

IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

CITY OF REGINA  
(REFERRED TO AS THE "EMPLOYER" OR "CITY")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 21  
(REFERRED TO AS THE "UNION" OR "CUPE")

POLICY GRIEVANCE

Union Workplace Notice Boards

ARBITRATION BOARD: Allen Ponak (Chair)  
Larry Leblanc (Employer Nominee)  
Merv Simonot (Union Nominee)

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AWARD OF THE ARBITRATION BOARD

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For the Union: Guy Marsden

For the Employer: Jim McLellan

Hearing at Regina, SK  
August 27 & 28, 2015 and January 20 & 21, 2016

Award Issued:

## ISSUE

The Union filed a policy grievance after the Employer ordered the Union to remove a poster it had placed on workplace notice boards regularly used by the Union for announcements to its members. The impugned poster advertised a barbecue in support of the “Yes” side in an upcoming city-wide referendum on a public-private partnership (P3) to operate the City’s waste water treatment facility.<sup>1</sup> The Union was part of a coalition that strongly opposed the P3 project while the Regina City Council had unanimously endorsed a P3 approach to the waste water plant. The Union complied with the City’s directive to remove the poster and then filed the current grievance.

Under the collective bargaining agreement (CBA), the Employer “agrees to install notice boards for the sole use of the Union..... for the purpose of posting notices of interest to the Union” (article 3(D)). The Union took the position that the CBA gave it the right to put up posters without Employer approval and that the Employer’s directive to remove the poster violated the CBA and the Union’s freedom of expression under the Charter of Rights and Freedoms. Citing *KVP*, the Union also argued that any City policy about non-involvement by employees in political campaigns was unenforceable because management had lobbied in support of the P3 project, demonstrating an inconsistent application of its own rules. The Union asked that the grievance be sustained and the Employer be ordered to cease interfering with Union notices.

The Employer argued that not every workplace bulletin board could be considered a Union notice board under the CBA. It submitted that the Union did not have a carte blanche to post anything it wanted, especially since some of the notice boards could be seen by the general public as well as the members of other unions. In the Employer’s view, the Union had

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<sup>1</sup>The wording of the referendum was such that a “Yes” vote meant favouring the prevailing public ownership and a “No” vote meant rejecting pure public ownership in favour of the P3.

essentially engaged in a political contest on the Employer's worksite, contrary to the City's policies on workplace political campaigning.

## **AGREED STATEMENT OF FACTS**

The parties provided the following agreed facts at the outset of the hearing.

### **A. Applicable Collective Agreement**

1. The grievance was filed under and is governed by the Collective Agreement between the parties for the period of January 1, 2010 - December 31, 2012. The relevant Articles of the Agreement are, inter alia, PREAMBLE, Article 3(D) - Notice Boards, and Article 8 - Grievances and Dispute Resolution.
2. A copy of the Collective Agreement is attached at Tab A and forms part of this agreed statement of facts.

### **B. Cause of grievance**

3. The grievance arose as a result of an Employer directive that led to the taking down of a Union poster from notice/bulletin boards during a referendum campaign to determine whether the new wastewater treatment plant should be built as a public-private partnership (P3) or through traditional public procurement.
4. The Parties do not agree on the status or nature of the notice/bulletin boards. The Union says that the notice/bulletin boards were notice boards within the meaning of Article 3(D) of the collective bargaining agreement. The City will be arguing that the boards were not notice boards within the meaning of Article 3(D).
5. Regina City Council voted in February 2013 to use a P3 model to build the new wastewater treatment plant.
6. CUPE Local 21 represents over 1,200 City of Regina employees, including approximately 25 employees at the wastewater treatment plant. The Union opposed using a P3 and worked with a community coalition called Regina Water Watch (RWW) to gather the requisite petition signatures to trigger a referendum on the issue. The City Clerk ruled that the petition signatures fell short of the requirements of The Cities Act, however, City Council voted to proceed with a referendum on September 25, 2013. During the referendum campaign, the Union worked with RWW to encourage Local 21 members and the public to vote "Yes" in the referendum campaign to using the traditional public procurement approach.
7. The union's poster promoted a Referendum BBQ for CUPE Local 21 and Local 7 members (representing city hall employees) to be held September 17, 2013. The poster also included the following text: "YES! On Sept 25 vote to Keep water public! PLEDGE TO VOTE YES: Text YES 306.988.1754." (This poster is attached at Tab B).
8. The poster was placed on boards in multiple city facilities on or around September 5, 2013.
9. On September 10, 2013 Jim Nicol, Executive Director - Governance & Strategy issued a memo to Directors and Managers re: Employee conduct during referendum. (This letter is attached at Tab C).

10. The same text of Mr. Nicol's letter was used for an article entitled "Employee conduct during referendum" published on the City of Regina's intranet newsletter "InSite." This newsletter is sent to all employees through the City's e-mail server. (This article is attached at Tab D).
11. Both of the above documents referenced The Regina Code of Conduct and Disclosure Bylaw (Bylaw No. 2002-57). (This bylaw is attached at Tab E).
12. After the removal of the Referendum BBQ poster from notice/bulletin boards, the Union developed a revised poster that did not reference the referendum at all. This poster promoted a special meeting for Local 21 & 7 members which would feature a special guest speaker. It included the text: "Say YES to a free burger." (The second Union notice is attached at Tab F).
13. In the referendum held September 25, 2013, 57 percent voted "NO" in favour of City Council's plans to proceed with a P3, while 43 percent voted "YES" in favour of the traditional public procurement option. The City subsequently proceeded with the P3 tendering process and awarded the contract to EPCOR Water Prairies Inc., which took over the running of the wastewater treatment plant starting January 1, 2015.
14. The Union filed a policy grievance re: Union Notice Boards September 30, 2013. (The grievance is attached at Tab G)
15. The Employer's letters denying the grievance at the first and second steps are at Tab H and Tab J, respectively. The Union's letters advancing the matter through the grievance process and referring it to arbitration are at Tabs I and K, respectively. The Parties will argue the admissibility of this material during the course of the hearing.

**C. Arbitration Board**

16. The Arbitration Board, chaired by Mr. Allen Ponak, has been properly appointed and has the authority to hear and decide the grievance.

**EMPLOYER MEMO ON "EMPLOYEE CONDUCT DURING REFERENDUM"**

Mr. Jim Nicol, Executive Director - Governance and Strategy for the City of Regina, sent the following memo to City directors and managers on September 10, 2013, two weeks before the referendum (exhibit 1C). The memo was reproduced on the City's intranet system where it would be viewed by employees logging into the City's computer system (exhibit 1D). It was undisputed that this memo triggered a directive to Union representatives to remove Union notices promoting a BBQ that advocated against the P3 project supported by City Council. The memo is set out below:

The Waste Water Treatment Plant referendum is nearly two weeks away. Although the referendum is a relatively new (and infrequent) experience for most employees and many citizens, it is conducted in accordance with the guidelines respecting a general election. In that regard, employees are reminded of the following guidelines:

- Employees retain the right to participate in the democratic process as outlined in *The Regina Code of Conduct and Disclosure Bylaw (Bylaw No. 2002-57)*; however, this participation is not to be conducted while at work or through the use of any city resource;
- Employees should not promote their political view points respecting the referendum in a public or City facility through any medium such as posters or buttons and should use caution if they choose to comment on either side of the referendum question;
- Employees should exhibit a high degree of discretion in publicly supporting either side of the referendum or commenting through social media to ensure that their actions do not negatively affect (or be seen to negatively affect) their current or future work environment.

It is equally important to remind all employees that it remains "business as usual" during the referendum campaign. The support and services provided to the public should remain professional and unchanged from what would normally be offered.

As the referendum is generally conducted in accordance with the guidelines respecting a general election, please manage employee time off for voting in accordance with the language specific to a civic election in the respective collective agreements.

## **WITNESS TESTIMONY**

The Union called six witnesses: Ms. Carmel Mitchell, a City cashier and Local 21 grievance chair; Mr. Darren Grychowski, an Irrigation Department worker and a Local 21 steward; Ms. Cheryl Stadnichuk, a CUPE national research representative; Mr. Alex Lenko, a national CUPE representative assigned to Local 21; Ms. Alberta Heisler, a fuel officer and a Local 21 executive-at-large; and, Mr. Dave Belyea, a laboratory analyst at the Regina waste water treatment plant and a Local 21 steward. No witnesses testified on behalf of the Employer.<sup>2</sup>

The testimony covered several topics and, for the most part, the material portions were not disputed and can be summarized.

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<sup>2</sup>The Employer originally intended to call Mr. Nicol, who issued the memo about employee conduct during the referendum, as its sole witness. He was unable to attend due to unavoidable transportation delays. After discussion, it was determined that his evidence was not critical to the matters in dispute. The Union agreed that it would not argue that negative inferences should be drawn from the absence of Employer witnesses.

### Referendum Over Waste Water Treatment Plant

The grievance has its roots in a highly visible and contentious public debate over how to fund and operate a new waste water treatment plant for the City of Regina. Regina's elected City Council unanimously endorsed a public-private partnership (P3) procurement model. A number of groups opposed to the P3 approach formed Regina Water Watch (RWW), a coalition advocating for continuation of purely public funding and operations. Mr. Grychowski agreed that it was fair to characterize RWW as a "political action committee hoping to bring political change".

CUPE Local 21 was a key player in Regina Water Watch. Nationally, CUPE has taken public stands against P3 projects, espousing a philosophy in favour of public sector infrastructure procurement and challenging the benefits of P3 projects. At the local level, in addition to any ideological reasons for opposing P3, various Union witnesses testified that they feared job losses and decreased wages and benefits if ownership of the water plant was transferred from the City to a private operator.

After the City Council endorsed the P3 model for the new plant, RWW mounted a campaign to force a referendum under the Saskatchewan *Cities Act*. Mr. Grychowski was active in this campaign, testifying that more than 20,000 signatures, 10 percent of eligible voters, were required within a three month period to trigger a referendum. After gathering what RWW believed was a sufficient number of signatures, disqualifications by the Office of the City Clerk for alleged deficiencies left RWW short of the needed signatures. After a public controversy, City Council voted to permit a referendum notwithstanding the possibility that an insufficient number of signatures had been obtained.

Referendums of this kind are rare in Regina; no examples of previous referendums could be cited by any of the witnesses.<sup>3</sup> The referendum was governed by the same legislation that governs municipal elections, the *Local Government Elections Act*. The RWW campaigned to defeat the P3 procurement model for the waste water treatment plant. Senior City officials publicly advocated in favour of the P3 model approved by City Council and expended resources to make the case in favour of the public-private partnership (exhibits 2T and 2U). In a response to an Access to Information request filed by a CUPE national representative, the City disclosed that it had spent approximately \$400,000 on referendum advertising, a substantial portion of which was directed to promoting the P3 model (exhibit 2R).

The referendum was held on September 25, 2013 and 57 percent of the voters approved the P3 approach. Voter turnout, at 33 percent, was similar to turnout in municipal elections. At the time of the hearing, the new waste water plant was in operation under a private operator and its employees remained unionized as part of Local 21, but in a different bargaining unit.

#### Union Notice Boards

Substantial testimony, accompanied by numerous photos, was provided about the location and characteristics of notice boards used by Local 21 at City of Regina worksites. The photos were entered as exhibits 2C - 2O, inclusive. The Union estimated that it normally posted its notices on 60 to 70 notice boards; it was able to provide a list of 60 of the locations (exhibits 2A & 2B). The evidence showed that the vast majority of the notice boards were in workplace locations that were not customarily open to the public, such as maintenance shops or interior hallways, although occasionally non-employees might visit and be able to see the

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<sup>3</sup>While the award was in preparation, the arbitration board chair read a newspaper article on fluoridation that revealed that there had been three referendums on the fluoridation of Regina drinking water. This discovery has no impact on the current case.

notice board. Postings on these notice boards would also be visible to employees who were members of other unions and to non-exempt staff. A very small number of the notice boards were generally visible to the public. For example, Ms. Mitchell testified that a notice board in the Fieldhouse would be visible to the public. Such notice boards were the exception, however.

The evidence established that most notice boards were not exclusively for Local 21 use. While a few of the notice boards were expressly identified as Local 21's, with some kind of sign, these were the exception. Typically, the notice boards did not have any special identifiers and would have a variety of postings from the City, individual employees, other bargaining units, out-of-scope employees, the joint Occupational Health & Safety Committee, and Local 21. Usually these boards had a space that Local 21 customarily used. Ms. Heisler, who posted notices for the Union, described the boards she used as a "hodgepodge".

Traditionally, the most common notices posted by Local 21 related to regular union membership meetings, union social events, contact information for union representatives, and personal announcements like births. Occasionally, notices were posted on more political topics, but such postings were infrequent. Examples cited included: posters about a national CUPE initiative in support of universal health care in 2014, a poster during the 2012 municipal elections that directed members to a union website on the election, a 2014 poster announcing a town hall meeting during a debate over moving from a defined benefit to a defined contribution pension plan, a change opposed by Local 21, a fact sheet about the privatization of a hospital laundry in Prince Albert, and a 1995 poster during a municipal election promoting candidates favoured by Local 21. It should be noted that none of these other posters and notices cited by various witnesses were entered into evidence at the hearing.

There was no evidence that any previous posters had been removed at the request of management. Mr. Lenko testified that the City complained about the 1995 poster promoting the

Union's preferred candidates, but the Union was not ordered to remove them. He agreed that after the City complained in 1995, the Union never again put up posters on workplace notice boards favouring particular candidates during municipal elections.

The Impugned Union Poster (exhibit 1B, appended to the Award)

The Union notice that is at the centre of this arbitration was posted on notice boards on or about September 5, 2013, three weeks in advance of the referendum vote. Ms. Heisler testified that she designed the poster herself. It advertises a "Referendum BBQ" to be held Tuesday, September 17, from 4 - 6 PM at a local community centre (non-City). It is described as a "Special meeting for Local 21 & 7 members". In the middle of the poster is a stylized hamburger and the bottom of the poster depicts flowing water. The poster states that there will be a guest speaker from the Regina Water Watch Committee and offers attendees "free burger, pop and chips". In the bottom third of the poster, where the water begins, is a large, capitalized "YES!" with the following words under it in fairly large letters: "On Sept 25 vote to Keep water public". Below these words are an invitation, in capital letters, to "PLEDGE TO VOTE YES" with encouragement to text a listed cell phone number.

This poster was placed on workplace notice boards by Local 21 representatives and remained in place for several days until the Union was told to remove the posters.<sup>4</sup> The exact date when the Union was advised to remove the posters was unclear from the evidence, but it occurred at approximately the same time as the release of Mr. Nicol's September 10, 2013 notice (exhibit 1C) and the InSite intranet post (exhibit 1D) about employee conduct during the referendum.

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<sup>4</sup>The BBQ posters also appeared without permission around City Hall and in its elevators, placed there by persons unknown. These posters were removed by the City.

The Union complied with the instructions to remove the posters, replacing them with a new poster, also designed by Ms. Heisler (exhibit 1F). This new poster shows a BBQ grill on the bottom third of the poster. There is no depiction of water. It advertises a “SPECIAL MEETING FOR LOCAL 21 & 7 MEMBERS”, gives the same time and location as the previous poster, and indicates that there will be a “Special Guest Speaker”. Below that are the following words: Say YES to a free burger”. There is no mention of Regina Water Watch, the referendum, or which side the Union is supporting.

The barbecue ultimately attracted less than 100 people, a very small proportion of the overall membership in the Local 21 and Local 7 and a disappointment to Union leaders. Its witnesses suggested that the poor turnout was due, in part, to the vague message on the replacement poster.

## **COLLECTIVE BARGAINING AGREEMENT (CBA)**

### ARTICLE 3 – UNION RECOGNITION AND SECURITY

#### D. Notice Boards

The City agrees to install notice boards for the sole use of the Union, in suitable locations, easily accessible to employees, for the purpose of posting notices of interest to the Union.

## **UNION ARGUMENT**

The Union characterized the issue as follows: “Did Local 21 have the right to post a referendum BBQ notice on the bulletin boards provided to the Union?”. In its submission the answer was yes, based on what it described as the clear and unambiguous language of article 3D. The Union noted that article 3D contained no restrictions regarding what can be posted, in contrast to language found in other collective bargaining agreements that required that posted notices be subject to management approval (for example, *Casco Inc. and United Food Processors Union, Local 483* (2002) 115 LAC (4<sup>th</sup>) 167 (Simmons) and *Treasury Board and Public Service Alliance of Canada* (2011) PSLRB 106 (Pacquet)). Nor, the Union noted, did the

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CBA between the City and the Union contain a management rights clause that might, by implication, suggest certain restrictions (*Plainfield Children's Home and service Employees Union, Local 183* (1985) 19 LAC (3<sup>rd</sup>) 412 (Emrich)).

The Union argued that the lack of any restrictive language in article 3D was consistent with the expansive language of the provision. It pointed to the phrases "notices of interest to the Union" and "sole use of the Union" as giving the Union substantial latitude to post notices on a wide range of issues that might interest to Union members, including notices that might be of a more political nature. Moreover, it was argued that the Union enjoyed a freedom of expression in carrying out its representational role that could not be interfered with unless there were compelling reasons for such interference: *Treasury Board - Post Office Department and Canadian Union of Postal Workers* (1978) 21 LAC (2<sup>nd</sup>) 96 (Lachapelle). The Union acknowledged the City's Code of Conduct regarding political campaigning at work by individual employees, but noted that the Union was not an employee of the City and was not governed by policies that might apply to individual employees.

The Union agreed that its posting rights were not unlimited (*Metropolitan Authority and ATU Local 508* (1992) 27 LAC (4<sup>th</sup>) 36 (Cromwell)). It pointed out, however, that even in arbitration cases in which more restrictive language appeared, arbitrators had interpreted union posting rights broadly, imposing restrictions only if a notice board was visible to the public, or the notice itself could be construed as abusive, malicious, defamatory, or advocated disobedience or illegality: *Post Office Department; Quality Meat Packers and UFCW Locals 175 & 633* (2003) 115 LAC (4<sup>th</sup>) 409 (Solomatenko); *Kingston General Hospital and CUPE Local 1974* (2004) 135 LAC (4<sup>th</sup>) 88 (Stewart); and *Casco*. The Union submitted that the Referendum BBQ poster did not display any of the characteristics that might justify removal. In its view, the message was fairly innocuous and hardly inflammatory. It did not attack City Council, the

mayor, or management. It simply urged Union members to attend a BBQ and vote against the proposed P3 waste water facility.

Finally, the Union argued that under *KVP* rules, the Employer could not apply its policies inconsistently (*KVP and Lumber and Sawmill Workers Union, Local 2537 (1965) 16 LAC 73* (Robinson)). In the Union's submission, the Employer could not enforce rules against employee political campaigning at work and allow senior management personnel to actively engage in the campaign in favour of the P3 using City resources. This inconsistent enforcement of the rule against political campaigning at work made the rule unenforceable and could not be the basis for rejecting the Union poster.

The Union asked that the grievance be upheld and that the City be ordered to refrain from interfering with Union notices in future referendum campaigns or elections.

### **EMPLOYER ARGUMENT**

The Employer argued that the article 3D restricted the Union to posting "notices" of interest to the union members, not anything the Union felt it wished to communicate to its members. The Employer pointed to the language that spoke to "Notice Boards" and "notices of interest", suggesting that there was a difference between bulletin boards and notice boards, the latter being more restrictive. It noted that several of the arbitration cases cited by the Union contained contract language about bulletin boards (*Kingston General Hospital; Plainfield Children's Home*) or included broader language such "other material" (*Post Office; Treasury Board*).

In the Employer's view, the entitlement to post notices did not extend to putting up posters that took a political referendum campaign into the workplace. A notice sets out a date, time, and purpose of an event and does not advocate a political viewpoint. The Employer submitted that the contentious, high profile nature of the campaign made the posters by

definition argumentative, provocative, and inflammatory. It was not a notice. The Employer provided a definition of “inflammatory” from the Free Dictionary: “arousing passion or strong emotion, especially anger, belligerence, or desire”. In the Employer’s submission, the referendum poster fit this definition. The poster was ordered removed, not because it may have violated the City’s Code of Conduct, but because the poster was not a notice and to allow it would require broader language than that contained in the CBA. Encouraging employees to vote against the P3 model was overtly political, and while the Union had a right to launch a campaign in the media or through other means, it did not have right to wage the campaign at work. The Employer pointed out that the Union had long been aware of the line between notices and political campaigning. In 1995, the Union had used the notice boards to recommend a union slate of candidates and after the City commented negatively, the Union had refrained from such postings until the referendum.

The Employer asked that the grievance be denied.

#### **UNION REPLY**

The Union encouraged the Board to consult other dictionary definitions beyond those of the Free Dictionary, contending that definitions of “notice” are somewhat broader than suggested by the Employer. It argued that the use of the word notice in the CBA could not be construed as an attempt to narrowly restrict the Union’s communication with its members. It characterized the difference between a bulletin board and a notice board as “a difference without a distinction”. The terms were used interchangeably (for example, *Casco*). According to the Union, had the parties intended to restrict Union material, it could have added express language in article 3D, for example, limiting the Union to posting information about meetings, retirements, births, and deaths. In the absence of such language, no such restrictions could be imputed.

The Union disagreed that the referendum poster could be considered inflammatory, noting the lack of any evidence that it aroused anger or tumult among employees. The Union further disagreed that there was any implicit understanding between the parties of political versus non-political notices, pointing to evidence that past Union notices had raised political issues of broad interest such as pensions, privatization, and health care.

## **DECISION**

It is the Board's decision to sustain the grievance. In our view, the information contained in the referendum poster that the Union posted on workplace notice boards was consistent with its rights under the collective bargaining agreement and did not contain language, depictions, or encouragement that might run afoul of accepted standards for workplace notice boards.

We begin the analysis with the arbitration case law. Unions do not have a general statutory right to post notices in the workplace and must negotiate CBA provisions that allow for the posting of workplace union announcements on assorted subjects. Most union-management contracts contain such provisions and numerous arbitration decisions have addressed what is permissible and what is not permissible under various types of contract terms.

*Plainfield Children's Home*, issued in 1985, is one of the earlier cited cases dealing with union notice boards (it should be noted that bulletin and notice board cases go back to the 1950's). Under the CBA, the employer was obligated to "supply and make available a bulletin for use by the union in a mutually satisfactory location" (paragraph 1). A dispute arose when the union posted a notice announcing the end of lock-out at another area business where it represented employees. The employer objected to the notice, arguing that the lockout was a sensitive issue in the community and that the union announcement could lead area businesses to form a negative image of the children's home. Arbitrator Emrich recognized the employer's legitimate interest in protecting its image within the community upon which it relied for support,

but opined that “such interests are weighed and balanced against the right of the bargaining agent to inform its members of union activities, pursuant to its duty to represent its members and concomitant with its entitlement to be free from interference, restraint or coercion by management in that regard” (paragraph 25). In upholding the union’s grievance, he further reasoned that “the form, tenor, and contents [of the notice] are not objectionable .... and was intended to be read by ..... members of the union local” (paragraph 28).

In short, the arbitrator adopted a balance of interest perspective on union and employer rights with respect to notice boards and concluded, on balance, that the interests of the union outweighed the interests of the employer given the fact situation at hand.

In *Casco*, the CBA required “bulletin boards [be] available for posting union notices” but notices were subject to approval by the plant manager (paragraph 4). The union grieved after approval was withheld for several notices that management felt were not in the best interests of the company, an auto parts manufacturer. The impugned notices included union political commentary against the North American Free Trade Agreement and the World Trade Organization, agreements favoured by the company, and articles on external labour disputes that the company considered corporate bashing (though not aimed at Casco itself).

After a thorough review of existing arbitration jurisprudence on this issue, the grievance was sustained. The relevant portions of Arbitrator Simmons’ analysis, which have been widely cited, is set out below (paragraphs 27 - 33):

27 The issue of posting notices on bulletin boards that first require the employer's approval is one which brings into sharp focus the divergent interests of the two parties. The union believes it ought properly have the right to post any notice it wishes without interference from the employer. ....

28 The employer on the other hand is the owner (or lessee) of the premises and believes it possesses the right to determine what will and will not be posted on its property. If the material intended to be posted is not in keeping with the employer's views of what ought to appear on bulletin boards on its premises it believes it has the right to prevent the posting.

29 In my view, neither party has a complete unfettered right when it comes to the issue of posting notices on union bulletin boards. The employer has legitimate interests which may hold dominance over the union's legitimate interests in the employer's pursuit of certain activities. These interests may include the employer's interest to protect its right to its continued control and direction of the work force in relation to productivity; its right to maintain a work force that is relatively discipline free; its right to have a clear, clean and orderly premises; its right against having a negative impact on the employer's image so as not to adversely affect its profit earnings. The list is not intended to be exhaustive.

30 But the union also possesses legitimate interests. Some are recognized and accepted by the employer such as notices of certain events and occurrences involving the local, such as local meetings, social events, retirements, deaths and births of its members and notices relating to negotiations, health and safety issues, and other employment related issues.

31 Other interests the union may wish to pursue go beyond what the employer considers to be legitimate interests of the union and which directly conflict with those of the employer which is what is alleged here. The employer maintains the national office's opposition to the free trade is inimical to its own interests and therefore should not be required to permit its walls being the vehicle to support these political advertisements.

32 It is obvious both parties have varied and divergent interests over what is and what is not to be posted on the union bulletin board. An arbitrator cannot be the arbiter in each and every notice request by the union so the best one can do is suggest certain guidelines to be followed. Guidelines have been suggested by arbitrators in the past which are helpful in offering suggestions and advice to the parties. It is difficult, if not impossible, to delve into the past with explicit declarations on whether this notice was permissible while that notice was not. But there appears to be a consensus among arbitrators and arbitration boards that certain approaches to this problem involve the following. When unions and employers agree in their collective agreement that notices for union bulletin boards are to be approved by the employer this gives the employer certain input into what may and may not be placed on the bulletin boards. It is generally accepted that approval will not be withheld unreasonably and that approval will be given objectively. Employers are not to be cast in the role of censors and deny approval simply because their sensitivities may be raised. Their right to prohibit activities that interfere with their control and direction of the work force takes prominence over the union rights. Control and direction would include activities that adversely affect the production of goods and services and the profit of the corporation. But the adverse impact must be actual and not merely imaginary or speculative.

33 In the instant situation the evidence of [the manager] was clear. The union notices were not directed at Casco nor have they have impacted adversely on productivity. They were not inflammatory; malicious nor is there any suggestion they would incite a breach of discipline. There is no evidence they would adversely affect peaceful labour relations. [Employer counsel's] response that the reason could lie in the fact they were not posted so we simply do not know whether or not they would have adversely impacted on the company is a consideration. However, having heard [the manager's] testimony and having observed his demeanour I have the distinct impression that his concerns were focused more on the impact the notices would have on the company's image to outsiders, including visiting company executives, rather than on disharmony or disruption within the work force the notices might have caused. I accept from his testimony that his concerns were the notices were against the interests of the company and ought not to be displayed on the union bulletin board. He did not convey a concern about the notices causing labour relations problems at Cardinal.

In our view, *Casco* stands for the proposition that neither the union's right to post notices nor management's right to prohibit what is posted are unfettered. At the same time, the sustaining of the grievance demonstrates that unions have a wide latitude to post notices in the workplace as long as the notices do not interfere with management's control and direction of the workforce, interfere with operations, promote disobedience or labour relations conflict, or are inflammatory or malicious. Notices that advocate political objectives, as did some of the contested notices in *Casco*, are not restricted simply because they take positions contrary to those espoused by the employer.

*Quality Meat* is another case in which the union right to post notices "of union meetings and other matters of interest to union members" on bulletin boards was subject to company approval which "shall not be reasonably withheld" (paragraph 1). The company was a meat processor and supplier. The union wanted to post a notice supporting a strike at a supermarket for which it was the bargaining agent. The notice contained a cartoon that mocked the supermarket's position on sick leave pay. The struck supermarket was one of Quality Meat's largest customers and it refused to post the notice, claiming the notice would damage its relations with an important customer, potentially costing it business.

After reviewing the extensive arbitration jurisprudence on notice boards, Arbitrator Solomatenko adopted a balancing of interest perspective, determining that "the only question... was whether it was reasonable for the company to deny approval on the premise that the content and nature of the notice presented the real possibility of permanently damaging its ongoing or future relationship with one of its significant company" (paragraph 21). The arbitrator concluded that it was not reasonable to withhold approval of the notice, taking into account, in particular, that the notice boards were not in public areas, the supermarket would have been aware and unsurprised by the union's position, and the poster would be attributed to the union,

not Quality Meat. The arbitrator reasoned as follows (paragraphs 23 & 24):

23 The fact that it is a partisan notice, or expresses a partisan view-point, does not itself make it ineligible for approval for posting. Article 17.1 does not restrict the subject matter to neutral topics such as announcements of meetings, births and deaths. There is express provision for "other matters of interest to Union members". It stands to reason that those other matters may not be of interest to the company or may express opinions not endorsed by the company. However, whether it is reasonable for the company to withhold its approval to post such a notice will be determined by whether it brings or could bring real harm to the company's legitimate business interests, not whether the company likes it or endorses the subject matter.

24 Furthermore, there was nothing in my view about the text of the notice or the cartoon itself that could reasonably be viewed as being inflammatory or derogatory. It would be a "stretch" to interpret the cartoon, as suggested by the company, as a statement that Fortinos [the supermarket] would require an infectious employee to continue working in the meat department. Even outside the exaggerated postures of negotiations, the general public is cognizant of the context and intended irony of cartoons and their attendant commentary. To characterize this cartoon as inflammatory or derogatory would in my view step squarely into the shoes of censorship and extreme sensitivity. In the context of these facts, it would be extremely difficult to conclude objectively that Fortinos would interpret the opinions of the union with which it was currently negotiating as opinions advocated or endorsed by the company.

*Quality Meat* supports the principle that unions enjoy wide latitude to post notices of interest to its members, regardless whether the employer agrees or disagrees with the information being conveyed. It interprets the concept of "interest to members" broadly to include partisan positions and decries any attempt at censorship. The overriding constraints are that the notices are posted in areas away from the public or customers, are not inflammatory or derogatory, and do not harm, objectively determined, the employer's legitimate business interests.

In *Kingston General Hospital*, the CBA required that bulletin boards "shall be provided by the hospital" but was silent as to permissible topics and did not specify management approval (paragraph 3). The bulletin boards were located in public areas of the hospital frequented by patients and visitors. A dispute arose when management instructed the union to remove a notice dealing with an ongoing dispute over mandatory flu shots for hospital staff. The union had obtained a legal opinion opposing mandatory flu shots and wished to post this

opinion on the union bulletin boards. While the grievance was wending its way through the arbitration process, the union removed the notice and mailed the legal opinion to its members.

Arbitrator Stewart upheld the grievance, ruling that the union could post the legal notice and that the employer had violated the CBA by requiring the union to remove the notice. She adopted a “balancing of relevant interests” approach and noted that the communication was neither defamatory nor malicious (paragraph 11). She reasoned as follows (paragraph 12):

..... that when the hospital’s interests in its public image and its reputation are weighed against the union’s interests in communicating effectively and efficiently with its members about a matter that it understood to have some imminence, the union’s interests should prevail and the hospital’s decision not to allow the opinion to be posted was unreasonable.

The arbitrator ordered the employer to reimburse the union for the cost of mailing the notice to its members.

*Kingston General Hospital* is consistent with the prevailing and overwhelming arbitration jurisprudence. Arbitrators are very reluctant to interfere with the negotiated right of unions to communicate with its members through workplace bulletin boards. The breadth of matters that may be posted are interpreted broadly and there are no special restrictions for messages that are contrary to the position of either private or public employers. Posted notices can take partisan positions on issues that unions deem important for their members. As long as the notice is not defamatory, malicious, or inflammatory, does not promote disobedience or is otherwise intended to impede operations, and is not demonstrably harmful to the employer’s legitimate interests, management cannot refuse to post a union notice under most contracts. In each case, the arbitrator will examine the actual contents of the disputed union posting to determine if, on balance, it can be said that the interests of the employer in having the posting removed outweigh the CBA rights of the union to communicate with its members.

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In addition to arbitration awards, the British Columbia Court of Appeal has also upheld the wide latitude enjoyed by unions to post notices of interest to its members even in areas where the notices could be seen by parents and teachers: *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation* (2005) BCCA 393. The notices in question conveyed the BCTF's position regarding collective bargaining over class size, a position directly opposed by B.C. school boards. The case was originally heard in arbitration and the arbitrator found the restrictions imposed by the school board constituted an unjustifiable interference in the BCTF's freedom of expression under section 2(b) of the *Charter of Rights and Freedoms*. The appeal court upheld the arbitrator's conclusion (paragraphs 34 & 37):

[34] ..... In my view, the arbitrator correctly decided the impugned directives restrict content. If they did not, and it became necessary to decide whether the forums--parent-teacher interviews and teacher bulletin boards--invoke the values underlying the guarantee, it seems self-evident that discussion of political issues relevant to school administration with parents or posting information about those issues on school bulletin boards fosters political and social decision-making and thereby furthers at least one of the values underlying s. 2(b). .....

[37] In light of this longstanding recognition of the breadth of the expression right in Canada and the significance of such rights to our democracy, I would not exclude political expression other than violence from the protection of s. 2(b) because of the role or the location of the person seeking to exercise the right. Except in the rarest of cases, public bodies should be required to justify any restriction they place on political expression.

For the purposes of the current case, it is sufficient to note that the City of Regina is a public body subject to the *Charter*. The court decision in *British Columbia* reinforces the proposition that political messages, in and of themselves, cannot be excluded from union notice boards unless the message runs afoul of some other restriction such as promoting an illegal strike.

We now turn to the facts of the current case. Article 3D of the CBA is the material provision negotiated by the Union with respect to notice boards. Under article 3D, the City agrees to provide easily accessible notice boards for the "sole use of the Union" for the purpose of "posting notices of interest to the Union". The language in this provision is broad and

contains no express restrictions, in contrast to contracts that require management approval before a notice may be posted. The key phrases are “sole use of the union” and “interest to the Union”. This wording suggests it is up to the Union to determine what it wishes to communicate to its members. We are satisfied that if the parties had wished to place limitations on what might be posted they could easily have done so. The fact that no restrictive language is found in article 3D leads to the conclusion that no special restrictions were intended.

That does not mean that the Union enjoys an unfettered right to post anything it wants. The arbitration cases make clear that certain restrictions are implied; for example, the Union is precluded from posting notices fomenting illegal action or material that is defamatory. We have reviewed the various restrictions specified in the authorities and are satisfied that none of the referendum posters put on the notice boards by the Union offend any of the implied limitations.

The referendum poster urges employees to attend a BBQ and also to vote to keep the proposed water treatment facility public. The wording and artwork in the poster are rather innocuous in the Board’s opinion. No City officials are mentioned, let alone targeted, and the Employer is not disparaged in any way. The message is a positive one - urging employees to vote to keep water public rather than criticizing the P3 funding and operating approach. The poster does not counsel illegal action or suggest any violation of the CBA. It does not suggest employees miss work to attend the BBQ. The tone of the poster, including the size of the lettering, the limited use of large capital letters, and the art cannot in any way be construed as inflammatory. There is no evidence that the posters damaged the City in some tangible way or caused employee discomfort during the several days the poster was on the notice boards before being removed..

It is true that the referendum campaign was hotly contested and very much in the political arena. There is no doubt that the Union’s poster message is partisan and opposes,

without expressly saying so, the position taken by City Council. The poster is political almost by definition, although the Union's opposition was partially motivated by a fear of job loss. However, as previous arbitration decisions and the British Columbia Court of Appeal have made clear, unions are not precluded from posting partisan and political messages as long as the tone is not inflammatory or derogatory. The Union's position could hardly have been a surprise to the City or its own members. Nor can it be a surprise that unions, in carrying out their representational role, often engage in political campaigns of various kinds. In the Board's opinion, the Union had the right to communicate with its members through workplace notice boards established for its sole use on an issue, the referendum, that it believed was of interest to its members. Accordingly, the Board concludes that the instruction by management to have the referendum posters removed violated article 3D of the collective bargaining agreement.

In reaching this conclusion, the Board rejects the arguments advanced by the Employer urging a much narrower interpretation of the Union's rights under article 3D. We do not see a difference between "notice boards" and "bulletin boards", the former, according to the Employer, intended to provide a scope restricted to union meetings, personal notices, and union contact information. Our reading of the case law failed to reveal any such distinction and, as already noted, had the parties intended to limit the subject matter of messages that could be placed on union notice boards, language to that effect could have been negotiated. The Board rejects the argument that the use of the terms "notice boards" was intended to restrict the Union from posting notices that go beyond meeting information, union contacts, and births and deaths.

The final point we wish to make is the public visibility of the notice boards. The purpose of the notice boards is to allow the Union to communicate with its members on relevant issues, not to communicate to the general public. While segregating notices from the public may not be

possible in some worksites, such as hospitals or schools (see, *Kingston General Hospital* and *BCTF*), this is not the case at the City of Regina. The evidence established that the vast majority of the notice boards were located in places to which the public does not normally have access. The fact that very occasionally a non-employee may be present in such areas is not sufficient to create a limitation as to what might be posted. The evidence was not precise, but it appears that a small number of notice boards are located in places that are readily visible to the public.<sup>5</sup> Union communication aimed at employees should not be in public spaces and should be limited to notice boards that are not customarily visible to the general public.

Aside from the caveat about posting the referendum poster on notice boards that are not normally visible to the public, the grievance is sustained. Given our ruling, it is unnecessary to address the Union's KVP argument.

With respect to remedy, we simply make a declaratory ruling that article 3D was violated by the Employer in the case at hand. We refrain from issuing a broad "cease and desist" order given that cases of this nature usually turn on the specific contents of the impugned posting and the surrounding circumstances. As well, there was no evidence that management has regularly attempted to curtail the contents of union notices. We note as a general principle that parties in a collective bargaining relationship are expected to abide by the terms of the CBA and it is our expectation that they will do so in the future, perhaps with guidance from this award.

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<sup>5</sup>There was little discussion in this case on the process for placing notice boards and the Board does not want to raise an issue that is not before us. Nor do we need to address the situation, as in a hospital, where there may be very limited spaces that are exclusive to employees.

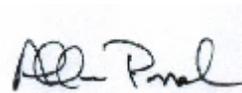
## **AWARD**

The grievance is sustained. The Employer violated the collective bargaining agreement when it directed the Union to remove its referendum posters from Union notice boards that are not visible to the general public.

The nominee of the Union, Merv Simonot, concurs with the award.

The nominee of the Employer, Larry LeBlanc, does not concur with the majority. His written dissent it appended to the majority award.

Dated on March 6, 2016 in Saskatoon SK.



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Allen Ponak