UNIFOR CANADA, LOCAL 594, Applicant v CONSUMERS' CO-OPERATIVE REFINERIES LTD., Respondent

LRB File No. 126-20; August 31, 2020
Vice-Chairperson, Barbara Mysko; Board Members: John McCormick and Lisa Poissant

Counsel for the Applicant,
Unifor Canada, Local 594: Crystal L. Norbeck

Counsel for the Respondent, Consumers' Co-operative Refineries Ltd.: Eileen Libby, Q.C.

Application for Interim Relief – Unfair Labour Practice Application – ss. 6-62(1)(b), (d), (e), (p), and (r) of *The Saskatchewan Employment Act* – Allegations of Improper Communications and Denial of Right to Union Representation – Interim Application Granted in Part.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for interim relief, filed with the Board on August 6, 2020. The Application was filed by the Union, Unifor Canada, Local 594 against the Employer, Consumers' Co-operative Refineries Ltd. The Application relates to the Union's unfair labour practice application, filed July 30, 2020, pursuant to clauses 6-62(1)(b) (d), (e), (p), and (r) of *The Saskatchewan Employment Act* [Act].[1] The Union is the certified bargaining agent for all employees of the Employer in and in connection with refining and marketing petroleum and petroleum products in Regina, but for certain exceptions.[2]

[2] The background is as follows. On December 5, 2019, after being served with a 48-hour strike notice, the Employer locked out the members of the Union. The related labour disruption continued for almost seven months until on June 22, 2020 the Union voted to ratify a new collective bargaining agreement [CBA]. Following its ratification, the Union's members began

[1] LRB File No. 123-20.
[2] LRB File No. 247-14.

returning to the workplace. Their return coincided with an Employer-led investigation of employee misconduct during the lockout.

[3] The CBA includes a Return to Work Agreement, containing the following provision:

> ***15. Discipline and Expedited Arbitration***
>
> *Upon the coming into force of this Agreement, the Co-operative will investigate misconduct engaged in by Employees during the Lockout and Boycott and may mete out discipline. In the event that discipline consists of a termination, which is grieved by the Union, the parties agree to participate in an expedited grievance and arbitration process as follows…*
> *…*
> *Grievances relating to any other disciplines (not terminations) will be addressed under the regular Grievance and Arbitration process in Article 14 of the Collective Agreement.*

[4] Since June 22, the Employer has conducted a number of meetings and interviews with employees - some disciplinary, others characterized as investigative [Lockout Meetings].

[5] It is alleged that, during the investigative meetings the Employer's representatives asked the following questions (as alleged by two separate affiants):

> 1. *How I felt about the strike vote conducted by Unifor 594, and how I had voted;*
> 2. *What duties I was assigned by Unifor 594 during the Lockout, and whether any of those duties made me uncomfortable; and*
> 3. *What I would have changed about my actions during the Lockout.*
>
> …
>
> 1. *Whether I regretted anything about my actions during the Lockout;*
> 2. *How I voted in the strike vote conducted by Unifor 594, and how the vote made me feel;*
> 3. *What roles I had during the Lockout; and*
> 4. *Whether my feelings toward CCRL had changed as a result of the Lockout.*

[6] For their part, the Employer's representatives deny questioning employees about how they voted or how they felt about the vote.

[7] In addition, one manager denies that the question was asked whether an employee's feelings toward CCRL had changed as a result of the labour disruption, but does not comment on whether the employee was asked if they regretted anything about their actions during the labour disruption. Another manager denies that either of these questions were asked, and suggests that the employee was asked whether there was anything they would change with respect to their actions or decisions.

[8] In the unfair labour practice application, the Union alleges:

4. Following the ratification of a new Collective Bargaining Agreement on June 22, 2020, Unifor 594's members began returning to the CCRL workplace. The new CBA does not change the existing wording respecting the representation of Union members.

5. Previous to July 23, 2020, CCRL conducted workplace meetings in the normal course, including by allowing me to attend as a representative of Union members.

6. On July 23, 2020, CCRL began requesting that individual members attend investigative meetings respecting matters and events which took place during the course of the lockout ("Lockout Meetings").

7. Some members were advised by CCRL that their Lockout Meeting was solely investigative. Others were advised before or within Lockout Meetings of the potential for discipline against them.

8. Each time a Unifor 594 member advised me of a planned Lockout Meeting, the member requested that I (or my delegate Andrew Fowlow) accompany the member as his or her representative.

9. CCRL has refused to allow me or any other representative to attend Lockout Meetings in which it has interviewed members about the collective action of Unifor 594 and its members in response to the Lockout.

10. In the course of the Lockout Meetings, CCRL's representatives have asked questions of Unifor 594 members which are prohibited by the SEA, including as to their votes in a secret-ballot strike vote and their associational activity during the course of the Lockout (the "Prohibited Questions").

11. On July 29, 2020, CCRL further gave me notice that it will no longer permit me or any official of Unifor National to attend disciplinary meetings involving bargaining unit members. Instead, CCRL has advised of its intention to unilaterally restrict bargaining unit members' representation even at disciplinary meetings to their immediate Shop Steward.

[9] Contained in the unfair labour practice application are two main allegations. First, the Employer refused to allow Union representatives, or specific Union representatives, to attend Lockout Meetings; Second, during those meetings the Employer's representatives questioned Union members in a manner that is prohibited by the Act.

[10] The Union now files the within application seeking the following interim relief:

a. an Interim Order ordering CCRL to permit the Union's Chief Shop Steward, or a duly authorized delegate thereof, to attend any investigative or disciplinary meeting it conducts with a Union member at the member's request; or

b. in the alternative, an Interim Order prohibiting CCRL from conducting any investigative or disciplinary meeting with a Union member without permitting the Union's Chief Shop Steward, or a duly authorized delegate thereof, to attend at the member's request;

c. an Interim Order prohibiting CCRL from questioning Union members about:
   i. their voting in votes authorized by Part VI of the SEA; and

> *ii. their participation, and the Union's collective action, in collective bargaining matters under Part VI of the SEA;*
>
> *d. Such further and other relief as may be requested and as this Board deems just and reasonable.*

[11] It is worth noting the timeline of the filings and attempted filings in this case. The Union filed its unfair labour practice application on July 30, 2020. It then filed an application for interim relief on August 6, 2020. By this date, the Employer had not yet filed a reply to the unfair labour practice application. The interim relief application was scheduled to be heard on the morning of August 18, 2020. The Employer provided the Board with its reply to the unfair labour practice application, late, on that same date, prior to the commencement of the hearing. In its Reply, the Employer states:

> *6. In reply to the whole of the Application, CCRL states that the Application brought by Local 594 should be deferred in favour of the grievance arbitration process. The Application alleges breaches of the 2020 CBA and the interpretation of the 2020 CBA are properly dealt with in the grievance arbitration process. CCRL states that the Board should defer the Application to that process, which is the appropriate process.*

[12] The interim application was heard via WebEx on August 18, 2020, as planned. The Board received helpful submissions and authorities from both parties and is grateful for their assistance.

Preliminary Issue:

[13] At the outset of the hearing, the Board dealt with an issue related to the admissibility of the affidavit of Rebecca Knowles, filed by the Employer. The Union argued that certain portions of the affidavit should be struck for failure to comply with section 15 of the Regulations. The Union's primary concern was that those portions are not confined to those facts that Ms. Knowles is able of her own knowledge to prove. For instance, Ms. Knowles stated that the Employer (not herself) was copied on a letter; that there were two witness interviews of a particular employee, only one of which she attended; and the Employer had specific concerns with the attendance of Union representatives at all interviews. The Board admitted the affidavit, making the observation that Ms. Knowles, in her capacity as Manager of Labour Relations, likely has personal knowledge of the facts to which she affirmed. The phrasing of the affidavit may not be perfect, but the content of the affidavit does not breach the Regulations.

[14] In addition to Ms. Knowles, the following individuals swore to or affirmed affidavits in this proceeding: Avery Riche, Carla McCrie, Scott Ashton, Richard Exner, Trent Rowsell, Kristin Miller,

Chinelo Kene-Arodiwe, Ryan Carton, Paula Etienne, and Andrew Dean Parker. There were no other objections in relation to the admissibility of the affidavits.

Argument on Behalf of the Parties:

[15] The following is a brief summary of the parties' arguments.

[16] The Union argues that it has met the two-part test applicable on an interim application. It is well established that, even in the absence of specific language in a collective agreement, a member represented by a bargaining agent is entitled to representation at an employer-directed meeting that may produce adverse consequences. The Act provides such protection through the operation of several provisions. This includes section 6-1, which defines collective bargaining, and clauses 6-62(1)(d) and (e), which set out specific, related unfair labour practice prohibitions.

[17] On the issue of improper communications, the relevant provisions are clauses 6-62(1)(b) and (p). Clause (p), in particular, makes clear that an employer is prohibited from questioning employees as to whether they or any of them have exercised, or are exercising or attempting to exercise, any right conferred by this Part. In the Lockout Meetings, the Employer's representatives have questioned employees about their assigned roles in the Lockout and views thereon, and their secret ballots in votes respecting job action. The Employer has no legitimate interest in these matters.

[18] In relation to the balance of convenience, the Board must, unlike the courts, focus on labour relations harm. The most obvious harm arising from the Employer's conduct is the risk of discipline to the members, and the Employer's clear violation, through improper questioning, of the employees' free and fair exercise of their rights pursuant to Part VI of the Act. The Union is harmed because it is undermined in its ability to protect the interests of its members from the "unfair and arbitrary" actions of the Employer. On the flip side, no labour relations harm will flow to the Employer from the granting of the requested interim relief.

[19] In response, the Employer urges the Board to consider whether this matter is properly before it, and only if it so determines, to then consider the test on an interim application.

[20] According to the Employer, the interim application should be deferred to arbitration. The essential character of the dispute pertains to the interpretation of a provision of a CBA. That CBA includes a grievance arbitration process that can address most if not all of the allegations (perhaps with the exception of the Employer communications issue). The case law is clear that arbitrators

are empowered to determine the appropriate remedy for an employer's breach of a union's right to participate in a discipline meeting.

[21] Even if the Board retains jurisdiction, it must deny the Union's request for relief. The Union has failed to establish an arguable case, first, that its members have a right to Union representation at witness interviews or a right to select the Chief Shop Steward as their representative for Lockout Meetings; it has likewise failed to establish that the Employer has breached these rights. Members have a contractual right to Union representation at disciplinary meetings. This right has been and will continue to be respected. The Union is seeking to extend this right beyond its intended application.

[22] Second, the Union has failed to establish an arguable case "that its members are being improperly questioned" during Lockout Meetings. There is conflicting evidence before the Board. The Employer's representatives have "wholeheartedly denied asking Union members how they voted, while two affiants from the Union have indicated they were asked about their votes". The other, alleged questions are not in violation of the Act.

[23] Lastly, the Union's request for relief is inappropriately broad. The Union alleges that specific questions were asked, but then seeks relief that extends beyond the scope of those allegations.

Applicable Statutory Provisions:

[24] The following provisions of the Act are applicable:

> ***6-1****(1) In this Part:*
>
> *. . .*
>
> *(e) "collective bargaining" means:*
>
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
>
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
>
> *(iii) executing a collective agreement by or on behalf of the parties; and*
>
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;*
>
> *. . .*
>
> ***6-41****(1) A collective agreement is binding on:*
>
> *(a) a union that:*

(i) has entered into it; or

(ii) becomes subject to it in accordance with this Part;

(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and

(c) an employer who has entered into it.

(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:

(a) do everything the person is required to do; and

(b) refrain from doing anything the person is required to refrain from doing.

(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.

(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails

. . .

6-45*(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by a collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedures established by the collective agreement.*

. . .

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:*

. . .

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

. . .

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

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

(i) employees covered by the agreement; or

(ii) employees in the bargaining unit;

. . .

(p) to question employees as to whether they or any of them have exercised, or

are exercising or attempting to exercise, any right conferred by this Part;

. . .

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

. . .

***6-103**(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

(a) conduct any investigation, inquiry or hearing that the board considers appropriate;

(b) make orders requiring compliance with:

(i) this Part;

(ii) any regulations made pursuant to this Part; or

(iii) any board decision respecting any matter before the board;

(c) make any orders that are ancillary to the relief requested if the board consider that the orders are necessary or appropriate to attain the purposes of this Act;

(d) make an interim order or decision pending the making of a final order or decision.

[25] The following provisions of the Regulations are applicable:

***15**(1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*

(a) an application in Form 12 (Application for Interim Relief) with the registrar;

(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:

(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;

(ii) the party against whom the relief is requested; and

(iii) any exigent circumstances associated with the application or the granting of the interim relief;

(c) a draft of the order sought by the applicant; and

(d) any other materials that the applicant considers necessary for the purposes of the application.

(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.

(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.

(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place on which the application is returnable.

(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application, along with the materials referred to in the application, on the party against whom the interim relief is claimed within:

(a) subject to clause (b), at least three business days before the date set for the hearing; or

(b) any shorter period that the executive officer may permit.

(7) Before the hearing, the applicant shall file proof of service of the application for interim relief mentioned in clause (1)(a).

Analysis:

[26] The onus on an interim application rests with the Applicant, the Union.

[27] To begin, both of the preconditions to an application for interim relief are satisfied in this case. There is an underlying application to which the grant of interim relief is ancillary, and there is a formal application along with affidavit evidence.

[28] Prior to considering the test on an interim application, the Board will deal with the Employer's argument on deferring this matter to arbitration.

[29] The Employer, in support of its request for the deferral of the interim application, relies on the Board's decision in *Health Sciences Association v Five Hills Health Region*, 2008 CarswellSask 439 [*Five Hills*]. In that case, the Board chose to defer the interim matter to arbitration, rather than deal with the substantive question related to whether the implementation of a return to work program violated the Union's rights pursuant to the Act.

[30] The result in *Five Hills* may have been expedient, but the Board is not charged with considering a deferral application in this case. It is charged with considering an interim relief application, subject to the applicable two-part test. Besides, the Board's approach to deferral is

grounded in its often concurrent jurisdiction with an arbitrator in matters related to unfair labour practice allegations. Deferring a matter to arbitration does not result in the Board relinquishing jurisdiction over an underlying unfair labour practice application.

[31] There is also an issue with respect to procedural fairness. If the Board were to decide the deferral issue on the interim application, it will have decided that issue substantively for the underlying application, without providing the Union with a fair opportunity to present its argument.

[32] Given these considerations, the Board denies the Employer's request to defer the interim application to the arbitration process.

[33] The next issue is whether the Union is seeking, through its interim application, the equivalent of final relief. As the Board pointed out in *Aluma Safway, Inc. v International Association of Heat & Frost Insulators and Asbestos Workers*, 2020 CanLII 19808 (SK LRB) [*Aluma Safway*], at paragraph 24, the bar may be set higher in cases where the applicant has requested the equivalent of final relief.

[34] While there are many similarities in the relief sought through both applications, a major distinguishing feature is disclosed in the following request made on the underlying application:

> *e. An Order prohibiting the Employer from pursuing discipline against Unifor 594 members based upon information acquired in any Lockout Meeting or other meeting arising out of an Unfair Labour Practice or violation of the SEA as described above; …*

[35] The underlying application seeks to prevent disciplinary action based on information acquired in a meeting arising out of a breach of the Act. The interim application stems from this overarching, but longer term concern. It is concerned with preventing harm before it begins. It is not seeking to prohibit the Employer from pursuing those discipline proceedings; it is seeking to prevent problems in relation to those discipline proceedings, arising from alleged breaches of the Act.

[36] The issue in this case is not equivalent to those considered in *Kone Inc. v International Union of Elevator Constructors*, 2020 CanLII 41808 (SK LRB) [*Kone*] or *AlumaSafway*. This is not a case in which the Applicant is simply attempting to expedite the Board's determination of the final question.

[37] Next, the Board will consider each of the branches of the applicable test on interim relief, in turn. The test was recently described by the Board in *Kone*:

> *[24] The substantive test is two-fold. The first stage asks whether the underlying, or main, application raises an arguable case. This is not a rigorous standard. The Board considers whether the underlying application discloses facts that, if established at the full hearing, would prove the alleged claim. The Employer is not required to demonstrate a probable contravention of the Act. The Board should refrain from evaluating novel arguments or statutory interpretations and is compelled to accept the evidence on its face. The Board does not pay close attention to the relative strengths or weaknesses of the applicant's case.*
>
> *[25] The second stage of the substantive test is whether the balance of convenience favours granting the interim relief pending a hearing on the merits of the underlying application. For this stage, the applicant is required to provide a description of the harm that will ensue if the order is not granted, with a view to demonstrating a meaningful risk of irreparable harm. Irreparable harm is generally considered harm that cannot be compensated through an award of damages.*
>
> *[26] In assessing the balance of convenience, the Board is charged with considering a variety of factors, including: whether there is a sufficient sense of urgency to justify the remedy sought; and whether, by granting the relief requested, the Board is in effect, granting all of the relief requested in the underlying application. In determining whether to exercise its discretion to grant interim relief, the Board must be satisfied that there is a solid labour relations purpose in doing so.*

[38] The first question is whether there is an arguable case. This is not a rigorous standard. As explained by the Board in *SGEU v Saskatchewan*, 2010 CanLII 81339 (SK LRB) [*SGEU*]:

> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case"…*

[39] On this question, two main issues arise. First, the Union must demonstrate that there is an arguable case that the Employer has breached a right to Union representation that applies in the circumstances set out herein, specifically to have a Union representative attend interviews that are not, or not yet, disciplinary in nature, and to have the Chief Shop Steward attend as their representative at Lockout Meetings. Second, the Union must demonstrate that there is an arguable case that the Employer has breached its obligations in relation to its communications with the members.

[40] The first matter relates to the right to Union representation. The Employer has acknowledged that Union members have a contractual right to Union representation in disciplinary meetings pursuant to the following provision (found at Article 14 of the predecessor CBA and reproduced in the current CBA):

> *9. The Co-operative agrees that an employee shall have the right to have his or her Shop Steward present at any discussion with a supervisor or manager, which might be the basis of disciplinary action. Where a supervisor or manager intends to interview an employee for disciplinary purposes, the supervisor or manager shall make every effort to notify the employee in advance of the purpose of the interview in order that the employee may contact his or her Shop Steward. The right to a Shop Steward shall also apply to Letters of Concern. Employees who are called in on their off hours for the purposes of an investigation do so voluntarily and shall be paid at straight time and the Co-operative shall make every effort to respect the hours of work and sleep requirements related to shift workers.*

[41] Where the Employer and the Union part ways is in the origins of this right and its breadth. The Employer says that the right arises from the provisions of the CBA, and disagrees that it is grounded in legislation, or that it is "free-standing". The Employer disagrees that the right extends to guaranteeing Union members representation at meetings other than those that are disciplinary.

[42] The Union says that the origin of the right to Union representation can be traced to the well-known American decision, *NLRB v Weingarten Inc*., 88 LRRM 2689, and that the right, which is independent of the language in a collective agreement, is well established in numerous Canadian jurisdictions. The Union interprets the applicable right to Union representation as guaranteeing "representation at an employer-mandated meeting which may produce adverse consequences".

[43] The Union relies for this proposition on cases from the Alberta, Ontario, and Canada Boards: *UFCW, Local 401 v Lakeside Feeders Ltd*., 2005 CarswellAlta 57 (LRB); *PSAC v Canada Post Corp*., 1985 CarswellNat 789 (LRB); *Mordowanec v ONA*, 1984 CarswellOnt 1136 (LRB). A review of these cases, and the applicable legislation, discloses that in each case, the board was relying on a statute that included an explicit protection for union representation, such as the following, from the Ontario statute:

> *184(1) No employer and no person acting on behalf of an employer shall*
>
> > *(a) Participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union…*

[44] The Union relies on these cases to suggest that the right to Union representation exists outside the negotiated terms of a collective bargaining agreement, as a fundamental right that arises from the Union's designation as the exclusive bargaining agent of the employees. The recognition of a Union as the exclusive bargaining agent means that the Union possesses the associated rights to represent employees in respect of collective bargaining matters, with the Employer.

[45] This right is enshrined in the governing statutory regime. A primary objective of Part VI of the Act is to facilitate and promote collective bargaining. The significance of this objective is underscored by section 6-1 (definition of collective bargaining) and clauses 6-62(1)(d) and (e). The Board interprets the definition of collective bargaining broadly, applying it to a broad array of disputes between the parties to a collective agreement. The applicable unfair labour practice provisions prohibit a refusal to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit. The Board in *United Steel v Mosaic Potash*, 2020 CanLII 31222 (SK LRB) recently affirmed the right of a union to choose its representative for the purpose of clause 6-62(1)(d) of the Act.[3] A union cannot contract out of substantive, statutory rights: see, subsection 6-41(6) of the Act.

[46] The matters raised through the investigation process "reflect live disputes and grievances arising out of actions allegedly taken during the course of the Lockout". The investigation process relates to collective bargaining.

[47] The Union also relies on section 6-41 of the Act which, combined with clause 6-62(1)(r), provides for an unfair labour practice where a person, who is bound by a collective agreement, fails to do everything the person is required to do or refrain from doing anything the person is required to refrain from doing.

[48] In contrast, the Employer relies on a number of arbitration decisions to argue that the Union representation right is purely contractual. In *Brink's Canada v ICTU, Local 1*, 1995 CarswellNat 1564, the arbitrator stated that it "is common ground that an employee's right to union representation is a contractual right, the scope of which is determined by the terms of the collective agreement".[4] In C*UPE v Air Canada*, 2010 CarswellNat 3756, the arbitrator decided a grievance pertaining to union representation rights, and made the following observation:

> *58 In determining grievances in which a violation of union representation rights is alleged, it is necessary to consider both the specific language of the collective agreement and the factual context in which the violation of the right is alleged to have occurred.*

[49] The Employer also relies on *Canada Safeway Ltd., v MacNeill*, 2000 SKCA 119 [*Canada Safeway*], a decision on appeal from an order of the Court of Queen's Bench dismissing an

---

[3] At para 70.
[4] At para 16.

application by the employer to quash an award of a board of arbitration. The Court of Appeal observed of the right to Union representation:

> *The right is a contractual one…*
>
> *Nor does the requirement give rise to a "fundamental right" in the usual sense, in the sense, that is, of denoting a basic human right of the subject, such as those protected by constitution or human rights legislation.*

[50] The Board observes that this comment does not specifically address the applicable statutory labour relations regime.

[51] Arbitrator Wallace's comments in *SGEU v Saskatchewan Crop Insurance*, 2017 CarswellSask 359 are more difficult to delineate:

> a. *There is no inherent right in labour law to union representation when an employee is interviewing an employee were discipline is intended or contemplated.*
>
> b. *For an employee to be entitled to any "union representation rights" with respect to disciplinary matters, the union must negotiate those rights in the collective agreement…*[5]

[52] Despite Arbitrator Wallace's comments, none of the preceding cases conclusively shuts the door to a general, statutory right to Union representation in Saskatchewan. The arbitrators were functioning within their jurisdiction to interpret the relevant collective agreement, not assessing the parties' rights pursuant to the statute.

[53] To be sure, these cases, supported by the Board's cursory overview of the case law in this area, suggest that parties to a collective agreement commonly negotiate the right of Union representation at disciplinary and related meetings, and resolve their disputes through arbitration following the interpretation of the negotiated provisions of the collective agreement. This approach is at the very least the usual practice and expectation in the field.

[54] Given the foregoing case law and the clear contractual language setting out the expected pattern of conduct in relation to specific circumstances, the Union's argument may be considered novel. However, it is not up to the Board to evaluate novel arguments or statutory interpretations, but to evaluate only whether the Union has demonstrated an arguable case.

---

[5] At para 37.

[55] Furthermore, the Union's case on the underlying application is strengthened by clause 6-62(1)(r) of the Act.

[56] The Board has concluded that the Union has established an arguable case that members have a right to Union representation in the circumstances set out herein – both to attendance at investigation meetings and to the selection of a specific Union representative in either disciplinary or investigation meetings – which is protected by the unfair labour practice provisions in the Act.

[57] The next issue is whether the facts, as alleged in the application, disclose a breach. The Board will begin with the issue of representation at Lockout Meetings.

[58] Although the Employer acknowledges that the Union's members have a contractual right to Union representation at disciplinary meetings, it says that the investigation meetings are non-disciplinary. In these Non Disciplinary Meetings, the Employer has allegedly questioned employees about what they would have changed about their actions during the lockout, whether their feelings toward CCRL changed as a result of the lockout, and whether they regretted anything about their actions during the lockout. The Employer representatives have denied some of these allegations. One Employer representative admits to a question about whether there was anything an employee would change with respect to their actions or decisions.

[59] This evidence, as a whole, discloses an arguable case that the Employer has breached a right to Union representation, contrary to the CBA and the Act, having allegedly asked questions the answers to which might be a basis for disciplinary action against that particular member, in the absence of Union representation.

[60] The next question is whether the balance of convenience weighs in favour of granting the requested remedy to permit Union representation at Non Disciplinary Meetings, pending a hearing on the merits of the underlying application. On this question, the Board is guided by the direction outlined in *SGEU*, at paragraph 32:

> *... In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy.*
>
> *… The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted… In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. …*

[61] The Union describes the global harm to the Union, caused by the Employer's actions, in this way:

> *33. In the case of members, the most obvious harm arises out of the risk of the imposition of discipline, based on either the circumstances of their own meeting conducted without proper representation, or information wrongly obtained from other bargaining unit members. In addition, members are being interrogated with prohibited questions whose answers intrude upon the free and fair exercise of their rights under Part VI of the SEA.*
>
> *34. In the case of the Applicant, the harm arises out of the inability of a duly certified bargaining agent to exercise its mandate of protecting the interests of its members from unfair and arbitrary employer action. This harm is especial severe in the aftermath of the Lockout, in which the Employer expended large amounts of resources in a campaign devoted to attacking the Union and Unifor Canada as representatives of their members.*

[62] The Union says that the most obvious risk of harm is that members, who attend Non-Disciplinary Meetings, will make self-incriminating comments in the absence of a Union representative and then be subject to discipline for those comments. The evidence suggesting that the Employer sees fit to question employees about their own activities during the Non-Disciplinary Meetings means that this risk is real.

[63] However, this risk is mitigated by the grievance process that allows for the adjudication of any discipline arising from the Employer's investigation. A central feature of such grievance process is the arbitrator's determination about whether the Employer breached the employee's right to Union representation in the course of obtaining information that formed the basis for the discipline, and the arbitrator's assessment of the appropriate disposition in light of that breach.

[64] The Board finds additional reassurance in the statement at paragraph 8 of the affidavit of Kene-Arodiwe:

> *I advised that anything obtained in this interview could not be used against her and that in the event anything came up that may invoke the disciplinary process for her, the meeting would be stopped until her Union representation was present. I also informed her that she could not be subject to disciplinary action without Union representation. I reiterated these comments at the conclusion of her interview, and confirmed to her at that time that there was no potential for discipline for her arising from that meeting.*

[65] In addition, the affidavits of Paula Etienne and Kristin Miller provide helpful context for the Employer's position, along the following lines:

> *…it was my understanding that Union representatives were to attend meetings only where a member is the subject of disciplinary action or there might be a basis for disciplinary action against that particular member. Further, where meetings were held with individuals who were not the subject of disciplinary action and/or where there was no basis for*

> *disciplinary action against them, if an individual began to speak about anything that might invoke disciplinary action for himself or herself during a meeting, it was my understanding that the meeting should be stopped and discontinued until a Union representative was present.*

[66] For its part, the Employer is concerned about the integrity of its investigation. It is concerned that, if it allows for Union representation in investigation interviews, its questions will be shared and the quality of its information will be degraded. It is also concerned that the sharing of information will result in backlash against witnesses, and a chilling effect on witness cooperation.

[67] For these reasons, the Board finds that the relative labour relations harm does not favour the requested, related remedy pending a hearing on the merits.

[68] Next, the Board concludes that the Union has established an arguable case that the Employer has breached its right to Union representation by attempting to micro-manage its selection of its Union representative. It is uncontroverted that the Employer has required the Union to amend its list in order to allow for representation by the Chief Shop Steward.

[69] The next question is whether the balance of convenience weighs in favour of granting the requested remedy. The Union has resorted to self-help by amending its list of Shop Stewards, and by taking this action, it has mitigated the potential for harm. Further to this amendment, the Employer has allowed the Chief Shop Steward to attend the meetings to which Union representatives are permitted. It is expected that the Employer will continue to do so.

[70] The Union suggests that the Employer continues to select the representative indirectly, by requiring the Union to amend its list. However, the risk of harm was capable of being abated and has been abated. It is therefore unnecessary to grant the requested relief pending a hearing on the merits.

[71] Next, the Board will address the issue of Employer communications. The Union alleges that the Employer has questioned employees contrary to clauses 6-62(1)(b) and (p) of the Act. Clause (p) prohibits an employer from questioning employees as to whether they or any of them have exercised, or are exercising or attempting to exercise, any right conferred by Part VI. The purpose of clause (p) is to promote the free exercise by employees of any right conferred by Part VI, without interference by an employer.

[72] There is clearly an arguable case that questioning Union members about how they voted in a strike vote is a breach of clause 6-62(1)(p) of the Act. Given the purpose of clause (p), there is an arguable case that questioning Union members about how the vote made them feel is a breach of clause 6-62(1)(p). The Employer has no legitimate interest in the answer to the question, and the answer is likely to disclose information about which the Employer is prohibited from questioning.

[73] The Employer suggests that, because of the denials issued by its affiants, the Union has failed to establish an arguable case. There is conflicting evidence before the Board. However, the Board does not attempt to weigh conflicting evidence in interim proceedings. As explained in *SGEU*:

> *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence*. …

[74] Furthermore, the Union's case does not, as the Employer suggests, consist of only bald assertions. The Union has filed sworn affidavits to support its allegations; and one of these contains interview notes.

[75] As for the balance of convenience, the Employer says the Union has failed to establish harm, or more specifically, that the Union has failed to present any factual basis for prejudice that might result if the interim relief order is not granted. It relies generally on *UFCW, Local 1400 v Arch Transco Ltd.*, 2004 CanLII 65604 (SK LRB) to suggest that the Union has failed to demonstrate a "reasonable factual basis" to support the allegations.

[76] The Union argues that where an allegation discloses an employer's interference with the free exercise of the employees' rights under Part VI, labour relations harm is inferred from the alleged breach. The Board agrees that labour relations harm is presumed where an employer is alleged to have questioned employees in a manner that is contrary to clause 6-62(1)(p). Besides, the context of the questioning is a "reasonable factual basis". The Board made a related observation in *UFCW, Local 1400 v AAA Security Group Ltd*., 2018 CanLII 53137 at paragraph 34, where an Employer was found to have communicated in a manner contrary to the Act, in the absence of any anti-union animus:

> *…However, the underlying concern remains the same, namely inquiries by an employer about whether a particular employee supports an [sic] union's organizing efforts may have a detrimental or chilling effect upon an employee who wishes to exercise their rights under Part VI of the SEA, not to mention the fundamental freedom of association guaranteed by section 2(d) of the [Charter]. The statutory objective of clause 6-62(1)(p) is to prevent such a situation from occurring.*

[77] While the current context does not involve an organizing drive, it is similar. The objective of clause 6-62(1)(p) is to prevent an employer's questions from having a chilling effect on an employee's exercise of rights under Part VI of the Act. It is incumbent on the Board to foreclose the Employer from questioning employees about the strike vote to prevent such a chilling effect from settling in.

[78] As stated in *Kone* at paragraph 25, the Union must "provide a description of the harm that will ensue if the order is not granted, with a view to demonstrating a meaningful risk of irreparable harm". In the Board's view, there is no suitable compensation for the alleged interference with the free and fair exercise of the employees' rights. The potential harm is irreparable.

[79] The Union has sought an order prohibiting questioning about votes authorized by Part VI. The Employer states that any order should be restricted to the factual circumstances outlined by the Union, that is, the strike vote. The Board notes that the Employer has no legitimate interest in questioning employees "as to whether they exercised any right conferred by Part VI"; this observation extends to all votes held in relation to Part VI. Given the clear prohibition in the Act, there will be no harm to the Employer in granting the requested order. Under the circumstances, the requested order is appropriate.

[80] Next, the Board will consider whether it is appropriate to grant an order preventing any other questioning. The Employer denies that it is a breach of the Act to question employees about what "duties they were assigned during the Lockout" and "whether any of those duties made them uncomfortable". The Employer points to the context, which is an investigation into misconduct during the lockout, supported by the negotiated Return to Work Agreement. The Union says that questioning employees about roles assigned during the lockout is a clear breach of the Act, and the Employer makes little if any effort to deny these allegations.

[81] The Union has established an arguable case that the Employer has breached the Act by questioning employees about their assigned roles and duties during the lockout. Section 6-4 of the Act grants employees the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing. The roles and duties assigned to

employees during a lockout, in support of the Union's collective action, are directly related to the employees' exercise of a right conferred by Part VI. If the Employer's specific questioning offends the Act, it is not enough for the Employer to say that the Union was aware of its investigation into misconduct or even that the Union supported it by signing the Return to Work Agreement. The investigation is general; the questions are specific.

[82] The relative harm favours granting an order prohibiting the Employer from questioning employees in the manner described below. The Employer has no legitimate interest in questioning employees as to whether they exercised any right conferred by Part VI. Even if it has to adjust its approach to its interviews, it will have done so in the service of preserving the employee's rights under the Act. The Employer can continue its investigation into employee misconduct during the lockout in the absence of these specific questions.

[83] The Employer says that the Union has not established sufficient urgency to justify the order being sought. In this Board's view, the absence of an interview schedule is not determinative. The investigation is ongoing. The substantive unfair labour practice application is not yet scheduled for a hearing. Given the rate of interviewing, it is likely that the interviews will continue and will occur prior to the substantive hearing of this matter. Therefore, it is necessary to issue an order to prevent harm from occurring before the unfair labour practice application can be heard.

[84] Lastly, the Union asks the Board to grant a general order prohibiting the Employer from questioning employees about their "participation, and the Union's collective action, in collective bargaining matters under Part VI of the SEA". Given the context of the investigation, the Board is concerned that such an order will result in significant interpretative issues, and greater conflict for the parties. The Board does not wish to cause, through its order, any additional conflict for these parties.

Conclusion:

[85] Given the foregoing reasons, the Board grants the Union's Application for Interim Relief, in part, and makes the following Orders:

1. Consumers' Co-operative Refineries Ltd. and its representatives are prohibited from questioning employees about:
    a. their voting in votes authorized by Part VI of *The Saskatchewan Employment Act*; and

b. the roles and duties assigned to them during the lockout and labour disruption.

[86] A few closing, if unsolicited remarks. A helpful approach to rebuilding a relationship is to personally take responsibility for one's role in its deterioration. This is difficult, and even those who try are likely to fail. The Board sincerely hopes that the parties can show grace in the face of what are likely to be intermittent failures on the road to rebuilding a relationship based on trust.

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

DATED at Regina, Saskatchewan, this **31st** day of **August, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson