UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Applicant v MOSAIC POTASH COLONSAY ULC, Respondent

LRB File No. 193-18; April 23, 2020

Vice-Chairperson, Barbara Mysko; Board Members: Shelley Boutin-Gervais and Laura Sommervill

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Unfair Labour Practice Application – Clauses 6-62(1)(b) and 6-62(1)(d) of *The Saskatchewan Employment Act* – Collective Bargaining – Alleged Failure or Refusal to Bargain – Alleged Interference in Internal Union Affairs.

Employees of competitor attend collective bargaining – Employer seeking information whether individuals selected for committee – Union refuses to provide information – Parties resume bargaining without competitor employees at bargaining table.

Breach of clause 6-62(1)(d) requires finding of failure or refusal to bargain with representatives – Presidents not representatives pursuant to clause 6-62(1)(d) – Evidence not clear, convincing, cogent – Breach not established.

Clause 6-62(1)(b) – Requests for information not interference with administration of union – Breach not established.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On September 11, 2018, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ["Union"] applied to the Board for an order determining whether an unfair labour practice or a contravention of the Act is being and/or has been engaged in by Mosaic Potash Colonsay ULC ["Employer"], pursuant to clauses 6-62(1)(b) and (d) of *The Saskatchewan Employment Act*

["Act"]. The Union's Application arises out of the parties' most recent negotiations to reach a new collective agreement. These are the Board's Reasons for Decision in relation to that Application.

[2] The Employer operates a potash mine located near Colonsay, Saskatchewan. The Union is certified as the exclusive bargaining agent for all employees of the Employer, employed at that mine site (subject to specified exceptions) by transfer of obligations[1], under an alternate certification order held by United Steelworkers of America (CLC).[2] The scope of that order is replicated in the current and the previous collective agreements.

[3] The salient parts of the Union's Application read:

> *3. The applicant alleges that an unfair labour practice (or a contravention of the Act) has been and/or is being engaged in by the respondent by reason of the following facts:*
>
> *(a) The union, United Steel, Paper and Forestry, Rubber, Manufacturing, Engineering, Energy, Allied Industrial and Service Workers International Union (the "Union" or "USW") is now and was at all times material a union as defined in Part 6 of The Saskatchewan Employment Act.*
>
> *(b) The Employer, Mosaic Potash Colonsay ULC (the "Employer"), is now and was at all times material an employer as defined in Part 6 of The Saskatchewan Employment Act, and operates a potash mine and production mill near Colonsay, Saskatchewan.*
>
> *(c) Pursuant to certification orders, the most recent of which is on LRB File No 019-03, naming IMC Potash Colonsay as the employer, and section 6-18 (transfer of obligations), the Employer is obligated to bargain collectively with the Union.*
>
> *(d) The Union bargains collectively with the Employer through its local union, Local 7656.*
>
> *(e) The Union Local 7656 has joined a council of union locals representing employees in the potash industry in Saskatchewan.*
>
> *(f) The Union and the Employer have bargained several collective agreements, the most recent of which was for the term 1 May 2015 to 30 April 2018.*
>
> *(g) On or about January 19, 2018, the Union served notice on the Employer to bargain revisions to the collective agreement.*
>
> *(h) The Union selected a committee of individuals to represent the Union's members for the purposes of collective bargaining revisions to the collective agreement. These individuals included the presidents or designates from other potash mines in Saskatchewan, including Barry Moore, Sheldon Yanoshewski, Roy Collins, Bruce Koob, Doug Purshega, Cory Uliski, Devon Howe (all members of USW Local 7656, and employed by Mosaic Potash Company at Colonsay); Darrin Kruger (USW Staff Representative and member of USW Local 7552 and employed by Nutrien at Vanscoy); Darryl Dziadyk (member of USW Local 7458, and employed by Nutrien at Cory); Jim Lee (member of USW Local 189 and employed Nutrien by Patience Lake); Jason Prokopchuk (member of USW Local 7689 and employed by Nutrien at Allan); Jeremy Wray (member of USW Local 7916 and employed by*

[1] As acknowledged by the Employer.
[2] LRB File No 019-03.

Nutrien at Rocanville); Shawn Wolfe (member of Unifor Local 922 and employed by Nutrien at Lanigan); and Sheldon Lamontagne (member of Unifor Local 892 and employed by Mosaic Potash Company at Esterhazy). Each and all of the individuals listed above are members of the Union's bargaining committee for the purposes of bargaining collectively with the Employer.

(i) The Employer, through the statements and written correspondence of its Human Resources Manager Braden Domres, has refused to bargain collectively with the bargaining committee representative chosen by the Union. The Employer has insisted on bargaining only with employees of the Employer or staff representatives employed by the Union, and has refused to bargain with other union bargaining committee members chosen by the Union, including individuals not employee by the Employer and individuals who belong to a different union than the USW.

(j) The Union corresponded with the Employer and offered assurances of confidentiality to address the Employer's objections, in an effort to resolve problems without seeking Intervention of the Board, and the Employer refused to modify its position.

(k) The Employer has refused and continues to refuse to bargain collectively with the negotiating committee chosen by the Union.

(l) In order to not delay the bargaining process, the Union has met with the Employer for the purpose of collective bargaining with less than the Union's full bargaining committee. The Union has taken this step without agreeing to the Employer's objections and in order to not delay bargaining processes, notwithstanding the Union's contention that the Employer's conduct constitutes an unfair labour practice.

(m) The Union says the Employer has imposed an improper precondition on bargaining, and in so doing has demonstrated a failure to make every reasonable effort to conclude a collective agreement.

(n) The Union says the Employer has interfered in the internal administration of the Union by attempting to designate or choose the union's bargaining representative.

4. The applicant submits that by reason of the facts set forth in paragraph 3 the respondent has been or is engaging in an unfair labour practice (or a contravention of the Act) within the meaning of section 6-62(1)(d) and section 6-62(1)(b) of The Saskatchewan Employment Act.

5. The union therefore request relief:

i. A declaration that the Employer has committed an unfair labour practice, and an order the Employer cease committing such unfair labour practice;

ii. An order that the Employer bargain collectively in good faith with the individuals designated by the applicant Union, regardless of whether such individuals are employees of the Employer;

iii. An order the Employer post the Board's reasons for decision and order for a period of at least 15 days in a prominent location in the Employer's workplace where it will be seen by employees in the bargaining unit.

iv. An order the Employer compensate the Union for any and all costs incurred as a result of the Employer's position and refusal to bargain; and

v. Such further and other relief as seems just to this Honorable Board.

[4] In its Reply, the Employer states:

5. The following is a concise statement of the material facts which are intended to be relied upon in support of this reply:

(a) Mosaic operates a potash mine located near Colonsay, Saskatchewan. The Union is certified as the bargaining representative for all in-scope employees of Mosaic working at the Colonsay mine site. The most recently executed collective bargaining agreement between Mosaic and the Union expired on April 30, 2018 with a term running from September 27, 2016 to April 30, 2018.

(b) The Union notified Mosaic that it intended to bargain with "observers" present who did not belong to the Union's local and are not employed by Mosaic and are instead employed by one of Mosaic's main competitor in Saskatchewan and globally, Nutrien Ltd. These individuals included: Darryl Dziadyk (member of USW Local 7458 and employed by Nutrien at Cory), Jim Lee (member of USW Local 189 and employed by Nutrien at Patience Lake), Jason Prokopchuk (member of USW Local 7689 and employed by Nutrien at Allan), Jeremy Wray (member of USW Local 7916 and employed by Nutrien at Rocanville) and Shawn Wolfe (member of Unifor Local 922 and employed by Nutrien at Lanigan) (the "Competitor's Employees").

(c) Mosaic raised concerns with the presence of the Competitor's Employees in bargaining including, without limitation, that the Competitor's Employees would obtain sensitive and confidential information in bargaining which, if shared with Mosaic's competitors would be prejudicial to Mosaic. The Union did not provide assurances satisfactory to Mosaic that confidential information will not be disclosed to Mosaic's competitors by the Competitor's Employees.

(d) The Union is seeking to have some or all of the Competitor's Employees also participate in collective bargaining with Nutrien.

(e) Mosaic does not acknowledge that the Competitor's Employees or Mosaic's employees from other unionized mines of Mosaic are properly constituted members of the Union's properly constituted bargaining committee and puts the Union to the strict proof thereof.

(f) Mosaic and the Union continue to bargain collectively without the presence of the Competitor's Employees.

(g) The Union's conduct related to the Competitor's Employees amounts to an improper roadblock in collective bargaining that is a significant divergence from prior collective bargaining with Mosaic and the unionized Saskatchewan potash industry generally. While the Union has certain rights under the Act, it cannot exercise those rights in a way that frustrates bargaining or amounts to bad faith bargaining.

(h) The Union's conduct related to the Competitor's Employees and employees from other unionized mines of Mosaic is an improper attempt to indirectly set up a multi-employer bargaining structure or potash sector bargaining structure not in compliance with the Act or the certification order.

(i) The Union's conduct amounts to bargaining in bad faith in violation of the Act. As the allegations of the Union arise out of its own breach of the Act, Mosaic has not breached the Act or committed an unfair labour practice as alleged or at all.

(j) Mosaic has not engaged in an unfair labour practice within the meaning of s. 6-62(1)(b) or 6-62(1)(d) of the Act.

[5] A similar unfair labour practice application was brought against Nutrien Ltd. (Rocanville Division) ["Nutrien"] in LRB File No. 194-18. Following the filing of both applications, Nutrien and Mosaic consented to LRB File No. 193-18 proceeding first, followed by LRB File No. 194-18. In *USW v Mosaic Potash Colonsay ULC and Nutrien Ltd.*, 33 CLRBR (3d) 63 (SK LRB) ["*Mosaic No. 1*"], the Board considered the respective employers' applications for Particulars and Production of Documents and Nutrien's application to intervene in LRB File No. 193-18. The Board dismissed the applications for Particulars and Production of Documents and decided that the two substantive matters would be set down for separate hearings. The hearing of this matter was held on October 15 and 16, 2019, November 25, 2018, and February 18, 2020.

[6] Having outlined the background to the hearing of this matter, the Board will proceed to summarize the arguments of the parties.

Summary of Argument:

On Behalf of the Union:

[7] The Union says that this case is defined by a simple question, as follows: "can the Employer can determine who is on the Union's negotiating committing in collective bargaining?" The answer is "no". The Union's role as the exclusive bargaining representative leaves no room for the Employer to determine or control who sits at the bargaining table for the Union. The existing labour relations regime depends on an arm's length relationship between the parties. Independence from the influence and control of management in the Union's selection of its representatives is inherent to the nature and purpose of collective bargaining.

[8] The Act provides mechanisms for employees who have concerns with internal Union administration. Employers do not have at their disposal the same mechanisms. They are not offered an opportunity to protest the Union's failure to represent employees or to police compliance with internal rules and regulations. The Employer's repeated request for particulars, minutes, and other documentation about the Union's internal exercise of democracy, and the Employer's refusal to accept the Union's wishes about who was to sit at the bargaining table, constituted an improper incursion into internal union affairs and an attempt to assert control over the Union's side of the bargaining table. An attempt to police or take part in internal union administration is expressly prohibited by clause 6-62(1)(b) of the Act.

[9] The Employer's refusal to bargain is contrary to the holding in *Marshall-Wells v Retail, Wholesale and Department Store Union, Local 454*, 55 CLLC 18,002 (SK LRB); [1955] 4 DLR

591 (SK CA); [1956] SCR 511 (SCC) ["*Marshall-Wells*"]. There, the Board and the courts confirmed that an employer is not permitted to refuse to bargain with individuals on the sole basis that they are not employees of the employer. Here, the Union opted for the presence of the Presidents from other locals to facilitate a better collective agreement; not to put up roadblocks to bargaining. On the other hand, when the Employer refused to bargain in the presence of the competitor's employees, it did exactly that. The Employer's conduct constitutes a violation of clause 6-62(1)(d).

On behalf of the Employer:

[10] Contrary to past practice, the Union sought to include at the bargaining table certain observers - individuals who were neither members of Local 7656 nor employed by Mosaic, but were instead employed by Mosaic's primary competitor, Nutrien. Generally, the Union has no legal right to include observers in collective bargaining. Furthermore, these observers were not appointed as representatives of the Union representing the employees in the bargaining unit.

[11] By extending an invitation to a competitor's employees, the Union put up a road block to collective bargaining and acted in a bad faith manner. The Union's conduct was an improper attempt to set up a multi-employer or potash sector bargaining structure, contrary to both the Act and the certification order. The observers were not in attendance for the purpose of negotiating the collective agreement, but instead to gain an advantage at other bargaining tables or to obtain sensitive information from Mosaic. There were legitimate labour relations concerns with including observers at the bargaining table.

[12] The Union's argument invites absurd consequences in practice:

> *…For example, does this mean a party can have a member of the media observe bargaining? Does this mean a party can invite an important regulator to observe bargaining? Does this mean a party can invite a political figure to observe bargaining? There must be limits. Bargaining is not a free for all. It must be assessed objectively against the expectations and practices of the parties.*[3]

[13] Lastly, the facts do not support a breach of the Act. The Employer raised its concerns and had discussions about including observers at the table, but it never refused to bargain. Nor did the Employer interfere with the administration of the Union. It simply asked for information, which the Union refused to provide.

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[3] *Employer's Brief* at para 80.

Evidence:

[14] The Board will next summarize the evidence, all of which it has carefully reviewed even if not explicitly stated in the following paragraphs.

[15] The Union called three witnesses: Darrin Kruger (International Staff Representative), Barry Moore (President, Local 7656), and Darryl Dziadyk (President, Local 7458, employee of Nutrien - Cory). The Employer called two witnesses: Braden Domres (Human Resources Manager – Esterhazy) and Kevin Quesnel (General Manager).

[16] As the International Staff Representative, Mr. Kruger is the lead negotiator on behalf of the Union in relation to the collective bargaining agreements in his service area, which includes Mosaic Colonsay. The Saskatchewan Potash Council [“Council”] is a representative organization for potash workers across the province. The Council is not certified under the Act as a bargaining agent.

[17] On January 19, 2018, the Union notified the Employer in writing that it intended to open negotiations for a new collective agreement. On June 20, 2018, the parties met to begin negotiations. They introduced their respective bargaining committees. The Union introduced a bargaining committee consisting of Barry Moore, Sheldon Yanoshewski, Bruce Koob, Doug Purshega, Devon Howe, Cory Uliski, and Roy Collins [“Local Members”], with Mr. Kruger as chief negotiator. Each of these individuals, other than Mr. Kruger, was an employee of Mosaic Colonsay at the time.

[18] On June 20, Mr. Kruger indicated that Presidents of locals for other mine sites, or their designates, [“Presidents”] had been invited to attend future bargaining sessions. He explained that the current space might be “tight” to accommodate everyone. Many of these Presidents were employees of Nutrien, a direct competitor of the Employer, and one of the Nutrien sites was represented by Unifor.

[19] Mr. Kruger could not remember whether he mentioned the Presidents by name. But how he described the Presidents was a matter of some apparent significance. According to Mr. Domres, Mr. Kruger used the word “observers”. Mr. Quesnel’s meeting notes used the word “visitors”, which he believed was the term used by the Union. Mr. Kruger admitted that it was possible that he had described them as “observers”.

[20] On June 21, Mr. Domres sent an email to Mr. Kruger requesting a phone call. On that call, which proceeded on June 22, Mr. Domres raised concerns with the presence of the competitor's employees at the parties' collective bargaining sessions. Mr. Kruger pointed out that the Union has the right to choose its own bargaining team and explained that the Presidents would maintain confidentiality over the information received during bargaining. Mr. Domres explained that the Employer would like to bargain exclusively with the Local, and felt that doing so would result in the best outcome.

[21] At the end of the conversation, Mr. Kruger said that the Presidents had already made travel arrangements and so he would need to "let them know". Although he did not follow up with Mr. Kruger after the call, Mr. Domres understood this to mean that the Presidents would not be in attendance at the next bargaining session, which was scheduled for June 25.

[22] Despite Mr. Kruger's reference to a "bargaining team", Mr. Domres remained confused by the nature of the Presidents' participation.

[23] In cross, Mr. Kruger was asked whether he told the Presidents not to attend bargaining after the phone call on June 22, to which he replied:

> *I don't advise them not to come. I'd simply alert them to the issue the Employer has raised, that they, they are opposing your presence. But it's not my position to tell them not to come. That's not for me. It's simply alerting them to an issue…Whether they come or not, it's up to them. That's not for me to control. Being invited, they can still come.*

[24] It was suggested to Mr. Kruger that he could have cancelled the invitation and he did not do that; he replied, "that's correct".

[25] On June 25, the parties met again to proceed with bargaining. The Presidents showed up at the beginning of the day. However, there were not enough chairs set up to accommodate them. The proceedings were withheld until everyone had a place to sit. When asked, Mr. Kruger could not recall which of the Presidents showed up on that day.

[26] Following initial introductions, the parties caucused. A hallway discussion ensued, including Mr. Kruger, Mr. Domres, Mr. Quesnel, and Mr. Moore ["Hallway Discussion"]. Mr. Domres and Mr. Quesnel again outlined the Employer's concerns about having competitor employees present during bargaining. The Union offered confidentiality agreements, to be signed by the Presidents, to help alleviate the Employer's concerns.

[27] Mr. Moore was left with the impression that the negotiations would end if the Union insisted on the inclusion of the Presidents at collective bargaining. Mr. Kruger said that they would reconsider the matter but would be willing to continue to meet without those individuals in the room.

[28] Later, the parties met again without the disputed individuals in the room. Mr. Domres went over a number of points, including:

a. the week prior, the Employer was taken by surprise by the prospect that the competitor's employees would be attending the bargaining sessions as observers;
b. the Employer had concerns about confidentiality and the potential chilling effect on bargaining; and
c. the Employer was "confused how the exchange of information will remain confidential if the entire potash council is present".

[29] Mr. Domres then stated:

> *The employer does not have any intentions of engaging in discussion with other potash representatives but you have given us notice that it is your intention to utilize these people during our process. We will seek advice on this practice but will still meet and hear your proposals for changes.*

[30] There was another break and then the parties reconvened at the table. Mr. Domres explained that the Employer was unsure how to proceed in light of its confidentiality concerns and would be seeking legal advice on the inclusion of observers in bargaining. He requested the Union's "position" in writing, and indicated that the Employer was prepared to bargain in the interim without observers present. Mr. Domres' notes disclosed a final point, which was not communicated at the time:

> *If they suggest keeping union presidents – we can't bargain temporarily with observers present before sorting this out because we don't have the OK to do so from our legal team. Our committee is concerned about allowing something that is legally improper.*

[31] The parties agreed to continue bargaining without observers until the issue could be resolved. According to Mr. Kruger, the labour relations climate in the Mosaic Colonsay workplace had improved markedly over the preceding years, and the Union had no interest in further delaying bargaining.

[32] According to both Mr. Moore and Mr. Kruger, one or both of the Employer representatives indicated during one of the sidebar discussions that it was not an issue for the Presidents to

remain in the caucus room. Mr. Domres denied this. Neither Mr. Moore or Mr. Kruger could recall the specifics.

[33] According to Mr. Dziadyk, after the hallway meeting he and the other Presidents left the main room for the remainder of bargaining. Going forward, the Presidents participated as committee members, but from the caucus room. Mr. Dziadyk would see the Employer representatives in the mornings as they entered the room; they would pass each other in the bathroom; and they would see each other in the buffet line, the hallways, and the elevators. Clearly, Mr. Dziadyk did not have direct conversations with the representatives of the Employer about the participation of the Local Presidents, but he relayed his experience.

[34] On June 26, 2018, the parties met again to move ahead with bargaining. Mr. Domres again requested the Union's "position" in writing, describing it as a "written submission on guest observers".

Committee Selection:

[35] Mr. Moore spoke about the committee selection. The intent of the Union was to have members represented at bargaining from different areas of the mine. At the Potash Council, there was also a "discussion" about bringing in representation from other mines. The Union's intention was to extend an open invitation to other Presidents to allow "access" to their negotiations. Because it was unclear which local would go first, the invitation would be reciprocated. Mr. Moore invited Presidents from other locals - Lanigan, Allan, Cory, Vanscoy, Esterhazy, and Rocanville – but not by letter. He may have sent some emails outlining the dates. Mr. Moore was invited to attend Lanigan's pre-session, as Lanigan was going to negotiate first. The mines had common concerns. Why not get everyone on the same page to achieve a good collective agreement for the Local?

[36] In cross, when asked who the members of the bargaining committee were, Mr. Kruger named the Local Members, as well as Mr. Dzydiak (Local 7458) or his designate, Dave Levesque (Local 7552) or his designate, Jim Lee (Local 189) or his designate, Jason Prokopchuk (Local 7689) or his designate, Shawn Wolfe (Local 922) or his designate, and Jeremy Wray (Local 7916) or his designate. Mr. Kruger viewed all of these individuals as comprising one, complete group. He was not aware of who the designates might be.

[37] Mr. Kruger has no personal knowledge about when or how any of the committee members, including the Presidents, were selected. Appointments, if there were any, would have been made by the Local.

The Quesnel-Moore Discussion:

[38] Around the end of June, there was a telephone conversation between Mr. Moore and Mr. Quesnel. In that conversation, Mr. Quesnel expressed concerns that the International Union was taking advantage of the relationship between site management and the Local. Mr. Quesnel would be the first manager to allow bargaining with a competitor's employees and this would reflect badly on him. He felt undermined. Mr. Moore indicated that the Union did not want to jeopardize the progress that had been made by site management, but that the presence of individuals in the bargaining room was the decision of the Local.

[39] According to Mr. Quesnel, Mr. Moore said that "this" was not what the Local wanted. Mr. Quesnel could not speak definitively to what Mr. Moore meant by "this", but agreed that it could have been about the "relationship" and the Union's ability to "get a good deal". In cross, Moore admitted that he may have said that the attendance of Presidents was not a decision of the Local. However, there was a broader context. There was no secret agenda. Ultimately, everyone at Potash Council had agreed to proceed in this manner. It remained the Local's decision to have the Presidents present.

Correspondence:

[40] In the meantime, a series of letters were exchanged between the parties. On June 27 or 28, 2018, Mr. Kruger sent a letter to Mr. Domres, stating:

> *This letter will confirm both of our discussions at the Mosaic Colonsay – United Steelworkers, Local 7656 Bargaining Table and our private discussions in the hallway.*
>
> *United Steelworkers, Local 7656 Bargaining Committee will include the Presidents (or designates) from the other potash mines in Saskatchewan. I have heard the Employer's concerns with sharing confidential business information with theses* [sic] *Committee members present at the Bargaining Table. In an effort to proceed with a successful round of negotiations, the Union has proposed a few measures to ease your concerns. The Union is prepared to have these members sign Confidentiality Agreements regarding the sharing of this confidential information. Second, if the confidential information is deemed too sensitive, the Employer may consult with the Union and the parties may agree to remove these members from the room during the specific discussions.*
>
> *I have reviewed with you our reliance under the Saskatchewan Employment Act to select our Committee as we choose, with no interference from the Employer. The Union does not wish to disrupt negotiations and look forward to a successful and respectful round of bargaining to reach a new agreement. We cannot however, permit the Employer to control the Union's Bargaining Committee selection process.*

> *I look forward to continuing to work with you and your Committee in reaching a new Collective Agreement that is fair and works for both parties.*

[41] The letter was marked without prejudice. The Union waived privilege at the hearing.

[42] On August 2, 2018, Mr. Domres replied to Mr. Kruger:

> *I have reviewed your letter dated June 28, 2018. Mosaic continues to have concerns with the Union's proposal to include presidents of other Saskatchewan potash unions on its bargaining committee. We too are hoping for successful and respectful bargaining sessions, but we do not believe that the presence of individuals who are neither Mosaic employees nor USW representatives in our meetings will be conducive to productive bargaining.*
>
> *You refer in your letter to the Union's bargaining committee selection process. Can you please clarify for us whether all individuals that the Union proposes to attend bargaining are duly elected or appointed members of the Union's bargaining committee? If so, we ask that you please substantiate their committee membership by providing to us: (1) excerpts from the Union's by-laws outlining bargaining committee membership and selection requirements; and (2) minutes of Union meetings approving the bargaining committee members.*
>
> *We look forward to your response. We hope that we can reach a resolution on this issue in a timely manner so as to not delay further bargaining.*

[43] On August 10, 2018, Mr. Kruger called Mr. Domres. Mr. Kruger explained that the Union's next course of action would be to file an unfair labour practice application, but that the Union wanted to carry on with bargaining in the meantime. Later that day, Mr. Kruger wrote to Mr. Domres:

> *As discussed earlier today with you, the Union has reviewed your letter of Aug 2, 2018 regarding the composition and selection process of the Union's Bargaining Committee. The Union is prepared to continue meeting with the Employer with the goal of reaching a fair collective agreement for our members. We are not however, prepared to engage in a debate or negotiation regarding the composition or selection of the Union's Bargaining Committee. These are long and well established rights protected by Law. The Union has, in good faith, tried to address and ease your stated concerns about confidentiality. The Employer has continued to resist and advised the Union that you would not meet if the members subject to your discourse were present.*
>
> *The Union can agree to continue bargaining without the members that you are opposed to and concurrently allow a third party to decide whether or not the Employer is justified in their position. The Union is prepared to simply file an Unfair Labour Practice and allow that to run its course while the parties continue to negotiate. The parties would then be bound by whatever the Labour Relations Board rules when that decision is handed down, be it this round or for future rounds of bargaining.*
>
> *Again, the Union is committed to a successful and respectful round of negotiations with this Employer, but cannot allow the Employer to interfere with our Committee in any fashion or refuse to meet with the Union due to disapproval of our Committee.*

[44] On August 17, 2018, Mr. Domres replied to Mr. Kruger:

> *Thank you for your letter dated August 10, 2018 and for the Union's agreement to resume bargaining without having representatives of other Saskatchewan potash unions present at our meetings. We look forward to continuing with bargaining during our scheduled sessions next week.*
>
> *While we respect the Union's right to seek a ruling on the issue in dispute from the Saskatchewan Labour Relations Board if it so chooses, we hope that you carefully consider whether such a process is in the best interests of the Union's members. Aside from the time and costs that both parties will incur through the hearing process, we question how much a positive outcome would actually benefit Union members. We reiterate our view that the presence of individuals in our meetings who are neither Mosaic Potash Colonsay employees nor USW Local 7656 representatives will not be conducive to productive bargaining.*
>
> *In any event, Mosaic will vigorously defend its interests should the Union decide to bring this matter before the Labour Relations Board.*

Past Practice and Confidentiality Concerns:

[45] It has not been the Union's practice to include, as regular participants in collective bargaining with this Employer, any individuals who are not members of Local 7656 (the International representative, excepted). Where such individuals have participated in collective bargaining, they have done so on an *ad hoc* basis. There is an expectation that advance notice will be provided before new individuals, outside of the bargaining committees of either of the parties, attend bargaining sessions.

[46] The Union's team typically includes the chief spokesperson (either a member of the Local or an International representative) and Local members from within the mine's operations. The Employer's bargaining team typically includes a chief spokesperson and members of Mosaic's operational teams.

[47] Mr. Domres shared what concerns the Employer had then, and continues to have now, with the presence of a competitor's employees at bargaining. The main concern was and is around the necessity in bargaining to candidly share confidential information, which in this workplace includes data on cost per tonne, cost competitiveness, provincial and global market comparisons, and proprietary matters, including the production of specialty products. The topic of contractors was also expected to come up at bargaining, as per Mr. Quesnel's testimony.

[48] The Employer was concerned not only about the existence of confidentiality obligations, but also about the practicality of enforcing those obligations and setting a precedent for future negotiations. To address the Employer's concerns, the Union offered that the disputed individuals

enter into confidentiality agreements. Despite this, no draft confidentiality agreement was presented for consideration by either the Union or the Employer.

[49] According to Mr. Domres, he never refused to bargain in the presence of the observers – he did not say those words; he only indicated that he had concerns with their attendance, being that they were employees of a direct competitor. He did not state that he would not meet with the Union if the Presidents were in the room. Nor did he dictate who could be a member of the Union's bargaining committee.

[50] Lastly, Mr. Dziadyk spoke to the past practice at Nutrien bargaining tables, and then briefly discussed his involvement in the Mosaic bargaining process on this occasion. His total direct examination was about ten minutes long. He described specific Nutrien bargaining tables at which individuals, who were not members of the local, had sat on the Union side of the table. When asked what he meant by "they were supporting", he explained:

> *…to act as a committee person with suggestions, theories, strategies, proposals, counter proposals of how to, to get a better collective agreement. So we just sort of work all together and have as much input as anyone else in the room on suggestions.*

[51] He described the role of an employee from a different site as "participating as any other member would". In cross, he acknowledged that the tables that he described were not Mosaic tables.

[52] Specific to the Mosaic table, Mr. Dziadyk described his involvement very briefly: "the involvement was to join the committee and supporting them in their bargaining process". When asked, he described what happened after the commotion on June 25:

> *…forward, uh, we were just involved, uh, myself and others, uh, to be in the side room, and not be at the, the bargaining table and participate as a, uh, committee member in the side room.*

Bargaining Dates:

[53] There were bargaining dates in June, August, October, November, and then in January, 2019. The parties achieved the ratification of a collective agreement on February 1, 2019.

Applicable Statutory Provisions:

[54] 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;

. . .

6-4*(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing. (2) No employee shall unreasonably be denied membership in a union.*

. . .

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

. . .

6-62*(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;

Analysis:

[55] As the applicant, the Union bears the onus of proof to establish the alleged breaches of clauses 6-62(1)(b) and 6-62(1)(d) of the Act. To satisfy this onus, the evidence must be sufficiently clear, convincing and cogent.

[56] To begin, it is well established that a union has a right to determine the composition of its bargaining committee. This right aligns and is supported by the principles of employee choice and independence, promoted by the existing statutory labour relations framework and by leading case

law interpreting and applying section 2(d) of the *Charter*: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3.

[57] The Board will now assess the alleged breaches, first pursuant to clause 6-62(1)(d) and then pursuant clause 6-62(1)(b) of the Act.

Clause 6-62(1)(d)

[58] As for whether the employees of another employer may be a part of the bargaining committee, clause 6-62(1)(d) is clear. It is an unfair labour practice 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.

[59] In *Marshall-Wells*, the employer discovered that two of the representatives of the union, who had been appointed to bargain collectively, were employees of a business competitor. The employer refused to bargain for this reason. The Board found that the statutory language was "direct and unambiguous" and that therefore the employer had engaged in an unfair labour practice by refusing to bargain collectively in the manner as set out:

> *Section 3 of The Trade Union Act explicitly provides that "employees shall have the right…to bargain collectively through representatives of their own choosing, and their representatives designated or selected for the purpose of bargaining collectively…shall be the exclusive representatives for the purpose of bargaining collectively." And under section 8(1)(c) it is provided as follows: "It shall be an unfair labour practice for any employer or employer's agent to: fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit."*

[60] A 4-1 majority of the Court of Appeal found that the Board was "right" in its "construction" of the relevant statutory provisions. Then Chief Justice Martin explained that conclusion:

> *16 It will be observed that the section provides that employees have the right to organize in and to form trade unions and to bargain collectively through representatives of their own choosing and it is also provided that representatives selected for the purpose of bargaining by the majority of employees in an appropriate unit shall be the exclusive representatives of all employees in the unit for the purpose of bargaining collectively. Under this section the employees are not restricted to any class in choosing their bargaining representatives; they are at liberty to choose anyone. In addition to the plain language of sec. 3 it is also made clear that no restriction is intended by the insertion in sec. 8 (1) (c) of the words "not necessarily being the employees of the employer" after the words "representatives elected or appointed." As to the contention that employees of a competing firm cannot bargain in good faith, the legislature in its wisdom has not provided that such employees are excluded and it is not the function of this court to question the wisdom of the legislature.*

[61] The dissenting voice of the Court of Appeal was McNiven, J.A., who made the following observation about the statute:

> *36 The gist of the offence is to fail to bargain collectively (negotiate in good faith) with the representatives appointed by a trade union. It was argued before us that the bracketed phrase "(not necessarily being the employees of the employer)" gave the trade union an unfettered discretion in its choice of representatives. The words "not necessarily" mean not compellably limited which merely means that an employer could not require the trade union to appoint the employer's employees exclusively to its bargaining committee. The bracketed phrase is negative and as such does not create rights, must less* [sic] *an unfettered discretion.*

[62] The judgment of the Supreme Court, delivered by the Chief Justice, was brief:

> *1 It is sufficient for the disposition of this appeal to state that, in my opinion, the Labour Relations Board did not misconstrue the relevant provisions of The Trade Union Act and, therefore, nothing is said as to any other point argued. Sub-section (1)(c) of s. (8), by which it is an unfair labour practice for any employer, or employer's agent,*
>
> > *(c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;*
>
> *is quite clear. The framework of the Act shows that it is anticipated that the representatives elected, or appointed, by a trade union need not be employees of the particular employer and the mere fact that they work for a competitor of the latter does not disqualify them from acting. While difficulties may arise if that situation exists, there is nothing in the Act prohibiting it, and there is no compulsion upon the employer to open its books to a meeting of its representatives with those of the union.*
>
> *2 The appeal should be dismissed with costs.*

[63] Then Chief Justice of the Court of Appeal, in recounting the background to the case, made an observation, at paragraph 2:

> *…that in 1954 the applicant discovered that two of the representatives of the respondent who had been appointed to bargain collectively were employees of the J. H. Ashdown Company Limited, a business competitor of the applicant, and for this reason refused to bargain collectively.*

[64] In *Marshall-Wells*, the competitor's employees were appointed to bargain collectively. The employer had refused to bargain collectively with those employees. The question before the Board was whether the employer had committed an unfair labour practice by refusing to bargain with the bargaining team, comprised of two employees of a competitor. The predominant issue was whether the employer's refusal was an unfair labour practice despite the specific statutory language: "with representatives elected or appointed (not necessarily being the employees of the employer)". Since *Marshall-Wells*, the language qualifying "representatives" as "elected or appointed" has been removed from the Act.

[65] The Employer argues that *Marshall-Wells* is not dispositive of the existing dispute for the following reasons. First, the Supreme Court plays a "reviewing role" over the decisions of the

Board but does not have "exclusive jurisdiction over labour relations or the Act". Reasonableness is the standard of review to be applied to decisions in which the Board has interpreted its home statute. *Marshall-Wells* should therefore be treated no differently than any other Board decision that has been upheld on judicial review, or any other Board decision from the 1950s. It is not binding on the Board. Second, *Marshall-Wells* provides only minimal contextual information or analysis of impact. Third, *Marshall-Wells* is an old authority incapable of capturing the significant evolution in labour relations and good faith bargaining in the intervening years.

[66] The Board will address each of these arguments in turn. First, the Employer relies for its standard of review argument on a decision of the Court of Queen's Bench from 2013.[4] It is well established that the presumptive standard of review for decisions of this Board was then, and continues to be, reasonableness. But there has been a significant evolution in the courts' approach to reviewing tribunal decisions over the past 60 years. The Supreme Court's decision in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 illustrates this evolution:

> *[35] The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227 ("CUPE"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to CUPE, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. CUPE marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.*[5]

[67] Further, both levels of court in *Marshall-Wells* made decisive interpretative statements about the provisions at that time. The 4-1 majority of the Court of Appeal found, at paragraph 14, that the Board was "right" in its "construction" of the relevant statutory provisions. Similarly, the

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[4] *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (UBCJA, Local 1985) v Saskatchewan (Labour Relations Board)*, 2013 SKQB 273, 426 Sask R 50 at para 15, relying on the reasoning of Popescul J in *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (United Brotherhood of Carpenters and Joiners of America, Local 1985) v Saskatchewan Labour Relations Board*, 2011 SKQB 380 (CanLII).

[5] As reported at 2008 SCC 9 (CanLII).

Supreme Court observed that “the Labour Relations Board did not misconstrue the relevant provisions”.

[68] Still, the Board must interpret the existing clause 6-62(1)(d) of the Act. 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.

[69] The Board notes, first, that clause 6-62(1)(d) is substantially similar to the provision considered in *Marshall-Wells*, but without the qualifiers “elected or appointed”. Furthermore, the existing language, “whether or not those representatives are the employees of the employer”, is clearer and more definitive than the previous language, “not necessarily being the employees of the employer”. If the individuals are representatives, an employer will be found to have committed an unfair labour practice if it fails or refuses to engage in collective bargaining with those representatives; if the individuals are representatives, it is irrelevant whether they are employees of the employer.

[70] Therefore, much turns on the meaning of the term “representatives”. In the ordinary sense, a “representative” stands in the place of, acts on behalf of, or “speaks for” another. In defining “representative” for purposes of clause 6-62(1)(d), the Board must be guided by the scheme and objectives of the Act, in particular Part VI. Division 2 of Part VI sets out the “Rights, Duties, Obligations and Prohibitions” of that Part. The provisions in Division 2 underscore the centrality of employee choice, good faith collective bargaining, independence from management, and the majoritarian system – principles that are central to the labour relations regime.[6] Taking these principles into account, a representative pursuant to clause 6-62(1)(d) is one that is chosen by the union that is representing the employees in a bargaining unit whether or not those representatives are the employees of the employer, to represent the union on behalf of the employees in that bargaining unit.

[71] For the following reasons, the Board is not persuaded that the Presidents were representatives of the Union representing the employees in the bargaining unit. For the Union to satisfy its onus on an allegation of a breach of clause 6-62(1)(d) of the Act, the evidence must be sufficiently clear, convincing and cogent. The Board concludes that it is not.

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[6] See, sections 6-4 through 6-8 of the Act.

[72] To begin, the Union in question is United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union. This is confirmed by the certification order and the collective bargaining agreements, which are made for the Union and on behalf of its Local No. 7656. However, as Mr. Kruger made clear, the Local makes the decision about selecting the bargaining committee in practice.

[73] Overall, the witness evidence disclosed a common recollection of the general outline of events, but a divergence in the perspectives on and impressions of the details of those events. Each of the witnesses testified about their perceptions; at the same time, each of the witnesses revealed some interest in the outcome of the proceedings. This is not unusual in proceedings before the Board. While Mr. Quesnel admitted that he took the Union's actions as an affront to his management style, he came across as relatively less entrenched and less positional, and therefore relatively neutral. Mr. Domres and Mr. Quesnel had taken detailed notes of key conversations and events, and they relied on those notes when testifying, where possible. On the many instances in which the Union witnesses were unable to recall specifics, they did not have notes to which they could turn, or upon which they could rely.

[74] The events of June 21, 2018 are telling. On that day, the Union introduced its bargaining committee, which did not include the Presidents, and then informed the Employer representatives that it had invited the Presidents to attend bargaining as observers. The terminology used to describe the Presidents was a point of contention. The notes of each of the Employer representatives describe the Presidents as observers or visitors. During the hearing and against his interest, Mr. Kruger admitted that he may have described the Presidents as observers.

[75] The parties' past practice was to provide advance notice prior to the attendance at bargaining of observers or non-committee members. Past practice did not include the regular attendance of a competitor's employees and/or members of other locals.

[76] After the June 22 call, Mr. Domres understood that the Presidents would not be attending bargaining. Given the parties' past practice, the Presidents' absence on June 21, and Mr. Kruger's statement that he would "let them know", this was a reasonable assumption. On June 25, the Employer representatives were taken by surprise at the Presidents' presence. The "mix-up", for which Mr. Kruger took responsibility, resulted in disruption and confusion. Furthermore, when asked, Mr. Kruger could not recall exactly which of the individual Presidents showed up on June 25.

[77] Based on the Union's introduction of its bargaining committee, its announcement of the invitation, and its description of the Presidents' role, it was reasonable for the Employer to conclude that the Presidents were observers to collective bargaining and not members of the Union's bargaining team. After the Employer representatives began to ask questions, the Union began to describe the Presidents as members of the bargaining committee, rather than observers, and did so more consistently with the passage of time. In line with this approach, the Union's later correspondence described the Presidents as a part of the bargaining committee.

[78] On June 21, the Union simply described the circumstances as it understood them to be. The Union had not yet developed an interest in presenting a more advantageous depiction of the makeup of its bargaining committee. However, after the Employer made its concerns known, the Union began to describe the Presidents as members of the bargaining committee. As time wore on, the parties' communications became more calculated and positional. At the hearing, when the Union's witnesses described the Presidents as "members of the bargaining committee", this description came across as a position rather than a description of the facts. In light of these circumstances, the Board prefers the description of the bargaining committee, as provided by the Union on June 21.

[79] It was understandable that the Employer had questions about the Presidents' role at bargaining. The Employer's concerns about confidentiality were genuine and were not unreasonable. The Employer may have acquiesced to the attendance of the Presidents in the caucus room, but this does not invalidate the Employer's concerns about having the Presidents at the full table, hearing the information first-hand.

[80] Mr. Moore indicated that the Local had selected members representing different areas of the mine and then issued an "open invitation" to locals to have "access" to the negotiations. As Mr. Moore's testimony discloses, the decision to invite the Presidents was made in consultation with other members of the Potash Council. Mr. Kruger's candid testimony raises questions about how much control the bargaining team had over the attendance of the Presidents:

> *I don't advise them not to come. I'd simply alert them to the issue the Employer has raised, that they, they are opposing your presence. But it's not my position to tell them not to come. That's not for me. It's simply alerting them to an issue…Whether they come or not, it's up to them. That's not for me to control. Being invited, they can still come.*

[81] This candid testimony is in contrast with Mr. Kruger's response to a "yes or no" question (in cross) about whether he could have cancelled the invitation. Mr. Moore also made a tentative

admission, that is, that he may have suggested to Mr. Quesnel that the attendance of Presidents was not a decision of the Local.

[82] Lastly, Mr. Dziadyk's evidence is of limited value. Mr. Dziadyk spoke generally to the role of non-local participants at previous Nutrien tables. His testimony about his role in the disputed Mosaic bargaining process was general, vague, and unpersuasive. Mr. Dziadyk is not a member of the Local, and based on Mr. Kruger's testimony, he would therefore not have been involved in choosing representatives; nor did he have any meetings or discussions with members of the Employer's bargaining committee about the Presidents' participation.

[83] Given the preceding facts, it is more likely that the Union gave the Presidents "access" to the negotiations, than the Union chose the Presidents as representatives of the Union representing the employees in the bargaining unit. Neither the occasional description of the Presidents as a "resource", the "broader context" suggested by Mr. Moore, or the letters sent by the Union, can erase or nullify the persuasive power of the various unprompted descriptions and events, against the Union's interest (for example, the June 21 description of the bargaining unit; the June 21 announcement describing the Presidents as observers; the non-attendance of the Presidents on June 21; Mr. Moore's admission that he may have said that the attendance of Presidents was not a decision of the Local; and Mr. Moore's extension of an "open invitation" for "access" to negotiations).

[84] In conclusion, the Union has not satisfied its onus to prove, on a balance of probabilities that the Employer breached clause 6-62(1)(d) of the Act. The evidence going to whether the Presidents were "representatives" is not clear, convincing or cogent. There was no failure or refusal to bargain with the representatives of the Union representing the employees in the bargaining unit. The parties continued to bargain through their respective bargaining committees, and without the Presidents in the room, and then ratified a collective agreement as a result.

[85] This conclusion should not be taken to mean that the Union is required to open its books to an employer to prove that individuals have been "duly appointed or elected", or to prove that a particular process was undertaken to select the Union's representatives.

[86] As a final matter, the Board distinguishes from *Pro Vita Care Management Inc. and HEU, Re*, [2017] BCWLD 200 ["*Pro Vita*"]. There, the British Columbia Board found that the employer had violated the B.C. Code by refusing to bargain in the presence of observers. The union spokesperson had explained that the union had adopted an open bargaining policy and that

certain individuals, who were Pro Vita employees from different bargaining units, were attending bargaining as observers. Pro Vita advised that it was not bound by the union's policy and that it would not permit the attendance of observers at bargaining. The union had indicated that its bargaining objective was to standardize the terms of the collective agreements, even though the parties had agreed to and had set separate dates for collective bargaining.

[87] The Board noted that collective bargaining is not a public process, but that the "private nature of collective bargaining" did not provide an adequate basis for the employer to refuse to bargain in the presence of observers, on the following facts:

> *49 Next, while I note that collective bargaining is not a public process, I must consider the facts before me. In my view, the observers in issue are not a disinterested group such that bargaining would be turned into a "'free for all', where 'all comers' are welcome, at one side's invitation", as asserted by the Employer. They are employees of Pro Vita, as well as members of the Union, albeit at different facilities and in different bargaining units. They are members of the Union bargaining committees at those facilities. The Union has provided a reason for their attendance, i.e., to observe in order to be better prepared for bargaining for their respective facilities. The four facilities are presently under a similar bargaining cycle.*[7]

[88] The Board found that the employer, by refusing to bargain in the presence of observers, imposed a precondition on the resumption or commencement of collective bargaining, which was a violation of the Act. The Board was not persuaded that Pro Vita's conduct constituted interference with the administration of a trade union. In outlining its reasons, the Board provided the following caveat:

> *47 This decision is intended to address the specific facts of the somewhat unusual circumstances at hand, and should be confined to the present situation.*

[89] The Board must always be cautious in relying on extra-provincial decisions. In *Pro Vita*, the Board found that the employer breached sections 11 and 47 of the B.C. *Code*, which are arguably broader than the governing legislation in this case. Further, the holding in *Pro Vita*, while upheld on reconsideration, was strictly restricted as follows:

> *6 While it may be a principle more generally applicable in law, we find it especially applicable in the present matter that the determination at issue in the Original Decision is "governed and qualified by the particular facts of the case": Gorenshtein v. British Columbia (Employment Standards Tribunal), 2016 BCCA 457 (B.C. C.A.), at para. 28, quoting Quinn v. Leathem, [1901] A.C. 495 (U.K. H.L.) at 506, and citing Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCCA 432 (B.C. C.A.). We do not see the determination at issue in the Original Decision speaking to broader propositions of law and policy under the Code. Rather, the determination at issue speaks in our view directly, but*

[7] 2016 CarswellBC 3138.

> *only, to the particular facts in the case, which are unique to the health care contract service provider industry and its unique certification and collective bargaining structures.*
> *…*
>
> *12 However, as noted above, the Union's conduct can also be seen as regrettably provocative, with a likely, predictably disruptive outcome, and needlessly so, given the Union's ultimate ability to communicate the information at the bargaining table in any event. As a result, we note that the presence of observers at the initial bargaining table which has in effect been allowed in the unique circumstances of these parties, must be carefully circumscribed by the Union. The observers are to have no role in the bargaining at that initial table.*[8]

[90] *Pro Vita* is an extra-provincial decision that does not bind this Board, and was strictly confined to the facts of that case.

Clause 6-62(1)(b)

[91] Next, the Board will consider the Union's allegations of a breach of clause 6-62(1)(b) of the Act.

[92] In describing the meaning of interference in internal union affairs, the Union relies on *United Food and Commercial Workers, Local 1400 v Federated Co-operatives Ltd*., [1985] May Sask Labour Rep 30 (SK LRB) at 33, citing the Canada Board in *National Association of Broadcasting Employees and Technicians v A.T.V. New Brunswick Limited*, 1979 3 CLRBR 342 at 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, collecting 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.*

[93] For its part, the Employer relies on a passage from *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Westfair Foods Ltd*., [1995] SLRBD No 35 (QL) (at 11), arguing that clause 6-62(1)(b) of the Act is breached only through certain types of actions:

> *…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 trade union as an organization, or creates obstacles which make it difficult or impossible for a trade union to carry on as an organizational entity devoted to representing employees.*

[8] [2017] BCWLD 1336, 2016 CarswellBC 3624.

[94] The Employer also relies on the Board's observations in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations,* 242 CLRBR (NS) (2d) 44 (SK LRB):

> *…The purpose of s. 11(1)(b) of The Trade Union Act is to protect trade unions from interferences such as bribery, intimidation of witnesses, or interferences in the election of officers and other officials. Section 11(1)(b) is about threats to the survival or independence of a trade union. It is not about protecting trade unions from the often unpleasant reality of collective bargaining, from all manner of conflict with employers, or from dissent within their ranks even if that dissent resulted from being influenced by the views and opinions expressed by an employer.*[9]

[95] The Union says that it is a basic principle that a union's negotiating team is chosen by the union, without interference by the employer. It relies for this principle on *Marshall-Wells*, as well as *C.A.W., Local 1967 v McDonnell Douglas Canada Ltd*., [1988] OLRB Rep 498 ["*C.A.W.*"]; *United Steelworkers of America, Local 4728 v Willock Industries Ltd.*, [1980] May Sask Labour Rep 72 ["*Willock Industries*"]; and *re Western Canadian Beef Packers Inc.*, [1998] SLRBD No 62 ["*Western Canadian Beef*"].

[96] In relation to the latter two decisions, the operating provision was section 11(1)(d) of the now repealed *The Trade Union Act*, which made it an unfair labour practice for an employer:

> *(d) to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or of employees in the appropriate unit, as the case may be, or to make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;*

[97] In *C.A.W*., the Employer had refused to recognize and deal with an individual in his capacity as President of the union because he was not one of the Employer's employees. The union took the position that the disputed individual had been duly elected by the union's members. The Ontario Board made the following observations about the relevancy of whether a representative of a union is an employee:

> *6 As a general proposition, there can be little doubt that a union is entitled to be represented by the individuals of its choice in dealing with an employer. The scheme of collective bargaining set out in the Labour Relations Act contemplates an arm's length relationship between two contracting parties independent of one another (see, for example, sections 13, 64, 65 and 67). The nature of both the employer and the union is that they are entities which can only act through individuals or agents. The selection of those individuals*

[9] As reported at 2014 CanLII 17405 at para 123.

> *must be free from interference by the other party, or the basic structure of the collective bargaining relationship may be undermined. As a result, the Board has made it clear that a refusal by an employer to recognize a union's chosen representatives on a bargaining committee may result in a finding that the employer has failed to bargain in good faith. […] In The Journal, supra, the Board also made these observations with respect to section 56 [now section 64]:*
>
> > *This section protects a union from employer interference with not only the formation, selection or administration of a trade union, but also the representation of employees by a trade union. The structure and composition of the union's bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union's bargaining team is altered, therefore, amounts to a breach of the duty to bargain in good faith - the essence of the wrong being the failure to recognize the union, as represented by its properly constituted bargaining team.*
>
> *7 Whether or not a representative of a union is an employee is also, generally speaking, irrelevant. The Board has in the past required employers to bargain with committees which include employees of competitors, employees who are not members of the bargaining unit, and employees who have been discharged […]. The National Labour Relations Board in the U.S. has taken a similar approach […]. Indeed, it is common for paid staff employees of unions who have no employment relationship with an employer to represent a union, often in conjunction with members of the bargaining unit. In the normal course of events, an employer has no more right to dictate the qualifications or identity of union representatives than the union has with respect to employer representatives.*[10]

[98] In *Willock Industries*, the employer had refused to allow the local union President, who had been terminated, to attend grievance meetings. Despite a collective agreement that provided that the union's grievance committee would be composed of regular employees of the company, the Board found that the employer was guilty of an unfair labour practice. The Board upheld the principle, pursuant to section 11(d) of *The Trade Union Act*, that the employer cannot refuse to deal with the representatives of the union and that, where there is a conflict between the collective agreement and the Act, the provisions of the Act prevail.

[99] In *Western Canadian Beef*, the employer had refused to negotiate with the union's representative, an international staff representative, for the settlement of grievances. In the hearing, the staff representative testified that, as a part of his duties, he acted as a representative of the union assisting with the processing of grievances. The employer argued that it had refused to meet with a specific individual, not the union as a whole. According to the employer representative, the main issue was that there had been deterioration in the relationship, that both individuals were "hot tempered", and the employer representative felt that nothing would be gained in their meeting.

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[10] 1988 CarswellOnt 1183.

[100] In finding that the employer had committed an unfair labour practice, the Board made the following comments:

> *36 While we do not ascribe any finding of bad faith on the part of the Employer in Mr. Third's refusal to meet with Mr. Meinema, the ramifications of that failure may be subtle but serious: in preventing Mr. Meinema from carrying out the duties of his position the result may be an undermining of the authority of the Union and of the status of Mr. Meinema in the eyes of employees.*
>
> *37 We are of the opinion that Mr. Third, acting on behalf of the Employer, was in violation of s. 11(1)(d) of the Act in refusing to meet with the Union's grievance committee including Mr. Meinema, a duly appointed representative of the Union. It is no answer for the Employer to say that the formal steps of the grievance procedure in the collective agreement had been duly fulfilled and that it was seeking to engage in a more informal discussion process rather than to re-open the final step of the grievance procedure. Having made the overture to the Union in indicating that the Employer wanted to discuss the grievances further, and having obtained the response of the Union that it was agreeable to doing so, the Employer could not then seek to dictate who the Union's representatives in that discussion would be.*
>
> *38 This is not to say that a party can unreasonably insist upon meetings and discussions for an illegitimate purpose under the guise of negotiating for settlement of grievances, but this was certainly not the situation in the present case. The Union in this case had every right to accept the Employer's offer of further negotiation free of any condition as to who its representatives could or could not be.*

[101] Again, the Board in *Western Canadian Beef* made clear that the disputed President was a duly appointed representative of the union.

[102] *C.A.W*. demonstrates that where an employer refuses to bargain until the bargaining committee is changed it may be found to have interfered with the administration of the union. Furthermore, *C.A.W*., *Willock Industries*, and *Western Canadian Beef* confirm that a representative need not be an employee to ground an unfair labour practice. However, the representativeness, as per the governing statutory provisions, of the disputed individuals was otherwise not in question.

[103] The Employer also distinguishes from *St. Paul's Roman Catholic Separate School Division #20 (Re)*, [1995] SLRBD No 26 ["*St. Paul's School Division*"] and *C.U.P.E., Local 3078 v Wadena School Division No. 46*, [2016] SLRBD No 16 ["*Wadena School Division*"].

[104] In *St. Paul's*, the Board found that "direct attempts to influence the choice of trade union leadership does…fall into the category of conduct prohibited by Section 11(1)(b)" of *The Trade Union Act*,[11] and that "it is sufficient for the Union to establish that an employer has taken action

[11] At para 79.

which constitutes interference, whether or not it has any demonstrable effect".[12] In *St. Paul's*, the employer had suggested to individuals that they should withdraw from positions on the union executive, and then ignored or sidelined a representative that had been duly chosen by employees to act on their behalf.

[105] In *Wadena School Division*, the employer insisted on an amnesty clause to the point of impasse in bargaining, and took the position that it had to be resolved as a part of a package. The Board found that the employer's actions had amounted to an attempt to interfere with the union members' "right to utilize provisions of the Union's constitution".[13] The Board went on to say, "[t]o 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."[14]

[106] The question here is whether the Employer interfered with the administration of the Union. Clause 6-62(1)(b) governs conduct that threatens the integrity of the Union as an organization, or creates obstacles that make it difficult or impossible to carry on as an organization devoted to representing employees.[15] It is not intended to deal with all types of conflict between parties. Albeit, the Employer repeatedly asked for information about the selection of the Union's bargaining committee. The details of the selection process were not the Employer's concern.

[107] However, the Employer's actions in requesting information, in this specific case, did not constitute interference with the administration of a union. It did not threaten the integrity of the union as an organization. It did not interfere with the members' ability to rely on their own union constitution. It did not interfere with the Union's selection of its representatives. The Employer asked for information about the selection process for representatives of the Union. There was no failure or refusal to bargain with the representatives of the Union representing the employees in the bargaining unit. There was no attempt to influence the composition of the existing bargaining committee.

[108] In conclusion, the Union's Application, pursuant to clauses 6-62(1)(b) and 6-62(1)(d) of the Act, is dismissed.

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[12] At para 80.
[13] 2004 CarswellSask 759 at para 48.
[14] *Ibid* at para 49.
[15] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Canada Safeway Limited*, [1995] SLRBD No 50.

[109] The Board is grateful to the parties for their helpful evidence and written submissions, all of which have been reviewed in the course of the Board's deliberations.

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

DATED at White City, Saskatchewan, this **23rd** day of **April, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson