letter to its employees[7]. This letter was mailed to employee's home addresses. On November 28, Gregg's provided a further letter[8] to its employees dealing with the certification vote to be conducted by the Board.

**[10]** On November 30, 2017, Gregg's posted two posters[9] in the workplace entitled "Facts".

**Union's arguments:**

**[11]** The Union argues that these communications and the all employee meeting offend the provisions of section 6-62(1)(a). It argues that employees were intimidated and were not able to leave the voluntary meeting without arousing suspicion from Gregg's. It argued that the communications were not factual and were designed to intimidate or coerce employees in the exercise of their rights under the *SEA*. The Union argued that the communications were not saved by the provisions of section 6-62(2) of the *SEA*. Furthemore, it argued, that the Board should consider the whole of the communications by Gregg's not just the individual communications.

**[12]** In support of its position, the Union cited the following cases. *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, a Division of*

[4] Entered as Exhibit U-13 in these proceedings.
[5] Entered as Exhibit E-14 in these proceedings.
[6] Entered as Exhibit E-13 in these proceedings.
[7] Entered as Exhibit U-5 in these proceedings.
[8] Entered as Exhibit U-7 in these proceedings.
[9] Entered as Exhibits U-8 and U-9 in these proceedings.

*Hollinger Inc.*[10], *C.E.P. v. Hollinger Canadian Newspapers, L.P.*[11], *Globe and Mail v. Southern Ontario Newspaper Guild, Local 87*[12], *Securitas Canada Ltd. v. UFCW Local 1400*[13], *UA Local 496 v. Bilton Welding and Manufacturing Ltd.*[14], *UBCJA, Local 2103 and Quorum Construction (BC) Ltd.*[15] and *SEIU, Local 1 Canada v. PRP Senior Living Inc.*[16]

**Employer's arguments:**

**[13]** Gregg's argued that the communications were saved by section 6-62(2) of the *SEA* in that the communications provided either facts or Gregg's opinions with respect to the matters at issue. In support of that argument, it cited the Saskatchewan Court of Appeal decision in *Cypress Regional Health Authority v. SEIU-West*[17].

**[14]** Gregg's argued that the test for whether or not a communication violated section 6-62(1)(a) was set out by the Board in *Securitas Canada Ltd. v. UFCW Local 1400*[18] at paragraph 31 of that decision.

**[15]** Nor, Gregg's argued, do trade unions have the exclusion right to provide information to its employees regarding the workplace or employee rights. In support, it cited *Clean Harbors Industrial Services Canada Inc. v. IBEW, Local 2038*[19]

**Analysis:**

**[16]** The Board's leading authority with respect to violations of section 6-62(1)(a) is its decision in *SEIU-West v. Saskatchewan Association of Health Organizations*[20]. (the "Cypress Health Authority" case). This decision arose out of a contentious round of bargaining between health care provider unions and the various provincial health authorities through their bargaining representative, The Saskatchewan Association of Health Organizations ("SAHO). The decision

[10] [1998] Sask L.R.B.R.770, LRB File No. 174-98
[11] [2001] Sask. L.R.B.R. 689, [2001] S.L.R.B.D. No. 66, 81 C.L.R.B.R (2d) 77
[12] [1982] 2 Can. L.R.B.R. 73
[13] 2015 CanLII 43778 (SK LRB)
[14] 2018 CarswellAlta 165 (AB LRB)
[15] 2017 CarswellAlta 2915 (AB LRB)
[16] 2013 CanLII 15847 (ON LRB)
[17] 2016 SKCA 161
[18] 2015 CanLII 43778 (SK LRB)
[19] 2014 CanLII 76047 (SK LRB)
[20] 2012 CanLII 18139 (SK LRB)

dealt with communications directed by SAHO to employees of the various health authorities during the collective bargaining process.

**[17]** *The Trade Union Act* which was considered by the Board in that case had been amended at various times to allow or disallow employer communications with employees. The most recent change had occurred in 2008 when the legislation was amended to add words similar to those set out in section 6-62(2) of the *SEA*. The Cypress Health Authority case was the first opportunity for the Board to consider the effect of the 2008 amendment and to ascribe meaning to that provision.

**[18]** The Board rendered its decision on April 10, 2014. Commencing at paragraph [88], the Board conducted an extensive review of the purpose and meaning of the amendment. At paragraph [96], the Board concluded:

> ***[96]*** *Our conclusions as to the effect of the 2008 amendment to s. 11(1)(a) of the Act are three (3) fold:*
>
> *1. In our opinion, the substantive test for determining whether or not impugned conduct represents a violation of s. 11(1)(a) is much the same as it was prior to the 2008 amendment. The test continues to involve a contextualized analysis of the probable consequences of impugned employer conduct on employees of reasonable intelligence and fortitude. We also note that the change to s. 11(1)(a) did not substantively alter the kind of prohibited effect that the legislature seeks to avoid. The legislature seeks to avoid employer conduct that would compromise or expropriate the free will of employees in the exercise of their rights under The Trade Union Act.*
>
> *2. The change to s. 11(1)(a) clearly signaled a greater tolerance by the legislature for the capacity of employees to receive information and views from employers without being interfered with, coerced or intimidated (i.e.: without their free will being compromised or expropriated). A corollary of this conclusion is a generally weakening of the historic presumption that all communications by an employer are invariably and inherently coercive or intimidating for employees.*
>
> *3. The change to s. 11(1)(a) has interpretive implications for a number of provisions in The Trade Union Act. The words that were added to s. 11(1)(a) are applicable to any section of the Act wherein a violation can be committed by means of an employer communication, including the balance of s. 11(1) and s. 9.*

**[19]** The Board goes on at paragraph [98] *et seq.* to describe the effect of the amendment. It says:

> ***[98]*** *In amending The Trade Union Act in 2008, the legislature did not alter the description of prohibited conduct in s. 11(1)(a). In our opinion, following the 2008 amendment, the Board begins its analysis of impugned employer conduct, much as it has in the past, by considering the conduct in light of the circumstances occurring at the time. If the Board is satisfied that the probable effect of the employer's conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of protected rights, a violation of the Act will be sustained. This test continues to be an objective one. The Board's approach continues to be to determine the likely or probably effect of an impugned conduct upon the affected employees. In doing so, we assume those employees are reasonable; that they are intelligent; and that they are possessed of some resilience and fortitude. See: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment, [2012] 205 C.L.R.B.R. (2nd) 139, 2011 CanLII 72774 (SK LRB), LRB File Nos. 107-11 to 109-11 & 128-11 to 133-11. In our opinion, the kind of prohibited effect which s. 11(1)(a) seeks to avoid is conduct by an employer that would compromise or expropriate the free will of employees in the exercise of their rights under The Trade Union Act.*
>
> ***[99]*** *In our opinion, the 2008 amendment to s. 11(1)(a) expanded the scope of permissible employer communications under The Trade Union Act. With this amendment, the legislature has confirmed that trade unions are not the only permissible source of information for certified employees. Although the amendment did not change the description of prohibited conduct in s. 11(1)(a), it undoubtedly signaled a greater tolerance by the legislature for the capacity of employees to receive information and views from their employers without being interfered with, intimidated or coerced. In our opinion, to interfere with an employee in the exercise of his/her rights now requires conduct intended to compromise or expropriate that employee's free will. For example, the mere fact that an employer has communicated facts and opinions to its employees and those employees may have been influenced by those views and opinions; even agree with those views; should not now automatically lead to a finding of interference, let alone employer coercion or intimidation. The prohibited effect targets a higher threshold than merely influencing employees in the exercise of their rights.*
>
> ***[100]*** *Furthermore, the historic presumption that all employer communications are inherently and inevitably intimidating or coercing for employees cannot stand in face of the 2008 amendment to s.*

*11(1)(a). It may well be that a power imbalance exists in a particular workplace or that a particular group of employees are vulnerable for one reason or another to the wishes or influences of their employer. However, it is no longer appropriate for this Board to begin its analysis of the impugned employer conduct by presuming that employees are inherently or inevitably susceptible to the expropriation of their free will by an employer. In our opinion, absent evidence of an unusual power imbalance in the workplace, we start from the presumption that employees are capable of receiving a variety of information from their employer; of evaluating that information, even being aided or influenced by that information; without necessarily being improperly influenced, threatened, intimidated or coerced by that information. Absent evidence of a particular vulnerability of employees, we start from the presumption that employees are capable of weighing any information they receive, including information from their employer, and will make rational decisions in response to that information. In blunt words, in evaluating the probable effect of impugned communication by an employer, we do not assume that affected employees are timorous minions cowering in fear of their masters.*

***[101]*** *The context in which an impugned communication occurs continues to be fundamental to evaluating the probable effect of that communication in two (2) ways. Firstly, contextualizing an impugned communication helps evaluate the probably effect of that communication on employees of reasonable fortitude. Considering the context within which an impugned communication occurs help the Board determine if an otherwise ambiguous statement may convey a subtle message or have a different meaning in that particular context. Secondly, the circumstances in which an impugned communication occurs also guides the Board in determining the approach it will take to intervention. An analysis of the Board's jurisdiction reveals that communications occurring during an organizing campaign or during a rescission application have generally been subject to a more rigorous review by the Board. During an organizing campaign or at any time when the representational question is before employees, the Board has generally been highly alert to subtle signs of employer interference, intimidation, coercion or threats. For example, communications from an employer about the relative benefits of unionization have been found to convey a subtle message of intimidating or coercive effect when made during an organizing campaign. See: Super Valu, a Division of Westfair Foods v. United Food and Commercial Workers, Local 401, [1981] 3 Can. LR.B.R. 412, LRB File No. 121-81.*

***[102]*** *On the other hand, a much more "laissez faire" approach has been taken to employer communications at times when employees are not deciding the representational question. For example, the Board has historically been reluctant to insert itself into the collective*

*bargaining process as a censor of communications between parties. See: Retail, Wholesale and Department Store Union v. Canadian Linen Supply Company Limited, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90; Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc., [2007] Sask. L.R.B.R. 87, 2007 CanLII 68775 (SK LRB), LRB File No. 162-05; Unite Here Union, Local 41 v. West Harvest Inn, 2008 CanLII 68748 (SK LRB), LRB File No. 127-07. See also: Regina Public Library Board v. Canadian Union of Public Employees, Local 1594, LRB File No. 001-12. Collective bargaining is emotionally-charged and difficult even for experienced negotiators. As a consequence, the Board has generally adopted a laissez faire approach when dealing with both employer and trade union communications occurring during collective bargaining and particularly so with respect to communications that occur at the table in the heat of the moment. Collective bargaining would undoubtedly grind to a halt in a flood of applications to this Board if we erroneously allowed ourselves to become the arbitrators of civility at the bargaining table.*

***[103]*** *Our final conclusion as to the implications of the 2008 amendment is that the words that were added to s. 11(1)(a) affected more than just that particular provision. The words that were added to s. 11(1)(a) are "but nothing in this Act precludes an employer from communicating facts and opinions to its employees". In our opinion, these words, by definition, apply to any section of the Act wherein a violation can occur as a result of employer communications. For example, in Gordon Button v. United Food and Commercial Workers, 1400 v. Wal-Mart Canada Corp., (2011) 199 C.L.R.B.R. (2nd) 114, 2011 CanLII 100501 (SK LRB), this Board modified its interpretation of s. 9 of The Trade Union Act in response to the 2008 amendment to s. 11(1)(a). The 2008 amendment may not have changed the language of the other provisions of the Act but it certainly can be seen as having a modulating effect on the interpretation of a number of provisions of the Act. For example, while an employer continues to be prohibited from coercing or intimidating their employees in the exercise of protected rights; from interfering in administration of a labour organization; and from circumventing the union and bargaining directly with employees with respect to the terms and conditions of their employment; the provision of facts and opinions to employees, simpliciter, cannot now represent a violation of The Trade Union Act. In evaluating the impugned conduct of an employer, the Board must now be more restrained in the inferences it takes as to the probable effect of impugned communications if those communications merely involve the reasonable expressions of facts or opinions.*

**[20]** The Board's decision in Cypress Health Authority was taken on judicial review to the Court of Queen's Bench. In its decision, the Court ordered that the decision of the Board be

set aside except insofar as it had found that SAHO had misrepresented the situation concerning retroactive pay. The Court ordered the Board to reconsider its decision, taking into account the findings that were made by the Court.[21]

**[21]** That decision was further appealed to the Court of Appeal for Saskatchewan. In its decision[22], the Court of Appeal supported the Board's decision and reversed the Court of Queen's Bench decision.

**[22]** The Court of Appeal described the Board's approach as a "middle ground"[23] between totally unrestricted communication by employers or that the amendment was meaningless and added nothing.

**[23]** In its decision, the Board concluded that it should adopt a *laissez faire* approach to its review of the impugned communications. In doing so, it adopted an objective standard, that being a contextualized analysis of the probable consequences of impugned employer conduct on employees of reasonable intelligence and fortitude[24]. The Board also determined that the communications must also be considered within the context in which they occurred.

**[24]** There are 5 communications which need to be examined to determine if they offend section 6-62(1)(a) of the *SEA*. The first is the all-employee meeting on November 23, 2017, the second is the wage schedule provided by Mr. Shamji to the meeting, the third is the November 24th letter to employees the fourth is the informational posters placed in the workplace on November 30, 2017 and finally we have the letter of December 1, 2017 delivered to employee's homes.

**[25]** The Union argues that the all employee meeting was inherently coercive or intimidating, citing *Quorum* from the Alberta Labour Relations Board. In that decision, the Alberta Board quotes from Adams in *Canadian Labour Law* at paragraph 56. It quotes from paragraph 10:980 of Adams as follows:

> *A much less "laissez faire" approach is taken where a board is not dealing with a mature and established bargaining relationship. This is particularly*

[21] Summary of the Court of Queen's Bench decision provided by Mr. Justice Richards in his decision (2016) SKCA 161) at paragraph 63.
[22] 2016 SKCA 161
[23] See paragraph 104 of the Court of Appeal decision.
[24] See paragraphs [96] and [106]

> *the case in the context of union organizing. By examining objectively, the circumstances of the case and drawing inferences about the probable effect of the impugned employer communication, labour boards attempt to establish whether the employees' free expression of their wishes has be thwarted by employer comments. Factual statements, comments about an employer's ability to remain competitive and the issue of job security—by themselves and without otherwise incriminating surrounding circumstances may not constitute illegal communications.*

**[26]** While acknowledging that the Board needs to be aware of potential imbalances during an organizing campaign and when the parties have a mature relationship, the test to be employed by the Board does not change and the objective standard remains to be applied**.** In making its analysis, the Board looks to the context, content, accuracy and timing of employer communications in discerning their purpose and effect.

**The All-employee Meeting:**

**[27]** We are fortunate in this case to have both a copy of Mr. O'Brien's remarks[25] at the all-employee meeting as well as a transcript[26] of a portion of a surreptitious recording made by one of the employees who attended the meeting. At that meeting, employees were provided a memorandum from Gregg's providing information regarding the unionization process. In addition, employees were provided the provincial agreement wage schedule by Mr. Shamji.

**[28]** In Mr. O'Brien's remarks, he made it clear that it wanted the employees to exercise their choice not to vote in favour of the union. He stated at the outset that he did not wish to lose the flexibility to communicate directly with the employees…"as individuals". In addition to saying that "we don't want you to join the union", he urged the employees "to vote No for a union". In making these statements, he was clearly campaigning against employees voting to have U.A., 179 represent the employees for collective bargaining.

**[29]** In his written speech, he also says:

> *I also wanted to speak to you about job security. I have heard that some team members were concerned about this. Unions cannot provide job security. The best way to build job security is to build strong and profitable businesses. The more customers that take our products and*

[25] Exhibit U-13
[26] Exhibit U-20

> *services and see us as the preferred choice, the more our business will grow. That is how security is built.*

**[30]** Later, he makes the following comments:

> *My final point is around the conversations with the unions. Unlike us, the employer, the union is free to promise you all sorts of wonderful things. My mum always told me, "If it sounds too good to be true, it is likely un-true". I understand that the union has been promising all sorts of benefits, big wage increases, pension plans, increased benefits, and on and on. I just ask all of you to look around at other HVAC companies and what those team members are getting to determine what is realistic in this industry. In some industries, insurance, Banking, Utilities and Government, they have some great benefit plans and salaries. In HVAC, the margins are very tight and the customers are very price sensitive. We have to be realistic about what type of costs we incur as they all translate to increased prices for our customers and our ability to compete.*
>
> *Remember, union promises are just a wish list.*

**[31]** In addition to these comments, Mr. Shamji provided employees at the meeting with a wage schedule which he had found on the internet and which he believed was the wage schedule for the provincial collective agreement between CLR and the Plumbers/Pipefitters. The Union took issue with this schedule saying that it misrepresented the hourly rate because the provincial rate was a net rate (ie benefits etc. were in addition to that rate) and the hourly rate paid by Gregg's was a gross rate (ie benefits etc. were deducted from that rate).

**[32]** Several Union witnesses testified that they felt intimidated at the meeting and could not leave when offered the opportunity. Their testimony, however, is not necessarily determinative of the issue. At paragraph 106 of the *Cypress Health Authority* case, Mr. Justice Richard says:

> *106 …The Chambers judge underlined that the Board heard evidence from ten employees who had said, in various ways, that they had effectively felt intimidated or coerced by SAHO's communications campaign. This evidence, of course, was presented but it was the responsibility of the Board to assess its significance. The question before the Board involved a contextualized assessment of the impact of SAHO's communications on employees of "reasonable intelligence and fortitude." It follows, necessarily, that the testimony of ten employees called by the Unions cannot be determinative of the s. 11(1)(a) inquiry.*

**[33]** Apart from the quotations noted above, the majority of Mr. O'Brien's comments at the meeting are relatively mundane. Additionally, his comments must be put into the context of the meeting which was called to review the business operations since the new ownership had taken over. It is not surprising that he would (a) not want to see a union in the workplace and (b) that he would stress team building and economic performance of the business as the path to success.

**[34]** Would an employee of reasonable intelligence and fortitude be intimidated or coerced by these comments by Mr. O'Brien? We think not. His comments were fair and expressed either facts or opinions permitted under section 6-62(2) of the *SEA*. He noted early on in his speech that he was precluded from making any promises "or get into discussions of what it would be like in the future if you voted against the union". He noted that he was constrained in what he could say to employees and noted regret that he might lose the ability to communicate individually with members if the union was certified.

**[35]** He noted, based upon experiences with unionized workplaces in Ontario that individual employee flexibility suffered when employees bargained collectively. He noted that it was his desire to retain that flexibility.

**[36]** There were no threats in the speech. Nor could it be said that the tone or words used could be considered to be intimidating. There was no attempt to restrain employee choice or to interfere with the voting process. Plain and simple, it was a plea to the employees not to vote in favour of a union in the workplace.

**[37]** It was clearly his opinion that the workplace would be better served without a union present. From his testimony, we see that that opinion was honestly held and was based upon his experience with unionized workplaces in Ontario.

**[38]** Clearly, the amendment in 2008 which was carried forward to the *SEA* was designed to allow employers to express their views (opinions) and to provide facts to their employees regarding the process of introducing a union to the workplace. As noted by the Board in *Cypress Health Authority* that ability to communicate is not a *carte blanche*, as such communications can, as was the case in *Cypress Health Authority*, still cross the line and run afoul of the provisions of section 6-62(1)(a).

**[39]** There is certainly no evidence to show that any employee was so intimidated, coerced, restrained, threatened or interfered with by Mr. O'Brien's speech that they did not exercise their rights under the *SEA*. We do not know if any employees changed their view of the Union as a result of Mr. O'Brien's speech, but even so, that would not, in and of itself, be offside of the provision. Employers are entitled to communicate with their employees in an attempt to change their minds as to how they may ultimately vote on the representation question.

**[40]** Based upon our review of the documents and evidence presented, we are not persuaded that these communciations were not permitted under section 6-62(2) of the *SEA.*

**The November 23rd memo to Employees:**

**[41]** This memo was from Shae Whalen, the General Manager of Gregg's. In it he notes that they were advised the week prior of the application by U.A. 179 to represent the employees of Gregg's. That memorandum used a question and Answer ("Q & A's") format to address issues surrounding the organizing drive.

**[42]** The Union takes issue with the Q & A's in three[27] respects. Firstly, they argue it was improper for the Q & A's to provide information regarding how an employee could reconsider support for the Union. Secondly, they argued that the Employer erred in its answer that all terms and conditions of employment would be negotiated with Gregg's rather than through the provincial agreement. Thirdly, the Union argued that it was improper to suggest that union members should contact either himself (Whalen) or another manager, but failed to provide contact information for the Union.

**[43]** We do not find any of these objections to have merit. The first issue represented a misunderstanding of the Board's process with respect to card based support. Card based support is only utilized by the Board to determine if the 45% threshold for ordering a vote has been reached. Evidence of support cannot be withdrawn for that purpose. If an employee has changed his mind regarding the union, that employee can make any adjustment to his support when presented with his ballot by the Board.

[27] In their written argument, the Union took exception in four respect. However, one of those issues arose not from the memorandum, but from Mr. O'Brien's speech in respect of job security.

**[44]** Secondly, the Union's argument presumes that the Board would issue a certification under Division 13 of the *SEA*. That has not been the case and the Board has determined that a non-Division 13 unit of employees is appropriate for collective bargaining. As such, Gregg's, should the vote be in favour, would be required to bargain collectively with the Union regarding terms and conditions of employment.

**[45]** Finally, even if it were necessary for Gregg's to have provided contact information for the Union, something which we do not believe to be the case, there is no demonstrable link between the failure to provide that information and any employee or reasonable intelligence and fortitude having their rights interfered with, intimidated, threatened or coerced by the information in the memorandum.

**The Wage Schedule:**

**[46]** Turning to the wage schedule provided by Mr. Shamji, we are also of the view that this document does not offend the section. The Union complains that the wage schedule was misleading, yet they did nothing to countermand this alleged misunderstanding at the time. The schedule represented a statement of fact by Gregg's. It obtained the wage schedule believing it to be the wage rates paid under the provincial agreement to plumbers/pipefitters. It left any analysis of the wage schedule to the employees. If there were any questions regarding it, or any employees felt interfered with, intimidated, threatened or coerced by the information that was not apparent from the evidence presented. We had no evidence to show that any employee of reasonable intelligence or fortitude was in any way interfered with, intimidated, threatened or coerced in exercise of their rights under the *SEA* was in any way impacted by the release of this information.

**November 24th letter to employees:**

**[47]** Reliance sent a letter to employees at their home addresses on November 24, 2017. The letter came from Shea Weber and again utilized a Q & A format. While the Union argued that the letter was objectionable from a number of standpoints, there was again no evidence to show that any employee was interfered with, intimidated, threatened or coerced in the exercise of their rights under the *SEA* by virtue of this information or any alleged inaccuracies in such information.

**[48]** This letter again made it clear that Gregg's opposed the union organizing drive, but at the same time it made it clear that the employees had the right to have a union represent them and that it would be the employee's choice if a union became their bargaining representative.

**[49]** The letter, while clearly expressing Gregg's opinion with respect to unions, cannot be seen as being in breach of section 6-62(1)(a), especially in light of section 6-62(2) of the *SEA.*

**The Informational Posters:**

**[50]** The Posters in question appeared in the workplace about November 30, 2017. Each of them was headed "FACTS!!!". One dealt with the issue of the potential for strikes during negotiations for a collective bargaining agreement. The second dealt with issues of job security, competitive wage and benefits packages, and direct communication with employees. Each of the posters advocated for a "NO" vote.

**[51]** The Union argued that the posters were unbalanced insofar as, for example, on the poster dealing with strikes there was no mention of strike pay for employees on strike. The Union also argued that the posters were presumptive in that they presumed Gregg's wage and benefits package for employees was both "competitive' and "comparable" without any frame of reference.

**[52]** These posters were not, we believe, objectionable and did not breach section 6-62(1)(a) when the right of employers to express facts and opinions in section 6-62(2) is considered. That provision allows employers to communicate and to provide their opinion and facts to employees. Balance is not required and provided the employer does not go to far as to deliberately mislead employees or made deliberately false statements, the communications, considered in the "rough and tumble" of the organizing campaign would be permissible.

**[53]** Two employees testified that they had a fear of retaliation and job losses. One witness testified that he was approached by a member of the administrative staff who told him that people would lose their jobs if the union was successful. That witness also testified that the administrative person told the employee of a pension plan and RRSP program available in other locations operated by the LP, but which had not been offered at Gregg's.

**[54]** The other witness testified that he was impacted by a statement made by O'Brien that he wanted to have 6 months to try to regain the employee's confidence without union representation.

**[55]** We have no testimony to challenge the testimony of the two witnesses concerning retaliation and job losses. However, no such threat was made in any of the communications that we have reviewed. Nor can we attribute comments from a junior administrative staff member to the management of Gregg's. There was no connection shown. Why that person made such comments we do not know.

**[56]** The witnesses which provided the testimony, however, did not testify that these comments in any way impacted their exercise of their representational rights or that their free will was in any way expropriated by the comments.

**The December 1st Letter:**

**[57]** Like the November 24th letter reviewed above, this letter was also sent by Mr. Whalen to employees at their home addresses. The Union objected to this letter because they argued that it (a) suggested that wages would decrease if the Union obtained representational rights, (b) that Gregg's assertion that it paid competitive wages was unproven, (c) that the reference to strikes failed to mention availability of strike pay, and that the letter contained a statement that it would be "very difficult to go back" if the employees chose to be represented by the Union.

**[58]** With respect, we do not agree with the Union's characterization of this communication. Firstly, the letter did not, as the Union suggests, contain a threat that wages would be reduced. In the letter, the question was posed; "Are your wages going to go up or go down as a result of voting in this Union?". Additionally, the letter stated; "There is no guarantee that your pay will remain the same if you join the Union". While the question and comment may spark debate and questions to the Union, it would not, in our opinion, stated in that form, be objectionable. The question and comment were intended to spark debate and questions with employees. However, the question and comment were not posed as a threat, or to coerce, intimidate, restrain or interfere with any employee's rights under the *SEA*.

**[59]** We have dealt with the issues raised in points (b) and (c) in paragraph [52] above and there is no need to deal with those objections further. In respect of (d), the comment

is factual insofar as once a union becomes certified within a workplace, it is difficult for employees to dislodge the union. While there are instances where a union does not resist a rescission application, that is not the general rule.

**The Onus on the Union:**

**[60]** There is no reverse onus provision under section 6-62(1)(a). As such, the Union has the onus of proof that the impugned actions by Gregg's and the communications which it made, have interfered with, restrained, intimidated, threatened, or coerced an employee of reasonable intelligence or fortitude in the exercise of their rights under Part Vi of the *SEA*.

**[61]** The only evidence which we have are the witness statements where they say that they did not feel comfortable in leaving the 'all employee" meeting when it was announced that they were free to do so. We discussed this testimony in paragraph [32] above and based upon that analysis, we must reach the conclusion that the absent any evidence of the impact on employees apart from their expressed concerns does not meet the onus necessary to prove that the communications violated section 6-62(1)(a).

**[62]** For the above reasons, we find that Gregg's has not committed an unfair labour practice contrary to section 6-62(1)(a) of the *SEA*.

**Allegations under section 6-62(1)(g)**

**Statutory Provision:**

> ***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:*
>
> > *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*
>
> *(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:*

> *(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and*
>
> *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.*
>
> *(5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.*

**[63]** The Union alleges that Gregg's breached this provision in two instances. The first was when it refused to indenture Brandon Heintz as an apprentice. The second related to an incident when Mr. Whelan, during a "drive along" with Alex Delara when Mr. Whelen advised him that he was eligible for a "top up" as a result of completion of apprenticeship programs, something which Mr. Delara was unaware and which had not been done under the previous ownership.

**[64]** With respect to Mr. Heintz, his evidence was that he was not laid off until approximately two months prior to the date of his testimony in early July of 2018. That would place his layoff at some time in the Spring of 2018, well after the organizing campaign and the representational vote. That being the case, his layoff cannot be considered to have been taken with a "*view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part*".

**[65]** Furthermore, U.A. 179 has filed a specific application with respect to Mr. Heintz related to his termination from his employment with Gregg's. In that application, the Union repeats its allegations contained in this application under sections 6-62(1)(a), (g) and (i) of the *SEA*.

**[66]** It would not be appropriate, we conclude, to prejudge this issue and we will defer any decision on this issue pursuant to section 6-111(1)(l) of the *SEA* to the proceedings before the Board in Application 154-18.

**[67]** The Union argued that the 'top up" policy implemented with respect to Mr. Delara was a previously unknown policy which was utilized by Gregg's to curry favour with Mr. Delara. However, Mr. Delara's testimony did not support this argument and Mr. Whelan testified that he had only recently come to Saskatoon and this was the first opportunity that he had to provide

the benefit to any employee. Mr. Shamji testified that the policy was long-standing and was available to all employees, including those employed by Gregg's.

**[68]** From the testimony of the witnesses, we have concluded that this was not a change in terms and conditions of employment since the application for certification. The policy, although unknown was in place when the application for certification was made, albeit the policy had not, until then, been utilized. Mr. Delara's view of the Union does not, from his evidence, appear to have been altered as a result of the "top up" granted to him.

**[69]** Accordingly, we find no breach of section 6-62(1)(g) of the *SEA*.

**Allegations under section 6-62(1)(i)**

**Statutory Provision:**

> ***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:*
>
> *(i) to interfere in the selection of a union;*

**[70]** In its argument to the Board, the Union relied upon this Board's decision in IBEW v. *Magna Electric Corporation*[28]. In Magna, the Board was dealing with an organizing drive where 3 employees were terminated and one employee associated with those employees quit rather than be fired as he expected would happen. The Board reviewed the employer's conduct under 3 separate heads of unfair labour practice, one of them being the *Trade Union Act* equivalent of section 6-62(1)(i).

**[71]** The Union relied upon two paragraphs from the decision wherein the Board says:

> ***[61]*** *Section 11(1)(g) is directed to conduct which interferes with the selection of a trade union as a representative of employees for the purpose of bargaining collectively. As in the case of complaints made under Section 11(1)(a), the test to determine the impact under this provision is an objective one, that is, what was the effect of the impugned conduct upon an employee of average intelligence and fortitude.*
>
> ***[62]*** *Again, however, we have no objective evidence to show what the effect was on any other employees. The Union argues that the*

[28] 2013 CanLII 74458 (SK LRB)

> *"chilling" effect of the terminations was ipso facto sufficient to demonstrate that employees would, in the face of terminations, continue to organize and rely upon their Section 3 rights. While inference could be drawn from the impact on the other employees of average intelligence and fortitude, we decline to do so absent any direct evidence from other employees as to how they were impacted by the terminations.*

**[72]** In its argument, the Union suggested that it was open to the Board to draw an inference that the whole of the employer's conduct referenced above with respect to section 6-62(1)(a) was sufficient to show that the employer acted to interfere with the employees' right to a bargaining agent of their own choosing. We would decline to make any such inference.

**[73]** The Board also declined to draw an inference from the actions of the employer which were more egregious than the case here. In that case, the actions of the employer in terminating the 3 employees was found to be a violation of the *Trade Union Act*, section 11(1)(e)[29].

**[74]** Absent any evidence to show some interference by an employer in the choice of a trade union, we cannot justify a finding of an unfair labour practice based strictly upon inferences. That was the case in *Magna* and is the case here as well. We therefore decline to find an unfair labour practice under section 6-62(1)(i) of the *SEA*.

**[75]** For these reasons, the application under section 6-62(1)(i) is dismissed.

**Allegations under section 6-62(1)(j)**

**Statutory Provision:**

> ***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:*
>
> *(i) to maintain a system of industrial espionage or to employ or direct any person to spy on a union member or on the proceedings of a labour organization or its offices or on the exercise of any employee of any right provided by this part;*

[29] Now section 6-62(1)(g) of *The Saskatchewan Employment Act*

**[76]** This allegation arises out of a meeting Ms. Kathy Ziglo, who is currently the Construction Manager for Gregg's. She had also acted a General Manager of Gregg's on an interim basis prior to Mr. Whelan's arrival. Ms. Ziglo testified that she received a telephone call from Mr. Blake Reddekopp asking if she could meet him for lunch. She agreed to do so.

**[77]** During that lunch meeting, the subject of the Union's organizing drive came up. Ms. Ziglo testified that she advised Mr. Reddekopp that she could not discuss what was going on in the Union drive with him stating that the employer needed to stay neutral in the process. She did advise Mr. Reddekopp that she was surprised that employees wished to form a union and that she thought management should have known about what was occurring in the workplace.

**[78]** The Union argues that this amounted to an invitation to Mr. Reddekopp to spy on the Union organizing campaign. This invitation, they say, was accepted when Mr. Reddekopp and another employee forwarded emails they had received to Ms. Ziglo.

**[79]** Gregg's takes the position that there was nothing sinister in the luncheon meeting and that Ms. Ziglo was friendly with several employees. Gregg's argued that Mr. Reddekopp only forwarded publically available information to Ms. Ziglo (the Union's construction compensation package) and the other employee only forwarded text messages sent to him by another Gregg's employee.

**[80]** Both parties referenced the Board's decision in *C.U.P.E. v. Warman (City)*[30]. In that case, the Board dismissed the claim under section 6-62(1)(j) with little discussion.

**[81]** As was the case in *Warman*, we do not believe that the type of evidence presented in this case is sufficient to satisfy us that the employer was engaged in industrial espionage as set out is 6-62(1)(j). As noted in *Warman* this provision is a holdover from an original provision in the original legislation promulgated in 1946. Since that time it has been little utilized and no cases on point have been provided to us.

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[30] 2017 CanLII 30130 (SK LRB)

**[82]** In this case, the Union has not satisfied the onus of proof that any employee, in the exercise of their rights under Part VI of the *SEA* has been impacted or that Gregg's was engaged in industrial espionage against the Union.

**[83]** For these reasons, the application under section 6-62(1)(j) is dismissed.

**Allegations under section 6-62(1)(p)**

**Statutory Provision:**

> ***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:*
>
> *(p) to question employees as to whether they or any of them have exercised, or are exercising or attempting to exercise, any right conferred by this Part;*

**[84]** The allegations under this provision also arise out of the meeting between Ms. Ziglo and Blake Reddekopp. The Union argued that the meeting, having occurred during the sensitive organizational campaign would effectively induce Mr. Reddekopp to disclose both his position with respect to the organizing drive and that he would be induced to supply information to Gregg's.

**[85]** Gregg's argued that there was no evidence the Gregg's questioned any employees contrary to section 6-62(1)(p) of the *SEA*. They argued that the lunch meeting had been initiated by Mr. Reddekopp and that Ms. Ziglo told him at the outset of the lunch meeting that she was precluded from discussing the union organizing drive.

**[86]** The Board concurs with Gregg's in respect of this allegation. There was no evidence to suggest that Gregg's engaged in industrial espionage or questioned employees as to their preference for a union. Some employees may have volunteered this information, but the employer did not, based on the evidence presented, seek to question any employees as to their engaging in protected rights.

**[87]** For these reasons, the application under section 6-62(1)(p) is dismissed.

**Order:**

**[88]** There will be an order dismissing the Union's unfair labour practice application.

**[89]** Member Jim Holmes dissents from this decision for reason to follow.

**DATED** at Regina, Saskatchewan, this 31st day of December, 2018.

**LABOUR RELATIONS BOARD**

Kenneth G. Love Q.C.
Vice-Chairperson

## DISSENT OF JIM HOLMES

**[1]** I have read the decision of the majority and, with respect, disagree with the conclusions.

**[2]** The majority decision quotes extensively from *Service Employees International Union (West) v Saskatchewan Association of Health Organizations, 2014 CanLII 17405 (SEIU SKLRB)* but that decision rests on a fact situation in the context of a mature and long standing bargaining relationship between the parties and has limited application in an organizing drive.

**[3]** I would also respectfully submit that *SEIU SKLRB* contains a number of striking features.

**[4]** The Board in *SEIU SKLRB* found no particular imbalance of power, stating in part:

> *We saw nothing in the evidence from which this Board could conclude that an unusual power imbalance exists between the respondent employers and health care workers. Nor did we see any basis upon which we could find that health care workers are particularly vulnerable to the opinions and views expressed by either SAHO or the respondent employers. To the contrary, in light of the extensive collective agreements in place and the security enjoyed by health care workers pursuant to those agreements, an inference of vulnerability would be very difficult to draw.[para 105].*

**[5]** At that time the affected employees had had their right to engage in strike action removed by the Legislature. This legislation had been considered by the Board, who declined to rule: but on judicial review, the Court of Queen's Bench, ruled the legislation unconstitutional which was then considered by the Court of Appeal, who overturned the Court of Queen's Bench in respect of the legislation's constitutionality. Eventually, the legislation found itself at The Supreme Court, (*Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, [2015] 1 S.C.R. 245.*) The Supreme Court, ruled the legislation unconstitutional, overturning the Court of Appeal, stating in part:

> *The right to strike also promotes equality in the bargaining process. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. While strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing*.

**[6]** Regardless of the constitutionality of the legislation at the time of the Board decision in *SEIU SKLRB*, the historical factual context was that the employees had been deprived of their right to strike.

**[7]** The Board in *SEIU SKLRB* heard from ten witnesses on the effect of the employer's communication on their members and themselves as members. All the witnesses, except one union staff representative, were also employees. I agree with the Court of Appeal (*Cypress (Regional Health Authority) v Service Employees' International Union-West, 2016 SKCA 161 (CanLII))* wherein they found at paragraph 106, that the testimony of the witnesses

cannot be determinative of the question. However, I would submit it was the most relevant evidence and deserved evaluation. This has been expressed by the Court of Queen's Bench where at paragraph [23] it stated in part:

> *The board decision did not make any specific reference to evidence led by the applicants with respect to the effect on their individual members, or on their own organizations of SAHO's communication strategy and the content of the same*." *SEIU-West v. Saskatchewan Association of Health Organizations, 2015 SKQB 222 (CanLII)*

**[8]** In *SEIU-West v. SAHO*, the Court recognized that the Board offered its own its own evaluation of the affect of the communications on the employees, and at paragraph [31] reproduces the Board's decision: *" In our opinion, to interfere with an employee in the exercise of his/her rights now requires conduct intended to compromise or expropriate that employee's free will."* (paragraph 99)

**[9]** This concept of compromising or expropriating free will does not appear in *the Act* nor in any other jurisprudence of which I am aware. A CanLii search of 500 cases containing "expropriation" all deal with the expropriation of property with the exception of the decisions (or Court cases arising out of) of the Saskatchewan Labour Relations Board starting with *SEIU SLRB.*

**[10]** It is certainly possible that the actions of a legislature or an employer may compromise employees' exercise of their rights. It is unclear how free will can be expropriated. Although the legislature outlawed a strike by the Saskatchewan Union of Nurses in 1999, the SUN members defied the legislation and accepted the consequences. *(Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62 (CanLII) (paragraphs 140-145). Ultimately, they did achieve a negotiated collective agreement.

**[11]** It could be said the miners shot and killed by the RCMP in Estevan in 1931 had their free will expropriated. This not typical of the cases adjudicated by the Saskatchewan Labour Relation Board.

**[12]** However in *International Brotherhood of Electrical Workers Local Union 2038 v Magna Electric Corporation*, 2013 CanLII 74458 (SK LRB*)* the Employer retained an employee who had made threats of physical violence and even death against fellow employees who were attempting to organize a union. The employer instead fired the Union organizers. The Board found the employer's stated reasons for these firing unconvincing and ordered the employees reinstated. The Board did not find the employer's action of firing the organizers and retaining the employee who made the threats, to have a chilling effect. The reason given by the Board was no employees testified on the impact of the employer's action to terminate the union organizers and retain the employee who made the threats. on them.

**[13]** In *SEIU SKLRB* the Board found, and the Court of Appeal upheld, that employee testimony cannot be determinative and that the Board could substitute its evaluation of the impact on employees. In *Magna Electric*, absence of testimony was determinative and the Board was apparently incapable of assessing the impact on employees.

**[14]** If indeed any employees have ever had their free will expropriated, how could this be proven?

**[15]** The actual representation vote is by secret ballot. Without compelling employees to testify how they voted and why they voted that way, it would be impossible to determine if they had their free will compromised or expropriated. No Labour Board in Canada would allow the compulsion of such testimony. To do so would be a travesty of the secret ballot.

**[16]** Theoretically, if these employees were compelled to testify, their free will have been expropriated. Would their free will be doubly expropriated or would they have it re-appropriated?

**[17]** The difficulty in respect of the Board's approach to the testimony it heard in *SEIU LRB,* and in this case, as to the effect of the Employer communication, is not that the Board did not accept the contradicted witness testimony as determinative of the issue. It is the Board's responsibility to determine the issue. The difficulty is that the Board evaluated the contradicted evidence it heard against its own novel standard of compromised or expropriated free will which is incapable of being proven or disproven. The Board then chose its own unverifiable theory.

**[18]** I may note that for thirty one years it was my responsibility to discern the aspirations of employees. Part of that was to ascertain their militancy (or fortitude). I attended hundreds of thousands of hours of meeting with employees and had the advice of thousands of union activists. Yet I sometimes spectacularly misjudged (both underestimating and overestimating) the fortitude of the members.

**[19]** There is no objective test I know of to predict the fortitude of a group of employees. A strike vote or ratification vote or a representational vote will answer the question but it will not in and of itself reveal what factors lead to that result. The reason these votes are so important is that no one can predict the decision of a group of people. Every rejected tentative agreement, every failed strike vote, indeed every election upset after the governing party called an election, are evidence of prediction error.

**[20]** We have two standards of what is permissible employer communication. There is the innovative "compromising or expropriation of the employee's free will" standard conceived by this Board in *SEIU SKLRB.* This decision was upheld as "reasonable" by the Court of Appeal. The Courts properly defer to the expertise of specialized tribunals like Labour Relations Boards. It is not necessary that the tribunal decision be the only reasonable decision or the reasonable decision the Court would choose. It must only be a reasonable decision.

**[21]** The other standard was enunciated in *Saskatchewan Federation of Labour* [supra] by Justice Ball. The constitutionality of Section 11 (1) (a) of the *Trade Union Act* (now 6-62 (2) (a) of SEA) was upheld. . Justice Ball clarified what he found to be permissible behaviour at paragraph 277, stating:

> *I find that the purpose and effect of the amendment to s. 11(1)(a) of The Trade Union Act is to declare that employers may communicate with employees in a manner that does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.*

**[22]** Justice Ball's reasoning was approved by both the Court of Appeal and the Supreme Court. The standard for acceptance of his decision is not reasonableness, but correctness.

**[23]** I would respectfully submit that "expropriated free will" standard has proven to be an exceptionally high, variable, and I would submit, unverifiable standard. I would respectfully submit that infringing on employee's ability to engage in their collective bargaining rights is the correct standard. One's rights can be infringed upon without one's free will be compromised or expropriated.

**[24]** Labour Relations Boards are not bound by their earlier decisions but are wisely extremely reluctant to reverse earlier decisions. Such reversals do not assist in maintaining labour relations stability. However, the expropriation of free will standard is so novel and so incapable of proof that I respectfully submit it should be replaced by the correctness standard as set out by Justice Ball in *Saskatchewan Federation of Labour* [supra].

**[25]** In reviewing the evidence in this case, it is useful to repeat Justice Ball's comments in *Saskatchewan Federation of Labour* [supra]where at paragraph 273 he states in part:

> *… it is grounded in bitter experience. Labour legislation in Canada invariably imposes limitations on employer communications with employees about union matters. It does so in recognition of the reality that employees are vulnerable to the influences of their employer, direct and indirect, which interfere with free exercise of their associational rights. As a former chairperson of the SLRB, I take notice of the fact that even a reasonably courageous employee can be cowed by employer statements that directly or impliedly threaten negative consequences if the wishes of the employer are opposed.*

**[26]** In the case before us we have a baseline measure of the balance of power within this workplace and with this population of employees.

**[27]** Prior to the discussion of the upcoming representational vote the employees had all been summoned to a mandatory business meeting.

**[28]** To prevent employees from feeling intimidated, Shae Whalen, the General Manager, asked all line managers to leave the meeting so employees could raise any production concerns they might have. I believe Mr. Whalen was a very conscientious manager, and genuinely was seeking employee operational input.

**[29]** Workplace concerns existed. At the hearing, Mr. Whalen mentioned necessary supplies that a previous manager had promised but never supplied. The employees had concerns about changes in shifts, changes in pay for time spent selling product, and changes in the benefit plans. The construction division was in distress following the loss of a huge and longstanding contract.

**[30]** The employees seeking unionization are not "timorous minions cowering" [para 100] *SEIU SKLRB* but members of a mandatory trade. Much of the business cannot be conducted without the trade certification these employees hold.

**[31]** The evidence is clear that only three employees spoke. One said that in the past, employees who spoke out faced retaliation. This employee held two mandatory trade certifications. One employee said that he had once worked in another workplace where employees were discriminated against for speaking out. The third employee who spoke after the

production meeting had adjourned, noted the business report had made no mention of the construction division, and he asked if it would continue to exist. He was told it would.

**[32]** That was the discussion. All line managers were absent for the production meeting. The discussion was about how to improve the business, not about the merits of unionization. The Manager genuinely took observable steps so the employees would not feel intimidated. This was not some theoretical group of average employees. This was effectively every employee. One question of substance and two comments about feeling intimidated in another time or another place. No other discussion. I respectfully submit this is the most compelling evidence the Board may ever receive of the imbalance of power in an unorganized workplace. And they had not even gotten to discussing the union yet.

**[33]** The meeting then turned to the issue of unionization. The employees were told attendance was voluntary. At about the same time, the managers were allowed back into the meeting. It was the testimony of Mr. Shamji and Mr. Whelan that they were new to the Saskatoon operation and did not know many of the employees by name. The returning managers all had long service and knew all the employees by name. The managers sat at the back and sides of the meeting room.

**[34]** No employees left the meeting.

**[35]** When looking at the employer communication in this matter, it is useful to review *Cypress (Regional Health Authority) v Service Employees' International Union-West*, 2016 SKCA 161 (CanLII*)* The Honourable Court said an exact the definition of, or demarcation between facts and opinions is not necessary. There exists however a practical guide of acceptable expression of facts and opinions.

**[36]** On its forms, the Board requires parties to sign the following declaration: "I, the undersigned, solemnly declare that the submissions above set forth, are, so far as they are matters of fact, true to the best of my information, knowledge and belief and insofar as they are matters of opinion, are reasonably and honestly believed by me".

**[37]** The minimal requirement is they must reasonably and honestly believe the statements are true. I submit this would be a workable and achievable standard the Board should apply to communications.

**[38]** When examining the statements made in the voluntary part of the November 23, 2017 meeting and subsequent written communication, three contexts are important.

**[39]** Reliance is a multi-national company but with the bulk of its operations in Ontario. All its Ontario operations are unionized, most by UNIFOR, one by USWA and two units, one construction and one maintenance, represented by UA.

**[40]** The business is thriving and has expanded rapidly, recently into Manitoba, Saskatchewan and British Columbia.

**[41]** The labour relations of Reliance are directed by Rhahim Shamji who testified at length at this hearing. Mr Shamji is a graduate with a minor in Labour Relations from York University (including a practicum working as a union organizer) and has a Masters Degree from the London School of Economics. He had about 10 years of senior labour relations experience prior to Reliance and has been employed for about 7 years with them.

**[42]** In *SEIU SKLRB* the Board quoted approvingly at paragraph 101, stating:

> *During an organizing campaign or at any time when the representational question is before employees, the Board has generally been highly alert to subtle signs of employer interference, intimidation, coercion or threats. For example, communications from an employer about the relative benefits of unionization have been found to convey a subtle message of intimidating or coercive effect when made during an organizing campaign.* See: *Super Valu, a Division of Westfair Foods v. United Food and Commercial Workers, Local 401*, [1981] 3 Can. LR.B.R. 412, LRB File No. 121-81.

**[43]** In this matter, the first communication was from Sean O'Brian President of Reliance. (U-13) The first questionable statement is "*If after six months you feel things are not getting better, then exercise your right to unionize."* This was not an isolated comment. It was repeated again in the Memorandum of November 28, 2017, signed by Shae Whelan and written by Mr. Shamji. *"Please allow us the opportunity to show that we have listened. If we don't demonstrate that in the next 6 months then you will still have the opportunity to unionize."*

**[44]** The SEA 6-12 (3) provides *"the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same or substantially similar unit…"*" The employees would not have the same unfettered right or perhaps any ability for 12 months. A similar provision exists in Ontario's *Labour Relations Act, 1995, SO 1995, c 1, SchA*, at Section 9. See: Communications, Energy and Paperworkers Union of Canada v Reliance Comfort Limited Partnership (Reliance Yanch Heating and Air Conditioning), 2011 CanLII 81930 (ON LRB).

**[45]** Mr. Shamji testified that this statement was not intended to confuse employees about their access to reapply for unionization but was rather meant to be a timeframe for the employer to improve the business or the consequence would be a change of managers.

**[46]** Of course in neither iteration does the statement make any reference to a change in managers, it only references employees reapplying for unionization. Further, the documents clearly state that Mr. O'Brian and Mr. Whalen took personal responsibility for the breakdown in the relationship between the employees and Reliance. Did Mr. Shamji reasonably mean that both men would be gone if the situation in Saskatoon did not improve? In any case, the hearing of this case began over six months after the November 23, 2017 meeting and the Reliance management remained unchanged from the time of the meeting to the hearing.

**[47]** In the next paragraph, Mr. O'Brian speaks of the flexibility to meet the needs of employees to *"get to a child's game or concert… paying for a course or sending you on training, accommodating special requests, these are things we do with out a union in place. We want our team members to have this flexibility."* The suggestion is that this flexibility will somehow disappear if the employees unionize.

**[48]** A distinctly different version of this "flexibility" emerged when Mr. Shamj testified. In response to a question if he had every experienced a strike, Mr. Shamji said Reliance had experienced a strike when it unilaterally implemented a reduction in the agreement provision for employees to take paid time off for special or family occasions. He stated it was debated whether it was a strike or lock out. He said the discretion to grant or decline such leave was important to incentivize employees.

**[49]** In the next paragraph Mr. O'Brian says, *"The best way to build job security is to build strong and profitable businesses."* This is a partially true statement, but the uncontradicted evidence is that the disastrous decline in the construction service was caused by ineffective bidding by managers on the key contract. It had nothing to do with union or non-union. In fact, Reliance had grown in Ontario as a totally unionized company.

**[50]** He also said "*Unions cannot provide job security."* This point was repeated in the MEMORANDUM Union Organizing Drive questions and answers dated November 23, 2017, from Shae Whelan), (E-13). Since Reliance operated as a totally unionized employer in Ontario, the employer must have known that unions provide job security through protection from unjust dismissal and also by either lay-off and recall or hiring hall provisions.

**[51]** Mr. Shamji testified he provided support for terminations, handled third stage grievances, and arbitrations for the company and that he, not Shae Whelan, was the author of the Exhibit E-13 and indeed all of Mr. Whelan's communications. This was confirmed by Mr. Whelan.

**[52]** Sean O'Brian's final point began with some advice from his mom, "If it sounds too good to be true, it likely is untrue. I understand the union has been promising all sorts of benefits, big wage increases, pension plans, increased benefits and on and on." This Board does not need to be highly alert to notice Mr. O'Brian had just called the union liars.

**[53]** He then goes on to suggest that higher labour costs will make the employer uncompetitive. At the hearing it was revealed that most Reliance employees do belong to a retirement plan but that it had not been implemented for the Reliance Gregg members. It was also claimed in MEMORANDUM Union Organizing Drive - You asked Us About… from Shae Whelan (but authored by Mr. Shamji) November 28, 2017, Exhibit (U-6) "*It appears to us that most of you are already paid more than the Collective Agreement provides*". In a November 28, 2017 letter, to a blacked out recipient, signed by Share Whelan (but authored by Mr. Shamji) this is expressed as "*it would appear that some of you would be taking a pay cut and we want you to understand that*."

**[54]** At the November 23, 2017 meeting Mr. Shamji distributed wage rates he thought were from the UA agreement. The rates contain a basic hourly rate to which are added health and welfare benefits, pension benefits, and other industry promotion contributions that indirectly benefit the employee.

**[55]** The Board was not supplied with wage rates for all Reliance/Gregg employees but the ones that were presented clearly had health benefit premiums deducted. There was no Pension Plan in Reliance/ Gregg .

**[56]** The possibility for confusion in the wage comparisons is obvious. It is possible if some of the plumber/pipefitters had worked as UA members, they would understand the difference between adding or deducting benefit costs. The person who most clearly understood the difference was Mr. Shamji, who negotiated both conventional "all employee contracts" and UA "construction and maintenance agreements". The same Mr. Shamji who authored the employer communications stating most employees made more than the union rate but who also heard Mr. O'Brian state the union rate would make the company uncompetitive. Whatever the actual comparison, the Union rate could not both be lower than the existing rate and render the

company uncompetitive due to higher costs. The un-contradicted evidence of Landon Mohl, on behalf of the Union, was that the union was prepared to negotiate terms to ensure the company remained competitive.

**[57]** In numerous of its communications the employer comments on unions and strikes. Mr Shamji's evidence was he had been involved in two work stoppages in his seventeen years working in unionized environments. One he admittedly provoked. In none of the employer's communication is there any mention that strikes can only occur after a vote as is required under Section 6-32 of *The Saskatchewan Employment Act*.

**[58]** In Exhibit U-5, mailed November 24, 2017 Questions and Answers Mr. Shamji asks and then answers his own question.: *What would team members gain if they were represented by a union? Question. Answer: In our opinion nothing.* However, Mr. Shamji testified he had a good and productive relationship with the unions in the Ontario workplaces. Each of these unions is well known and recognized to this Board as legitimate bargaining agents. Mr Shamji handles third stage grievances and arbitrations. It is not credible that Mr. Shamji honestly and reasonably believes the unions do nothing for these employees.

**[59]** In summary of the employer communication, I would suggest much of it was intended to be misleading. This Board should not find an Unfair Labour Practice for every misstatement of fact or controversial opinion expressed. But in this case the employer communications contained numerous and repeated misstatement of facts, subtle, and sometimes not so subtle, attempts to undermine the credibility of the union. Therefore I would respectfully submit that this employer has committed unfair labour practices as defined by the *Super Valu* decion cited in paragraph 42 above. *For example, communications from an employer about the relative benefits of unionization have been found to convey a subtle message of intimidating or coercive effect when made during an organizing campaign.*

**[60]** This Unfair Labour Practice is distinguished from the case against Andrew McGee (LRB File 254-17) because, unlike McGee, Shamji is a very well educated and experienced in labour relations. McGee's statements, although intemperate and sometimes simply wrong, could reasonably be held by someone of his limited labour relations experience. McGee had no authority over the recipients of his communications.

**[61]** I would suggest that the voluntary meeting, following as it did immediately after the mandatory meeting, but with the line managers now in attendance, was intrinsically intimidating and coercive.

**[62]** The Board should not involve itself in the minutiae of collective bargaining. It must however recognize the context in which the communications take place. *During an organizing campaign or at any time when the representational question is before employees, the Board has generally been highly alert to subtle signs of employer interference, intimidation, coercion or threats.* (*Super Valu* paragraph 41 above)

**[63]** The balancing of the rights of the employer to communicate facts and opinions, and the rights of employees to freely associate and act in association, need not be an irreconcilable difference.

**[64]** However, the rights of the employees must take priority since these are protected rights under the Charter. The rights of the employer flow from property rights that are deliberately not protected in the Charter.

**[65]** The right to form a Union is fundamental. A right does not, or at least should not, require any fortitude or average intelligence to exercise it. (gaining a right may require a considerable amount of both fortitude and intelligence) Engaging in a right is not meant to be trial by ordeal.

**[66]** Employees forming a union are in a more vulnerable position than employees in a mature bargaining relationship.

**[67]** The rights of employees and employers can coexist within some simple guidelines. These guidelines follow the processes used in Canadian federal and provincial elections where each recognized party has equal access to voters and equal opportunity to address voters. I would respectfully recommend that the Board's adoption of these principles would be consistent with Canadian democratic standards. Indeed, not to adopt them might be seen as inconsistent with those values. I would suggest that union activities both by legislation and tradition have a democratic character far exceeding most other economic organizations.

My recommendations are:

1. Firstly, employers are not required to discuss union drives on company time, but if they do convene a meeting like the meeting of November 23, 2017, they must allow the union equal time to meet with the affected employees. The evidence was the November 23 meeting lasted 20 minutes to one half hour, so this is not an onerous requirement. Since the employees might be more outspoken at a union meeting, that meeting could start at an equal length of time before the end of the work day. Of course, if the employer did not hold its own meeting, or held voluntary meetings outside working hours, it would be under no obligation to provide time during working hours to the union.

2. Secondly, if employers choose to post information in the workplace then the union must be given equal and equivalent space to post its information.

3. Thirdly, if the employer chooses to use addresses including electronic addresses it has in its possession, then such addresses must be supplied to the union.

In conclusion, as I have stated, I would find the employer committed an unfair labour practice by interfering with the employees right to freely exercise their right to choose a union. The purpose of the certification process is to encourage bargaining in good faith. I would respectfully submit It is inimical to that goal for the Board to take a *laissez faire* approach to misleading statements at the beginning of that relationship.

**DATED** at Regina, Saskatchewan, this 30th day of January, 2019.

Jim Holmes, Board Member