Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 600-3, Applicant v. GOVERNMENT OF SASKATCHEWAN (COMMUNITY LIVING DIVISION, DEPARTMENT OF COMMUNITY RESOURCES), Respondent

LRB File No. 238-05; November 20, 2008
Vice-Chairperson, Angela Zborosky; Member: Leo Lancaster

The Applicant: Peter Barnacle
For the Respondent: Ross Macnab

Arbitration – Deferral to arbitration – Unfair labour practice application and grievance not the same dispute, arbitrator not empowered to resolve dispute set out in unfair labour practice application and no suitable alternative remedy available through arbitration process - Board determines not to defer complaint to grievance arbitration process under parties' collective agreement.

Unfair Labour Practice – Failure to Bargain - Whether new criminal record check policy unilaterally implemented by employer without negotiating with union constitutes a failure to bargain in good faith – Board determines that criminal record check policy is a term or condition of employment and one that must be bargained with union – Policy conflicts with, modifies and adds to collective agreement – Policy contains provisions related to other provisions in the collective agreement – Policy covers matters similar in nature to others the parties have in the past found obligated to bargain – Board determines that unilateral implementation of criminal record check policy, as it applies to current employees, a breach of the duty to bargain in good faith.

***The Trade Union Act*, ss. 2(b), (d), 3, 5(c), (d), (e), (g), 11(1)(c) and 18(l).**

REASONS FOR DECISION

Background:

[1] The Canadian Union of Public Employees, Local 600-3 (the "Union") represents employees employed by the Government of Saskatchewan in the Community Living Division of the Department of Community Resources (the "Employer"), working at the Valley View Centre (a long term care facility for mentally disabled individuals) in Moose Jaw, Saskatchewan, with certain named exceptions. At the time of the events

giving rise to the within application, the parties were concluding the negotiation of a collective agreement with a term of October 1, 2003 to September 30, 2006.

[2] On December 21, 2005, the Union filed an application alleging that the Employer violated s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"), by unilaterally implementing a criminal record check policy ("CRC policy") that would or could impact the terms and conditions of employment of its members, without negotiating that policy with the Union.

[3] In its reply to the application, the Employer asserted that it merely revised its existing CRC policy and that the development and implementation of the policy fell within the rights and responsibilities of management and was not subject to negotiation with the Union. The Employer stated that there has been a CRC policy in place for many years and that the recent revision merely expands the use of criminal record checks to those positions in which employees work with vulnerable clients. The Employer also asserted that the revision was made with the knowledge of the Union. The Employer took the position that the matter is not appropriately the subject of an unfair labour practice application, noting that the Union has grieved the implementation of the policy and will have the opportunity to grieve any occasion where the CRC affects the terms and conditions of employment of any member.

[4] A hearing was held in Regina on April 11, 2006. Shortly following the hearing, the Employer filed a final written submission.

[5] At the hearing, the Employer raised a preliminary issue – whether the matter ought to be deferred to the grievance-arbitration process under the collective agreement, given that the Union had previously filed a grievance concerning the CRC policy. Following the parties' submissions on this issue, the Board reserved its decision and proceeded to hear the application proper. The Board has determined that deferral is not appropriate in the circumstances of this application. While this issue was argued by the parties prior to the introduction of any evidence at the hearing, the evidence led at the hearing is helpful to an understanding of the issue and therefore, reasons for our decision not to defer to the grievance-arbitration process will be set out below in our Analysis and Decision.

[6] Unfortunately, a panel member, Patricia Gallagher, passed away subsequent to the hearing and before this decision was rendered. The parties agreed, through their correspondence to the Board, to allow the remaining panel members to render a valid decision. Had the parties not so agreed, we would have, on the basis of necessity, decided the matter with the two remaining panel members who heard the application: See, *Teamsters Union, Local 395 v. Regina Leader Post Group Inc.*, [2007] Sask. L.R.B.R. 707, LRB File No. 118-05 and *Graham Construction and Engineering Ltd. et al. v. United Brotherhood of Carpenters and Joiners of America, Local 1985 and Saskatchewan Labour Relations Board*, [1999] Sask. L.R.B.R. c-25 (Sask. Q.B.).

Facts and Evidence:

[7] At the hearing, the parties provided the Board with an agreed statement of facts. This statement was supplemented by the *viva voce* evidence of the Union's witness, David Stevenson, president of Local 600-3 of the Union, and the evidence of the Employer's witnesses: (i) Bridget McLeod, senior labour relations consultant with the Public Service Commission of the Government of Saskatchewan; and (ii) Don Zerr, director of labour relations with the Public Service Commission.

[8] The agreed statement of facts reads as follows:

> 1. *CUPE Local 600 is the bargaining agent for employees of the Employer in the Community Living Division (CLD) of the Department of Community Resources and Employment DCR.*
>
> 2. *Pursuant to the notice to bargain served August 5, 2003, the parties entered into negotiation for renewal of their collective agreement (Document 1) and a new collective agreement was reached in January 2005 and ratified in March 2005 and signed April 7, 2005 (Document 2).*
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> 3. *The Parties also met in the fall of 2005 to negotiate the merger of the Saskatchewan Property Management Corporation (SPMC) and CLD CUPE collective agreements.*
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> 4. *The implementation of a revised criminal records check policy was not raised by the Employer during negotiations for the new collective agreement, nor was it discussed at the SPMC-CLD table.*

5. *The Employer commenced an internal review of its existing criminal records check policy about February 2005 and implemented the revised criminal records check policy in the Saskatchewan Public Service effective September 7, 2005 (Document 3).*

6. *A criminal records check policy was first introduced in the CLD in 1990-91, with an initial revision of October 19, 1994 (Document 4). Subsequently, a further revision took place effective March 24, 1997 (Document 5) and a third revision effective February 1, 2002 (Document 6). The initial policy and revisions were implemented without negotiation with the Union.*

7. *All previous criminal check policies for CLD CUPE members applied only to new hires and not existing employees.*

8. *As a result of the new policy implemented in September 2005, the following changes with respect criminal records checks were implemented by the Employer:*

   a. The policy not only applied to new employees, but also current employees, regardless of the nature of their appointment, in the position categories covered by the policy.

   b. Three new position categories were added to those previous requiring criminal record checks: those employees responsible for public money, those with the ability to modify IT systems; and those working with third party organizations.

   c. Current employees must obtain a criminal records check within five years of September 2005 if they currently occupy a position requiring a criminal record check. Criminal record checks will be reviewed every five years for such employees continuing to occupy those positions.

   d. If a current employee applies to a position requiring a criminal records check, even if they are presently in such a position, then they will be required to get a new check if they have not had one within the previous one year period.

   e. The cost for current employees to obtain a criminal records check for their current position/appointment will be paid for by the Employer, as well as for employees moving to positions requiring criminal records checks as a result of an Employer-initiated action or for the cyclical updates of criminal records checks every five years.

   f. *External applicants and current employees applying to criminal records check positions are required to pay for their own*

checks (currently $35.00).[1] The costs for these checks vary, but a routine criminal records check (name check) may be obtained through the Moose Jaw RCMP without cost.

9. *Since the policy revision, two grievances have been filed by CUPE respecting the requirement that the employee pay for the criminal record check on changing jobs. Both grievances were settled.*

10. *The Employer has provided information to employees on its website with respect to the criminal records check policy. This documentation includes:*

    a. *Question and Answers (Document 7)*

    b. *Information Handout (Document 8)*

    c. *Criminal Records Check Transmittal Form (Document 9)*

11. *The Parties reserve the right to call further evidence in the hearing of this matter.*

[9] Mr. Zerr testified concerning the history of the use of CRCs in the public service. He stated that the Government first began to use CRCs for the prison guard positions in the Department of Corrections in the 1970's. In the years following, each department of Government created their own guidelines for CRCs and developed a list of categories of positions that required CRCs, after checking with the Public Service Commission ("PSC"). Mr. Zerr stated that in 1990-91, the PSC developed a guideline to assist the departments in determining when and how these checks would be performed. Mr. Zerr believed that the first version of the policy that applied at the Valley View Centre in the early 1990's may well have been restricted to those employees who had direct patient contact, although in the early 2000's, the application of the policy was expanded to include all other employees, given that every employee has some contact with patients. In any event, the policy at Valley View Centre has always only applied to new hires, not existing employees.

[10] Mr. Stevenson stated that since 1991, only new hires in a limited number of positions had been required to get CRC at Valley View Centre, specifically, those responsible for direct patient care.

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[1] It was noted by the parties at the hearing that the fee usually ranges from $25.00 to $50.00 but is occasionally free of charge.

[11] Mr. Zerr testified that in late 2004, it became known to the public that two employees of Government committed fraud with public funds – one for approximately $300,000 and another for one million dollars. Both cases attracted a great degree of scrutiny concerning the hiring practices of Government, particularly because both individuals had criminal records for fraud.

[12] In an attempt to address the problems highlighted by these two incidents of fraud and to firm up the CRC policies being used across Government, the PSC undertook an assessment of the jurisprudence on CRCs and an examination of what other jurisdictions and employers were doing. Mr. Zerr noted that the last occasion on which an official review had been conducted was in the late 1990's. He stated that they discovered that as a result of permitting the individual departments to develop their own policies, there were several inconsistencies between them in terms of how the CRCs were requested, recorded and stored, all leading to the possibility of inconsistent decision-making. The PSC identified that a more centralized approach was required. There was also a recognition that the information obtained from the CRCs was extremely prejudicial, very sensitive and that employees needed to be assured that it would be kept and treated as confidential information. The PSC also noticed that there were several areas of the policies that needed improvement, particularly with respect to the determination of which positions required CRCs, in particular, financial positions, positions where the employees deal with certain third party organizations that required their employees to have CRCs, and information technology positions (where the employee has the ability to adjust or control payments made). In addition, the PSC discovered that the policies in many of the departments did not require current employees moving into new positions ordinarily requiring a CRC, to obtain a CRC.

[13] Mr. Zerr testified that in developing the revised CRC policy in 2005 to apply to all of Government, the PSC took a centralized approach to administration of the policy and decided to make a number of changes to the content of the policies, including the addition of new positions to the list of those required to obtain CRCs (the financial and IT positions and those working with third parties), the requirement that current employees moving to positions covered by the policy obtain a CRC, and the requirement that current employees in positions covered by the policy periodically obtain CRCs over

the course of their employment. He stated that the latter requirement was added because it was considered a proper means to access information that the Employer felt it could always have accessed. A new process was also developed for the collection of the CRCs to ensure the protection of employees' privacy as much as possible. Under the revised policy, the employee is now required to send the CRC to the CRC Coordinator, rather than to a supervisor or manager (as was the case under the previous policies), and it is the Coordinator who makes an initial decision as to whether the record has any relevance to the individual's job duties. If the Coordinator determines that the record has no relevance, the individual's supervisor or manager does not see the CRC. If the Coordinator is uncertain of the impact of the record on job duties, consultations would be held with a lawyer from the Department of Justice and an individual with the labour relations branch. In all cases, the original CRCs are returned to the individual while a copy is filed in a secure area with the Coordinator being the only person with access to the CRCs.

[14] In cross-examination, Mr. Stevenson stated that the new policy has been expanded to require all employees of Valley View Centre to obtain a CRC, not only those who are responsible for direct patient care, as has been the policy since 1991. Also, prior to the 2005 revision, the policy at Valley View Centre only applied to new hires, not current employees (i.e. both those working in their current jobs and those applying for new positions). He acknowledged in cross-examination that the inclusion of all positions at Valley View Centre under the terms of the policy occurred because all employees come in contact with vulnerable people in the facility. Mr. Stevenson indicated that the Union has never opposed the Employer's implementation of the policy in the past because it only applied to new hires – those that were not yet employees of the Employer and members of the Union (they were therefore not yet covered by the collective agreement).

[15] Mr. Zerr explained that there may be occasions where a name search CRC is insufficient (i.e. for an individual with a common name) and finger print analysis needs to be done. He testified that this process could take an extra eight months but generally, a delay of four to eight months is to be expected. He acknowledged that this presents some difficulty with new hires or the movement of current employees into new positions. He stated that although a person may be appointed to a position conditional

upon receipt of a satisfactory CRC (with appropriate safeguards in place), the person cannot pass their probation and become a permanent employee until the CRC is received. The length of the probationary period for most employees, as set out in the Union's collective agreement, is six months.

[16] Mr. Zerr also testified about the considerations listed in the policy for determining the appropriate consequences for having a criminal record: the relationship to the level and nature of the position assignment; the number, nature and seriousness of the offence(s); when the offences occurred; and what the person has done in the intervening period.

[17] Mr. Zerr stated that the Employer applied these same considerations prior to the 2005 revision of the policy when it determined the consequences to the individual of having a criminal record. Mr. Zerr testified that even though the CRC policies have in the past been restricted to new hires, there have been occasions where the Employer has become aware of a criminal conviction of a current employee and the Employer has dealt with that information by assessing the relevance of the conviction to the individual's job duties, the length of time since the conviction, and what the individual has done in the intervening time. Therefore, as Mr. Zerr put it, the Employer has always been concerned about any criminal convictions of its current employees and has used the same analysis of the record's relevance prior to 2005 as under the revised policy. He specifically pointed to the terms of the policy applying to the CLD, revised in 1994, where it indicates that having a criminal record will not automatically disqualify an individual from program involvement - the department would "consider only those offences that are relevant to them working with children or vulnerable adults" and that, in any event, the record would be discussed with the job applicant.

[18] In cross-examination, Mr. Zerr insisted that requiring current employees to provide a CRC every five years is not a change to the employees' terms and conditions of employment. In his view, the policy, as it applies to current employees, is merely a change in the process or change in the way in which the Employer operates in the workplace. He stated that there was always a requirement or an ability by the Employer to act on the information that an employee has a criminal conviction and that the revision to the policy merely provides a systematic method of obtaining the

information. That an employee might be disciplined for insubordination if he or she refuses to provide a CRC, or is denied or delayed in receiving a position, does not make the CRC a condition of employment.

[19] In cross-examination, Mr. Stevenson acknowledged that he is not aware of anyone having been disciplined or losing their job as a result of a positive CRC since the 2005 revision came into effect, even though many CRCs had been performed by the date of this hearing. He also stated that he is not aware of the factors that go into assessing the effect of a positive CRC. Although he knows that not every conviction will impact an employee, the Union's complaint is that it never got the opportunity to discuss and negotiate these issues.

[20] With respect to the payment of fees for a CRC, Mr. Zerr testified that an individual seeking a promotion, transfer or demotion to an included position would be required to pay for his or her own CRC whereas the Employer pays for CRCs for those individuals currently in positions that require a CRC every five years, explaining that responsibility for payment comes down to the notion that if the Employer requires the CRC, the Employer pays for it.

[21] With respect to the time frame for the development of the revised policy, Mr. Zerr testified that in February and March 2005, the PSC began conducting a series of interviews and researching the policies used in other jurisdictions. He stated that by April or May 2005, the Minister responsible publicly reported the Government's intention to revise the CRC policy and that by late August 2005, the PSC knew that a revised policy would soon be implemented.

[22] Both Mr. Zerr and Ms. McLeod acknowledged that the CRC policy was never brought to the bargaining table during negotiations for the 2003 – 2006 collective agreement, which discussions concluded in January 2005. Mr. Zerr felt that there was no obligation to disclose, during collective bargaining, that a revised policy was being developed, although in cross-examination, he stated that their relationship with the Union was such that they would probably have raised it in bargaining if they had known about it at that time. Ms. McLeod testified that she was not aware during the collective agreement negotiations that concluded in January 2005, that the Government was

intending to revise the CRC policy; however, in response to the question asked in cross-examination that if the Employer had become aware of the Government's intention to change the policy, whether the Employer would have had a legal obligation to advise the Union, she stated that she "supposed so." In re-examination, she stated that she is not sure of the nature of an Employer's obligation to disclose or raise such issues during bargaining but that given the Employer's relationship with the Union, they probably would have advised the Union that they were working on the policy, if they had known about it at the time.

[23] With regard to the negotiations with SPMC referred to in paragraph 3 of the agreed statement of facts, Mr. Stevenson explained that the parties entered negotiations in September 2005 (around the time that the CRC policy was implemented by the Employer) to deal with the fact that SPM ceased existence as a crown corporation and became part of executive government and therefore the parties had to amalgamate the two groups of employees (with two collective agreements) into one. He stated that the Employer made no reference to the CRC policy at those negotiations.

[24] Mr. Zerr stated that while the policy was not raised in bargaining with the Union, he believes they met with the Union about the policy approximately one week before the policy was sent out for implementation, at which time they presented the Union with the completed policy and asked for their comments. Ms. McLeod testified in a similar vein. Mr. Stevenson disagreed. He stated that the Union only found out about the policy through a press release issue by the Government on September 7, 2005, the date of its implementation. He stated that Ms. McLeod had phoned him to let him know that the press release was being sent to him. Mr. Stevenson testified that the first meeting with the PSC at which the policy was discussed was on September 14, 2005. The parties had met on that date to discuss a number of issues, including the CRC policy. At that meeting, the PSC representatives indicated that they would be implementing the policy immediately but gave the Union representatives a copy and asked them to bring back any concerns they had about the policy.

[25] Mr. Stevenson testified that the parties next met about the policy on October 25, 2005, at which time the Union expressed concerns about the potential impact of the policy, what would be done with the information obtained in relation to an

employee's future employment or promotion, the cost of obtaining CRC's, the non-permanent employees having to obtain a CRC every three months at significant cost, and the potential impact on continued employment in the employees' current positions.

[26] Following this meeting with the PSC, the Union's representatives discussed the implications of the policy and felt that the policy should have been negotiated with the Union rather than imposed. The Union representatives also discussed the specific terms of the policy that could have been examined and negotiated, examples of which included: how to apply the policy to those who hold more than one appointment; the length of time a CRC is valid; why the CRC is mandatory if an employee is working in a position and there are no problems; the problems caused by the length of time a finger print analysis takes (Mr. Stevenson was aware of one case where it took a year to get the results); the costs of finger print analysis; the possible action the Employer might take for a positive CRC; the necessity and impact of having to meet with a deputy minister about CRC results; possible disciplinary consequences; and whether employees could return to their previous positions if a CRC prevented their obtaining the positions applied for. All in all, the Union expressed its concerns over the lost opportunity to discuss and negotiate these issues with the Employer.

[27] The Union raised the issue of the revised CRC policy again at a joint union-management committee meeting on December 15, 2005, indicating that it opposed the CRC policy because it changed conditions of employment that had been negotiated with the Union. The Employer made no response at that meeting.

[28] Mr. Zerr testified that the PSC has numerous policies in the workplace which have not been negotiated with the Union that impact the employment/working relationship. Mr. Zerr compared the requirement to provide a CRC when applying for a new position to other requirements to provide information to the Employer as proof of their qualifications, such as a transcript of marks or a professional driver's license, stating that the Employer does not pay for these either and that these requirements have never been subject to negotiation with the Union.

[29] The Union filed a policy grievance on December 22, 2005. While the agreed statement of facts also refers to two individual grievances filed by the Union that

have been settled, few details of those grievances were relayed to the Board.[2] The policy grievance states that the Union claims that "[t]he employer failed to bargain collectively with the union by unilaterally implementing the Criminal records checks (CPIC) in the workplace." In the grievance, the Union requests "that the employer negotiate the implementation of the CPIC policy." In its cover letter sent with the grievance, the Union requested a meeting with the Employer and indicated the name of its appointed investigator under the collective agreement, should the issue not be resolved at that meeting.

[30] Ms. McLeod testified that, because it was a policy grievance that was filed by the Union, the grievance was forwarded to the PSC by the human resources manager at Valley View Centre. Following her receipt of the grievance, she contacted Joe Murrell and Mr. Stevenson of the Union and arranged a meeting for January 13, 2006, however, Mr. Murrell and Mr. Stevenson indicated that they did not want to meet at that time. She stated that she asked them whether the Union wanted to put the grievance in abeyance but it was not until April 4, 2006, that the Union wrote to the Employer advising that "[a]fter discussions and verbal agreement with Bridget McLeod PSC, Cupe 600-3 is officially requesting to place this Grievance … into abeyance, until after the matter is resolved through the Labour relations hearing set up for April 11, 2005 [sic]." At the hearing, Ms. McLeod denied that she had verbally agreed with the Union to hold the grievance in abeyance, stating that she had always wanted to have a grievance meeting so that the Employer could formally respond to the grievance. Ms. McLeod stated that she was aware that the Union had also filed an unfair labour practice application with the Board around the same time as it had filed the grievance and understood that the Union did not want to meet about the grievance until after a determination of the unfair labour practice application before the Board. Ms. McLeod stated that she had also been aware that the Employer had filed a reply to the Union's application and that she agreed with statements in that reply, in particular, that the grievance procedure was a more appropriate method to deal with the matter at issue, however, she stated that she could not force the Union to attend the grievance meeting if it did not want to do so.

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[2] At one point during the hearing, Mr. Stevenson stated that the Union and the Employer may differ on the relevance of a conviction and that was why there had been grievances.

[31] Ms. McLeod acknowledged in cross-examination that the Employer did not rely on the time limits set out in the grievance procedure (for taking the next step) and agreed that the Employer could not argue that the Union violated the time limits in the collective agreement if it had agreed to hold the matter in abeyance. In re-examination, Ms. McLeod clarified that the PSC has never rejected a grievance on the basis of a breach of time limits (in fact, she was not aware of the process for doing so) because at arbitration, an arbitrator has the power to relieve against time limits.

[32] In cross-examination, Ms. McLeod acknowledged that by February 20, 2006, at which time there had been an exchange of emails between herself and Mr. Stevenson about the grievance, a change had been made to the CRC policy concerning the length of time that a CRC was valid – from three months to one year. She stated that she was aware that the Union had had a concern about that issue in relation to those employees who frequently changed jobs. Ms. McLeod expressed that this was precisely why she wanted a grievance meeting with the Union – to understand the concerns the Union had with the policy. She was aware that the cost of the CRC was an issue for the Union (as expressed to her by Mr. Stevenson on a couple of occasions) but was not aware of any other specific issues. She stated that she first became aware that there were other possible issues in the February 20, 2006 email exchange with Mr. Stevenson where he advised that in addition to the cost and the duration a CRC result is to be effective, the Union also had a problem with the requirement that current employees were being subject to a CRC. Upon Ms. McLeod making a further inquiry as to the specific concern in that regard, Mr. Stevenson indicated he would have to get back to her after speaking to the Union's legal counsel and staff representative, but that the problem may relate to how the CRCs could impact employees' future employment. Mr. Stevenson testified that he did not further respond to Ms. McLeod's inquiry because, after speaking with the Union's legal counsel, he did not want to jeopardize their position at this hearing before the Board, by further responding to her inquiries.

Arguments:

Preliminary Issue:

[33] The Employer argued that the matter at issue should be deferred to the grievance-arbitration process under the parties' collective agreement, the Union having

filed a grievance similar in nature to the complaint contained in its unfair labour practice application, only the day after it filed this application with the Board. The application before the Board alleges that the Employer unilaterally implemented a CRC policy which would or could impact terms and conditions of employment of the employees, without bargaining the same with the Union, in violation of s. 11(1)(c) of the *Act*. The grievance alleges that the Employer failed to bargain collectively with the Union by unilaterally implementing the CRC policy. The Employer argued that the dispute is the same and therefore, in accordance with the Board's usual policy, the Board should defer the matter to an arbitrator under the parties' collective agreement. The Employer referred to the "preamble" and "bargaining agent" provisions in the collective agreement as the terms of the collective agreement that applied to such a grievance. The preamble states that the parties "recognize the mutual value of joint discussions and negotiations on all matters pertaining to working conditions, hours of work and scales of wages …" In the "bargaining agent" provision, the Employer is required to recognize the Union as the sole bargaining agent of the employees and "consents and agrees to negotiate with the Union …on any and all matters dealing with working conditions, hours of work and scale of wages."

[34] The Employer submitted that it matters not that the Union has taken the position that the grievance should be held in abeyance pending the outcome of the Board proceedings. Also, the Employer noted that in addition to the policy grievances, two other individual grievances have been filed concerning the operation of the CRC policy and those have been resolved through the grievance procedure.

[35] In response, the Union took the position that this is not an appropriate case for deferral, citing the Board's decisions in *United Food and Commercial Workers International Union, Local 226-2 v. Western Canadian Beef Packers Inc.,* [1998] Sask. L.R.B.R. 743, LRB File No. 026-98 and *Canadian Union of Public Employees v. University of Saskatchewan and University of Regina*, [2004] Sask. L.R.B.R. 45, LRB File Nos. 246-03 & 247-03. The Union submitted that the grievance and the unfair labour practice application are not the same and, while not being entirely certain of the scope of the policy grievance, suggested that the focus of the grievance would likely be whether the application of the policy is reasonable, in which case the actual terms of the policy would be at issue. Counsel argued that what would not be in issue at arbitration

of the policy grievance, and what is at issue before the Board, is the process used to implement the CRC policy. While acknowledging that the preamble and the bargaining agent provisions of the collective agreement are important, the thrust of the unfair labour practice complaint is a violation of s. 11(1)(c) of the *Act* and the ability of the Employer to unilaterally implement the CRC policy. Therefore, the issue before the Board, in the unfair labour practice, is whether the Employer was required to negotiate the policy and thus failed in its duty to bargain collectively, whereas the grievance concerns the question of whether the policy is reasonable or has been violated in its application. The Union also submitted that the Board should decline to defer on the basis that the Union could not obtain the same remedies before an arbitrator as it seeks from this Board.

Section 11(1)(c) Application:

[36] The Union argued that the Employer's failure to raise with the Union that it was conducting a review of the CRC policy and its failure to negotiate the terms of the new policy caused a lost opportunity for the Union to negotiate those provisions. The Union argued that its complaint is not necessarily with the specific terms of the policy itself, although the impact of the policy on job opportunities and career mobility as well as the financial cost to its members, are relevant. The Union argued that the terms of the policy must be considered terms and conditions of employment and that in implementing this policy, the Employer has changed employees' terms and conditions of work. The Union argued that had the Employer negotiated the policy, its specific terms may have been different. For example, the Union may have convinced the Employer that requiring current employees to provide CRCs every five years was arbitrary and not appropriate; that obtaining a CRC when an employee makes a lateral transfer in the same classification is not necessary; and that all the costs should be paid for by the Employer. The Union might also have convinced the Employer to negotiate a policy within the policy with respect to how the results of the CRC were dealt with. They might also have discussed how to handle a provisional appointment in the event of a delay in obtaining the CRC results.

[37] While the Union is not basing its case on the proposition that the Employer failed to disclose relevant information during collective bargaining, it submits that if the policy is a term or condition of employment or affects terms and conditions, then the Employer would have had a duty to disclose it during bargaining. It follows then

that there would also be a duty to bargain the issue with the Union. The Union noted that in asserting that the Employer was required to bargain the policy with the Union, it is not saying that the Employer was required to get the Union's agreement on all aspects of the policy – to the extent that the Employer is required to do so is an issue of what occurs at an "impasse" in bargaining, an issue that is not before the Board in this case. The key, it argued, is that the Union must at least have the opportunity to bargain the terms of the policy.

[38] The Union relied on the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1993] 4th Quarter Sask. Labour Rep. 216, LRB File Nos. 256-93 to 260-93, to establish the importance of the Employer recognizing the Union as the exclusive bargaining agent and that any "impact" is considered a term or condition of employment subject to collective bargaining. In *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95, the Board emphasized the rights of employees under s. 3 of the *Act*, stating that the Union must be able to exercise those exclusivity rights and that "bargaining collectively" in s. 2(b) of the *Act* extends beyond renewal bargaining and includes mid-contract bargaining. The Union also referred to the Board's decisions in *International Brotherhood of Electrical Workers, Local 529 v. Bill's Electric City Ltd.*, [1996] Sask. L.R.B.R. 399, LRB File No. 061-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. McGavin Foods Limited*, [1997] Sask L.R.B.R. 210, LRB File No. 173-96; *Western Canadian Beef Packers Inc.*, *supra*; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation o/a Casino Regina,* [2004] Sask. L.R.B.R. 187, LRB File No. 250-03 & 252-03, for the proposition that the Employer must recognize the Union as the employees' exclusive bargaining agent, that the Employer must deal with the Union and only with the Union in matters concerning employees' terms and conditions of work, that the obligation to bargain collectively does not apply only to bargaining a renewal collective agreement but also the entering of discussions with the Union about any matters concerning terms and conditions of employment, that the obligation embraces all aspects of the relationship between Employer and employee affecting terms and conditions of employment, and that the failure to enter into such discussions about terms and conditions to be applied to employees is a violation of s. 11(1)(c) of the *Act*.

[39] The Union noted that it had not challenged the Employer's CRC policy in the past because the policy had not previously applied to current employees – it had only applied to new hires who were not yet employees and therefore not yet members of the Union subject to the provisions of the collective agreement. The Union argued that once the Employer decided to revise the policy to include its application to current employees and not just new hires, the matter became a term and condition of employment, required to be bargained with the Union as the employees' exclusive bargaining representative.

[40] The Union submitted that the present case bears most similarity to that before the Board in *Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations*, [2002] Sask. L.R.B.R. 624, LRB File No. 057-02, where the Board found that the employer violated the duty to bargain in good faith in s. 11(1)(c) of the *Act* by unilaterally implementing a process to determine a provincial market supplement for employees. The Board directed the employer to negotiate the implementation of that process with the union.

[41] The Union submitted that the question of whether the policy "impacts" the employees' terms and conditions of employment is the proper test to determine whether the policy needs to have been bargained with the Union. Also of consideration, it says, are whether the terms of the policy conflict with the terms of the collective agreement. The Union argued that the employees' terms and conditions of employment have been impacted by the policy both by reason that employees could be disciplined or terminated if there is a positive CRC or if they refuse to provide a CRC (i.e. it impacts the "just cause" provisions of the collective agreement) and because a positive CRC could limit the employees' promotional opportunities or transfers. The Union also argued that there is a conflict between the policy and some of the provisions of the collective agreement not only with respect to the "just cause" provisions but also because an employee cannot be appointed to a permanent position after passing their six month probationary period until the employee obtains the CRC, which can take longer than the six month probationary period. Lastly, the Union argued that some of the employees are impacted by the cost of the policy, particularly those who are seeking promotions, demotions or transfers. As such, it argued, the Employer has violated s. 11(1)(c) of the

Act by failing to recognize the Union as the exclusive bargaining agent of the employees and failing to provide it with an opportunity to influence and negotiate the terms of the policy.

[42] With respect to remedies, the Union seeks a declaration that the Employer has violated s. 11(1)(c) of the *Act*, an order that the Employer cease and desist implementation and application of the policy, and an order that the Employer comply with its obligation to bargain collectively by negotiating in good faith with the Union a revised policy prior to its implementation. The Union also seeks an order for payment of damages suffered by employees who had been subject to the terms of the revised policy, including monetary loss for those members that have had to pay for a CRC under the new policy. The Union also suggested that the Board might consider directing the Employer to file a rectification plan under s. 5.1 of the *Act* because the entire losses suffered by the members were not yet known at the time of the hearing; such a plan could include terms to address not only the payment to members of the costs they incurred obtaining a CRC under the new policy, but also terms to address the effect that the requirements of the policy have had on any employee denied a promotion because of a positive CRC.

[43] In response, the Employer argued that it appears that the Union's real complaint is that the Employer has unilaterally implemented a policy that would or could affect the employees' terms and conditions of employment. However, the Employer pointed out that all or most of the policies that have been properly instituted by the Employer, without negotiating them with the Union, have such an impact. Therefore, that cannot be the appropriate test to determine what terms an Employer is obligated to bargain with the Union. The Employer maintained that the policy has not changed employees' terms and conditions, but is simply a matter of policy development within an employer's management rights. The Employer submitted that the CRC policy merely regularizes the collection of information, while ensuring fairness and privacy. The Employer stated that if the Union is concerned about the "impact" of the policy, it is always open to an employee to grieve the application of the policy.

[44] While acknowledging that the Board has interpreted the obligation to bargain collectively quite broadly, that obligation cannot entail every interaction between

the Employer and employee. It is only where the Employer's action deals with terms and conditions of employment that a failure to negotiate with the Union constitutes an unfair labour practice.

[45] The Employer distinguished the cases cited by the Union on the basis of their facts; the facts being completely unlike those before us. The cases cited deal more broadly with the Employer's obligation to bargain collectively and often where there was a refusal to recognize the union as a bargaining agent at all. In addition, some of the cases dealt with an employer that instituted a major change having a dramatic and direct effect on working conditions or rates of pay. These cases do not lend support to the notion that all workplace policies must be subject to collective bargaining. In none of the cases, except the *Saskatchewan Association of Health Organizations* case, *supra*, was the Board dealing with a workplace policy, however, this case is also distinguishable on the basis of its unique facts.

[46] The Employer also argued that the CRC policy has not changed any of the employees' terms and conditions of employment. The CRC policy is merely an administrative process that was changed and designed to gather information about employees.

[47] The Employer argued that it has never had a policy to ignore criminal convictions and therefore, to now consider the criminal convictions cannot be characterized as a "change" to employees' terms and conditions of work. It is only once a conviction is determined to be relevant that the Employer takes action. The Employer also submitted that the four criteria used to asses the relevance of the criminal record has not changed under the new policy – they are the criteria the Employer has always applied when it has discovered the existence of an employee's conviction. Therefore, the criminal convictions are being treated by the Employer in the same manner as they were before the 2005 revision to the policy. The Employer also argued that it has merely established an effective means of obtaining information it has always been entitled to obtain. A criminal conviction is not a private matter as the public has access to that information when it occurs. The Employer argued that the gathering of information itself has no effect on the employees. The Employer submitted that it is not the CRC policy itself that impacts the employee's terms and conditions of employment but rather, it is

the application of the policy in the sense that it is a positive criminal record, or a conviction, that could impact an employee's terms and conditions of employment (depending on the application of the four criteria set out in the policy to assess relevance of the conviction). Although no evidence was led on this point, the Employer provided an example of another workplace policy which could have such an impact - the conflict of interest policy in which the employee must disclose any potential conflicts. The Employer pointed out that this disclosure could impact an employee's terms and conditions of employment and the employee could be disciplined for a failure to disclose such conflicts.

[48] The Employer referred to the following cases in its argument: *Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board*, [1996] Sask. L.R.B.R. 732, LRB File No. 052-96 and *Saskatchewan Union of Nurses v. Saskatchewan Association of Health Organizations*, [1999] Sask. L.R.B.R. 549, LRB File No. 078-97. The Employer also referred to an excerpt on "Criminal Conduct" from *Canadian Labour Arbitration*, Brown and Beatty, topic 7:3420.

[49] In reply to the Employer's arguments, the Union asserted that the Employer had no previous entitlement to the criminal records of its current employees. The Union submits that the Employer's argument ignores the fundamental issue for the Union - it should have a say in what goes into the policy. The Union is not saying that a CRC policy is not a good thing or that the policy is an unreasonable one – only that it is a matter that should be bargained with the Union and the Union should have had input into its framework and terms.

Relevant Statutory Provisions:

[50] Relevant statutory provisions include ss. 2(b), 2(d), 3, 5(c)(d)(e) and (g), 11(1)(c), 18(l) of the *Act*, which provide as follows:

> *2. In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective*

bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;

. . .

(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;

3 *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

. . .

5 The board may make orders:

. . .

> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> > *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
> >
> > *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> . . .
>
> *(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary*

> *loss or any portion of the monetary loss that the board considers to be appropriate;*
>
> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
>
> *. . .*
>
> *18 The board has, for any matter before it, the power:*
>
> *(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*

Analysis and Decision:

[51] It is necessary for the Board to deal with two issues in this application. The first relates to the preliminary issue raised by the Employer that this matter should be deferred to the grievance arbitration process under the parties' collective agreement. The second issue deals with the main application, that is, whether the Employer has violated s. 11(1)(c) of the *Act* by failing or refusing to bargain the revision to the CRC policy.

Preliminary Issue - Deferral

[52] The Board has the power to defer any matter to the grievance-arbitration process under a parties' collective agreement pursuant to s. 18(l) of the *Act*. The Board has considered this question on many occasions and in so doing, has been guided by the three criteria prescribed by the Saskatchewan Court of Appeal in *United Food and Commercial Workers v. Westfair Foods Ltd. et al.* (1992), 95 D.L.R. (4th) 541 (Sask. C.A.). These criteria are that:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*

> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance-arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application to the Board.*

[53] In *Energy and Chemical Workers Union, Local 649 v. Saskatchewan Power Corporation*, [1988] Winter Sask. Labour Rep. 64, LRB File No. 022-88, the Board dealt with the issue of deferral in the context of a "bonus" payment made by the employer to its employees without having bargaining the same with the union, even though it was currently in collective agreement negotiations with the union and claimed to have no funds available for wage increases. The union took the position that the employer had acted in violation of s. 11(1)(c) of the *Act* in paying those bonuses. In refusing to defer the matter to grievance-arbitration, the Board stated at 68:

> *The fact is that whether or not the payment violated the collective agreement is not for this Board to decide. What is for the Board to decide is whether a complaint, the essence of which is that one or more provisions of the Trade Union Act have been violated, is properly before the Board and well founded on the merits.*
>
> *In the Board's view, the essence of the union's complaint in this case is that by its conduct SPC refused to recognize the union as the exclusive bargaining representative of all employees in the bargaining unit and failed to make every reasonable effort to reach a collective bargaining agreement, thereby failing to negotiate in good faith contrary to Section 11(1)(c) of The Trade Union Act. Those complaints are matters over which an arbitrator would have no jurisdiction, which require no interpretation of the collective bargaining agreement, and which should properly be dealt with by this board. The board adopted a similar position in Clark Roofing (1964) Ltd., 1984 9 CLRBR 96 and Wm. Clark Ltd., Sask. Labour Rep. Volume 35, Number 11, Page 43.*

[54] In *Western Canadian Beef Packers, supra*, the union brought an application alleging a violation of s. 11(1)(a), (c) and (d) of the *Act* by reason of the employer's alleged failure to permit a representative of the union to attend the workplace to negotiate for the settlement of grievances. In declining to defer the matter, the Board stated at 751:

> *The parties did not join issue before the Board with respect to the Employer's assertion that it had fulfilled its obligations pursuant to the grievance procedure in the collective agreement made between them. Indeed, the collective agreement was not entered in evidence at the hearing before the Board. And, there was no evidence presented to the Board that the matters in issue on this application are the subject of a grievance. Accordingly, the Board dismisses the initial argument made by counsel for the Employer that the Board should defer to an arbitration process under the collective agreement regarding the issue whether the Employer had fulfilled its obligations under the collective agreement between the parties with respect to the negotiation of the grievances in question. Even if the identical matters have been grieved, there is no evidence that an arbitrator appointed under the parties' collective agreement has the remedial jurisdiction to grant complete and sufficient relief in the event that a grievance is upheld, such as the remedial relief that this Board is able to grant under s. 5 and 42 of the Act. There is simply no basis in law or in policy on which to accede to this request.*

[55] It is our view that it is not appropriate to defer this matter to grievance-arbitration. We are not satisfied that any of the three criteria in *Westfair Foods Ltd., supra,* have been met. Specifically, we are not satisfied that the dispute under the collective agreement and the *Act* are, in essence, the same dispute. While the wording of the grievance and the unfair labour practice application are near identical, it does not appear that the Union intended that they be the same dispute, even though they are both directed at a challenge to the Employer's implementation of the CRC policy. The essence of the dispute before the Board is that the Employer has failed to recognize the Union as the exclusive bargaining representative of the employees and by implementing the CRC policy, acted in violation of the duty to bargain in good faith, contrary to s. 11(1)(c) of the *Act*. The essence of the dispute which would be before an arbitrator is difficult to discern but it cannot include an alleged violation of the duty to bargain in s. 11(1)(c) of the *Act*. It is not clear what provisions of the collective agreement the Union is alleging were violated in its grievance. Although the Employer suggested that the preamble and the bargaining agent provisions of the collective agreement were relevant, the Union seemed to disagree and suggested that the essence of the dispute in the grievance involved a question as to whether the policy is reasonable. In the Union's view, the grievance would not involve a review of the process of implementation of the policy, a matter which is at issue in the application before us.

[56] In any event, the question of whether to defer can more easily be answered through an assessment of the second part of the test, that is, whether an arbitrator is empowered under the collective agreement to resolve the dispute in question. In this respect, the considerations in *Saskatchewan Power Corporation, supra*, are applicable. In our view, an arbitrator is clearly not empowered to decide whether the Employer improperly failed to negotiate the CRC with the Union. Only the Board can determine whether there has been a violation of s. 11(1)(c) of the *Act* and specifically, whether the CRC policy is a term or condition of employment, whether the Employer was obligated to bargain this term or condition with the Union and if so, whether its failure to do so amounted to a violation of the *Act*. An arbitrator is restricted to interpreting the provisions of the collective agreement and at this stage, it has not been determined that the CRC policy is a term or condition of employment – certainly its terms are not contained in the parties' collective agreement and are therefore, not open to interpretation by an arbitrator.

[57] In addition, or in the alternative, we find that there are no suitable alternate remedies available through the arbitration process. As in *Western Canadian Beef Packers, supra*, there was no evidence (and no argument) before us that an arbitrator has jurisdiction to grant sufficient and complete relief as that within the Board's power under s. 5 of the *Act*. Although arbitrators' remedial powers have generally expanded in recent years, we are not convinced that an arbitrator would be able to grant the full relief that might be available in the event of a finding of a violation of s. 11(1)(c) of the *Act*, such as an order to cease and desist or an order that the Employer bargain collectively with the Union.

[58] We see no reason in law or policy to defer this dispute to the grievance-arbitration process under the parties' collective agreement.

Whether the Employer has violated s. 11(1)(c) of the Act:

[59] The issue before the Board is whether the Employer's unilateral implementation of the revised CRC policy without first bargaining the same with the Union, is a failure to bargain in good faith, in violation of s. 11(1)(c) of the *Act*. This application raises two crucial questions: (i) what might constitute a term or condition of

employment in any given circumstances; and (ii) whether the matter is one about which it is necessary for the employer to bargain with the union (see *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [1993] 4th Quarter Sask. Labour Rep. 158, LRB File No. 240-93). If the Board determines that the CRC policy is a term or condition of employment and one which is necessarily to be bargained, the failure by the Employer to bargain that matter with the Union is a violation of s. 11(1)(c) of the *Act*.

Is the CRC policy a term or condition of employment?

[60] Whether the CRC policy is a term or condition of employment is the easier of the two questions asked. As stated in the *Saskatoon Board of Police Commissioners* case, *supra*, this question commonly arises in two contexts: (i) where the issue involves a question of whether there has been a unilateral change of terms and conditions during a statutory freeze period, and (ii) as in the case before us, whether collective bargaining should be compelled about a certain issue. In *Saskatoon Board of Police Commissioners*, *supra,* the Board commented on the broad interpretation given to "terms and conditions of employment" at 161:

> *Canadian boards have, however, adopted a very broad interpretation of issues which may properly be the subject of collective bargaining, and have included a wide range of items among those which may be put on the table. In Pulp & Paper Industrial Relations Bureau v. Canadian Paperworkers Union, [1978] 1 C.L.R.B.R. 60, the British Columbia Labour Relations Board concluded that a trade union is entitled to seek to bargain with respect to the pension benefits of persons who are no longer members of the bargaining unit.*
>
> *The Ontario High Court supported a broad interpretation of the concept of "terms and conditions of employment" in Liquor Control Board of Ontario and Ontario Liquor Board Employees' Union (1980), 114 D.L.R. (3d) 715. In upholding the decision of an arbitrator that this phrase could include pension benefits for retirees, the Court made the following comment, at 719:*
>
> > *The term "working conditions" has been considered in many cases, including Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1975), 8 O.R. (2d) 65, 57 D.L.R. (3d) 161, in which Jessup, J.A. said "working conditions" are words of very broad compass in their*

> *ordinary meaning . . . I am of the opinion that the expression "terms and conditions of employment" is even wider in scope than "working conditions." However, even within the more restricted term of "working conditions" the interpretation must encompass all matters that are involved between the employer and the employees.*

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

> *Furthermore, we cannot agree with the argument of the employer that the grievance procedure is a method of enforcing rights, under a collective agreement, rather than a right itself. The ability of an employee to grieve the employers decisions to an impartial arbitrator, with binding authority, is not just a mere process as the employer suggests, but a substantive right which, in Saskatchewan, must be bargained for and won at the bargaining table.*
>
> *.... the Board concludes that "terms and conditions" of employment referred to in Section 2(d) reflect any and all articles or provisions embodied in the agreement arrived at in negotiations between the parties while bargaining collectively pursuant to Section 2(b) of the Act. The Ontario High Court took a similar view in re: Liquor Control Board of Ontario v. Ontario Liquor Board Employees Union (1980), 114 D.L.R. (3d) 715 at 718. In our view, to conclude otherwise would attribute an interpretation that is not in accord with the purpose and objects of the Act or within the clear meaning of Section 2(b) and 2(d).*

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

> *The Board has thus evidenced an inclination to interpret "terms and conditions of employment" to include a wide range of items which touch the working environment for employees represented by a trade union. …*

[61] In the *Saskatoon Board of Police Commissioners* case, *supra*, the Board was required to determine whether the employer's unilateral implementation of an early retirement program should have been bargained with the union prior to offering it to the employees. The employer was acting in response to significant budget reductions and devised the program to generate overall cost savings. The early retirement program contained specific eligibility criteria and a monthly bonus payment until the normal retirement age of 60 years. The employer distributed information related to the program to the employees without first presenting it to or discussing it with the union. The union argued that the employer violated s. 11(1)(c) of the *Act* by offering the program directly to employees and not engaging in collective bargaining with the union representing those employees. The union argued that the employer was obligated to bargain with it because the program constituted an alteration in the employees' terms and conditions of employment and referred to a provision in the collective agreement concerning "superannuation and retirement." The union also argued that the introduction of the program may have an impact on a number of important issues including the future health of the pension plan and the availability of funds to bargain other issues with the employer. In response, the employer argued that it has no obligation to bargain the early retirement program because it does not constitute a term or condition of employment and, in the alternative, even if it is a term or condition of employment, the provisions of the program lie within the prerogative of management to implement without bargaining with the union.

[62] The Board went on to answer the first of the two necessary questions, that is, whether the early retirement program is a term or condition of employment, stating at 162:

> *In this case, the terms on which a certain group of employees were to be entitled to sever their connection with the Employer were to be modified for a specific period of time. There can be little doubt, in our view, that this constituted a term or condition of their employment.*

[63] At this stage of the analysis, the question is not whether the CRC policy is a matter the parties must negotiate – that is answered under the second part of the analysis. At this point, the question is simple and direct – is this a term or condition of employment, or in other words, is this policy an item which touches on the work environment of the employees represented by the Union? In our view, it does, as those terms are applied to current employees who are represented by the Union. Clearly, the terms of the policy fall within the description of "all matters that are involved between the employer and the employees." The terms of the policy, as they apply to current employees, are not a mere process but rather, are a "substantive right" of the employer – prior to the 2005 revision, the Employer could not (and did not) require a very large number of current employees to periodically prove they had no relevant criminal convictions, nor were they required to prove the same when they applied for a new position covered by the policy, let alone personally pay to prove that to the Employer. In addition, a new condition has been placed on a current employee's ability to obtain a permanent appointment to a position, beyond the agreed-to probationary period, should fingerprint analysis be required. Clearly, all of these matters touch on the work environment of current employees.

[64] It matters not at this stage of the analysis, that an employee's criminal conviction may have always held some relevance to the Employer or that the Employer has applied any particular set of criteria to determine the relevance of a criminal conviction. The terms of the policy are no less "terms and conditions of employment." What we are concerned with is not the consequence of having a criminal conviction, but rather the right of the Employer to request one in certain circumstances and the method used to obtain a CRC.

[65] We note that the decision of the Board referred to above focuses on or frames the question in terms of what the parties "may" negotiate. In many cases, including the Board's decisions in *Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations, supra,* (cited by the Union in this case) and *Saskatchewan Power, supra,* (as cited in the *Saskatchewan Association of Health Organizations, supra*), the Board was looking at the employer's direct negotiation of issues or matters with the employees, thereby undermining the exclusive status of the union afforded by s. 3 of the *Act*. Also, in these cases, the fact situations involved the

giving of some benefit to the employees, in contrast to the present situation before us, where the employees are now being required to do something for the Employer. However, this is a distinction without a difference. In an employment relationship, there are two sides to the bargain – both the employer and the employees (through the union) have benefits and entitlements under the collective agreement and in the relationship generally. That the policy in question requires the employees to do something for the benefit of the Employer makes it no less a term and condition of employment than if the employer had done something to benefit the employees without bargaining it with the union. For example, should the employer decide to unilaterally require an employee to attend a two-hour training session each week in addition to working a regular work week of 37 ½ hours, as required by the terms of the collective agreement, the training session and the extra hours the employee must devote to the employer are still terms and conditions of employment. Furthermore, the case law makes it clear that a matter is still a term or condition of employment whether it is to the employee's benefit or not – i.e. both the unilateral payment of a bonus and a unilateral deduction from an employee's pay would both be considered terms or conditions of employment – it matters not that the employer unilaterally decides to pay more or less to an employee. In all situations though, the critical question is whether the issue is a term or condition *that the employer must bargain with the union.* That is the question we must now answer.

Whether the CRC policy is a term or condition of employment that must be bargained with the Union?

[66] This question is at the crux of our analysis. Not all terms and conditions of employment must be bargained by the parties. This is recognition of the acceptance of the Employer's argument that not all policies instituted in the workplace must be bargained with the Union. In other words, there are some terms and conditions of employment that lie within management's prerogative, giving effect to the management's rights provision typically contained in a collective agreement.

[67] Section 5(c) of the *Act* is the statutory source of the employer's obligation to "bargain collectively" with the union that is certified to represent its employees. The obligation to "bargain collectively" is defined by reference to that term in s. 2(b) of the *Act*, which requires the parties to bargain in good faith the conclusion of a collective bargain agreement, which term is defined in s. 2(d) of the *Act* and includes "an

agreement in writing … setting forth the terms and conditions of employment or … other working conditions of employees."

[68] The statutory role of the union that gives it exclusive status to represent those employees is contained in s. 3 of the *Act* which reads as follows:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose* ***shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively****.*
>
> [**emphasis added**]

[69] Therefore, once the union is certified to represent employees of an employer, the principle of exclusivity applies. That principle, and its application, was described by the Board in the *Saskatoon Board of Police Commissioners, supra*, at 164:

> ***The attainment of a certification order under The Trade Union Act confers upon a trade union the right to be accorded exclusive status as the representative of members of the bargaining unit in negotiating their terms and conditions of employment with their employer.*** *This exclusive status as a bargaining agent for employees is reinforced in a number of ways in The Trade Union Act, and it is evident from many of the decisions of this and other labour relations boards that it is a large part of the task of such a tribunal to safeguard the exclusive status which is enjoyed by the certified trade union.* ***It is important in this respect that a trade union be seen as the channel through which changes in the terms and conditions of employment which affect employees are effected, and that the power of a unionized employer to deal unilaterally with those terms and conditions be placed under limitations which are well-understood and clear.***
>
> [**emphasis added]**

[70] The Board has determined, as have other labour relations boards and courts, that the employer's obligation to bargain in good faith is composed of an obligation to recognize the union as the exclusive bargaining representative of the

employees for the purpose of bargaining collectively and an obligation to make every reasonable effort to conclude a collective agreement (see *Saskatchewan Association of Health Organizations, supra* at para. 31)). As in the *Saskatchewan Association of Health Organizations,* case, *supra*, the matter before us relates to the first obligation, that is, the obligation to recognize the exclusivity of the union. In that case, the Board went on to say at 633:

> *[32] … In general terms, once a certification order is issued, the employer must address the certified union with its proposals and concerns related to the terms and conditions of employment of its employees. …*
>
> *[33] The exclusivity principle was reinforced by the Supreme Court's later decision in McGavin Toastmaster Ltd. v. Ainscough (1975), 54 D.L.R. (3d) 1 where the Court ruled at 6 as follows:*
>
>> *The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.*

[71] It was recognized in the *Saskatoon Board of Police Commissioners*, decision, *supra*, that tribunals "have had some difficulty defining the elements of the personal relationship which continue and which can be addressed without the involvement of the trade union." To assist in this determination, the Board examined an arbitrator's decision in *Government of British Columbia v. British Columbia Government Employees' Union* (1987), 30 L.A.C. (3d) 138, where the arbitrator concluded that "*there would be circumstances where an employer could make arrangements with an employee concerning how the provisions of the collective agreement would be applied to the unique circumstances of that employee, but suggested that* ***it was not open to an employer to do anything which would have the effect of modifying, adding to or derogating from the provisions themselves****.*" [**emphasis added**] However, the Board

also noted that an arbitrator's jurisdiction is limited by the provisions of the collective agreement, whereas, *"[i]t is our view that the jurisdiction of this Board is not circumscribed by the limitations which arise because the power of arbitrators is derived from the collective agreement."* This leads us to the obvious conclusion that the Board's inquiry into whether a term or condition of employment is such that it must be negotiated, goes beyond looking at what the parties have specifically agreed to in their collective agreement. Certainly, the parties are not limited in bringing forward new matters to be negotiated for inclusion in the collective agreement. It follows that those new matters may have to be negotiated rather than unilaterally implemented by one of the parties.

[72] It is for these reasons that we reject, in part, the Union's argument in this case that the crucial question is about "impact" on the employees' terms and conditions under the collective agreement. The real question is whether the policy amounts to terms and conditions touching or impacting on the employees' work environment in such a way that they must be bargained with the union as the employees' exclusive bargaining representative. We do this by examining not only whether the terms and conditions in the policy conflict with the provisions that parties have already agreed to in the collective agreement, but also by examining whether the subject of the new matter either touches upon subjects already addressed in the collective agreement or ***adds*** new requirements to the employment relationship that are similar to other provisions collectively bargained by the parties in the past. This latter point was made in the *Saskatoon Board of Police Commissioners* case, *supra*, where the Board examined the parties' collective agreement and found that "superannuation and pension" provisions which addressed an employee's severance from their employment, were similar in nature to the new matter of the early retirement program unilaterally implemented by the employer.

[73] It is for these reasons that we also reject the Employer's arguments that it is not the CRC policy that impacts employees' terms and conditions of employment but rather, it is the criminal conviction revealed by the CRC that impacts employees' terms and conditions of employment (of course, depending on the application of the four criteria mentioned). As previously mentioned, the difficulty with the Employer's argument is that it is characterizing the *consequences* of the CRC as the potential "term or condition" rather than the Employer's right to require a CRC and the method used to

obtain the CRC. In turn, this also allows the Employer to argue that the manner in which the Employer has assessed the relevance of a criminal conviction and decided the consequences to the employee of a relevant criminal conviction, has not changed since the 2005 revision. With respect, these arguments miss the point. The new matter which is the term and condition of employment is the requirement to obtain a CRC, as well as the effect of that process – it requires action by current employees with resulting inconvenience, embarrassment and/or a financial cost to the employee, and it potentially extends probationary periods of employees in some cases.

[74] It is most useful to consider this analysis in the context that it was applied in the *Saskatoon Board of Police Commissioners*, decision, *supra.* In that case, the employer had argued that the early retirement program "was entirely novel and unprecedented in the context of the relationship between the employer and the union," and that the collective agreement did not contemplate an incentive package related to early retirement. Therefore, it argued, it is within the employer's prerogative "to devise and implement such a plan without consultation with the union." The employer also pointed to provisions of *The Police Act* that give it certain managerial responsibilities - statutory duties that place a greater importance on its obligations to act responsible and be held publicly accountable than on its obligations to collectively bargain with the union.

[75] The Board, in *Saskatoon Board of Police Commissioners*, determined that it could find that there was an obligation to bargain a term or condition of employment (such as the early retirement program) even if there were no such term or condition presently in the collective agreement because its jurisdiction is not limited in the sense that an arbitrator is limited. The Board also stated that it was also relevant that the parties had included a provision in their collective agreement dealing with the "pension plan and related matters." The Board explained the relevance of this provision in the following terms, at 167:

> *It is also relevant that in this case the parties have addressed the "pension plan and related matters" in Article 16 of the collective agreement, suggesting that they wished to include within the scope of terms and conditions considered in bargaining between them the issue of the terms on which departure from the workforce through retirement would occur. It is not clear from the wording of this provision what sanctions would ensue upon a finding that it*

> *had been violated; its existence does, however, serve to underline and to reinforce the obligation of the Employer to engage in bargaining concerning terms and conditions related to these issues.*

[76] In that case, the Board concluded that even though the offer of the early retirement program may have been attractive to some employees, it was still a threat to the bargaining strength of the union as it weakened the status of the union as representative of the employees, "in a way which may be equally damaging as the infliction of a penalty which the Union is powerless to prevent." The Board observed that the program offered by the employer proposed payment to employees to induce them to end their relationship with the employer and their membership in the union, ending all future claims in the employment relationship. The Board concluded that the union was entitled to an opportunity to consider the impact of the program on the employees they represent, both those who qualified for the program and other employees who may be impacted in a less direct way by the program. The Board declared the employer to be in violation of s. 11(1)(c) of the *Act* by failing to bargain collectively with the union with respect to the early retirement program and by offering it directly to the employees without reference to the union.

[77] On the basis of the above authorities, it is therefore important that we exam: (i) whether the policy conflicts with, modifies or derogates from any provisions currently in the collective agreement; (ii) whether the policy contains provisions that relate to any provisions covered by the collective agreement; or (iii) whether the policy covers matters that are similar in nature to other matters that the parties have found obligated to bargain the past. We note that the latter two points of inquiry may be similar and focus on whether the policy is an "addition" to the contract between the Employer and the Union. We are not, as the Employer suggests, limited in our inquiry to determining whether the policy represents a "change" to existing terms and conditions of employment (which it argued had not been proven because an employee was never permitted to have a relevant, significant criminal record, without consequences). It is clear, through the authorities, that we are also concerned with whether the matter in question (the CRC policy) represents an *addition* to the collective agreement.

[78] It is clear that certain terms in the policy conflict with those in the parties' collective agreement. The most obvious one is how the requirements of the policy potentially affect probationary employees. In the event that fingerprint analysis is required, the CRC takes longer, often 8 months and up to one year. That the CRC policy requires that an individual not be appointed to a position permanently until a record check is complete, results in this term or condition being in direct conflict with an agreed-upon term in the collective agreement – that the probationary period (the time before an employee receives the appointment permanently) is six months for most employees.

[79] As previously stated, we must also examine whether the policy "adds" to the terms of the collective agreement in a way that it should be subject to the duty to bargain collectively. In our view, several of the terms of the policy do.

[80] One way in which the terms of the policy add to the collective agreement is the fact that there is a new requirement on employees to pay the cost of the CRC, in circumstances where they are seeking a new position through promotion, transfer or demotion. It is apparent that this requirement may be more onerous for some employees than others given that there are a number of temporary or term positions in Government of a more casual or time limited nature, and possibly situations where employees have multiple appointments. Given that the policy contains a new requirement to obtain the CRCs and a new requirement to pay for those CRCs, we find that these are additional terms or conditions of employment for current employees which must be bargained with the Union.

[81] We also find that the new requirement that current employees in CRC designated positions must obtain a CRC every five years is a term or condition of employment that must be bargained with the Union. Although there is no cost to the employee associated with obtaining the CRC, the requirement to obtain and produce one is a term or condition to be bargained because an employee is, in essence, being asked to re-prove their qualifications or fitness to continue to work in a position they already occupy and had obtained permanently through proper appointment procedures. To add a new requirement and condition to continue in one's permanent position amounts to a term of employment to be bargained.

[82] In reaching the conclusion that the policy contains additions to the terms in the collective agreement, what we also find relevant is that the requirements in the policy are of the same type as other terms already included in the collective agreement. In other words, we are guided by what the parties have in the past said are terms and conditions of employment to be bargained. Some analogous examples from the parties' collective agreement include:

(i) *Article 19.04(a) - allows management to request that an employee provide a doctor's certificate and if the Employer so requests, it will pay the doctor's charge for such a certificate;*

(ii) Article 23.02(6) – indicates that any time the minimum qualifications are changed for a position, the Union shall be informed and shall have the opportunity to make representations before the qualifications are finalized;

(iii) Article 23.02(d) – prescribes what occurs where a position is reallocated or reclassified to a higher level, including whether incumbent continues in position, is given time to establish qualifications, is examined, obtains transfer rights, or is placed on a re-employment list;

(iv) Article 22.14 – the Employer agrees to reimburse the professional fees employees must pay;

(v) Article 26.01 – how the probationary period is handled in the event the employee is on workers' compensation benefits during the probation period (i.e. – a recalculation of probationary period);

(vi) Article 27 – deals with employees who have tuberculosis – rules around an investigation by management of the employee, what happens to their employment status, how they are compensated, the handling of sick leave, etc.;

(vii) Article 28.04 – under the heading "Working Conditions", it indicates that the Employer will pay for the cost to permanent or probationary employees for any required annual examination fees or annual trade certificates issued by the Department of Labour;

(viii) Article 28.06 – also under the heading "Working Conditions", it indicates that where a position requires professional certification or membership in a professional association, the employee must maintain that certification or membership to remain in their classification;

(ix) Article 29 – provides extensive terms and conditions applying to probationary periods, including: (a) that a person shall be on an initial probationary period of 6 months, although that period may be extended up to 12 months through an agreement with the Union, at which time the person becomes a permanent employee or is terminated and, (b) that a limited number of classifications have a 12 month probationary period;

(x) Article 29.02 – indicates the reversion rights that employees have if they do not pass their probation; and

(xi) Letter of Understanding #96-10 – includes provisions as to what occurs if an employee is charged with a criminal offence resulting from action carried out in good faith and within the scope of their employment duties.

[83] In listing the above articles of the collective agreement, we are not suggesting they relate directly to the CRC policy (except those related to probationary positions as we have mentioned above); however, there may be some overlap between these terms and conditions and those contained in the CRC policy. Most importantly though, we find that the above provisions demonstrate what the parties have in the past determined to be terms and conditions of employment subject to the obligation to bargain collectively. We find that these provisions are so similar in nature to those in the CRC policy that there can be no doubt that the CRC policy is also a term or condition that must be bargained by the parties, to the extent that the provisions of it apply to current employees. For example, the provisions dealing with Employer requests to provide a medical certificate, rules around the contracting of tuberculosis, and the requirements to maintain professional certification and memberships, all speak to an employee's fitness to work or a requirement on the employee to continue to establish their qualifications for their current position in much the same way that the CRC policy requires current employees to obtain periodic CRCs and to obtain CRCs for new positions they apply for. We also note that Article 23.02(b) specifically requires the Employer to advise the Union about new minimum qualifications for any position and that the Union has the opportunity to make representations about it (which is a form of bargaining to a limited extent). Furthermore, there are a number of provisions that address the Employer's payment for certain requirements, including a medical certificate, professional fees and memberships, and trade certificates, all of which bear striking similarity the requirement under the CRC policy to pay the costs of a CRC in certain circumstances. Lastly, there are a number of provisions that address the impact

to an employee of an Employer requirement or action including: (i) Article 23.02(d) that deals with consequences and employee rights upon the reclassification of a position; (ii) provisions dealing with how the probationary period is handled in the event of the employee suffering an injury compensable under worker's compensation; (iii) the provisions dealing with employment consequences if an employee contracts tuberculosis; (iv) the rights of reversion upon failure of probation; and (v) what occurs when an employee is charged with a criminal offence while working. All of these terms and conditions address the impact to an employee of an Employer rule or decision. They serve to further illustrate that the consequences and impacts of the CRC policy, including its impact on probation, appointments, or continued employment in a current position, are matters similar to those of which the parties have in the past treated as terms and conditions of employment subject to the duty to bargain collectively.

[84] It is for all of these reasons that we find that the CRC policy, as it applies to current employees, is a term or condition of employment that must be bargained with the Union. It is impossible to separate out those provisions of the policy that must be bargained and those that need not be bargained. It is the key components of the policy that we have found to be terms and conditions subject to be bargained and these are not only interrelated but are also related to other terms in the policy. The only exception is those provisions in the policy relating to new hires. These individuals are not yet represented by the Union or covered by the collective agreement and therefore, the terms of their hiring are not subject to the obligation to bargain. However, once those persons are hired, the terms and conditions that apply to them, even as probationary employees, are necessarily to be bargained with the Union.

[85] The Employer argued that the CRC requirement is no different than the Employer requiring an employee to supply, at his or her own cost, other items to prove qualifications, such as transcript of marks or a special driver's license. Except to the extent that those requirements apply to new hires (not yet represented by the Union or subject to the collective agreement), we disagree. We find that the CRCs and terms of the policy are more similar to the items bargained between the parties, as identified above and, in particular, the requirements for professional membership and certification, trade certification or medical fitness certification, than they are to providing a transcript of marks or a driver's license. In addition, there was no evidence led at the hearing that

these were requirements for any position at Valley View Centre after the initial hiring stage.

[86] On the basis of the above, we conclude that the Employer, by its failure to negotiate the CRC policy with the Union, as it applies to current employees, has violated s. 11(1)(c) of the *Act* and we will issue a declaration to that effect.

[87] We wish to make one further note before moving to the issue of remedies. That the union was entitled to the opportunity to consider the impact of the early retirement program in *Saskatoon Board of Police Commissioners*, was particularly important because the parties were in the process of bargaining a renewal collective agreement at the time the program was offered. The Board stated, at 168:

> *… We have often stressed that it is not the task of this Board to instruct the parties as to what items they discuss or what positions they take on those issues at the bargaining table. We have also indicated, however, that it is reasonable for a trade union to expect that an employer will not only give a clear picture of its bargaining position and the basis for it, but will inform the union of any important plans or initiatives which may affect collective bargaining, so that the union will have an opportunity to take those into account.*

[88] Similarly, in the case before us, the revised CRC policy was rolled out only months after the parties concluded and ratified their collective agreement. Even if it is true that no one bargaining in relation to the Valley View Centre knew that the policy was being revised at the time the parties concluded their discussions in January 2005, there was opportunity for the Employer to advise the Union prior to the signing of the collective agreement. In addition, there was an opportunity to discuss the policy at the mid-term negotiations held for the purpose of dealing with SPMC's transition to executive government. We also note that both of the Employer's witnesses stated that if they had been aware of the Government's intention to revise the CRC policy when they were in negotiations with the Union, they would have raised the issue. While Mr. Zerr did not appear to go as far as Ms. McLeod in terms of stating that the Employer had an obligation to bargain the issue had they known about it, the significance of that evidence is that it again illustrates that these types of provisions would normally be discussed with the Union. However, what is also important is that had the Employer disclosed its

intentions regarding the CRC policy during negotiations with the Union (which it was required to do, on the basis that parties are required to disclose "important plans or initiatives that may affect collective bargaining"), the Union would have had the opportunity to bargain that issue in the context of other issues on the table at the time. We simply make note of this to indicate that we are aware the Union lost this opportunity in addition to simply the lost opportunity to bargain the CRC policy on its own.

Remedies:

[89] As stated, we will issue a declaration that the Employer has violated s. 11(1)(c) of the *Act*. We will also issue a cease and desist order to stop implementation or application of the CRC policy until the Employer bargains collectively the CRC policy with the Union. However, in making this order, we note with interest the comments of the Board in the *Saskatoon Board of Police Commissioners,* decision, *supra*, where the Board dealt with the employer's argument that it had an overriding obligation to act responsibly and protect the public, an argument not unlike that which underlies the Employer's submissions in the present case. In *Saskatoon Board of Police Commissioners*, the Board stated at 168:

> *We accept that the Employer has important statutory responsibilities, and that the difficulties of carrying out those duties at a time when the civic authorities to which the Police Service is accountable has imposed financial constraints are serious. Witnesses for the Employer gave evidence to show that, once they decided that an ERIP would be a useful measure, they were under severe time constraints because the funds which were earmarked for the program must be returned to the City of Saskatoon if they are not expended before December 31, 1993; this evidence was credible, and we must accept it.*
>
> *These factors do not, however, create an exemption for the Employer from fulfilling obligations which are imposed by The Trade Union Act. Many employers experience financial exigencies, and many might say that they would find it more efficient or more satisfying to address those exigencies without subjecting them for their solution to the complex process of collective bargaining.* ***In our view, neither financial pressures nor responsibilities to the public can be relied on to justify a departure from those rights and obligations set out in The Trade Union Act.***
>
> *Whether the ERIP would run into heavy weather in collective bargaining, or whether the Union would be receptive, is a matter*

> *of speculation. It is possible that the Employer would be unable to convince the Union that the ERIP offers a unique opportunity, that it would serve the interests of both parties, or that the funds would not be available for any other purpose dearer to the heart of the Union.* ***We feel, nonetheless, that an employer is not entitled to resort to unilateral implementation of a good idea at the cost of weakening the effectiveness of collective bargaining.***
>
> [**emphasis added**]

[90] At the hearing, the Employer provided a very strong rationale for revising its 2005 CRC policy – it became known that the Government had been defrauded of enormous sums of public monies by two of its employees. In concluding that the Employer was obligated to negotiate the CRC policy with the Union, we are in no way suggesting that an expanded CRC policy with a more centralized approach is not a good idea. Indeed, the Union acknowledged the same in its argument. However, we agree with the Board's comments in *Saskatoon Board of Police Commissioners, supra,* that a good policy or program should not come at the cost of weakening the effectiveness of the collective bargaining agent. It is for these reasons that we must issue the cease and desist order. However, we note that throughout the course of the hearing, some very insightful observations were made about the operation of the policy and the impact of its provisions, and it was apparent to the Board that the parties might benefit from further discussions of the issues that have arisen, before the Board's order takes effect. We also are generally aware that our Order may have some implications for other Government workplaces, employees and bargaining agents. In light of our observations, we find it most appropriate to suspend the operation of the Board's order for a period of ninety (90) days to allow the parties an opportunity to bargain collectively with respect to the terms of a new CRC policy.

[91] The Union made note in its argument that we are not dealing with the question of what an employer may be able to do if collective bargaining reaches an impasse, only with the Union's lost opportunity to negotiate a CRC policy. We agree with this point. The consequences that might occur should the parties collectively bargain the issue within the meaning of the *Act* and reach an impasse, is not an issue before us and we will not speculate on what the parties' rights and responsibilities are should that occur.

[92] We have declined to issue an order that the Employer file a rectification plan in accordance with s. 5.1 of the *Act*, as requested by the Union. It is our view that we can address the financial loss of the employees who spent their personal funds on a CRC by making an order of reimbursement to that effect. With respect to the Union's suggestion that the Board must somehow remedy situations where an employee was denied a promotion because of a CRC under the policy, we believe that is an issue more appropriately dealt with by an arbitrator (particularly where the dispute involves the question of whether the criminal conviction was relevant). To the extent that the Union's dispute is that the Employer would not have discovered a criminal conviction had the employee not been required to provide a CRC under the impugned policy, it is practically impossible for the Board to fashion an appropriate remedy that would be enforceable by the Union. The Employer's knowledge of the criminal conviction simply cannot be erased. In our view, this matter is best resolved through a cease and desist order and the suspension of the operation of our order for ninety (90) days to allow the parties the opportunity to negotiate a new CRC policy.

Summary:

[93] In the circumstances set out above, we have determined that the Employer has violated s. 11(1)(c) of the *Act* by failing to negotiate the CRC policy with the Union, as that policy applies to current employees. We therefore order as follows:

1. Under s. 5(d), a declaration that the Employer violated s.11(1)(c) of the *Act*;

2. Under s. 5(e) that the Employer cease and desist from any further violations of s.11(1)(c) and specifically, that it not implement or apply the CRC policy revised in 2005, as that policy applies to current employees, unless and until it negotiates a new policy with the Union;

3. Under s. 5(g) that the Employer pay to affected current employees the monetary loss they have suffered as a result of being required

to pay for any and all criminal record checks since September 7, 2005;

4. That the operation of this order be suspended for a period of ninety (90) days, or such further period as may be agreed to by the parties or ordered by the Board's Executive Officer, to allow the parties an opportunity to collectively bargain a revised criminal record check policy; and

5. That the Board reserves jurisdiction to deal with any issues arising out of the implementation of this Order.

DATED at Regina, Saskatchewan, this **20th** day of **November, 2008.**

LABOUR RELATIONS BOARD

____

Angela Zborosky,
Vice-Chairperson