UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, APPLICANT v MOOSE JAW CO-OPERATIVE ASSOCIATION, RESPONDENT

LRB File No. 210-18; March 19, 2019
Vice-Chairperson, Barbara Mysko; Board Members Bettyann Cox and Allan Parenteau

Counsel for the Applicant Union: Dawn McBride
Counsel for the Respondent Employer: Robert Frost-Hinz

Unfair Labour Practice – Strike – Leafleting – Employee is served with a Notice pursuant to section 11 of *The Trespass to Property Act* – Board reviewed case law on leafleting and concluded the Employer committed an unfair labour practice under section 6-62(1)(a) of *The Saskatchewan Employment Act*.

Unfair Labour Practice – Remedy – Board declared that Employer committed an unfair labour practice, and pursuant to section 6-111(1)(s) of *The Saskatchewan Employment Act* directed the Employer to post a copy of the Reasons for Decision and the Board's Order in a place where Employer normally posts notices to employees.

Unfair Labour Practice – Remedy – Monetary loss – Board's goal in designing remedy to place union and its members in position they would have been in but for Employer's violation under *The Saskatchewan Employment Act* – Board finds insufficient evidence to support a monetary remedy.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** United Food and Commercial Workers, Local 1400 (the "Union") brings an application under section 6-62(1)(a) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1, alleging that Moose Jaw Co-operative Association Ltd. (the "Employer") committed an unfair labour practice in the course of a strike in the Fall of 2018 (the "Application").

[2] The Union is the certified bargaining representative for all employees of the Moose Jaw Co-operative Association Ltd. in or in connection with its places of business in the City of Moose

Jaw. The Employer consists of (4) four locations in Moose Jaw, including a property located at 1592 – 9th Avenue (the "Gas Bar"), at which the alleged unfair labour practice took place.

[3] On September 29, 2018, the Union served the Employer with strike notice following a breakdown in collective bargaining. The strike began on October 2, 2018.

[4] In its Application, the Union outlines the following facts in support of the alleged breach:

a. The union was engaged in legal strike activity following the failure to reach a renewal of a collective agreement in bargaining.
b. The union served proper strike notice and the employer followed with serving lockout notice.
c. The legal strike commenced at midnight on Tuesday, October 2, 2018.
d. The union and its members have been engaged in legal picketing at the employer's numerous worksites.
e. On Monday, October 8, 2018 the union commenced leafleting at the employer's gas bar site at its Ross Park location – 1592 9th Avenue, in Moose Jaw, Saskatchewan.
f. The union president, Norm Neault, was approached by Impact Security manager, Simon Brown, and advised that the employer was alleging trespass to private property and Impact Security had instructions to remove the union and its members from the employer's property. Mr. Neault expressed his opinion that the leafletting was a legal expression of its rights and suggested that the employer would have to contact the police as the union would not vacate the property unless forced to. The police did attend at the employer's premises and advised the union that it must vacate the employer's property as the employer was claiming trespass.
g. The union and its members obeyed the police request and vacated the employer's property.

[5] On March 7, 2019, the Board heard evidence and argument in relation to this Application. Both the Union and the Employer filed written briefs and authorities which the Board has reviewed and has found helpful.

Statutory Provisions:

[6] The Union relies on the following sections of *The Saskatchewan Employment Act* in its Application and written materials:

Right to form and join a union and to be a member of a union

6‑4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.

Unfair labour practices – employers

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;

Board powers

6‑104(1) In this section:

(a) "former union" means a union that has been replaced with another union or with respect to which a certification order respecting the union has been cancelled;

(b) "replacing union" means a union that replaces a former union.

(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

(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 any thing 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;

(d) requiring an employer to reinstate any employee terminated under circumstances determined by the board to constitute an unfair labour practice, or otherwise in contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;

(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union

the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;

(g) amending a board order if:

(i) the employer and the union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;

(i) subject to section 6‑105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee;

(j) when acting pursuant to section 6‑110, relieving against breaches of time limits set out in this Part or in a collective agreement on terms that, in the opinion of the board, are just and reasonable.

Powers re hearings and proceedings

6‑111(1) With respect to any matter before it, the board has the power:

. . .

(s) to require any person, union or employer to post and keep posted in a place determined by the board, or to send by any means that the board determines, any notice that the board considers necessary to bring to the attention of any employee;

[7] The Union also raises sections 2(b) and 52(1) of *The Canadian Charter of Rights and Freedoms (*the "Charter"*)*, which read as follows:

2. Everyone has the following fundamental freedoms:

…

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

. . .

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Onus of Proof:

[8] The Union does not take a position with respect to the onus, and appropriately so, as the case law suggests that it is not a contentious issue.

[9] On this Application, the Union has the onus to prove, on a balance of probabilities, that the Employer committed an unfair labour practice. The evidence presented must be "sufficiently clear, convincing and cogent."[1] In relation to section 6-62(1)(a), the Union must show that it is more likely than not that the Employer interfered with, restrained, intimidated, threatened or coerced an employee in the exercise of any right conferred under Part VI of *The Saskatchewan Employment Act*.

Evidence:

[10] The Employer states that there is little dispute on the facts.[2] Based on its review of the evidence, the Board agrees. The witnesses shared a common or consistent recollection of the following facts:

(a) One individual, Lily Olson ("Olson"), was involved in leafletting;
(b) Olson was leafletting around the front entrance and the gas pumps at the Gas Bar on October 8, 2018;
(c) Olson's leafletting activities lasted approximately 30-45 minutes;
(d) The security manager, Simon Brown ("Brown") had discussions with Local President, Norm Neault ("Neault") about the legality of the leafletting;
(e) The police were called and attended at the Gas Bar to deal with the leafletting;
(f) Olson stopped leafletting before the police arrived;
(g) There was no further leafletting for the remainder of the strike;
(h) On October 9, 2018, Olson was served with a Notice pursuant to section 11 of *The Trespass to Property Act* (the "Notice"). Ultimately no tickets were laid or charges issued;
(i) There was no retraction of the Notice at any time during the strike or thereafter.

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[1] See, for example, *R.W.D.S.U. v Sakundiak Equipment*, 2011 CarswellSask 756, [2011] SLRB No 28, 205 CLRBR (2d) 139; *United Food and Commercial Workers, Local 1400 v Calokay Holdings Ltd*., 2016 CanLII 74282 (SK LRB); *Elmwood Residences Inc. v SEIU-West*, 2018 CanLII 38247 (SK LRB) citing *F.H. v McDougall, 2008 SCC 53 (CanLII)*, [2008] 3 SCR 41, at paras 46, 49 per Rothstein J.
[2] In its oral argument, the Employer says that the facts are mainly not in dispute, except for a few points of clarification.

[11] The Union called two witnesses, Neault and Olson, who elaborated on the events of October 8 and 9, 2018.

Evidence - Norm Neault:

[12] Neault has been the President of the Local for about (10) ten years. On October 8, 2018, Neault was walking the picket line at the Gas Bar along with other members of the Union. The picket line was located on the perimeter of the property in between (2) two vehicle access points to the Gas Bar.

[13] Neault testified that the location of the picket line made it difficult to communicate information to customers who were crossing the picket line. As vehicles turned in to the Gas Bar, picketers attempted to communicate with the vehicles' occupants, an approach that turned out to be ineffective and even a little dangerous. Given the impracticality of picket line communications, Neault instructed Olson to engage in leafleting elsewhere. Olson began leafletting at or near the front entrance of the Gas Bar and around the gas pumps while Neault continued to walk the picket line.

[14] Neault said that Olson had been leafletting for about (10) ten minutes before there was "intervention". Around this time, Brown, Regional Manager with Impact Security, told Neault that the Employer was not happy about the leafletting activities, and that the police were going to be called as a result.

[15] According to Neault, the police arrived approximately 30-60 minutes later. At some point, Brown had asked Neault if Olson would stop leafletting until the police arrived. Brown framed his request as a "favour" for Brown because "they were having a really hard time at Co-op". As a result of his discussion with Brown, Neault instructed Olson to stop leafletting. By the time the police arrived, Olson had stopped leafletting and was back on the picket line. In total, Olson leafletted for approximately 30-45 minutes.

[16] Although Neault and Olson insisted that they had the right to leaflet, the police indicated that if the leafletting continued, someone would be "charged" or "ticketed". Olson provided information about the "*KMart* case", to which the police replied that they would be seeking advice.

[17] Neault indicated that the Union pulled back from the leafletting activities due to the threat of being "charged" and out of concern for a potential arrest. Neault said that the aforementioned interactions stymied the Union's ability to escalate the strike and to thereby resolve the conflict. The intervention, in effect, put an end to the leafletting.

[18] Neault testified that during the strike there were 85 picketers in total, which resulted in picket pay of $40,000 per week including benefits, "roughly speaking". The strike ended on November 4, 2018, lasting a total of 4-5 weeks.

Evidence – Lily Olson:

[19] Olson is a national representative for the Union. She was on the picket line on the first day of the strike and then returned on October 6 or 7, 2018 and every day thereafter.

[20] Olson said that Neault instructed her to engage in leafleting. He handed her a bib to wear and told her to be at the front of the store and at the gas pumps to engage the customers by providing the information and then backing away. The bib had "important information" printed on the front in large black letters. She did not stop anyone from entering the gas station or threaten any customers. Some customers took the leaflets; others did not.

[21] Olson said that there was some "intervention" after about 30 minutes of leafletting, and that she stopped her leafletting activities after receiving a text from Neault calling her back. Olson stated that when the police arrived she provided them with a one-page document explaining the "*KMart* case". The police said that they would look into it and get back to them.

[22] On the following day, October 9, 2018, Olson returned to the picket line where Brown served her with the Notice. At the time, Brown advised Olson that anyone else on the property who "did this"[3] would receive the same Notice. If Olson continued leafletting, law enforcement would be contacted. Later that day Olson emailed the Notice to her "supervisors" in the Union, advising that Brown "said this is what anyone who goes on the property will get".

[23] A police constable arrived at the Gas Bar on that same day and presented Olson with a copy of *The Trespass to Property Act*, instructing her to follow the advice of her legal counsel.

[3] As described in Olson's words.

Evidence – Simon Brown:

[24] The Employer called one witness, Mr. Simon Brown ("Brown"). Brown is the Regional Manager for Saskatchewan with Impact Security. As the Regional Manager, Brown oversees the day to day operations of the security umbrella in Saskatchewan.

[25] The Employer retained Brown to act as the liaison between the Co-op and the Union for the purpose of observing and reporting issues to the Employer for the duration of the dispute. Brown acted as the one point of contact for any issues that arose. No other guards took action without his oversight; everything was reported through him. Brown explained that he had a good working relationship with the Union members. He was familiar with the Union members in part because Impact Security was represented by the same Union.

[26] Brown said that he and Neault discussed the leafletting activity approximately (2) two days before it occurred. At that time, Neault had advised Brown that the leafletting might be happening. Brown told Co-op management of the potential for leafletting, but did not obtain specific instructions at that time.

[27] Brown was at the Gas Bar on October 8, 2018 doing a routine patrol when he observed Neault and Olson changing smocks. Brown approached Neault, who advised that Olson was going to be leafleting. Brown did not know if the leafletting activity was legal and so he advised Neault that he was going to contact the police. After about 15 minutes, Brown went back to Neault, advising that the police had been called and requesting that Olson be pulled off until the police made a determination.

[28] Brown approached Olson and asked if he could take her photo, and she agreed. Olson provided him with a copy of the leaflet that she was handing out, and then left the area where she was leafletting. Brown stated that he had only wanted the leaflet and the photo at that time, and that he did not ask Olson to leave.

[29] When the police arrived, there was a discussion about *The Trespass to Property Act*. According to Brown, the police were unsure about the legalities of the situation and wanted to consult with the Crown. They were also going to look into the status of the adjacent road. Brown

asked that the Union not engage in further leafleting until a determination was made by the Crown and, according to Brown, "all parties agreed" to his request. The police contacted Brown the following day, and indicated that the Crown would follow through with charges if warranted, and that the adjacent road was a private, not public, road.

[30] Brown said that, at some point, Co-op's legal team drew up a trespass notice. When Brown served Olson with the Notice, he indicated that "they" would be following through with *The Trespass to Property Act* enforcement, instructing Olson to, "please pass that along because we want the others to know. I don't want to have to issue them if I don't have to".

[31] On cross examination, Brown said that the Employer's loss prevention manager was in meetings with Brown and others every morning. This individual met Brown on the steps of the Co-op's downtown location on one occasion, providing Brown with a handful of Notices. Brown agreed that he had full authority from Co-op to present the Notice.

[32] Brown acknowledged that he never rescinded the Notice. The Notice was addressed to Olson and reads as follows:

> ***RE: Notice pursuant to Section 11 of The Trespass to Property Act***
>
> *Please consider this written notice pursuant to Section 11 of The Trespass to Property Act, SS 2009, c T-20.2 that you are hereby prohibited entry in or on Moose Jaw Co-operative Association Ltd.'s premises located at 1592 9th Ave NE, Moose Jaw, SK (the "Premises"), effective immediately.*
>
> *Any refusals to vacate the Premises or future attempts to gain access to the Premises will result in law enforcement being contacted.*
>
> *Sincerely,*
>
> ***Moose Jaw Co-operative Association Ltd.***
>
> *Per:*
>
> *Gerry Onyskevitch*
> *General Manager*

[33] The Employer called no other witnesses. There was no testimony from Co-op management.

Evidence – Identity of Leaflet:

[34] Throughout the hearing and in its submissions, the Employer took issue with the identity of the leaflet distributed by Olson. Although Neault and Olson identified one leaflet ("Leaflet No. 1"), Brown suggested that Olson was distributing another leaflet ("Leaflet No. 2") altogether.

[35] Brown had taken a photo of Olson on the day in question, and in the photo, Olson is shown holding a leaflet that, although unclear, is closer in appearance to Leaflet No. 2. In cross examination, Olson could not identify with certainty which leaflet she distributed on the day in question. Olson explained that she is a regular "leafleter" and that there had been various leaflets throughout the dispute. It was difficult to keep straight which leaflets were distributed when.

[36] Although much was made of this issue, the Board's decision does not turn on the identity of the leaflet. The substance of both leaflets is very similar. Both leaflets raise a pay equity issue for second tier clerks in the workplace. The second leaflet includes additional detail around contract negotiations and refers explicitly to pay equity for "women workers". There is otherwise nothing that materially distinguishes one leaflet from the other.

Argument of the Parties – the Union:

[37] In support of its Application, the Union submits that the Employer has engaged in or is engaging in an unfair labour practice (or contravention of the *Act*) by forcibly removing Union members engaged in leafleting in the gas bar parking lot. The Union relies for this submission on the Supreme Court of Canada's decision in *U.F.C.W., Local 1518, v KMart Canada Ltd.*, [1999] 2 SCR 1083, 1999 CanLII 650 (SCC) ("*KMart*"). According to the Union, its members are entirely within their rights to leaflet on that part of the employer's premises to which the public is invited. Doing so constitutes a valid exercise of freedom of expression pursuant to section 2(b) of the *Charter*.

[38] The Union says that the Employer's actions in restricting the leafleting in this case amounted to a *prima facie* infringement of section 2(b) of the *Charter* and are caught by the unfair labour practice sections of *The Saskatchewan Employment Act*. The Union says that the Employer's actions interfered with the rights of the Union members and constitute a violation of section 6-62(1)(a).

[39] The Union also relies on the Supreme Court of Canada's decision in *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 156, 2002 SCC 8 (CanLII) ("*Pepsi*") and the labour board decisions in *United Food and Commercial Workers, Local 1400 v Calokay Holdings Ltd.*, 2016 CanLII 74282 (SK LRB) ("*Seven Oaks*"), *Sobeys Capital Inc. (Re)*, [2011] ALRBD No 79, and *Sony of Canada Ltd. (Re)*, [1999] BCLRBD No 519.

Argument of the Parties – the Employer:

[40] The Employer acknowledges that the Union has a common law right to leaflet, but says that the common law right is subject to limitations, one of which is the existence of "independent tortious activity". The Employer states simply that there is "no constitutional right to leaflet". It says further that "statute trumps the common law" and that, in Saskatchewan, the legislature has created a statutory limit on the Union's common law right to leaflet.

[41] The Employer relies on *The Trespass to Property Act* as the legal authority for its actions in this case. It says that the Employer is an "occupier" under that *Act*, and as an occupier it is entitled to provide notice to a trespasser and thereafter remove the trespasser from the property. Once service is accomplished, the individual's continued presence on the Employer's property constitutes continuing trespass.

[42] The Employer relies specifically on subsection 2(c) and section 3 of *The Trespass to Property Act*, which read as follows:

> ***Interpretation***
> *2 In this Act:*
>
> *(c) "occupier" includes:*
> *(i) a person who is in physical possession of premises;*
> *(ii) a person who:*
>
> *(A) has responsibility for and control over the condition of premises or of the activities there carried on; or*
>
> *(B) has control over persons allowed to enter in or on the premises; or*
> *(iii) a person prescribed in the regulations;*

> ***Trespass prohibited***
> *3(1) Without the consent of the occupier of a premises, no person who is not acting under a right or authority conferred by law shall:*
> *(a) enter in or on the premises when entry is prohibited pursuant to this Act;*
> *(b) engage in an activity in or on the premises if that activity is prohibited by this Act;*
> *(c) after being requested either orally or in writing by the occupier to leave the premises, fail to leave the premises as soon as is practicable;*
> *(d) after being requested either orally or in writing by the occupier to stop engaging in an activity in or on the premises, fail to stop the activity as soon as is practicable;*
> *(e) after leaving the premises pursuant to a request to do so made pursuant to this Act, re-enter the premises; or*
> *(f) after discontinuing an activity pursuant to a request to do so made pursuant to this Act, resume the activity in or on the premises.*
>
> *(2) For the purposes of subsection (1), the onus rests on the defendant to prove, on a balance of probabilities, that he or she had the consent of the occupier to enter in or on the premises or to engage in the activity in or on the premises.*

[43] The Employer argues that the absence of specific exceptions to trespass in *The Trespass to Property Act* demonstrates that there is no statutory protection for leafleting. This is as compared to the legislation from Manitoba and British Columbia, which carve out specific exceptions to the application of trespass laws. These exceptions are proof that, in Saskatchewan, leafletting is not an exception to trespass.

[44] In summary, the Employer says that it was empowered to remove Olson from the premises further to *The Trespass to Property Act*. The Employer says, in the alternative, that the Union has failed to adduce evidence to substantiate a contravention of section 6-62(1)(a) of *The Saskatchewan Employment Act*.

Analysis:

[45] Underlying this application is the right to strike which is protected by sections 6-31 through 6-37 of *The Saskatchewan Employment Act*, and by section 2(d) of the *Charter*.[4]

[46] In *KMart*, the Court found that "leafleting can be carried out in a permissible manner that is innocuous and appropriate in the labour relations context."[5] In *Seven Oaks*, then Vice Chairperson Mitchell summarized the salient aspects of the *Kmart* decision:

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[4] See, also, *Seven Oaks* at para 107.
[5] *KMart* at para 55.

[124] In KMart, the Court concluded that in the context of a strike or lock-out, consumer leafletting was a constitutionally protected form of expression. Cory J. who wrote for the Court distinguished consumer leafleting from picketing as follows at paragraphs 39, 40 and 43:

> *Picketing is an important form of expression in our society and one that is constitutionally protected. In B.C.G.E.U. Dickson C.J. held that picketing is an "essential component of a labour relations regime founded on the right to bargain collectively and to take collective action" (p. 230). Dickson C.J. referred to Harrison v. Carswell, [1976] 2 S.C.R. 200, where a majority of this Court stated at p. 219:*
>
> > *Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing. . . .*
>
> *There can be no doubt that picketing is an exercise of freedom of expression. Yet its trademark is the picket line, which has been described as a "signal" not to cross. Whatever may be its message, the picket line acts as a barrier. It impeded public access to goods or services, employees' access to their workplace and suppliers' access to the site of deliveries…*
>
> *.….*
>
> *Consumer leafleting is very different from a picket line. It seeks to persuade members of the public to take a certain course of action. It does so through informed and rational discourse which is the very essence of freedom of expression. Leafletting does not trigger the "signal" effect inherent in picket lines and it certainly does not have the same coercive component. It does not in any significant manner impeded [sic] access to or egress from premises. Although the enterprise which is the subject of the leaflet may experience some loss of revenue, that may very well result from the public being informed and persuaded by the leaflets not to support the enterprise. Consequently, the leafleting activity if properly conducted is not illegal at common law….*

[47] In its argument, the Employer interprets this latter paragraph to mean that the protection for leafletting is limited to the common law. But Cory J, on behalf of a unanimous Court in *KMart*, made clear that leafletting is protected by the *Charter*:

30 It is obvious that freedom of expression in the labour relations context is fundamentally important and essential for workers. In any labour dispute it is important that the public be aware of the issues. Furthermore, leafleting is an activity which conveys meaning. In light of the very broad interpretation that has been given to freedom of expression, it clearly falls within the purview of s. 2(b) of the Charter. In Libman, supra, at para. 31, it was said: "Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian Charter".

> *31 In the case at bar, the respondent and the Attorney General very properly conceded that the restriction on consumer leafleting activity was prima facie an infringement of freedom of expression. […]*

[48] Read in its entirety and in context, *KMart* clearly confirms a *Charter* protection for leafletting, including at secondary sites. The Court also observes that leafletting is "not illegal at common law".[6] The Court's acknowledgment of the existence of a common law right does not negate the existence of a *Charter* protection.

[49] If the Employer's argument were accepted, it would mean that the common law can and should be interpreted in a vacuum, immune from *Charter* values. This cannot be. This approach would mistakenly overlook the vital rapport that exists between the *Charter* and the common law.[7] The *Charter* serves as a guide in developing and modifying the common law, and in so doing, encourages the overall coherence of the legal system.[8]

[50] Similarly, the interpretation of legislation must reflect *Charter* values. Courts read down legislation when necessary to ensure an interpretation that is consistent with *Charter* values. Administrative tribunals, including this Board, may choose not to apply legislation where doing so would result in an inconsistency with the *Charter*.

[51] As to the influence of the *Charter* on the development of the common law, the Supreme Court in *Pepsi* stated:

> *[18] The second preliminary issue is how the Charter may affect the development of the common law. Here again the answer seems clear. The Charter constitutionality enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.*

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[6] *KMart* at para 43. The Court states further that, "[i]n the absence of independently tortious activity, protection from economic harm resulting from peaceful persuasion, urging a lawful course of action, has not been accepted at common law as a protected legal right".
[7] *Pepsi* at para 19.
[8] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 as cited in *Pepsi* at para 22.

[52] In *Pepsi*, the Supreme Court confirmed that picketing is protected under the *Charter*, and therefore by the common law, as long as it is not accompanied by "wrongful action":

> *[67] While freedom of expression is not absolute, and while care must be taken in the labour context to guard against extending the more severe effects of picket lines beyond the employer, if we are to be true to the values expressed in the Charter our statement of the common law must start with the proposition that free expression is protected unless its curtailment is justified. This militates against a rule that absolutely precludes secondary picketing, whether harmful or benign, disruptive or peaceful. The preferred methodology is to begin with the proposition that secondary picketing is prima facie legal, and then impose such limitations as may be justified in the interests of protecting third parties.*
>
> *…*
>
> *[73] … Torts such as trespass, intimidation, nuisance and inducing breach of contract will protect property interests and ensure free access to private premises. Rights arising out of contracts or business relationships will also receive basic protection. Torts, themselves the creatures of common law, may grow and be adapted to current needs.*
>
> *[74] In summary, a wrongful action approach to picketing allows for a proper balance between traditional common law rights and Charter values, and falls in line with the core principles of the collective bargaining system put in place in this country in the years following the Second World War.*

[53] It is a well-established and oft-cited principle that *Charter* rights and freedoms are to be given a generous and liberal interpretation so as to fulfill the purpose of the right or freedom in question. Freedom of expression, in particular, is a fundamental freedom that is "the foundation of any democratic society" and "the cornerstone of democratic institutions".[9]

[54] It is clear, however, that freedom of expression is not absolute. To determine whether an infringement has occurred, courts are required to undertake a balancing exercise, giving consideration to the context of the particular case. Still, "[t]he starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society".[10]

[55] In *KMart*, the Court conducted the requisite balancing exercise and determined that the leafletting in issue had conformed with the following:

(i) the message conveyed by the leaflet was accurate, not defamatory or otherwise unlawful and did not entice people to commit unlawful or tortious acts;

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[9] *KMart* at para 21.
[10] *Pepsi* at para 37.

(ii) although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only;

(iii) the manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful or tortious;

(iv) the activity did not involve a large number of people so as to create an atmosphere of intimidation;

(v) the activity did not unduly impede access to or egress from the leafleted premises;

(vi) the activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to the neutral sites.[11]

[56] The Court suggested that leafleting that "complied with these conditions would normally constitute a valid exercise of freedom of expression carried out by lawful means".[12]

[57] The Employer argues that the absence of an explicit statutory protection for leafletting allows the Employer to restrain leafletting as was done in this case. We do not agree. The legislature is presumed to have knowledge, but that includes an understanding of how the law is made.

[58] A similar argument was made in *Pepsi*, which the Court rejected, stating,

> *We cannot agree. There is nothing to suggest that statutory silence should be interpreted as a legislative intent to crystallize the common law and preclude its development in this area. The law as it presently stands was developed by judges in response to social, moral and economic needs. Equally, judges can and should alter the common law to reflect these needs as they change over time[.]. The Saskatchewan Legislature must be taken to have understood this when they chose to leave the matter of secondary picketing to the common law.*
>
> *[citations removed]*

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[11] *KMart* at para 58.
[12] *KMart* at para 58.

[59] The Employer relies for its assertion on the principles of statutory interpretation known as "presumed knowledge" and "presumed perfection".[13] But these principles cannot be divorced from a similar and related presumption, which Ruth Sullivan describes as follows:

> *Presumed intention embraces the entire body of evolving legal norms which contribute to the legal context in which official interpretation occurs. These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. Their primary source, however, is the common law. Over the centuries courts have identified certain values that are deserving of legal protection and these have become the basis for the strict and liberal construction doctrine and the presumptions of legislative intent. These norms are an important part of the context in which legislation is made and read.*[14]

[60] Stated otherwise, "[t]he legislature, when enacting new provisions must be taken to be aware of the state of the law as it existed when the new provisions are enacted."[15]

[61] The Union suggests that this Board can take judicial notice of Hansard in considering legislative intent. The Employer disagrees, saying that the Board cannot take Hansard into account unless the legislation in issue is ambiguous or in conflict with other legislation. On this topic, this Board stated in *Saskatoon Public Library Board v Canadian Union of Public Employees*, Local No. 2669, 2017 CanLII 6026 (SK LRB) that, "the value of such extrinsic aids is limited when there is no ambiguity or more than one plausible reading to be given to the provisions under review". Having found that there was no ambiguity, the Board decided that it was "unnecessary to resort to extrinsic evidence to assist to resolve any such ambiguity."[16]

[62] Ruth Sullivan takes a more nuanced view of the use that can be made of extrinsic evidence:

> ***23.15 Must the legislation be ambiguous?*** *It is sometimes said that the courts should not look to extrinsic materials, even though the materials otherwise would be admissible, unless the legislation to be interpreted is ambiguous. This constraint is a vestige of the plain meaning rule.*
>
> ***23.16*** *To say that a provision is not ambiguous, that its meaning is clear or "plain", is a conclusion reached at the end of interpretation. It is a judgment that can appropriately be made only in light of all the available evidence of legislative meaning and intent. The issue,*

[13] The Employer relies on passages from Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014 at 205.

[14] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014 at 9.

[15] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*, 2015 CanLII 19983 (SK LRB) at para 68.

[16] *Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669*, 2017 CanLII 6026 (SK LRB) at paras 42, 44.

> *then, is whether the assistance afforded by extrinsic materials - as legal context, as evidence of external context, as evidence of legislative intent, or as authoritative opinion evidence – should be included in the initial work of interpretation.*[17]

[63] According to Sullivan, while extrinsic evidence may not be necessary to resolve ambiguity, that does not necessarily preclude its consideration at an earlier stage.

[64] Despite this, the Board has arrived at its result independent of the Hansard excerpts. The Board's analysis is guided by foundational principles of statutory interpretation and the relationship between the common law and the *Charter*.

Application of the Law to the Evidence:

[65] There is no question as to whether Brown was acting as an agent of the Employer at the material times. The following points are decisive:

(a) The Employer retained Brown to act as the liaison between the Co-op and the Union for the purpose of observing and reporting issues to the Employer for the duration of the dispute;
(b) Brown acted as the one point of contact for any issues that arose;
(c) Brown advised Co-op management of the potential for leafletting, but did not obtain specific instructions from the Employer at that time;
(d) Co-op's legal team drew up the Notice pursuant to *The Trespass to Property Act*;
(e) The Employer's loss prevention manager met Brown on the steps of the Co-op's downtown location, providing Brown with a handful of Notices;
(f) Brown acknowledged that he had full authority from Co-op to present the Notice;
(g) The Moose Jaw Co-operative Association Ltd. is listed on the Notice as the sender.

[66] Furthermore, the Board finds that the leafleting took place on property to which the public is invited. While the Union members were picketing, vehicles were entering the Gas Bar from the road. Olson testified that during her short period of leafleting, she was standing either near the front entrance to the store or around the gas pumps. At both these locations, customers would be coming and going. Olson was approaching and interacting with customers who were conducting

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[17] *Sullivan, supra*, at 660.

their business in these locations. In fact, the very aim of the leafletting was to interact with customers who were on the property to conduct their business.

[67] The Union's choice of leafletting locations was limited. The picket line was set up on the side of the road between the two entrances to the Gas Bar, with no meaningful access to customers who were on foot. The photos of the Gas Bar location are consistent with Neault's testimony that the picketers' attempts to communicate with members of the public were impractical and at times dangerous. The Union chose the leafletting locations under these circumstances. It seems clear that, by confining the Union to the picket line, the Employer was restricting the Union's ability to communicate its message in a meaningful way.

[68] Brown raised the issue of an adjacent private road, which turned out to be a red herring. There was no evidence to suggest that Olson was leafleting on that road.

[69] Although the Employer suggested that Leaflet No. 2 was concerning, and perhaps even defamatory, there is nothing particularly unusual or concerning about that leaflet. It is noteworthy that the leaflets in *KMart* went significantly further by explicitly seeking a consumer boycott of the *KMart* stores. Furthermore, the Employer led no extrinsic evidence on the accuracy of the leaflets.

[70] Moreover, the Employer seems to be expressing a post-facto "'content-based' objection to the presence" of the leafleter, which as the Board in *Seven Oaks* has found, "is not a valid basis for removing leafleters from places accessible to the general public".[18] Nor is there any evidence suggesting that either the Employer or Impact Security communicated its concerns with the content of the leaflet. The Employer's actions suggest that it was more concerned with the *fact* of leafleting than the content of the message.

[71] The Union was engaged in lawful leafletting in this case. As in the *KMart* case, the number of leafleters is not a concern, nor is the location of the leafletting. There was only (1) one individual doing the leafleting in this case, as compared to *KMart* where there were between (2) two and (12) twelve individuals involved in protected leafleting activities.[19] In both cases, the leafletting took place near the front entrances (and the gas pumps, in this case). There was no evidence to suggest that the location was generally restricted to the public. Nor was there any evidence to

[18] *Seven Oaks* at para 132.
[19] *KMart* at para 3.

suggest that Olson's activities were anything but peaceful. Olson did not impede access to the Gas Bar, nor engage in any intimidating behavior.

[72] As in *Seven Oaks*, the Board finds that the facts giving rise to *KMart* are analogous to the facts here. But unlike in *Seven Oaks*, and contrary to the Union's Application, the Union was not forcibly removed, at least not in a physical sense.

[73] The Board agrees with the Employer that the Union must satisfy the Board on the evidence presented that the actions of the Employer have interfered with, intimidated, threatened, or coerced an employee of reasonable intelligence and fortitude against the exercise of a right conferred by the *Act*.[20] This test involves a contextual analysis of the probable consequences of the Employer's conduct on employees of reasonable intelligence and fortitude. It is an objective test. If the Board is satisfied that the probable effect of the conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in their exercise of their protected rights, the Board may find a breach. Prohibited conduct is that which would compromise the free will of the employees.

[74] Brown's testimony was that all parties agreed to refrain from leafletting activities until a determination was made. It seems unlikely that the preceding discussions and interactions did not compromise the free will of the employees in entering into this "agreement". Leading up to the agreement, Brown made clear that the Employer was concerned about the continued leafletting, that there was a chance that it was illegal, and that a determination was going to be made. Whether or not the union was "doing a favour"[21] for Brown by standing down, there is no question that the combined effect of the interventions on October 8, 2018 interfered with the Union's protected right. The intervention occurred under the cloud of potential legal action against the Union.

[75] Therefore, the Board finds that, on an objective standard, the probable consequence of Brown's actions (and therefore the Employer's), including the multiple conversations and interactions with Neault and Olson, would have been to interfere with an employee's exercise of the protected right to engage in consumer leafletting.

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[20] See *R.W.D.S.U. v Sakundiak Equipment*, 2011 CarswellSask 756, [2011] SLRB No 28, 205 CLRBR (2d) 139 at paras 124-5; *Saskatchewan Government and General Employees Union v Lac La Ronge Indian and Child Services Agency Inc.*, 2015 CarswellSask 754, 2015 CanLII 80539 (SK LRB)

[21] Brown requested the "favour", in part, because "they were having a really hard time at Co-op".

[76] Furthermore, it is difficult to imagine that serving someone with a Notice pursuant to *The Trespass to Property Act* would not be intimidating. Indeed, the police acted cautiously in advising Olson later to follow the direction of her lawyer. But the Employer's agent had previously advised that a determination on legality would be made before further action was taken. Serving the Notice was "follow up action".

[77] By presenting the Notice, the Employer was communicating that it had made a determination and that the leafletting activity amounted to a trespass. The Notice made clear that any further trespass would place Olson in further legal jeopardy. The Notice was never rescinded. This threat of legal jeopardy persisted for the remainder of the strike.

[78] In this context, it is entirely understandable why neither Olson nor any other member of the Union pursued further leafletting activity during the strike. This is not the reaction of someone with "less than average" resilience.

[79] The Board therefore finds that, on an objective standard, a probable consequence of the Employer's actions on October 9, 2018 was to intimidate and threaten an employee, of reasonable intelligence and fortitude, in the exercise of a protected right.

[80] The Employer relies on *Saskatchewan Government and General Employees Union v Lac La Ronge Indian and Child Services Agency Inc.*, 2015 CanLII 80539 (SK LRB) ("*Lac La Ronge*"), to suggest that the Board can decline to find an unfair labour practice where there is no evidence of impact. Whether or not that is the case, the facts in *Lac La Ronge* are distinguishable from the pattern of pressure exerted on the Union in this case. In *Lac La Ronge*, the only "impact" evidence was that the Executive Director had provided employees with a comparison of advantages and disadvantages of joining a union.

[81] The Employer makes the argument that leafletting is a common law right that can be abridged, limited or restrained through legislation. This argument overlooks two significant points: (1) the Court in *KMart* was clear that leafletting is a protected form of expression pursuant to section 2(b), and; (2) the *Charter* informs both the development of the common law and the interpretation of *The Saskatchewan Employment Act*.

[82] If the Board were to accept the Employer's argument, it would mean that an Employer had the power to circumvent the protection for consumer leafletting by serving a notice pursuant to *The Trespass to Property Act*. The Employer's arguments, taken to their logical conclusion, would mean that an Employer could redefine the parameters of the protection according its own terms. This cannot be so.

[83] This brings us to the Notice in issue in this case. The Notice cites section 11 of *The Trespass to Property Act* which sets out the method of giving notice to an individual under that *Act*. The notice signals that entry in or on the premises may be prohibited pursuant to section 4 of the *Act*. Further, section 3 of the *Act* states:

> ***Trespass prohibited***
> *3(1) Without the consent of the occupier of a premises, no person who is not acting* ***under a right or authority conferred by law shall****:*
>
> > *(a) enter in or on the premises when entry is prohibited pursuant to this Act;*
> > *(b) engage in an activity in or on the premises if that activity is prohibited by this Act;*
> > *(c) after being requested either orally or in writing by the occupier to leave the premises, fail to leave the premises as soon as is practicable;*
> > *(d) after being requested either orally or in writing by the occupier to stop engaging in an activity in or on the premises, fail to stop the activity as soon as is practicable;*
> > *(e) after leaving the premises pursuant to a request to do so made pursuant to this Act, re-enter the premises; or*
> > *(f) after discontinuing an activity pursuant to a request to do so made pursuant to this Act, resume the activity in or on the premises.*
>
> *(2) For the purposes of subsection (1), the onus rests on the defendant to prove, on a balance of probabilities, that he or she had the consent of the occupier to enter in or on the premises or to engage in the activity in or on the premises.*
>
> *[emphasis added]*

[84] It seems clear that the "right conferred by law", as contemplated by section 3, includes the Union's right to leaflet, as described in this case and in *KMart*.

[85] The Union asks the Board to issue a declaration that the Notice is null and void. Although the Notice was never rescinded, the strike is now over. The Employer is not in a position to enforce the Notice against the Union. By all accounts, Olson received the Notice and refrained from leafletting in the areas concerned. Therefore, there is currently no practical conflict between the Notice and the Board's finding in this case. If any such conflicts were to arise, this Board has no

doubt that any relevant defenses to trespass would be raised by able counsel in the appropriate forum.

Remedy:

[86] Based on the foregoing, the Board finds pursuant to subsection 6-104(2)(b) of *The Saskatchewan Employment Act* that the Employer committed an unfair labour practice.

[87] The Union also asks for a declaration that the Employer has violated the Union's rights under the *Charter*.[22]

[88] The *Charter* is limited in its application to Parliament and the legislatures, and to the executive and administrative branches of government.[23] As no state action is being challenged, at least not directly or in the presence of state parties, the requested *Charter* remedy is not available. Although the Board relies on *Charter* principles as an aid to interpretation, the *Charter* does not have direct application to disputes between private parties so as to allow for the remedy requested. The Board therefore denies the Union's request for a declaration that the Employer has violated its rights under the *Charter.*

[89] The Union also seeks a monetary award for a breach of its rights under both *The Saskatchewan Employment Act* and the *Charter*. It seeks an award for the lost compensation, including strike pay for all picketers and benefit premiums for all picketers and striking employees. The Union says that it "feels that had it been free to exercise its *Charter* rights, the pressure on the Employer would have intensified and the strike would have ended."[24] The period in question runs from October 8, 2018 to November 6, 2018.

[90] To support its request for compensation, the Union relies on this Board's previous jurisprudence, in which the Board has described the goal of a remedy as being to "place the parties into the position they would have been but for the commission of the unfair labour

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[22] Perhaps as was done in *Seven Oaks*, at para 133.
[23] See, section 32 of the *Charter.* See also, *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573. See, also, *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII), in which the *Dore* principles are applied to review administrative action.
[24] Union's Brief at para 26.

practice."[25] This Board has previously found that an unfair labour practice has prolonged a strike and has ordered an employer to reimburse wages and strike pay: *Canadian Union of Public Employees, Local 3078 v Board of Education of Wadena School Division No 46 of Saskatchewan*, 2004 CanLII 65618.

[91] However, the Union has the onus to show that the breach resulted in the loss of wages or benefits claimed. And although it is possible that the interference with the leafletting activities prolonged the strike, there is insufficient evidence to establish that the Employer's actions, more likely than not, had that effect. The strike lasted approximately four to five weeks. The leafletting activity took place on October 8 and the strike ended on November 4. On the existing evidence, the suggestion that the Employer's activities prolonged the strike is almost entirely speculative.

[92] Furthermore, there was very little evidence as to the actual amount lost, or due to be compensated. The Union seeks full compensation for lost wages and benefits. And while Neault testified briefly as to the approximate cost to the Union of weekly strike pay and benefits, as well as the total number of picketers (85), there was no additional evidence on the number of employees on strike or the exact amount of wages and benefits owing.

[93] For the foregoing reasons, the Board denies the Union's request for monetary relief. The Board also denies the request for a declaration that the Notice is null and void. The Board is assured that the Employer will review these Reasons and govern itself accordingly in the future.

[94] The Board makes the following Orders:

(a) That on October 8 and 9, 2018 the Employer committed an unfair labour practice in violation of subsection 6-62(1)(a) of *The Saskatchewan Employment Act* when it interfered with the Union's leafletting activities, including by serving a Notice under *The Trespass to Property Act* on a Union member.

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[25] *Seven Oaks*, at para 141 citing *Moose Jaw Firefighters' Association Local 522*, 2016 CanLII 3650 at para 140; *Swift Current (City) v International Association of Fire Fighters*, Local 131, 2014 CanLII 76050 (SK LRB) at para 60.

(b) That upon receipt of the Reasons for Decision, the Employer shall post a copy of the Decision and the Board's Order for a period of fourteen (14) days in a place in the workplace where the Employer normally posts notices to employees.

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

DATED at Regina, Saskatchewan, this **19th** day of **March, 2019.**

LABOUR RELATIONS BOARD

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Barbara Mysko
Vice-Chairperson