Saskatchewan
Labour Relations Board

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

LRB File No. 230-18; August 15, 2022

Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Laura Sommervill

Counsel for the Applicant, Saskatoon Co-operative Association Limited:	Kevin C. Wilson, Q.C. and Shane Buchanan
Counsel for the Respondent, United Food and Commercial Workers, Local 1400:	Crystal L. Norbeck, Q.C. and Samuel Schonhoffer
The Respondent, Craig Thebaud:	Self-Represented

Unfair Labour Practice Application – Sections 6-7, 6-63(1)(c), 6-41, and 6-63(1)(h) of *The Saskatchewan Employment Act* – Allegation that Respondents engaged in Bad Faith Bargaining and Violated Duties under Collective Agreement.

Conduct Away from the Bargaining Table – Strike – Third Party Actors – Petition to Call Special Meeting – Objective to Remove and Replace Board of Directors – Seeking to Change Employer's Bargaining Position – Election of Board of Directors at AGM – Endorsing Candidates Supporting Union's Bargaining Position.

No Mirror Duty of Internal Interference – In Collective Bargaining Union and Employer Separate Legal Entities – Duty to Bargain in Good Faith – Course of Conduct Designed to Replace Directors – Circumventing Collective Bargaining Process.

Breach of Sections 6-7 and 6-63(1)(c) – No breach of Sections 6-41 or 6-63(1)(h) – Argued Duties and Prohibitions Not Applicable – Requisite Intention Not Established.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On November 8, 2018, the Employer, Saskatoon Co-operative Association Limited, filed an unfair labour practice application against the Union, United Food and Commercial Workers, Local 1400 and an individual, Craig Thebaud.

[2] Saskatoon Co-op is a co-operative that is organized and operated pursuant to *The Co-operatives Act, 1996*, c C-37.3 [*The Co-op Act*]. A Board of Directors exercises the powers of the co-operative through the employees and agents of the co-operative and directs the management of the business and affairs of the co-operative, pursuant to section 72 of *The Co-op Act*.

[3] Saskatoon Co-op runs a retail business at multiple locations in and around Saskatoon, Saskatchewan. The Union is certified to represent an all-employee bargaining unit of the employees of the Employer.

[4] Mr. Thebaud is a former employee of both the Employer and the Union. He is also a vocal critic of the Saskatoon Co-op management and an activist.

[5] The dispute relates to the renewal negotiations for the collective agreement which had expired on November 19, 2016. Renewal bargaining began in 2017. In or around August 2017, the Union declared an impasse and the matter came before this Board. On January 8, 2018, the Board decided that the Union's declaration of an impasse was an unfair labour practice and ordered the Union to return to the bargaining table: *Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400*, 2018 CanLII 1733 (SK LRB). Overall, bargaining was prolonged. By the end of October 2018, an agreement had still not been reached.

[6] Central to the renewal negotiations, and to the parties' disagreement, was the two-tier wage schedule proposed by the Employer, which would adversely affect the wages of new employees.

[7] The Union served the Employer with strike notice on October 29, 2018. On November 1, 2018, the Union and its members went out on a strike that lasted over five months. In April 2019, the parties concluded a renewal agreement that included a two-tier wage schedule with a bridge, presumably to benefit those employees subject to the lower wages. The renewed agreement disclosed a softening of the parties' respective positions with respect to the second tier over time.

[8] During the labour dispute, there was significant opposition to the two-tier wage schedule and other management tactics. A movement was formed with the goals of overturning the Board of Directors and redefining the corporate policy. The movement focused, first, on forcing a special meeting to overturn the Board of Directors and then on electing progressive candidates at the annual general meeting [AGM], which was held in June 2019. Just prior to the AGM, on June 11, 2019, the Employer filed an amended application including particulars about events which had ostensibly taken place in the months since November 2018.

[9] It may provide clarity to these Reasons to point out that there are two sets of "members" engaged in this application: the members of the Union [Union members] who are employees of the Employer, Saskatoon Co-op, and the members of Saskatoon Co-op [Co-op members].

[10] *The Co-op Act* provides the Co-op members with certain rights, including the right to notice of annual and special meetings, the right to vote at meeting, and the right to remove any director from office by a resolution and vote. Section 104 also provides that directors shall call a special meeting on receipt of a written request from a minimum number or percentage of the membership.

[11] In this application, the Employer says that the respondents cooperated to organize a petition of Saskatoon Co-op members to call for a special meeting and remove and replace the Board of Directors of Saskatoon Co-op. The express stated goal of the petition was to change the Employer's bargaining position with respect to the two-tier wage schedule. The respondents' attempts to manipulate the election were an attempt to undermine the Employer's governance structure and interfere with collective bargaining. The Employer alleges that the respondents' actions amount to bad faith bargaining and contravene sections 6-7, 6-63(1)(c), 6-41, and 6-63(1)(h) of *The Saskatchewan Employment Act* [Act].

[12] In its Reply, the Union says that Mr. Thebaud's employment relationship with the Union ended in or around 2016, and that Mr. Thebaud was, and is, in no way acting as an agent of the Union. After that relationship ended, the Union had no further relationship with Mr. Thebaud. The Union denies that it organized or sanctioned the Petition. While it referenced the Petition on its website, it did not expressly support, promote, or otherwise endorse the Petition.

[13] In his reply, Mr. Thebaud says that members of Saskatoon Co-op have complete control of the governance of the Co-op, and are the exclusive, equal shareholders. Members govern the Co-op by passing resolutions at general meetings and choosing a Board of Directors. He admits that he organized a petition to call for a special meeting for the purpose of removing the current Board of Directors. He denies, however, that the petition contained an "express stated goal…to change the Saskatoon Co-op's bargaining position". He asserts that he has held no affiliation with the Union since leaving its employment in January 2017.

[14] The main issues for determination are whether the respondents have contravened sections 6-7, 6-63(1)(c), 6-41, or 6-63(1)(h) of the Act.

Evidence:

[15] The evidence included testimony from three witnesses for the Employer: Daniel Burke, Lawrence Hartwig, and George Janson; and two witnesses for the Union: Norm Neault and Lucia Flack Figueiredo. Mr. Thebault testified on his own behalf.

[16] During the labour dispute, Mr. Burke was the Controller for the Employer and, as of February 1, 2019, was the Director of Finance. Mr. Hartwig and Mr. Janson were employed by a private security firm that was providing security for the Employer during the labour dispute.

[17] Mr. Neault was the President and Ms. Figueiredo was the Secretary-Treasurer of the Union. Ms. Figueiredo has since been elected President. Mr. Thebaud worked for the Employer from 2003 until 2010. He was on the executive of the Union from 2008 to 2010. He also worked for the Union on and off from 2009 until January 2017.

[18] The Board of Directors consists of nine directors, three of whom are elected on three-year staggered terms. Mr. Burke explained that the Board of Directors has significant influence over the CEO. Directors are elected at an AGM or by way of a special meeting called by the membership pursuant to *The Co-op Act*.

[19] Mr. Neault has been a Co-op member for at least 40 years. He would guess that employees of the Co-op were also members, given the loyalty program and discount associated with membership.

[20] The Union has, for as long as Mr. Neault has been around, discussed candidates for the Board of Directors, including at the stewards' meetings held prior to the AGM. The Union has a history of supporting candidates, including in 2018, in 2019, and since then. As far as Mr. Neault is aware, the Co-op has not objected, other than to come to an understanding that neither the Union nor management would run candidates. Saskatoon Co-op employees have run for the Board of Directors in the past.

[21] Mr. Thebaud is also a Co-op member. He did not leave his employment with the Union on good terms. There is no evidence that he had an ongoing relationship with Ms. Figuieredo or Mr. Neault after his departure.

[22] Mr. Thebaud did, however, have an ongoing interest in Saskatoon Co-op. As such, he had been following the news about bargaining and the labour dispute. He was concerned about the two-tier wage schedule and decided to do something about it. He did some research. He came

across a court decision that he interpreted to mean that, although the Co-op members did not have direct power over the co-operative's operations they did have power to remove the Board of Directors. To accomplish this goal, he designed a petition that was to be signed by Co-op members.

[23] In designing the petition, Mr. Thebaud attempted to comply with section 104 of *The Co-op Act*, which requires the directors to call a special meeting of the members on receipt of a written request specifying the purpose of the meeting from a specified number of members or percentage of the membership. The preamble to the petition stated:

> *Request to Call A Special Meeting Of The Saskatoon Co-operative Association Limited*
>
> *We the undersigned members of the Saskatoon Co-operative Association Limited formally request a special meeting of the Saskatoon Co-operative Association Limited as per Section 104 of The Co-operatives Act of Saskatchewan. For the purpose of:*
>
> *Removing the current board of directors from office through the following motion: "That all of the current directors be removed from their positions as directors for the Saskatoon Co-operative Association Limited."; and*
>
> *Replacing all vacancies on the Board of Directors.*

[24] On October 30, 2018, Mr. Thebaud sent a text message to Mr. Neault describing his plan and stating,

> *As I am very disappointed in my saskatoon coop board of directors, I want to remove them from office. I can do that [with] a motion that receives 2/3 at a general meeting. I was going to start a petition to have a special meeting (needs 300 signatures). I don't however want to do something that's going to F* up the picket line or whatever. Do you see an issue with that?*

[25] He testified that the Union had, in the past, not taken well to surprises, even if the surprises were to their benefit. He also explained that the Union did not trust him. He wanted to ensure that the Union wasn't opposing the petition. Mr. Neault replied, "Non whatsoever. Thanks Craig."

[26] Mr. Thebaud called Mr. Neault shortly after to notify him that some people would be coming to the picket line to gather signatures. It was protocol to notify the Union in advance of showing up on the line.

[27] At 3:48 pm on November 2, Mr. Thebault sent the petition as an email attachment to Mr. Neault, explaining, "It was not leaving my outbox in outlook so I am trying to send it again." About a half hour later, the Union shared to its Facebook page a post by Mr. Thebaud providing a link

to the petition. Ms. Figueiredo was provided the petition by Mr. Neault. She placed it on the front counter at the Union office in Saskatoon. She thought it was a good idea.

[28] Mr. Thebaud also formed a Facebook group called the Saskatoon Co-op Members for the Fair Treatment of Employees group [Petition Group]. The group explicitly sought to change the Employer's bargaining position with respect to the two-tier wage schedule, and requested a special meeting be called for the purpose of removing and replacing the Board of Directors. Another petition was launched around the same time calling for a special meeting to discuss labour relations issues. The organizer was James Mills, the spouse of a Saskatoon Co-op staff member.

[29] Many of the picketers were following the Petition Group on Facebook. Members of the Petition Group attended the picket line to obtain signatures. Jennifer Bowes was one of the administrators of the Petition Group and was assisting in gathering signatures for the petition. On Facebook, she was also directing potential signatories to the picket captains on the picket lines. The Petition Group informed its members that they could pick up signs to show their support for the Union.

[30] Mr. Thebaud's petition, containing the signatures of 474 persons, was submitted to the Board of Directors on November 16, 2018. Mr. Thebaud blind copied the Union on a press release. At a meeting of the Board of Directors held on November 26, 2018, the Board passed a resolution declining to call the requested special meeting. The Board suggested that the petition failed to meet key requirements governing requests for a special meeting.

[31] On November 20, 2018, Mr. Thebaud gave an interview with the radio personality, John Gormley, about the petition. In the interview, Mr. Thebaud explained that he had initiated the petition to protect his equity interest in the Co-op and to ensure that the Co-op was "treating its workers with the kind of values that I expected the Co-op to treat their workers with." He explained that he viewed the Co-op's bargaining position as a betrayal.

[32] The Board of Directors' refusal to hold the special meeting was the subject of an application to the Court of Queen's Bench, brought by Mr. Thebaud. Some of the picketers attended the court proceedings. Ms. Figueiredo was aware and was okay with picketers being in attendance.

[33] In *Thebaud v Saskatoon Co-operative Association Limited Board of Directors*, 2019 SKQB 14 (CanLII), the Court dismissed Mr. Thebaud's application. The Court concluded that Mr.

Thebaud's motives were to force his own objectives on the Board of Directors to the detriment of the members of Saskatoon Co-op. The Court reviewed the purpose of *The Co-op Act* and found at paragraph 18 that, "if the application to remove the Board of Directors and replace them is therefore motivated for the benefit of future employees rather than for its members, the application could be said to be for an improper motive."

[34] Throughout 2019, there was a series of Town Hall meetings held every few weeks, organized at first by Mr. Mills and then by Jason Hicks (the spouse of a later candidate for the election to the Co-op Board of Directors), and then attributed mainly to an organization called the Co-op Members for Fairness [Election Group]. Mr. Hicks was the spokesperson for the group. In an advertisement for the 2019 AGM, the group described itself as follows:

> *We are Co-op members who:*
> - *support Co-op's workers who were on strike simply to preserve good conditions of employment at Co-op.*
> - *oppose the board's abdication of governance of Co-op to FCL. We insist that they intervene to end Co-op management's assault on wages via the proposed "two-tier" wage structure, today and forever.*
> - *support bringing true member democracy to Co-op, where members vote on policy, the board follows the policy, and management implements the policy.*
> - *support resolutions and other initiatives to reverse the slide of Co-op into a corporate, rather than co-operative model.*

[35] The inaugural meeting was held on February 20, 2019 at the Rusty MacDonald Library in Saskatoon. Mr. Mills was the chair of the meeting. He had rented the facility to discuss his plan to inundate the AGM with resolutions.

[36] In attendance at the meeting were four members of the Union's negotiating committee. At least three of them spoke, mostly about bargaining and the strike. There was discussion about taking control of the Board of Directors. The bargaining committee members were involved in this discussion.

[37] Mr. Thebaud testified that there were various community members present at the meeting with differing reasons for being disgruntled with the Employer. There was a desire to change the composition of the Board of Directors but to do that, it would be necessary to overcome the challenge of the "management slate".

[38] Mr. Mills' plan didn't receive universal support, and the "hat was passed" to compensate him for the facility rental. At the end of the meeting, Mr. Mills observed that his meeting had been hijacked.

[39] Also in February, windshield flyers supporting the labour dispute were distributed, displaying the Union logo and calling on Co-op members to attend the AGM to "[h]elp elect new Board members who are true believers in fairness, community values and hard-working families", and calling on non-members to join for a $10 rebate on the initiation fee.

[40] At the beginning of March, a second Facebook page was set up by the Election Group. Rob Butz was the lead for the page.

[41] On March 7, a Town Hall meeting was held at the Food Bank. The meeting was presented as an evening to "discuss and amend presented resolutions, discuss strategy and hear a presentation from the [Petition Group] on their ongoing legal challenge". Six overarching and two additional, targeted resolutions were approved. One of the resolutions, under the heading "Respect and Support for Workers", stated:

> *That the Saskatoon Co-op Membership directs the elected co-op board of directors to adopt the principles of respect, fairness, and equality in all its bargaining negotiations and resulting agreements removing the "two tier wages" from any current or future bargaining processes and contracts.*

[42] On March 20, a Town Hall meeting was held at Station 20 West, for the apparent purpose of discussing the upcoming elections, and to be specific, "our plans to locate candidates to run for the Co-op board who champion the resolutions we developed as a group at the last Town Hall." Mr. Thebaud provided an update on his legal action. A subcommittee was formed to adapt the resolutions and present them at the AGM. Included on the subcommittee were Mr. Butz and Mr. Hicks, but not Mr. Thebaud.

[43] Also in March and April, the Election Group promoted solidarity pickets with the striking workers and lawn signs in support of the strike.

[44] On April 2, Ms. Figueiredo participated, along with Ashlee and Jason Hicks, on a CFCR radio show called Civically Speaking. Ms. Figueiredo was invited to speak about bargaining. Ms. Hicks was an employee of the Saskatoon Co-op. The topics of conversation included the negotiations, the strike and pickets, the AGM, the Town Halls, and community support for the striking workers.

[45] In and around April 16, the parties concluded the renewed collective agreement and ended the strike. On April 17, the Election Group posted an article about the end of the strike (including an image credit from the Union), stating:

> *But one answer that is clear to us as Co-op Members for Fairness already is that there is an urgent need to replace the Board of Directors with fresh voices. The lower pay-scale for new Co-op staff should never have been introduced, and as far as we are concerned, Co-op management had no mandate to pressure valued workers (who serve us as members and customers) into concessions, via stonewalling their concerns and demands about a wage rollback for months.*

[46] On April 17, via Facebook, the Petition Group invited Co-op members to the upcoming Town Hall meeting to:

> *VOTE for Board candidates who will commit to upholding Co-operative principles and eliminating the shameful second tier that new workers will now be subjected to[.]*

[47] On April 18, the Union hosted a BBQ for members and supporters, advertised by the Election Group as "a Thank-you BBQ for those who showed support during their recent strike and a rally to thank all who walked the picket line". The BBQ took place prior to the Town Hall on April 18 at Station 20 West.

[48] On May 13, the group hosted another Town Hall meeting for a vote to determine who would be endorsed as candidates for election at the upcoming AGM. Further to that meeting, the group endorsed Dan Danielson, Erika Ritchie and Ms. Hicks, with two alternate candidates, being Carroll Chubb and Vanessa Amy. On a later date, Mr. Danielson was swapped out for Ms. Chubb.

[49] On May 21, the Petition Group posted on Facebook that it would be amalgamating with the Election Group and announced that the merged Facebook page would be the Election Group's page:

> *Co-op Members for Fairness share our points of unity respect for workers and their representative organizations replacement of the Saskatoon Co-op Board with Co-op Members who feel that FCL (Co-op's Management) must answer to the Board, not the other way around.*

[50] The Union endorsed the candidates chosen by the Election Group.

[51] In addition to some detailed information describing her interest in the co-op movement and support for co-operative values, Ms. Chubb's candidate profile raises concerns with the two-tier wage system as violating the co-operative value of equality, and states: "Perhaps by next year, a sufficient number of Members of the Board would support reopening negotiations with the Union for the purpose of returning to a one-tier wage structure."

[52] Ms. Hicks's candidate profile indicates opposition to the two-tier wage structure, and outlines why, from her perspective, the two-tier wage structure does not align with co-operative values. Ms. Hicks later became an employee of the Union.

[53] The AGM was held on June 20, 2019 at TCU Place in Saskatoon. Prior to the AGM, the Union held a meeting at the same location. The candidates were invited to present on their platforms.

[54] The AGM was very well attended – significantly more so than usual. There was lively discussion. Among others, Lily Olson, a National Representative for UFCW, spoke. She criticized the Employer's position on the second tier.

[55] There were 15 candidates running for the three available seats on the board. They made speeches. Ms. Chubb stated that the "current board in my opinion made a mistake in a two tier wage structure. I think a two tier wage structure does not conform to Co-operative values". In his speech, Mr. Danielson referred to the pre-determined Federated Co-operatives [FCL] and Union "slates", observing that members "tell me they prefer a candidate not bound by any special interest group". He also spoke about taking back control of the Co-op.

[56] Two new directors were elected to the Board of Directors: Ms. Ritchie and Ms. Chubb. Ms. Hicks came in fifth in the ballot results. One existing director was re-elected.

[57] The AGMs that took place in 2020 and 2021 were held on a virtual platform.

[58] Mr. Burke testified about the Employer's practice of making candidate recommendations, through senior management, to other managers within the company. The recommendations were for candidates who demonstrated alignment with the Co-op's long-term interests. Managers were encouraged to attend the AGM.

[59] At the AGMs, there were generally two groups of voters divided roughly along the lines of, first, out-of-scope staff and, second, in-scope staff with Union friendly people. There was also a third neutral group.

[60] In June 2020, Ms. Figueiredo attended a Town Hall focusing on the Co-op Refinery lockout. Ms. Figueiredo testified that she and Mr. Neault attended the meeting to ensure that no one was going to boycott the Saskatoon Co-op stores.

[61] After the AGM, the two Facebook pages were merged.

Statutory Provisions:

[62] The following provisions of *The Saskatchewan Employment Act* are applicable to this matter:

> ***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.*
>
> ***6-41****(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.*
>
> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> > *…*
> > *(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;*
> > *…*
> > *(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.*
>
> ***6-104*** *(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

> *(a) requiring an employer or a union representing the majority of employees in a bargaining unit to engage in collective bargaining;*
>
> *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
>
> *(c) requiring any person to do any of the following:*
>
> > *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
> >
> > *(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;*

[63] The Union has also raised the following provisions of the *Canadian Charter of Rights and Freedoms*[1] [*Charter*] and *The Saskatchewan Human Rights Code*[2]*:*

> *The Charter*:
>
> ***2*** *Everyone has the following fundamental freedoms:*
>
> > *(a) freedom of conscience and religion;*
> >
> > *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
> >
> > *(c) freedom of peaceful assembly; and*
> >
> > *(d) freedom of association.*
>
> *The Saskatchewan Human Rights Code*:
>
> > ***5*** *Every person and every class of persons has the right to freedom of expression through all means of communication, including the arts, speech, the press or radio, television or any other broadcasting device.*
> >
> > ***6*** *Every person and every class of persons has the right to peaceable assembly with others and to form with others associations of any character under the law.*

Arguments:

Saskatoon Co-op:

[64] The respondents have attempted to undermine the collective bargaining process, using two methods, namely, the use of the petition and the interference with the election. The

[1] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[2] 2018, SS 2018, c S-24.2.

respondents have attempted a takeover of the Board of Directors to achieve their goal of eliminating the proposed two-tier wage schedule, and to achieve indirectly what they could not achieve directly through the collective bargaining process. Both schemes are bad faith bargaining.

[65] The actions of the respondents are an example of what has come to be known as "astroturfing". Astroturfing is organized activity that is intended to create a false impression of a grassroots movement.

[66] In considering clause 6-63(1)(c) of the Act, the Employer acknowledges that the provision has not been subject to much consideration by this Board and asks the Board to rely on the analysis used in relation to clause 6-62(1)(d) of the Act. The Employer refers to *C.A.S.A.W., Local 4 v Royal Oak Mines Inc.*, [1996] 1 SCR 369 (SCC) [*Royal Oak*], in which it was explained that the duty to bargain in good faith requires a commitment "from each side to honestly strive to find a middle ground between their opposing interests."

[67] The Union had a duty to bargain. Even after the collective agreement was concluded, the respondents continued to seek to overthrow the Board of Directors with the express goal of re-opening the agreement and removing the second tier.

[68] Although there is no specific prohibition against a union's interference with the internal affairs of an employer, it is implicit. The absence of a specific statutory provision should not be interpreted to mean that the Legislature intended to permit union interference with employer governance structures. The unique circumstances in this case, in which the members are statutorily permitted to directly influence the governance structure of the co-operative, introduces an uncommon coercive power. For the Act to be coherent, there must be an implied prohibition on a union interfering with employer governance structures for the purpose of collective bargaining.

[69] The purpose of clause 6-62(1)(b) of the Act is to ensure that an employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length. Allowing a union to interfere with the governance structure of an employer during collective bargaining, while prohibiting an employer from doing the reverse, would introduce an absurd double standard into the Act. Similarly, the definition of a strike contained in clause 6-1(1)(n) of the Act should not be interpreted so as to include attempts to undermine an employer's governance structure.

[70] Finally, the respondents' actions demonstrate that the Union refuses to be bound by a collective agreement and seeks to improperly renege on its terms, in contravention of sections 6-41 and 6-63(1)(h) of the Act.

[71] Mr. Thebaud acted as an agent of the Union in organizing the petition. The Board has previously acknowledged that individuals can be found to be agents of a union: *Amenity Health Care L.P. v Workers United Canada Council, Tanya Parkman and Gwen April Britton*, 2018 CanLII 68441 (SK LRB) [*Amenity Health Care*], at paragraph 121.

[72] To find that Mr. Thebaud was acting as an agent of the Union, the Board should adopt the reasoning used in decertification applications. In those applications, the Board considers whether there is evidence from which it can draw an inference that the employer was involved in the making of the application. Any unusual or suspicious circumstances invite a close examination.

[73] Even if Mr. Thebaud was not acting on behalf of the Union, it remains the case that Mr. Thebaud has committed an unfair labour practice pursuant to subsection 6-63(1) of the Act.

[74] The Employer submits that, although it is entitled to significant remedies against the respondents, it is waiving any right to monetary loss. It is instead seeking the following remedies:

- A declaration that the respondents have engaged in an unfair labour practice;
- An order that the respondents cease and refrain from coordinating with third party organizations, directly or indirectly, to subvert collective bargaining and/or interfere with Saskatoon Co-op's governance structure;
- An order that the Union distribute a copy of the Board's decision to every Saskatoon Co-op employee represented by the Union; and
- Such further and other relief as the Board may determine appropriate.

Union:

[75] The Union says that the Employer's factual allegations are simply false, as follows:

- The Union did not organize and was not in control of the petition;
- The Union did not organize and was not in control of Mr. Thebaud;
- The Union did not organize and was not in control of the Election Group;
- The Union did not organize and was not in control of the Resolutions;
- The Union did not organize and was not in control of the director candidates.

[76] Neither Mr. Thebaud nor the Election Group members were agents of the Union. Any alignment of interest was nothing more than that – an alignment of interest.

[77] There was no plan to overtake the governance of the Co-op or to unwind the collective agreement.

[78] The Union objects in the strongest possible terms to the theory adopted by the Employer. It is overreaching, seeking as it does to transform the duty to bargain in good faith into a trojan guarantor of the Employer's bargaining positions, and trampling on the Union's well-established constitutional, statutory, and common law rights to advance its positions in collective bargaining and to participate in picketing activities.

[79] The current application should be situated within its context, which includes a broader community movement through which concerns have been raised about the application of co-operative values and about the relationship between FCL and the organization of local co-operatives. There is a perceived democratic deficit in Saskatoon Co-op's governance.

[80] The Union has a history of participating in Saskatoon Co-op politics, which includes supporting directors with whom the Union has confidence. It is a longstanding practice of the Union to hold a stewards' meeting immediately prior to the AGM to discuss and possibly endorse director candidates. Management of the Co-op engages in a mirror image practice by selecting directors who are understood to be "friendlies" and encouraging employees to attend the AGM and vote for those candidates.

[81] The Union went on strike because of its opposition to the two-tier wage proposal, and as part of its efforts during the strike, it voiced its opposition to that proposal. The Union sought to exert influence on the Employer and the public in support of its position. The Union's position with respect to the two-tier wage structure was not a secret. The Employer is now asking the Board to restrain the Union from resisting (or having resisted) its bargaining proposal. The Union did not arrange or organize Mr. Thebaud's activities, but it was permissible for it to support, organize or agree with a campaign that put pressure on the Employer in relation to the very issue that lay at the heart of the strike.

[82] The Union asserts that its conduct is protected, not only as part of the right to strike, but more broadly within the framework of expressive and associational rights. For this assertion, the Union relies on *Pepsi-Cola Canada Beverages (West) Ltd. v R.W.D.S.U., Local 558*, 2002 SCC

8 [*Pepsi*]; *U.F.C.W., Local 1518, v KMart Canada Ltd.*, 1999 CanLII 650 (SCC), [1999] 2 SCR 1083 [*KMart*]; and *UFCW, Local 401 v Alberta (Information and Privacy Commissioner)*, 2013 SCC 62 [*Alberta IPC*]. The Board should apply the *Charter* values test in *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 SCR 395 [*Doré*]. The Union also relies on sections 5 and 6 of *The Saskatchewan Human Rights Code* which provide for a right to free expression and a right to peaceable assembly and to free association, respectively.

[83] The Employer's allegations seek to restrain the Union's picketing activities and to restrain activities that are closely analogous to picketing activities, such as the dissemination and support for a message related to the labour dispute; the public expression of opposition to the two-tier wage structure; the attendance at public meetings; and, the association with members of the public who were involved in Saskatoon Co-op politics, including some with interests that were in alignment with the Union.

[84] The Union has done nothing that should be found to be a violation of its duty to bargain in good faith. The Employer is not claiming that the Union undermined bargaining efforts or did anything less than try to conclude an agreement. The Employer is attempting to shoehorn the facts into a category of violation that does not exist at law. It is not an unfair labour practice for a union to attempt to elicit public sympathy for its positions through pickets and dissemination of union literature. The Employer's application is equivalent to a complaint about the Union's opposition to its bargaining position.

[85] A union is not restricted in its actions in the same manner as is an employer. This not an accident but is directly related to the history and purpose of the collective bargaining regime. The Act does not prohibit the type of "conduct away from the bargaining table" at issue in this case. The unfair labour practice that is established through a failure or refusal to bargain in good faith stands on its own; it is not an alternate vessel for a non-existent interference prohibition. The Employer seeks to use this application to expand the duty to bargain in good faith beyond what it was intended to cover.

[86] Even if the direct bargaining cases are superficially similar to the facts as alleged in this case, they are not substantially the same. The prohibition on employers against direct bargaining with employees does not have an equivalent for unions.

[87] Finally, the Board ought not "take jurisdiction" over what is essentially a dispute among the stakeholders of a co-operative. Sections 188, 189, and 190 of *The Co-op Act* set out the

derivative action and oppression remedies available in the event of a finding of impropriety by the directors. The Court of Queen's Bench has jurisdiction over matters arising from *The Co-op Act*, including by supervising the administration of petitions, elections, and the conduct of meetings.

Mr. Thebaud:

[88] Mr. Thebaud's argument is succinct. He relies on *Saskatoon Co-Operative Association Limited v Craig Thebaud*, 2020 CanLII 35487 (SK LRB) [*Thebaud Summary Dismissal*] for its consideration of the application of the unfair labour practice provisions to individuals. He also relies on the wording of the statutory provisions that have been put in issue.

[89] First, section 6-7 of the Act states that every union and every employer shall engage in good faith collective bargaining. There is no evidence that Mr. Thebaud is a union or an employer. Therefore, he cannot be found to have committed a violation of this provision.

[90] Second, section 6-41 states that a collective agreement is binding on a union, employees of an employer, and an employer. A person bound by a collective agreement must do everything the person is required to do and must refrain from doing anything the person is required to refrain from doing. There is no evidence that Mr. Thebaud is a union, employee, or an employer. Therefore, Mr. Thebaud cannot be found to have breached this section of the Act.

[91] Third, clause 6-63(1)(c) states that it is an unfair labour practice to fail or refuse to engage in collective bargaining with an employer respecting employees in a bargaining unit if a certification order has been issued for that unit. Mr. Thebaud is not listed on the certification order. Individuals do not have an obligation to bargain with employers. Individuals cannot be held responsible for violations of this section of the Act. Therefore, Mr. Thebaud cannot be found to have breached this section of the Act.

[92] Fourth, clause 6-63(1)(h) states that it is unfair labour practice to contravene an obligation, a prohibition or other provision of Part VI imposed on or applicable to a union or an employee. There is no evidence that Mr. Thebaud is a union or an employee. Therefore, Mr. Thebaud cannot be found to have breached this section of the Act.

[93] Given the foregoing, there are no grounds upon which the Board can find that Mr. Thebaud has committed an unfair labour practice.

Analysis:

[94] The issues for the Board to determine are whether the respondents have contravened sections 6-7, 6-63(1)(c), 6-41, or 6-63(1)(h) of the Act. The Employer bears the onus to prove a contravention on a balance of probabilities.

Preliminary Issues:

General:

[95] There are two preliminary issues. The first is whether Mr. Thebaud, acting alone or as an agent, can be found to be in violation of sections 6-7, 6-63(1)(c), 6-41, or 6-63(1)(h) of the Act. The second is whether Mr. Thebaud acted as an agent of the Union.

[96] The Board will consider, first, whether Mr. Thebaud, acting alone or as an agent, can be found to be in violation of the relevant provisions of the Act.

[97] The Board considered a similar issue in *Thebaud Summary Dismissal*. The issue in that case was whether the Board should grant an application for summary dismissal brought by the Employer, Saskatoon Co-op, as against Mr. Thebaud in relation to Mr. Thebaud's own unfair labour practice application. In his application, Mr. Thebaud had alleged that the Employer had engaged agents to conduct espionage at various events in and around June and July 2019, and thereby contravened clause 6-62(1)(j) of the Act, which states:

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

[98] The Board granted the summary dismissal because Mr. Thebaud did not have standing on an application brought pursuant to clause 6-62(1)(j). Based on his own denials, he was not a union member or an employee, or agent of the union, and did not have a sufficient interest or stake in the matter.

[99] In considering the matter, the Board addressed the parties' arguments about the decision in *Metz v S.G.E.U.*, [2003] Sask LRBR 28 [*Metz*]:

> *[36] In Metz, the Board considered the applicant's standing to bring an application pursuant to clause 11(1)(c) of now-repealed The Trade Union Act. As Mr. Thebaud accurately observes, Metz does not stand for the proposition that an individual can never bring an unfair labour practice. Rather, it stands for the proposition that an individual cannot bring*

> *an unfair labour practice application alleging that a union or an employer has failed to bargain in good faith. This makes sense, because the duty to bargain in good faith is a duty that belongs to unions and employers.*
>
> *[37] The following excerpt from Metz is apposite:[5]*
>
> > *We find that the Applicant lacks standing to bring the s. 11(1)(c) complaint against the Employer. The Employer owes a duty to bargain in good faith to the Union selected by the employees to be their exclusive representative. Once employees select a union to represent them in collective bargaining, the Employer must negotiate work place disputes exclusively with the Union. As set out by the Ontario Labour Relations Board in Beurling v. C.L.A.C., [1998] O.L.R.B. Rep. 115 (Ont. L.R.B.) at para. 9, citing Abramowitz v. O.P.S.E.U., [1987] O.L.R.B. Rep.455 (Ont. L.R.B.), at para. 8:*
> >
> > > *Thus, the Board has consistently held in the context of The Labour Relations Act that employees do not have the status to assert that their trade union or their employer has violated the duty to bargain in good faith and make every reasonable effort to make a collective agreement ... The bargaining duty imposed by those provisions is owed by the trade union to the employer, and vice versa.*
> > >
> > > *For these reasons, the unfair labour practice application brought by the Applicant against the Employer is dismissed for lack of standing.*

[100] This holding in *Metz* was followed in *Saskatchewan Power Corporation v Joel Zand*, 2020 CanLII 36086 (SK LRB) and *Wees v Saskatchewan Insurance*, 2005 CanLII 63094 (SK LRB).

[101] Section 6-7 states that every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to Part VI or an order of this Board. The bargaining duty imposed by section 6-7 is owed by the union to the employer, and vice versa.

[102] Section 6-63 provides for a broader range of potential actors than does section 6-62. The introductory clause of section 6-62 states that it "is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following." This is in contrast with section 6-63, which states that it "is an unfair labour practice for an employee, union or any other person to do any of the following". The Board must give effect to the phrase "any other person".

[103] On the other hand, clause 6-63(1)(c) uses specific language setting out potential breaches that are caught by that provision. It is an unfair labour practice to "fail or refuse to engage in collective bargaining". This is in comparison with clause 6-63(1)(a), which states that it is an unfair labour practice to "interfere with" or "restrain" an employee for a particular purpose. There, the phrase "any other person" has broader practical applicability. Many of the clauses within section 6-63 use similarly specific language appropriate for the unfair labour practices they describe and

provide context for the meaning of “any other person”. Many of these are more broadly worded than clause 6-63(1)(c).

[104] It should also be noted that some of these unfair labour practice provisions address a union’s conduct vis-à-vis employees, placing an emphasis on employee choice: (1)(a), (intimidation); (1)(e) (terminating for failure to maintain membership); (1)(f) (discouraging decertification); and, (1)(g) (orderly transition post replacement). Other provisions regulate the tripartite relationship among the union, employer, and employees, but also involve an issue of choice: (1)(b) (pending matter); (1)(d) (strike vote). Any person who offends employee choice, in the manner described in those provisions, commits an unfair labour practice.

[105] The ordinary and grammatical meaning of clause 6-63(1)(c) is that it is an unfair labour practice for a person who is subject to the duty to refuse or fail to comply. The duty arises from the language set out at section 6-7, which refers to the employer and the union and, in the case of a renewal or revision, section 6-26, which refers to “either party” to the collective agreement. The phrase “any other person” supports extending the duty to those acting as agents for a person who has such a duty.

[106] The mirror unfair labour practice, applicable to employers, does not apply to third party actors who do not act on behalf of an employer. This also weighs in favour of adopting the foregoing interpretation.

[107] Mr. Thebaud is not a person, who if acting alone, is contemplated by clause 6-63(1)(c). He did not have a duty that he could have refused or failed to do.

[108] Next, section 6-41 of the Act states that a collective agreement is binding on a union that has entered into it and every employee of an employer who is included in or affected by it. A person bound by a collective agreement must do everything the person is required to do and refrain from doing anything the person is required to refrain from doing. As per subsection (4), the word “both” suggests that the “parties” are the union and the employer. Employees are also “bound” by a collective agreement. Mr. Thebaud, not being an employee of Saskatoon Co-op, is not bound by the collective agreement.

[109] Lastly, clause 6-63(1)(h) states that “[i]t is an unfair labour practice for an employee, union or any other person…to contravene an obligation, a prohibition or other provision” of Part VI “imposed on or applicable to a union or an employee”. Clause 6-63(1)(h) refers to a “union” or an “employee”. In *Amenity Health Care*, the Board found that the union and two individuals

committed an unfair labour practice contrary to clause 6-63(1)(h) by promoting and encouraging voting in a manner that was not a secret ballot. The two individuals were employees.

[110] Mr. Thebaud, acting alone, cannot be found liable for a breach of clause 6-63(1)(h) of the Act.

[111] However, the fact that an individual may not be liable for a breach does not prevent the Board from making an order requiring that person to rectify a violation of the Act committed by another party. Clause 6-104(2)(c) permits the Board to require any person to do any thing for the purpose of rectifying a contravention of Part VI. The Court of Appeal made this point in *The City of Saskatoon v Amalgamated Transit Union*, 2013 SKCA 132 (CanLII), in relation to a substantially similar provision of the previous Act:

> *[30] The City's first argument concerns the specific meanings of ss. 5(e)(ii) and 42. With respect to s. 5(e)(ii), the City acknowledges the language giving the Board authority to require "any person" to do "any thing for the purpose of rectifying a violation of this Act." However, it says this authority can only affect the parties directly involved in a dispute. In this case, that would be the Union and Mr. Read.*
>
> *[31] I am not persuaded that s. 5(e)(ii) should be read quite this categorically or narrowly. The words "any person" were obviously chosen deliberately by the Legislature. This is apparent from the fact that other parts of s. 5 use the terms "employer," "trade union" and "employee." For example, ss. 5(c) and (l) read as follows:*
>
> > *5 The board may make orders:*
> > *…*
> >
> > *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
> > *…*
> > *(l) excluding from an appropriate unit of employees an employee whom the board finds, in its absolute discretion, objects;*
> > *…*
> > *[emphasis added]*
>
> *All of this suggests that the reference to "any person" in s. 5(e)(ii) was intended to give the Board a broader authority than the one described by the City. And the City, after all, was named as a party to the proceedings before the Board. It was not a stranger to them.*
>
> *[32] It is also significant that s. 5(e) originally provided only that the Board could make orders "requiring any person to refrain from violations of this Act or from engaging in any unfair labour practice." This language, if applied to the circumstances of this case, would embrace only the Union. However, s. 5(e) was amended in 1994 to include what is now s. 5(e)(ii), i.e. a power to require "any person" to do any thing for the purpose of "rectifying a violation of this Act." See: The Trade Union Amendment Act, 1994, S.S. 1994, c. 47. This change clearly broadened the reach of s. 5(e) and, on its face, extended that reach to include an employer in the position of the City.*

[112] Furthermore, the language "any other person" in subsection 6-63(1), combined with the remedial power provided by clause 6-104(2)(c), allows for agent liability.

[113] The next question is whether Mr. Thebaud was acting as an agent of the Union.

[114] In *Canadian Agency Law*, Professor Fridman explains that agency must be specifically pleaded by the party alleging that it exists, that the question of whether agency exists is a question of fact, and the onus of proving the existence of agency is on the party that is pleading its existence.[3] Professor Fridman defines agency as follows:

> *Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.*

[115] Professor Fridman explains that "the basis of agency is the endowment by the principal of the agent with the power to act, coupled with the exercise of that power by the agent".[4] Professor Fridman explains that, to be an agent, a person must have been authorized by the principal to act in a manner that would affect the principal's legal situation:

> *In accordance with this definition, the law of agency will only apply to a relationship in which the agent is endowed by the principal with the power to change the principal's legal situation and the principal is subjected to the liability of such change. The endowment of such power and the susceptibility of such liability are essential features of agency. In the absence of such a power-liability relationship there cannot be an agency. To be an agent, a person must have been authorized by the principal, in ways to be examined later, to act in a manner that will affect the legal situation of the principal for whom the agent acts vis-à-vis a third party. In the absence of any such authority there is no legal agency.*[5]

[116] In considering whether agency exists, the Board should bear in mind:

> *…If there is no evidence capable of establishing that one party intended another to act as his or her agent, there is no agency. It is the effect in law of the way the parties have conducted themselves and the language they have used that must be investigated to determine whether an agency relationship has come into existence.*[6]

[117] In general, for agency to exist in law there must be either consent (without a contract), a contract, or estoppel. Consent may be explicit or implicit. In the latter case, an agency relationship is created where the principal behaves in such a way so that consent may be implied. There may

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[3] G.H.L. Fridman, *Canadian Agency Law*, 3rd ed (Toronto: LexisNexis, 2017) at 1.3, ftnt 10.
[4] *Canadian Agency Law* at 1.13.
[5] *Ibid*, at 1.2.
[6] *Ibid*.

be instances in which an agency relationship exists without consent, contract, or the operation of estoppel, but these are less common.[7]

Application of the Agency Law to the Facts – Petition:

[118] First, there is no question whether the Employer specifically pleaded agency. It did.

[119] Whether Mr. Thebaud acted as an agent of the Union is a question of fact, applying the relevant principles of law. The question, then, is whether the Union endowed Mr. Thebaud with the power to act in a manner that would affect its legal situation and whether Mr. Thebaud exercised that power.

[120] To begin, the Board does not believe that the Union representatives reached out to Mr. Thebaud and then directly asked him or directed him to pursue the petition or take any other action to overthrow the Board of Directors. Even though he had a history with the Union, Mr. Thebaud did not leave his employment with the Union on positive terms. There is no evidence that he had an ongoing relationship with Ms. Figueiredo or Mr. Neault after his departure.

[121] Mr. Thebaud provided a detailed, credible explanation about his thought-process leading up to and his preparation when drafting the petition. When he first contacted Mr. Neault, he explained his motivation for having decided to draft the petition. At that point, he had solidified the basic strategy. The Board has no reason to believe that Mr. Thebaud was not capable of doing the research and planning that he claims to have done. Nor does the Board have any reason to believe that the Union "wound him up" and "sent him on his way". It is likely that he initiated the petition without the Union's knowledge.

[122] The Employer asserts that Mr. Thebaud "has no real direct interest in the Saskatoon Co-op", suggesting that he does not have the requisite motivation of a lone actor. The Board finds this argument unpersuasive. It overlooks the fact that Mr. Thebaud is an activist with demonstrably strong views. He was working alongside and with the support of an obviously active and passionate movement whose collective objective was to bring "co-operative values" back to the Co-op. There is considerable evidence of a broader community interest in the management of the Co-op. Just because Mr. Thebaud could not be found to have had a material self-interest, other than in his "equity", does not mean that he did not have other, values-based motivations.

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[7] *Ibid* at 1.10.

[123] Furthermore, two-tier wage systems are not minor issues with which a broader social movement, including a broader union movement, is unlikely to be concerned. This is not to suggest that two-tier wage systems are new or unusual, generally illegal, a breach of a union's duty of fair representation, or not apt to be accepted by a union.[8] However, the case law discloses a not uncommon concern that a two-tier wage system will foment dissent and erode the solidarity of the union. Solidarity is a pillar of union strength and a fundamental principle of the union movement.

[124] An example of the type of concern with two-tier wage systems is highlighted in the following passage from *IWA-Canada, Local 2693 v MacMillan Bloedel Building Materials Limited*, 1990 CanLII 5728 (ON LRB), an application to settle a first contract by arbitration:

> *22. As Mr. Dines testified, the company took this position for several reasons. The com-pany felt that if it gave organized workers the benefit levels that unorganized employees had received, then it would be pressured to provide similar higher levels in its other collective agree-ments with the applicant, the applicant would be able to organize elsewhere in the company, the customers who bargained with the applicant would leave the company, and competitors of the company would have to pay similar benefits to their unionized workers. The objection was not per se to paying such high levels of benefits, for the company had always paid this level to its (unorgan-ized) employees. Nor (for example) had the company previously been concerned that the high lev-els of benefits it paid might put pressure on its competitors to pay similar high levels. It was only concerned that it not pay its unionized employees these high benefits. The objection was to contin-uing to pay such levels to employees because they were now organized. These justifications, looked at in context, are designed to send a message that unionizing will cost employees the benefits they had received prior to becoming organized. Although current employees and those hired before January 1, 1990 would continue to receive the current benefits, a two-tiered system as proposed by the employer would clearly foment dissension within the bargaining unit and with the bargaining agent. It is a proposal which will likely lead to a decertification application, for under it new employees will receive less benefits only because the union represents them. Two-tiered systems are not inherently unreasonable, and many negotiations consider such proposals. What makes the instant proposal unreasonable is the context in which it is proferred and the justifications or rea-sons behind it. The employer's bargaining position is also designed to discourage other employees who might want representation, and unions who might seek to organize them. It tells them that the response to unionization is a reduction in benefits. It is qualitatively no different a message than threatening to lay off employees or close the business only because employees have organized or are contemplating so doing. This bargaining position is not reasonably justified for purposes of sec-tion 40a(2)(b) of the Act. It is not reasonable to take a position of reducing current benefits when one of the main reasons for doing so is only because a union now represents employees.*[9]

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[8] See, for example, *UFCW, Local 340 v Saskatchewan Brewers Association Ltd*., LRB File No. 245-95 [*Sask Brewers Association*].

[9] Note, however, the dissenting opinion finding that the employer had not been uncompromising in its bargaining position.

[125] In the current case, there is considerable evidence of a broader social movement raising concerns with many of the foregoing issues, in particular, equity among employees, member solidarity, and union strength. These issues were continuously raised and addressed, as disclosed in various exhibits before the Board, including statements from multiple individuals made on Facebook; non-employee candidate profiles for the election to the Board of Directors; transcripts of candidate speeches; and, Mr. Danielson's presentation on "Making a profit based on Co-operative values" given at a Town Hall meeting. One need only review the candidate profiles to appreciate the significance of, and even identification with, the issues on the part of some of the non-employee Co-op members.

[126] As such, the Board does not believe that the Union orchestrated a fake grassroots movement as a front to advance its agenda. To so find would be to completely disregard the very real and very active co-operative movement that is apparent on any, even cursory, review of the evidence.

[127] However, the absence of a finding of explicit consent or "astroturfing" does not prevent the Board from making a finding of an agency relationship. Although the Union did not direct Mr. Thebaud to pursue the petition, it did endow him with the power to act in a manner that would affect its legal situation. The Union's consent was implicit and is inferred from its conduct.

[128] The Union cannot reasonably claim that it was not aware of the broader objective of the petition. Mr. Thebaud organized the petition to remove the Board of Directors and promoted the signing of the petition through a Facebook page that he managed. The express purpose of the petition was to affect the course of Union-Employer negotiations to the benefit of the Union's negotiating position.

[129] Mr. Thebaud was the spokesperson for the Petition Group. He reached out to Mr. Neault, the President of the Union, to ask if he had an issue with the petition. He was concerned, specifically, with whether the petition would negatively impact the picket line. Mr. Neault indicated that he had no concerns. Given this exchange and Mr. Thebaud's testimony, it is not likely that Mr. Thebaud would have proceeded with the petition had he been told that the Union had concerns with his actions.

[130] Mr. Thebaud also called Mr. Neault to notify him that some people would be coming to the picket line to gather signatures. The Union shared the petition link to its Facebook page and Ms. Figuieredo placed it on the Union office front counter.

[131] On Mr. Thebaud's personal Facebook page, Jennifer Bowes directed potential signatories to the picket captains on the picket lines. The petition was circulated on the picket lines. The Union, which was responsible for the picket lines, permitted the petition to be circulated there. On the same Facebook page, Mr. Hicks encouraged people to drop the petitions off at the picket lines. Picketers and Union members were in attendance at the court hearing about the petition.

[132] Mr. Thebaud "blind-copied" the Union on press releases, including the release announcing that the special meeting had been requested.

[133] There was a perceived potential benefit to the Union as a result of the actions of Mr. Thebaud and the petition. This is so, even if Mr. Neault didn't really believe the petition would be successful. At no time did the Union repudiate the petition or Mr. Thebaud's actions.

[134] The Union, in its Reply to the Application, sworn by Ms. Figueiredo, denied that it "expressly supported, promoted or otherwise endorsed the Petition".[10] This categorical denial is contradicted by the evidence and it undermines Ms. Figueiredo's credibility. Clearly, the Union promoted the petition.

[135] In his cross examination by counsel for the Employer, Mr. Thebaud denied hoping that the Union would collect signatures for the petition, denied that he knew that the petition was on their front counter and suggested that no one had attended the Union office to retrieve the completed petition forms. Given the evidence, these statements, in particular the first statement, are unreliable.

[136] Ms. Figueiredo and Mr. Thebaud have each attempted to distance themselves from the actions of the other.

[137] The Union endowed Mr. Thebaud with the power to act in a manner that was intended to affect its bargaining power, influence the negotiations, and result in a contract that was acceptable to it. The Union endowed Mr. Thebaud with the power to, in this way, intervene in the negotiations. In the beginning, the Union gave consent to the petition explicitly. It proceeded to provide implicit consent throughout the following days and weeks. As such, Mr. Thebaud acted as an agent of the Union.

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[10] *Union Reply*, at para 8.

Involvement of Mr. Thebaud and Union in Election:

[138] Mr. Thebaud's involvement in the election is less central than in relation to the petition. As mentioned, there was a broader social movement afoot. Many people were operating on a grassroots level to find solutions to what they perceived to be a serious governance issue with the Co-op. The first Town Hall for this purpose took place a few weeks after the Court of Queen's Bench decision was issued, in February 2019. Mr. Mills opened the meeting with a speech about the Co-op's perceived democratic deficit. After the speech he introduced members of the bargaining committee who provided an update. Multiple strategies were being suggested or employed, including various resolutions, petitions, and voting in the director election.

[139] At the next Town Hall Meeting, Mr. Thebaud was in attendance to give a presentation on the legal challenge related to the petition. There was also some focus on a media relations strategy. By the time the next meeting occurred, a committee, which apparently did not include Mr. Thebaud, had formed to develop a list of qualified candidates for the Board of Directors. One or two candidates had already announced an intention to run.

[140] There are some obvious connections between the two Facebook groups and organizations, including participant overlap, objectives, and coordination. The decision to merge the pages was made. Mr. Thebaud explained that the work of the two groups was directed to the same ultimate objective, and his page enjoyed the most support of the two. Although there was a decision to merge the pages, Mr. Butz was concerned about losing supporters during the merger, and decided to postpone the merger until after the AGM. The two pages were formally merged at the end of June 2019. Before the merger, the Petition Group helped to advertise the AGM. After the merger, Mr. Thebaud remained an administrator of the page but was not actively involved in the page.

[141] There is insufficient evidence to find that the Union consented specifically to Mr. Thebaud's actions in relation to the election. Nonetheless, the Union was directly and centrally involved in the election strategy at an early stage and prior to the conclusion of the collective agreement. Shortly after the Court of Queen's Bench decision, the Union distributed a windshield flyer inviting Co-op members to attend the AGM. It encouraged people to apply for membership and attend the AGM to elect new Board members. It provided a rebate on initiation fees for new members. There was Union representation and significant participation at the Town Hall meetings. Meetings opened with Union members providing a strike update. A focus of the meetings was the concern with the second tier. Later, after the conclusion of the collective

agreement, the Union publicly endorsed and promoted the candidates that were chosen through the Town Hall process.

Mirror Duty:

[142] The next question is whether there is a prohibition on conduct by a union that mirrors that set out in clause 6-62(1)(b) of the Act. The short answer to this question is "no".

[143] The Employer acknowledges that a mirror prohibition is not explicitly outlined in the Act. It says that the conditions necessitating an explicit prohibition could not have been contemplated by the Legislature. The current case is extremely unique. The Employer urges the Board to carefully review the facts and interpret the unfair labour practice provisions in a manner that does not result in an absurdity.

[144] It is well recognized that the Legislature does not intend to produce absurd consequences: *Re Rizzo and Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 (SCC). The presumption against absurdity includes four propositions, summarized by Professor Sullivan, as follows: [11]

> 1. *It is presumed that the legislature does not intend its legislation to have absurd consequences.*
> 2. *Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.*
> 3. *Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.*
> 4. *The greater the absurdity, the greater the departure from ordinary meaning that is tolerated.*

[145] Professor Sullivan explains that the courts have adopted inconsistent approaches to issues in consequential analysis in cases that involve text that is clear. She attempts to uncover a unifying principle among those cases:

> ***10.24 Governing Principle.*** *Although the courts do not expressly say so, their practice appears to be guided by the following principle: the more compelling the absurdity to be avoided, the greater the departure from ordinary meaning that is tolerated; conversely, the clearer the language of the text, the greater the absurdity required to justify departure from its apparent meaning. If the language is relatively obvious and intolerable, most courts will strain language to avoid it and some courts will go further and significantly alter the legislative text. Absurd results can sometimes be avoided by correcting a clear drafting mistake.*

[11] *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at 10.5 [*Sullivan*].

[146] The greater the absurdity, the greater the departure from ordinary meaning that tends to be tolerated. What the Employer asks of the Board is to read in a prohibition that is plainly absent from the legislation. This would be a departure from ordinary meaning in the extreme.

[147] Professor Sullivan observes that "the courts are not allowed, under the guise of interpretation, to substitute their own notions of good policy for those of the legislature".[12] In all cases, the Board must apply the modern principle to give effect to the intention of the legislature. "An interpretation that would tend to frustrate legislative purpose or thwart the legislative scheme is likely to be labelled as absurd."[13]

[148] In assessing legislative purpose, the Board must be guided by section 6-4 of the Act, which states:

> ***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.*

[149] Section 6-4 is the first provision in Division 2: Rights, Duties, Obligations and Prohibitions in Part VI (Labour Relations). Division 2, which comes after Division 1: Preliminary Matters for Part, set outs certain foundational principles for Part VI. Section 6-4 is a cornerstone of the Part.

[150] Employees have the right to engage in collective bargaining through a union of their choosing. The effect of certification is to grant exclusive bargaining rights to a union on behalf of a unit of employees, and to oblige the employer of those employees to deal with the union as the exclusive bargaining agent.[14]

[151] A simple description of collective bargaining, such as that found in *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391 [*Health Services*], at paragraph 29, reveals the purpose of the existing prohibition against interference with internal affairs:

> *… Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:*
>
> > *Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that,*

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[12] *Ibid* at 10.25.
[13] *Ibid* at 10.28.
[14] See, section 6-13 of the Act.

> *it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his...employees on the basis of a comparative equality of bargaining strength.*

[152] Collective bargaining is the procedure through which the views of the workers are made known and expressed through representatives chosen by them.

[153] By extension, the employer's recognition of the union's exclusivity and its treatment of the union as independent are critical components of the collective bargaining relationship.[15] Conduct designed to undermine the union, for example, by negotiating directly with employees, may constitute an unfair labour practice. A labour organization or employee association that is dominated by an employer is not permitted to be certified under the Act.

[154] The union's status as exclusive bargaining agent arises from a historical compromise designed to eliminate recognition strikes and encourage greater industrial stability. This history is outlined in *Health Services*:

> *54 While employers could refuse to recognize and bargain with unions, workers had recourse to an economic weapon: the powerful tool of calling a strike to force an employer to recognize a union and bargain collectively with it. The law gave both parties the ability to use economic weapons to attain their ends. Before the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it (…). The unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American Wagner Act model of legislation, discussed below.*
>
> *63 In summary, workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the Wagner Act model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers.*
>
> *98 Consideration of the duty to negotiate in good faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights. It is worth referring again to principle H of the ILO principles concerning collective bargaining, which emphasizes the need for good faith in upholding the right to collective bargaining and in the course of collective bargaining. Principle H thus states:*

---

[15] See, for example, *Cypress (Regional Health Authority) v Service Employees' International Union-West*, 2016 SKCA 161 (CanLII), at paras 116, 117.

> *The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.*
>
> [citations removed]

[155] Relatedly, the requirement that the union be independent of management permits the union to undertake its exclusive duty to represent its members and to be involved in the fair administration of the collective agreement.

[156] In *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 SCR 3, the Supreme Court confirmed that the principle of independence in the collective bargaining context has constitutional status:

> *[88] The function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management (Delisle, at paras. 32 and 37). Like choice, independence in the collective bargaining context is not absolute. The degree of independence required by the Charter for collective bargaining purposes is one that permits the activities of the association to be aligned with the interests of its members.*
>
> *[89] Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.*
>
> …
>
> *[99] In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(d).*

[157] An employer's collective bargaining rights and duties arise when employees exercise their right to organize in a union. When a union is certified as an exclusive bargaining agent, the employer is obligated to bargain in good faith with the union. The employer's duty to bargain places procedural constraints on its management of the workplace. As a result, it is often treated as a duty to be avoided.

[158] The same is not generally true in the reverse. A union cannot be certified in the absence of an employer. A union and its members are vulnerable to the economic and business realities within which an employer operates. The continued viability of the employer is in the union's, and its members', interests. Although there will be debate about priorities and methods, it is not generally in a union's interest to threaten the viability of the employer and, as a result, the livelihood of its members.

[159] The consequence of decertification is the loss for employees of their collective strength. There is no equivalent for an employer. The closest comparison is a challenge, posed by another bargaining agent, to the existing bargaining agent in industries in which collective employer bargaining is a statutory requirement. The impact of interference, as between employees and employers, is asymmetrical. The Honourable George W. Adams sums it up this way:

> *This is a product of the state's reluctance to intervene in internal trade union affairs and the fact that the potential for trade union improprieties is not as great. In this latter respect, an employer occupies a far different position with regard to the coercive impact of its action upon employees than does a union.*[16]

[160] The origins and purpose of the prohibition against interference in internal affairs of a union are clear. Clause 6-62(1)(b) of the Act establishes an unfair labour practice for an employer, or any person acting on behalf of an employer, to discriminate respecting or interfere with the formation or administration of a labour organization or to contribute financial or other support to it. A related provision, clause 6-62(1)(c), establishes that bargaining collectively with a labour organization that is dominated by the employer is an unfair labour practice. Other, related provisions include clause 6-62(1)(e) (refusal to permit a representative to negotiate); clause (i) (interference in selection of union); and, clause (j) (espionage on employees, union members, and labour organizations). There are no similar prohibitions on a union.

[161] In conclusion, there is no similar purpose that would justify "reading in" a mirror prohibition against a union interfering in the internal affairs of an employer.

Duty of Good Faith:

[162] Next, it is necessary to consider whether the respondents have breached the duty to bargain in good faith.

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[16] George W. Adams, Canadian Labour Law, loose-leaf (3/2022 - Rel 1) 2nd ed (Toronto: Thomson Reuters, 2021), at 10-162 – 10-162.1 [*Adams*].

[163] The duty to bargain in good faith applies to both the employer and the 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.*

[164] "Collective bargaining" is defined at clause 6-1(1)(e):

> *(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;*

[165] The duty extends to the negotiating in good faith with a view to the conclusion of a collective of a collective agreement, or in this case, its renewal, putting the terms in writing, and executing a collective agreement.

[166] A helpful summary of the principles underlying the duty is provided in *Health Services*:

> *99 Consistent with this, the Canada Labour Code and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith (see generally Adams, at pp. 10-91 and 10-92). The duty to bargain in good faith under labour codes is essentially procedural and does not dictate the content of any particular agreement achieved through collective bargaining. The duty to bargain is aimed at bringing the parties together to meet and discuss, but as illustrated by Senator Walsh, chairman of the Senate committee hearing on the Wagner Act, the general rule is that: "The bill does not go beyond the office door." (Remarks of Senator Walsh, 79 Cong. Rec. 7659; see F. Morin, J.-Y. Brière and D. Roux, Le droit de l'emploi au Québec (3rd ed. 2006), at pp. 1026-27.)*
>
> *100 A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process (Carter et al., at p. 301). As explained by Adams:*
>
> > *The failure to meet at all is, of course, a breach of the duty. A refusal to meet unless certain procedural preconditions are met is also a breach of the duty.*
> > *...*
> > *A failure to make the commitment of time and preparation required to attempt to conclude an agreement is a failure to make reasonable efforts. [pp.10-101 and 10-106]*
>
> *101 The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract (Adams, at p. 10-107; Carrothers, Palmer and Rayner, at p. 453). As Cory J. said in Royal Oak Mines Inc. v. Canada (Labour Relations Board), 1996 CanLII 220 (SCC), [1996] 1 S.C.R. 369:*

> *In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions. [para. 41]*

102 Nevertheless, the efforts that must be invested to attain an agreement are not boundless. "[T]he parties may reach a point in the bargaining process where further discussions are no longer fruitful. Once such a point is reached, a breaking off of negotiations or the adoption of a 'take it or leave it' position is not likely to be regarded as a failure to bargain in good faith" (Carter et al., at p. 302).

103 The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions (Gagnon, LeBel and Verge, at pp. 499-500). Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a "tough position in the hope and expectation of being able to force the other side to agree to one's terms" (Canadian Union of Public Employees v. Nova Scotia Labour Relations Board, 1983 CanLII 162 (SCC), [1983] 2 S.C.R. 311, at p. 341).

104 In principle, the duty to bargain in good faith does not inquire into the nature of the proposals made in the course of collective bargaining; the content is left to the bargaining forces of the parties (Carter et al., at p. 300). However, when the examination of the content of the bargaining shows hostility from one party toward the collective bargaining process, this will constitute a breach of the duty to bargain in good faith. In some circumstances, even though a party is participating in the bargaining, that party's proposals and positions may be "inflexible and intransigent to the point of endangering the very existence of collective bargaining" (Royal Oak Mines, at para. 46). This inflexible approach is often referred to as "surface bargaining". This Court has explained the distinction between hard bargaining, which is legal, and surface bargaining, which is a breach of the duty to bargain in good faith:

> *It is often difficult to determine whether a breach of the duty to bargain in good faith has been committed. Parties to collective bargaining rarely proclaim that their aim is to avoid reaching a collective agreement. The jurisprudence recognizes a crucial distinction between "hard bargaining" and "surface bargaining" ... Hard bargaining is not a violation of the duty to bargain in good faith. It is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. Hard bargaining is not a violation of the duty because there is a genuine intention to continue collective bargaining and to reach agreement. On the other hand, one is said to engage in "surface bargaining" when one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act. The dividing line between hard bargaining and surface bargaining can be a fine one.*
>
> *(Canadian Union of Public Employees, at p. 341; see also Royal Oak Mines, at para. 46)*

105 Even though the employer participates in all steps of the bargaining process, if the nature of its proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship, the duty to bargain in good faith will be breached: see Royal Oak Mines Inc. To the words of Senator Walsh, that collective bargaining does not go beyond the office door, we would add that, on occasion, courts are nevertheless allowed to look into what is going on in the room, to ensure that parties are bargaining in good faith.

> *106 In Canada, unlike in the United States, the duty to bargain in good faith applies regardless of the subject matter of collective bargaining. Under Canadian labour law, all conditions of employment attract an obligation to bargain in good faith unless the subject matter is otherwise contrary to the law and could not legally be included in a collective agreement (Adams, at pp. 10-96 and 10-97; J.-P. Villaggi, "La convention collective et l'obligation de négocier de bonne foi: les leçons du droit du travail" (1996), 26 R.D.U.S. 355, at pp. 360-61). However, the refusal to discuss an issue merely on the periphery of the negotiations does not necessarily breach the duty to bargain in good faith (Carter et al., at p. 302).*

[167] In *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2014 CanLII 17405 (SK LRB) [*SEIU (West) v SAHO*], the Board described the power struggle that characterizes collective bargaining and the role of the Board in determining whether the conduct of a party crosses the line into bad faith bargaining:

> …
>
> *[128] Together, s. 11(1)(c) and s. 11(2)(c) impose companion obligation on both employers and trade unions in organized workplaces to bargain in good faith and to make reasonable effort to conclude a collective agreement. A secondary (but not less important) purpose of s. 11(1)(c) is to secure the union's position as the exclusive bargaining agent for organized workers and to compel the employer to negotiate with the union (as opposed to directly with the employees) in good faith with a view to conclusion of a collective agreement.*
>
> *[129] While ss. 11(1)(c) and 11(2)(c) of The Trade Union Act clearly imposes a duty on the parties to bargain in good faith and makes it a violation of the Act to fail to do so, the practice of this Board in enforcing these obligations has historically been one of measured restraint. Simply put, the Board takes the position that it is not our role to supervise or monitor too closely the bargaining strategies adopted and employed by the parties provided that they genuinely engage in the process. This restraint has grown from the desire of the Board to permit the parties to define and develop their own collective bargaining relations and to avoid interference in the balance of economic power that may exist between the parties. See: Noranda Metal Industries Ltd. Canadian Association of Industrial, Mechanical and Allied Workers v. Noranda Metal Industries Limited, [1975] 1 Can. L.R.B.R. 145. See also: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, A Division of Westfair Foods, [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92.*
>
> *[130] The reality of collective bargaining is that it is a process of resolving conflict through conflict. While The Trade Union Act may regulate that conflict, it also contemplates that a power struggle may well occur between employers and trade unions. The purpose of collective bargaining is to bring the parties together in a setting where they can present their proposals, justify their positions, and search for common ground. Although the parties may have expectations that particular proposals will be agreed to, or that certain kind of concessions will never by asked of them, or that issues will be discussed in a particular order, or that a particular result will be achieved within a certain period of time, there is no guarantee that such will be the case. Each party has the right to attempt to achieve an agreement on terms that it considers advantageous and to adopt strategies intended to advance its own self interests. The parties also have the right to hold firm in their respective positions. The results of collective bargaining flow from the skill of the negotiators, from the prevailing social and economic realities of the day, from the relative strength of the parties, and from their willingness to exercise their respective strength.*
>
> *[131] The function of this Board is to ensure that the parties engage in a process of collective bargaining; that they agree to meet; that they come to the bargaining table*

prepared to enter into a collective agreement and/or resolve the issues in dispute between the parties through collective bargaining; that their negotiators have authority to bind their principals; that they explain their proposals and disclose relevant and necessary information that could affect their collective bargaining relationship; and that they not misrepresent the facts or their proposals to the other party. See: Saskatchewan Government Employees' Union v. Government of Saskatchewan and the Honourable Bob Mitchell, [1993] 1st Quarter Sask. Labour Rep. 261, LRB File No. 264-92. Simply put, it is the responsibility of the Board to ensure that the parties engage in a process of collective bargaining; it is not the function of this Board to ensure that a particular substantive result is achieved or avoided through collective bargaining.

[132] The parties are best able to fashion the terms of their relationship and, in the event of impasse in collective bargaining, each has recourse to economic sanctions. Each round of collective bargaining is a new beginning and many external factors can influence the relative economic power (or perception thereof) of the parties. As a consequence, this Board does not judge the "reasonableness" of the proposals advanced by the parties at the bargaining table unless we conclude that the proposals being advanced or the positions being taken by a party are indicative of a desire to subvert, frustrate or avoid the collective bargaining process. While holding firm on proposals or hard bargaining is permissible, surface bargaining or merely going through the motions of collective bargaining without any real intention of concluding a collective agreement is not consistent with the duty to bargain in good faith. The difficulty of distinguishing "hard bargaining" from subversive behavior was acknowledged by this Board in Saskatchewan Government Employees' Union v. Government of Saskatchewan & Saskatchewan Association of Health Organizations, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98 wherein the Board made the following comments:

> *In mature bargaining relationships, such as this one, it is often difficult for the Board to discern if the bargaining behaviour falls within the realm of "tough, but fair" or if it crosses over into an unacceptable avoidance of collective bargaining responsibility. In Canadian Union of Public Employees v. Saskatchewan Health-Care Association, [1993] 2nd Quarter Sask . Labour Rep. 74, LRB File No. 006-93, the Board described this dilemma in the following terms, at 83:*
>
> > *. . . when an allegation of an infraction under s.11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that process, while at the same time, not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether the conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.*

[168] In summary, the duty to bargain in good faith is primarily concerned with the process of collective bargaining as opposed to the substance of a particular agreement achieved through collective bargaining. The duty prohibits attempts by either party to avoid the conclusion of a collective agreement and to take actions directed at destroying the collective bargaining relationship. Neither hard bargaining nor a failure to make concessions, alone, amount to bargaining in bad faith.

[169] Conduct away from the bargaining table, in appropriate circumstances, may breach the duty to bargain in good faith. For example, an employer's unilateral change to the terms and conditions of employment or bargaining directly with employees may constitute bad faith bargaining. In both these circumstances, which are two of the most common examples of bad faith conduct away from the bargaining table, the law seeks to prohibit and discourage an employer from attempting to undermine the union as the exclusive bargaining agent on behalf of the employees.

[170] The duty to bargain in good faith applies in the time and in the manner required pursuant to Part VI or by an order of the Board.[17] In general, it is not an ongoing duty but, instead, is subject to temporal limits.[18] Pursuant to section 6-26, the duty to bargain a renewal agreement is initiated following written notice within the period that is set out, which is referred to as the "open period".

[171] The general rule against mid-term bargaining may be relaxed if a dispute arises relating to an employee's terms and conditions of employment, if the terms are included in the collective agreement: *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB). This is because the duty extends to the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union, as described in subclause 6-1(1)(e)(iv).

[172] Otherwise, only in exceptional circumstances does a party have an obligation to bargain collectively during the term of a collective agreement. In *Heartland Livestock Services*, 2003 CanLII 62870 (SK LRB) [*Heartland No. 1*], the Board outlined those circumstances:

> *[89] In certain cases a refusal to bargain may be a breach of an extant collective agreement, as where the agreement contains a provision for mid-term bargaining in certain circumstances. However, with few exceptions – for example, negotiating for the settlement of disputes and grievances, failure to comply with which is a violation of s. 11(1)(c) of the Act, and pursuant to s. 43, the technological change provisions of the Act – the Act does not expressly require an employer to bargain collectively with a certified union during the term of a collective agreement. Otherwise, under the Act, the parties are bound to bargain collectively only upon notice during the "open period" in the circumstances described in s. 33(4) for the renewal or revision of the agreement, or in the case of a first collective agreement imposed by the Board, s. 26.5(9).*

[173] The reasoning in *Heartland No. 1* has since been cited with approval by this Board: *CUPE, Local 600-3 v Government of Saskatchewan*, 2009 CanLII 49649 (SK LRB); *Saskatchewan*

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[17] Section 6-7 of the Act.
[18] George W. Adams, *Canadian Labour Law,* loose-leaf (6/2022 - Rel 2) 2nd ed (Toronto: Thomson Reuters, 2021), at 10-173.

Polytechnic Faculty Association v Saskatchewan Polytechnic, 2016 CanLII 58881 (SK LRB). An application for reconsideration of the decision in *Heartland* was dismissed in *Grain Services Union Canada v Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.)*, 2003 CanLII 62871 (SK LRB) [*Heartland No. 2*].

[174] Similar examples have been provided by the Honourable George W. Adams:

> *…However, there may be an ongoing duty to consult and deal with a trade union where the employer has introduced a change of fundamental importance, particularly where the change and its impact were not contemplated by the parties on entering the agreement. It has been held that the duty to bargain in good faith applied to wage reopener negotiations; throughout a compulsory interest arbitration process; during a statutory alternate dispute resolution process; and to the requesting of a statutory final offer vote. In certain jurisdictions, technological change gives rise to a mid-term duty to bargain by virtue of statute.*[19]

Relevance of the Strike and Picket:

[175] The Union argues that its activity is protected by the right to strike and the freedom of expression pursuant to sections 2(d) and 2(b) of the *Charter*, respectively, and sections 5 and 6 of *The Saskatchewan Human Rights Code*. The Employer counters that the impugned activity does not fall within the definition of a strike or the protections provided by the right to strike or the freedom of expression.

[176] Collective bargaining is by its nature a power struggle. This struggle is significantly enhanced during a strike or lockout. The Board's role in assessing the parties' conduct must be viewed within this context. As observed by the Board in *Noranda Metal Industries Ltd.,* [1975] 1 Can LRBR 145 (B.C.) [*Noranda Metal*], at 28:

> *The question still remains of how searching a look the Board should take at specific incidents in the bargaining history. We believe it would be undesirable to go as far as was suggested by the Union in this case, to a point where any conduct the Board considered unfair and likely to disillusion the other side might be an unfair labour practice. …Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:*
>
> > *'There is also danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value*

[19] George W. Adams, *Canadian Labour Law,* loose-leaf (6/2022 - Rel 2) 2nd ed (Toronto: Thomson Reuters, 2021), at 10-173 – 10-174.

> *on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.'*
>
> *Accordingly, while we interpret Section 6 as requiring adherence to certain fundamental principles of [reasonable] bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.*

[177] This Board places a high value on free collective bargaining, especially between parties with an established and mature bargaining relationship.

[178] As the Court recognized in *Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4 (CanLII),* [2015] 1 SCR 245 [*Saskatchewan Federation of Labour*], the strike has a "unique role in the collective bargaining process".[20] It has multiple functions. It is used primarily as an "economic tool" or a sanction on an employer.[21] It permits workers "to refuse to work under imposed terms and conditions", thereby affirming "the dignity and autonomy of employees in their working lives".[22] By collectively withdrawing their labour, employees are able to negotiate with an employer "on a more equal footing".[23] And, it brings the "debate on the labour conditions with an employer into the public realm":

> *[58] Moreover, while the right to strike is best analyzed through the lens of freedom of association, expressive activity in the labour context is directly related to the Charter-protected right of workers to associate to further common workplace goals under s. 2(d) of the Charter: Fraser, at para. 38; Alberta (Information and Privacy Commissioner), at para. 30. Strike action "bring[s the] debate on the labour conditions with an employer into the public realm": Alberta (Information and Privacy Commissioner), at para. 28. Cory J. recognized this dynamic in United Nurses of Alberta v. Alberta (Attorney General), 1992 CanLII 99 (SCC), [1992] 1 S.C.R. 901:*
>
> > *Often it is only by means of a strike that union members can publicize and emphasize the merits of their position as they see them with regard to the issues in dispute. It is essential that both the labour and management side be able to put forward their position so the public fully understands the issues and can determine which side is worthy of public support. Historically, to put forward their position, management has had far greater access to the media than have the unions. At times unions had no alternative but to take strike action and by means of peaceful picketing put forward their position to the public. This is often the situation today. [p. 916]*
>
> *[59] As Dickson C.J. observed, "[t]he very nature of a strike, and its raison d'être, is to influence an employer by joint action which would be ineffective if it were carried out by an individual" (Alberta Reference, at p. 371).*

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[20] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245 [*Saskatchewan Federation of Labour*, at para 77.
[21] *SGEU v Government of Saskatchewan, Mamawetan Churchill River District Health Board, et al*., [1999] Sask LRBR 307; *Saskatchewan Federation of Labour*, at paras 49-50.
[22] *Saskatchewan Federation of Labour*, at para 54.
[23] *Ibid*, para 57.

[179] In summary, the purpose of a strike is to influence an employer through collective action, which actions may include persuading, engaging with, and using to one's advantage the weight of public opinion.

[180] Next, the scope of the guarantee of freedom of expression, pursuant to section 2(b), is broad but it is not absolute. It was initially found to include any activity conveying or attempting to convey meaning*: Irwin Toy Ltd. v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 [*Irwin Toy*]. In *Montréal (City) v 2952-1366 Québec Inc*., 2005 SCC 62, [2005] 3 SCR 141, at paragraphs 60–85, the Court clarified that the location or method of the expression may remove it from the protection of section 2(b). Although some internal limits have developed over time, in most cases if limitations are to be found, they will be identified at the section 1 stage of the analysis.

[181] Picketing involves expressive action. Picketing within the labour context has even been described as a "particularly crucial form of expression with strong historical roots".[24] It is "an essential tool in the economic arsenal of workers in the collective bargaining process": *Unifor Canada Local 594 v Consumers' Co-Operative Refineries Limited,* 2021 SKCA 34 (CanLII) at para 55 [*Unifor v CCRL*]. Freedom of expression may assist in redressing the power imbalance between employers and employees.[25]

[182] Freedom of expression includes a right to communicate the message (but also third-party rights not to listen).[26] The "peaceful distribution of leaflets accurately setting out the position of employees involved in a labour dispute with their employer" is protected by the guarantee of freedom of expression.[27]

[183] Expressive activity taken to support a labour dispute is also protected by the freedom of association guarantee pursuant to s. 2(d).[28] As explained in *SFL* at paragraph 49, "expressive activity in the labour context is directly related to the Charter-protected right of workers to associate to further common workplace goals under s. 2(d) of the Charter".

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[24] *Alberta IPC* at para 35.
[25] *Pepsi* at para 34.
[26] *Unifor v CCRL* at para 108.
[27] *KMart* at para 1.
[28] *SFL* at para 58; *Unifor v CCRL* at para 49.

[184] Freedom of expression in a labour dispute brings issues into the public realm for debate. As acknowledged in *Alberta IPC*:

> *[33] Finally, in the labour context, freedom of expression can enhance broader societal interests. As this Court found in Pepsi, the free flow of expression by unions and their members during a labour dispute plays an important role in bringing issues relating to labour conditions into the public arena for discussion and debate: paras. 34-35. As this Court emphasized in Pepsi, free expression provides "an avenue for unions to promote collective bargaining issues as public ones to be played out in civic society, rather than being confined to a narrow realm of individualized economic disputes": Michael MacNeil, "Unions and the Charter: The Supreme Court of Canada and Democratic Values" (2003), 10 C.L.E.L.J. 3, at p. 24.*

[185] The weight of public opinion may "determine the outcome of the dispute".[29]

[186] As mentioned, freedom of expression is not absolute. It is acceptable for a union to exert public or economic pressure provided that the union's activities are not tortious or criminal, or in other words, wrongful.[30] The wrongful action approach is explained in *Pepsi*:

> *[76] The wrongful action approach, by contrast, focuses on the character and effects of the activity, as opposed to its location. It gets at the heart of why picketing may be limited. As discussed, the umbrella of picketing covers a diverse range of behaviours, tactics and consequences that often have little to do with location. Where picketing occurs has little to do with whether it is peaceful and highly respectful of the rights of others on the one hand, or violent and disrespectful of the rights of others on the other hand. By focussing on the character and effect of expression rather than its location, the wrongful action approach offers a rational test for limiting picketing, not an arbitrary one.*
>
> *[77] Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation, will be impermissible, regardless of where it occurs.*

[187] Furthermore, the Honourable George W. Adams explains that, where challenged pursuant to section 2(b), statutory restrictions on expression have been found not to breach section 2(b) or have been found to be justified pursuant to section 1.[31]

[188] In Saskatchewan, there are many examples of statutory restrictions on expression. Employer communications that undermine a union's bargaining authority, including in cases of direct bargaining and cases involving vulnerable employees, will generally be found to be unfair labour practices. A union who persuades an employee to take part in a strike while a matter is pending before a labour relations officer appointed pursuant to Part VI commits an unfair labour

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[29] *KMart* at para 46.
[30] *Pepsi* at paras 101-7.
[31] George W. Adams, *Canadian Labour Law,* loose-leaf (6/2022 - Rel 2) 2nd ed (Toronto: Thomson Reuters, 2021), at 3-205 – 3-216.1.

practice.[32] A union who declares a strike in the absence of a strike vote also commits an unfair labour practice.[33]

[189] The expressive character of a party's actions does not justify a failure to comply with the minimal degree of order in collective bargaining that is imposed by the Act.

Guiding Questions:

[190] In the current case, there was a duty on both parties to bargain in good faith the renewal of the collective agreement. The duty was continuous following the service of the notice to bargain and applied during the period of the strike.[34]

[191] The question for the Board is whether the respondents' actions went beyond the "generous limits of the tolerable in collective bargaining" or whether they constitute "a permissible exploitation of strength or skill by one party to gain advantage over the other".

[192] As disclosed by the foregoing case law, many of the usual concerns that arise in bargaining are not engaged by this case. This case does not involve a failure or refusal to meet, a refusal to meet unless procedural conditions are met, a failure to make a commitment of time, or a failure to exchange and explain proposals. Nor does this case involve surface bargaining or attempts to avoid the conclusion of a collective agreement.

[193] As far as the Board is aware, there is no precedent for a decision involving circumstances quite like those that are currently before the Board.

[194] Given the unique set of circumstances engaged by this case, it is necessary for the Board to apply the general principles to the facts as they have been found and to determine whether those facts are indicative of bad faith bargaining. From the established principles, the Board can identify three guiding questions with particular significance to this case:

a. Whether the Union (and agent) was not honestly striving to find a middle ground in respect of the opposing interests;
b. Whether the content of bargaining shows hostility by the Union (and agent) toward the collective bargaining process;

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[32] Clause 6-63(1)(b) of the Act.
[33] Clause 6-63(1)(d). Other, perhaps less analogous, examples are those statutory restrictions on union expression that has the effect of interfering with *Charter* rights.
[34] See, for example*, Royal Oak Mines Inc. v Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), [1996] 1 SCR 369.

c. Whether the nature of the Union's actions (and those of the agent) were aimed at destroying the collective bargaining relationship.

[195] What these questions have in common is a concern with the Union's genuine commitment to the collective bargaining process and relationship. An affirmative answer to any of these questions will result in a finding of a breach.

[196] For the reasons previously described, unfair labour practices designed to destroy the relationship, committed by a union, tend to have a different flavor than those committed by an employer. An employer might avoid reaching a collective agreement to "foster the union's early demise": *Canadian Union of Public Employees v Labour Relations Board (N.S.) et al.*, 1983 CanLII 162 (SCC), [1983] 2 SCR 311. A union, on the other hand, might seek to impair its collective bargaining relationship so as to secure a better deal through an alternative to its current negotiating environment. It may, for example, impair the process of bargaining so as to position itself for a strike: *Serco Facilities Management Inc.*, 2008 CIRB 426 (CanLII), or it may impair the process so as to position itself for a third-party process such as conciliation or arbitration.

[197] While neither of these examples are attempts to avoid concluding a collective agreement, they may disclose hostility towards the bargaining process. This is not to suggest limitations on employees' constitutional right to strike or their statutory right to engage in third-party processes, but instead to say that each party must genuinely engage in bargaining in each stage in the process.

[198] There are also occasions where a union may be motivated not to recognize an Employer's bargaining agent. This will include situations in which there are perceived, albeit illegal, alternatives to the employer's existing bargaining agent. For example, within the construction industry division, section 6-70 of the Act requires a union representing the unionized employees in a trade division to engage in collective bargaining with the representative employers' organization for the trade division. The Board has found that a failure to do so is an unfair labour practice: *CLR Construction Labour Relations Association of Saskatchewan Inc. v International Association of Heat and Frost Insulators and Asbestos Workers, Local 119*, 2016 CanLII 30542 (SK LRB) [*CLR*].

Relevance of the Co-operative Context:

[199] In deciding whether a party has engaged in bad faith bargaining, the Board should consider all the relevant circumstances, including "the totality of a collective bargaining

relationship."[35] Significant among the circumstances in this case is the nature of the Employer's business, being a co-operative that is organized and operated pursuant to *The Co-op Act*.

[200] Co-operatives are formed by their members to fulfill particular purposes, must exist primarily for their members, and must operate according to the principle of one member, one vote. Members have extensive powers, including the power to enact, amend or repeal bylaws and to elect and remove directors. The powers of the directors are subject to the bylaws.

[201] Unionized co-operatives are not new. For example, the original certification order for Federated Co-operatives Ltd. is dated May 11, 1949.[36] That certification order replaced an existing certification order for Saskatchewan Federated Co-operatives Ltd. by Canadian Co-operatives Employees' Union Local No. 2, made by the Board on May 13, 1946. The FCL, in one form or another, has been unionized in Saskatchewan for over 70 years.

[202] There is an apparent tension, but also alignment, between the co-operative business model and the union movement. A member-owned co-operative, in which employees may be members, is one in which employees who are members have power related to the governance of the co-operative, including through the election and removal of directors. Although a union cannot be dominated by an employer,[37] a co-operative which is owned by its members, including its employee-members, can be unionized.

[203] Employee-members cannot be required to choose between exercising the powers available pursuant to *The Co-op Act* and their constitutional right to collective bargaining.

[204] Still, while both the co-operative model and the union movement can have the effect of increasing democracy in the workplace, their democratic objectives are different. The role of the union is to represent the employees in the bargaining unit; the co-operative's purpose is to look out for the interests of its members, some of whom are employees. The practical reality is that, while most unions negotiate with an employer who is separate from the employees, a union in a co-operative setting negotiates with an employer, which is a separate entity, but is a collective of members, including employees. However, the legal reality is that an employer and a union are separate legal entities engaging in negotiations affecting the working lives of employees.

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[35] *Radio Shack*, [1979] OLRB Rep December 1220, 1979 CanLII 817 (ON LRB), at para 69.
[36] LRB File No. 005-48.
[37] See, clause 6-1(1)(p) of the Act.

Context of the Management Slate:

[205] It is also relevant that the Employer, on this occasion and at previous AGMs, has endorsed candidates for the Board of Directors. Mr. Burke testified that senior management would make a recommendation to managers about the candidates. The recommendation would arise following management discussions which included back and forth between FCL and Saskatoon Co-op. The Employer's practice was well-known, and its list of candidates was referred to as the "management slate". At the AGM, there tended to be two main voting blocs consisting of the out-of-scope group and the in-scope group (including so-called Union "sympathizers").

[206] The Union has endorsed candidates in the past and since the 2019 AGM, including in 2018 after the collective agreement had expired.

Decision on Bad Faith Bargaining:

[207] To begin, the Board will proceed on the basis that the Board of Directors is exercising an authority over management that has a direct impact on negotiations. The Board must proceed on the basis of the evidence that it has before it, and the evidence supports this premise.

[208] Next, the Employer and the Union are separate legal entities with a duty to engage in good faith bargaining. The fact that their bargaining relationship resides within a co-operative business model does not diminish these duties.

[209] The existence of a statutory process does not necessarily prevent a person's activities in relying on that process from being found to be an unfair labour practice. By way of analogy, when a party impairs the process of bargaining so as to position itself for a strike or a third-party process, as provided by the Act, they may be found to have been bargaining in bad faith. In the current case, while the Co-op members have significant powers in relation to the governance of the business, the Union and the Employer, both, must continue to uphold their duties in relation to collective bargaining.

[210] The Union was not a mere bystander to events that occurred within the community. It was directly and centrally involved in both the petition and the election strategy. Even if the Union did not create the playbook, it helped to carry the ball down the field. Mr. Thebaud acted as an agent in carrying out the petition strategy. The election strategy, including the focus on the second tier, and the Union's involvement in that strategy, crystallized before the conclusion of the collective agreement. Both strategies were intended to influence the course of the existing negotiations. The possibility of a pre-AGM end to negotiations does not change that fact.

[211] The Board has concluded that the respondents have breached sections 6-7 and 6-63(1)(c) of the Act. In so concluding, the Board has found that the respondents, and particularly the Union, were engaged in a course of conduct designed to replace the directors during the strike and prior to the conclusion of the collective agreement.

[212] It is clear that the respondents did not accept what they perceived to be the direction or the guidance coming from the Board of Directors. In pursuing the petition and election strategies, they sought to change that direction from within. They sought to circumvent the collective bargaining process so as to secure a better deal through an alternative to the available negotiating environment. Their sole motivation in promoting the petition and endorsing the director candidates was to change the composition of the Board of Directors to influence collective bargaining, whether in the immediate rounds or in a future negotiation.

[213] The respondents were not genuinely striving to seek a middle ground between the parties' opposing interests. The fact that the parties eventually achieved a compromise does not change their pre-agreement conduct. The respondents' strategies, while not altogether successful, demonstrated hostility toward the collective bargaining process.

[214] On the issue of expression, the strategies went beyond bringing the debate on labour conditions into the public realm. The intention was not merely to initiate debate, exert public pressure, or impose economic sanctions on the Employer. The intention was not merely to influence, or even compel, a change of direction in the Employer's bargaining position – the intention was to directly change the Employer's position. The respondents demonstrated a lack of respect for the free collective bargaining expected of two separate parties to the bargaining relationship.

[215] On the other hand, given the evidence, it is likely that the election strategy was, at least in part, a response to the management practice and an attempt, as it was described, to "overcome the management slate". By pointing this out, the Board is not sanctioning the respondents' actions. It is observing however, that, within a "one member, one vote" system, both parties to the bargaining relationship are attempting to influence the outcome of the director elections. The Employer, in its argument, concedes that "the Union backing candidates who might be aligned in philosophy is one thing". To suggest that there is some practical way to completely isolate the influence exercised by either party from the outcome of any collective bargaining round is simply not realistic. The Employer and the Union have different interests and they represent those

interests at the bargaining table. Whether the parties are seeking to replace the directors with new directors or to retain the existing directors, they are still acting in alignment with their own interests.

[216] However, it is helpful to consider the respondents' actions alongside those of management. The evidence before the Board is that management made recommendations to managers about candidates for the Board of Directors. The Union also endorsed candidates to the employees who belonged to the bargaining unit. In addition to this, the respondents promoted a petition to call a special meeting mid-strike and engaged the Co-op members in doing so. The Union encouraged new members to sign up and offered them a rebate on their membership fees. It promoted the extensive, related petition and election strategies during the open period of collective bargaining for a renewal agreement with the intention of changing the Employer's bargaining position on a key issue.

[217] It is important to understand, however, that the value of these latter observations (public involvement, new members, timing, extensive strategies) as comparisons is limited to what evidence came before the Board, and that evidence focused on the respondents' actions. The Board makes these comments to ensure that the parties are aware that this decision is grounded in the facts that were before the Board.

[218] Lastly, a co-operative is a unique business model formed by the members to fulfill particular purposes. It is not a local, provincial, or federal government. The Board wishes to be very clear that its findings should not be generalized to seek to abridge a union's rights in those other contexts.

Decision on Sections 6-41 and 6-63(1)(h):

[219] The next question is whether there was a breach of sections 6-41 and 6-63(1)(h) of the Act. The combined effect of these provisions is that, if a person who is bound by a collective agreement fails to do everything the person is required to do or does anything the person is required to refrain from doing, there has been a contravention of Part VI, and a contravention of a provision of Part VI that is imposed on or applicable to a union or employee is an unfair labour practice. In the vernacular, if a union that is a party to a collective agreement breaches the collective agreement, the union has committed an unfair labour practice.

[220] The Employer suggests that the Union is bound by the two-tier structure, that it strategized to accomplish the election of directors who opposed that structure, and that, in doing so, it

intended that the newly constituted Board of Directors would then proceed to reopen the collective agreement in the middle of the term so as to eliminate the second tier from the recently concluded existing agreement. Had the Union been successful, the reopener negotiations would appear to have been voluntary but would, in fact, have been orchestrated by the Union. This may seem like a tortured argument, but it is easier to appreciate when one considers that, after the conclusion of the collective agreement the parties' duty to bargain in good faith came to an end, and the Employer would have had no recourse for the conduct complained of, pursuant to clause 6-63(1)(c).

[221] The Employer has not grounded its argument in the common law duty of good faith, which is a general organizing principle of contract law applicable to contractual performance, as per *Bhasin v Hrynew*, [2014] 3 SCR 494 (SCC), 2014 SCC 71 (CanLII); *C.M. Callow Inc. v Zollinger*, 2020 SCC 45 (CanLII); *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (CanLII). Instead, the Employer has suggested that the principles of good faith bargaining and interference in internal affairs should apply to these circumstances. For the reasons already outlined, neither of those duties or prohibitions apply.

[222] Furthermore, the only way the Board could entertain the possibility of a breach is if the Union had intended through its actions to orchestrate a reopening of the collective agreement during the term of the agreement. Such a specific intention would be distinct from a general intention to influence the course of future sets of negotiations.

[223] The Board does not discount the evidence that could be supportive of that finding, but it is rather scant, and the evidence as a whole is not sufficient to satisfy the burden of proof. To be sure, Ms. Chubb's candidate profile suggests that she was hoping that, at least after the following election, the Board of Directors would be in a position to reopen the negotiations on the second tier. As well, there was a sense of urgency or excitement around the election of directors, for a three-year term, at the 2019 AGM. Assuming the collective agreement expired outside that timeframe, newly elected directors, during their first term, would have a direct influence over policy only during the collective agreement term. And, there is a statement on the Election Group's urgent AGM notice insisting that the Board of Directors "intervene to end Co-op management's assault on wages via the proposed 'two-tier' wage structure, today and forever."

[224] However, the whole of the evidence, including discussion at the Town Hall meetings, the aspirational nature of the resolutions, the references to "championing the resolutions", and the remaining candidate profiles, discloses an overall strategy that included, beyond influencing

current negotiations, a longer-term plan with the objective of creating sustainable cultural or systemic change within the Co-op. The evidence of these dual objectives is consistent and clear and is obvious throughout the materials. It demonstrates that the movement and the Union intended, in addition to influencing current negotiations, to shift the thinking at the Co-op and change the governance ethos, including by advocating for more education about co-operative values which would be led by the new directors.

[225] Ms. Chubb was one endorsed candidate among others. The candidate profiles disclose different views on how to exercise their powers once installed. Other profiles expressed an opposition to the second tier but not an intention to seek to reopen negotiations over an existing agreement. One of those profiles states, “I will work hard to understand why we had to go this route, and what can be done to make sure things are fair going forward”. Another refers to the labour dispute as a symptom of a “broader malaise within the Co-op itself”. At the AGM, most of the candidate speeches were focused on longer term plans.

[226] The Election Group’s communications contain no other reference to reopening the collective agreement. They do refer to the elimination of the second tier and state that it should “never have been introduced”. These are neutral references, which could refer to eliminating the second tier from the workplace via future sets of negotiations. There is also the short and inaccurate statement calling for an end to the assault on wages “via the proposed ‘two-tier’ wage structure, today and forever”. This is certainly unhelpful language, but it also has a rhetorical flair, and lacks specificity about the means necessary to accomplish the ends.

[227] By contrast, there is the more thoughtful and precise statement contained in an Election Group article, which congratulates the Union on achieving the bridge, communicates its “hope that the new agreement …turns out to be, in practice a fair and just settlement” and refers to future negotiations, stating, “we have no doubt that Co-op will be back in a few years, demanding more concessions. Unless the Co-op members and workers join together well in advance to stop it.” This statement discloses a future orientation, consistent with the balance of evidence from this timeframe.

[228] Lastly, there are many, plausible explanations for the apparent urgency, including the momentum from the strike and the two-tier structure stoking fears about losing control of the Co-op’s culture.

[229] In summary, the Board is not satisfied that the evidence discloses, on a balance of probabilities, that the Election Group's objective was to reopen the agreement and that the Union supported that objective.

[230] Furthermore, the relevant collective agreement is not before the Board. None of the parties have put it in evidence. Subsection 6-41(2), in describing the manner in which a person is bound by a collective agreement, states that said person "must, *in accordance with the provisions of that collective agreement*" [italics added] do everything the person is required to do and refrain from doing anything they are required to refrain from doing. This suggests that, assuming the matter is properly before the Board and not an arbitrator, the provisions of the collective agreement are central to a determination as to whether the person has breached it. The wording of certain provisions, such as reopener clauses or mutual assistance clauses, could, theoretically, have a bearing on the question. All of this is as an aside, however, given the absence of the requisite intention.

[231] Finally, one might suggest that, related to the internal interference argument is an argument that the Union violated its duty to bargain in good faith by attempting to influence future sets of negotiations. The Union's duty to bargain in good faith applied in the time and in the manner required pursuant to Part VI. At the time that the duty came into effect, the Union was required to bargain in good faith in relation to the existing negotiations. It did not apply to future sets of negotiations.

Conclusion and Remedy:

[232] First, the Board will grant a declaration that the respondents have engaged in an unfair labour practice, pursuant to clause 6-63(1)(c) of the Act.

[233] Second, the Board will not grant an order that the respondents "cease and refrain from coordinating with third party organizations, directly or indirectly, to subvert collective bargaining and/or interfere with Saskatoon Co-op's governance structure", as was requested by the Employer. The term "subvert" lacks legal precision and is unhelpful. Also, it does not properly reflect Mr. Thebaud's role as agent. The reference to interference cannot be made given the Board's conclusions on that issue. Instead, the Board will order the respondents to cease and refrain from coordinating with third party organizations, directly or indirectly, to contravene clause 6-63(1)(c) of the Act.

[234] Third, the Board will order that the Union make reasonable efforts to distribute a copy of these Reasons, and the accompanying Order, to all Saskatoon Co-op employees who are members of the bargaining unit.

[235] Next, the Board will make some obiter comments. This is new territory. The circumstances before the Board are unique. The Board has taken longer than usual in issuing these Reasons. In doing so, it hopes to provide the parties with sufficient guidance to understand their obligations, within the constraints of the case before it. Given these constraints, it was not possible for the Board to comment on the extent of the parties' obligations in all situations that might arise. If the parties wish to have the Board determine another, related dispute, they may consider bringing a reference to the Board, by consent, pursuant to section 6-110 of the Act. To be sure, this is not a comment on what form of said reference would be acceptable to the Board.

[236] Finally, the Board thanks the parties for their oral and written submissions, which the Board has reviewed and found helpful. Although not all of them may have been mentioned in these Reasons, all were considered in making this decision.

[237] Board Member Maurice Werezak dissents from these Reasons for Decision. His written dissent will follow at a later date.

DATED at Regina, Saskatchewan, this **15th** day of **August, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson