SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v CORNERSTONE CREDIT UNION FINANCIAL GROUP LIMITED, Respondent

LRB File No. 051-24, March 25, 2025
Chairperson, Kyle McCreary; Board Members: Kris Spence and Aina Kagis
Citation: *RWDSU v Cornerstone Credit Union*, 2025 SKLRB 13

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Unfair Labour Practice – Statutory Freeze – Strategic Incentive Program not a term or condition of employment and the statutory freeze is not violated

Deferral – The Board declines to defer to arbitration – Dispute in its essential nature relates to bargaining and not the provisions of the Collective Bargaining Agreement

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** Saskatchewan Joint Board Retail, Wholesale and Department Store Union ("RWDSU or the Union") has brought an unfair labour practice against Cornerstone Credit Union Financial Group Limited ("CCU" or "the Employer") alleging that the Employer has breached the statutory freeze in s 6-62(1)(n) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1, ("the SEA" or "the Act") by changing the terms and conditions of employment during bargaining by not making a payment under an employer incentive program on a specific date.

[2] The Employer takes the position this matter should be deferred to arbitration and alternatively that the pattern of payment is for the incentive payment to be delayed until the conclusion of bargaining.

[3] The Board finds that the Employer did not breach the statutory freeze as the pattern of the administration of the program has been that the Employer delays or announces a delay of payment of the incentive in the year of bargaining. It is within the reasonable expectations of

employees that the Employer manage the incentive program in the same manner it has for both certified unions for over a decade.

[4] The Board declines to defer to arbitration as per the test for deferral as set out by the Saskatchewan Court of Appeal. The Board maintains the current test but notes that it may not properly respect the exclusive jurisdiction model as set out in Horrocks.

Evidence:

[5] The parties filed an agreed statement of facts. The parties agreed on the following facts:

1. The Applicant RWDSU is the certified bargaining agent for a unit of employees employed by the Respondent, CCU (formerly Yorkton Credit Union Limited) in connection with its business in Yorkton, Saskatchewan, and surrounding area. RWDSU has been the certified bargaining agent for this unit since 1975.

2. RWDSU's bargaining unit with CCU includes four CCU branches in the following locations: Yorkton, Ituna, Kelliher and Wynyard. There are approximately 97 members in RWDSU's bargaining unit.

3. CCU also has other branches that are either not unionized or not within the scope of RWDSU's bargaining unit. The United Food and Commercial Workers International Union ("UFCW") is the certified bargaining unit for a unit of employees at CCU's Tisdale and Vibank branches. In total, CCU has approximately 275 employees at all of its branches.

4. The previous collective agreement between CCU and RWDSU had a three-year term and expired on December 31, 2023. At the time this Application was filed, the parties were in the process of bargaining towards a new collective agreement.

CCU's Variable Compensation Policy

5. CCU has a Variable Compensation Policy entitled "Variable Compensation – Strategic Incentive Program" ("SIP") that applies to all of its employees, including employees that are not covered by the above-mentioned RWDSU bargaining unit. The SIP establishes annual performance bonuses for employees based on their individual performance in the previous year.

6. CCU has had some form of performance bonus policy since at least 2000. Since that time, performance bonuses have been paid out to eligible employees on an annual basis.

Most Recent Round of Bargaining

7. In connection with the expiry of the previous collective agreement on December 31, 2023, the parties met for bargaining on December 19, 2023, January 4, 2024, January 16, 2024, March 5, 2024 and March 6, 2024.

8. During the second day of bargaining on January 4, 2024, Corvyn Neufeld, Chief People & Governance Officer at CCU, advised RWDSU during bargaining that CCU would not be proceeding with SIP bonus payments to RWDSU members until a new collective agreement was concluded.

9. SIP bonuses had previously been scheduled to be paid out to employees on February 23, 2024.

10. RWDSU disagreed with CCU not paying out the SIP bonus payments to RWDSU members until a new collective agreement was concluded, and the parties exchanged correspondence on the issue.

11. CCU paid out SIP bonuses to other employees not included in the RWDSU bargaining unit as scheduled on February 23, 2024. CCU did not pay out bonuses to members of the RWDSU bargaining unit at that time.

RWDSU files Unfair Labour Practice Application and Grievance

12. The within application was filed on March 1, 2024. On the same date, RWDSU also filed a grievance alleging that CCU had breached a provision of the Collective Agreement by refusing to make bonus payments until a collective agreement was reached. The parties agreed to put the grievance on hold pending the hearing of this application.

Parties Reach a CBA

13. The parties met for bargaining sessions on March 5th and 6th, 2024 and were able to reach a tentative Collective Agreement, subject to ratification by bargaining unit members.

14. The new Collective Agreement was ratified by bargaining unit members on March 11, 2024.

15. Once the new Collective Agreement was ratified, CCU advised members of the RWDSU bargaining unit that SIP bonus payments would be in March 2024. CCU in fact paid SIP bonuses to RWDSU members in March 2024.

[6] In addition to the agreed statement of facts, each of the parties called additional evidence.

[7] The Union called Guy Rein and Angela Filipchuk. Mr. Rein works for the Union and was responsible for bargaining this round. Mr. Rein provided testimony as to his response to the Employer advising of the intention to delay the payment of the SIP, his efforts to get the Employer to pay it on the February date and the Union's repeated communications with the Employer disputing its decision to delay the SIP payment.

[8] Ms. Filipchuk is a CCU employee and a member of the Union. She testified as to how the SIP and its predecessors were dealt with and the fact that while a delay was always threatened, members of RWDSU have always been paid in February. Also, no SIP was paid to anyone in 2021. Ms. Filipchuk provided further evidence about bargaining and the SIP and felt that the Employer's actions were unfair and pressured Union members into concluding bargaining faster than they would have wanted to. In cross examination Ms. Filipchuk was aware of the previous withholding from UFCW and admitted she was not surprised by the Employer's position, but disappointed and felt it was unfair treatment of unionized employees.

[9] The Employer called Corvyn Neufeld, Chief People & Governance Officer at CCU. Mr. Neufeld provided testimony on the history of the SIP program and its predecessors. The SIP program was formerly two programs involving variable compensation and profit sharing separately. Over time those two programs have been merged into the single SIP program.

[10] In the 2012 round of bargaining, there were two separate programs, one related to performance and one that was profit sharing. The Employer only gave notice of an intention to delay the profit-sharing portion and the payment was made on time.

[11] In the 2015 round of bargaining, the Board finds that the Employer gave notice of an intention to delay variable compensation. The evidence establishes that the Employer authorized the payment at the end of February due to the settlement of the CBA, with the reasonable implication that it had given notice of an intention to delay before that time.

[12] In the 2017 round of bargaining with UFCW, the employer did end up delaying payment of SIP to UFCW members and that payment was only made once an agreement was reached between the parties.

[13] In the 2018 round of bargaining, the variable compensation was paid in February. The Employer's evidence establishes that it took the position that if the agreement had not been settled, it would not have been paid in February.

[14] In 2021, no SIP payments were made to any employees, neither RWDSU employees nor any other employees.

[15] Overall, the Board finds that the Employer has established a pattern that it has taken a position consistently since 2012 that a portion of variable compensation, which is dealt with in policies outside the CBA and has never formed part of the CBA, is potentially withheld until the conclusion of bargaining if bargaining is not completed by the end of February.

[16] The Employer's justification for its approach to delaying payment until after finalization of the agreement is that it cannot be certain that it can afford the payments until bargaining is concluded. The Union challenged this in cross examination on the basis that it is budgeted based on the previous year and does not rely on go forward profits. The Union also asserted that the purpose was to pressure the unions into settling and not to cost concerns. Mr. Neufeld maintained his position that it was for the stated reasons and not as a pressure tactic.

[17] The Board found all of the evidence to be credible. The case did not involve significant contradictions in the evidence, the issue is more a question of how to interpret the previous pattern and what the conditions of employment were at the commencement of bargaining.

[18] As it relates to the Employer's intention, the Board finds that the cost justification is credible, but despite Mr. Neufeld's denials, the Employer also likely had an intention to pressure the Union into settlement. The explanations are not mutually exclusive: the Employer can have concerns about cost certainty and the affordability of settlement and labour disruption and want to pressure employees to settle earlier in bargaining.

Relevant Statutory Provisions:

[19] This application is pursuant to s. 6-62(1)(n), and the other statutory freeze under s. 6-62 is clause 6-62(1)(l):

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:*

. . .

(l) to declare or cause a lockout or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while any matter is pending before a labour relations officer, special mediator or conciliation board appointed pursuant to this Part;

….

(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;

[20] The Board's authority to defer an application is pursuant to s. 6-111(1)(l):

6-111*(1) With respect to any matter before it, the board has the power:*

…

(l) to defer deciding any matter if the board considers that the matter could be resolved by mediation, conciliation or an alternative method of resolution;

[21] The jurisdiction of labour arbitrators is at question in the deferral, and in particular in determining deferral in this case the Board considered ss. 6-45 and 6-49:

Arbitration to settle disputes

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

(2) Subsection (1) does not prevent the director of employment standards as defined in Part II or the director of occupational health and safety as defined in Part III from exercising that director's powers pursuant to this Act.

(3) Without restricting the generality of subsection (2), the director of employment standards may issue wage assessments, issue hearing notices, take action to collect outstanding wages or take any other action authorized pursuant to Part II that the director of employment standards considers appropriate to enforce the claim of an employee who is bound by a collective agreement.

…

6-49*(1) Subsections (2) to (4) apply to all arbitrations required to be conducted in accordance with sections 6-45 to 6-48.*

(2) The finding of an arbitrator or arbitration board:

(a) is final and conclusive;

> *(b) is binding on the parties with respect to all matters within the legislative jurisdiction of Saskatchewan; and*
>
> *(c) is enforceable in the same manner as a board order made pursuant to this Part.*

Analysis and Decision:

Should this application be deferred in favour of arbitration?

[22] The Employer has taken the position that the Board should defer this matter to grievance arbitration. The test for deferral is set out *U.F.C.W., Local 1400 v. Saskatchewan (Labour Relations Board),* 1992 CanLII 8286 (SK CA)

> *[16] Morris Rod Weeder speaks of "an alternative remedy of the same grievance" and makes clear the principle that where a trade union elects both the grievance-arbitration procedure provided for in the collective agreement between the parties and an application to the Board for an unfair labour practice order to resolve the same dispute, the Board may consider the trade union's election to use the grievance-arbitration procedure as a relevant factor in determining whether to dismiss the application. The case is authority for the proposition that for such an election to constitute a relevant (as opposed to an "extraneous" or "irrelevant") consideration three preconditions must coexist: (i) the dispute put before the Board in the application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same, dispute; (ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure, and (iii) the remedy under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board. There appeared to be no question between the parties in that case that these three preconditions coexisted to constitute the necessary foundation for the court's holding that the trade union's election was a relevant consideration.*

[23] The continuing applicability of this test was commented on by the Board in *610539 Saskatchewan Limited (Operating as Heritage Inn Saskatoon) v The United Food and Commercial Workers Union*, 2024 CanLII 15859 (SK LRB):

> *[14] This test has been found to be consistent with the "exclusive jurisdiction model" which "directs that if the essential character of the dispute in question, arises out of the interpretation, application or violation of a collective agreement, its resolution falls to be decided through the grievance arbitration process".*
>
> *[15] To be sure, whether this test is consistent with the exclusive jurisdiction model, or with concurrent jurisdiction, may be subject to reasonable debate.*
>
> *[16] However, where a grievance-arbitration process is invoked as an alternative method of resolution, whether pursuant to a deferral request or a dismissal request, the central task for the Board is to consider the "essential character of the dispute" and to do so in the following way:*
>
> > *[30] In assessing the essential character of the dispute, the Board is to account for "the factual circumstances underpinning the dispute". In other words, the Board*

> *is to inquire into the facts alleged, rather than the legal characterization of the matter. The Board is also to consider the "ambit of the collective agreement".*
>
> *[17] This approach requires the Board to inquire into the nature of the dispute, based on the facts alleged, and determine whether the dispute arises from the collective agreement to which the parties are bound.*

[24] The request for deferral can be determined on the essential nature of the dispute, which does not relate to the interpretation or application of the CBA. On the other factors of the test, particularly whether the arbitration offers a suitable alternative remedy, these are matters where the Board in a future case may have to consider whether the Board interpretation of jurisdiction in *Saskatchewan Crop Insurance Corporation v. Saskatchewan Government and General Employees' Union*, 2017 CanLII 68785 (SK LRB) at para 31; accords with decisions of other provincial Boards such as P*rovince of British Columbia v Professional Employees' Association,* 2014 CanLII 39499 (BC LRB) at paras17-22; and the Majority decision of the Supreme Court of Canada in Horrocks.

[25] The essential nature of the dispute in this case is not an issue arising from the interpretation of the CBA. The dispute arises from the SIP, which is outside of the CBA, and whether the change in the date of the payment of the SIP was permissible as it relates to bargaining. This does not arise directly or inferentially from the CBA. The grievance is framed as the Employer breaching the non-discrimination provision of the CBA in the implementation of the SIP. The jurisdiction of an arbitrator's decision on alleged breach of the non-discrimination provision of the CBA does not extend to a determination of whether an unfair labour practice has been committed related to bargaining. The essential nature of this dispute relates to an Employer policy that is separate from the CBA and a grievance arbitrator does not have jurisdiction to determine whether the statutory freeze was violated in this case. The Board declines to defer to arbitration.

Did the Employer violate the statutory freeze in relation to the SIP?

[26] The purpose and test for the statutory freeze related to bargaining were discussed by the Board under the former Act in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Winners Merchants International L.P.*, 2005 CanLII 63021 (SK LRB):

> *[26] In Canadian Union of Public Employees, Local 4152 v. Canadian Deafblind and Rubella Association, [1999] Sask. L.R.B.R. 138. LRB File No. 095-98, the Board undertook a detailed historical review of its approach to the interpretation of s. 11(1)(m) of the Act, and clarified the principles involved. At 151, the Board referred to the purpose of what is often called the "statutory freeze" provision:*

[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.

. . .

[27] However, the application of the provision is often not easy. In United Steelworkers of America v. Conservation Energy Systems Inc., [1993] 1st Quarter Sask. Labour Rep. 75, LRB File Nos. 215-92, 216-92 & 217-92, the Board observed as follows, at 78-79:

> *Attempts to determine the extent to which terms and conditions of employment should be seen as "frozen" during a period when there is no collective agreement in force, and what may be the practical significance of such a freeze, have given rise to a number of complications and uncertainties in the interpretation of the jurisprudence of this and other labour relations boards. The complexity of this picture is compounded when the parties have not yet reached a first collective agreement.*
>
> *The critical question then becomes what represents the status quo in the employment relationship which is to be preserved pending the conclusion of a collective agreement through bargaining between the employer and the union.*
>
> *It is relatively easy to state a rationale for the preservation of the status quo between the parties under these circumstances. During the period which follows certification, the union is in a vulnerable position. It has yet to demonstrate that it can use the status it has gained through employee support to obtain improvements in the position of those employees. The employer cannot be allowed to use advantages accrued from the lopsided balance of power which previously existed to punish employees for making the choice to support certification or to confer benefits on them in an attempt to show how little they need the union.*
>
> *It is more difficult to decide how this rationale applies to any given set of circumstances. An example of the complications which may arise is provided by the struggles which this Board has had with the question of whether an employer is entitled to give or withhold wage increases in the period before a collective agreement is concluded.*

[28] The Board then cited Crestline Coach, supra, as an example of the complications in application of the provision. And, at 79, the Board described what it perceived as the difference in the factual findings in Crestline Coach and Brandt Industries, supra, that led to the respective decision in each case:

> *More recently, in its decision in United Steelworkers of America v. Brandt Industries, LRB File Nos. 193-92 and 194-92, the Board drew a distinction between a wage increase, like that in the Crestline Coach case, which was arrived at on the basis of a unilateral and discretionary assessment related to each employee, and one which was made in accordance with well-established criteria and past practice. This latter finding of the Board is currently the subject of judicial discussion, but the point may be taken from these examples that the delineation of what constitutes the status quo may be a matter of some difficulty.*

[29] In Canadian Deafblind, supra, the Board described the standard applied by labour boards to better define the limits of the otherwise unrestricted management rights of employers prior to certification. Referring to what is commonly called the "business as before" standard, the Board stated, at 151:

> *[55] The "business as before" standard allows for sensitivity to the exigencies of carrying on the employer's business while preserving the stability necessary to ensure good faith bargaining. An employer must operate the business in accordance with the pattern established before the freeze. The right to manage the business is maintained, circumscribed only by the condition that it be managed as before the freeze.*
>
> *In that case, the Board also described, the modern application of this standard within the context of the "reasonable expectations of employees" test developed to clarify the "business as before" standard and accommodate those employee "privileges" enjoyed prior to certification and an employer's ability to react to first time or unexpected events following certification and before a collective agreement is achieved.*

[30] Canadian Deafblind, supra, followed upon the analysis made by the Board in its earlier decision in Brekmar Industries, supra, where the Board described in detail the jurisprudential development of the "reasonable expectations of employees," and, at 129, explained the result of this interpretation as follows:

> *The result of this interpretation is that Section 11(1)(m) preserves not merely the terms and conditions of employment in effect at the moment of certification, but also the practices, policies and processes by which the employer operates. The employer's right to manage is maintained, qualified only by the condition that the business be managed as before. Generally, a departure from the pre-certification pattern is a prohibited change whereas a change consistent with these policies represents maintenance of the status quo as required by Section 11(1)(m).*

[31] In Brekmar Industries, supra, at 132, the Board commented on this interpretation in the specific context of wage increases as follows with reference to the following comment of the Ontario Labour Relations Board in Queen's Way General Hospital and Ontario Nurses Association (1992), 12 C.L.R.B.R. (2d) 80, at 86-87:

> *The Board has consistently found that the failure of an employer to pay a wage increase or otherwise continue with or institute an improved working condition during the statutory freeze, in accordance with a pre-existing pattern or a promise to do so, constitutes a breach of the freeze provisions. Collective bargaining does not occur in a vacuum. In our view, it is both contemplated by the legislation and appropriate that the basis for collective bargaining be the pattern of the employment relationship, and the resulting reasonable expectations of employees, including any pattern or expectation of wage increases.*
>
> *The Board then stated that, before the statutory freeze will apply, there must be a factual foundation that the policy or practice is sufficiently established to become part of the framework of terms and conditions of employment:*
>
> > *The "business as usual" or "reasonable expectation" interpretation of Section 11(1)(m) leads to the factual sub-issue of whether the policy or practice regarding wage increases was sufficiently established to become part of the framework of terms and conditions of employment preserved by Section 11(1)(m).*

[32] In Brekmar Industries, supra, the Board commented that some of its earlier decisions regarding the interpretation of s. 11(1)(m), including Crestline Coach, supra, were not as clear as they might have been – in part, at least in the case of Crestline Coach, because

of the uncertainty created by the brevity of the Reasons for Decision. The Board commented as follows at 132:

> *This Board has previously accepted the "business as usual" interpretation of Section 11(1)(m), although some of its earlier decisions, such as the ones relied upon by the employer (see: Fort Garry Industries Ltd.; Crestline Coach Ltd., supra), are not as clear as they could be. In Fort Garry Industries Ltd., the Board simply found that the past practice or policy on wage increments was not sufficiently established. The Board's reasoning in Crestline Coach Ltd. is very brief and admittedly susceptible to two interpretations. The Board may have simply found, as it did in Fort Garry Industries Ltd., that the pattern or policy on wage increases was not sufficiently established. If, however, the Board found that such policies, even when well-established, are not preserved as part of the status quo, then it is not consistent with subsequent decisions.*
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> *In Ne-Ho Enterprises Ltd., (1989) Winter, Sask. Lab. Rep., p. 78, the Board held that the freeze provisions were not intended to place employers in a strait-jacket during certain periods. The decision is very brief, but the Board expressly accepted that Section 11(1)(m) preserves the employer's "ability to carry on business as usual." Subsequent to Ne-Ho Enterprises Ltd., the Board again adopted the "business as usual" interpretation in Brandt Industries Ltd., supra.*

[33] In Brekmar Industries, supra, the evidence established that for approximately twelve years most of the employees received an annual increase at approximately the same time every year based on a formula that took into account three factors: merit, years of service and the employer's ability to pay. The Reasons for Decision, at 127, established that how each factor was weighted, how each employee was evaluated and how the actual amount of the increase was arrived at were entirely within the discretion of the employer. In all but two of the years, the employees were placed in categories and the salary increase varied with each category. In two of the years the same increase was awarded to all employees across the board. The evidence of the employer's principal as to why the increase was withheld following certification was quite similar to that offered by Ms. Lawson in this case. At 127, the Board noted as follows:

> *Mr. Markusa is the President of the company and has held that position since the company was founded. He admits that the company did not follow its pre-certification policy on wage increases after the union was certified. He did not claim that the employees' performance did not warrant an increase or that the company lacked the ability to pay, although there was evidence that profits were down. Instead, he testified that the company withheld the wage increases because it believed that the effect of certification was to freeze wages at existing levels subject only to changes negotiated with the union. Accordingly, the company threw the subject of wages on to the bargaining table along with everything else.*

[34] In finding that the employer had committed a violation of s. 11(1)(m) of the Act, the Board observed as follows, at 132 and 133:

In this case, the evidence reveals that the employer had an articulated and thought-out formula, which it applied to determine all wage increases. This policy was long-standing, and followed consistently year after year. In the Board's opinion, this policy was a real, well-known and well-defined part of the labour relations fabric before certification, and therefore part of the employment relationship preserved by Section 11(1)(m).

[27] As noted by the Board in *United Food and Commercial Workers, Local 1400 v 610539 Saskatchewan Limited (operating as Heritage Inn Saskatoon)*, 2024 CanLII 14520 (SK LRB), the

Board has maintained a similar approach to both the test for a condition of employment and the statutory freeze under the SEA:

> *[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?*
>
> *…*
>
> *[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;*
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> *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).*

Did the condition of employment exist on the day the freeze commenced?

[28] The Board agrees that the test as set out in *National Police Federation* is appropriately applied when there is an alleged breach of the statutory freeze. However, the Board declines to

follow interpretations of this test arising from the previous legislation which expands “conditions of employment” to includes privileges of employment. What is meant by “conditions of employment” as contemplated under the SEA must be interpreted consistently throughout the entire Act. Consistent interpretation reveals that the SEA applies this term to legal entitlements acquired through the employment relationship both expressed and implied. Broader interpretations may have been supported by *The Trade Union Act*, RSS 1978, c T-17, but, for the reasons below, this interpretation is not supported by the current wording of the SEA.

[29] The term “conditions of employment” is not strictly defined in the governing legislation. While it is used in Part VI of the SEA, the statutory conditions of employment are set out entirely in Division 2 of Part II. Previous interpretations of the term may have drawn upon meaning provided through The Trade Union Act and *The Labour Standards Act*, RSS 1978, c L-1, as distinct pieces of legislation. However, the consolidation of these statutes in the SEA necessitates that the term which is both undefined and used in multiple parts of the Act be given a meaning that produces consistency throughout the entire statute. If the legislature intended for “condition of employment” to hold a different meaning for purposes of interpreting Part VI than it conveyed in Part II, then it would have included such a distinction in the definitions specific for Part VI which are set out in s. 6-1 of the Act. Failing to do so requires interpretations of the same to have regard to the Act as a whole to ensure consistency is achieved.

[30] An example of a term used throughout the SEA that has a distinct definition for Part VI is the definition of employee. As found by the Board in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2014 v United Cabs Limited Operating As United Cabs And Blue Line Taxi And The United Group*, 2019 CanLII 57383 (SK LRB), the legislature intended employee to have a different definition for different Parts of the Act:

> *[71] With respect to the Act, United Cabs makes several arguments. First, it argues that the Board can only find Owners and Drivers to be employees for the purposes of Part VI of the Act if they are also employees for the purposes of Part II of the Act. This argument reflects a fundamental misunderstanding of the architecture of legislation. The Act is divided into eleven Parts, for the convenience of the reader. Part I is entitled Preliminary Matters. It is made up of four sections that apply to the interpretation and application of the entire Act, including section 1-2, which sets out six definitions that apply “In this Act”. These definitions do not include the terms “employee” or “employer”. That is because the Legislature chose not to adopt one definition of those terms in the Act but to use various definitions for the purposes of the various Parts of the Act.*
>
> *[72] Part II, Employment Standards, includes, in section 2-1, its own definitions of “employee” and “employer” that apply only to Part II and Part IV. If these definitions were meant to apply to Part VI, section 2-1 would have said so, and it clearly does not.*

> *[73] Part III, Occupational Health and Safety, also includes its own definition of "employer" and a definition of "worker", that apply only to that Part. Part VI includes its own definitions of "employee" and "employer", in section 6-1, that apply only to that Part. Part VII, Essential Services, has definitions of "employee" and "public employer", that apply only in Part VII, that rely to a certain extent, but in a modified form, on the definitions of "employee" and "employer" in Part VI. Part VIII, Labour-Management Actions (Temporary Measures During an Election), has its own definitions of "employee" and "employer" that apply only to that Part.*

This intention is not present for conditions of employment. The term is not defined for the Act as a whole or for any individual Part. Thus, the term is left to be interpreted using the principles of interpretation.

[31] Section 2-10 of *The Legislation Act*, SS 2019, c L-10.2, and the modern principle of statutory interpretation is the proper approach to statutory interpretation in this province and supports the notion that statutes are to be interpreted consistently, *Farm Credit Canada v Gustafson*, 2021 SKCA 38 at para 36-38. This approach requires legislation to be interpreted textually, contextually and purposively.

[32] Within a contextual interpretation the presumption of consistent expression has particular application in this case. The presumption of consistent expression was discussed by the Saskatchewan Court of Appeal in *Equinav Financial Corporation v Roesslein Estate*, 2020 SKCA 69 (CanLII) at paras 40-41:

> *[40]…This conclusion follows from the operation of the presumption of consistent expression. Sullivan explains as follows:*
>
> *§8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.*
>
> *[41] Sullivan further notes, "[t]he presumption of consistent expression applies not only to individual words, but also to patterns of expression" (at §8.38). Thus, the different words and pattern of words used here – "deemed to have knowledge" (at ss. 9(1) and 9(2)) contrasted with "presumed to have known … unless the contrary is proved" (at s. 6(2)) – carry with them the presumption that these phrases are intended to have different meanings. In R v Smith, 2003 SKCA 8 at para 50, [2003] 5 WWR 30, this Court characterized the presumption of consistent expression as a "conventional interpretive aid … posited on the idea the legislature chooses its words with care so that the same words employed throughout a statutory provision have the same meaning, and different words have different meanings". See also R v Spencer, 2011 SKCA 144 at para 72, [2012] 4 WWR 425.*

[33] The previous interpretation of condition of employment did not properly reconcile the wording of ss. 6-62(1)(l) and 6-62(1)(n). In s. 6-62(1)(l), the legislature specifically protects both conditions of employment and privileges in certain situations. The choice to not repeat the language in 6-63(1)(n) supports the intention of the legislator being that conditions of employment does not include privileges.

> . . .
> *(l) to declare or cause a lockout or to make or threaten any change in wages, hours,* ***conditions or tenure of employment****, benefits or* ***privileges*** *while any matter is pending before a labour relations officer, special mediator or conciliation board appointed pursuant to this Part;*
>
> *(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;*
>
> *[emphasis added]*

[34] The conclusion that "conditions of employment" as declared in s. 6-62(1)(n) does not include privileges is supported through a reading of these subsections and with regard to the presumption of consistent expression which directs that the same words have the same meaning in different sections and the use of different words imply an intention for a different meaning. Where the legislature has distinctively enumerated "privileges" to be distinct from conditions of employment in s. 6-62(1)(l), it cannot be said that they intended to capture them within the term "conditions of employment" in s. 6-62(1)(n)

[35] Both parties argued that the principle of consistent expression should not alter the interpretation of conditions of employment. The Board agrees with the Union's submissions that conditions of employment must include rates of pay and hours of work, which are examples of enumerated conditions in s. 6-62(1)(n). Further, wages and hours of work are explicit conditions of employment under Part II, Division of the SEA meaning that such an interpretation provides for consistency throughout the SEA. The Board also agrees with the submission of the parties that conditions of employment include both bargained conditions and bargainable conditions such that both expressed and implied conditions are included in conditions which make up employment. The Board disagrees, however, given the structure of the SEA and the choice to separately enumerate privilege in a preceding clause, that the Board should continue to interpret conditions of employment as including privileges which are not legally enforceable conditions of employment. If that had been the intention of the legislature, conditions would either have been separately

defined in Part VI, or the wording of s. 6-62(1)(n) would more closely parallel the wording of s. 6-62(1)(l).

[36] Further, the Board would note that the associated words rule supports reading other conditions of employment in s. 6-62(1)(n) as being limited by the preceding words. The associated words rule is that terms in a list must be interpreted contextually with reference to the surrounding terms. As discussed by the Saskatchewan Court of Appeal in *Holtby-York v Saskatchewan Government Insurance*, 2016 SKCA 95 (CanLII):

> *[14] It is a well-known rule of statutory interpretation that words (or phrases) used in a list must be interpreted by reference to the other words or phrases included in the list (the associated word rule – nosciicur a sociis). Justice Bastarache in his dissenting judgment (though not on this point) in Marche v Halifax Insurance Company, 2005 SCC 6, [2005] 1 SCR 47 [Marche], described how the rule operates:*
>
> > *[67] ... It is a well-known rule of interpretation that a term or an expression cannot be interpreted without taking the surrounding terms into account. "The meaning of a term is revealed by its association with other terms: it is known by its associates": 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), 1996 CanLII 153 (SCC), [1996] 3 S.C.R. 919, at para. 195 (emphasis omitted).*
> >
> > *[68] Professor Sullivan, at p. 173, defines the associated words rule, noscitur a sociis, as follows:*
> >
> > > *The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator.*
> >
> > *[69] This rule of statutory interpretation was applied by this Court on numerous occasions: Brossard (Town) v. Quebec (Commission des droits de la personne), 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279, at pp. 328-29; Ontario v. Canadian Pacific Ltd., 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, at para. 64; 2747-3174 Québec Inc., at para. 195; R. v. Daoust, 2004 SCC 6 (CanLII), [2004] 1 S.C.R. 217, at para. 51.*
> >
> > *[70] When applying the noscitur a sociis rule (associated words rule) to a term that is part of a list, one must look for a common feature among the terms, "the meaning of the more general being restricted to a sense analogous to the less general": R. v. Goulis (1981), 1981 CanLII 1642 (ON CA), 33 O.R. (2d) 55 (C.A.), at p. 61. Legislative provisions must not be considered in a vacuum. "The content of a provision 'is enriched by the rest of the section in which it is found...'": Canadian Pacific, at para. 64; R. v. Nova Scotia Pharmaceutical Society, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, at p. 647. In the present case, while "condition" standing alone could potentially have a broader connotation, its association with the words "stipulation" and "warranty" narrows its scope. As submitted by the insurer, under the Insurance Act, the concepts of "statutory" stipulation or "statutory" warranty do not exist. A stipulation or warranty is necessarily contractual. Consequently, the list should be limited to the common denominator to all the terms: the contract. Every single one of these provisions is*

> *of a contractual nature. When addressing this factor, one must not confuse the immediate context with the broader context of the statute. These two factors, while linked, should be examined separately: one needs to address the specific context of an expression or word before referring to the entire context of the statute.*
>
> *[15] The associated words rule as set out by Bastarache J. in Marche was employed by this Court in R v Spencer, 2011 SKCA 144 at para 68, 283 CCC (3d) 384, aff'd 2014 SCC 43, [2014] 2 SCR 212, and more recently in Ayers v CPC Networks Corp., 2016 SKCA 90 at paras 69-71.*

[37] The surrounding words of hours and wage support interpreting conditions of employment to being limited to legal conditions and not extended to privileges. This is consistent with how the Board has interpreted the influence of the presumption of consistent expression.

[38] The text and context support a legal interpretation of conditions of employment. The purpose supports a broad interpretation of the provision, but purpose cannot be used to supplant clear statutory language*: Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII), [2006] 1 SCR 715. The choice of different language between the clauses of s. 6-62 is an intent to have different scope; the Board cannot use the purpose to override the legislative choice of different scope.

[39] The Board finds that the SIP was a privilege and not a term and condition of employment as the evidence establishes it was a discretionary program of the Employer that has never been part of the collective agreement and does not give rise to a legal entitlement. As such any change to a privilege is not a breach of the statutory freeze.

[40] The Board finds, based on the prior pattern going back to 2012 of giving notice of an intention to delay payment in bargaining years for both units, actually delaying it in one case, and not making any payment in 2021, it was not a condition of employment that the SIP be paid on February 23, 2024. When interpreting an implied term, the surrounding circumstances must be considered, and those circumstances are not limited to the last CBA as argued by the Union but considered in the entire context of the history and evolution of the implied contractual term at issue.

If the date of the payment of the SIP was a condition of employment, has the statutory freeze been breached?

[41] As well, the date of payment of SIP on February 23, 2024 is an implied term, and that such a term can be properly understood to be a condition of employment and not a privilege. The Board finds that the Employer has established that there was a reasonable expectation that payment

would be potentially delayed in a bargaining year as it was in previous bargaining years for the Union and for the UFCW bargaining unit. Therefore, the Employer has established a reasonable expectations defense. The Union disagreed with the decision repeatedly, but the testimony supports that its membership was not surprised as it had long been the Employer's approach to this issue.

[42] As a result, with these Reasons, an Order will issue that the Application in LRB File No. 051-24 is dismissed.

[43] The Board's decision is final subject to s. 6-115 of the Act.

[44] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

[45] Board Member Spence concurs and Board Member Kagis dissents with reasons noted below.

DATED at Regina, Saskatchewan, this **25th** day of **March, 2025.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson

DISSENT

[1] With respect, I do not agree with the decision of the majority to dismiss the Union's Application. The Union filed an Unfair Labour Practice Application alleging that the Employer violated s.6-62(1)(n) of the SEA.

[2] The Board found, at paragraph 18, that the Employer intended to pressure the Union to settle a revised Collective Bargaining Agreement by threatening to withhold payment of the SIP.

[3] I believe that this was the Employer's sole motivation. The value of the SIP was calculated and budgeted in the year that employees' performance was evaluated – i.e., the previous year – so it is disingenuous for the Employer to claim, as it did, that cost concerns for the upcoming year were a motivation for making the threat. Had this been a legitimate concern, the Employer would have added that, depending on the cost associated with a newly settled Collective Agreement, the SIP might not be paid at all.

[4] The question remains whether the SIP was a "condition of employment" as set out in s.6-62(1)(n) that the Employer unilaterally changed or removed. I disagree with the majority's conclusion that the SIP was a "privilege" and with the majority's determination that the "presumption of consistent expression" precludes including "privilege" under the aegis of "conditions of employment".

[5] The Employer's own description of the SIP included in the Variable Compensation Policy states that it is "an important piece of a competitive total compensation package" – not a mere privilege conferred at the Employer's whim.

[6] The word "benefits" appears in s.6-62(1)(l) but does not appear in s.6-62(1)(n). Pension plans and health benefit plans are often not included in the enumerated conditions of employment in a Collective Agreement, yet few would argue that the "presumption of consistent expression" requires us to interpret 6-62-1(n) as NOT including such benefits.

[7] In paragraph 15, the majority writes, "Overall, the Board finds that the Employer has established a pattern that it has taken a position consistently since 2012 that a portion of variable compensation, which is dealt with in policies outside the CBA and has never formed part of the CBA, is potentially withheld until the [conclusion] of bargaining if bargaining is not completed by the end of February." The fact remains that, although there may have been a pattern of threats made to withhold the SIP, the Employer had not previously withheld it from the RWDSU

bargaining unit. Counsel for the Employer tried to argue that this was because the former RWDSU staff representative who led bargaining skillfully managed to guide the group to settlements before the deadline each time the threat was made. No evidence was proffered to support that argument.

[8] In this case, the Union filed its Unfair Labour Practice Application on March 1, 2024, that is, a few days after the Employer's oft-repeated threat became a reality: the SIP was to have been paid on February 23, 2024 and was not.

[9] In my view, we have a legitimate condition of employment unilaterally changed by the Employer, in violation of 6-62(1)(n).

[10] I would have granted the Union's application for a finding that the Employer violated s.6-62(1)(n), thereby committing an unfair labour practice.

Aina Kagis, Board Member