

# KING'S BENCH FOR SASKATCHEWAN

Citation: 2025 SKKB 177

Date: 2025 10 17  
Docket: KBG-SA-01279-2022  
Judicial Centre: Saskatoon

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BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION,  
LOCAL 1400

APPLICANT

- and -

SASKATOON CO-OPERATIVE ASSOCIATION LIMITED

RESPONDENT

- and -

THE SASKATCHEWAN LABOUR RELATIONS BOARD

RESPONDENT

## Appearances:

Samuel I. Schonhoffer  
Brent M. Matkowski

Craig Thebaud

for the applicant  
for the respondent,  
Saskatoon Co-operative Association Limited  
on his own behalf

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JUDGMENT  
October 17, 2025

ELSON J.

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## Introduction

[1] On November 1, 2018, the all-employee bargaining unit at the Saskatoon Co-operative Association Limited, described as “Saskatoon Co-op” or “Co-op”, went

on strike – a walkout that lasted more than five months. The central and most divisive issue between the parties surrounded the Saskatoon Co-op’s proposal for a two-tier wage schedule in a renewed collective agreement. The employees, represented by the United Food and Commercial Workers, Local 1400 [UFCW], took the position that the proposed schedule unfairly impacted new employees.

[2] During the labour dispute, individuals opposed to the Co-op’s bargaining stance decided to pursue their own strategies. The initial force behind these strategies was Craig Thebaud, a former employee of both the Co-op and UFCW. Two strategies eventually developed. First, a petition was created for the ostensible purpose of forcing a special meeting of the Co-op’s membership where the existing board of directors could be replaced with candidates who would support a different bargaining position. In the remainder of this judgment, I will describe this strategy as the “Petition Strategy”. When the Petition Strategy failed, the movement changed course and decided to plan for the 2019 annual general meeting of the Co-op membership [AGM]. At the AGM, certain seats on the board of directors would be up for election or re-election. The individuals behind the movement planned to campaign for candidates who would press for a different bargaining position. This strategy, which I will hereinafter describe as the “Election Strategy”, carried on despite the settlement of the strike and a renewed collective agreement that included a “bridged” two-tier wage schedule.

[3] The Saskatoon Co-op took exception to both strategies. During the Petition Strategy, it brought an unfair labour practice application to the Saskatchewan Labour Relations Board [Board], challenging Mr. Thebaud’s actions, which it claimed were actively supported by UFCW. The Co-op asserted that both UFCW and Mr. Thebaud engaged in bad faith bargaining and contravened sections 6-7, 6-63(1)(c), 6-41, and 63(1)(h) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act]. After the settlement and renewed collective agreement, the Co-op amended its

application to assert similar claims in relation to the Election Strategy.

[4] In its decision, dated August 15, 2022 (2022 CanLII 73372 (Sask LRB)) [*Decision*], the Board concluded that Mr. Thebaud, acting as an agent of UFCW, contravened provisions of the *Act*, including sections 6-7 and 6-63(1)(c). As for UFCW's conduct in these actions, the Board was satisfied that it "was not a mere bystander" to the events in question. Rather, the Board concluded that, through its tacit support of Mr. Thebaud's actions, UFCW "sought to circumvent the collective bargaining process so as to secure a better deal through an alternative to the available negotiating environment". It necessarily followed, in the Board's view, that UFCW also contravened sections 6-7 and 6-63(1)(c) of the *Act*.

[5] In this judicial review, UFCW seeks to set aside the Board's *Decision*. Among other things, it argues that the *Decision* unreasonably prohibits it and its members from engaging in legitimate advocacy and electoral action in the context of a democratically controlled co-operative employer.

[6] Mr. Thebaud joined in this judicial review. While he did not serve and file his own originating application, he filed a brief and was granted leave to make oral submissions to the Court. For that reason, he is listed as a party but not in the style of cause.

### **Relevant Facts**

[7] Under this heading, I will summarily discuss the narrative that relates to the Saskatoon Co-op's unfair labour practice and the Board's *Decision*. As I read the record, including the *Decision*, the narrative can be divided into three contextual settings. The first setting consists of background circumstances related to the parties and their relationship with each other. It also includes a more specific discussion about the Saskatoon Co-op, including its legal status as a co-operative. The second setting

includes evidence about the petition Mr. Thebaud created and the steps taken to force a special meeting of the Saskatoon Co-op membership. The third and final setting includes evidence of steps taken by Mr. Thebaud and others, including the UFCW, to elect Co-op directors who would support a perspective that would be more in line with the bargaining positions advanced by the UFCW.

### *Background Information*

[8] As noted by the Board, the Saskatoon Co-op is a co-operative incorporated pursuant to *The Co-operatives Act, 1996*, SS 1996, c C-37.3 [*Co-op Act*]. It operates retail businesses at various locations in and around Saskatoon, Saskatchewan.

[9] Before going further into the background information, it is worth noting the statutory nature of a co-operative. This is principally reflected in section 3 of the *Co-op Act*, which sets out the basis on which a co-operative is organized, operated and administered. It reads:

#### **Co-operative basis**

**3** For the purposes of this Act, a body corporate is organized, operated and administered on a co-operative basis where:

- (a) no member or delegate has more than one vote;
- (b) no member or delegate is entitled to vote by proxy;
- (c) its business is carried on primarily for the benefit of its members;
- (d) its membership is voluntary and available, without any artificial restriction or any unlawful basis of discrimination, to any person who can use its services and is willing to accept the responsibilities of membership;
- (e) the limit on the interest or dividends on share capital that it pays does not exceed the prescribed rate; and

- (f) any surplus or saving arising out of its operation is:
  - (i) used to develop its business;
  - (ii) used to provide or improve common services to members;
  - (iii) distributed among members in proportion to their patronage with the co-operative;
  - (iv) used to educate its members, officers or employees or the general public in the principles and techniques of economic and democratic co-operation; or
  - (v) distributed to non-profit, charitable or benevolent organizations.

[Emphasis added]

As is evident from this provision, the concept of membership, including the democratic principle of one-member/one-vote and the purpose of “carrying on business for the benefit of its members”, is central to the nature of a co-operative. In a fundamental way, this reflects a conceptual distinction between co-operatives and business corporations. See *Silzer v George Taylor Housing Co-operative Ltd.*, 2023 SKKB 125.

[10] In its *Decision*, the Board noted the powers of a co-operative’s board of directors, as described in section 72 of the *Co-op Act*. This provision reads as follows:

**Directors’ powers**

**72(1)** Subject to this Act, the regulations, the articles and the bylaws, and unless the articles or bylaws provide otherwise, the board of directors, however designated, shall:

- (a) exercise the powers of the co-operative directly or indirectly through the employees and agents of the co-operative; and
- (b) direct the management of the business and affairs of the co-operative.

(2) Not less than a majority of the directors are to be persons ordinarily resident in Canada.

Subject to the *Co-op Act's* regulations or the co-operative's articles or bylaws, the election of directors is governed by section 74 of the *Co-op Act*. In the case of the Saskatoon Co-op, the Board received evidence that there were nine directors, three of whom are elected on three-year staggered terms. It also heard testimony to the effect that the Co-op's board has significant influence over its Chief Executive Officer.

[11] According to the Board's *Decision*, it heard testimony from six witnesses, including three witnesses called by the Saskatoon Co-op and two witnesses called by UFCW. Mr. Thebaud testified on his own behalf as a named respondent in the proceeding.

[12] UFCW is the certified bargaining agent for the bargaining unit consisting of in-scope Saskatoon Co-op employees. Not surprisingly, many of the bargaining unit employees are also members of the Co-op. According to testimony before the Board, a noted reason for this relates to the loyalty program and discounts that are associated with membership. Of course, as Co-op members, these employees also have the right to vote at the AGMs or any special meetings that may be called to address special issues.

[13] The Board heard testimony that, prior to 2018, it was not unusual for bargaining unit employees to talk about candidates seeking election to the Saskatoon Co-op's board of directors. Moreover, there has been a history of bargaining unit members supporting specific candidates, all without objection from management. Likewise, there was evidence before the Board that the Co-op's management also supported specific candidates. Having said all this, UFCW's president, Norm Neault, testified that there was an informal agreement that neither UFCW nor management would specifically run candidates.

[14] As mentioned in the Introduction, Mr. Thebaud has had an association with both the Saskatoon Co-op and UFCW. Aside from being a Co-op member,

Mr. Thebaud worked for the Co-op for seven years prior to 2010. During that time, he also served as an executive member with UFCW and later worked for the union, on an on-and-off basis between 2009 and 2017. According to the uncontested evidence, Mr. Thebaud's departure from UFCW's employment was on something less than good terms. Further, the Board expressly noted the absence of any evidence that Mr. Thebaud had an ongoing relationship with any UFCW officers.

[15] The evidence describing the circumstances that led to the strike and the renewed collective agreement are not in dispute. Those circumstances were concisely described by the Board as follows, at paragraphs 5-7:

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

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

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

[Emphasis added]

*The Petition Strategy*

[16] The Board heard evidence that Mr. Thebaud remained interested in the operations of the Saskatoon Co-op and became very concerned about the proposal for a two-tier wage schedule. He concluded that a strategy he could employ would be to circulate a petition that would require the directors to call a special meeting pursuant to section 104 of the *Co-op Act*. With this in mind, he designed a petition containing the following preamble:

*Request to Call A Special Meeting Of The Saskatoon Co-operative Association Limited*

*We the undersigned members of the Saskatoon Co-operative Association Limited formally request a special meeting of the Saskatoon Co-operative Association Limited as per Section 104 of The Co-operatives Act of Saskatchewan. For the purpose of:*

*Removing the current board of directors from office through the following motion: “That all of the current directors be removed from their positions as directors for the Saskatoon Co-operative Association Limited.”; and*

*Replacing all vacancies on the Board of Directors.*

[17] In the *Decision*, the Board noted evidence of the steps Mr. Thebaud and other petition supporters took to obtain signatures, some of which involved interactions or communication with representatives of UFCW. Summarily described from specific paragraphs in the *Decision*, this included evidence of the following:

- a. On the day the strike notice was served, Mr. Thebaud sent a text message to Mr. Neault about the petition and its purpose. He also asked the president if he saw an issue with it, to which Mr. Neault essentially replied that he did not. See paragraphs 24-25.
- b. On that same day, Mr. Thebaud advised Mr. Neault that petition supporters would be attending at the picket line to gather signatures.

See paragraph 26.

- c. On November 2, 2018, after receiving the petition as an email attachment from Mr. Thebaud, UFCW shared a post from him on its Facebook page, containing a link to the petition. The UFCW's secretary-treasurer, Lucia Flack Figueiredo, thought the petition was a good idea and placed a copy of it on the front counter of the UFCW office. See paragraph 27.
- d. Mr. Thebaud formed a Facebook group called the Saskatoon Co-op Members for the Fair Treatment of Employees group, described in the Board *Decision* as the "Petition Group". The explicit goal of the Petition Group was to change the Saskatoon Co-op's bargaining position with respect to the two-tier wage schedule. See paragraph 28.
- e. Members of the Petition Group attended the picket line to obtain signatures and directed potential signatories to picket captains on the picket lines. See paragraph 29.

[18] On November 26, 2018, after Mr. Thebaud submitted the petition with 474 signatures, the Saskatoon Co-op's board of directors passed a resolution in which it declined to call the requested special meeting. This prompted Mr. Thebaud to seek an order from this Court to direct that a special meeting be held by January 25, 2019.

[19] The application was heard by Gabrielson J., who dismissed it. In his reasons, reported in *Thebaud v Saskatoon Co-operative Association Limited Board of Directors*, 2019 SKQB 14, 87 BLR (5th) 195, my former colleague first noted that the petition's stated purpose arguably conflicted with the statutory framework for removing directors in section 80 of the *Co-op Act*. The more critical issue, however, surrounded the legal propriety of the petition's motive. Drawing on reasoning from authorities such

as *Smythe v Anderson* (1970), 11 DLR (3d) 503 (Sask CA) and *Morgan v Chappel*, [1980] 4 WWR 482 (Sask QB), Gabrielson J. concluded, at paragraphs 16-20, that the petition's expressly stated motive did not conform with the Co-op's statutory goal of carrying on business "primarily for the benefit of its members". Rather, he found that it sought to force Mr. Thebaud's objectives on the Co-op to the detriment of its members.

[20] Before going further in the narrative, it should be noted that the Saskatoon Co-op's initial unfair labour practice was filed on November 8, 2018, eight days before Mr. Thebaud submitted the completed petition to the board of directors. As framed at that time, the Co-op's application was predicated solely on the assertion that Mr. Thebaud and UFCW were utilizing the petition as an instrument of bad faith bargaining. An amended application was later filed on June 11, 2019.

#### *The Election Strategy*

[21] Despite the failure of the petition to force a special meeting, Mr. Thebaud and his supporters persisted, albeit with the Election Strategy. The Co-op's complaint about the Election Strategy is included in its amended application.

[22] The activity surrounding the Election Strategy began on February 20, 2019, primarily with town hall meetings held for the ostensible purpose of changing the perspective of the Saskatoon Co-op's operation. Eventually, these town hall meetings were attributed to an organization identified as the "Co-op for Fairness", described in the Board *Decision* as the "Election Group". In an advertisement, related to the 2019 AGM, the Election Group described itself as follows:

*We are Co-op members who:*

- *support Co-op's workers who were on strike simply to preserve good conditions of employment at Co-op.*
- *oppose the board's abdication of governance of Co-op to*

*FCL. We insist that they intervene to end Co-op management's assault on wages via the proposed "two-tier" wage structure, today and forever.*

- *support bringing true member democracy to Co-op, where members vote on policy, the board follows the policy, and management implements the policy.*
- *support resolutions and other initiatives to reverse the slide of Co-op into a corporate, rather than co-operative model.*

[23] In the *Decision*, the Board described the evidence it received about the Election Group's campaign leading up to the 2019 AGM, which was held on June 20, 2019. Again, summarily described from specific paragraphs in the *Decision*, this included evidence of the following:

- a. The Election Group's inaugural meeting was held on February 20, 2019. It was organized by James Mills, the spouse of a Co-op's employee. Although the meeting was said to have been "hijacked", it was noted that members of UFCW's negotiating committee were in attendance and that some of them spoke about bargaining and the ongoing strike. See paragraphs 34-38.
- b. In February 2019, windshield flyers, displaying the UFCW logo, were distributed. The flyers called on Saskatoon Co-op members to attend the AGM to "[h]elp elect new Board members who are true believers in fairness, community values and hard-working families". See paragraph 39.
- c. On March 7, 2019, a town hall meeting was held at the Saskatoon Food Bank, ostensibly to discuss possible resolutions and strategy. The Board noted that six "overarching" resolutions and two "targeted" resolutions were approved. The Board specifically observed that one of the resolutions called for the elected directors to adopt principles in

all its bargaining negotiations that would result in agreements “removing the ‘two tier wages’ from any current or future bargaining processes and contracts”. See paragraph 41.

- d. On March 20, 2019, a town hall meeting was held at which there was a discussion about the upcoming elections and the presentation of the previously developed resolutions. See paragraph 42.
- e. In March and April 2019, the Election Group promoted solidarity pickets with striking workers and lawn signs in support of the strike. See paragraph 43.
- f. On April 2, 2019, the UFCW vice-president participated in a local radio show with members of the Election Group. The topics of discussion included the negotiations, the AGM, the town hall meetings and community support for the striking workers.
- g. On April 17, 2019, the day after the Co-op and UFCW concluded a new collective agreement, the Election Group posted an article that included an image credit from UFCW. The article read as follows:

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

See paragraph 45.

- h. On April 17, 2019, the Petition Group, via Facebook, invited Co-op

members to vote for board candidates who would, among other things, eliminate the “shameful second tier that new workers will now be subjected to”. See paragraph 46.

- i. On May 13, 2019, the Election Group held a town hall meeting at which three candidates and two alternate candidates were endorsed for election as directors at the upcoming AGM. One of the alternate candidates was later swapped in for an endorsed candidate. UFCW later endorsed the Election Group’s candidates. See paragraphs 48 and 50.
- j. On May 21, 2019, the Petition Group posted on Facebook that it was amalgamating with the Election Group and merging their Facebook pages to the Election Group’s page. It also stated that the Election Group shared its views about the replacement of the Saskatoon Co-op’s board of directors with members who feel that management must answer to it, not the other way around. See paragraph 49.
- k. The Board noted that two of the Election Group’s endorsed candidates prepared candidate profiles that focused on the two-tier wage schedule. Both candidates expressed the view that the schedule violated co-operative values. One candidate expressly raised the prospect of the Co-op’s board of directors “reopening negotiations ... for the purpose of returning to a one-tier wage structure.” See paragraphs 51-52.
- l. The AGM was held on June 20, 2019, at TCU Place. Just before it convened, UFCW held a meeting at the same location, where candidates were invited to present their platforms.

- m. There were 15 candidates for the three available seats on the Co-op's board. One incumbent director was re-elected and two of the three candidates endorsed by the Election Group and UFCW were elected. See paragraphs 55-56.
- n. The Board noted the testimony of the Saskatoon Co-op's controller. He told the Board about the Co-op's practice of making candidate recommendations, through senior management, to other managers. He stated that the recommendations were for candidates who demonstrated alignment with the Co-op's long-term interests. The controller also testified that managers were encouraged to attend the AGM.

*Relevant Provisions of The Saskatchewan Employment Act*

[24] Before describing the relevant aspects of the Board's *Decision*, I think it would be helpful simply to review the provisions of the *Act* that related to the issues the Board considered, as well as one provision that specifically pertains to this application. These provisions include sections 6-7, 6-62(1)(b), 6-63(1)(c), 6-63(1)(h), 6-104(2) and 6-115(4).

[25] A central consideration in this matter involved the application of section 6-7 of the *Act*, which sets out the duty of every union and employer to engage in good faith collective bargaining. This provision reads as follows:

**Good faith bargaining**

**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.

[26] Although not engaged directly in the Saskatoon Co-op's application to the Board, an issue arose about whether UFCW faced an obligation that "mirrored" an

employer's obligation not to interfere with the internal operation of a labour organization. This employer obligation is set out in section 6-62(1)(b) of the *Act*, which reads as follows:

**Unfair labour practices — employers**

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

...

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

[27] The Saskatoon Co-op's application specifically engaged sections 6-63(1) (c) and (h) of the *Act*. These two provisions read as follows:

**Unfair labour practices — unions, employees**

**6-63(1)** It is an unfair labour practice for an employee, union or any other person to do any of the following:

...

(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issued for that unit;

...

(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.

[28] Another provision of the *Act* that factored in the Board's analysis is section 6-104(2)(c). This provision, which the Board found was engaged by Mr. Thebaud's situation, reads as follows:

**6-104(2)** In addition to any other powers given to the board pursuant to this Part, the board may make orders:

...

(c) requiring any person to do any of the following:

(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;

(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;

[29] Finally, and specifically in the context of this judicial review, the Court must be mindful of the strongly worded privative clause in section 6-115(4) of the *Act*. This provision reads as follows:

**6-115(4)** The board's decisions and findings on all questions of fact and law are not open to question or review in any court, and any proceeding before the board must not be restrained by injunction, prohibition, mandamus, *quo warranto*, *certiorari* or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court on any grounds.

### **The *Decision* of the Board**

[30] In its *Decision* the Board considered a broad range of issues that it found were raised by the evidence and the submissions it received. They included: (1) Mr. Thebaud's personal liability for an unfair labour practice; (2) whether Mr. Thebaud acted as an agent for UFCW; (3) whether UFCW had an obligation that mirrored an employer's obligation under section 6-62(1)(b); (4) the nature of the duty to conduct collective bargaining in good faith; and (5) whether UFCW's participation in the Petition and election strategies breached that duty. In the consideration of these issues,

the Board also addressed the significance of the employer being a co-operative, where bargaining unit employees held memberships.

[31] On the question of personal liability for an unfair labour practice, the Board concluded, at paragraph 110, that Mr. Thebaud could not be found liable for breach of section 6-63(1)(h) of the *Act*. That said, it also noted that section 6-104(2)(c) of the *Act* permitted the Board to require “any person” to do anything to rectify a contravention of the labour relations provisions in Part VI of the *Act*. In the Board’s view, it necessarily followed that the phrase “any other person” in section 6-63(1), combined with the remedial power in section 6-104(2)(c), allowed for “agent liability”. See paragraph 112.

[32] As for whether Mr. Thebaud acted as agent for UFCW, the Board concluded that he did. While it found no evidence that UFCW reached out to Mr. Thebaud or conspired with him to pursue the Petition Strategy, the Board still concluded that it endowed him “with the power to act in a manner that would affect its legal situation.” See paragraph 127. In the Board’s view, this conclusion was informed by: (1) the expressly stated purpose of the petition; (2) the likelihood that Mr. Thebaud would not have pursued the Petition Strategy if UFCW expressed concerns about it; (3) the attendance at the picket line to gather petition signatures; (4) placing the petition on the front counter of the UFCW office; (5) directing potential signatories to picket captains; and (6) Mr. Thebaud blind-copying UFCW with press releases related to the petition. Having regard to all this evidence, the Board summed up its conclusion at paragraphs 133-137:

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

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

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

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

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

[Emphasis added]

[33] Turning to the question of a mirror obligation to section 6-62(1)(b), the Board rejected the Saskatoon Co-op’s argument that such an obligation should be read-in to the *Act*. Describing the Board’s analysis in a nutshell, it concluded that, having regard to the different vulnerabilities trade unions face, compared to those facing employers, there was no justifiable purpose in applying the same mirror prohibition. See paragraphs 142-160.

[34] Of course, the central feature of the dispute between the parties related to the nature of the duty to conduct collective bargaining in good faith and whether UFCW breached that duty. In its description of the duty, the Board specifically relied on

observations in *Health Services & Support-Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*], as well as from *Service Employees Union (West) v Saskatchewan Association of Health Organizations*, 2014 CanLII 17405 (Sask LRB), rev'd on other grounds in 2015 SKQB 222, 479 Sask R 195, appeal allowed in part in *Cypress Regional Health Authority v SEIU-West*, 2016 SKCA 161, 294 CLRBR (2d) 1.

[35] From *Health Services*, the Board specifically recited paragraphs 99-106 where McLachlin C.J. described the relevant principles associated with good faith bargaining. It is not necessary to repeat that recitation here. That said, I take special note of paragraph 105 of *Health Sciences*, where the Chief Justice appeared to suggest that actions with the potential to harm the “collective bargaining relationship” could be seen as a breach of the duty to bargain in good faith. In this regard, she wrote the following:

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.* [[1996] 1 SCR 369]. 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.

[Emphasis added]

[36] Based on its review of the applicable principles and the cited authorities, the Board offered a general description of the duty to bargain in good faith, acknowledging that it could include conduct away from the bargaining table. In this regard, the Board’s description appears at paragraphs 168-169:

**[168]** In summary, the duty to bargain in good faith is primarily concerned with the process of collective bargaining as

opposed to the substance of a particular agreement achieved through collective bargaining. The duty prohibits attempts by either party to avoid the conclusion of a collective agreement and to take actions directed at destroying the collective bargaining relationship. Neither hard bargaining nor a failure to make concessions, alone, amount to bargaining in bad faith.

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

[Emphasis added]

[37] In the context of a union’s duty to bargain in good faith, the Board specifically addressed UFCW’s argument that a favourable ruling on the Saskatoon Co-op’s amended application would run contrary to the right to strike and its right to freedom of expression, all of which is protected under the *Canadian Charter of Rights and Freedoms* and *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2. The Board did not fully accept this argument. In short, while the Board acknowledged the existence of these rights, it also concluded that the expressive character of a party’s action, including those associated with a strike, “does not justify a failure to comply with the minimal degree of order in collective bargaining that is imposed by the Act”. See paragraphs 175-189.

[38] In addressing the specific circumstances before it, the Board identified three guiding questions it found were significant to determining the outcome of the Saskatoon Co-op’s application. The passage from the *Decision* that identified these questions, and which I find to have revealed much about the Board’s thinking on this matter, appears in paragraphs 194-197. This passage reads as follows:

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

- a. Whether the Union (and agent) was not honestly striving to find a middle ground in respect of the opposing interests;
- b. Whether the content of bargaining shows hostility by the Union (and agent) toward the collective bargaining process;
- c. Whether the nature of the Union's actions (and those of the agent) were aimed at destroying the collective bargaining relationship.

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

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

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

the process.

[Emphasis added]

[39] Finally, the Board addressed the nature of the Saskatoon Co-op's business as an organized co-operative. In doing so, it acknowledged the tension between the different democratic objectives that exist between UFCW membership and Co-op membership. In this regard, the Board wrote the following at paragraphs 202-204:

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

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

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

[Emphasis added]

[40] In the end, the Board decided that both UFCW and Mr. Thebaud breached sections 6-7 and 6-63(1)(c) of the *Act*. The Board explained its conclusion by emphasizing that the sole purpose of both strategies was to change the composition of

the Co-op's board of directors and thereby compel the employer to revisit and change the bargaining position it took in 2018-19. The Board's explanation appears at paragraphs 210-214:

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

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

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

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

[214] On the issue of expression, the strategies went beyond

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

[Emphasis added]

[41] At the same time as it offered this explanation, the Board candidly acknowledged an obvious and important reality. That reality revolved around the lack of any effective way to isolate either party's efforts to influence elections of the Co-op's directors from the collective bargaining process or its outcome. This acknowledgement, which I find offers somewhat of a qualification to the different democratic objectives identified in paragraphs 202-204 of the *Decision*, appears in paragraph 215:

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

[Emphasis added]

The above acknowledgement was followed by further observations in which the Board

tried to make it clear that its *Decision* was grounded on the facts presented to it. It also stated its wish “that its findings should not be generalized to abridge a union’s rights in other contexts ...”.

[42] In the final disposition of the case, the Board granted a declaration that UFCW and Mr. Thebaud engaged in unfair labour practice pursuant to section 6-63(1)(c) of the *Act*. The Board, however, expressly declined to grant the order requested by the Saskatoon Co-op. That order would have obliged both respondents to “cease and refrain from coordinating with third party organizations, directly or indirectly, to subvert collective bargaining and/or interfere with Saskatoon Co-op’s governance structure”. Among the Board’s reasons for declining this request, it observed that the reference to some form of “interference” did not coincide with its conclusions about that issue. In place of the requested order, the Board simply ordered the respondents to “cease and refrain from coordinating with third party organizations, directly or indirectly, to contravene clause 6-63(1)(c) of the *Act*.” See paragraph 233.

[43] Before completing my discussion about the *Decision*, I think it appropriate to recite an *obiter* observation and comment the Board made in its closing. In that observation and comment, the Board addressed the unique circumstances that were presented by the Saskatoon Co-op’s application as well as the constraints placed on any guidance that might be drawn from the *Decision*. The *obiter* appears at paragraph 235 and reads as follows:

[235] Next, the Board will make some *obiter* comments. This is new territory. The circumstances before the Board are unique. The Board has taken longer than usual in issuing these Reasons. In doing so, it hopes to provide the parties with sufficient guidance to understand their obligations, within the constraints of the case before it. Given these constraints, it was not possible for the Board to comment on the extent of the parties’ obligations in all situations that might arise. If the parties wish to have the Board determine another, related dispute, they may

consider bringing a reference to the Board, by consent, pursuant to section 6-110 of the Act. To be sure, this is not a comment on what form of said reference would be acceptable to the Board.

### **Positions of the Parties**

[44] The Saskatoon Co-op's position can be simply stated. Although it did not persuade the Board of all its submissions, it contends that the impugned *Decision* meets all the requirements of a reasonableness review. The Co-op specifically posits that the Board's interpretation of section 6-7 of the *Act* as well as its analysis of the duty to bargain in good faith were fully supportable. They also fell well within the Board's acknowledged expertise in labour relations.

[45] UFCW's position has multiple aspects. Its general argument is that the Board's *Decision* extends the duty of good faith bargaining beyond its traditional role and that the extension unduly limits union rights. More specifically, this general argument includes supporting assertions, such as:

- a. The Board implicitly expected that it was obliged to refrain from participating in the democratic processes of a member owned consumer co-operative.
- b. The Board ignored the reality that collective bargaining was not actually circumvented or undermined in this case.
- c. The Board did not properly consider the *Charter* issues and did not conduct an analysis of its *Decision*'s impact on union's rights and the *Charter* values.
- d. The Board adopted an understanding about the duty to bargain that is at odds with the more nuanced and reasonable understanding as of the duty.

- e. The Board’s conclusion is founded on the premise that UFCW was required to accept the Co-op’s bargaining position and refrain from attempts to influence the direction of the organization
- f. The Board failed to create a workable or coherent distinction between “advocacy” and public pressure to change the employer's position in bargaining (which it was certainly allowed to do).
- g. The Board failed to appreciate the union’s lack of ability to control whether there is a petition circulating on the picket line and effectively creating a positive obligation to oppose such a petition (which is not what the *Decision* purports to do) and to exert a type of control over the conduct of individual members on the picket line which is unrealistic in context.

## **Applicable Law**

### *Standard of Review – The Nature of Reasonableness Review*

[46] The parties agree that the applicable standard of review this Court must apply in its review of the *Decision* is reasonableness. As articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], reasonableness is now regarded as the presumptive standard of review, subject to very limited exceptions.

[47] It is important to understand that the reasonableness standard of review is not a vague and abstract concept that focuses solely on a tribunal’s conclusion. It is rooted in the analysis earlier articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], where the Supreme Court of Canada, at para. 47, emphasized the underlying rationale of administrative law decision-making. In light of

that rationale, the Court concluded that a reasonable decision is one that is justified, transparent and intelligible within the decision-making process. Along with these considerations, a reviewing court must concern itself with whether the administrative decision falls within a range of acceptable outcomes that are defensible in respect of both the facts and the applicable law.

[48] In *Vavilov*, the Supreme Court of Canada essentially reaffirmed the reasonableness analysis in *Dunsmuir*, albeit with a somewhat sharpened focus. See *Pierson v Estevan Board of Police Commissioners*, 2020 SKQB 144 at paragraphs 56-60.

[49] In Saskatchewan, a frequently cited summary of the reasonableness review, as drawn from *Vavilov*, was penned by Barrington-Foote J.A. in *Service Employees International Union - West v Saskatchewan Health Authority*, 2020 SKCA 113, 454 DLR (4th) 363 [*SEIU-West*]. Although the summary appears in a dissenting judgment, both the majority and minority agreed with its contents. From paragraphs 102 -105 of the judgment, the summary reads as follows:

[102] I agree with my colleagues that the Chambers judge was correct in selecting the reasonableness standard when reviewing the *Award*, and that the issue is whether he correctly applied that standard. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*], the majority confirmed the reasonableness standard requires the reviewing court to answer two questions; that is, “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst* [2012 SCC 2, [2012] 1 SCR 5], at para. 13” (at para 99). For analytical purposes, the Court described two kinds of fundamental flaws as a convenient way to discuss the issues that may show a decision to be unreasonable (at para 101). First, is there “a failure of rationality internal to the reasoning process”? Second, is the decision “in some respect untenable in light of the relevant factual and legal constraints that bear on it”? (at para

101). The Court emphasized that in order to justify setting aside a decision, the flaws must be “sufficiently central or significant”, not superficial or peripheral (at para 100).

[103] The first category of flaws reflects the principle that a reasonable decision must be based on internally coherent reasoning; that is, reasoning that is both rational and logical. As the majority put the matter, “the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic” (*Vavilov* at para 102). A decision will be unreasonable if it fails to reveal a rational chain of analysis or exhibits an irrational chain of analysis. While administrative decision makers must not be held “to the formalistic constraints and standards of academic logicians”, a decision may be unreasonable if it exhibits “clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise” (*Vavilov* at para 104).

[104] As to the second category, “a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision ... Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers” (*Vavilov* at para 105). The relevant constraints depend on the facts. In *Vavilov*, the majority discussed what they characterized as “a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies” (at para 106). The Court cautioned that these elements are not a checklist and vary in significance depending on the context.

[105] I would finally note that reasonableness is a deferential standard and must be sensitive and respectful of the role of the delegated decision maker. It is not a “line-by-line treasure hunt for error” (*Vavilov* at para 102). The court’s function is to “ensure the legality, the reasonableness and the fairness of the administrative process” (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 28, [2008] 1 SCR 190). However, reasonableness review must also be robust. Arbitrators, like other administrative

decision makers, do not have free rein in interpreting a collective agreement. To paraphrase *Vavilov* (at para 68), precise or narrow contractual language may limit the number of reasonable interpretations open to the arbitrator, and may limit it to one.

[Emphasis added]

[50] In this Court, a frequently cited authority on reasonableness review, consistent with the summary described above, is the decision in *Premier Horticulture Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184*, 2020 SKQB 77, 54 CLRBR (3d) 1 [*Premier Horticulture*]. That case also involved a judicial review of a Board decision. In *Premier Horticulture*, Scherman J. summarized the *Vavilov* analysis as it pertained to both standard of review selection as well as the nature of the reasonableness review. The summary of the reasonableness review appears in subparagraphs 7(e)-(o), where my former colleague wrote the following:

[7] I extract from and summarize from *Vavilov* the principles and directions that I find are applicable to the judicial review at hand. All references are to the majority decision. The pertinent principles and directions are as follows:

...

- (e) Reasonableness reviews start with judicial restraint and respect for the distinct role the legislatures have assigned to administrative decision-makers. The aim is to give effect to the legislature's intent and assign certain decisions to administrative bodies while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law. See paragraphs 75 and 82.
- (f) The reviewing court is to begin its inquiry into the reasonableness of the decision by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision-maker to arrive at its conclusion. See paragraph 84.

- (g) A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker.
- (h) Reasonableness is, according to *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, “concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.” The reasons must justify the decision reached. See paragraph 86.
- (i) The written reasons given by an administrative body must not be assessed against a standard of perfection. What is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. The review of an administrative decision cannot be divorced from the institutional context in which the decision was made nor from the history of the proceedings. See paragraphs 90 and 91.
- (j) The reviewing court is to ask whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision. See paragraph 99.
- (k) The burden is on the party challenging the decision to show that it is unreasonable. See paragraph 100.
- (l) Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. The court must be satisfied that any shortcomings or flaws relied upon by the party challenging the decision are sufficiently central or significant to render the decision unreasonable. See paragraph 100.
- (m) Significantly, at paragraph 102, the court affirms

previous statements that reasonableness review is not a “line-by-line treasure hunt for error”. The reviewing court must be able to trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”. See paragraph 102.

- (n) At paragraphs 105 to 135, the majority decision of the Supreme Court of Canada elaborated upon and gave directions on the application of the principles. It stated that a reasonable decision:
  - (i) is based on internally coherent reasons;
  - (ii) is justified in light of the legal and factual constraints that bear on the decision including:
    - (A) the governing statutory scheme;
    - (B) other statutory or common law;
    - (C) principles of statutory interpretation;
    - (D) evidence before the decision-maker;
    - (E) submissions of the parties;
    - (F) past practices and past decisions of the administrative decision-maker; and
    - (G) the impact of the decision on the affected individual or party.
- (o) Absent exceptional circumstances, a reviewing court will not interfere with an administrative decision-maker’s factual findings. In this respect, the Court cited its decision in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, which established the principle that on appellate or judicial review, findings of fact should only be overturned in circumstances of palpable and overriding error.

[Emphasis added]

[51] In *United Food and Commercial Workers, Local 1400 v Prairie Pride Natural Foods Ltd.*, 2022 SKKB 274 [*Prairie Pride*], aff'd in *Prairie Pride Natural Foods Ltd. v UFCW, Local 1400*, 2024 SKCA 84, I referenced the summary in *Premier Horticulture*. In doing so, however, I noted that the last observation in the summary did not identify the applicable passage from *Vavilov* that discussed this point. Given its significance in *Prairie Pride*, I recited the applicable passage in the discussion about reasonableness review. In the circumstances of the present case, I think the passage is of equal importance. In the passage, which appears at paragraph 125 of *Vavilov*, the majority wrote the following:

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC* [2018 SCC 31, [2018] 2 SCR 230], at para. 55; see also *Khosa* [2009] SCC 12, [2009] 1 SCR 339], at para. 64; *Dr. Q* [2003 SCC 19, [2003] 1 SCR 226], at paras. 41-42. Indeed, many of the same reasons that support an appellate court’s deferring to a lower court’s factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen* [2002 SCC 33, [2002] 2 SCR 235], at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[Emphasis added]

[52] Before leaving the decision in *Premier Horticulture*, I think it helpful to reference the Court’s overall observation about the reasonableness review. I cited this in *Prairie Pride* as well. In the context of the application before him, and with some appropriate metaphors, Scherman J. discussed the macroscopic nature of the review at paragraphs 49-50:

[49] The Employer advanced numerous distinct “errors” in support of its position and that the Board’s decision was unreasonable. Unreasonableness is not a conclusion arrived at

by my minute focus on details and parsing individual words or phrases of the language used. The reasonableness assessment is, to modify an old cliché, about the health of the forest, not the individual trees within the forest.

[50] In the words of the Supreme Court of Canada in the *Vavilov*, reasonableness review is not a “line-by-line treasure hunt for error”. While the reviewing court must be able to trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic, it is the overarching logic that the reviewer must focus on. Reasonableness reviews start with judicial restraint and respect for the distinct role the legislature has assigned to the labour relations boards. While in various respects there is a measure of logic and reason to the Employer’s individual criticisms of the Board’s decision, it is the overall reasonableness of the Board’s decision that is the test, not whether there is some reason to the criticisms made.

[53] As noted in the relevant authorities, the reasonableness review also applies to the interpretation of a tribunal’s home statute. While statutory interpretation operates as a constraint on the tribunal, it is understood that a tribunal’s interpretation of its home statute need not be correct. If its interpretation meets the hallmarks of reasonableness and is consistent with the language used in the home statute, including the context in which that language appears, a reviewing court must extend deference. The precision, or not, of the language will also signal whether a tribunal is constrained in its interpretation. In *Vavilov*, the majority judgment addressed the nature of a reasonable interpretation of a tribunal’s home statute. These comments appear in paragraphs 109-110, where the majority wrote the following:

109 .... Although a decision maker’s interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues’ concern (at para. 285), this does not reintroduce the concept of “jurisdictional error” into judicial

review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

110 Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker’s authority. If a legislature wishes to precisely circumscribe an administrative decision maker’s power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker’s ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, “in the public interest” — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker’s authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

[Emphasis added]

### *Bargaining Collectively in Good Faith*

[54] While section 6-7 of the *Act* obliges unions and employers to bargain collectively in good faith, the nature of that obligation is not statutorily defined. Rather, the task of crafting a workable understanding of this concept has been left to courts and – more importantly – to labour relations tribunals.

[55] A longstanding description of the duty to bargain in good faith, still cited by Canadian labour relations tribunals, is the decision of the Ontario Labour Relations Board in *U.E. v De Vilbiss (Can.) Ltd.*, [1976] 2 Can LRBR 101 (WL) (Ont LRB) [*De Vilbiss*]. A significant issue in that case involved interpretation of then existing

Ontario legislation that obliged parties, subject to a certification order, to meet and “bargain in good faith and make every reasonable effort to make a collective agreement”. In construing this provision, the board observed two purposes associated with it. One purpose is to emphasize the importance of an employer recognizing the union’s exclusive right to represent the bargaining unit employees. The other purpose is to reinforce the obligation to engage in frank discussions with a view to entering into a collective agreement. Regarding the latter of these purposes, the board wrote the following at paragraph 13:

13 .... The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective — that of entering into a collective agreement and section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

[Emphasis added]

[56] Twenty years after *De Vilbiss*, the Supreme Court of Canada embraced a

similar definition in *Royal Oak Mines Inc. v Canada (Labour Relations Board)*, [1996] 1 SCR 369 (WL) [*Royal Oak*]. In *Royal Oak*, the Court affirmed a decision from the Federal Court of Appeal dismissing the employer's judicial review application from a decision of the Canada Labour Relations Board (as it was then known). In that decision, the employer was found to have bargained in bad faith, contrary to section 50(a) of the *Canada Labour Code*, RSC 1985, c L-2. In addressing the obligation to bargain in good faith, Cory J., for the majority, penned what could fairly be described as the classic definition of good faith bargaining. In this regard, he wrote the following at paragraphs 41-43:

41 Every federal and provincial labour relations code contains a section comparable to s. 50 of the *Canada Labour Code* which requires the parties to meet and bargain in good faith. In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code. 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.

42 Section 50(a) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.

43 Section 50(a) requires the parties to “make every reasonable effort to enter into a collective agreement”. It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of “reasonable effort” must be assessed objectively, the Board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith. ...

[Emphasis added]

[57] The most common breaches of good faith collective bargaining arise from conduct by a party at the bargaining table during negotiations. That said, there are circumstances where labour relations tribunals have found breaches based on events that occur away from the bargaining table. George W. Adams, *Canadian Labour Law*, loose-leaf (December 2019) 2nd ed, vol 2 (Toronto: Thomson Reuters, 2019) at para 10.2000, cites several tribunal decisions where such findings were made. While most of the cited decisions involved improper communication by employers before or during bargaining, at least one case, *St. Joseph’s Hospital v Edwards*, [1976] OLRB Rep 255, found a union and its representative acted in bad faith by threatening an unlawful strike prior to the start of bargaining. As dated and possibly unique as this case is, it arguably underscores the point made by McLachlin C.J. in *Health Services* about the potential of one or the other party to harm the collective bargaining relationship.

#### *Judicial Review of Good Faith Bargaining Cases*

[58] As I read the case law on the review of good faith bargaining rulings by labour relations tribunals, it is apparent that deference is the principal and recurring theme. While this theme is especially apparent in cases after 2019, the authorities that predate both *Vavilov* and *Dunsmuir* also reveal it.

[59] A longstanding authority in this respect is the already referenced judgment in *Royal Oak*. As I have already noted, the employer was found to have failed to bargain in good faith. Describing the facts somewhat more specifically, the Canada Labour Relations Board found the employer had improperly refused to bargain about an arbitration procedure to address grievances from employees who were discharged during a violent and turbulent work stoppage. The Federal Court of Appeal dismissed the employer's application for judicial review and the dismissal was affirmed by the Supreme Court of Canada. Applying the pre-*Dunsmuir* standard of review, Cory J. concluded that the employer had to show that the ruling was patently unreasonable. In keeping with Parliament's expectation, such a standard of review called for considerable deference. The nature of that deference, together with a recognition of the tribunal's specialized expertise and experience, was described at paragraphs 33-35:

33 It is clear then that the question as to whether or not the parties bargained in good faith is one which falls squarely within the jurisdiction of the Board. This is a matter that has been assigned to the Board by Parliament in its enabling legislation. This would be sufficient in itself to determine that the Board's decision should not be the subject of court interference unless it is patently unreasonable.

34 Yet, there are other factors which also point to this degree of deference being appropriate. The expertise and experience of the members of the Board in the difficult and sensitive field of labour relations demonstrates that the Board is best suited to resolve this very issue. Moreover, whether or not a party has bargained in good faith is primarily a question of fact which the Board is well qualified to determine. See for example the reasons of Dickson J. (as he then was) dissenting, but not on this point, in *Digby Municipal School Board v. C.U.P.E., Local 1185*, (sub nom. *Nova Scotia (Labour Relations Board) v. C.U.P.E.*) [1983] 2 S.C.R. 311 (the "*Digby School Board*" case), at p. 342.

35 Further, the importance and significance that should be attached to the Board's expertise has been recognized by Parliament in the wording of the strong privative clause set out

in s. 22. Ever since the decision was rendered in *New Brunswick Liquor Corp. v. C.U.P.E., Local 963*, [1979] 2 S.C.R. 227, it has been recognized that the existence of a privative clause serves as a clear indication to the courts that decisions of a labour relations board made within its jurisdiction are protected and sheltered from strict judicial scrutiny. A consideration of these factors leads inexorably to the conclusion that the decision of the Board on this issue cannot be subject to judicial review unless it is patently unreasonable.

[Emphasis added]

[60] As for whether the employer met this burden, Cory J. concluded that it had not. In doing so, he repeated his observation that the determination of this issue fell within the authority Parliament had given to the tribunal and added that, given the evidence, the Court below had properly deferred to its ruling. In these regards, he wrote the following at paragraph 49.

49 In summary, on the issue of the Board's finding that the appellant failed to bargain in good faith, I am of the view that this precise issue was by the provisions of the *Canada Labour Code* granted to the Board to decide, and that the courts should not set aside the Board's decision unless it was patently unreasonable. There is overwhelming support for the Board's finding that the appellant breached its duty to bargain in good faith by imposing an unreasonable condition to the collective bargaining process. Accordingly, the decision was clearly not patently unreasonable and the Federal Court of Appeal, recognizing this, properly deferred to the Board's finding....

[61] The deference theme is also apparent in the more recent pre-*Vavilov* judgment of the same court in *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42, [2014] 2 SCR 197 [*Canadian Artists*], rev'g 2013 FCA 64, [2014] 3 FCR 576. An understanding of this case is assisted by a brief description of its facts.

[62] In *Canadian Artists*, the two appellant organizations were certified by the Canadian Artists and Producers Professional Relations Tribunal [Tribunal] to represent

visual artists in Canada (one organization for visual artists in Québec and the other for visual artists in the rest of Canada). Under the governing federal legislation, which also served as the Tribunal’s home statute, the certification provided the organizations with exclusive authority to bargain with producers for the purpose of concluding a “scale agreement”. Such an agreement is defined in the governing legislation as an agreement respecting “minimum terms and conditions for the provision of artists’ services and other related matters”.

[63] During the organizations’ negotiations with the National Gallery of Canada [Gallery], the two sides had included discussions about minimum fees for the use of visual artists’ existing works. After the Gallery received a legal opinion, it abruptly changed its bargaining position. Based on the opinion, it concluded that the organizations had no authority to negotiate copyright related issues which, in turn, meant that the Gallery could legitimately refuse to bargain any issues touching on copyright, including terms for minimum fees. The appellants filed a complaint with the Tribunal, asserting a breach of the Gallery’s duty to bargain. The Tribunal allowed the complaint, concluding – among other things – that the legislation governing the bargaining of scale agreements complemented the regime provided in copyright legislation. On judicial review, a divided Federal Court of Appeal sided with the Gallery and set aside the Tribunal’s decision.

[64] Before the Supreme Court of Canada, the appeal was allowed. Writing for the Court, Rothstein J. essentially adopted much of what was said by the dissenting judge in the Court below, Pelletier J.A. Specifically, Rothstein J. agreed that the applicable standard of review was reasonableness, and that it was reasonable for the Tribunal to have found that the “provision of artists’ services”, as that phrase appears in the definition of a scale agreement, would include the provision of existing works by visual artists.

[65] In the overall consideration of *Canadian Artists*, I find the dissenting judgment in the Federal Court of Appeal, essentially affirmed in the subsequent appeal, to be especially helpful. The analysis articulated by Pelletier J.A. included discussions about the Tribunal's responsibility to decide: (1) a question of law arising from the construction of its home statute; and (2) a question of mixed fact and law arising from assessing the alleged breach of the duty to bargain in good faith. Given various applicable factors, including a strong privative clause, Pelletier J.A. concluded that both matters fell squarely within the Tribunal's specialized responsibility and that its decision on each matter could only be reviewed on a reasonableness standard and with the necessary deference. His analysis in these regards appear at paragraphs 66-69:

[66] That said, the question remains as to whether the "provision of ... services" includes authorizing others to do that which the holder of the copyright has the exclusive right to do.

[67] This is a question of law which must be decided by a tribunal in the course of construing its home statute. As the Supreme Court indicated in *Dunsmuir*, cited above, and in a number of cases since (*Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paragraph 28, and *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 34, to name but two), the decision of a tribunal interpreting its home statute will normally be reviewable on the standard of reasonableness. See also the majority reasons in *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (*Alberta Teachers' Association*).

[68] Even without the benefit of this jurisprudence, the standard of review analysis leads to the same conclusion. The Tribunal is a specialized tribunal charged with administering a labour relations scheme governing relations between artists and producers in the federal sphere. The decisions of the Tribunal are protected by a strong privative clause (section 21 of the *Act* [SC 1992, c 33]) which is substantially the same as the privative clauses found in the *Public Service Labour Relations Act*, S.C. 2003 c. 22 s. 2, at section 51, and the *Canada Labour Code*, R.S.C. 1985, c. L-2, at section 22. Finally, the decisions of the

Tribunal have a strong policy component, given the guiding principles set out in sections 2 and 3 of the *Act*. All of these factors support the conclusion that the standard of review of the Tribunal's interpretation of the phrase "provision of ... services" is reasonableness.

[69] As for the finding that the National Gallery failed to bargain in good faith, the application of a legal standard to a set of facts is a question of mixed fact and law. In this case, the Tribunal identified the legal test for bargaining in good faith and applied it to the course of bargaining between the parties. The National Gallery did not identify an extricable question of law, focusing instead on the Tribunal's weighing of the evidence. The standard of review of a question of mixed fact and law in this context is reasonableness: see *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paragraph 78.

[66] As for the Tribunal's finding that the Gallery failed to bargain in good faith, Pelletier J.A. concluded, at paragraph 76, that it met all the required elements articulated in *Dunsmuir*, including a reasoning process that was justifiable, transparent, and intelligible. It also fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law".

### **Analysis**

[67] At the outset of my analysis, I must say that I share the Board's view that the case before it presented a very unique set of circumstances. As common as it may be for co-operatives to find themselves in collective bargaining relationships, neither the Board nor this Court have been able to identify any precedent where the juxtaposition between union and co-operative membership inspired such a head-on conflict. I also agree with the Board's *obiter* observation that this uniqueness may constrain any guidance drawn from the *Decision*. By the same logic, it may also constrain any guidance drawn from this judgment.

[68] Giving the *Decision* an overall and macroscopic reading, I am satisfied

that it demonstrates the hallmark qualities of justification, transparency and intelligibility that are necessary to meet the initial reasonableness assessment. I am also satisfied that the outcome of the *Decision* – as well as the reasoning leading to that outcome – reflects justification in relation to the factual and legal constraints that bear on it. While the *Decision*, like all forms of judicial rulings, may be subject to a degree of criticism, I find no meaningful *indicia* of the kinds of decision-making flaws identified in *Vavilov*.

[69] Perhaps more importantly, the arguments advanced by UFCW do not persuade me that the *Decision* cannot stand. Overall, I find some of UFCW’s submissions resembled arguments one might associate with a correctness standard of review. This was especially apparent in the various arguments that urged the Court to find the Board to have strayed from what UFCW regarded as the “traditional” understanding of the duty to bargain in good faith. The implicit thesis of these arguments was the Board somehow acted incorrectly, as opposed to unreasonably, in rendering its *Decision*. Moreover, I found these arguments did not directly address the Board’s understanding, drawn from such authorities as *Health Services*, that actions carrying the potential to cause harm to the “collective bargaining relationship” could be seen as a breach of the duty to bargain in good faith.

[70] I am also not persuaded by UFCW’s more specific challenges of the *Decision*. One such argument criticized the Board for implicitly expecting UFCW to refrain from participating in the democratic processes of a co-operative employer or exercising any advocacy in such processes.

[71] Respectfully, I find this argument, and others like it, either misunderstand or mischaracterize the Board’s analysis. As I read the *Decision*, the Board was careful not to overstate its concern about UFCW’s breach of the duty to bargain in good faith. This was especially apparent in the Board’s closing *obiter* comment, where it

acknowledged the unique, fact-driven circumstances of the case. It was also equally apparent in the Board's candid acknowledgment, at paragraph 215 of the *Decision*, where it accepted that efforts of either party to influence elections of directors could not be completely isolated from collective bargaining. In this context, I interpret the Board to be saying that the gravamen of UFCW's breach principally related to the non-bargaining steps it took in specific response to the Co-op's bargaining stance in the latest negotiations. The Board did not say anything, implicit or otherwise, that purported to prohibit UFCW, its members, or the Saskatoon Co-op's management from participating in the election of the board of directors. In this regard, I discern the Board's view to be that, as long as such participation does not outwardly or explicitly target the collective bargaining process, it will not be seen as a breach of section 6-7 of the *Act*.

[72] As for the argument that the Board failed to adequately consider UFCW's constitutional and statutory rights to freedom of expression, I am satisfied that, for the reasons it described at paragraphs 175-189, the Board's response to this issue was not unreasonable. I earlier noted in this judgment a very abbreviated description of the Board's understanding that freedom of expression, whether on the picket line or otherwise, cannot justify failure to comply with the minimal amount of order necessary to meet statutory collective bargaining obligations. That was an understanding the Board was entitled to apply in its consideration of UFCW's argument.

[73] If I may be allowed a final observation, it seems to me that assessing whether a trade union or an employer has bargained in good faith can be a very contextual exercise. It requires labour relations' tribunals to assess the party's conduct and possibly its state of mind, relating both to the content of bargaining and the circumstances that surround it. In some contexts, such as that which existed in *Royal Oak* – where the evidence reveals a discernibly obvious answer – the tribunal's task is

reasonably clear. In other contexts, however, the task may be much more nuanced and much less obvious. That is especially so in cases, such as this one, where the impugned conduct occurred away from the bargaining table. In such cases, labour relations' tribunals are required to weigh the evidence carefully and distinguish between conduct intended to persuade or compromise from that which has the potential to coerce or destabilize the collective bargaining relationship.

[74] In my view, the Board weighed the evidence and drew a reasonable distinction, all as it saw fit. Having regard to the standard of review, it is not for this Court to interfere.

### **Conclusion**

[75] In the result, UFCW's application for judicial review is dismissed.

[76] The Saskatoon Co-op shall have its costs taxed under Column 3 of the Tariff of Costs.

\_\_\_\_\_  
J.  
R.W. ELSON