**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v SASKATOON CO-OPERATIVE ASSOCIATION LIMITED, Respondent**

LRB File No. 066-19; February 5, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Laura Sommervill

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| Counsel for the Applicant, United Food and Commercial Workers, Local 1400: | Heath Smith |
| Counsel for the Respondent, Saskatoon Co-operative Association Limited: | Kevin C. Wilson, Q.C. and Tom Richards |

**Unfair Labour Practice – Clause 6-62(1)(a) – Strike – Employer Communication – Enforcement of Union fines – Alleged Interference – Not Interference with Employee of Reasonable Intelligence and Fortitude in Exercise of Right.**

**Unfair Labour Practice – Clause 6-62(1)(b) – Interference in Internal Union Affairs – Discipline of Union Members – Internal Union Matters – Administrative Function – Integrity of Union – Contravention Established.**

**Practice and Procedure – Bifurcation of Proceedings – Case to Meet – Fairness to Opposing Party – Bifurcation and damages dismissed.**

## REASONS FOR DECISION

### Background:

**[1]** **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an unfair labour practice application, filed with the Board on March 20, 2019 [the "Application"]. The United Food and Commercial Workers, Local 1400 [the "Union"] brings the Application against Saskatoon Co-operative Association Limited [the "Employer"], pursuant to clauses 6-62(1)(a) and (b) of *The Saskatchewan Employment Act* [the "Act"].

**[2]** The Application alleges:

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 November 1, 2018.*

d. *The Union and its members have been engaged in legal picketing at the Employer's numerous worksites.*

e. *On March 12, 2019 the Employer sent out a message to all employees respecting the Union's right's* [sic] *to fine its members who have crossed the picket line.*

f. *The message to all employees was entitled "Strike Update" and has the heading: "UFCW is threatening to fine its workers: what you need to know". The message contains legal advice to the Union members although stated indirectly – the union contends it is still legal advice.*

g. *The Union submits that the Employer's message to all of its unionized employees is interference with the administration of a union. The Employer's interference in the Union's activities has no legitimate – neither a valid nor compelling – business purpose. The Union's constitution and its administration of its constitution is not the Employer's business and to interfere with such is a violation of The Saskatchewan Employment Act.*

**[3]** The Union says that the Employer's actions delayed the strike and were an attempt to convince members of the Union to cross the picket line.

**[4]** In its Reply, the Employer states:

a. *The Union represents approximately 900 of Saskatoon Co-op's employees in and around Saskatoon.*

b. *The most recent collective agreement between the Employer and Union expired on November 19, 2016.*

c. *The parties commenced collective bargaining on February 24, 2017 with a view to concluding a new agreement.*

d. *The parties met numerous times throughout 2017 and 2018 in an attempt to conclude a new agreement.*

e. *On January 8, 2018 the Board determined in LRB File No. 197-17 that the Union had committed an unfair labour practice in contravention of s. 6-63(1) by serving notice of impasse pursuant to s. 6-33 when there was no reasonable belief that the parties were at impasse.*

f. *The parties were unable to conclude a new agreement and negotiated to the point of impasse.*

g. *On October 29, 2018 the Union served the Employer with strike notice and commenced strike action on November 1, 2018.*

h. *The parties have made other applications to the Board.*

    (i) *The Employer has two applications before the Board. LRB File No. 230-18 concerns the improper use of a petition by the Union to undermine the Employer's*

*governance structure. LRB File No. 231-18 concerns the unlawfulness of the strike when considered in the context of s.6-63(1)(b)(i) of the Act.*

*(ii) Excluding this application, the Union has other three applications before the Board. LRB File No. 034-19 concerns an allegation of bad faith bargaining. LRB File No. 035-19 concerns the provision of benefits to picketing employees. LRB Fil No. 063-19 concerns an allegation of improper conduct by the Employer in the context of leafleting by bargaining unit members. The Employer also denies the allegations of an unfair labour practice in each of those applications.*

*i. Notwithstanding the Employer's position that the Union's strike is unlawful and the Union has engaged in unfair labour practices, the Employer has engaged in good faith bargaining with the Union throughout the process.*

*Communication*

*j. On March 12, 2019 the Employer sent a communication to employees affected by the strike (the "Communication").*

*k. The Employer denies that the Communication constituted a contravention of s.6-62(1)(a) of the Act as alleged or at all.*

*l. The Employer denies that the Communication constitutes a contravention of s.6-62(1)(b) of the Act as alleged or at all.*

**[5]** The hearing on this Application was held on October 22 and 23, 2019.

**[6]** For purposes of this Application, and to simplify the issues before the Board, the Employer conceded that the Union's strike was lawful. This concession applies only to the current Application in LRB File No. 066-19.

**Arguments of the Parties:**

**[7]** The issue before the Board is whether the Employer's communication, made on March 12, 2019 [the "March Update"], constitutes a breach of either clause 6-62(1)(a) or clause 6-62(1)(b) of the Act.

***The Union***

**[8]** The Union argues that, in issuing the March Update, the Employer ran afoul of clause 6-62(1)(a) by interfering with employees in the exercise of their rights conferred by Part VI. It says that not only would the probable consequence of the March Update have been to interfere with an employee of average or reasonable intelligence and fortitude in the exercise of a right, but the March Update did so interfere. In support of its argument, the Union alleges that, due to the March Update, employees took positions, cast ballots, made strike participation decisions, and confronted Union representatives about the enforcement of Union fines.

**[9]** The Union also argues that disciplining Union members is an issue of internal Union administration. The Employer admitted as much in its own communication, but then relied on that same communication, the March Update, to interfere anyway. Due to the Employer's claims, some Union members decided to cross the picket line, and others signaled they would withdraw their support for strikes in the future. In issuing the March Update, the Employer interfered with the administration of the Union, contrary to clause 6-62(1)(b) of the Act.

***The Employer***

**[10]** The Employer implores the Board to consider the context in which the March Update was issued. It says that the Union had been threatening to levy fines against its members for crossing the picket lines throughout the labour dispute. The Employer issued the impugned communication to inform the members that such fines had not been enforced by courts outside of Saskatchewan, that Saskatchewan courts did not appear to have addressed the question as to whether such fines were in fact enforceable, and that the Employer did not believe that Union fines would be enforceable as debts by Saskatchewan courts. Understood in this context, the Employer says that, through the March Update, the Employer communicated facts and opinions as contemplated by subsection 6-62(2) of the Act. Furthermore, the March Update does not constitute prohibited conduct as contemplated by clause 6-62(1)(a).

**[11]** In reference to clause 6-62(1)(b), the Employer denies that it interfered with the administration of the Union. It says that, for the Board to find that the Employer contravened this provision, it must find that the Employer's actions posed a threat to the Union's survival or its integrity as an organization. The Union bears the onus, and having failed to establish facts that rise to this level, this aspect of the Union's application must be dismissed.

**Evidence**:

***Background***

**[12]** As may be evident, the focus of the Application is the March Update, the entirety of which is replicated below:

# *Strike Update - March 12, 2019*

*3/12/2019*


***UFCW is threatening to fine its Members: what you need to know***

***What is happening?***

- *We understand that UFCW Local 1400 is attempting to take disciplinary action against their members in Moose Jaw in the form of fines being levied against employees for hours worked at the Co-op during the labour dispute from October 2, 2018 and November 5, 2018.*
- *The Union leadership may be considering similar attempts against Union members at Saskatoon Co-op.*
- *Although this is an internal constitutional matter for UFCW, Co-op feels, based on legal guidance and precedence in Saskatchewan and other jurisdictions within Canada, these unfortunate actions by the Union Leadership are not enforceable.*

***Can the Union do this, and what can employees do?***

*Saskatoon Co-op sought a legal opinion on this matter. The opinion we received is that these actions are not seen as enforceable by the courts in four other jurisdictions in Canada. Also, there has never been a successful imposition of union fines for employees working during a strike in our province under the current Saskatchewan Employment Act, that Saskatoon Co-op is aware of.*

*UFCW previously attempted to impose similar fines on employee with another employer in Saskatchewan.*

- *Employees did not attend any hearings to answer to charges laid against them by the Union. These hearings were convened in front of a panel of UFCW Executive, not any formal court or board.*
- *Employees refused to pay fines levied by the UFCW panel following these hearings.*
- *UFCW's attempts to secure payment were not successful and they have not pursued collection of the fines further. Employees were not required to or ordered to pay the fines.*
- *No employees lost their jobs as a result of any disciplinary action taken by the Union.*

*Employees of Moose Jaw Co-op have obtained legal representation and we understand are taking similar actions to resist the attempt by UFCW to take this action.*

**If you have any questions, please reach out to your team leader,**

**Or contact Human Resources at 306 933-3810.**

**[13]** Earlier communications occurred on October 30, 2018, December 6, 2018, January 7, 2019, and February 7, 2019, and while not exactly the same, consisted of similar themes. These earlier communications informed employees that the Union could not impact the status of employment for those employees who chose to cross the picket lines, outlined the number of employees currently working through the strike, and explained that if the Union chose to deny an employee access to membership in the Union, the Employer would continue to collect and remit Union dues. In two of these earlier communications, the Employer issued the following statement:

"You may have heard that there will be action taken against you such as fines, liens on your home or impacts to your employment if you choose to cross the picket line".

**[14]** After the Union announced its intention to strike, Grant Wicks ["Wicks"], the Employer's Chief Executive Officer, penned a letter to express the Employer's support for employees who wished to continue to work during the labour disruption. In the letter, Wicks referred to the fact that the Employer had issued a lockout notice to the Union. He explained that the Employer would only lock out employees in response to "job actions taken by the Union that require us to do so" and that employees were encouraged to "continue to come to work". Appended to the letter was a summary of "additional information for employees continuing to work", including information on whether employees could be terminated for crossing the picket lines, whether fines had been enforced in other jurisdictions, and whether fines were likely enforceable as debts in Saskatchewan courts.

**[15]** On April 14, 2019, the parties (the Union and the Employer) signed a return to work protocol, which included the following provision:

> *5. The Employer and those acting on its behalf shall not recriminate in any way against any bargaining unit employees as a result of their participation in the strike or prestrike activities. The Union and all its bargaining unit employees agree that they shall not recriminate in any way against the Employer and those active on its behalf or against other employees as a result of their participation or non-participation in the strike or pre-strike activities, including the imposition of penalties or fines to those employees who continued to or returned to work prior to the ratification of the revised collective agreement.*

**[16]** Neither party suggested that the foregoing protocol barred the present action.

**[17]** The parties agreed further to the de-escalation of tensions that were present throughout the dispute and agreed to messaging for future public communications.

***Witness Evidence***

**[18]** The Union called two witnesses - Roger Haatvedt and Lucia Flack Figueiredo. The Employer elected to call no evidence.

**[19]** Roger Haatvedt ["Haatvedt"] is a long-time Saskatoon Co-op employee who currently works in the maintenance department. He serves as a chief shop steward and as a representative on the bargaining committee. Haatvedt reflected on his first impressions of Wicks' letter. In short, it made him mad. The strike was a long time in coming. And after all that time, the employees had

given the Union a strike mandate. Haatvedt felt that the letter was interference with Union business.

**[20]** Haatvedt testified about the nature and extent of internal Union communications during the labour dispute. He admitted that, while Union representatives had announced at pre-strike meetings that crossing the picket lines could result in fines being levied, he could not recall Union representatives warning that strike-breakers could risk losing their Union membership. Nor could he recall any representatives declaring that liens could be placed on members' homes.

**[21]** As for external communications, both sides communicated actively with the public, including use of billboards, newspaper advertising, radio, social media, websites, and flyers. Both parties actively communicated with employees before and during the strike. As communications went out, employees approached Haatvedt with questions. He provided the employees with examples in which fines could be imposed. As for the existence of strike-breakers, he noted that some employees crossed the picket lines from the outset of the strike. Some later. Co-op remained open throughout the strike.

**[22]** The purpose of telling members about fines was to provide a disincentive to employees against crossing the picket lines and to maintain Union solidarity during the strike. In cross examination, Haatvedt admitted that the Union was trying to "compel" people to stay on the lines, that he was unfamiliar with the extent of enforcement in previous cases, and that he was unaware that the statutory fine enforcement mechanism had been removed.

**[23]** Lucia Flack Figueiredo ["Figueiredo"] is the Secretary Treasurer of the Local, and has held various roles throughout her time with the Union, beginning in 1998. From 2010 to 2016, Figueiredo was the Union's representative in collective bargaining with the Employer. Overall, she has been involved in collective bargaining work for over ten years.

**[24]** When asked how the Union collects fines, Figueiredo explained that any member can charge another member with a violation of the Constitution. Typically, the process is initiated in the form of a letter submitted to the Executive or the President, and the President then convenes a panel of the Executive to hear the charge. The member making the allegations, and the member being charged, have the opportunity to appear at the hearing and present their respective cases. There is an appeal process. Once complete, the Union enforces the Constitution and proceeds through the collections process. According to Figueiredo, the Union has never threatened anyone's employment in retaliation for crossing the picket lines.

**[25]** Article XIV of the Local's Bylaws (entitled, *Disciplinary Proceedings*) authorizes the charging of a member by an active member of the Local or by a representative of the International. Fines are referred to in clause A(13):

> *13. A detailed written record of the trial proceedings shall be made and preserved and shall constitute the trial record, provided that no fine, nor loss of membership rights or Union office, shall be imposed unless a stenographic record and transcript are kept of the trial proceedings*.

**[26]** The Constitution of the International includes the same provision at Article 26(A)13.

**[27]** Around the time of the strike, the issue of Union fines for crossing the picket lines came up at every Union meeting. Union fines was the topic of greatest interest on employees' minds leading up to bargaining. It dominated the meetings. Based on those meetings, Figueiredo concluded that the members wanted to know that there were consequences for those who crossed the picket lines, to ensure the strength of the lines. In response to member questions, Figueiredo explained that the Union could fine people who crossed the picket lines but the parties would negotiate the enforcement or implementation of those fines.

**[28]** According to Figueiredo, whether the Union is capable of enforcing fines is not the issue. When the Union fines a member, that person is a member not in good standing until the fines are paid; therefore, fines are highly symbolic. They are also practical – the Union revokes certain privileges for members not in good standing.

**[29]** Figueiredo is not aware of anyone in the organization who has threatened an employee's employment. The Union never places liens on an employee's home – however, there were rumors circulating (about an individual with a bad credit rating) that might explain the origins of this latter notion.

**[30]** During the strike, Saskatoon Co-op continued its operations, at first on a limited basis and then on an expanded basis as the strike continued. Some employees crossed the picket lines at the outset. Prior to the issuance of the March Update, the fine process in relation to the Moose Jaw strike had been initiated, and so when the March Update was issued, Figueiredo assumed that the Moose Jaw news had trickled back to Saskatoon. By the time Figueiredo received the March Update, the strike had been happening for almost five months.

**[31]** The Union communicated to its members that if they returned to the picket lines, the Union would forgive their fines. Figueiredo made a point of distinguishing between this one communication and the series of communications issued by the Employer.

**[32]** Counsel for the Employer challenged Figueiredo for wavering on whether the decision to levy or enforce fines was up to the bargaining unit or up to the bargaining committee. In other words, was the Union misrepresenting its authority when it promised to forgive the members' fines? In response, Figueiredo suggested that the decision may be up to the bargaining unit, the bargaining committee or both, depending on the circumstances. The bargaining committee made the decision in this case.

**[33]** According to Figueiredo, Saskatoon Co-op members were aware that the decision whether to enforce fines would be reached through or after bargaining. At the ratification meeting, members were standing up and saying that if the Union chose not to fine strike-breakers, they would not walk the picket line the next time there was an opportunity to do so. Members wanted to be assured that there would be consequences for crossing the picket lines. In Figueiredo's opinion, the lack of assurance could impact the likelihood of a strike mandate in the future.

**[34]** Figueiredo is uncertain about the nature of the Union's power to take retributive action against a member who crossed the picket lines. She does not know whether the fines are enforceable through the courts, but if the membership "demanded" that the Union proceed through the court process, then the Union would comply with that demand. Any member would be aware that fine imposition or collection is a decision to be made at the end of the labour dispute. Likewise, Figueiredo does not know whether the Union's authority over internal discipline can extend to employee terminations, but if it did so extend and the membership found termination to be appropriate, then the Union would follow the members' direction.

**[35]** She agreed that it was reasonable for the employees to be concerned about termination but, as far as she was concerned, the employees were not asking this question, and even if they were, why was the Employer answering it? She acknowledged that the newspaper article, which suggested that the Employer could be forced to terminate employees, could have raised these concerns. In re-exam, she explained that she had never heard of an employee being terminated as a result of crossing the picket lines.

**[36]** Figueiredo agreed that the Union, through the prospect of fines, was threatening a financial penalty to discourage workers from crossing the picket lines. However, the Union was

simply enforcing the Union Constitution and Bylaws, consisting of terms and conditions that the workers "signed on to" when they became members of the Union. From the beginning, the Employer nullified that threat by issuing its various communications, and so the workers who crossed the picket lines did so with full awareness of the potential for fines and yet with minimal concern for their enforcement. Those who remained on the lines, in Figueiredo's view, chose to do so out of loyalty and motivated by support for their coworkers or out of fear for their judgment. As a result, workers crossed only when they felt like they had to.

**[37]** Commenting on the specifics of the March Update, Figueiredo disputed the suggestion that the Union was "considering similar attempts", insisting that, at the time of the March Update, the decision about fines had not yet been made. Figueiredo took issue with the use of the word "threatening" in the statement, "UFCW is threatening to fines its members"; and with the word "attempting" in the statement, "Local 1400 is attempting to take disciplinary action against their members in Moose Jaw". The Union was not threatening or attempting; it was doing. While the March Update seemed designed to instill fear, the Union had been transparent with its membership about the possibility of fines.

**[38]** Figueiredo spoke generally to the second set of bullets in the March Update, which describe events in relation to a previous case. According to Figueiredo, no one attended the hearings in that case. The explicit mention of the Executive panel juxtaposed against a court or board seemed designed to diminish the panel's authority. While the employees did refuse to pay the fines that were levied, the Union proceeded to collections. Whether the collections process proved valuable is another matter. As for the issue of employees potentially losing their jobs, the Union had never communicated that employees' jobs were at risk of termination, and so she questioned why the Employer would see fit to raise the issue. She was unsure whether employees of Moose Jaw Co-op had obtained legal representation.

**Applicable Statutory Provisions:**

**[39]** The following statutory provisions are applicable:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*

> *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*
>
> *. . .*
>
> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*
>
> *(3) Clause (1)(b) does not prohibit an employer from:*
>
> *(a) permitting representatives of a union to confer with the employer for the purpose of collective bargaining or attending to the business of a union without deductions from wages or loss of time while so occupied; or*
>
> *(b) agreeing with any union for the use of notice boards and of the employer's premises for the purposes of the union.*
>
> *. . .*
>
> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization;*
>
> *(b) to commence to take part in or persuade an employee to take part in a strike while:*
>
> *(i) any application is pending before the board; or*
>
> *(ii) any matter is pending before a labour relations officer or special mediator who is appointed pursuant to this Part or a conciliation board established pursuant to this Part;*

**Analysis:**

***Onus***

**[40]** On the present Application, the onus of proof rests with the Applicant, the Union. The Union bears the onus to prove, on a balance of probabilities, that the Employer breached clauses 6-62(1)(a) and 6-62(1)(b) of the Act. The evidence before the Board must be sufficiently clear, convincing, and cogent.

**[41]** The Board will proceed to assess the Union's complaint on the bases of clauses 6-62(1)(a) and 6-62(1)(b), in turn.

***Clause 6-62(1)(a) – General Principles***

**[42]** To begin its analysis of clause 6-62(1)(a), the Board will address three general questions of law that were raised throughout the course of the proceedings.

**[43]** First, in *United Food and Commercial Workers, Local 1400 v Moose Jaw Co-operative Association*, 2019 CanLII 43225 (SK LRB) [*Moose Jaw Co-operative Association*], at paragraph 73, the Board described the test to establish a breach of clause 6-62(1)(a):

> *… 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.*

**[44]** This is an objective test - the Board is required to consider the probable consequences of the Employer's actions on employees of reasonable intelligence and fortitude. The protected rights are those that are conferred by Part VI.

**[45]** The Employer relies on the foregoing description from *Moose Jaw Co-operative Association*, suggesting that the Union has failed to demonstrate that the Employer's actions would have the probable consequence of compromising or expropriating the free will of employees of reasonable intelligence and fortitude. In assessing the validity of this argument, it is helpful to review and consider the case law in which the "free will" language has been examined.

**[46]** The Court of Appeal had occasion to consider this issue in *Cypress Regional Health Authority v SEIU-West*, 2016 SKCA 161 [*Cypress Regional*], and in that case described the language as "a kind of shorthand for the full legislative language of s.11(1)(a)[.]"[1] According to the Court of Appeal, the Board had adopted the language after reflecting on the relevant legislative amendments, and having determined that, in assessing an alleged breach of clause 6-62(1)(a), it was appropriate to "move less automatically in considering whether an employee had been interfered with, intimidated, coerced or restrained". In contrast with the purported previous approach, the Board had resolved to "not always or necessarily start from a presumption that all employer communications are inherently or inevitably intimidating or coercive".[2]

**[47]** Taking into account *Cypress Regional*, the use of the phrase "compromise or expropriate" must be considered, not as a replacement for the language of clause 6-62(1)(a), but as a shorthand to describe the Board's approach to assessing the allegations brought pursuant to clause 6-62(1)(a).

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[1] At para 92.
[2] At para 93.

**[48]** Second, the Employer argues that the prohibition set out at clause 6-63(1)(a) of the Act, coupled with the absence of a statutory fine enforcement mechanism, provide crucial context against which the Employer's actions should be assessed. According to the Employer, the statutory framework supports the Employer's contention that the Union fines are unenforceable, or at least suggests that this belief was reasonably held. Furthermore, the Union, in threatening to fine strike-breakers, acted improperly, perhaps even by coercing and intimidating its members, contrary to clause 6-63(1)(a). Clause 6-63(1)(a) prohibits an employee, union or any other person from interfering with, restraining, intimidating, threatening or coercing an employee with a view to encouraging or discouraging activity in or for a labour organization. The Union has admitted that it threatened employees with fines to discourage them from crossing the picket lines.

**[49]** However, while the Employer makes the point that the Act does not contain any statutory right to enforce union fines, the Employer does not assert that the Act prohibits union fines altogether or that the Union cannot "issue internal union discipline or fines" under its Constitution:

> *Importantly, Saskatoon Co-op was not challenging the fact that UFCW may issue internal discipline or fines. Instead, Saskatoon Co-op highlighted that such fines may not be enforced by Saskatchewan Courts. The issue is not whether the Union can impose fines under its constitution and bylaws. The Saskatoon Co-op has never challenged that assertion. What it has challenged is the assertion that the fines could be enforced through the Courts, which they cannot.*[3]
>
> *[underlining in original]*

**[50]** While the Board has in the past carefully examined the meaning of clause 6-62(1)(a), the Employer's argument seeks a further review of the statutory scheme, taking into account clause 6-63(1)(a) and the absence of an explicit statutory authorization for the enforcement of union fines.

**[51]** Indeed, the modern principle of statutory interpretation asks the Board to read the legislative text in its ordinary sense harmoniously with the scheme and objectives of the Act, in particular Part VI, and the intention of the legislature. In doing so, the Board must be guided by the objective of Part VI in conferring collective bargaining rights to individuals.

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[3] *Employer's Brief* at para 76.

**[52]** Ruth Sullivan in *Construction of Statutes* suggests that the goal in interpreting a statute is to arrive at an interpretation that is "appropriate". Sullivan breaks down the components of an "appropriate interpretation", as follows:

> ***2.9*** *[…] An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.*[4]

**[53]** Sullivan cautions against committing errors due to a failure to consider the various factors that may justify interpretative outcomes:

> ***2.37*** *Texts are not either plain or ambiguous; rather they are more or less plain and more or less ambiguous. The factors that justify outcomes in statutory interpretation are multiple, involving inferences about meaning and intention derived from the text, non-textual evidence of legislative intent, specialized knowledge, "common sense" and legal norms. These factors interact in complex ways. It is never enough to say the words made me do it.*
>
> *[emphasis added]*

**[54]** Bearing these principles in mind, the Board will proceed to consider the Employer's arguments about the statutory scheme.

**[55]** First, as asserted by the Employer, subsections 36(4) through (6) of now-repealed *The Trade Union Act* explicitly authorized unions to fine their members for crossing the picket line and provided for the enforcement of that fine as a debt owed pursuant to a contract in a court of competent jurisdiction. The ability to assess or fine union members existed as a qualification to the union security provisions of *The Trade Union Act*:

> ***36****…*
>
> *(4) Notwithstanding subsection (3), a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during that strike.*
>
> *(5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.*
>
> *(6) A fine imposed on a member pursuant to subsection (4) with respect to an action that takes place after the coming into force of this subsection is deemed to be a debt due and owing to the trade union and may be recovered in the same manner as a debt owed pursuant to a contract in a court of competent jurisdiction.*

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[4] Sullivan, *Construction of Statutes*, 6th ed (Markham:LexisNexis, 2014) at 10 (2.9).

**[56]** Subsections (4), (5), and (6) did not make their way into the current Act. However, the fact that the provisions are no longer in existence does not mean that unions have lost their ability to fine their members pursuant to their internal constitutions. The Employer acknowledges as much. On the other hand, the Employer suggests that union fines are not enforceable through the courts in Saskatchewan. The Employer relies for this proposition on the existing case law from other jurisdictions, as alluded to in the March Update.

**[57]** According to the Employer, courts outside of Saskatchewan have characterized union fines as an "in terrorem" method of preventing members from crossing a picket line, a characterization that supports the Employer's view of the Union's actions being akin to a breach of clause 6-63(1)(a).[5] This is to distinguish from fines that may be related to an actual or estimate of damages suffered. However, while it is true that certain courts have refused to enforce the provisions of a union's constitution that authorize fines for strike-breakers, they have done so for a variety of reasons.

**[58]** To illustrate, in *Birch v Union of Taxation Employees*, Local 70030, 2008 ONCA 809 (CanLII) [*Birch*], a case on which the Employer relies, the majority of the Ontario Court of Appeal found that union fines were not enforceable due to unconscionability. The majority refused to sound the "death knell" for the rule against penalty clauses but left that issue to another day:

> *[37] Assuming that the common-law rule against penalty clauses still has some life, I would agree that this is not the case to make a sweeping pronouncement that the rule is no longer applicable to the law of contract generally. The rule was developed through a wide spectrum of what might be described as typical commercial cases. Whatever may be said of the facts of this case, it is not a typical commercial case and I would not wish to be taken as suggesting that what follows is intended to be general authority for sounding the death knell for the rule against penalty clauses. Like Sharpe J.A., I am of the view that the broader issue should be left to another day. [page12]*
>
> *[38] While I agree with the view that a union constitution represents a different kind of contract between a union and its members and that a penalty clause is not necessarily unenforceable in accordance with the common-law rule, I see no reason to suggest that the law of unconscionability does not apply to these kinds of agreements. Given the obiter dicta expressed by Sharpe J.A. in Peachtree II, it was understandable that the application judge hesitated to declare the rule against penalty clauses was no longer applicable. In any event, he properly proceeded to consider whether the clause in issue was unconscionable.*
>
> *[39] I can discern nothing in the unique contractual relationship between a union member and his or her union which would suggest to the court that we should refuse to apply the*

[5] See, for example, *Birch* at para 28.

*doctrine of unconscionability in appropriate circumstances. To suggest otherwise would be to deny the exercise of the equitable jurisdiction of the court to provide a remedy to individual members who have suffered an injustice at the hands of their union.*

**[59]** The majority upheld the finding of unconscionability as follows:

*[53] The application judge determined that there was no evidence to support the union's position that the fines were proportional to the damage suffered by the union as a result of Mr. Birch and Ms. Luberti crossing the picket line. Before the application judge, the union sought to justify the fines as a genuine pre-estimate of the damages suffered by the union. Although there was no evidence to support this position, the union submitted that the damages amounted to one cent per member, which produced an amount of $258.95 for the total union membership of 25,895. If $50 per day strike pay (for a total of $150) is subtracted from that amount, the total amount of the damages would be reduced to $108.95. The actual amount of the fine was $476.75 or 454 per cent greater than the union's estimate of its damages less the $150 for strike pay. I agree with the application judge that a fine of that magnitude can properly be described as excessive and unconscionable. Even if I did not agree with him, I am satisfied that a high degree of deference is owed to the application judge on that issue.*

*…*

*[56] The fact that Saskatchewan is the only jurisdiction in Canada that has seen fit to authorize a trade union to levy a fine on a member who crosses the picket line during a legal strike, limited to a member's net pay, adds support to the conclusion of the application judge that a fine greater than that amount is excessive. While I do not think it is necessary to conclude, as did the application judge, that no fine is enforceable in the absence of legislation authorizing the imposition of a fine, I find the legislation in Saskatchewan is informative on the issue to be decided here.*

*[57] The application judge also considered whether the fines provided under the constitution were justified in order to deter members from taking the benefits of union membership without accepting the burden of a work stoppage due to a legal strike. He decided that there were more appropriate means than fines of the magnitude here to accomplish this end. I also note that the respondents were suspended from union membership for three years. In my view, a suspension of such duration is a significant penalty in itself. The respondents not only lose the benefits of union membership but risk ostracism and ridicule from their fellow employees who are members of the union.*

*[58] I recognize that a fundamental principle of the union movement and the collective bargaining process is union solidarity. I accept that the penalty provision in this case was aimed at preserving union solidarity. As important as that principle is, the means adopted to achieve it in this case have been found to be "very unfair".*

*…*

*[64] I agree with the application judge that the absence of a prohibition against the imposition of fines for crossing a picket line during a legal strike in ss. 188(c)-(e) and 192(1)(f) of the Public Service Labour Relations Act does not entitle a union to impose such fines. I do not find it necessary to decide whether the application [page18 ]judge was correct in holding that an express statutory grant is required to give the union such authority to impose a fine. Whatever one may make of the statutory context under which this union*

> *operates, I find nothing in it that would permit the enforcement of a fine that the court found to be unconscionable.*
>
> *[65] As indicated above, the application judge rejected the union's argument that ss. 188(c)-(e) and 192(1)(f) prohibited the union's imposing of fines in situations that did not include a fine for crossing the picket line. I do not find it necessary to decide whether the application judge was correct in holding that an express statutory grant is required to give the union such authority. Whatever one may make of the statutory context under which this union operates, I find nothing in it that would permit the enforcement of a fine that the court found to be unconscionable.*
>
> *…*

**[60]** The Court of Appeal did not find it necessary to comment on the necessity of a specific grant of authority for union fines.

**[61]** In *Birch*, the Court of Appeal made clear that there was no ability to enforce a fine that was unconscionable. The particular type of fine would not have even satisfied the fine criteria in Saskatchewan law, at that time.

**[62]** It cannot be said that Saskatchewan courts have definitely decided the issue. To be fair, the Employer does not suggest that they have.

**[63]** Next, the Board will consider the Employer's arguments in relation to clause 6-63(1)(a). In comparison to clause 6-62(1)(a), the Board has had relatively little opportunity to interpret and apply clause 6-63(1)(a). However, in two recent cases, the Board found that the tests to be applied in relation to the two provisions are similar or the same: *Reliance Gregg's Home Services (Reliance Comfort Limited Partnership) v United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada*, 2018 CanLII 127676 (SK LRB) and *Amenity Health Care L.P. v Workers United Canada Council, Tanya Parkman and Gwen April Britton*, 2018 CanLII 68441 (SK LRB).

**[64]** However, the clauses are not identical. For one, clause 6-63(1)(a) includes an element of intent as demonstrated by the phrase "with a view to", a phrase not included in clause 6-62(1)(a). Second, clause 6-63(1)(a) is restricted to actions that intersect with "membership in or activity in or for a labour organization", in contrast with the broader "exercise of any right conferred by" Part VI.

**[65]** More to the point, both clauses must be understood within their proper context. The purpose of Part VI is to facilitate and promote collective bargaining rights. The interpretation of

clause 6-63(1)(a) must take into account the unique character of the relationship between union members and the union. A union is a democratic organization that in the Canadian tradition depends, in large part, on the principle of majoritarianism. Union representatives are elected to represent employees on behalf of the majority. Members of the bargaining unit vote in a majority system to take action, including strike action, to pursue their collective interests.

**[66]** If the majority votes in favour of a decision to take strike action, and the effectiveness of the strike hinges on a degree of solidarity, a union should be allowed to discipline those employees who choose to defy the majority decision and whose actions erode the solidarity and therefore the bargaining power of the organization. The strike mandate, achieved through the operation of the majoritarian system, diminishes the coercive or threatening aspect of this action. In the majoritarian system, union members can be assumed to have understood that there would be ramifications for crossing the picket lines; some members will even rely on these ramifications to gauge the potential value of a strike.

**[67]** This line of reasoning is not novel. The Board has previously recognized that employees have a right to be free of "specious" punishment but that unions must also have some authority to act against strike-breakers to maintain a modicum of union solidarity, necessary for regulating the balance of power between the union and the employer in a labour dispute: *R.W.D.S.U., Local 955 v Morris Rod Weeder Co. Ltd*., [1997] Sept Sask Labour Rep 32 at 4, as cited in *Canadian Union of Public Employees, Local 3078 v Board of Education of The Wadena School Division No. 46 of Saskatchewan*, 2004 CanLII 65618 (SK LRB) [*Wadena*] at paragraph 46.

**[68]** As a corollary, a union should be allowed to communicate to its members about the potential for discipline. While the Union's witnesses have conceded that, through the prospect of fines, the Union was "threatening" a financial penalty to discourage workers from crossing the picket lines, these descriptions of actions or events do not, by necessity, define the legal implication of those actions or events. To strip away at a union's ability to warn of, or even "threaten", potential discipline risks eroding the effectiveness of that discipline and, depending on the circumstances, jeopardizing the very purpose for which the discipline exists. It also risks eroding the Union's ability to communicate to its members, generally, about potential discipline in the course of a strike.

**[69]** Lastly, the Board must consider the proper application of subsection 6-62(2) in determining the defensibility of the Employer's actions. Subsection 6-62(2) provides that clause

6-62(1)(a) does not prohibit an employer from communicating facts and its opinions to its employees. The Board in *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*, 2015 CanLII 43778 (SK LRB) [*Securitas Canada*] described the protection offered by subsection 6-62(2), in the following terms:

> *[34]...To fall within the protection of s. 6-62(2) of the Act, there must be an evidentiary basis for the facts and opinions expressed by an employer and, generally speaking, the genesis of the information must be within the business knowledge of the employer and/or the personal experience of the communicator. Furthermore, the facts and opinions communicated by or on behalf of the employer must be relevant and useful to the subject employees. The greater the utility of the information being conveyed to employees, the more likely such information will fall within the sphere of permissible communications…*

**[70]** However, it is not the case that, just because a communication is a "fact" or an "opinion", it is of no consequence whether it interferes with, restrains, intimidates, threatens or coerces an employee. The Board has rejected the notion that subsection 6-62(2) creates a full defense to an unfair labour practice claim made pursuant to clause 6-62(1)(a). Richards C.J.S. for the Court of Appeal in *Cypress Regional* explained the Board's analysis this way:

> *[81] …Under this line of analysis, a communication that is a fact or opinion does not receive a free pass, i.e., an employer cannot send out coercive or intimidating communications with impunity simply because they can be characterized as facts or opinions. The determinative issue is always whether the communication improperly impairs the employee's ability to exercise his or her rights.*

**[71]** The Board in *Securitas Canada* elaborated on the balance it attempts to achieve in considering a claim pursuant to clause 6-62(1)(a):

> *[33] While employers now enjoy a greater capacity to communication facts and their opinions to employees, there continues to be a number of important limitations on an employer's so-called "free speech". As noted by the Saskatchewan Court of Appeal in Saskatchewan Federation of Labour v. Saskatchewan, et. al., 2012 SKQB 62 (CanLII), the inclusion of the right to communicate "facts" and "opinions", does not give employers an unrestricted right to do so. The Saskatchewan Employment Act (as did its predecessor The Trade Union Act) seeks to balance a number of laudable, yet clearly competing, interests in dealing with communications by an employer, including; the interests of employers (the right to freely communicate with its employees regarding matters directly affecting its business interests, its current activities, and its plans for the future); the interests of employees (the right to exercise their associational rights free from coercion, intimidation or interference); and the interests of trade unions (the right to be the exclusive bargaining agent for organized employees). See: Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, supra. While employers may communicate with their employees, they may not do so in a manner that infringes upon the ability of those employees to engage and exercise their collective bargaining rights.*

**[72]** Next, the Board will be guided by the foregoing principles in its assessment of the Union's unfair labour practice claims made pursuant to clause 6-62(1)(a).

***Clause 6-62(1)(a) – Assessment of Claim***

**[73]** The Board in *Securitas Canada* provided a guide for assessing whether a communication is caught by clause 6-62(1)(a), consisting of the following factors:

> 1. *Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employers. […]*
> 2. *The maturity of the bargaining relationship between the parties. […]*
> 3. *The context within which the impugned communication occurred. […]*
> 4. *The evidentiary basis for and value of the impugned communication. […]*
> 5. *The balance or neutrality demonstrated by an employer in communicating impugned information. […]*

**[74]** The Employer relies on these factors as demonstrating support for its position.

**[75]** Overall, the Union must satisfy the Board on the evidence presented that the actions of the Employer would have the probable consequence of interfering with, restraining, intimidating, threatening, or coercing an employee of reasonable intelligence and fortitude in the exercise of a right conferred by Part VI.

**[76]** In this case, the right in question is the right to strike as authorized by sections 6-31 through 6-37 of the Act and as recognized by the Supreme Court of Canada in *Saskatchewan Federation of Labour v Government of Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245. The employees in question are those who were employed by Saskatoon Co-op at the time, were members of the bargaining unit, and who may or may not have chosen to return to work.

**[77]** In assessing a claim of a breach of clause 6-62(1)(a), the Board must give due regard to context. The *Securitas Canada* guidelines assist the Board in performing the contextual analysis of the probable consequences of the Employer's conduct on employees of reasonable intelligence and fortitude. Therefore, the Board will proceed to consider each of the *Securitas Canadas* factors in turn.

***Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employers***

**[78]** First, the *Securitas Canada* guidelines ask that the Board consider whether the employees in question were a highly sensitive or a captive audience.[6] There is no evidence of the sort contemplated by this particular guideline.

***The maturity of the bargaining relationship between the parties***

**[79]** Second, the parties enjoy a relatively mature and stable bargaining relationship. There is a previous, successful collective bargaining history. The most recent collective agreement expired on November 19, 2016. The parties re-commenced collective bargaining in February, 2017. It is no secret that a labour dispute occurring in a mature and stable relationship will often give rise to different contextual considerations than will an organizing drive. There is an inherent insecurity in a prospective collective bargaining relationship, that does not arise in an established relationship. Therefore, the relative maturity of the bargaining relationship weighs in favour of the Employer's position in this case.

***The context within which the impugned communication occurred***

**[80]** Third, the Board must consider the overall context in which the impugned communication was made. The context includes failed negotiations, a strike mandate, and an acrimonious labour dispute. The March Update was issued while the employees were on strike and while many employees were on the picket line.

**[81]** There is a certain expectation that labour disputes will involve a degree of jostling for position. In part for this reason, the Board has tended to treat communications that occur during a strike with relatively lesser scrutiny than those that occur during an organizing drive. That does not mean that during a strike an Employer has license to communicate in a manner that offends clause 6-62(1)(a); instead, it simply means that the Board should take into account the generally accepted climate of a labour dispute. During the labour dispute, both the Employer and the Union engaged in a communication strategy directed at the public and the employees, through a variety of media and means.

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[6] *Saskatchewan United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, [1983] Sask Labour Rep 29, LRB File Nos 255-83 and 256-83 at 40, as cited in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2014 CanLII 17405 (SK LRB) at para 93.

**[82]** While the Union has not filed unfair labour practice applications in relation to the earlier communications, both parties agree that those communications inform the overall context. The parties do not, however, agree on the significance of those communications for the unfair labour practice claims. The Employer suggests that the earlier communications demonstrated the Union's supposed ambivalence or even acquiescence to the Employer's consistent messaging. The Union argues, to the contrary, that the earlier communications are evidence of a continuous campaign of interference in the Union's internal affairs. Either way, the parties agree that there was an ongoing battle for the employees' loyalty and that the battle for loyalty was considered critical to the respective parties' ultimate success.

**[83]** In his testimony, Haatvedt admitted that the Union had warned its members about the potential for fines, and that the purpose of doing so was to generate a disincentive for employees who may have been tempted to cross the picket lines and to promote or ensure employee solidarity with the Union's labour action. When asked point-blank whether the Union was trying to compel its members to remain on the picket line, Haatvedt replied, "yes".

**[84]** Lastly, the Employer argues that the prohibition set out at clause 6-63(1)(a) of the Act provides crucial context against which the Employer's actions should be assessed. The Employer suggests that the existence of clause 6-63(1)(a) presents a strong justification for its communication strategy. For the reasons as outlined in the earlier analysis, the Board is not persuaded that the existence of clause 6-63(1)(a) provides the sort of justification that the Employer urges upon the Board.

***The evidentiary basis for and value of the impugned communication***

**[85]** The fourth factor is the evidentiary basis for and value of the impugned communication. The Employer relies, in part, on the case law considering union fines to insist that the March Update was "factually correct", and that it usefully "cleared up the fear created by UFCW or by the rumour mill that legally enforceable fines could follow a personal decision to cross the picket line in a prolonged labour dispute". The Employer argues, in the alternative, that the Employer reasonably believed the legal assessment to be true at the time that the March Update was issued, and whether it was accurate is irrelevant in an assessment of whether the Employer contravened clause 6-62(1)(a) of the Act.

**[86]** The Employer cites the following authorities to suggest that the union fines are not enforceable in the courts: *Birch v Union of Taxation Employees Local 70030*, 2007 CanLII 43894

(ON SC), 288 DLR (4th) 424, aff'd 2008 ONCA 809 (CanLII), 93 OR (3d) 1, leave to appeal to SCC refused 2009 CanLII 23090 (SCC); and *Berry v Pulley*, 2002 SCC 40 (CanLII), [2002] 2 SCR 493 [*Berry*].

**[87]** The Employer also cites the following authorities to suggest that union fines are neither debts nor damages, and so therefore cannot be enforced in the Provincial Court of Saskatchewan: *Telecommunications Workers Union Local 202 v MacMillan*, 2008 ABPC 38 (CanLII), [2008] 7 WWR 170 [*MacMillan*], aff'd 2008 ABQB 657, leave to appeal to the SCC dismissed: 2009 CanLII 23088 (SCC); *International Association of Machinists and Aerospace Workers v Perks, Grandy and Hearn*, 1986 CanLII 3467 (NL SC), 62 Nfld & PEIR 69 [*Perks*]; *B.M.W.E. v Litke*, 1998 CanLII 27829 (MB QB), aff'd [2000] 1 WWR 383, 1999 CarswellMan 446, leave to appeal refused 1999 CarswellMan 446, [2000] 1 WWR 383.

**[88]** For the latter argument, the Employer relies on section 3 of *The Small Claims Act, 2016*, SS 2016, c S-50.12 which sets out the categories of claims and counter claims available to litigants before the Provincial Court.

**[89]** The Employer says that the cited cases confirm, first, that the fines in this case would not be characterized as debts or damages enforceable by a Saskatchewan court and second, that the March Update accurately identified that courts in four jurisdictions outside Saskatchewan have found union fines to be unenforceable.

**[90]** The Employer's argument begs for a determination of an underlying point of contention, which is whether union fines are enforceable in Saskatchewan courts. However, it is unclear how the Board can or should opine on the accuracy of communications that purport to summarize or communicate the contents of a legal opinion. First, there is no way for the Board to assess whether the March Update provides an accurate representation of that opinion; nor is this an issue with which the Board can or should be concerned. Second, legal opinions generally fall on a spectrum of accuracy, and on that spectrum, incontrovertible accuracy can be somewhat elusive. For these reasons, arguments about the supposed legal accuracy of the March Update are not dispositive of the current question.

**[91]** Setting legal accuracy aside, and having reviewed the March Update in full, the Board concludes that the March Update is largely accurate but incomplete and potentially misleading. To start, the following facts support a finding of accuracy: Saskatoon Co-op is "not aware" of a "successful imposition" of union fines for strike-breakers pursuant to the Act; in a previous case

the employees did not attend hearings; and, in that case, the hearings were held by the Executive panel, employees refused to pay the fines, and no employees lost their jobs. On the other hand, and for what it is worth, Figueiredo repeatedly insisted that the Union did proceed to collections in the case to which the March Update refers. Whether the collections were successful is perhaps another matter.

**[92]** However, the Employer makes no attempt through the March Update to clarify that the fines may result in the loss of Union privileges. In this respect, the March Update is either intentionally misleading, or its authors assume that Union members are not concerned with what has been described as the Union's internal enforcement mechanism, that is, the removal of Union privileges. In defending the statement that "these unfortunate actions by the Union Leadership are not enforceable", the Employer suggests that the statement was informed by the latter assertion that these actions "are not seen as enforceable by the courts in four other jurisdictions in Canada". This is one interpretation. But it would be wrong to assess the March Update in a vacuum, divorced from the context of the ongoing labour dispute.

**[93]** It is not particularly helpful to discuss the dictionary meaning of "enforcement" for purposes of the present analysis. Even reasonably intelligent employees are not expected to review Employer notices with dictionaries in hand. Granted, "enforcement" may often be understood to involve police, prosecutors, and the courts, as representing the institutions that compel or "force" the compliance with the penalty or the rule. However, the present circumstances also involve a Union Constitution. While the Employer evidently places little importance on the revocation of Union privileges as an enforcement tool, it is of utmost importance to the Union.

**[94]** Under the circumstances, it seems rather under-inclusive to completely omit any mention of internal consequences from the enforcement discussion, or more on point, to fail to direct employees to the Union for information about potential, internal consequences. Having noted this omission, the Board notes that there is some overlap in these conclusions, relevant to the question of neutrality, which is the next factor.

### *The balance or neutrality demonstrated by an employer in communicating impugned information*

**[95]** The last factor is the balance or neutrality demonstrated by a person in communicating the impugned information. This is a difficult factor to assess. In a labour dispute neither an employer nor a union can rarely if ever be described as neutral.

**[96]** In this vein, it is noteworthy that of the communications filed in evidence, the March Update is the only communication that explicitly mentions a legal opinion. The Board agrees with the Union that, by referencing a legal opinion, the Employer has created, or attempted to create, an aura of credibility and authority in relation to its message. In her testimony, Figueiredo suggested that the Employer's message seemed designed to target those employees who doubted the reliability of the earlier communications and had remained on the picket lines for that reason. The Board agrees. The outward reliance on a legal opinion attempted to assuage that fear and to cure any misapprehension, providing to those remaining employees the confidence they needed to feel free to cross the picket lines and return to work.

**[97]** Despite these observations, the Board is not persuaded that the Employer has contravened clause 6-62(1)(a). Overall, while the March Update skates perilously close to the line, the Board finds that it would not have had the probable consequence of interfering with, restraining, intimidating, threatening, or coercing an employee of reasonable intelligence and fortitude, in the exercise of a right pursuant to Part VI.

**[98]** The purpose of the March Update was to encourage employees to break the strike and return to work before collective bargaining was resolved. The Union describes the March Update as a "thinly veiled coercion". "Coercion" is characterized by a degree of threat or intimidation that provokes fear of potential consequences. There is no evidence to suggest that a probable consequence of the March Update would have been to coerce an employee of reasonable intelligence and fortitude in the exercise of the right to strike. Perhaps for this reason, the Union principally and properly relies on its characterization of the communication as having interfered with, rather than coerced, employees.

**[99]** Given this position, the question is whether the March Update had the probable consequence of interfering with an employee of reasonable intelligence and fortitude in the exercise of the right to strike. There is no question whether the series of Employer communications had the probable consequence of influencing the decision of some employees to return to work. The circumstantial evidence is such that the employees were sufficiently concerned about the Union fines; and the alleged unenforceability of those fines probably had influence over some employees' decisions whether to cross the picket lines.

**[100]** However, the Union has restricted its Application to the March Update. By the time that the March Update was released, the strike had entered its fifth month. The parties signed the

return to work protocol shortly thereafter, on April 14, 2019. Even considering the additional persuasive power of the legal opinion, the Board is not persuaded that the March Update interfered with an employee of reasonable intelligence and fortitude in the exercise of the right to strike.

**[101]** In arriving at this conclusion, the Board is persuaded not by any one factor in isolation, but by the whole of the circumstances. For one, the employees of Saskatoon Co-op were capable of making further inquiries about the information contained in the Employer notice, which is supported by the fact that, having personally concluded as much, many employees proceeded to make such inquiries. Second, the probable influence of the March Update was significantly less than the influence of the entire suite of Employer communications, most of which were already complete and had served their purpose by the time that the March Update was issued. Third, the employees remained fully capable of deciding whether to exercise their right to strike upon due consideration of the information provided by both the Employer and the Union.

**[102]** In concluding as much, the Board has not failed to consider the impact of the impugned communications on the strike overall. The Board recognizes and acknowledges that the Employer's various communications had the likely effect of lessening the strength and power of the strike, and may be taken to have interfered with the effectiveness of the strike. However, the Employer's interference with the effectiveness of the strike is not equivalent to the Employer's interference in the exercise of the employees' right to strike.

**[103]** For the foregoing reasons, the Board has reached the conclusion that the Union did not meet its onus of proving that the March Update contravened clause 6-62(1)(a) of the Act.

***Clause 6-62(1)(b)***

**[104]** Next, the Board will outline its assessment of the Union's unfair labour practice claims brought pursuant to clause 6-62(1)(b). For the following reasons, the Board has concluded that the Employer's conduct, in issuing the March Update, constitutes interference in the administration of a labour organization contrary to clause 6-62(1)(b).

**[105]** The Board notes that it has had few opportunities to consider and apply clause 6-62(1)(b) of the Act. For this reason, the Board relies on previous jurisprudence with respect to the application of section 11(1)(b) of *The Trade Union Act*, the predecessor provision to clause 6-62(1)(b). The Board in *Service Employees International Union (West) v Saskatchewan*

*Association of Health Organizations*, 2014 CanLII 17405 (SK LRB) [*SAHO LRB*] considered its previous case law with respect to the application of section 11(1)(b) of *The Trade Union Act*, as follows:

> *[118] Section 11(1)(b) of The Trade Union Act has been considered by this Board on relatively few occasions. In Saskatchewan United Food and Commercial Workers, Local 1400 v. Federated Co-operatives Ltd, [1985] May Sask. Labour Rep. 30, LRB File No. 213-83, the Board described the legislative purpose of this provision as follows:*
>
> > *Section 11(1)(b) of The Trade Union Act prohibits an employer from interfering with the formation or administration of any labour organization. The Canada Labour Relations Board considered the phrase "interference with the formation or administration of a trade union" as it appears in Section 184(1)(a) of The Canada Labour Code in National Association of Broadcasting Employees and Technicians v. A.T.V. New Brunswick Limited (C.K.C.W.-T.V.) 1979 3 CLRB 342 and stated at p. 346-7:*
> >
> > > *The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collection of money, expenditure of this money, general meetings of the members, etc. In a word, all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length.*
> > >
> > > *A union's right to discipline its own members is as much an administrative function of the union as the election of its officers. Section 11(1)(b) prohibits an employer from interfering with that function. Interference could occur in a number of ways. Some of the most obvious include, for example, attempting to bribe, intimidate or improperly influence witnesses or union officials involved in discipline proceedings.*
>
> *[119] This definition was quoted with approval by this Board in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400, [1995] 3rd Quarter Sask. Labour Rep. 140, LRB File Nos. 246-94 and 291-94. The Board further commented on the legislative purpose of s. 11(1)(b) as follows:*
>
> > *In our view, this passage suggests the appropriate focus for this section. We see it as intended to protect the integrity of the trade union as an organization, not to speak to all of the types of conflict which may arise between a trade union and an employer in the course of their dealings. Insofar as meetings between an employer and employees are permissible – and we have outlined the perils which they face on other grounds – it is to be expected that they will be planned by the employer so that the persuasive impact of the information conveyed will be maximized. This in itself, however annoying, does not constitute "interference with the administration" of a trade union within the meaning of Section 11(1)(b).*
>
> *[120] In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canada Safeway Limited, et. al., [1995] 3rd Quarter Sask. Labour Rep. 170, LRB File No.*

> *093-95, this Board adopted the above descriptions of the legislative purpose of s. 11(1)(b) and came to the following conclusions with respect to the application of this provision:*
>
> > *We have stated above our view that not every instance of employer conduct which has an effect which is not expected, welcomed or approved of by a trade union constitutes "interference" of a kind which is prohibited under Section 11(1)(b). This comment seems equally applicable to an allegation of an infraction of Section 11(1)(b). In the relationship between a trade union and an employer, there will be many occasions when the strategy pursued by the union does not have the anticipated result, or the union must make concessions in the face of the superior bargaining power of the employer. This is the nature of collective bargaining. It cannot be the case that every action of an employer which does not serve the best interests of the trade union can be viewed as an infraction of Section 11(1)(b). As we indicated in the cases cited above, this provision must, in our view, be taken to govern conduct which threatens the integrity of the trade union as an organization, or creates obstacles which make it difficult or impossible for the trade union to carry on as an organizational entity devoted to representing employees.*
> >
> > [emphasis added]

**[106]** On review, in *SEIU-West v Saskatchewan Association of Health Organizations*, 2015 SKQB 222 (CanLII) [*SAHO QB*], the Court found, at paragraph 57:

> *The board decided that s. 11(1)(b) related only to the protection of unions as an independent legal entity, and went on to say at para. 123 that "the fact that the views and opinions being expressed by SAHO and the respondent employers made the jobs of the applicant trade unions more difficult" could not amount to a violation of s. 11(1)(b). That it concluded the independence of the union was not adversely affected by the respondents' conduct is not unreasonable, but it does leave open the question of whether an employer making the union's life difficult can ever be the subject of an unfair labour practice as the board has stated such submission does not belong in either s. 11(1)(a) or s. 11(1)(b).*

**[107]** When the matter made its way to the Court of Appeal, there was no consideration of clause 11(b) due to the absence of a cross-appeal by the unions.[7]

**[108]** Bearing this case law in mind, the remaining question is whether the prohibition pursuant to clause 6-62(1)(b) extends to the March Update. As has been fully canvassed in these Reasons, the clear purpose of the March Update was to encourage employees to break from the strike and to return to work before the outstanding collective bargaining matters were resolved.

**[109]** In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400*, [1995] 3rd Quarter

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[7] *Cypress Regional (CA)* at para 108.

Sask Labour Rep 140, the Board adopted with approval the following description of the prohibition outlined in clause 11(1)(b) of *The Trade Union Act*:

> *A union's right to discipline its own members is as much an administrative function of the union as the election of its officers. Section 11(1)(b) prohibits an employer from interfering with that function. Interference could occur in a number of ways. Some of the most obvious include, for example, attempting to bribe, intimidate or improperly influence witnesses or union officials involved in discipline proceedings.*

**[110]** Clause 6-62(1)(b) is not substantially different from clause 11(1)(b) of *The Trade Union Act.*

**[111]** A union's right to discipline its own members is as much an administrative function of the union as is the election of its officers. As such, clause 6-62(1)(b) prohibits an employer from interfering with that function.

**[112]** Along the same lines, in *Wadena*, the Board explained why negotiating an amnesty clause to impasse was found to constitute an unfair labour practice:

> *[44] In the decision General Teamsters, Local Union 979 v. Brinks Canada Limited [2002] CIRB No. 175, the Canada Industrial Relations Board dealt with a situation which was identical to the case at hand and held, at 26:*
>
> > *…that, while the tabling of a "no reprisal clause" is not in and of itself illegal or improper, however, if and when an employer negotiates this issue until it reaches an impasse and prolongs the strike on the basis of this issue, then such conduct does become improper and constitutes bargaining in bad faith, contrary to section 50(a) of the Code.*
>
> *[45] In Brinks Canada, supra, the Canada Board reviewed the jurisprudence in other jurisdictions in relation to reaching an impasse on an amnesty clause or a no reprisal clause. The Canada Board referenced decisions of the Canada, British Columbia, Alberta, Saskatchewan and Ontario labour relations boards which all held that bargaining an amnesty clause to impasse was improper, illegal or inconsistent with the scheme of labour relations.*
>
> *[46] The Canada Board, in Brinks Canada, supra, referred to this Board's decision in R.W.D.S.U., Local 955 v. Morris Rod Weeder Co. Ltd., [1977] Sept. Sask. Labour Rep. 32, LRB File Nos. 375-77, 451-77, 452-77 & 462-77, which provides at 4:*
>
> > *The Board therefore finds that the matter of discipline of Union members is an internal Union matter and therefore not a proper subject for collective bargaining. The Company in insisting on the condition set out in the letter above brought negotiations to an impasse by insisting on a condition which was not a proper subject of collective bargaining and the Board therefore finds that it was guilty of an unfair labour practice as defined by Section 11(1)(a), (b) and (c) of the Trade Union Act*

. . .

> *With respect to Section 11(1)(b), the action of the Company interfered with the administration of the Union in attempting to impose conditions upon the relationship between the Union and the six members in question. With respect to Section 11(1)(c), the action of the Company constituted a failure to bargain collectively by insisting, as a condition precedent to any collective agreement, on a matter which is not the proper subject of collective bargaining.*

*[47] The Canada Board in Brinks Canada, supra, provided further analysis in relation to a no reprisal clause at 25:*

> *The CLRB had reviewed this issue in Eastern Provincial Airways Ltd. (1983), 51 di 209; and 3 CLRBR (NS) 75 (CLRB no.419)….this particular decision addressed the issue of the "no reprisal" clause in the context of bad faith bargaining and pushing that issue to an impasse. The Board essentially maintained the same position as the one outlined by the Alberta Labour Relations Board. The CLRB found that such a clause constitutes an interference with internal union affairs and, thus, becomes illegal and tantamount to bad faith bargaining if pushed to an impasse.*

*[48] This Board accepts its jurisprudence and the jurisprudence in other jurisdictions to the effect that, by bargaining the amnesty plus clause issue to impasse and by taking the position that all items had to be resolved as a package, the Employer committed an unfair labour practice pursuant to s. 11(1)(b) and (c) of the Act. As in Morris Rod Weeder, supra, the Employer's actions attempted to interfere with the Union's members' right to utilize provisions of the Union's constitution.*

*[49] In Morris Rod Weeder Co. Ltd., supra, the Board states that the business of disciplining union members is an internal union matter and that, by insisting on interfering with union affairs and thereby bringing bargaining to an impasse, an employer is guilty of an unfair labour practice. The Board accepts that a union must be able to say to its members "there are rules which govern member conduct during a labour dispute." To hold otherwise could lead to the dangerous situation where individual union members, because they cannot rely on their own union constitution, take matters into their own hands, which is in no one's best interest.*

**[113]** It is therefore well established that the discipline of union members is an internal union matter. A union must be able to establish and enforce, without interference, those rules that govern member conduct during a labour dispute. The Employer is not, and should not be permitted to be, the arbiter of appropriate enforcement of internal union discipline.

**[114]** According to the Employer, the Union cannot satisfy the Board that the impugned activity posed threat to the integrity of the Union as an organization, or to its survival. The Employer says that an act that frustrates a union, or even creates dissent within its ranks, does not in and of itself contravene clause 6-62(1)(b). This argument overlooks Laing J.'s observation about the Board's *SAHO* decision, in his reasons for the Court of Queen's Bench:

> *[57] … That it concluded the independence of the union was not adversely affected by the respondents' conduct is not unreasonable, but it does leave open the question of whether an employer making the union's life difficult can ever be the subject of an unfair labour practice as the board has stated such submission does not belong in either s. 11(1)(a) or s. 11(1)(b).*

**[115]** Either way, the act in question threatened to do more than simply frustrate the Union or create dissent within the Union's ranks in the course of collective bargaining. Likewise, it threatened to do more than simply undermine the Union's collective bargaining strategy. It threatened, and attempted to undermine, the effectiveness of the Union's internal discipline policy and process, so as to undermine the Union's strike action and undercut its collective bargaining efforts.

**[116]** The Employer argues that the March Update does not approach the type of direct and substantial interference demonstrated in cases of bribery and intimidation. Certainly, conduct involving bribes or intimidation discloses less tact, and by that barometer, is more obviously wrongful than the Employer's actions in this case. However, in communicating to employees *en masse* about the unlikely enforceability of union fines, and therefore the unlikely success of a central feature of the Union's internal discipline process, the Employer deliberately undercut the effectiveness of the Union's discipline, generally, and the effectiveness of that discipline in ensuring Union solidarity in job action, on a grand scale – not in a manner that was restricted to one particular discipline proceeding. By this barometer, the Employer's actions are at least as wrongful as attempts to "improperly influence witnesses or union officials involved in discipline proceedings", which is also considered wrongful pursuant to clause 6-62(1)(b).

**[117]** In further support of its argument, the Employer relies on *FW Woolworth Co v UFCW, Local 1400 (1994)*, 22 CLRBR (2d) 123 (WL) (SK LRB) [*Woolworth Co*] and Wal-Mart Corp v UFCW, Local 1400 (2012), 217 CLRBR (2d) 103 (WL) (SK LRB) [*Wal-Mart Corp*].

**[118]** In *Woolworth Co.*, the Employer had refused to provide to the Union the addresses and telephone numbers of newly-hired employees. The Board in that case found that there was no reason "to sanction a practice which fails to serve any legitimate interest of the employer and is designed merely to frustrate and obstruct the union's access to rights clearly accorded to it".[8]

[8] At para 38.

**[119]** In *Wal-Mart Corp.*, the Board found that the Employer had committed an unfair labour practice when it denied union officials the opportunity to periodically inspect the notices posted on its behalf in the workplace. The issue was not whether the union was entitled to post notices, which it was; it was whether union officials could periodically inspect those notices, which they could not. In this way, the employer interfered with the union's ability to ensure the visibility and continuity of its message in the workplace.

**[120]** Comparing *Woolworth Co.*, while the Board recognizes that the Employer's actions do not directly obstruct the Union's access to its discipline procedures, the March Update was designed to frustrate those procedures by attempting to persuade employees that they would not likely have to attend disciplinary proceedings, or to even pay their fines. Comparing *Wal-Mart Corp.*, while the Employer did not deny the Union its ability to ensure the visibility of its message – a message about which the Employer had no genuine, direct interest - it certainly obfuscated that message.

**[121]** The Employer's argument seems to suggest that the Union was misrepresenting the law to its membership, the Union's discipline policy was based on a faulty premise, and that by issuing the March Update the Employer was providing welcome, useful, and helpful information to the employees in making a decision. In other words, if the discipline policy is based on a faulty premise, then how could the Employer be found to have interfered with the administration of the Union?

**[122]** However, it is not the case that the Employer was simply trying to be helpful. The Employer issued the March Update in an effort to encourage employees to return to work. The March Update, while lacking, was clothed in the appearance of credibility and authority that comes with a legal opinion. It is not the Employer's responsibility to provide, whether directly or indirectly, legal guidance to employees on the propriety or efficacy of the Union's internal discipline process. In this respect, whether the fines are enforceable in Saskatchewan courts is of no consequence, and is not the Employer's concern.

**[123]** The Employer argues that its actions, even if interfering, are not sufficiently "direct" to ground a contravention. In considering this issue, the Board has examined certain instances in which a contravention has been or may be made out, pursuant to clause 6-62(1)(b). These instances may be characterized in the following terms: frustrating and obstructing the union's access to its own rights (*Woolworth Co*.); removing the union's ability to ensure the continuity and visibility of its communications (*Wal-Mart Corp*.); offering or providing a gift or other inducement

to persuade employees to act, or attempting to do so (bribes); compelling or deterring employees through threats, or attempting to do so (intimidation); and, otherwise improperly influencing a witness.

**[124]** To compare, the present Application involves communicating to employees about the ineffectiveness of the Union's discipline process with a view to removing the disincentive to remain on the picket line. When viewed from this angle, the current case is not so dissimilar from the examples provided. The purpose and effect of influencing a witness in a disciplinary process is to interfere with the ability of the union to take control of its own administrative function, to administer its own constitution, and to manage its own affairs. The purpose and effect of communicating to employees about the alleged ineffectiveness of the Union's discipline process is similar. Such actions have the purpose and effect of undermining the Union's ability to administer its own Constitution and to manage its own affairs. The Employer's passing acknowledgement of an "internal constitutional matter" cannot be found to cure actions that would otherwise constitute interference into Union affairs.

**[125]** While the Employer argues acquiescence on the part of the Union, the Board is not persuaded that this factor relieves the Employer of a contravention. Granted, the Union did not write to the Employer and indicate that its conduct was inappropriate or file an unfair labour practice application on the basis of the earlier communications. When asked, Figueiredo testified that the Union was concerned about the issue of applications pending, acknowledged that there may have been pre-existing applications, but explained that the Union did not want to add to the list. Figueiredo's response did not fully explain the absence of any formal objection to the Employer's conduct, or account for the fact that the strike was ongoing. Still, the Union had to choose whether and when to file an application. The Union did not, through its delay during the intervening months, communicate agreement with the Employer's message. The Board finds that, while the Union's relative silence may lessen the gravity of the Employer's conduct, it does not absolve the Employer of a breach.

**[126]** Further, in relation to clause 6-62(1)(b), the focus is on whether the Employer interfered with the administration of the Union. This provision governs conduct that threatens the integrity of the Union as an organization - with an emphasis on the impugned conduct and its significance for the Union's organizational integrity. This interpretation is supported by the phrase "interfere with…administration of any labour organization", as opposed to the phrase used in clause 6-62(1)(a), "interfere with… an employee in the exercise of any right", which if transposed into

clause 6-62(1)(b), might read, “interfere with… a labour organization in the exercise of its administration”. It is also supported by the case law. Indeed, even *attempts* to bribe, intimidate or improperly influence witnesses can constitute interference in the administration of a union. Therefore, the fact that the March Update may have been less determinative of the employees’ choices, than the entire suite of communications, does not mean that the Employer has not contravened clause 6-62(1)(b). Likewise, the fact that the Union did not fine its members at the close of the strike does not remove the potential for a contravention, because only the Union (with its members) can make that decision.

**[127]** It can therefore easily be said that the March Update threatened the integrity of the Union as an organization, in that it attempted to erode a central pillar of the Union’s internal discipline process.

**[128]** The Board arrives at these conclusions, taking into account the fact that the Union has voluntarily entered into an amnesty agreement. While it is improper for an employer to negotiate this issue to impasse and thereby prolong the strike, the tabling of an amnesty clause or agreement (and therefore its existence) is not in and of itself improper. It is the Employer’s attempt to assert control or power over the disciplinary process that is problematic.

***Remedies***

**[129]** Lastly, the Board will consider what remedies are appropriate in this case.

**[130]** In its brief, the Union seeks the following orders and declaratory relief:

> *a. A declaration that Saskatoon Co-op has committed the unfair labour practices and violations of the SEA set out above;*
>
> *b. An order that Saskatoon Co-op cease committing such unfair labour practices and violations of the SEA, and comply with its obligations under the SEA;*
>
> *c. An order that this Board’s decision be posted in the workplace and communicated through the same means used by the Employer to communicate to its employees.*

**[131]** In fashioning a remedy, the Board strives to rectify the labour relations consequences of the breach, and in doing so, place the injured party or parties in the position that they would have been in, if it were not for the breach.[9] There must be a rational connection between the breach,

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[9] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Loraas Disposal Services Ltd*., [1998] Sask LRBR 556.

its consequences and the remedy imposed.[10] Taking into account these principles, the Board finds that each of the foregoing remedies strives to place the Union in the position it would have been in, but for the breach, and for that reason each of the foregoing remedies is appropriate.

**[132]** In its Application, the Union seeks an order for monetary damages representing the monies paid by the Union for all striking members' strike pay, benefits, and costs, plus all wage loss to the striking employees. The Union did not lead evidence on damages, but instead, at the end of the hearing, declared its intention to request a bifurcation of the proceedings for the purpose of addressing that issue.

**[133]** The Board has recently made the following, apposite observations about a similar approach:

> *[65] At the end of the hearing, the Union asked that the matter before the Board be bifurcated such that the issue of damages would be addressed in a separate hearing. For obvious reasons, the Board expressed its concern with the Union's announcement at the end of the substantive hearing, with no notice to the Employer. Despite this, the Employer advised that it had no concerns with proceeding in the manner requested by the Union. As it turns out, due to the Board's determination on the substantive matter, it has not had to address the issue of damages in any fashion. Despite this, the Board wishes to remind the Union of its expectation that requests for bifurcation are to be submitted and addressed at the beginning of the hearing.*[11]

**[134]** The Employer has the right to know the case it has to meet, not the case it *had* to meet. While the Union included the request for damages in its Application, it should have alerted the Employer to its desire for a bifurcation of the proceedings prior to the hearing and with sufficient time to prepare. The issues raised by the Application, including the issue of damages, are interrelated. The Employer had a right to consider whether to agree to the Union's request for bifurcation, prior to the commencement of the hearing. The timing of the Union's request raises serious issues about fair process for the Employer and for this reason, cannot be permitted or encouraged. The Board declines the bifurcation request and, in turn, awards no damages to the Union.

**[135]** In conclusion, the Board makes the following Orders pursuant to section 6-111:

a. A declaration that the Employer committed an unfair labour practice contrary to clause 6-62(1)(b) of the Act;

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[10] *Royal Oak Mines Inc. v Canada (Labour Relations Board),* 1996 CanLII 220 (SCC), [1996] 1 SCR 369.
[11] *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 179 v Yorkton Plumbing & Heating Ltd./YPH Mechanical*, 2019 CanLII 107150 (SK LRB).

b. An order requiring the Employer to refrain from committing the unfair labour practice;

c. An order that within three days of the receipt of these Reasons for Decision, the Employer post a copy of these Reasons for Decision, together with the Board's Order, for a period of 60 days, in a conspicuous place in the workplace;

d. An order that within seven days of the receipt of these Reasons for Decision, the Employer send and post a copy of these Reasons for Decision, together with the Board's Order, using the same means it used to communicate the March Update, and to keep the Reasons for Decision and Order posted for a period of 60 days.

**[136]** The portion of the Application that alleges a contravention of clause 6-62(1)(a) of the Act is dismissed.

**[137]** The Board is grateful to the parties for their oral and written arguments, all of which the Board has reviewed and found helpful.

**[138]** This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **5th** day of **February, 2020.**

**LABOUR RELATIONS BOARD**

Barbara Mysko
Vice-Chairperson