UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v 610539 SASKATCHEWAN LIMITED (operating as Heritage Inn Saskatoon), Respondent

LRB File No. 076-23; February 28, 2024
Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Grant Douziech

Counsel for the Applicant, United Food and Commercial Workers, Local 1400: Heath Smith

Counsel for the Respondent, Heritage Inn: Steve Seiferling

> **Unfair Labour Practice Application – Good Faith Bargaining – Section 6-7 of *The Saskatchewan Employment Act* – Reasonable Efforts to Enter into Collective Agreement – Employer Attempt to Gut Agreement – Maintaining Proposals to Impasse – Breach of Duty to Bargain in Good Faith.**
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> **Communications – Alleged Coercion – Clause 6-62(1)(a) – Coercion Not Established.**
>
> **Communications – Alleged Threat to Close – Clause 6-62(1)(k) – Threat Not Established.**
>
> **Statutory Freeze – Alleged Unilateral Change – Clause 6-62(1)(n) – Method of Delivery of Pay Stubs – Condition of Employment – Not Contained in Provision of Collective Agreement – Lack of Evidence about Condition at Time of Freeze Commencement.**

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an unfair labour practice application brought by United Food and Commercial Workers, Local No. 1400 [Union] in relation to 610539 Saskatchewan Ltd. operating as Heritage Inn Saskatoon [Employer]. The Union is certified as the exclusive bargaining agent to the Employer pursuant to an Order of the Board dated October 3, 2002, in LRB File No. 161-02. The Union claims that the Employer has contravened sections 6-7, 6-62(1)(a), 6-62(1)(b), 6-62(1)(k), and 6-62(1)(n) of *The Saskatchewan Employment Act* [Act].

[2] The parties enjoy a mature collective bargaining relationship. On or around June 30, 2019, the most recent collective bargaining agreement [CBA] between the parties expired. The parties

met for the purpose of negotiating a new CBA, and then during the pandemic, agreed to hold bargaining in abeyance.

[3] The Union makes the following allegations:

a. After bargaining had recommenced, the Employer engaged in conduct intended to mislead the employees about the nature of its proposals to the Union, to attempt to "funnel employees into communicating directly with the Employer's own counsel", and to direct the parties towards a potential labour dispute.

b. The Employer has not demonstrated a genuine interest in collective bargaining, has attempted to undermine the Union and has negotiated in bad faith.

c. The Employer has "effectively threatened to shut down or move its business" to induce employees to accept the Employer's bargaining agenda and that the Employer has unilaterally changed conditions of employment for employees since the expiry of the CBA.

[4] The Employer denies that it has breached any provision of the Act and asks the Board to dismiss the application in its entirety.

Evidence:

[5] Two witnesses were called by the Union: Roderick Gilles and Carrie Bovill. The Employer called no witnesses.

[6] Gilles is in-house counsel and Director of Negotiations for the Union. He has been working for the Union for approximately seven years. He oversees or directly bargains approximately 115 collective agreements and has negotiated all or almost all of these agreements to completion at least twice.

[7] Bovill is a housekeeping supervisor. She has worked for the Employer for about 12 years.

[8] Gilles observed that the staff at the Heritage Inn in Saskatoon is comprised of housekeeping, front desk staff, and restaurant staff.

[9] He also observed that the staff is relatively diverse, and a large majority of the staff consists of new Canadians who do not speak English as a first language. Counsel for the Employer objected to this latter testimony on the basis of hearsay.

[10] Gilles testified that, as Director of Negotiations, he had direct and indirect involvement with the membership, including those on the bargaining committee. In the normal course of preparing for bargaining, Gilles reviews the agreement, has meetings with the members and conducts polls to determine what issues are to be prioritized. In this case, Gilles did not meet with the employees as a group (besides the committee members). He testified that he met with the committee members probably two times in advance of bargaining. He also met with them to prepare the passes.

[11] In cross, Bovill was asked whether she met with Gilles "before the bargaining in March". She responded, "I'm not sure about that one because I don't remember, um, meeting with him before all of this." It was unclear whether she meant that they hadn't met to prepare before the first session or they hadn't met prior to the bargaining round. She also testified in cross that she didn't help with preparing the documents, but clarified in redirect that she had talked to Gilles about the documents but didn't "write it on the paper" and "never typed it up".

[12] Bovill was present for all of the bargaining dates.

[13] In preparing to bargain in this case, Gilles observed that language and communication with the membership was, at times, challenging.

[14] Gilles also indicated that there were some discussions about work permits, although he provided very little detail about those discussions.

[15] Following the pandemic hiatus, the parties started communicating again in 2022. They proceeded to recommence bargaining in relation to the Moose Jaw and Saskatoon locations, with the Moose Jaw location proceeding first. The Employer's lead negotiator was Steve Seiferling.

[16] Gilles testified primarily about bargaining with respect to the Saskatoon location. According to Gilles, the parties decided to recommence bargaining "from scratch" – it would be less artificial to do it that way. Gilles acknowledged that a lot had changed in the hotel industry.

[17] On March 15, the Employer provided the Union with its proposal document, which Gilles characterized as a "summary of intended proposals". Gilles took issue with many aspects of the

document: the Employer did not work from the Union's track changes document; nor did it provide a full mark-up of the agreement. Nor did the Employer directly respond to the Union's proposals.

[18] Gilles acknowledged, however, that the parties were quite far apart, and the Employer had made proposals in relation to articles that the Union was seeking to amend.

[19] Gilles suggested that this was not a document that he could respond to in a meaningful way because the proposals were not specific.

[20] On March 20, Gilles contacted Seiferling, requesting an initial document be ready for the next day. The next day (March 21), the Union provided its comprehensive proposals to the Employer, contained in an abridged version of the CBA with track changes. Its comprehensive proposals for Saskatoon were similar but not identical to its comprehensive proposals for Moose Jaw.

[21] March 21 was the first day that the parties met in person for the Saskatoon bargaining.

[22] In the morning, the Employer's representatives described the "state of affairs" of the business and the hotel industry in general, indicating that the hotel had been experiencing financial hardships and was operating at a loss. Gilles acknowledged that throughout bargaining he heard this message on many occasions.

[23] In the late morning on the same day, the Employer provided a Word version of the CBA, marked up with proposed changes using track changes, indicating:

> *As you can see, we have agreed to the Union's changes in 5.03, 19.01(a), and 19.01(b). The remainder of your proposals either have corresponding employer proposals, are monetary, or are to be discussed this afternoon.*

[24] The agreed changes to Articles 5.03, 19.01(a), and 19.01(b) consisted of adding the phrase "email address" in reference to the employees' contact information.

[25] On the document, the Employer had also indicated that certain matters were monetary. As such, it was implied that these matters would be addressed in a later stage.

[26] The next day, on March 22, the Union provided a written response. In it, the Union agreed to a small number of the Employer's proposals. It refused to agree to over 80 of the proposals (indicating only "No"). Where the Union provided counterproposals, it provided some explanation.

Following this exchange, the parties had discussions which resulted in resolutions on some of the outstanding matters.

[27] On March 23, the Employer emailed the Union its wage proposal.

[28] Gilles testified that, by the end of the day on March 23, the only incomplete proposals pertained to the meal discounts, gratuities percentage breakdown, and the dental plan:

a. The Employer wanted to make a proposal with respect to the meal allowance. The proposal was a percentage discount, but the Employer did not present the percentage that it was proposing.

b. The Employer had made a gratuity proposal. The Union needed to know the percentage that the Employer was proposing and how the gratuities would be distributed.

c. The Employer had indicated that it wanted to make a proposal on dental benefits. The Union asked for that proposal in writing.

[29] However, Gilles acknowledged that there was discussion about a 20% discount and that there was discussion about the distribution of the gratuities if not the breakdown. The Employer had proposed to develop a policy about gratuities, but the breakdown remained unclear.

[30] Otherwise, the only remaining issue was the dental plan. Here, the Employer communicated that it did not have information about usage rates and that it needed to have those rates before providing a proposal. Gilles explained that he didn’t have access to that information – only the trustees would have access. Gilles told the Union President about the request, and she indicated that the Employer has full access to that information and provided the contact information for the plan. Gilles provided the contact information to the Employer.

[31] In Gilles’ view, the changes that the Employer was proposing were so voluminous and so significant it seemed like the Employer was attempting to gut the contract. The Employer repeated the phrases “flexibility in operations” and “cooperative workplace” to justify its approach. Gilles asked how the Employer’s proposals supported these themes but didn’t believe he was receiving helpful answers. The Employer was suggesting that all of its proposals were important and was not prioritizing any of them.

[32] Among the Employer's proposals were the following:

a. the inclusion of changes to the scope and removal of protection for bargaining unit work;

b. the elimination of any guarantee of full-time employment;

c. a change to seniority such that it would relate to department, not workplace;

d. remuneration based on departmental seniority;

e. a grant of discretion to the Employer to reject the attendance of a Union representative (based on operational needs);

f. the removal of the prohibition on individual contracts or agreements (despite the Employer's explanation of this proposal as for accommodation purposes only);

g. the elimination of the guarantee of fair and equitable distribution of work;

h. the inclusion of discretion by the Employer to approve leaves for Union business;

i. the removal of paid bereavement leave;

j. the removal of Boxing Day as a paid statutory holiday;

k. the removal of upper vacation accrual rates;

l. the removal of "company time" from the staff room clean up obligation;

m. minimum wage training rate for a period of 30 days upon transfer to a new department;

n. the removal of protection for employees from responsibility for float shortage absent proof of theft; and,

o. changes to the contracting-out language;

[33] In the afternoon of March 23, Gilles suggested that the parties proceed to voluntary conciliation and the Employer agreed. On March 23, the parties wrote to the Minister, jointly requesting assistance with collective bargaining, pursuant to section 6-27 of the Act. Kevin Eckert, Senior Labour Relations Officer, was appointed further to that request.

[34] The parties chose May 25 as the first day for conciliation bargaining. It was the Union's turn to respond to the Employer. Gilles testified that he was going to respond on May 25. On March 30, Seiferling contacted the parties to indicate that he now had availability on April 11 (Easter Monday was April 10). The parties agreed to meet on that date.

[35] Gilles testified that, in the meantime, one of his bargaining committee members (Carrie Bovill) brought him a document that had ostensibly been created on or around March 24. It appeared to be a letter from the Employer. Gilles believed that it “lent itself to a slight undermining of the confidence of the membership”. He was concerned that the Employer was providing bargaining details to the membership, that the letter instilled fear in the membership, and was misleading. He suggested that parties usually respect a degree of confidentiality at this point in bargaining to avoid putting a spin on the issues.

[36] Gilles didn’t raise his concerns with the Employer. He said there was nothing blatant about the letter, but it was a red flag.

[37] Gilles then testified that Bovill later provided him with another document, dated April 5, 2023. Again, the document appeared to be a letter from the Employer. He stated that this document heightened his concern. The letter suggested that the Employer had provided the Union with an offer.

[38] Gilles explained that he never received an offer from the Employer. According to Gilles, the Employer’s proposal did include wage proposals, but it could not be described as an “offer”; the Employer presented no document that the Union reasonably could have presented to the membership; and, in the “200-plus negotiations” he has done, the employers have either presented a memorandum or an employer’s offer, which are specific documents, or the parties have resorted to job action. When the Union decides to present an employer’s offer to the membership, it presents the employer’s document, not a document of its own creation.

[39] Gilles also observed that the reference in the letter to a wage increase omitted the fact that the wage increase was in line with minimum wage.

[40] Gilles testified that Bovill also had brought him a LabourWatch document, which had been posted next to the April 5th letter on the bulletin board, and that she gave him both the April 5th letter and the LabourWatch document at the same time. The LabourWatch document contains only the words “LABOURWATCH” followed by a phone number starting with “1-888”. There is no other information on the document.

[41] Gilles raised no concerns with the Employer about any of these communications.

[42] Gilles testified in cross that Bovill brought him the documents (in paper copy) while he was in his office and that she provided them within a day or so from the date that appears on those

documents. According to Gilles, Bovill told him that she got the LabourWatch document from the bulletin board in the staff room (which he understands is used by housekeepers). Gilles has never been in the staff room.

[43] Gilles testified that when he received the LabourWatch document he did some research. He took screenshots of the LabourWatch website, which included pages containing contact information for "employer advisors", "employee advisors", and "content advisors". The only entry under each of these headings was Seiferling Law.

[44] Bovill spoke about the March 24 document, explaining that the staff received it in an envelope from the housekeeping manager, Donna[1], at around the date which appears on the letter (if not before). Bovill testified, "I believe we actually got it around the 20th".

[45] Bovill didn't remember having seen the April 5th letter.

[46] Bovill testified that she had seen Donna photocopying the LabourWatch document sometime in April (early to middle of April). Bovill asked why (presumably, why she was copying it). Donna explained that the document had to be hung up in each department. In cross, Bovill later said that the LabourWatch document was hung up "in the office".

[47] Bovill testified that she didn't ask Donna for a copy of the document; the staff didn't get copies of the document; and she didn't give the document to Gilles.

[48] Around this time, Gilles learned that the Super 8 hotel and the Heritage Inn had retained the same lead negotiator. When he learned this, he searched for information about what was happening in bargaining with the Super 8 hotel. He came across a newspaper article that caused him some concern. According to Gilles, the article made him think that the lead negotiator was employing some of the same tactics in both sets of bargaining. Gilles acknowledged that he had no direct knowledge of what occurred in the Super 8 bargaining.

[49] The parties proceeded to meet on April 11 for conciliation. Conciliation bargaining was conducted in shuttle form (and virtually). The Union prepared a bargaining response for the meeting on April 11. In that response, the Union sought more detail so that "the Union can properly address the actual concerns and issues the Employer has". To that end, the Union posed specific questions about the specific proposals made by the Employer, indicating,

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[1] Donna is a nickname that is used for the housekeeping manager.

> *The above will assist the Union in formulating a pass back to the Employer. Identifying the actual concern the Employer has will facilitate the ability to address the concern specifically, whether its [sic] in the form of acceptance, counter or rejection of same.*

[50] In addition to its questions, the Union also made comments expressing its view as to whether the Employer's proposals fit within the Employer's primary goals, as earlier expressed by the Employer.

[51] During the session, the Employer provided written answers to these questions (through the conciliator).

[52] After receiving this information, the parties took a break to allow the Union to provide a response and agreed to meet again on May 25. The Union received an email from the Employer on April 12. In it, the Employer expressed its disappointment with the Union's "lack of preparedness" at the recent session, and that the Employer had received nothing "of substance" from the Union. The Employer went on to state:

> *Our next date is set for May 25, 2023. We have concerns that the May 25 session will end up the same as the session yesterday – with zero progress, and with zero proposals from the Union.*
>
> *Accordingly, we are requesting that you provide a pass, by the end of next week (April 21, 2023), so that we can review with our team, and determine whether proceeding with bargaining on May 25, 2023 will be productive.*
>
> *With respect to the one outstanding issue – the dental plan – we have reviewed the plan, and the waiting period for plan eligibility, and have determined that it is not effective with respect to the employees of the Heritage Inn. Our proposal is therefore to remove the plan from the CBA. That is the last outstanding issue from our side.*
>
> *We await your response, by or before the end of day on April 21, 2023. Following your response, the Heritage Inn will determine the appropriate steps.*

[53] Gilles felt that this communication had unfairly disparaged his conduct. He felt that he had had very little time to prepare and believed that the questions he had posed were a legitimate part of the bargaining process.

[54] On April 25, Gilles responded:

> *I have received your email dated April 12, 2023. Thank you for providing advice on the Employer's intention to remove the Dental Plan. I would assume the Employer's initial monetary position is now complete.*
>
> *In response to your email and since I have received some information in the Employer's response on April 11th, I will be preparing a full pass back to the Employer. I have no difficulties providing the pass before May 25, but will only do so if and when the document is complete.*

[55] In response, the Employer indicated that it was aware that Gilles was meeting with the committee on May 4, and taking that into account, was seeking the full pass document no later than the end of business on May 10. The Employer expressed a desire to have sufficient time to review the document prior to the next bargaining date.

[56] On May 1, Gilles responded that one of his committee members was going to be leaving the Heritage Inn and that a replacement could have an effect on completing the pass. He concluded with:

> *…As I have indicated before, I will provide you with the document once it is complete, whether that is before or after the date that you would prefer to receive it.*

[57] On May 23, the Employer emailed Eckert indicating that the Union had still not provided a pass. The Employer had again asked for the pass to be provided by the end of the day on May 24.

[58] The Union did not provide the pass until May 25 (the second date that the parties met for conciliation bargaining). In cross, Gilles was asked whether he had given any explanation for the additional delay. His response was that "it wasn't complete" and then, "it definitely wasn't the only file on my desk", and then, "I didn't think that there was delay".

[59] As for the pass document, instead of stating "no" in response to the proposals, it now stated "not agreed". Within the CBA (besides Schedules and LOUs) there were approximately 21 "agreeds" and approximately 87 "not agreeds". There were three non-monetary counter proposals, all of which were "maintained" from the last pass. One of the "counters" appears to have been made in error.

[60] In the monetary section, the Union observed that the Employer was seeking a term equivalent to six years and seven months with minimal wage increases over the course of that term. It also made a monetary counterproposal.

[61] In cross, Gilles observed that the Union expected responses from the Employer that would involve discussions about counters. It was frustrating that the Employer was very hesitant to move on anything. The Union was hoping to get some movement from the Employer's side.

[62] Early in the afternoon, the Union received word that the Employer was not going to respond to the document, that the Employer was pulling out of conciliation bargaining and was

declaring an impasse. The Employer emailed the Union proposing two options, both involving mediation/conciliation on June 1 – one in which the time was equally divided between voluntary bargaining for the Moose Jaw location and impasse bargaining for the Saskatoon location[2]; another in which the time was committed to the Moose Jaw matter with the opportunity to discuss the Saskatoon matter privately with the conciliator. Within the Employer's proposal, it stated:

> *…the Heritage Inn does not believe that further video, or in-person, bargaining is useful, unless the Mediator determines that there is progress to be made.*

[63] On June 1, bargaining for Moose Jaw continued. The present application was filed the next day.

[64] On the same day, June 2, the Union sent a letter to the membership about the Employer's earlier letters, in which it made the following statements (paraphrased):

a. the Union had not received an offer from the Employer;

b. voluntary conciliation cannot "wind up in job action";

c. the "raise" referred to in the Employer's letter would be required pursuant to the statutory minimum wage;

d. the Union believed that the Employer was bargaining in bad faith, had refused to respond, and had declared impasse;

e. the Union had filed an unfair labour practice application;

f. the Employer was using the same tactics in both Moose Jaw and Saskatoon;

g. the same lead negotiator was involved in the Super 8 and the Employer there had locked out the employees.

[65] Bargaining recommenced at some point, including impasse bargaining that occurred during the summer, and Gilles has not been involved. On August 1, Eckert wrote to the Minister to advise that the parties had been unable to reach an agreement. According to that communication, the cooling off period was deemed to expire on August 15. Lockout notice was given September 5, and the lockout began on September 7. On November 15, two decertification applications were filed.

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[2] Pursuant to section 6-33 of the Act.

[66] Lastly, Bovill explained that the employees, as of the end of March or beginning of April 2023, now receive their pay stubs by email. Bovill does not have a computer at home or a cell phone. Her general manager just created an email address for Bovill so that she could review her pay stub. When she found out about the change, she tried to complain but was told that it was more efficient for the Employer to do it this way.

Arguments:

Union:

[67] The Employer's own documents disclose that the Employer was not genuinely interested in reaching a renewed CBA. Instead, the Employer's approach precluded true negotiations. The Employer presented an overwhelming, unwieldy, 60-page bargaining document which sought to alter almost every article in the CBA and then refused to prioritize proposals, insisting that every issue was just as important as the next. The Employer demonstrated no willingness to engage in meaningful discussions about proposals or to make meaningful movement from its initial positions. The Employer attempted to impose arbitrary deadlines for document production. After only five days of bargaining, the Employer insisted that the parties had reached an impasse and then abandoned the conciliation process immediately on the third day.

[68] The Employer also created a proposal document that was comprised of crushing proposals. These included: deleting any reference to full-time employment; deleting seniority as a factor in the workplace; modifying the ability of the Union to enter the workplace to provide service; cutting paid bereavement leave; cutting the dental plan; and insisting on wage rates at or near the minimum wage.

[69] The Employer seeks to paper the record to create the impression that it was more involved in bargaining than it was. However, the Employer generated only four documents that could be characterized as seeking to further the collective bargaining process: one is not a proposal document but identifies proposals that may come; two are basically the same; and one contains the Employer's commentary further to the Union's requests. The Employer has created only a single proposal document. The Employer only ever agreed to one proposal, that is, to include the reference to "email addresses" in the agreement. It never made a counter-proposal document, at least not one that is in evidence.

[70] The Employer did not engage with the Union's proposals. It did not participate in creating a reply stream of documents. It did not take on any new information. It did not seek any information

from the Union. It did not inquire about solutions to problems. It did not adapt. It did not demonstrate a genuine interest in reaching an agreement.

[71] There is an inherent power imbalance between employers and employees. Some employees are particularly vulnerable, as was the case here. The Employer engaged in misleading communications with these employees, excluding vital information on the Employer's proposals for drastic cuts.

[72] The Employer posted the phone number for LabourWatch in the workplace. LabourWatch is not a neutral source of information. By providing this information, the Employer was communicating a clear preference to employees on the topic of unionization. Furthermore, counsel for the Employer serves in an advisory role with LabourWatch. By posting the LabourWatch phone number, the Employer was funneling the employees into communicating directly with the Employer's own lawyer. This is completely inappropriate.

[73] The Employer issued to its employees two communications, dated March 24, 2023 and April 5, 2023, that were misleading and coercive. The communications presented a one-sided picture of bargaining and signaled that the hotel's operations were unsustainable. The employees would likely have interpreted these communications as threatening closure of the hotel in the event that the Employer did not meet its objectives in bargaining.

[74] Furthermore, the Employer suggested in those communications that the employees could reach out to the Employer. The Union is the exclusive bargaining agent. It is not appropriate for the Employer to suggest to the employees that they speak to the Employer about collective bargaining.

[75] Lastly, the Employer has unilaterally changed the employees' conditions of work by moving to a purely digital system of providing pay stubs. Although the provision covering pay stubs was not subject to bargaining in this round and the provision does not mention the method of delivery of pay stubs, there has been a practice in place for years (even decades perhaps) and that practice was changed unilaterally by the Employer.

Employer:

[76] The Union has the onus on this application. It is unnecessary for the Employer to provide evidence if the Union has not made its case.

[77] The Union's argument paints a selective picture of the evidence before the Board. The Union is advancing a case without real evidence and asking the Board to accept its spin. The Union didn't call an employee to speak about language issues. It didn't call employees to speak about how the Employer's communications impacted them. It didn't call Donna, the housekeeping manager, to speak about the LabourWatch document.

[78] Gilles' evidence contained many inconsistencies and contradictions, including in relation to the application that he swore in this case. Gilles' evidence should be discarded or treated with caution.

[79] Furthermore, there is no evidence that the Employer's communications, especially the April 5th communication, were distributed in a specific way to employees. There is no evidence that the April 5th communication was distributed along with the LabourWatch document.

[80] The Board should look at the whole of the evidence. The documents, in particular, provide a clear chronology of what happened.

[81] This case is about collective bargaining. There are no rules for collective bargaining except that the parties must bargain in good faith. There are no rules against hard bargaining. There was no agreement about confidentiality.

[82] The Union has made no allegation that could be interpreted as bad faith bargaining. There is no claim that the Employer refused to engage or refused to provide information on a timely basis. The Employer actively engaged in bargaining, made its positions clear, and provided a number of passes in a timely manner. The Employer provided a comprehensive document with a wage proposal, with the only outstanding proposal being in relation to the dental plan.

[83] The parties jointly agreed to voluntary conciliation. They met on April 11 and at that time the Union provided a list of questions to which the Employer responded quickly, providing its answers to the questions as well as an overall justification for its approach. It also noted that the Union had provided questions in relation to some but not all of the proposals. The Employer wanted to proceed to make progress on all of the proposals.

[84] Upon receipt of the Employer's response, the Union said that it needed more time to review the answers. Then, the Union delayed despite the Employer's multiple attempts to follow up. When the Union finally responded on May 25, it became apparent that there was no progress to be made. The bulk of the Union's responses were "not agreed". When the notice of impasse

was filed, the Union did not contest it. The Union states that the Employer failed to respond to the May 25 pass, but at that point there was no progress to be made.

[85] The Board should not consider the evidence with respect to the bargaining that occurred in relation to the Super 8. It is irrelevant hearsay. The Union called no witnesses who could testify about the bargaining at that table. Statements that have been attributed to the union involved in the Super 8 negotiations raise questions about the reliability of the evidence that has been presented.

[86] This Board should not get involved in the specifics of bargaining. It should not be concerned with the nature of the proposals, the length of bargaining, or the substance of bargaining unless a party has alleged unlawful proposals or actions. No such allegations are made here.

[87] If the Board considers the proposals, it should consider them in context. For example, the Employer's seniority proposal was to create two types of seniority to enable cross training and the ability to work in two different departments. Also, the Employer was not trying to delete bereavement leave (which is protected under the Act); the Employer was trying to remove paid bereavement leave.

[88] The Union is wrong to suggest that the Employer did not engage with its proposals. After agreeing to three proposals, the Employer pointed out that the remainder of the Union's proposals were subject to corresponding Employer proposals, were monetary, or were to be discussed. Gilles acknowledged in his testimony that the parties had meaningful conversations on a number of matters.

[89] It is legitimate that there was some overlap in bargaining between the Saskatoon and Moose Jaw tables. The collective agreements were similar. The Union's proposals were the same.

[90] The Employer did not breach clause 6-62(1)(a). The communications were factual. The Employer's invitations to the employees to reach out should be read in context, which include the Employer's assertion that management cannot bargain directly with employees in a unionized environment. There is no evidence that any employees reached out. There is no evidence that the communications impacted any employees. The employees could have received the communications, evaluated that information, and decided for themselves.

[91] There is no evidence that the LabourWatch document interfered with the Union.

[92] There was no threat to close. The "threat to close" case law includes actual closure (not a threat) and threats to close if certified (a violation). Factual statements about a business's financial affairs do not equate to threats of closure. Furthermore, the Union's own documents suggest that the Employer's statements appeared genuine, and the hotel hasn't closed.

[93] Allegations of a breach of the statutory freeze are most often raised in the context of a new certification. Such allegations are rarely raised in renewal bargaining. Unless the subject matter is an issue in bargaining it is not a term and condition of employment for the purpose of the freeze period. Once a collective agreement is negotiated, the terms and conditions of the agreement remain in force until the renewal of the agreement or until a labour dispute occurs.

[94] The method of the delivery of pay stubs is not an issue in bargaining. It is not a term or condition of employment. If the Union has past practice evidence, then it should bring that evidence to the appropriate avenue, the grievance process. To be clear, if the Union were to do this, then the Employer will likely object on the basis that the subject matter is not contained in the collective agreement.

Applicable Statutory Provisions:

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

> ***6-1****(1) In this Part:*
>
> *...*
>
> *(e)* ***"collective bargaining"*** *means:*
>
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
>
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
>
> *(iii) executing a collective agreement by or on behalf of the parties; and*
>
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;*
>
> ***6-7*** *Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*
>
> *…*

6-62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;

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

…

(k) to threaten to shut down or move a plant, business or enterprise or any part of a plant, business or enterprise in the course of a labour-management dispute;

…

(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit;

…

(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.

(3) Clause (1)(b) does not prohibit an employer from:

(a) permitting representatives of a union to confer with the employer for the purpose of collective bargaining or attending to the business of a union without deductions from wages or loss of time while so occupied; or

(b) agreeing with any union for the use of notice boards and of the employer's premises for the purposes of the union.

Analysis:

Onus:

[96] To begin, the Union bears the onus to prove its allegations on a balance of probabilities.

Bad Faith Bargaining:

[97] The duty to collectively bargain in good faith is a cornerstone of Part VI of the Act.

[98] Section 6-7 imposes the obligation on the Union and the Employer to engage in collective bargaining in good faith. Clause 6-1(1)(e) emphasizes the good faith component of collective bargaining "with a view to the conclusion of a collective agreement or its renewal or revision". Where notice is given, subsection 6-26(3) obliges the parties to "engage in collective bargaining

with a view to concluding a renewal or revision of a collective agreement or a new collective agreement”.

[99] The Supreme Court of Canada in *Health Services* summarized the principles underlying the duty to negotiate in good faith:[3]

> *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).*

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[3] *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391 [*Health Services*].

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).

[100] The Board's role in determining whether there has been a breach of the duty is as follows:

In enforcing these obligations, the approach of the Board is one of measured restraint. It is not the Board's role to supervise or monitor too closely the bargaining strategies used by the parties, provided that they genuinely engage in the process. The Board's role is to

> *monitor the process. The Board's role is to ensure that neither party acts to frustrate collective bargaining by failing or refusing to meaningfully participate in the process.*[4]

[101] The Board's role is to monitor the process of collective bargaining and to ensure that neither party fails to meaningfully participate in the process.

[102] It is not a failure of good faith bargaining to engage in hard bargaining. However, if the nature of a party's proposals is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship, the Board may find that the party has failed to comply with its duty. The Board may find as much even if the party has participated in all the steps of the bargaining process. It is not enough to go through the motions of collective bargaining. The party has to make every reasonable effort to enter into a collective agreement.

[103] The Board may find that a specific proposal(s) is indicative of bad faith bargaining in the following situations:[5]

> *In summary, the cases demonstrate that while Boards generally will not delve into the reasonableness of the bargaining positions taken by either party during collective bargaining, Boards may find that a specific proposal does constitute bad faith bargaining if: (1) the proposal contains some illegality; (2) the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective agreement; and (3) the proposal is or should be known to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiation of a collective agreement.*

[104] In line with the foregoing principles, the Board has recently explained the purpose for reviewing the content of parties' proposals: [6]

> *45 The Board will not consider the content of the parties' proposals except for the purpose of determining whether a party is engaging in surface bargaining or except if they are otherwise indicative of a party not acting in good faith. The Board will not judge the reasonableness of the parties' proposals unless the Board concludes that the proposals being advanced or the positions being taken are indicative of a strategy to subvert, frustrate or avoid the collective bargaining process. The Board may examine the proposals put forward by the parties, but only for the purpose of determining what they might reveal about the motivation of the parties. 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 to conclude a collective agreement is a contravention of the duty to collectively bargain in good faith. A party may not engage in surface bargaining, in which an outward willingness to observe the form of collective bargaining masks an intention to avoid entering a collective agreement at all.*
>
> *[…]*

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[4] *SEIU-West v Canadian Blood Services*, 2022 CanLII 25872 (SK LRB) [*Canadian Blood Services*], at para 44.
[5] *Saskatchewan Government Employees' Union v Government of Saskatchewan, Mamawetan Churchill River District Health Board, et al*., [1999] Sask LRBR 307 [*Mamawetan Churchill*], at 341-42.
[6] *Canadian Blood Services*.

> *47 What the Board must determine, without intervening unduly in the dynamics of the bargaining process, is whether a sincere effort was being made by the Employer to conclude a collective agreement with the Union. Or does the Employer's conduct reveal an unwillingness to strive toward the conclusion of a collective agreement? In reviewing the Employer's conduct, the Board must assess whether that conduct was designed to or had the effect of impeding discussions for a resolution of the collective agreement. Was the Employer negotiating in good faith with a view to arriving at a collective agreement?*

[105] The duty to enter into bargaining in good faith is measured on a subjective standard whereas the related duty to make reasonable efforts is measured on an objective one.[7]

[106] In various labour relations board decisions, a party has been found to have breached its duty to bargain in good faith where for example:

a. an employer has maintained an “intransigent position on an issue of fundamental significance to trade unions” (arbitration of discharged employees)[8];

b. a party made late first-time proposals, made delayed changes to proposals, and proposed to reserve the unilateral right to reduce wages[9];

c. the employer took positions that were designed to unseat the union, made proposals that were unlawful, and refused to provide information[10];

d. the employer refused to negotiate any due process for employees that it proposed to terminate and proposed zero seniority and no bumping rights of all remaining employees[11].

[107] Where a party maintains a position which, viewed objectively, a party knows or ought to know is of fundamental significance to the other party, that position is one which should attract the “scrutiny” of the Board.[12]

[108] Turning to the current case, many of the proposals and positions taken by the Employer, viewed objectively, were proposals and positions which the Employer ought to have known were of fundamental significance to the Union and which should attract the scrutiny of the Board.

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[7] See, Royal Oak. Note that the reasonable efforts duty was an explicitly separate statutory duty.
[8] *U.S.W., Local 6500 v Vale Inco Ltd*., 2012 CarswellOnt 2479 [*Vale*], as cited in *Adams* at 10-190.
[9] *Intek Communications Inc. and CEP, Re*, 2013 CIRB 683, as cited in The Honourable George W. Adams, K.C., *Canadian Labour Law*, loose-leaf (12/2023 - Rel 5) 2nd ed (Toronto: Thomson Reuters, 2023) [*Adams*], at 10-190.
[10] *Egg Films, Inc. and IATSE, Local 849*, Re, 2015 CarswellNS 943, as cited in *Adams* at 10-190.
[11] *Unifor, Local 597 and D-J Composites Inc*., Re, 2017 CarswellNfld 303.
[12] See, for example, *Vale*, as cited in *Adams* at 10-190.

[109] First, there were proposals which could risk undermining the employees' job security and erode the bargaining unit, a primary concern of and purpose for engaging a union as the bargaining agent in the workplace. These included the following:

a. Alteration to the scope of the bargaining unit (3.01);

b. Removal of the protection for bargaining unit work (3.02);

c. Removal of sunset clause for the use of the employee's record (9.02(c));

[110] The scope proposal was to add exclusions from the bargaining unit. Whereas the certification order excluded "anyone above the rank of manager" the proposal was to exclude "supervisors in all departments, and anyone at or above the rank of supervisor".[13] The Employer suggested that there were "only two current posts at the Heritage Inn Saskatoon that this would apply to. No doubt, the word "current" would not have provided the Union with much reassurance.[14]

[111] The scope proposal was accompanied by a proposal removing the protection for bargaining unit work. What follows is the Article, which was proposed to be deleted, in its entirety:

> *3.02 The managers will continue to perform the same work as they have historically performed at this location prior to the certification, but shall not perform duties that are regularly performed by in scope employees to the extent that employment in the bargaining unit is reduced, it causes a reduction in hours, prevents an increase in hours, it prevents a position from being filled or prevents a laid off employee from being recalled. In the case of staff shortage due to employee absence or an unexpected sudden increase in business of a short duration, managers may work where needed.*

[112] This proposal intensified the effect of the proposed scope change (which, in fairness, had previously been a legislated requirement) by further threatening to weaken the strength of the bargaining unit.

[113] Next, when asked about how the sunset proposal assisted with flexibility or collaboration, the Employer offered only, "the sunset clause is a double-edged sword, which only allows employees to say that they have a clean record for the length of the sunset clause." Obviously, a

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[13] There also appears to be a new exclusion for "sous chef", although the Employer's materials do not refer to it.
[14] This proposal was made after the removal of the requirement to exclude supervisors from non-supervisory employee bargaining units. The Act was amended shortly after the issuance of *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2021 CanLII 12946 (SK LRB). Before that decision was issued, the exclusion was not treated as applicable to existing bargaining units, and therefore, would not have impacted existing employees.

perpetual discipline record would be a serious concern for any employee with discipline or facing potential discipline.

[114] Other proposals would result in a complete overhaul of established seniority guarantees:

a. Alteration of seniority from workplace-based to department-based while adding a number of departments (2.01), which alteration had implications throughout the collective agreement;

b. Relatedly, layoff and recall based on departmental seniority (rather than workplace seniority) combined with “qualifications and ability to perform the work at the time of recall” (10.04).

[115] Other proposals would more explicitly and directly chip away at the Union’s role as the bargaining agent, whether during the “open” period or mid-term, while also compromising the employees’ job security:

a. Removal of Union representation for written warnings (9.01(b));

b. Allowing the Employer to use discretion to “reject” (or reschedule) the attendance of a Union representative (based on operational needs) (6.04(c));

c. The removal of the prohibition on individual contracts or agreements (19.04);

[116] Although the Employer suggested that the prohibition on individual contracts or agreements had only to do with employee accommodation[15] it didn’t specify as much in the collective agreement; rather, the proposal simply removed the prohibition.

[117] Another proposal, if accepted, would raise questions about the utility of accrued seniority and the value of a union in the context of filling new positions or vacancies. The relevant provisions, with proposed changes, state:

…

11.01

[…]

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[15] And indicated in its initial proposal that it “could be construed so as to prevent an employee from requesting accommodation directly from the Company”.

(b) *Vacant positions shall be posted within five (5) days of the vacancy if the Company intends to fill it. Employees who are absent from work due to illness, disability, accident, layoff or leave of any kind, but who retain seniority, shall be entitled apply, but ~~shall be given direct notice of such posting via telephone conversation through management~~ are responsible for informing themselves of any posting.*

(c) *Jobs may be posted internally and externally at the same time, so long as the filling of vacancies follows the process outlined in this agreement.*

11.02 New positions and/or vacancies will be filled as follows:

(a) *First priority will be given to the most senior applicant from within that department (Departmental Seniority) with sufficient ability and experience in the discretion of the Company and sufficient qualifications to handle the work;*

(b) *If the position cannot be filled from within the department, applications from other departments will be accepted and the job shall be given to the most senior applicant (Company Seniority) with sufficient ability, experience, and qualifications to handle the work, in the discretion of the Company;*

(c) *In the event that the Company ~~correctly finds~~ determines that none of the internal applicants possess sufficient ability and qualifications to handle the work, outside applications will be ~~accepted~~ considered.*

[118] The proposed changes to Articles 11.01 and 11.02 would mean that the Employer would have discretion to determine whether internal applicants had the ability, experience, and qualifications to do the job. The Employer would not be required to make such determination “correctly”. By extension, this proposal would limit the Union’s ability to challenge the Employer’s decision to hire an external applicant. And, employees who were absent from work (including due to disability or accident) would no longer be informed of a posting, therefore making it more likely that internal applicants would miss the opportunity. The net effect could be to chip away at the benefit of being a current bargaining unit member.

[119] Many of the foregoing proposals alone would raise questions about the Employer’s intentions. Together, these proposals tend to signal that the Employer was not serious about concluding a collective agreement.

[120] Other proposals would have had an impact, not on full job security, but on existing and guaranteed hours of work – a matter closely related to job security, and on the benefits of belonging to the bargaining unit:

a. Removal of protection from a reduction in hours upon contracting out (19.06(b));

b. Deletion of allocation of work on fair/equitable basis (13.08);

c. Removal of guarantee of full-time employment (19.22).

[121] The Board notes that counsel for the Employer suggested, while cross examining Gilles, that a full-time employment guarantee does not exist in the Moose Jaw contract. Gilles' response was that he couldn't remember but that "if you suggest it, I have no problem with that". The Moose Jaw CBA is not in evidence.

[122] Given the evidence[16], albeit very vague, the Board is treating this proposal with some caution. If this proposal is in alignment with the Moose Jaw contract, then this fact may be relevant to whether its maintenance is indicative of bad faith bargaining. On the other hand, full-time employment for specific positions is an established right, the removal of which would erode the existing strength of the unit.

[123] Yet another proposal could have the effect of undermining the conduct of Union business:

a. the inclusion of discretion by the Employer to approve leaves for Union business (12.01)

[124] Given the nature and number of proposals, it is obvious why the Union lost trust in the Employer during the negotiations. The issues of bargaining unit work, seniority, and job security are issues of "fundamental importance for any association of employees".[17] The overall provocative and potentially damaging proposals, touching on these issues, would have been alarming for any reasonable union.

[125] Together, the proposals being advanced were indicative of a strategy on the part of the Employer to frustrate the collective bargaining process.

[126] Other proposals, which were monetary in nature, would also have been difficult for the Union to accept:

a. the removal of paid bereavement leave;

b. the removal of protection for employees from responsibility for float shortage absent proof of theft; and

[16] The suggestion from counsel alone is not evidence.

[17] *Royal Oak Mines Inc. v Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), [1996] 1 SCR 369 [*Royal Oak*], at para XLV.

c. the ultimate elimination of the dental plan.

[127] With respect to its proposals, especially those of greatest importance to the membership, the Employer was, overall, intransigent. The Employer refused to prioritize proposals. It wanted the Union to make substantive compromises but was not demonstrating a willingness to do so itself, especially in relation to the most important proposals.

[128] The Employer rushed through the bargaining process and declared impasse after only five days of substantive bargaining. It ended conciliation bargaining early and did not provide a response to the Union's pass.[18]

[129] By May 25, the Employer had maintained all of the foregoing proposals (any many others), including the most concerning among them, to the point of providing impasse notice pursuant to section 6-33 of the Act. A prerequisite to providing impasse notice is that the party is of the opinion that "collective bargaining to conclude a collective agreement has reached a point where agreement cannot be achieved".

[130] In other words, the Employer maintained the proposals to the point at which it decided that agreement could not be achieved. It would be required to submit to impasse bargaining, but both parties had already had the opportunity to bargain with or through a third-party mediator. The Employer had failed to make progress with respect to the impugned proposals at that time.

[131] The Union also points to the Employer's communications as evidence of bad faith bargaining. As is discussed under clause 6-62(1)(a), there is a lack of evidence before the Board with respect to the distribution of both the April 5th letter and the LabourWatch poster. Therefore, the Board's focus is on the letter dated March 24.

[132] In considering this issue, the Board is mindful of the observations made by the Court of Appeal in *Cypress Regional Health Authority*.[19] There, the Court of Appeal found that the Board's decision with respect to bargaining in good faith (specifically, direct bargaining) was unreasonable. It based this conclusion, in part, on the Board's conceptual error in treating employers and unions as equal third-party actors:

[18] There is no evidence that the Employer responded to the Union's monetary counterproposal.
[19] *Cypress Regional Health Authority v SEIU-West*, 2016 SKCA 161, 2016 CarswellSask 791. The matter was returned to the Board, but it was not reheard because the matter was withdrawn.

> *116 First, and most fundamentally, the Board appears to have taken a view of employer-employee-union relationships that involved an unprecedented and unreasonable characterization of the role of unions in the collective bargaining process. Employers and unions are not somehow equal third party actors, each trying to convince an audience of employees of the reasonableness or merits of their positions at the negotiating table. To the contrary, unions are the recognized exclusive bargaining agents for the employees in their bargaining units. All of this is confirmed and made clear in s. 3 of The Trade Union Act:*
>
> > *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

[133] While the Union has characterized the Employer's communications not explicitly as "direct bargaining" but as "undermining" the Union's role as the exclusive bargaining agent, the Court of Appeal's direction remains relevant to whether the Employer was undermining the Union, contrary to its duty to bargain in good faith.

[134] The Board's analysis should begin from the premise at section 6-4 of the Act:

> ***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.*

[135] Although section 6-4 does not expressly state that the union shall be the exclusive representative, the exclusive representative status of the union is a fundamental pillar of the labour relations regime. Subsection 6-13(2) states that if a union is certified the union has "exclusive authority to engage in collective bargaining for the employees in the bargaining unit". Employees exercise the rights set out in section 6-4 only through the exclusive authority of the union.

[136] The Court of Appeal also found that it was an error for the Board to have imported its analysis of the 2008 amendment into its analysis of clause 11(1)(c) of *The Trade Union Act* (failure to bargain in good faith):

> *120 As discussed above, the Board held that the 2008 amendment effected what might be called a re-appreciation of the robustness of employees and of how vulnerable they are to intimidation, coercion and so forth. But, and importantly, there is no connection between how susceptible an employee is to being intimidated or coerced and the question of whether direct bargaining has taken place. These two concepts are like apples and oranges. An employer can violate the Act by bargaining directly with employees who are vulnerable, but it can also violate the Act by bargaining directly with employees who are*

> *immune from intimidation or coercion. In other words, employees' susceptibility to intimidation or coercion does not bear on the question of whether an employer has attempted to sidestep a union and bargain directly with them. Thus, in my view, the Board acted unreasonably to the extent it saw the 2008 amendment as somehow weakening or diluting the prohibition against direct bargaining that exists by virtue of s. 11(1)(c).*

[137] To consider whether the communication is indicative of bad faith bargaining, the Board will start with the premise outlined in section 6-4, taking into account that the Union is the exclusive bargaining agent for the employees.

[138] The March 24th letter explicitly states that the Employer cannot bargain directly with the employees. It communicates the reasons for the Employer's approach at the bargaining table, including by characterizing some of its proposals. It attempts to present its proposals in a positive light. It criticizes the Union, indicating that the Union is responsible for the minimal progress at the bargaining table because it has rejected most of the Employer's proposals. However, it follows this up by stating that the Employer and the Union have agreed to seek assistance and that it is hopeful that "the mediator will be able to help us make progress". It invites the employees to reach out to the Employer but not the Union.

[139] This letter was issued after the third bargaining day, shortly after the Employer had provided the Union with most of its proposals, and very shortly after the Employer had provided its wage proposals and the parties had agreed to attend conciliation bargaining. Between the close of bargaining on March 23 and the next day, March 24, the Employer had drafted and distributed a full-page letter about the status of bargaining. In other words, the Employer appeared to be taking control of the narrative, providing very little time for the Union to communicate with its membership about what had been happening at the bargaining table.

[140] It is well understood that during bargaining a union does not have a monopoly on communicating with its members. However, there is a line between lawful communication and communication that infringes a union's exclusive right to bargain on behalf of the employees. Given the timing of the letter and the Employer's unusual level of impatience with the progress of bargaining, this letter appeared to be designed to raise questions for the employees about whether the Union was acting in their best interests and to contribute to a subtle undermining of their confidence in the Union's role as the exclusive bargaining agent. This can be compared with the Union's letter, which was distributed after the March 24th letter and after the Employer had declared impasse.[20]

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[20] Generally, communications that take place after impasse has been declared are less suspect.

[141] The overall context of bargaining informs the Board's conclusions about the March 24th letter. However, when compared with the Employer's many alarming proposals taken impatiently to impasse, this letter was relatively subtle, and is not central to the Board's determination.

[142] Furthermore, given the subtle nature of the March 24th letter, the Board has also considered the Employer's conduct in the absence of this letter.

[143] However, before drawing conclusions with respect to whether the Employer breached the duty of good faith bargaining, the Board will also consider whether the Union's conduct contributed to the deterioration of the bargaining round.

[144] The Union was not always on its best behavior in bargaining. Gilles testified that he could not respond to the Employer's document dated March 15. And yet, the Union responded to a substantially similar document created by the Employer in the Moose Jaw matter, including by providing counters. Moreover, although the Union criticizes this document by characterizing it as a summary of intended proposals, many of the proposals are quite specific.

[145] The Union also overstates its contention that by March 23, the Employer's overall proposals were incomplete. The Union points to three proposals. First, the parties were able to have discussions about a 20% meal discount at the table that day and about the distribution of the gratuities. Second, it was evident that the Union needed more information about the gratuities policy, but it cannot reasonably be said the issue could not be discussed. The Employer had not made its proposal with respect to the dental plan, but it had told the Union that it was seeking more information about it. The Employer eventually provided mostly complete proposals.

[146] The parties met for conciliation bargaining on April 11. At the outset of conciliation, the Union posed questions about the Employer's proposals. There is nothing wrong with asking questions about an opposing party's proposals. By seeking to understand the basis of the proposals a party can make strides towards finding common ground. On the other hand, the Union gave the Employer no time to review the questions in advance of the session. While the Union may not have had a lot of time to prepare on this occasion, valuable bargaining time was spent reviewing the Union's questions.

[147] The Employer asked the Union to prepare a pass in advance of the next session. Although it came across as a demand, it was generally a reasonable request. The Union didn't do this, despite the Employer making repeated requests and providing extensions to its requested

timeline. And despite the Employer providing these extensions, the Union implied that the Employer's requests were unreasonable and then communicated with the Employer in an uncooperative manner.

[148] The Union did not provide the pass until May 25. At the hearing, when asked whether he had explained the delay, Gilles' response was not satisfactory.

[149] After the Union sought and received answers to the questions it posed, many of the proposals that it objected to simply remained "not agreed".

[150] Shortly after the Employer declared impasse, the Union filed this application. Impasse bargaining occurred during the summer. There is no evidence of what happened at the impasse bargaining. There is no evidence as to whether the Employer continued to maintain all of its proposals. All that is clear is that the parties did not reach an agreement.

[151] The Union's conduct raises questions about whether it contributed to the deterioration of bargaining. The Union was not as cooperative as it could have been. However, the Employer made a decision that it could not reach a collective agreement and, before it made that decision, it made no attempt to take any of the numerous alarming proposals off the table. Instead, it ended conciliation bargaining early. The Employer was not only impatient with the lack of progress on the Union's end, but it was also pressing to impasse matters of fundamental importance to the Union which, as a package, it could not reasonably expect the Union to agree to.

[152] The Employer's bargaining team was sophisticated. The Employer ought reasonably to have known the likely impact of the proposal package it was putting forward. The fact that it did not seek to compromise with respect to any of the most concerning of its proposals (as outlined above) suggests that it was not genuinely seeking agreement.

[153] It is well established that maintaining a position to impasse may breach the party's duty to bargain in good faith where the Board can make the inference that the party doesn't intend to enter into a collective agreement or that it seeks to undermine the union. The position does not need to be illegal *per se*.

[154] The Employer attempted to provide justifications for its proposals (not at the hearing, but at the bargaining table). While the Employer's financial concerns appeared genuine, the Employer's stated goals, being "flexibility, efficiency, collaboration, and cost management",

pitched a wide tent.[21] It is understandable that the Union expressed some skepticism about whether the Employer was harnessing those goals to undermine collective bargaining.

[155] Given the nature of the Employer's proposal package, the Employer's intransigence with respect to the most concerning of those proposals, the Employer's minimal participation in reply stream documents[22], and the Employer's declaration of impasse after only five days of bargaining, in the middle of conciliation bargaining, the Board must find that the Employer wasn't making every reasonable effort to enter into a collective agreement. The Employer's paper record and its progress on some issues does not change this assessment. The Employer was demonstrating an outward willingness to observe the form of collective bargaining while masking an intention to avoid entering a collective agreement at all.[23]

[156] In coming to these conclusions, the Board has considered the Employer's concerns with respect to Gilles' testimony.

[157] In assessing the reliability of witness testimony, the Board will consider the witnesses' "powers of observation, relationship to parties in the dispute, self-interest, consistency, and a failure to produce material evidence if necessary".[24] In this case, Gilles was unable to recall some of the details of the bargaining sessions and he indicated that Bovill provided him with documents that she testified to having never seen or provided. There were also some errors in the dates mentioned in the application filed by the Union.[25]

[158] Bovill also described having some issues with recall.

[159] An issue with reliability may stem from recall, perspective, inattention, or a combination of these factors. It may be relative, may go to weight, and does not equate to a finding of dishonesty. To be sure, in the appropriate case, dishonesty or deliberate withholding[26] might be the most reasonable explanation. However, the Board has not made such findings in this case.

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[21] To be sure, there was no clear, articulated link between the goals and the proposals that pertained to summarizing complaints, providing for a court reporter in arbitrations, and removing the sunset clause.
[22] The Board has taken into account that the Employer had corresponding proposals to Union proposals.
[23] *Canadian Blood Services*, at para 45.
[24] *Conrad Parenteau v Saskatchewan Government and General Employees' Union*, 2019 CanLII 57379 (SK LRB).
[25] Paragraph 31 of the Application indicates that "[t]he issue of how documents are issued to employees is an outstanding issue between the parties in collective bargaining". There was no evidence that the issue of how pay stubs are issued is an outstanding issue, but there was evidence that the issue of how other documents are issued was an outstanding issue.
[26] An example of a case where a witness was "choosing to hold information back from the Board" is found at *Beardy v SEIU-West and Saskatoon Twin Charities Inc*., 2023 CanLII 118987 (SK LRB), at para 197.

[160] The inconsistency between Gilles' and Bovill's testimony may be explained by imperfect recall (either Gilles' or Bovill's). The evidence is that Gilles received the March 24th letter from Bovill. Given this, it is plausible that he mistakenly associated Bovill with all of the documents.

[161] Furthermore, it is unlikely that he deliberately misled the Board, given that he knew that Bovill would also be testifying later at the same hearing.

[162] Unfortunately, there was a degree of inattention apparent on the face of the Union's application. Relatedly, the Board is aware that Gilles was managing an extensive workload as the lead negotiator for the Union.

[163] However, the Board has had the benefit of reviewing the documentation relating to the parties' passes, their exchanges in between bargaining sessions, and their communications with respect to the progress of bargaining and the declaration of impasse. The documents have provided an important source of information for the Board about what was happening during this bargaining round. Where the Board found that it could not rely on Gilles' recall, it considered instead whether the Union's allegations were established through the documents before it.

[164] Furthermore, in coming to these conclusions, the Board has not considered the hearsay evidence about the Super 8 negotiations.

Communications:

[165] The Union alleges that the Employer has breached sections 6-62(1)(a), 6-62(1)(b), and 6-62(1)(k) as a result of the letters dated March 24, 2023 and April 5, 2023, and the LabourWatch document.

Clause 6-62(1)(a) – Interference and Coercion:

[166] With respect to clause 6-62(1)(a), the Union claims that:

a. The Employer has interfered with the Union's members by providing the LabourWatch contact sheet;

b. The Employer's communications refer to the hotel's operation as unsustainable, which is likely to be interpreted as a threat of closure if the Employer does not meet its objectives in bargaining;

c. The Employer's communications are misleading and the effect of this misleading communication is to coerce the employees.

[167] The test to establish a contravention of clause 6-62(1)(a) is an objective test involving a contextual assessment of the probable consequences of the Employer's conduct. The Board asks whether the likely effect of the Employer's conduct, on employees in this workplace of reasonable intelligence, resilience and fortitude, would have been to interfere with, restrain, intimidate, threaten and/or coerce them in the exercise of their rights conferred by Part VI of the Act.[27]

[168] The Board has established five factors for assessing whether there has been a contravention of clause 6-62(1)(a), as follows:[28]

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

2. The maturity of the bargaining relationship between the parties.

3. The context within which the impugned communication occurred.

4. The evidentiary basis for and value of the impugned communication.

5. The balance or neutrality demonstrated by an employer in communicating impugned information.

[169] The Board has made the following findings with respect to these factors:

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

[170] Gilles has observed that the bargaining unit members are not overly sophisticated, and that language and communication can, at times, be difficult. He had direct and indirect involvement with the membership in the normal course of preparing for bargaining. The Board accepts that Gilles had sufficient exposure to the membership to be able to observe certain difficulties in communication with some members, even if he did not meet with the membership as a group. Language and communication challenges are a generally accepted barrier to securing some preferred forms of employment. However, he has not provided sufficient information to

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[27] *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*, 2015 CanLII 43778 (SK LRB) [*Securitas - Communications*], para 31.
[28] *Ibid*, para 34.

explain how he has concluded that the membership is comprised of newcomers to Canada. The vague evidence about work permits is not sufficient.

[171] The Union has demonstrated some particular vulnerability of the subject employees to the views and opinions of the Employer, but not to the extent that the Union alleged.

The maturity of the bargaining relationship between the parties.

[172] The Union has conceded that the parties have a mature bargaining relationship. In general, "in a mature bargaining relationship, employees are less vulnerable to the views and [opinions] of their employer".[29]

The context within which the impugned communication occurred.

[173] To begin, it is necessary to observe that, pursuant to clause 6-62(1)(a), communications made during bargaining are generally subject to lesser scrutiny than those made during an organizing campaign.[30] All of the communications occurred or are alleged to have occurred during bargaining, and to be specific, renewal bargaining.

[174] The first communication was provided to the employees by management in an envelope. The date on the document is March 24. Bovill testified, "I believe we actually got it around the 20th". She provided no further clarification about this comment. There was no testimony that contradicted this statement. However, the letter refers to the voluntary mediation process that was suggested and agreed to on March 23. Therefore, it is likely that the letter was received on March 24.

[175] As of March 24, the parties had bargained for three days and remained in the middle of bargaining.

[176] The second communication is dated April 5, 2023. The parties did not proceed to voluntary conciliation until April 11.

[177] Gilles testified that he received the document from Bovill, but Bovill testified that she could not recall having seen it ("I could have but I don't remember"). As such, there is no reliable evidence about when that communication was distributed and in what manner.

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[29] *Ibid*.
[30] *Ibid*.

[178] To be sure, the Board can accept that Gilles came into possession of a document that was purported to be created by the Employer. The Board can also accept that the document, which was on Heritage Inn letterhead, was authentic. The only other possibility is that it is a fake, which no party has suggested.

[179] However, the context with respect to the distribution of this document is limited.

[180] The last communication is the LabourWatch document. Bovill testified that this document was hung up "in the office", and that she was told by the housekeeping manager that it had to be hung up in every department. She provided no explanation for the phrase "in the office". The Board accepts that the document was hung up in the housekeeping department and that, wherever it was hung up in the department, it was visible to the staff (a LabourWatch document hung up for management only would have served no purpose). Given Bovill's testimony about when it was copied, it was likely hung up sometime in April, and therefore, around the time of the outset of the conciliation bargaining.

[181] With respect to the April 5 and LabourWatch documents, the paucity of context restricts what the Board can infer about the likely effect of the communications on the employees in this workplace.

[182] Given the evidence, the Board cannot conclude that the LabourWatch communication was hung up next to the April 5th letter; nor can the Board find that the LabourWatch communication was provided to the employees with or in a manner associated with the April 5th letter.

[183] The Union argues that the Board can infer that, in the age of cell phones, just having the name of "LabourWatch" is "enough to cause some trouble". However, there is no information about what if anything was said to employees when this document was hung up. Even if the poster gives the employees the power to "google" the name of LabourWatch there is no evidence about any additional information provided to the employees about what they should be looking for on the LabourWatch website.

The evidentiary basis for and value of the impugned communication:

[184] In *Securitas - Communications*, the Board commented on this factor:

> *The evidentiary basis for and value of the impugned communication. To fall within the protection of s. 6-62(2) of the Act, there must be an evidentiary basis for the facts and opinions expressed by an employer and, generally speaking, the genesis of the information*

> *must be within the business knowledge of the employer and/or the personal experience of the communicator. Furthermore, the facts and opinions communicated by or on behalf of the employer must be relevant and useful to the subject employees. The greater the utility of the information being conveyed to employees, the more likely such information will fall within the sphere of permissible communications. See: International Brotherhood of Electrical Workers Local 2038 v. Clean Harbours Industrial Services Canada & BCT Structures Inc., 2014 CanLII 76047 (SK LRB), LRB File Nos. 063-14, 071-14, 096-14, 105-14 & 106-14.*

[185] As for the March 24 communication, the impugned statements, which include the references to the hotel industry's uncertain future; impacts of the pandemic; current levels of operation; actions, content and progress in bargaining, had a sufficient evidentiary basis.

[186] The relevant question is whether the Employer's belief in the facts that were communicated was reasonable under the circumstances at the time of the communication.[31] Gilles testified that when the pandemic occurred, he had personally observed a rise in the vacancy rate at the hotel. It was for this reason that he had agreed that it was appropriate to postpone bargaining. He also testified that, during bargaining, the Employer had repeatedly communicated that it was experiencing financial challenges and was concerned about its financial sustainability. The Employer's communications about its financial challenges show up in the bargaining correspondence and proposals that were entered into evidence. In the Union's interim response, dated April 11, the Union stated:

> *The Employer provided a presentation regarding the financial state of affairs. Their plea appeared genuine.*

[187] Given these facts, the Board accepts that the Employer's belief in the facts pertaining to financial sustainability, as communicated, was reasonable under the circumstances at the time of the communication.

[188] The Union takes issue with the references to wage increases, cross-training opportunities, and a potential labour dispute. As for the wage increases that were proposed, they were minimal and, in some cases, required by law. It was not untrue, however, that the Employer had proposed wage increases.

[189] Next, the full description of "cross-training opportunities" is "cross-training opportunities for employees to enhance their skills and expand their knowledge". The relevant proposed change pertains to Article 18 and states that "[e]ach new hire, or transfer to another department, shall

[31] *Securitas - Communications*, at para 39.

undergo a training period of 30 working days." While in training, the employee would receive minimum wage. And, given the Employer's seniority proposal, a transferred employee would not be able to rely on the employee's accrued seniority from the original department.

[190] The Board finds, given the context, that the Employer's description of the cross-training opportunities is somewhat misleading. To be sure, the proposal might guarantee training for employees who have been transferred to new departments. However, the letter omits any reference to the minimum wage remuneration (a reduction in the wage for many employees) and the limits on seniority. It describes the training as an opportunity to enhance skills and expand knowledge, but the training (and therefore the minimum wage) would be required upon transfer.

[191] Lastly, the reference to a potential labour dispute is incomplete but not particularly concerning in terms of its accuracy. It is true that if the parties remained far apart then a labour dispute could arise. While voluntary conciliation cannot result in a labour dispute, a labour dispute could have arisen after additional steps were taken (including impasse bargaining). The Employer used shorthand to describe the possible outcomes of a lengthy bargaining process, even if those outcomes could not occur right after voluntary conciliation.

[192] As for the April 5th letter, the statements dealing with the wage increase and approving the deal were misleading.

[193] The Employer was taking credit for a wage "proposal" that was in line with the increase in the statutory minimum wage. The Employer was communicating indirectly that it was making a voluntary wage proposal instead of complying with the law. It is true that the Employer's wage proposal, in some cases, exceeded the minimum wage, but the example used and the way in which it was used, tracked the statutory minimum wage increases.

[194] The word "offer" alone is not a concern. To be sure, the Employer had not made any "offer" that could have been brought to the membership. It had made proposals, but those proposals did not coalesce into an offer. On the other hand, the Employer was using shorthand to describe the proposals it had made to the Union, which were close to being complete by the end of the day on March 23. It is unlikely that the employees, some of whom had difficulties with the language, would be familiar with the meaning attributed to terminology in collective bargaining settings, and would interpret the word "offer" to mean that the proposals were in a state that they could be presented to the membership.

[195] More concerning is the phrase “approve the deal”, which suggests that there is a “deal” outstanding, and one that has not been presented to the membership (by the Union). Contrary to the letter, there was nothing for the employees to “approve”. In the absence of an offer, there was nothing to present to the membership and therefore, the employees were not in a position to be able to “approve the deal”.

[196] However, the Employer also encourages the employees to obtain “copies of what has actually been offered”. This statement counteracts the concerning statements to some degree.

[197] The rest of the letter was accurate.

[198] Next, the impugned statements were within the business knowledge and personal experience of the Employer.

[199] In both instances, the Employer was communicating information about its bargaining proposals, the bargaining process, and the next steps to the employees, which information was, in general, relevant and useful for the employees. However, to the extent that the letters were designed to undermine the Union as the exclusive bargaining agent it would contradict the purposes of the Act to find that the information contained therein was “useful”.

[200] The April 5th letter contained relevant information, but that information was more misleading and less useful than the information contained in the March 24th letter.

[201] Given the limited nature of the information provided with respect to LabourWatch, there is no issue as to whether there is an “evidentiary basis” with respect to it, or whether it is within the personal experience of the Employer – it consisted of a name and a phone number.

[202] The Union suggests that the Employer provided the phone number to funnel the employees through to the Employer’s counsel. The evidence does not establish a connection between the phone number and the information that appears on the website (about which Gilles testified). Therefore, the Board cannot conclude that the Employer attempted to direct employees to the Employer’s counsel.

[203] The Union also alleges that the Employer posted the LabourWatch document to generally undermine the Union. In making this allegation, the Union asks the Board to accept that LabourWatch is not a neutral source of information. The Union relies for this proposition on two

cases in which the respective Boards either analyzed the content of specific LabourWatch materials or the content of the LabourWatch website.[32]

[204] In this case, the materials that have been entered into evidence consist of two general substantive pages and a section on decertification from the website (as well as the sections about the “advisors”). The general sections raise employee rights and make a few questionable statements, such as, a tongue in cheek reference to “forced dues” and an assertion that “union members will lack help to address alleged employer unfair labour practices”. The internet links that are included focus on taking action against a union, with one line about “employees who want to become or remain unionized”. However, there is also a short section referring employees to union websites for “excellent resources”.

[205] According to the website excerpts that were entered, the Canadian LabourWatch Association is “independent” of unions and financially supported by “national and provincial industry associations and law firms”.

[206] In summary, the general materials focus on a particular understanding of employee rights and on the potential for taking action against unions. However, the pages provided are few, the information contained therein is limited, and there is nothing particularly egregious within that information.

[207] The specific information about decertification is detailed and purports to provide factual information about how to apply for decertification. Overall, it is not particularly surprising or concerning. To better assess this information, it would have been more helpful to have had the opportunity to compare the decertification information with whatever information exists on the website about certifying a union.

[208] However, there is, again, no evidence that any employees were exposed to any of this information. There is no evidence of what happened if and when an employee called the phone number. Nor is there evidence of any additional information provided to the employees about what they should be looking for on the LabourWatch website.

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

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[32] Relying on *Canadian Union of Public Employees, Locals 5412 v Paladin Security Group Ltd*., 2023 CanLII 84313 (NB LEB) and *Saskatchewan Government and General Employees’ Union v Quint Development Corp*., 2019 CanLII 79286 (SK LRB).

[209] With respect to the March 24 letter, the Employer should have clearly directed the employees to communicate with the Union if they had had any questions. However, this omission was softened by the Employer's clarification that the Union had the authority to bargain, and the Employer could not negotiate directly with the employees. The Employer described its goals in collective bargaining and the financial environment and indicated that it is committed to bargaining in good faith.

[210] On the other hand, the letter is designed to raise questions for the employees about whether the Union was acting in their best interests and to contribute to a subtle undermining of their confidence in the Union's role as the exclusive bargaining agent.

[211] The April 5th letter attempted to correct a purported misconception that the Employer wasn't offering raises but did so by taking credit for a raise that would be attributable to minimum wage increases. This is not neutral information. To be sure, the Employer encourages employees to talk to the Union to obtain copies of the wage proposals and to talk to the Union (or the Employer) with questions about bargaining. Otherwise, the document provides a neutral update on bargaining.

Conclusion on Clause 6-62(1)(a)

[212] Despite the Board's misgivings about these documents, the Board does not find that the Employer, through these documents, breached clause 6-62(1)(a) of the Act.

[213] The Union has alleged that the Employer interfered with the Union's members by providing the LabourWatch poster. For the reasons as outlined, the evidence about the LabourWatch poster is too weak to establish that the Employer interfered with employees in this workplace of reasonable intelligence, resilience and fortitude, in the exercise of their Part VI rights.

[214] The Union also alleges that the effect of the letters was to coerce the employees. In *Saskatoon Co-op*, the Board stated that "'[c]oercion' is characterized by a degree of threat or intimidation that provokes fear of potential consequences".[33]

[215] With respect to the March 24th letter, it is not probable that the aforementioned employees would have interpreted the references to sustainability as a threat to close. Rather, it is probable

[33] *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2020 CanLII 10516 (SK LRB).

that such employees would have interpreted these references as inferring that the dispute could be lengthy, and that the Union's conduct was contributing to the continuation of the dispute.

[216] While the March 24th letter would have raised questions (for employees of reasonable intelligence, resilience and fortitude in this workplace) about the Union's bargaining strategy, it contains a degree of nuance which, in the Board's view, does not rise to the level of "coercion" pursuant to clause 6-62(1)(a) of the Act.

[217] To be sure, the April 5th letter comes close. Although the Board allows a certain degree of spin, especially during negotiations,[34] the more "misinformation or unnecessary amplification or spin" contained in a communication, the more likely it is to stray outside of what is considered permissible.[35]

[218] The problem for the Union is that there was no reliable evidence about how this document was disseminated among the employees. In the absence of that evidence, the Board cannot find that the Employer, by distributing the document, improperly interfered with employees.

S.6-62(1)(k) – Threaten to Shut Down:

[219] The Board has addressed the relevant facts in relation to clause 6-62(1)(a). The Union has also made an allegation that the Employer breached clause 6-62(1)(k) of the Act. The Union does not allege that the Employer has explicitly threatened to shut down the hotel, nor does the evidence support such an allegation. Instead, the Union alleges that the Employer has implicitly threatened to shut down the hotel by communicating to the employees about the sustainability of its operations in the context of bargaining.

[220] The Employer's comments did not constitute threats to close. The Employer was communicating that it could not operate at a loss indefinitely. It was informing the employees about its financial state of affairs. It was communicating that bargaining was difficult and that it could be lengthy; it was not communicating that it would close if it didn't get what it wanted. There has been no breach of clause 6-62(1)(k).

Section 6-62(1)(b) - Administration of the Union:

[221] The Union alleges, first, that the LabourWatch communication is an interference in the administration of the Union and, second, that the Employer's bad faith conduct has protracted

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[34] *Securitas - Communications*, at para 34.
[35] *Ibid*.

collective bargaining, "causing the Union to expend unnecessary resources on collective bargaining, and thereby affecting how the Union administers its services".

[222] With respect to the LabourWatch communication, the Employer relies on *Button*.[36] In that case, the Board found that the Employer's posting of a communication on a notice board during an organizing campaign, which included the LabourWatch website, was not a violation of s.11(1) of *The Trade Union Act*, as it existed prior to the 2008 amendments.

[223] Here, the evidence does not establish that the Employer, through the provision of the LabourWatch communication, provided the employees any specific information.

[224] Given the dearth of evidence, there are simply no grounds to find a violation of clause 6-62(1)(b) in relation to the LabourWatch communication.

[225] Next, the Union's argument about having been forced to "expend unnecessary resources" did not receive a lot of airtime or explanation at the hearing. Given this, the Board is not persuaded that the Union has established a breach of clause 6-62(1)(b).

6-62(1)(n) - Changing Conditions of Employment:

[226] The Union alleges that the Employer changed a condition or conditions of employment of the employees in the bargaining unit after the expiry of the collective agreement without engaging in collective bargaining respecting that change. The Union argues that the Employer has done so by implementing digital (or email) pay stubs without negotiating that issue with the Union.

[227] Much of the Saskatchewan case law pertaining to the statutory freeze relates to the period following a certification order and prior to the conclusion of a first collective agreement. [37]

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[36] *Button v United Food and Commercial Workers, Local 1400*, 2011 CanLII 100501 (SK LRB).
[37] Unlike clause 6-62(1)(n), clause 11(1)(m) of *The Trade Union Act* applied "where no collective bargaining agreement is in force". Clause 6-62(1)(n), by contrast, applies "after the expiry of the term of a collective agreement".

In *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CanLII 44004 (SK LRB), at para 71, the Board suggested that this change clarified that the statutory freeze "operates in circumstances other than during the collective bargaining period of a first collective agreement". However, the case law suggests that the statutory freeze under *The Trade Union Act* applied to circumstances other than during the collective bargaining period of a first collective agreement, but that there was some nuance as to the meaning of "in force". Moreover, the duty to bargain in good faith continued to apply to prevent unilateral implementation of changes. *R.W.D.S.U., Locals 454 & 480 v Canada Safeway Ltd*., 1985 CarswellSask 1088; *Saskatchewan Joint Board, R.W.D.S.U. v O.K. Economy Stores*, 1994 CarswellSask 656.

However, the general principles underlying a first agreement freeze have been applied to renewal bargaining.[38]

[228] In *Canadian Deafblind*,[39] the Board described the purpose of the predecessor “statutory freeze” provision found at clause 11(1)(m) of *The Trade Union Act*:

> *[54] The purpose of the statutory freeze provision is to maintain the prior pattern and structure of the employment relationship while collective bargaining takes place. It provides a solid foundation and point of departure from which to begin negotiations towards a first agreement, preventing unilateral changes to the status quo which might allow an unfair advantage to one party in the bargaining process.*

[229] The freeze provides for a period of stability to facilitate collective bargaining and prevent unilateral changes that undermine employee support for the union. In practice, it is difficult to determine the extent to which terms and conditions of employment should be treated as “frozen”.[40] To resolve this question, the Board may ask what “represents the status quo in the employment relationship which is to be preserved”?[41] The Board may also ask “what might constitute a term or condition of employment?”

[230] Boards across Canada have adopted a broad interpretation of “terms and conditions of employment” or, in the language used in the Act, “other conditions of employment”. This Board explained its approach in *Saskatoon City Police*:[42]

> *13 The argument of the Employer identifies what seem to us to be the two crucial questions which arise. The first of these questions is that of what might constitute a term or condition of employment in any given circumstances. This question often arises in connection with the issue of whether bargaining can be compelled with respect to items which are brought to the bargaining table by one of the parties, and also in connection with the issue of whether there has been a unilateral change to terms and conditions of employment during any of the "freeze" periods created by The Trade Union Act and its counterparts in other jurisdictions. Labour relations boards in Canada have not followed the path adopted in American jurisprudence of dividing issues into those which the parties must bargain, those which they may bargain, and those which they may not bargain.*
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> *14 Canadian boards have, however, adopted a very broad interpretation of issues which may properly be the subject of collective bargaining, and have included a wide range of items among those which may be put on the table. In Pulp & Paper Industrial Relations Bureau v. Canadian Paperworkers Union, [1978] 1 C.L.R.B.R. 60, the British Columbia*

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[38] *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*, 2015 CanLII 43767 (SK LRB) [*Securitas - Freeze*], at paras 45-7.
[39] *Canadian Union of Public Employees, Local 4152 v Canadian Deafblind and Rubella Association*, [1999] Sask LRBR 138.
[40] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Winners Merchants International L.P.*, 2005 CanLII 63021 (SK LRB) [*Winners*], at para 27.
[41] *United Steelworkers of America v Conservation Energy Systems Inc*., [1993] 1st Quarter Sask Labour Rep 75, cited in *Winners*, at para 27.
[42] *Saskatoon (City) Police Assn. v Saskatoon Board of Police Commissioners*, 1993 CarswellSask 739 (SLRB).

Labour Relations Board concluded that a trade union is entitled to seek to bargain with respect to the pension benefits of persons who are no longer members of the bargaining unit.

15 The Ontario High Court supported a broad interpretation of the concept of "terms and conditions [of] employment" in Liquor Control Board of Ontario and Ontario Liquor Board Employees' Union (1980), 114 D.L.R. (3d) 715. In upholding the decision of an arbitrator that this phrase could include pension benefits for retirees, the Court made the following comment, at 719:

> *The term "working conditions" has been considered in many cases, including Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1975), 8 O.R. (2d) 65, 57 D.L.R. (3d) 161, in which Jessup, J.A. said "working conditions" are words of very broad compass in their ordinary meaning...I am of the opinion that the expression "terms and conditions of employment" is even wider in scope than "working conditions." However, even within the more restricted term of "working conditions" the interpretation must encompass all matters that are involved between the employer and the employees.*

16 This question of what does or does not constitute a term or condition of employment arose in a slightly different form in the decision of this Board in Retail, Wholesale and Department Store Union v. Canadian Linen Supply Ltd., LRB File No. 207-89. It was argued in that case that the grievance procedure provided under an expired collective agreement did not constitute a term or condition of employment, and was therefore not subject to the restrictions on unilateral employer action laid out in Section 11(1)(m) of the Act. The Board made the following comment:

> *Furthermore, we cannot agree with the argument of the employer that the grievance procedure is a method of enforcing rights, under a collective agreement, rather than a right itself. The ability of an employee to grieve the employers decisions to an impartial arbitrator, with binding authority, is not just a mere process as the employer suggests, but a substantive right which, in Saskatchewan, must be bargained for and won at the bargaining table.*

.... the Board concludes that "terms and conditions" of employment referred to in Section 2(d) reflect any and all articles or provisions embodied in the agreement arrived at in negotiations between the parties while bargaining collectively pursuant to Section 2(b) of the Act. The Ontario High Court took a similar view in re: Liquor Control Board of Ontario v. Ontario Liquor Board Employees Union (1980), 114 D.L.R. (3d) 715 at 718. In our view, to conclude otherwise would attribute an interpretation that is not in accord with the purpose and objects of the Act or within the clear meaning of Section 2(b) and 2(d).

17 This conclusion was also adopted in the decision of the Board in Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Dairy Producers' Co-operative Ltd., LRB File Nos. 181-89 to 186-89; 238-89 and 239-89, and this broad interpretation of the motion of "terms and conditions of employment" was accepted by the Saskatchewan Court of Appeal (C.A. #1204, Reasons dated June 23, 1993, per Sherstobitoff, J.A.).

18 The Board has thus evidenced an inclination to interpret "terms and conditions of employment" to include a wide range of items which touch the working environment for employees represented by a trade union. In this case, the terms on which a certain group of employees were to be entitled to sever their connection with the Employer were to be modified for a specific period of time. There can be little doubt, in our view, that this constituted a term or condition of their employment.

[231] The method of providing pay stubs is not contained in a provision of the CBA between the parties in this case. The relevant provisions state:

> *18.03 (a) The Company shall pay each employee on the fifth (5th) and twentieth (20th) of each month. Cut off dates for each pay period will vary accordingly to banking requirements. These cut off dates will be published on a yearly basis by December 20th for the following year and provided to employees with their pay stub for the December 20th pay cheque. An itemized statement indicating rate of pay, overtime, specific deductions, etc., shall accompany each payment. Where pay day falls on a Statutory Holiday, pay will be provided by 2:00 p.m. of the preceding banking day.*
>
> *(b) All wages shall be paid by direct deposit to the branch of the financial institution of the employee's choice. Each employee's pay and statement of earnings will be available on pay day by 3:00 p.m. unless the delay is due to circumstances beyond the control of the Company.*
>
> *[emphasis added]*

[232] The CBA contains the following management rights clause:

> *4.01* ***Management Rights***
>
> *(a) The company reserves all rights and prerogatives in the management of the business unless clearly and explicitly granted to the Union by this Agreement, and the Union shall not in any way interfere with these rights, including, without limiting the generality of the foregoing, the right to plan, direct, and control the Company's operation, to contract out work, the right to decide on the number of employees, the mode, method, equipment to carry out the work, the right to alter from time to time, rules and regulations to be observed by employees, (such rules not to be unreasonable or inconsistent with the provisions of this Agreement) the power and right to maintain and improve the efficiency of the operations; to hire, promote, layoff, assign duties, assign working hours, and also to demote, suspend, discharge or discipline employees, for just cause. The failure to exercise any right or prerogative or to exercise any right in a particular manner, shall not be deemed a waiver of such right or different manner not in conflict with the express terms of this Agreement or Provincial Statute.*
>
> *(b) Management reserves the right to perform any or all duties in any or all departments, as per past practice.*
>
> *(c) The exercise of Management Rights shall not evade or violate any other provisions of this Agreement. The Parties agree that in interpreting and administering the provisions of this Agreement, they shall act in good faith.*

[233] The question is whether the method of providing pay stubs is an issue which, despite not being included in the CBA, is subject to the statutory freeze.

[234] The Employer takes the following positions:

> a. *The claim with respect to pay stubs is something that should properly be the subject of a grievance, as it goes to the existing language of the CBA (which is not part of negotiation);*
>
> b. *Even if this Board is willing to consider the substantive argument, a change to the method of delivering pay stubs does not create a change to rates of pay, hours of work, or conditions of employment, in a manner to violate the freeze period.*[43]

[235] In essence, the Employer argues that the method of delivery is not a condition of employment that is subject to the freeze.

[236] In *Canadian Deafblind*, the Board explained that it has given "a broad, flexible and purposive interpretation to s.11(1)(m) of the Act", and that "what in Ontario might be considered to be 'privileges' rather than 'terms and conditions' of employment, in Saskatchewan appear to have been interpreted to be included within 'other conditions of employment'".[44]

[237] The Board also described the Ontario Board's interpretation of "privileges":

> *63 The Ontario Board has interpreted "privileges" of employees as encompassing a much broader range of items than is contained within the "terms or conditions of employment"; "privileges" include benefits and practices of the employment relationship that employees, or an individual employee, are accustomed to receiving and have come to reasonably expect, but to which they have no legal entitlement.*

[238] In *National Police Federation*, the Federal Court of Appeal explained that an applicant union is required to establish four elements on a "bargaining freeze":[45]

> 1. *a condition of employment existed on the day the freeze commenced;*
> 2. *the condition was changed without the consent of the bargaining agent;*
> 3. *the change was made during the freeze period; and*
> 4. *the condition is one that is capable of being included in a collective agreement.*

[239] According to the Court, the focus then shifts to the defenses offered by the employer (business as usual or, in some cases, reasonable expectations).[46]

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[43] *Brief of the Employer*, at para 133.
[44] *Canadian Deafblind*, at para 70.
[45] *Canada (Attorney General) v National Police Federation*, 2022 FCA 80 (CanLII), at para 37.
[46] The decision also reflects the language of the provision, s.107 of *The Federal Public Sector Labour Relations Act*, SC 2003, c 22, s. 2 (the FPSLRA)), which, unlike the Act includes the words "in force":

> 107 Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is <u>in force</u> on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or…

[240] To support its argument, the Employer relies on two cases that grapple with the limited duty on parties to engage in mid-term bargaining. These cases are *Community Living*[47] and *SaskPoly*[48]. Neither of these cases support the Employer's argument.

[241] The Employer argues that, in *Community Living*, the Board considered whether the new criminal record check requirement was a term or condition of employment and concluded that it was not because it was not a live issue at the bargaining table.

[242] In *Community Living*, the principal issue pertained to the mid-term bargaining requirements in the Act.[49] The applicable provision was subsection 11(1) of *The Trade Union Act*, which made it an unfair labour practice to fail or refuse to bargain collectively with the union. The new policy was introduced after the parties had just concluded the negotiation of a collective agreement. On reconsideration, the Board found that there was no general requirement that once a collective agreement has been reached, the parties must re-open the agreement to deal with an issue that has arisen.

[243] The Board explained:

> *[34] In the present case, the original panel got off course when it began its inquiry by answering the question "Is the CRC policy a term or condition of employment?." There is little doubt that such a policy could properly be the subject of collective bargaining between the parties. However, it is, we believe an erroneous "leap of logic" to use that analysis to then conclude that the fact that it can be a subject of collective bargaining means that it must be a subject of collective bargaining; and to then determine that the failure to reopen negotiations outside the open period amounts to an unfair labour practice is contrary to both the provisions of the Act and to the Board's previous jurisprudence as noted above….*

[244] With respect to *SaskPoly*, the Employer relies on the following quotation:

> *[81] Despite counsel for SPFA's valiant attempt to argue the contrary, the Board finds that parking is not a term and condition of employment for SPFA's members. We acknowledge that parking could be an issue for future collective bargaining. However, as SPFA did not raise it in the last round of bargaining and as there is no reference to parking in the current collective agreement, there is no basis upon which the Board can find that parking is a term and condition of employment.*

[emphasis added]

[47] *CUPE, Local 600-3 v Government of Saskatchewan (Community Living)*, 2009 CanLII 49649 (SK LRB).
[48] *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB).
[49] *CUPE, Local 600-3 v Government of Saskatchewan (Community Living)*, 2009 CanLII 49649 (SK LRB) [*Community Living*], at para 42.

[245] In *SaskPoly*, the application had been brought pursuant to clause 6-62(1)(d). The union had asserted that the employer had unilaterally increased parking fees, thereby reducing the wages under the collective agreement. Parking had not been a subject of collective bargaining during the most recent round of negotiations which resulted in an agreement.

[246] The Board observed that the union was seeking an order to compel the employer to engage in mid-contract bargaining. The question, therefore, was whether the employer was obligated to engage in mid-term bargaining with respect to parking. The Board noted, first, that there was no relevant or helpful re-opener clause. The next issue was whether the employer was required to negotiate the settlement of disputes and grievances, pursuant to paragraph 6-1(1)(e)(iv) of the Act.

[247] The Board observed:

> *[79] These authorities clearly demonstrate that while a particular subject matter may qualify as a term and condition of employment, in order to compel an employer to collectively bargain the issue outside the "open period" provided for in subsection 6-26 of the SEA, it must already be included in the current collective agreement. The failure to have addressed the matter in the bargaining process and provide for it in the collective agreement will defeat any claim that it qualifies as a "dispute" which must be negotiated mid-term.*

[248] In short, both of these cases focus on the duty to bargain mid-term, and to what subject matter that duty extends.

[249] The Court of King's Bench, as it is now known, has also distinguished between issues that are "bargainable" and those that are subject to an agreement and therefore part of the mid-term bargaining obligation. In *Potash Corporation (KB)*[50], the Court upheld the Board's decision finding that the voluntary waiver of vacation time could have been a bargainable issue, but having not been raised at the bargaining table, remained part of the management rights clause, and therefore, the employer was under no obligation to bargain mid-term with respect to that issue.[51] Voluntary waiver of vacation was not a term or condition of employment in that context.

[250] The Court of Appeal upheld *Potash Corporation (KB)*[52], highlighting an important distinction:

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[50] *United Steelworkers, Local 7458 v Potash Corporation of Saskatchewan (Cory Division)*, 2011 SKQB 86 (CanLII).
[51] *Ibid*, at para 36.
[52] *United Steelworkers, Local 7458 v Potash Corporation of Saskatchewan*, 2013 SKCA 86 (CanLII), at para 14:

> *[31] Third, the Board did not ignore its past jurisprudence. The Board mentioned the key decisions, when reviewing the Union's arguments. More importantly, the Board's past jurisprudence does not dictate a particular result in this case; each decision cited to us is distinguishable and illustrates how fact specific each ruling is. For example, Saskatoon City Police Association, supra concerns a complaint made under s. 11(1)(m) of The Trade Union Act. Section 11(1)(m) prohibits an employer from unilaterally changing rates of pay, hours of work or other conditions of employment without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit and is intended to protect the union's bargaining rights once a collective agreement has expired and a new agreement has yet to be negotiated. The Board held on that occasion that the employer had unilaterally acted to change the terms of employment, but the relevance of the decision in this context is questionable. The Board in the within case did not decide that the Potash Corporation had changed terms or conditions of employment for the individual employees who accepted its offer, but rather that the Potash Corporation had not failed to bargain collectively because it had no obligation to do so. Admittedly, the Board navigates a fine line in a case such as this, but surely, it is for the Board to determine whether the employer has crossed that line and for this Court to defer to the Board's decision, in the absence of something more egregious than what has occurred in the instant case.*

[251] *Potash Corporation (KB)* relies on two helpful decisions of the Ontario Board.

[252] First, in *Progressive Packaging Limited*, the Ontario Board explained succinctly that, in relation to layoffs, "there is no obligation to bargain about such matters mid-term in a collective agreement apart from any specific obligation in the collective agreement itself."[53] This holding is consistent with this Board's case law on the issue.

[253] Second, in *Primo Foods Limited*[54], the Ontario Board commented on the method of payment issue:

> *16 … In the case before us, the union and Primo have negotiated concerning the rate of pay to which employees are entitled. The collective agreement is silent concerning the method of payment leaving this issue to the employer to decide pursuant to the management's rights clause. When the employer requests information from employees to facilitate the payment of the wages to which the employee is entitled, is this conduct to be considered "bargaining" directly on an individual basis with employees in contravention of section 68 of the Act? It does not appear to us to be conduct which is prohibited by section 68 of the Act.*
>
> *. . .*
>
> *18 … Obviously, the method of payment of employees could be a bargainable item in the same way that uniform colour preference could be a bargainable item. Frankly, it is difficult to think of very few matters which could not be bargainable if raised by the union or the employer during the collective bargaining process.*

Relying on [*Community Living*], the Board concluded that because the Potash Corporation's proposal could have been the subject of collective bargaining does not mean that it had to be the subject of collective bargaining outside of the statutory "open period" provided for in The Trade Union Act (see para. 42)…

[53] *Toronto Typographical Union, Number 91 v Innopac Inc.*, 1990 CanLII 5836 (ON LRB) [*Progressive Packaging Limited*].

[54] *Primo Foods Limited*, [1993] OLRD No 810 (QL).

> *19 … An employer is entitled to deal on an individual basis with employees during the life of the collective agreement, as long as doing so does not violate the collective agreement or the Labour Relations Act.*

[254] In *Saskatoon Police Association*, the Board found that the employer had breached the Act when it had offered an incentivized early retirement package directly to employees, even though the collective agreement did not contemplate an incentive program:

> *36 In this case, the Employer essentially proposes to offer a payment to employees in order to induce them to sever their connection with the Police Service, to end their membership in the bargaining unit represented by the Union, and to abandon any future claims which might be based on their employment status. Though we do not accept that the program would have all of the catastrophic effects portrayed by counsel for the Union, it is our view that the Union is entitled to an opportunity to consider the impact of this on the employees they represent, including the group of employees to whom the package was offered.*
>
> *37 This is particularly true, in our opinion, where the parties are in the process of bargaining in an effort to conclude a new collective agreement. We have often stressed that it is not the task of this Board to instruct the parties as to what items they discuss or what positions they take on those issues at the bargaining table. We have also indicated, however, that it is reasonable for a trade union to expect that an employer will not only give a clear picture of its bargaining position and the basis for it, but will inform the union of any important plans or initiatives which may affect collective bargaining, so that the union will have an opportunity to take those into account.*
>
> *[emphasis added]*

[255] The Board found that its conclusion was supported by the fact that the parties had bargained the issue of the “pension plan and related matters”:

> *31 It is also relevant that in this case the parties have addressed the "pension plan and related matters" in Article 16 of the collective agreement, suggesting that they wished to include within the scope of terms and conditions considered in bargaining between them the issue of the terms on which departure from the workforce through retirement would occur. It is not clear from the wording of this provision what sanctions would ensue upon a finding that it had been violated; its existence does, however, serve to underline and to reinforce the obligation of the Employer to engage in bargaining concerning terms and conditions related to these issues.*

[256] In summary, for a matter to be protected by the statutory freeze, it is not necessary that it be included in the collective agreement. However, it is necessary that it be a condition of employment that existed on the day that the freeze commenced and that it be capable of being included in a collective agreement. If it is such a condition, then it may be protected by the statutory freeze.

[257] In the present case, the condition in question is not specified in the CBA. In this case, the Union could not simply point to the collective agreement to establish a *prima facie* case of a condition of employment that should be protected by the statutory freeze.

[258] This alone is not necessarily a reason to find that the method of delivery is not a condition of employment. The case law makes clear that the method of delivery of pay stubs is capable of being included in a collective agreement. However, the Board has to determine whether the condition in question should be subject to the statutory freeze. Where a condition is not a term of a collective agreement, there should be some evidence about the nature of that condition, so that the Board may make that determination.[55]

[259] The evidence on this point is minimal. Bovill testified, in cross, that she used to receive the pay stubs by paper. There is no other evidence of past practice, bargaining patterns, or employees' expectations around this issue. The Union argued that the paper delivery was a practice that lasted years or decades, however, there is no evidence of this. Furthermore, there is no evidence that paper delivery was a condition at the time that the freeze commenced.

[260] For these reasons, the Board cannot find that the Employer breached clause 6-62(1)(n) of the Act.

Remedy:

[261] In conclusion, the Board has found that the Employer and/or its agents breached its duty to bargain in good faith, pursuant to sections 6-7 and 6-62(1)(r). The Board will therefore make a declaration that the Employer committed an unfair labour practice when it breached its duty to bargain in good faith.

[262] The Board cannot, however, grant all of the remedies sought by the Union. In particular, the Union seeks an order from the Board that the parties submit to binding arbitration. Such an order is available only in the most exceptional of circumstances. As explained in *Egg Films*:[56]

> *149 It is also clear, however, that precisely because such a power undercuts the principle of free collective bargaining it can be employed only in the most dire and exceptional of circumstances — only where, for example, there is no other way to secure the various social policies that underlie labour relations legislation. So, for example, where the failure to bargain in good faith, in part, led to labour strife marked by violence, bombings and death*

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[55] That is, a union may make out a *prima facie* case by pointing to the collective agreement provision; where the provision is silent on the issue, it will need to present evidence to establish that the condition existed at the time of the freeze.

[56] *Egg Films, Inc. and IATSE, Local 849, Re*, 2015 CarswellNS 943.

such an order can be made: C.A.S.A.W., Local 4 v. Royal Oak Mines Inc., [1996] 1 S.C.R. 369 (S.C.C.); see also Telus Communications Inc. v. T.W.U., 2005 FCA 262 (F.C.A.) at paras.76-79. Another example may arise where the employer's bad faith and anti-union animus following certification and the negotiations over a first collective agreement has led to the decimation of the bargaining unit represented by the union, such that the latter's ability to negotiate was undermined by "the task of having to organize the workplace once again:" Teamsters, Local 91 v. D.H.L. International Express Ltd., [2001] C.I.R.B. No. 129 (C.I.R.B.). at paras.135-36; and see Teamsters, Local 91 v. D.H.L. International Express Ltd., [2002] C.I.R.B. No. 159 (C.I.R.B.) at paras.7, 23 and 27. Such an order may also be made if the party that engaged in bad faith bargaining had in fact made binding arbitration a part of its proposals during collective bargaining. In such a case the order would affirm rather than negate the principles of free collective bargaining since it is what the party itself was prepared to accept prior to its lapse into bad faith conduct: see Teamsters, Local 91 v. Boldrick Bus Services Ltd. [2010 CarswellOnt 18077 (Ont. L.R.B.)], 2010 CanLII 51873. As well, a labour relations board may retain jurisdiction to declare by way of binding arbitration (final offer selection) any term that the parties still cannot agree upon following a return to collective bargaining-but, we note, as a last rather than as a first resort: see, for e.g., Intek Communications Inc. and CEP, Re, 2013 CCRI 683 (C.I.R.B.); see also Navistar Canada Inc. v. Unifor, Local 127 [2015 CarswellOnt 4614 (Ont. L.R.B.)], 2015 CanLII 16341.

[263] The present case is not comparable to the cases described in *Egg Films*.

[264] Instead of binding arbitration, the Board will order that:

a. The Employer and/or its agents cease and refrain from committing the unfair labour practice;

b. The Employer return to the bargaining table and make every reasonable effort to conclude a collective agreement;

c. Within 7 days of the Board’s Order and these Reasons for Decision, both documents be posted by the Employer in conspicuous places in the workplace for a period of 30 days.

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

DATED at Regina, Saskatchewan, this **28th** day of **February, 2024.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson