Labour Relations Board
Saskatchewan

UNITED STEELWORKERS OF AMERICA, LOCAL 5917, Applicant v. WHEAT CITY METALS, A DIVISION OF JAMEL METALS INC., Respondent

LRB File No. 060-05; May 19, 2005
Chairperson, James Seibel; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Jeff Grubb, Q.C. and Noah Evanchuk

Statutory interpretation – Interpretative rules – Board employs contextual approach in interpreting provisions of *The Trade Union Act* – Board starts by identifying purpose of *The Trade Union Act*, then addresses plausibility of competing interpretations to determine which is more consistent with legislative text – Board also considers efficacy of proposed interpretations in terms of ability to promote objectives of *The Trade Union Act* and acceptability of both interpretations.

Statutory interpretation – Interpretative rules – Board confirms that ambiguities and doubtful expressions in *The Trade Union Act* should be resolved in favour of establishing and maintaining collective bargaining rights for employees.

Statutory interpretation – Contracting out of legislation – Board confirms that provisions of collective agreement invalid in so far as provisions inconsistent or conflict with provisions of s. 33 of *The Trade Union Act*.

Duty to bargain in good faith – Surface bargaining – If proposal for collective agreement term in excess of three years may be pressed to impasse and industrial action taken thereon, stage set for bargaining in bad faith or surface bargaining – Party may have no intention of honouring what other party believes has been bargained in good faith by both parties.

Collective agreement – Clause – Duration of agreement – Board reviews interplay between s. 33 and s. 44 of *The Trade Union Act* – Legislature, in enacting s. 33, could not have intended to provide that agreement may be renegotiated after three years without ability to take industrial action to effect changes sought.

Duty to bargain in good faith – Non-negotiable items – Duration clause - Party may insist on negotiating collective agreement with term that does not exceed three years – Party may make proposal for agreement with term in excess of three years and parties may explore that option but proposal may not be pressed to impasse nor may industrial action be predicated thereon.

Duty to bargain in good faith – Impasse – Board discusses concept of impasse in bargaining and concludes that, in circumstances of case, employer remained insistent on position without realistic possibility of position being changed – Employer pressed to impasse insistence that collective agreement be for five-year term.

Duty to bargain in good faith – Refusal to bargain – Employer refused to make every reasonable effort to achieve collective agreement by insisting on five-year term with no wage increases, by not attempting to justify, explain or rationalize this insistence and by not acceding to union's request to discuss shorter term agreement where unlawful to press to impasse issue of term of collective agreement in excess of three years – Board finds violation of s. 11(1)(c) of *The Trade Union Act*.

Lock-out – Unlawful – Lock-out aimed at inducing agreement over terms and conditions of employment part of collective bargaining process contemplated by *The Trade Union Act* – Lock-out aimed at dissuading employees from exercising rights under *The Trade Union Act* not lawful – Lock-out in this case predicated upon, had its foundation in and was imposed in furtherance of unfair labour practice and therefore unlawful.

Duty to bargain in good faith – Remedy – Board notes that issue of remedy for failure to bargain collectively not easy to resolve - Board finds employer guilty of unfair labour practice, orders employer to bargain collectively with union and not insist upon term of agreement in excess of three years, orders employer to cease unlawful lock-out and orders employer to pay employees monetary loss arising from unlawful lock-out.

***The Trade Union Act*, ss. 2(b), 2(d), 2(j.2), 3, 5(e), 5(g), 11(1)(c), 11(7), 33, 34 and 44.**

REASONS FOR DECISION

Background:

[1] United Steelworkers of America, Local 5917 (the "Union"), is certified as the bargaining agent for a unit of employees of Wheat City Metals, A Division of Jamel Metals Inc. (the "Employer"). The latest collective bargaining agreement between the parties has an effective date of January 2, 2002 and expired on December 31, 2004 ("the expired collective agreement"). On or about November 4, 2004, the Union gave notice in writing to the Employer pursuant to and within the 30/60-day time period

mandated by s. 33(4) *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"), to negotiate a revision of the collective agreement.

[2] On March 28, 2005, the Employer presented the Union with a "final offer" (the "Employer's final offer") advising that if it was rejected or not accepted by the Union by noon on April 1, 2005, the offer would be withdrawn and notice of lock-out would be served. The duration of the proposed agreement according to the terms of the Employer's final offer was essentially for five years, from the date of ratification to December 31, 2009. The Union responded by letter dated April 1, 2005, prior to the deadline for acceptance of the Employer's final offer, that to insist upon a collective agreement with a term exceeding three years and to press the matter to the point of impasse was illegal and constituted bargaining in bad faith. Later that day, the Employer provided written notice withdrawing the Employer's final offer and then providing a notice of lock-out to the Union and the Minister of Labour pursuant to s. 11(7) of the *Act*. The approximately 39 employees were locked out commencing April 4, 2005, and remain so.

[3] On April 6, 2005, the Union filed an application with the Board alleging that the Employer had committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* by failing to bargain collectively. The Union also filed an application seeking an order for interim relief pursuant to s. 5.3 of the *Act*. The interim application was scheduled for hearing on April 13, 2005. At that time, the Board declined to consider making an interim order on the basis of the affidavit evidence and directed that the application proper be scheduled for an expedited hearing on April 19 and 20, 2005 in order to hear *viva voce* evidence and full argument. This approach is similar to that taken by the Board in *Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd.,* [2000] Sask. L.R.B.R. 223, LRB File No. 079-00.

Evidence:

[4] The Board heard extensive evidence respecting the course of the negotiations and bargaining between the parties from the respective chief spokespersons for the negotiating committees of each of the Union and the Employer, Michael Park, a staff representative of the Union for eleven years and Ross Gair, controller for Jamel Metals Inc. for the past two years. The testimony of each gentleman with respect to the chronology of events did not differ markedly or materially, unless

otherwise indicated in these Reasons for Decision. Debbie Thomas, the Employer's Regina office manager for nearly sixteen years and a member of the Employer's committee that negotiated the expired collective agreement between the parties and Karen Strewchuk, the Jamel Metals Inc. Winnipeg office and payroll administrator for nearly twenty years, testified, respectively, regarding uncontroverted details in relation to certain aspects of the expired collective agreement between the parties and the collective agreements covering bargaining units of employees at the divisions of Jamel Metals Inc. in other cities.

[5] The Employer operates a scrap metal collection and recycling operation adjacent to the IPSCO Inc. steel manufacturing plant in Regina, which is its main customer. The Union was certified as the bargaining agent for a unit of the Employer's employees pursuant to a certification Order issued by the Board on August 18, 1988. One of the earlier collective agreements between the parties was for a term of four years from August 1, 1990 to July 31, 1994 (the "1990-94 collective agreement"), although the first year had passed by the time the agreement was signed by the parties. Although the expired collective agreement was for a three-year term, the Employer's final offer proposal during bargaining therefor (made on December 11, 2001) was for a contract with a four-year term. The failure of the Union to accept that offer was followed by the Employer locking-out the employees from January 6 to February 15, 2002. During those negotiations, in its January 10, 2002 counterproposal the Union had stated that it believed the maximum term of a collective agreement allowed by law to be three years. The contract that was eventually settled was for a three-year term.

[6] The Employer's parent company, Jamel Metals Inc., also operates scrap metal collection and recycling operations at plants in Thunder Bay, Ontario, Winnipeg, Manitoba, and both Calgary and Edmonton, Alberta. The Winnipeg and Thunder Bay operations are organized and represented by the International Union of Operating Engineers, and the Calgary and Edmonton operations by different locals of the United Steelworkers of America. The duration of the current collective agreements with the unions in those locations are as follows: Thunder Bay, 4 years; Winnipeg, 5 years; Calgary, 4 years; Edmonton, 4.5 years.

[7] Following is a summary of the facts regarding the course of negotiations for revision of the expired collective agreement that, in our opinion, were not in material dispute between the parties.

[8] In November 2004, the Union provided valid notice to bargain a revision of the collective agreement within the 30/60-day period mandated by s. 33(4) of the *Act*.

[9] The parties' first negotiating meeting was December 8, 2004 at which time they discussed contract language issues and agreed to several matters. They agreed to postpone discussion of monetary issues to their next meetings, which they scheduled for January 5, 6, 12 and 13, 2005. Mr. Gair, on behalf of the Employer, expressed his concern regarding the impending expiry of the then current collective agreement on December 31, 2004 and the desire of the Employer to achieve a revised agreement quickly.

[10] At the January 5 and 6, 2005 meetings the parties exchanged proposals regarding monetary issues. The Employer's proposal was for a six-year agreement to December 31, 2010, with no wage increases or other payments (e.g., lump sums) for the entire term. The Union's proposal was for a two-year term and "a fair and equitable wage increase," enhancements to the health benefits package, an increase in the weekly indemnity (short-term disability) benefit from $450.00 to $500.00 and an increase in the basic pension benefit for all past and future service from $29.00 per month per year of service to $50.00. During their meeting, Mr. Park, on behalf of the Union, commented to Mr. Gair that "money buys term," that it "would cost" the Employer to obtain a three-year agreement and that the Employer likely could not afford an agreement with a longer term.

[11] At the parties' meeting of January 13, 2005, Mr. Park identified wages and enhanced pension benefits and weekly indemnity benefits as three issues of priority to the Union. The Union's proposal regarding the pension benefit was reduced to $40.00 per month per year of service. Mr. Park also indicated that the Union might look at an agreement with a term of three years, "but it would be expensive." Mr. Gair indicated to Mr. Park that the Union would have to address certain matters of importance to the Employer including poor production, safety and absenteeism, by looking at putting

incentives in the collective agreement. Mr. Gair also indicated that the Employer would change its proposal to an agreement with a five-year term. After the parties met in caucus, the talks broke off. Mr. Park advised Mr. Gair that the Union was seriously concerned about the idea of making safety issues subject to incentives in a collective agreement and that the membership would have to be consulted.

[12] On January 21, 2005 Mr. Park contacted Mr. Gair by telephone advising that he had some ideas for discussion on the matters raised by the Employer with respect to production and safety, but that he could not meet until February 15, 2005.

[13] Mr. Gair sent Mr. Park a letter dated February 11, 2005 that purported to establish a deadline for the completion of negotiations of March 31, 2005. The letter provided, in part, as follows:

> *In an effort to move this process forward I felt it necessary send (sic) this letter informing you of the Company's intention of setting a deadline for these negotiations. …Over the last three months we have been available, with very little exception, to meet with the Union. …As a result of this lack of progress, we feel it necessary to establish a deadline of March 31, 2005 for resolution of these negotiations. The establishment of a deadline is necessary to provide some level of certainty to our consumers and other stakeholders… .*

[14] Mr. Park, who said he had formed the impression that the Employer was re-directing scrap metal from the Regina plant, possibly to prepare for a lock-out, contacted Mr. Gair and asked for clarification of the February 11, 2005 letter. Mr. Gair responded to the effect that the Employer had to provide assurances to its customers that bargaining was progressing and that, although the Employer had not planned what steps it would take if the March 31, 2005 deadline for the completion of negotiations was not met, its actions would be based on how negotiations progressed. The parties agreed to meet on March 2, 2005.

[15] On March 2, 2005 Mr. Park expressly asked Mr. Gair whether the Employer was going to lock-out the employees. Mr. Gair responded that the Employer would not issue a lock-out notice on March 31, 2005. At their meeting, the Union provided a verbal counter-proposal to the Employer's last offer, including an increase of

the term of a collective agreement from two years to three years. With respect to the Employer's concerns regarding productivity, safety and absenteeism, the Union proposed the formation of a labour-management relations committee and advised that it could not consider collective agreement incentives with respect to the issue of safety. Mr. Gair indicated that he was not impressed with the Union's offer and that the Employer was not prepared to change its position with respect to a five-year agreement with no increase in wage rates for the entire term, but might look at cash bonuses for employees. He proposed that the parties meet with a mediator to assist them in bargaining. Mr. Park suggested making a joint application to the Minister of Labour for the appointment of a mediator. He forwarded the request and the Minister appointed Doug Forseth, Executive Director of Labour Relations and Mediation Division, Saskatchewan Labour, as mediator.

[16] Mr. Forseth met separately with the parties on March 9, 2005. The Union was adamant that it would not accept a five-year agreement. The Union had conducted a strike vote and obtained a strike mandate from its members in early March 2005, but no date was set for exercising industrial action. However, the Union did not advise the Employer of this fact and it only came to the Employer's attention at the March 9, 2005 meeting.

[17] Mr. Gair testified that he understood on March 9, 2005 that one of the Union's priorities was that the term of a collective agreement could not exceed three years, but his impression was that it was the least of the Union's four priorities (the others being wages, pension and weekly indemnity). The Employer made a further proposal at that time. With respect to the main monetary issues, the Employer proposed no wage increases for the entire term of a five-year agreement, but offered a $400.00 lump sum payment on the date of ratification of the agreement, a $300.00 lump sum payment on January 1 in each of 2006, 2007 and 2008 and a $600.00 lump sum payment on January 1, 2009. With respect to pension enhancement, the offer proposed an increase of one dollar per month per year of service for future service only in each of years 1, 2 and 4 of the agreement. It offered an increase in the weekly indemnity benefit effective January 1, 2007. The Union rejected the proposal and declined to make a further offer of its own that day. The talks then broke off.

[18] Shortly after the March 9, 2005 meeting, the Union advised Mr. Forseth that it was available to continue negotiations with his assistance on March 30 and 31 and April 1, 2005. The Union sent a letter to the Employer on March 18, 2005 requesting leave for the members of the Union's bargaining committee on those dates, but it was ahead of Mr. Forseth contacting Mr. Gair to firm up the dates and the Employer denied the leave request. When Mr. Forseth contacted Mr. Gair on March 21, 2005, Mr. Gair indicated that, unless the Union was prepared to tender a further offer, there was not much sense in meeting. There was no contact between the parties during the following week.

[19] The Employer sent the Union a letter dated March 28, 2005 attaching what it described as a "final offer" and advising that if it was not accepted by the Union by noon on April 1, 2005, the offer would be withdrawn and notice of lock-out served. The letter provided, in part, as follows:

> *Enclosed you will find Jamel Metals' final offer for your consideration. …If the Union rejects the offer, or fails to notify the Company of its acceptance by 12:00 noon CST on Friday, April 1, 2005, the offer will be withdrawn and notice of lockout will be served.*

[20] The Employer's final offer essentially formally embodied its offer of March 9, 2005, including an agreement with a term of five years, with no material changes. Mr. Gair agreed with Union counsel, in cross-examination, that the letter provided an ultimatum that if the Union did not accept the offer the Employer would lock out the employees.

[21] During the morning of April 1, 2005, Mr. Park sent Mr. Gair a letter by facsimile of the same date advising that, in the Union's opinion, the Employer's pressing of the proposal for an agreement of five years' duration to the point of impasse was illegal and constituted bargaining in bad faith. The letter provided, in part, as follows:

> *. . . .*
>
> *Unfortunately we are not able to accept your offer for all of the reasons we have discussed at the bargaining table. Primarily the*

> *Union will not consider a term of more than 3 years. This point I have made very clear at the table.*
>
> *I am very concerned about the Company's ultimatum to "accept the offer or be locked out". …I am sure you are aware it is in contravention of the Saskatchewan Trade Union Act to insist upon a term for a collective agreement of more than 3 years and less than one year.*
>
> *It is the Union's position that to make a term of longer than 3 years a point of impasse is an illegal position as it constitutes bargaining in bad faith. I urge you to withdraw your lock out notice and set meeting dates upon which we can attempt to negotiate a collective agreement with a term of between 1 and 3 years.*
> *. . . .*
>
> *To date the union has not had an opportunity to negotiate around a term of between 1 and 3 years and frankly we insist on our right to meet at the table to have a full discussion on a legal package prior to being subject to a lockout.*
> *. . . .*

[22] Later that day, in the early afternoon, the Employer responded with a facsimile letter dated April 1, 2005, withdrawing the Employer's final offer, as follows:

> *I am in receipt of your letter advising of the Union's rejection of our March 28, 2005 offer. Consequently the offer is withdrawn and we have no option but to proceed with issuing notice of lock-out.*

[23] A few minutes later the same day, the Employer sent the Union a facsimile notice of lock-out advising the lock-out would commence not earlier than 6:00 p.m. on Sunday, April 3, 2005.

[24] And, a short time later that same day, the Employer sent a second letter to the Union advising that it disagreed with the Union's contention that the Employer was in violation of the *Act*. The Employer sought legal advice after receiving the Union's letter and before serving the lock-out notice.

[25] Employees attending for work on the morning of April 4, 2005 were not allowed in to work and have been locked out since.

Relevant Statutory Provisions:

[26] Provisions of the *Act* referred to by counsel for the parties in their arguments or the Board in these Reasons for Decision include the following:

> *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;*
>
> *. . .*
>
> *(j) "labour organization" means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes;*
>
> *. . .*
>
> *(j.2) "lock-out" means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment:*
>
> *(i) the closing of all or part of a place of employment;*
> *(ii) a suspension of work;*
> *(iii) a refusal to continue to employ 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:

(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;

. . .

11(7) No employer may cause a lock-out unless:

(a) he gives the union or union's agent at least 48 hours written notice of the date and time that the lock-out will commence; and

(b) promptly, after the service of the notice, notifies the minister or his designate of the date and time that the lock-out will commence.

. . .

33(1) Except as hereinafter provided, every collective bargaining agreement, whether heretofore or hereafter entered into, shall remain in force for the term of operation provided therein and thereafter from year to year.

33(2) Where a collective bargaining agreement:

(a) does not provide for its term of operation;
(b) provides for an unspecified term; or
(c) provides for a term of less than one year;

the agreement shall be deemed to provide for its operation for a term of one year from its effective date.

33(3) Where a collective bargaining agreement hereafter entered into provides for a term of operation in excess of three years from its effective date, its expiry date for the purpose of subsection (4) shall be deemed to be three years from its effective date.

33(4) Either party to a collective bargaining agreement may, not less than 30 days or more than 60 days before the expiry date of the agreement, give notice in writing to the other party to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

34(1) Notwithstanding anything contained in any collective bargaining agreement heretofore entered into or, except as otherwise specifically provided therein, hereafter entered into, where either party to such agreement gives or has given notice in writing pursuant to subsection 33(4) to negotiate a revision of the agreement, the employees in respect of whom the agreement applies and the employer of such employees may, after this section comes into force and after the expiry of the term of operations provided in the agreement, commence to strike or commence a lock-out, as the case may require.

. . .

44(1) No employer shall cause a lock-out during the term of a collective bargaining agreement.

(2) No employee bound by a collective bargaining agreement shall strike during the term of the collective bargaining agreement and no person, employee or trade union shall declare, authorize or participate in a strike during that term or counsel a strike to be effective during that term.

Arguments:

The Union

[27] Mr. McLeod, counsel for the Union, argued that it constitutes a refusal to bargain collectively in violation of s. 11(1)(c) of the *Act* to press to impasse a collective bargaining proposal for an agreement with a term exceeding three years. That is, while it is permissible to propose and to negotiate in respect of a contract term exceeding three years, it cannot be made a condition for settlement of an agreement. In the present case, throughout the parties' negotiations, the Employer was stolidly set in proposing a six- and then a five-year collective agreement, while the Union was adamant that it be for three years or less. The Employer imposed a lock-out because the Union refused to accept the Employer's final offer for a five-year collective agreement with no wage increase; the lock-out was predicated, at least in part, upon the refusal to accept the five-year term and is, therefore, illegal. As industrial action, the lock-out is an extension of the bargaining process and integral to the unfair labour practice. Counsel submitted that the Board ought to order the Employer to cease and desist the lock-out and award the locked-out employees compensation for monetary loss.

[28] Counsel conceded that the Union advised the Employer for the first time in its letter of April 1, 2005 that it considered a final offer collective agreement with a greater than three-year term to be illegal if pressed to the point of impasse. That is, it was not unlawful for the Employer to propose an agreement exceeding three years' duration, but, counsel contended, the legal landscape changed when the Employer made acceptance of its proposal a condition of avoiding a lock-out. That is, the mere proposal of a five-year agreement took on a different legal character when it was changed from a negotiable item at the bargaining table to a condition of settlement to prevent the imposition of a lock-out.

[29] In this respect, counsel submitted, a proposal for a collective agreement exceeding three years is of the same nature as several other items that may be negotiated, but cannot be pressed to impasse. Counsel cited the following examples:

- A party may propose to negotiate a scope clause in the collective agreement that differs from the bargaining unit description in the

certification order – such as to place out of the scope of the bargaining unit a position described by the certification order as in-scope – but cannot insist on the change as a condition of settlement of a collective agreement: *Retail, Wholesale and Department Store Union, Local 496 v. Beeland Co-operative Association Limited*, [1982] Nov. Sask. Labour. Rep. 38, LRB File No. 259-82; *Service Employees International Union, Local 336, v. Town of Shaunavon*, [1986] Dec. Sask. Labour Rep. 37, LRB File No. 151-87.

- An employer may propose amnesty for employees in the bargaining unit who crossed a picket line and worked during a strike, but may not make it a condition of settlement of a collective agreement: *Canadian Union of Public Employees, Local 3078 v. Board of Education of the Wadena School Division No. 46 of Saskatchewan*, [2004] Sask. L.R.B.R. 199, LRB File No. 188-03.

- One party may propose that the other party forego rights to continue or institute grievance, arbitration, labour board or court proceedings, but may not press the proposal to impasse in obtaining an agreement: *Radio Shack Division of Tandy Electronics*, [1985] OLRB Rep. Dec. 1789; *Brookfield Management Services Ltd.*, [2000] O.L.R.D. No. 3397.

- An employer may propose to bargain a union security clause that differs from that set forth in s. 36(1) of the *Act*, but if the union insists on the statutory clause, the employer cannot press its proposal to impasse: *United Steelworkers of America v. Rite Way Mfg. Co. Ltd.*, [1980] May Sask. Labour Rep. 78, LRB File No. 006-80.

[30] Counsel asserted that in the present case the Union at no time waived its right to insist upon bargaining a collective agreement that did not exceed a three-year term. When the Union advised the Employer that the Union's position on the duration of a revised collective agreement had not changed and that it considered the Employer's final offer to be unlawful in that respect, the Employer had time to consider the situation and did indeed seek legal advice before providing the lock-out notice.

[31] Counsel submitted that the jurisprudence is clear that the provisions of s. 33 of the *Act* take precedence over anything to the contrary that parties might bargain into a collective agreement. In *Utah Co. of Americas v. International Union of Operating Engineers, Local No. 870* (1959), 29 W.W.R. 633 (Sask. C.A.) the Court determined that the effect of the phrase "notwithstanding anything contained [in a collective bargaining agreement]" found in s. 26 of *The Trade Union Act*, R.S.S. 1953 (s. 33(1) of the *Act*) "ma[d]e it clear that provisions in the collective bargaining agreement cannot affect the provisions of s. 26 of the statute." Similarly, in *Canadian Union of Public Employees, Local 2399 v. Integ Management and Support Services Ltd.* (1986), 32 D.L.R. 4th 421 (Sask. Q.B.), the Court considered a clause in a collective agreement providing that notice of termination of the agreement be made "not less than 30 days nor more than 90 days before the expiry date of the agreement," which was inconsistent with the 30/60 day notice requirement in s. 33(4). Scheibel, J. held that the opening phrase in the present s.33(1), "except as hereinafter provided" made the notice requirement of s. 33(4) mandatory and that the collective agreement was null and void to the extent of the inconsistency. The Court cited with approval the following statement by Chairperson Sherstobitoff (as he then was) in *Retail Clerks Union, Local. 401 v. Independent Trucking Ltd*., [1978] Mar. Sask. Labour Rep. 51, LRB File No. 549-77 at 53, in reference to *Utah Co*., *supra*:

> *This Board is of the view that the same reasoning applies notwithstanding that s. 26(1) of the 1953 statute contained the words "notwithstanding anything contained therein", referring to the Collective Bargaining Agreement, whereas Section 33(1) of the 1972 statute does not contain these words. A perusal of Section 33 of The Trade Union Act, S.S. 1972, makes it clear that the legislature intended that the section should apply to every Collective Bargaining Agreement and it is the opinion of this Board that the provisions of the said section override any provisions in a Collective Agreement which conflict with the provisions of Section 33.*

[32] In asserting that it is unlawful to insist upon a collective agreement with a term longer than three years to the point of impasse and as part of the basis for imposing a lock-out, counsel submitted that, while s.33(3) of the *Act* recognizes that parties may bargain a collective agreement with a term exceeding three years, it is deemed to be a three-year agreement for the purposes of providing notice to negotiate a

revision of the agreement pursuant to s. 33(4). That is, while s. 33(3) does not change an agreement with a longer term into a three-year agreement, it enables either party to provide notice to negotiate changes during the open period in s. 33(4). In practical terms, counsel said, while parties may enter into a collective agreement with a longer term, they do so at their peril. In light of *Integ Management*, *supra*, the parties cannot override by agreement the right of a party to exercise the option to seek revision of the collective agreement provided by s. 33(4) of the *Act*.

[33] Counsel suggested that this was the reason why IPSCO Inc., a Regina steel manufacturer, and another local of the Union that is bargaining agent for a unit of employees of IPSCO Inc., had obtained an act of the Legislature in order to exempt their four-year collective agreement from the enabling operation of s. 33(3) of the *Act*. Section 2 of *The IPSCO Inc. and United Steelworkers of America, Local 5890, Collective Bargaining Agreement Act, 2002,* S.S. 2002, c. 60, (the "*IPSCO Act, 2002*"), provides as follows:

> *2. Notwithstanding subsection 33(3) of The Trade Union Act, for the purposes of subsection 33(4) of that Act, the expiry date of the collective bargaining agreement … is the expiry date set out in the collective bargaining agreement.*

[34] In other words, counsel said, a longer-term collective bargaining agreement is not enforceable after three years from its effective date and its term must be taken to be ended at that point. Counsel asserted that this must necessarily be so in light of s. 44 of the *Act* prohibiting lock-out or strike "during the term of the collective agreement," otherwise a party could require negotiation of revision of the agreement by serving notice in the open period provided by s. 33(4), but would have to bargain without being able to back it up with the threat or exercise of industrial action.

[35] Furthermore, counsel submitted, in light of s. 34(1) of the *Act*, after three years, "the term of operation provided in the agreement" mentioned therein must be deemed to be expired, otherwise the employees or employer may not "commence to strike or commence a lock-out, as the case may require," as provided by that section.

[36] Counsel argued that it is untenable to accept that the Legislature intended that, while a party could require negotiation for revision of a longer collective agreement

at the end of the third year – indeed, force the other party to the bargaining table – it would be barred by either or both of ss. 44 or 34(1) from striking or locking out to exert pressure for acceptance of its demands. By extension, it stands to reason that the Employer in the present case cannot press to impasse the issue of the duration of the agreement beyond three years on which to base a lock-out, because, while the Union could require negotiation for revision in the third year, it would be precluded from using strike action as part of its arsenal to obtain any changes and, practically speaking, would be saddled with the collective agreement for the longer term. Accordingly, counsel said, it is no answer to say there is no risk to a longer term agreement against a party's wishes to say that it can be renegotiated after three years – the stage would be set for the other party to engage in merely "surface bargaining."

[37] Moreover, counsel submitted, it is against the concept of good faith bargaining for a party to agree to a longer-term collective agreement if it has no actual intention at the time of entering into the agreement of honouring it for the full term.

[38] Referring to the decisions of the Ontario Labour Relations Board in *Aristokraft Vinyl Inc.*, [1985] OLRB Rep. June 799 and *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Dec. 1628, counsel argued that when a matter in respect of which it is permissible to make a proposal in bargaining is transformed into an illegal position if pressed to impasse, an ensuing lock-out is likewise unlawful if based, even if only in part, upon that position and the Board may grant remedies in respect thereof. That is, a lock-out that is otherwise legal may be unlawful if even part of the motivation for its imposition is with a view to compel or induce employees to refrain from exercising rights under the *Act*: See, *Aristokraft Vinyl*, *supra*, at 809.

[39] Counsel submitted that the approach of the Board in assessing whether a party is bargaining in good faith and when the Board will intervene was explained in *Saskatchewan Government Employees' Union v. Government of Saskatchewan, Mamawetan Churchill River District Health Board, et al.*, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98 (the *"Mamawetan Churchill* case"), at 341-42, as follows:

> *In summary, the cases demonstrate that while Boards generally will not delve into the reasonableness of the bargaining positions taken by either party during collective bargaining, Boards may find*

> *that a specific proposal does constitute bad faith bargaining if: (1) the proposal contains some illegality; (2) the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective agreement; and (3) the proposal is or should be known to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiation of a collective agreement.*

[40] Counsel argued that the circumstances of the present case satisfy all three grounds for warranting intervention: Firstly, the final proposal term for a collective bargaining agreement with a duration exceeding three years is illegal; secondly, that proposal along with the Employer's conduct, *inter alia*, in refusing to meet after March 9, 2005 and threatening lock-out if the Union did not accept its proposal including no wage increases for the five-year term and a meager enhancement of pension benefits, indicates a subjective unwillingness to conclude a collective agreement; and, thirdly, the proposal for a five-year agreement, together with the proposals on monetary items, is against bargaining standards in the industry and is generally unacceptable and would have the effect of blocking the negotiation of a collective agreement.

The Employer

[41] Mr. Grubb, counsel for the Employer, argued that the lock-out was not unlawful and the Employer had not committed an unfair labour practice. For the Union to succeed with the present application, it must demonstrate both that the agreement for a term greater than three years is unlawful and that the Employer is not bargaining in good faith and that the parties had reached an impasse over the duration of the agreement.

[42] Counsel submitted that it is not the role of the Board to assess the reasonableness of the Employer's position in bargaining, but the legality, citing in support of his position the decision of the British Columbia Labour Relations Board in *Royal Diamond Casinos Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, (CAW- Canada) Local 3000*, [2002] B.C.L.R.B.D. No. 18.

[43] Counsel emphasized that the real points of difference between the Employer and the Union were wages, pension and weekly indemnity – which the Union advised the Employer during its meeting on January 13, 2005 – and not the term of the agreement. While he acknowledged that the Union communicated through the mediator on March 9, 2005 that the duration of the agreement was one of its priorities, it was clear that the Union was mainly concerned with the pension issue. That is, placed in context, the term of the agreement was not very important.

[44] Referring to the decision of the Ontario Labour Relations Board in *Brookfield Management*, *supra*, counsel submitted that a critical point was the fact that the Employer withdrew the Employer's final offer of March 28, 2005 on April 1, 2005 before it imposed the lock-out. That is, at the moment the lock-out was imposed there was no offer on the table for the Union to accept, hence the offer of a five-year agreement was off the table.

[45] Counsel further submitted that it was important to bear in mind the fact that the negotiations for the expired agreement in late 2000 and early 2001 followed a pattern similar to the present negotiations in that the Employer had proposed a four-year agreement and then locked out the employees.

[46] In the present situation, counsel said, nothing prevents the Union from making an offer to place on the bargaining table and get negotiations restarted.

[47] Counsel asserted that the parties were not at an impasse over the duration of the agreement. Counsel referred to the decision of the Alberta Labour Relations Board in *Alberta Projectionists and Video Technicians Local 302 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada v. Famous Players Inc*., [1995] Alta. L.R.B.R. 162, in which the Alberta Board identified the following concepts from the case law that it reviewed in that case at 182 and 183:

> *From these excerpts we take several concepts important to this case, namely:*

- *the requirement to bargain in good faith is not a requirement to forego one's own interests in collective bargaining,*
- *the Board must assess the totality of the collective bargaining relationship,*
- *patently unreasonable proposals lacking any semblance of business justification may suggest bad faith bargaining,*
- *the Board must be cautious not to insert itself in the collective bargaining relationship by engaging in too penetrating a review of the contents of the proposals,*
- *tendering a patently unreasonable proposal or an illegal proposal is not bad faith bargaining unless the proposal is pushed to impasse.*

[48] In that same case, the Alberta Board referred to its earlier decision in *Brewery Workers Local 287 v. Molson Breweries*, [1991] Alta. L.R.B.R. 607, regarding the concept of impasse, where it stated as follows at 607:

> *There are many cases, in the developing Canadian law in this area, that deal with the propriety of certain bargaining demands. A common feature of these cases is that labour boards usually only intervene and make a finding of bad faith bargaining if the offending party pushes its demands to impasse. Impasse in this sense means that the party remains insistent on its position without a realistic possibility of change, which forces the other side into industrial conflict because of the insistence on that position.*

[49] With respect to the concept of impasse, counsel further referred to the decision of the National Labour Relations Board in *Taft Broadcasting Company*, [1967] C.C.N.NLRB 21,170, (referred to in *obiter* in *Retail, Wholesale and Department Store Union v. Canada Safeway Ltd.*, [1986] Mar. Sask. Labour Rep. 23, LRB File No. 392-85), which stated as follows at 27,527:

> *…On the other hand, after bargaining to an impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals. Whether a bargaining impasse exists is a matter of judgment. The bargaining history, good faith of the parties in negotiations, the importance of the issue or issues as to which there is a disagreement, the contemporaneous understanding of the parties as to the state of the negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.*

[50] With respect to the present case, counsel said the parties appeared to be making some progress in bargaining. With respect to the matter of the term of the agreement, the Employer had moved from proposing a six-year term to a five-year term. In leaving its objection to the length of the proposed term for so long, even though Mr. Park testified that he thought the Employer was gearing up for a lock-out, the Union demonstrated that the issue was not a crucial one. In support of his argument, counsel referred to the decision of the Ontario Labour Relations Board in *Radio Shack*, *supra*, at 1800, as follows:

> *40. …If the Union is now claiming that the company acted illegally by refusing to remove a similar item from the bargaining process, it is our view that it was incumbent upon the union to put that proposition directly to the company to give it an opportunity to respond.*

[51] Counsel further referred to the decision of the Ontario Board in *Brookfield Management*, *supra*, where the union objected at the last minute to the insistence by the employer on including a clause in the collective agreement requiring the discontinuance of grievances. The employer's response was to withdraw its offer and then to impose a lock-out. The Ontario Board stated as follows, at paragraph 88:

> *There need not always be an offer on the table when the employer locks out its employees, or when a union chooses to strike. It is lawful for a party to present a final offer and, when the other indicates its unwillingness to accept it …, to withdraw it and take industrial action. In a sense the party exercising its power says to the other, our last offer is not acceptable, you can now come back to us with something that we can look at. Parties understand when there is no offer on the table that one or the other of them (usually the party which rejected the last offer) can return with something fresh which seeks, in whole or in part, to meet the interests of the other. Parties expect that the exigencies of economic pressure will affect the offers which will be made during the course of the strike or lock-out. Parties are not tied to the last offer made (and withdrawn) before the industrial action began. They may adjust their proposals as the strike or lock-out proceeds.*

[52] With respect to the Union's position that the final offer proposal for a term of collective agreement greater than three years is unlawful, counsel argued that that is not the meaning of the plain wording of ss. 33(3) and (4) of the *Act*. Counsel submitted that, according to the decision of the Board in *International Brotherhood of Electrical*

Workers, Local 2067 v. Saskatchewan Power Corporation, et al., [2000] Sask. L.R.B.R. 30, LRB File No. 207-98, a party can only be guilty of bad faith bargaining if it is asking the other party to "relinquish rights." The Board stated, at 64, as follows:

> *Various matters may be raised at the bargaining table and the Board will exercise very little supervision over the topics chosen for discussion. However, if the proposal requires one party to relinquish rights that it currently enjoys under the statutory scheme set out in the Act, then the proposal cannot be pursued to impasse.*

[53] Counsel submitted that ss. 33(3) and (4) of the *Act* do not prohibit the parties from negotiating an agreement with a longer term. Because it is contemplated by those provisions that there may be agreements for a term exceeding three years, it cannot be an unfair labour practice to press such a demand to impasse. Conversely, there is no right for a party to insist upon a term of agreement of less than three years. However, in order to avoid the ability for a party to seek renegotiation after three years, the parties must obtain the permission of the Legislature as was done in the case of the *IPSCO Act, 2002*, *supra*. In the present case, counsel asserted, there was no demand that the Union "relinquish rights." Counsel submitted that prior to the enactment of s. 33(3) of the *Act* there were no restrictions regarding the length of the term of collective agreements and that the provision strikes a compromise by allowing renegotiation of longer term agreements without prohibiting them.

[54] Counsel also referred to the decision of the Board in *Merit Contractors Association Inc. v. Saskatchewan Provincial Building and Construction Trades Council, et al.,* [1996] Sask. L.R.B.R. 119, LRB File No. 098-95, in which the applicant asked the Board, *inter alia*, to rule on the legality of the Crown Construction Tendering Agreement given that the term of that agreement was five years. On that point, the Board stated, at 131, as follows:

> *It is conceivable that, when the agreement has been in operation for sufficient time, these differences may make it necessary to determine whether the terms of the agreement or the provisions of the statutes must take precedence, or whether they can be reconciled. These differences, however, could not serve to render the entire agreement "illegal" from the outset.*

[55] Therefore, counsel said, the Board declined to find that it was a statutory right to insist that the term of a collective agreement not exceed three years.

[56] Counsel cited the decision of the Board in *Johnston v, Service Employees' International Union, Local 333*, [2003] Sask. L.R.B.R. 7, LRB File No. 157-02, a case regarding the duty of fair representation in bargaining, where the Board noted that the collective agreement was for a term of four years but that the Union could serve notice to bargain at the conclusion of the third year.

[57] Counsel also filed a written brief of his argument which we have reviewed in detail.

The Union in Reply

[58] In argument in reply, Mr. McLeod submitted that the assertion by counsel for the Employer that *Brookfield Management, supra*, supports the proposition that withdrawal of a final offer before imposing a lock-out meant there could be no impasse, even if correct on the facts of that case, was not applicable to the present case. Counsel said this was because the Union's April 1, 2005 letter in response to the Employer's final offer sought to return to the bargaining table on the basis of negotiating a collective agreement for a term of three years or less and the Employer's implicit refusal by imposing the lock-out demonstrated the parties were at impasse over the matter of the term of the agreement. However, counsel pointed out, in *Brookfield Management*, *supra*, in finding that the parties were not at an impasse in bargaining when the lock-out was imposed, the Ontario Board noted that the employer's final offer including the impugned term of the agreement was on the table for less than a day, that the parties arranged a further bargaining date when the negotiations concluded at which the final offer was withdrawn and that the impugned provision was not included in the proposal the employer next made after the lock-out was imposed, all of which factors suggested that the employer had not pursued it to impasse. The Ontario Board stated, at paragraph 103, as follows:

> *103. As soon as the possible illegality of the Final Offer was conveyed to the employer by the union, the employer withdrew the offer. Both the Final Offer and the [union's] Offer were raised fleetingly, as part of the general endeavour by the parties to see if*

> *they could come to terms on that day before their meeting was to end. Parties understand that proposals presented and rejected can be withdrawn from the table and they then have no further efficacy. Despite the break-off in discussions on August 17, the situation was still fluid when they separated. The union made clear that it had room to move on its Options 1 and 2. Before they parted on August 17, the parties arranged further dates on which to bargain. They were still exploring options when the deadline arrived. From the context of the negotiations, I cannot conclude that the employer was so wedded to its proposals in paragraphs 10, 11 and 12 of the Discontinuance Agreement that it was not willing to reach an agreement unless those paragraphs formed part of it. That was clear from the withdrawal of the Final Offer. Those provisions had made no appearance prior to August 17, and they were gone that day. When the parties got back together on September 7 the provisions were missing from the employer's proposal. That too suggests that the employer did not pursue them to impasse.*

[59] Counsel submitted that the real issue was whether the positions of the parties in the present case were intractable at the time the lock-out was imposed, and he said they were.

[60] With respect to *Merit Contractors*, *supra*, counsel pointed out that the Board noted in its Reasons for Decision, at 126, that the Crown Construction Tendering Agreement in issue in that case was not a collective bargaining agreement within the meaning of the *Act.*

[61] Counsel also asserted that the cases on "impasse" cited by counsel for the Employer that were in the context of the unilateral imposition of new terms and conditions of employment when a collective agreement was terminated prior to the 1994 changes to s. 33(4) of the *Act* were not applicable to the present situation.

Analysis and Decision:

[62] No issue was raised either that the Employer's action in locking out the employees effective Sunday, April 3, 2005 was a lock-out within the meaning of s. 2(j.2) of the *Act*, or that it was legitimate in terms of the timeliness and form of the notice as prescribed by s. 11(7) of the *Act*. The broad issues raised in this application are, (a) whether the Employer in the present case failed to bargain collectively and committed an unfair labour practice in violation of s. 11(1)(c) of the *Act*, (b) whether the lock-out is

unlawful, and (c) if so, the remedy therefor. Subsumed in these issues are the more particular ones as follows: (a) whether it is unlawful for an employer to press to impasse a "final offer" proposal including a proposal for a collective bargaining agreement in excess of three years' duration in light of the provisions of s. 33 of the *Act*, and (b) whether the parties were at an "impasse" with respect to the duration of the collective agreement.

[63] The Union distinguishes between bargaining with respect to that which it says is a statutory right (i.e., to insist upon a collective bargaining agreement not exceeding three years' duration) and the pressing of a demand of that kind to impasse and the imposition of a lock-out based thereon. The Union does not take issue with the Employer having made proposals for a six-year and then a five-year agreement, but complains that the Employer pressed the demand to impasse. The Union contends that is unlawful and that the lock-out that followed on the Union's rejection of the Employer's final offer, in the face of the Union's stated position that it considered the proposal regarding the duration of the agreement to be illegal and requesting to bargain with respect to an agreement with a term not exceeding three years' duration, is consequently also unlawful.

[64] The Employer contends that the present case is not a matter of demanding that the Union relinquish rights protected by the *Act* and that the parties were not at impasse regarding the issue of the term of a proposed collective agreement. The Employer denies that it failed to bargain collectively and further denies that the lock-out of the employees is unlawful.

The Role of the Board in Assessing the Duty to Bargain

[65] Through Reasons for Decision issued in several cases in the last 20 years or so the Board has articulated its role in assessing whether the legal obligation pursuant to the scheme of collective bargaining set out in the *Act* has been met.

[66] In *Saskatchewan Government Employees Union v. Government of Saskatchewan et al.*, [1982] May Sask. Labour Rep. 44, LRB File No. 563-81, the Board rejected the United States model of collective bargaining where topics are categorized into either mandatory or permissive items, pursuant to which mandatory items must be

bargained and can be pushed to the point of impasse, while permissive items may be bargained, but cannot be pushed to impasse. Adopting the principles enunciated by the British Columbia Labour Relations Board in *Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union*, [1978] 1 Canadian LRBR 60, the Board confirmed that the legal duty to bargain in good faith pursuant to the *Act* is "a single, global obligation to negotiate settlement of an entire collective agreement," but it is not a violation *per se* of the duty to bargain in good faith to refuse to discuss a specific item at the bargaining table.[1]

[67] In *Construction and General Workers v. Midway Sales (1979) Ltd*., [1988] Jan. Sask. Labour Rep. 35, LRB File No. 302-86, for example, the Board indicated, as follows, that the parties must satisfy some minimal criteria in order to meet the requirements of the duty to bargain collectively at 39:

> *Although the duty to negotiate in good faith does not impose a duty to reach agreement, both parties do have an obligation to meet with the other side, to genuinely intend to resolve issues in dispute, and to make every reasonable effort to do so.*

[68] In its decision in *Canadian Union of Public Employees v. Cheshire Homes of Regina Society*, [1988] Fall Sask. Labour Rep. 91, LRB File No. 051-88, the Board gave a further indication of its understanding of the nature of the duty to bargain as follows at 93 and 94:

> *In this case the employer says that it is under no duty to agree with the union on matters of procedure or substance; that its conduct is an example of hard bargaining; and that if the union doesn't like it then the union's recourse is to use whatever power it has to stop it. That argument, however, ignores the employer's obligation to make every reasonable effort to engage in full and rational discussion. In the Board's opinion, for there to be full and rational discussion, particularly in negotiations for a first collective agreement, each party must have the ability to frame and present its position in words of its own choosing and to have that position fairly considered and discussed. The employer wrongly treated its right to refuse to agree to the union's proposals as if it were a right to refuse to even discuss the union's proposals. Its conduct in that regard was incompatible with its duty to make all reasonable*

[1] For a full discussion of the principles adopted in *Government of Saskatchewan*, see the *Mamawetan Churchill* case, *supra*.

> *efforts to reach an agreement by engaging in full and frank discussion of the issues.*

[69] In *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1993] 1st Quarter Sask. Labour Rep. 261, LRB File No. 264-92, the Board described its role as follows at 268 and 269:

> *Though the obligation to bargain has been in existence in more or less this form in many North American jurisdictions for nearly sixty years, its significance and implications continue to be questions of great complexity for the tribunals charged with interpreting these issues. In general, labour relations boards have interpreted their role as one of assessing whether true bargaining is taking place, and whether either party is engaging in conduct which will impair the health of such bargaining, rather than to influence the substantive content or outcome of the bargaining process. The responsibility of the labour relations boards is to do what they can to ensure that the parties do bargain collectively; it is the responsibility of the parties to determine what they bargain about and what comes of the bargaining.*
>
> *Though an argument can be made that labour relations boards have in recent years been somewhat readier to evaluate the content of bargaining in certain respects, it is still the case that they are not inclined to become entangled in the complex web of strategy, historical experience and economic give-and-take of which the bargaining process is composed. As the Canada Labour Relations Board expressed this view in CKLW Radio Broadcasting Ltd., [1977] CLLC 16,110, at 16,784:*
>
> > *The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy or an indicia, among other things, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a gentle fashion...*
> >
> > *At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that*

> *prevents full, informed and rational discussion of the issues.*

[70] In *Canadian Union of Public Employees v. Saskatchewan Health-Care Association*, [1993] 2nd Quarter Sask. Labour Rep. 74, LRB File No. 006-93, the Board commented on the inherent dilemma presented by an assessment of an allegation that the duty to bargain collectively has been breached at 83:

> *.... when an allegation of an infraction under Section 11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that process, while at the same time not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.*

[71] A short time later in *Canadian Union of Public Employees v. Saskatoon Society for the Prevention of Cruelty to Animals*, [1993] 2nd Quarter Sask. Labour Rep. 91, LRB File No. 092-93, the Board observed that labour relations boards have become somewhat more interventionist in circumstances where illegality is at issue, stating as follows at 94:

> *In the SaskPower case, supra, (LRB File 256-92) we alluded to some recent academic analysis of the duty to bargain. In an article entitled "The Duty to Bargain in Good Faith: Does it Affect the Content of Bargaining?" in Studies in Labour Law, Swan and Swinton (eds.) 1983, Donald D. Carter makes a convincing argument that Canadian labour relations boards have adopted an increasingly interventionist position on the duty to bargain when illegality is an issue which arises from positions or agreements of the parties to a collective bargaining relationship.*
>
> *As a general proposition, the notion that a labour relations board has a responsibility to make assessments of the conduct of the parties during bargaining which take into account the possible legality of proposals they make or agreements they suggest seems perfectly consistent with the role of such tribunals as we understand it.*

[72] The following year, in *United Steelworkers of America v. Six Seasons Catering*, [1994] 3rd Quarter Sask. Labour Rep. 311, LRB File No. 118-94, the Board considered the situation where the union alleged that the employer violated s. 11(1)(c) of the *Act* in that the union said that it would be illegal for it to agree to the employer's bargaining proposal regarding preference in hiring and job security (i.e., with respect to northern residents) because it would violate the union's duty of fair representation in bargaining. The Board found that it was "by no means clear" that acceptance of the provision would constitute breach of the union's duty and that the alleged "illegality" was not of the kind that the employer could be held to have refused to bargain for adhering to the position that it be included in the agreement. However, the Board did find that it had a legitimate role in supervising bargaining where a party insists on the inclusion of a provision in a collective agreement which clearly contravenes the law, stating as follows at 319:

> *If an Employer is insistent on the inclusion of a provision in a collective agreement which clearly contravenes the law, such as wage levels which are below the minimum wage, for example, it seems reasonable to conclude that the Employer is failing or refusing to bargain in good faith because they know that such a provision cannot legitimately be included in the final agreement, and that, by insisting on the provision, the Employer is signifying that the bargaining process need not be taken seriously. Where the alleged "illegality" is something which is as speculative as that which is alleged here, the firmness of the position taken by the Employer cannot be seen as an attempt to flout the bargaining process or to weaken improperly the effectiveness of the trade union.*

[73] In the *Mamawetan Churchill* case, *supra*, the Board discussed the setting of priorities for bargaining by the parties and its relationship to bargaining in good faith, as follows at 340-41:

> *Our system of supervising collective bargaining allows parties to set their own bargaining priorities and to develop bargaining strategies around those priorities, which may include the use of the economic tools of strikes and lock-outs to address so-called peripheral bargaining issues. A refusal to bargain with respect to a specific topic will not constitute a per se violation of the statutory obligation to bargain in good faith; there must exist an underlying intention to avoid concluding a collective agreement. As Chairperson D. Ball, Q.C., stated in University of Saskatchewan Faculty Association v. University of Saskatchewan, [1989] Fall*

> *Sask. Labour Rep. 52, LRB File No. 254-88, "so long as [a bargaining demand] is not designed to ensure failure and can be lawfully agreed upon, the "reasonableness" of any demand is for the parties to assess in the context of collective bargaining." In Canadian Union of Public Employees v. Cheshire Homes of Regina Society, [1988] Fall Sask. Labour Rep. 91, LRB File No. 051-88, Vice-Chairperson J. Hobbs expressed the obligation to bargain collectively as a requirement to "make every reasonable effort to engage in full and rational discussion" and held that "unreasonable conduct or tactics designed to impede this discussion violate the requirements." In International Brotherhood of Electrical Workers, Local 2067 v. SaskPower and Government of Saskatchewan, [1993] 1st Quarter Sask. Labour Rep. 286, LRB File No. 256-92, the Board arrived at the following conclusion, at 292-293:*
>
> > *It is our conclusion from reading the academic works referred to us by counsel for the Union that they do not support the conclusion that Canadian labour relations boards have intervened - or even that they should intervene - to influence the course of negotiations between two parties to collective bargaining, with the exception of circumstances where the position taken by one of the participants is illegal, stands in fundamental contravention of the objectives of collective bargaining legislation, or, arguably, precludes the attainment of essential procedural protection for employees or trade unions. They do not seem to us to invite an extension of labour relations board intervention to otherwise modify or manipulate the bargaining positions adopted by the parties.*

[74] In that case, the Board referred to the decision of the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada Labour Relations Board and Canadian Association of Smelter and Allied Workers, Local No. 4*, [1996] 1 S.C.R. 369, where the Court justified the intrusion of the Canada Labour Relations Board when it found that the employer's position regarding the submission of grievances to arbitration concerning employees dismissed for picket line activity during the strike had "blocked bargaining completely, and this is a matter in respect of which the Board must intervene." The Court stated as follows at 396 and 397:

> *Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in food faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found*

> *to be in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*
>
> *Section 50(a) requires the parties to "make every reasonable effort to enter into a collective agreement". It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of "reasonable effort" must be assessed objectively, the board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith.*

[75] In the *Mamawetan Churchill* case, *supra*, at 341-42, the Board summarized the situations where it may find that a specific proposal does constitute bargaining in bad faith, as follows:

> *97. In summary, the cases demonstrate that while Boards generally will not delve into the reasonableness of the bargaining positions taken by either party during collective bargaining, Boards may find that a specific proposal does constitute bad faith bargaining if: (1) the proposal contains some illegality; (2) the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective agreement; and (3) the proposal is or should be known to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiation of a collective agreement.*

[76] In the present case, the Union alleges that the Employer's final offer proposal contains an illegality, and, in the alternative, also violates points (2) and (3), in the immediately preceding excerpt from the *Mamawetan Churchill* case.

The Duration of the Proposed Collective Agreement – Section 33

[77] The Union's contention regarding the legality of the pressing to impasse of a proposal for a collective agreement with a term greater than three years' duration concerns the interpretation of s. 33 of the *Act*.

[78] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, the Board observed that it is fairly well settled that in interpreting legislation the "modern contextual" approach is preferred over the so-called "plain meaning" approach at 716:

> *56. This contextual approach to the interpretation of statutes, in which the purpose, overall context and general history of a provision are considered in order to determine the meaning of a provision, is well summarized by Professor Ruth Sullivan: Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) as follows, at 131:*
>
> > *There is only one rule in modern interpretation, namely, courts are obligated to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.*
>
> *57. At the Supreme Court of Canada, L'Heureux-Dube J. urged the adoption of this modern contextual methodology of statutory interpretation, as opposed to the "plain meaning" methodology in which the plain meaning of a word is to be applied unless the context suggests that it means something else: see City of Pointe-Claire, supra, at 34 - 36 (dissenting judgment); Verdun v. Toronto Dominion Bank, [1996] S.C.R. 550 (concurring judgment). In 2747-3174 Quebec Inc. v. Quebec, (1997), 140 D.L.R. (4th) 577,*

> *L'Heureux-Dube J. discussed the competing methodological approaches to statutory interpretation, at 631 - 647, and described the "modern" approach as follows, at 637 - 638:*
>
> > *All of these approaches reject the former "plain meaning" approach. In view of the many terms now being used to refer to these approaches, I will here use the term "modern approach" to designate a synthesis of the contextual approaches that reject the "plain meaning" approach. According to this "modern approach", consideration must be given at the outset not only to the words themselves but also, inter alia, to the context, the statutes other provisions, provisions of other statutes in pari materia and the legislative history in order to correctly identify the legislature's objective. It is only after reading the provisions with all these elements in mind that a definition will be decided on. This "modern" interpretation method has the advantage of bringing out the underlying premises and thus preventing them from going unnoticed, as they would with the "plain meaning" method.*
>
> *58. The central criticism made of the "plain meaning" approach is that it fails to recognize the linguistic principle that words take on their meaning only in the context in which they are written. What may pass for "plain meaning" is in fact an interpretation based on unstated assumptions. The principle advantage of the contextual approach is that it attempts to provide an explicit rational for accepting one interpretation over another thereby demystifying the process and hopefully increasing the likelihood that the tribunal or court charged with the interpretation of a statute remains faithful to the legislative purpose.*

[79] With respect to the interpretation of labour relations legislation in particular, the Board in *Pepsi-Cola*, *supra*, at 716 referred to the following observation by the Supreme Court of Canada in *Re Bradburn v. Wentworth Arms Hotel Ltd*. (1978), 94 D.L.R. (3d) 161:

> *55. … speaking for the majority Estey J. rejected an interpretation of two conflicting collective agreement provisions that would perpetually prohibit strike activity. In doing so the majority adopted the reasoning of Lacourciere J.A. in the Ontario Court of Appeal, who stated at 70 D.L.R. (3d) 303 as follows, at 310:*
>
> > *In assessing the significance of this art. 13.02, one must not only follow ordinary canons of*

> *construction, but do so in the framework of the Labour Relations Act as a whole as well as modern labour law and practice. The conflicting interests must be weighed realistically and fairly, having regard to the social policy behind the Labour Relations Act as progressively administered by the Labour Relations Board and interpreted by the Courts.*

[80] In *Pepsi-Cola*, *supra*, the Board summarized its approach to interpretation of the *Act* and the process that it followed in that case as follows at 717:

> *59. This Board is of the view that the contextual approach is the most appropriate methodology to apply in interpreting the provisions of the Act. In doing so we will start by identifying the purpose of the Act and any interpretative guidance that flows from that purpose. We will then address the plausibility of the competing interpretations to determine which is more consistent with the legislative text contained in the Act. The Board will also consider the efficacy of the interpretations proposed in terms of their ability to promote the objectives of the Act and the acceptability of both interpretations.*

[81] We propose to employ the same process of interpretation in our consideration of s. 33 and particularly subsections (3) and (4).

[82] The statutory purpose of the *Act* is set out in s. 3, *supra*. In *Pepsi-Cola*, *supra*, the Board iterated that the *Act* prefers and reinforces collective bargaining relationships and militates against conduct that weakens those relationships. The Board stated as follows at 718:

> *61. When faced with an interpretative issue under the Act, the Board starts with the overall purpose of the Act which is to grant rights to employees to bargain collectively through unions of their own choosing. The Act is not "neutral" in the sense of not preferring unionized or non-union workplaces. It is explicit in preferring the development of collective bargaining relationships between employees acting through trade unions of their own choosing and employers. The Act reinforces the preference of this relationship through its various provisions which prohibit certain conduct that would otherwise destroy or weaken the collective bargaining relationship. As a result, the remainder of the Act must be interpreted in light of the Act's central purpose.*

[83] The Board also stated that “ambiguities and doubtful expressions” in the legislation should be resolved in favour of establishing and maintaining collective bargaining rights for employees, as follows at 718:

> *62. In the recent Supreme Court of Canada decision in Opetchschesaht Indian Band v. Canada, [1997] S.C.J. No. 50, in a dissenting judgment, McLachlin J. observed as follows, at para. 76:*
>
> > *In interpreting statutes relating to Indians, ambiguities and "doubtful expressions" should be resolved in favour of the Indians: Nowegijick v. The Queen, [1993] 1 S.C.R. 29; Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85. As La Forest J. stated in Mitchell, "in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them" (p. 143).*
>
> *63. While trade unions lack the constitutional status that has been accorded to aboriginal people of Canada, in our view, the same interpretative approach should apply to the Act, that is, in resolving any "ambiguities or doubtful expressions" the benefit of the doubt should be resolved in favour of establishing and maintaining collective bargaining rights for employees. This interpretative approach derives from s. 3 of the Act and its explicit preference for collective bargaining relationships as the method of determining wages and conditions of work for employees.*

[84] In the present case, the Union submits that, while it is not illegal for a party to collective bargaining to propose that a collective agreement be for a term exceeding three years, s. 33(3) establishes the right for a party to insist that the term of a agreement not exceed three years and it is unlawful for the other party to press the issue to the point of impasse – that is, to make it a condition of settlement of an agreement. The Union submits that such right is of the same kind as the right to insist that the scope clause of the collective agreement conform to the certification order, or that the union security clause take the form provided by s. 36(1) of the *Act*, or to insist that there be no amnesty for members of the bargaining unit who crossed the picket line during a strike: See, *Rite-Way Mfg.*, *Town of Shaunavon*, *Beeland Co-op*, *Wadena School Division,* all *supra*. The Employer contends, however, that the plain and ordinary meaning of s. 33(3)

does not create any such right and it is not unlawful to press to impasse the issue that the duration of a collective agreement be in excess of three years.

[85] Section 33(1) of the *Act* provides that "every collective bargaining agreement … shall remain in force for the term of operation provided therein and thereafter from year to year," but this is qualified by the opening phrase "except as hereinafter provided." Exceptions are subsequently set forth, firstly, in s. 33(2) with respect to a collective agreement with no provision for a term of operation, an unspecified term or for a term of less than one year and, secondly, in s. 33(3) with respect to an agreement that provides for a term of operation in excess of three years from its effective date. A collective agreement in the former class is deemed to provide "for its operation for a term of one year from its effective date." A collective agreement in the latter class is deemed to have an "expiry date" three years from its effective date "for the purpose of subsection (4)." Subsection 33(3), which had originally been enacted in 1972 to provide for a two-year deemed expiry date[2], was amended in 1983 to provide for the present three-year deemed expiry date.[3]

[86] Subsection 33(4) of the *Act* provides that a party may provide notice to the other party to the agreement to negotiate a revision of the agreement during the 30/60-day open period before "the expiry date of the agreement."

[87] The jurisprudence is clear that the provisions of a collective agreement are invalid in so far as they are inconsistent or conflict with the provisions of s. 33 of the *Act*: See, *Utah Co*., *Integ Management* and *Independent Trucking*, all *supra*.

[88] In *Communications Workers of Canada v. Northern Telecom Canada Limited*, [1985] Oct. Sask. Labour Rep. 46, LRB File No. 062-85, the Board held that if a notice to negotiate a revision of the collective agreement is not provided within the open period prescribed by subsection 33(4), neither party is obligated to negotiate revisions, and the agreement is "automatically renewed for one year by operation of subsection 33(1)."

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[2] *The Trade Union Act, 1972*, S.S. 1972, c. 137.
[3] S.S. 1983, c. 81, s. 11.

[89] In *Westfair Foods Ltd. v. United Food and Commercial Workers, Local 1400*, [2004] S.J. No. 552, the Saskatchewan Court of Appeal held, in considering the effect of s. 33(4) of the *Act*, that a collective agreement does not remain in effect following its "expiry" and a strike or lock-out.

[90] The Court observed that amendments to the *Act* in 1994[4] which removed the reference to the "notice to terminate" a collective agreement were not intended to alter "the fundamental principles of collective bargaining," but only to remove an employer's right to unilaterally alter terms and conditions of employment when the parties reached an impasse during negotiations, as the Court observed, at paragraphs 16 through 19:

> *16. …It was commonly thought before the amendment that there was a significant difference resulting from a notice to terminate as distinct from a notice to revise. In 1986, the Saskatchewan Labour Relations Board in Canada Safeway Limited v. Retail, Wholesale and Department Store Union, Locals 454 and 480, [[1986] March Sask. Labour Rep. 23 .] where the Board stated:*
>
> > *... The service of a notice to revise pursuant to Section 33(4) of the Act gives rise to a duty to bargain in good faith with a view to the revision of the collective bargaining agreement. Until a revised agreement is concluded, the terms and conditions of employment embodied in the last agreement remain in existence subject only to the statutory right to strike or lock-out contained in Section 34.*
> > *On the other hand, a notice to terminate brings a collective agreement to an end on its expiry date. Terms and conditions of employment embodied in the terminated agreement survive only because of the duty to bargain in good faith with respect to any change, and only until that duty has been fulfilled and a unilateral change is legitimately implemented...*
>
> *17. A close examination of that decision reveals that in both cases the collective bargaining agreement remains in force in the sense that the terms and conditions of employment survive in one form or another because of the duty to bargain in good faith with respect to any changes subject to the right to strike. The real question is the effect of the strike on the collective bargaining agreement. If the agreement is not in effect, then there can be no*

[4] S.S. 1994, c. 47, s. 16.

> *obligation on the part of the employer to pay statutory holiday pay as set out in the collective bargaining agreement.*
>
> *18. The controlling statutory provisions are s. 33(4) and s. 34(1) of the Act. It is noteworthy that s. 34(1) remained unchanged after the amendment to s. 33(4). It provides a right to strike or lockout "after the expiry of the term of operation provided in the agreement."*
>
> *19. Thus, while the Act is silent on the issue of whether the agreement remains in force during a strike, the logical conclusion, having regard to the Act as a whole, is that the collective bargaining agreement does not continue in existence after the commencement of the strike.*

[91] And, at paragraph 21, the Court further stated:

> *21. I also agree with the Chambers judge that to continue the collective bargaining agreement in force during a strike is inconsistent with the philosophy of the restitution of dispute which reached an impasse by the use of lawful strikes and lockouts.*

[92] Counsel on behalf of the Employer takes the position that s. 33(3) allows for the making of a collective agreement with a term exceeding three years – which issue may be pressed to impasse in bargaining by either party – and that neither party is prejudiced, because either party may provide notice to the other party to renegotiate the agreement at the end of the third year. That is, the parties are not locked into the agreement beyond three years unless a notice to renegotiate is not provided.

[93] However, counsel for the Union described this interpretation as unfair and implausible and said that it could not have been the intention of the legislature. A summary of the Union's argument against the Employer's interpretation is that, given the use of the phrases "expiry of the term of operation provided in the agreement" and "the term of the collective bargaining agreement" in s. 34(1) and s. 44, respectively, a party providing notice to renegotiate at the end of the third year cannot press to impasse its demands for changes to the agreement and take industrial action, because the end of the third year is not the end of "the term of operation" provided for in the agreement, as required by those provisions. This would mean that such party has no power at all in the so-called "negotiation," and hence no ability to effect changes to the agreement.

[94] Counsel for the Employer expressed no opinion as to the potential effect of ss. 34(1) and 44 on the ability to attempt to effect changes to a longer-term agreement by taking industrial action after the third year.

[95] In our opinion, the interpretation of the Employer is not plausible, efficacious or acceptable given the context of the *Act* as a whole and with regard to its overarching object and purpose of promoting the development of collective bargaining relationships and good faith collective bargaining.

[96] The ability to choose to engage in industrial action after the end of the third year of a collective agreement and thus render the agreement of no effect notwithstanding that one has agreed to a term for a longer period is inimical to the concepts of the development of collective bargaining relationships and good faith collective bargaining as the overarching objectives of the *Act.* There is the real possibility that if one accepts the position of the Employer in the present case – that a proposal for a term of a collective agreement in excess of three years may be pressed to impasse and upon which a party may take industrial action – it would set the stage for bargaining in bad faith. One party might very possibly agree to an agreement with a term in excess of three years in order to avoid industrial action being taken at that time by the other party that presses for such an agreement, but with no intention of honouring the agreement beyond the third year and, in fact, intending from the outset to serve notice to renegotiate at the end of the third year and perhaps take its own industrial action when, for example, economic or industrial conditions might be more in the first party's favour. This kind of false bargaining or bargaining in bad faith would be almost impossible to detect. It is a variety of "surface bargaining" in the sense that a party may have no intention of honouring what the other party believes has been bargained in good faith by both parties. And who could say, when the option to renegotiate is exercised in the third year, that that was or was not the intention all along.

[97] And, in our further opinion, it could not have been the intent of the Legislature in enacting s. 33, and amendments thereto, to provide that an agreement may be renegotiated after three years without the ability to take industrial action to attempt to effect the changes sought.

[98] It seems obvious that this was the reason why the affected parties sought passage of the *IPSCO Act, 2002* to obtain a statutory exemption from the operation of s. 33(3).

[99] While s. 33(3) contemplates the entering into of a collective bargaining agreement for a period in excess of three years from its effective date, it deems its expiry date, for the purpose of seeking to negotiate revision of the agreement pursuant to subsection 33(4), to be three years from its effective date. In our opinion, if a notice to negotiate revision of the agreement is not provided in the open period, the agreement expires as per s. 33(3), but there is no duty to negotiate revision and the collective agreement is automatically renewed for a period of one year and from year to year thereafter as provided by s. 33(1): See, *Northern Telecom*, *supra*. If a notice to negotiate renewal is duly provided during the open period, the agreement likewise expires but the parties are obligated to negotiate renewal or revision or the conclusion of a new agreement.

[100] In our opinion, and with reference to *Westfair Foods*, *supra*, the phrases "expiry date" in s. 33(3) and "expiry date of the agreement" in s. 33(4) connote the end of "the term of operation of the agreement," whether by "natural" expiry as specifically set forth in the collective agreement or by "deemed" expiry by operation of the statute. In the case of collective agreements that are three or more years in duration, providing the notice to renegotiate during the open period at the end of the third year effectively terminates the collective agreement at the end of that year and the parties may be in a position to strike or lock out.

[101] The most plausible, efficacious and acceptable interpretation of s. 33(3) of the *Act* having reference to the objects and purposes of the *Act* as a whole – the development of collective bargaining relationships and good faith bargaining – is that it provides that a party may insist upon negotiating a collective bargaining agreement with a term that does not exceed three years. That is, while a party may make a proposal for an agreement with a term in excess of three years and the parties may explore the option, the proposal may not be pressed to impasse nor may industrial action be predicated thereon. This interpretation negates the potential for a party to feel

compelled to engage in false bargaining of the kind described above and does not prejudice either party.

Did the Employer press the issue of the term of the collective agreement to impasse?

[102] Determining whether there is an impasse in bargaining is essentially a question of fact. While a lock-out may occur without there being an impasse in bargaining, a lock-out may also be an indicator of an impasse. In *Alberta Projectionists*, *supra*, the Alberta Board also observed that an impasse may exist but not be apparent until later events occur. In its jurisprudence, the Board has not defined "impasse" as a term of art. However, it has recognized the concept and the consequences that may result from same (See, for example, *Saskatchewan Government Employees' Union v. Namerind Housing Corporation Inc.*, [1998] Sask. L.R.B.R. 542, LRB File No.189-97, at 547). As referred to by counsel for the Employer in his argument, in *Alberta Projectionists*, *supra* at 185, the Alberta Board accepted the definition of impasse described in its earlier decision in *Molson Breweries*, *supra*, as occurring when a party "remains insistent on its position without a realistic possibility of change…."

[103] In the present case, the parties met and made some progress during their meetings in early January 2005. On February 11, 2005 the Employer imposed a "deadline" for the completion of negotiations of March 31, 2005. When asked whether the Employer intended to impose a lock-out if the deadline was not met, Mr. Gair responded that he did not know what the Employer would do in that event, but confirmed that it would not lock out the employees on that date.

[104] It may be accepted that during the meetings between the Union and the Employer on January 5, 6 and 13, 2005 the Union left the impression that, while it preferred a two-year agreement, it might consider a three or more-year agreement, but that it doubted that the Employer could afford it. Certainly the Union never made any proposal to the Employer that included a term of agreement in excess of three years. And by the same token, the Employer never indicated that it was willing to negotiate an agreement for three years or less and certainly never made any proposal for an agreement with such a term.

[105] However, in his testimony, Mr. Gair admitted that the Employer was aware, at least on March 9, 2005, that the Union was not willing to bargain an agreement with a term in excess of three years: the Union advised the Employer that its four "priorities" in the negotiations included one that an agreement could not exceed three years' duration. Nonetheless, the Employer's proposal on that date was for a five-year agreement. The Union rejected it almost immediately, citing the term of the agreement as one of the reasons for rejection. Although negotiations broke off that day, the Union proposed meeting again with the assistance of the mediator prior to the March 31, 2005 deadline imposed by the Employer. The Employer refused to agree to meet again before the deadline, ostensibly on the ground that the Union had not made a counter-offer since the March 9, 2005 meeting.

[106] Despite this, the Employer made a "final offer" on March 28, 2005, open for acceptance until noon on April 1, 2005. In reality, the Employer's final offer did not differ materially from the rejected offer that it had made on March 9, 2005, and did not differ at all with respect to the proposal for a five-year term. The Employer's March 28, 2005 cover letter stated that if the Employer's final offer was rejected or not accepted by the time indicated, the Employer would withdraw it and serve a notice of lock-out. Mr. Gair agreed that this was an ultimatum to the Union.

[107] The Union advised the Employer prior to noon on April 1, 2005 that it considered the insistence by the Employer on a five-year collective agreement to be contrary to the *Act*. The Union offered to meet to negotiate with respect to an agreement that did not exceed three years' duration.

[108] The Employer's response shortly thereafter was to withdraw the final offer and serve a notice of lock-out.

[109] We are satisfied that the parties were at an impasse in bargaining on March 28, 2005 when the Employer made a "final offer" that simply reiterated its rejected proposal of March 9, 2005 for a collective agreement with a five-year term when there is no question that the Employer knew that one of the Union's "priorities" was that a collective agreement not exceed three years' duration. And, even if we are mistaken in this regard, then we are satisfied the parties were at an impasse on April 1, 2005 when

the Union expressed its opinion to the Employer that it was unlawful to insist on a five-year term and that the Union requested to bargain on the basis of an agreement with a term of three years or less. The parties were certainly deadlocked on the issue.

[110] After the parties' negotiations of March 9, 2005, at which the Union rejected the proposal for a five-year agreement and clearly indicated that one of its priorities was to conclude a collective agreement for a term of three years or less, the Employer rebuffed the Union's request to meet to bargain further on March 30, 31 and April 1, 2005. Instead, the Employer's response was to deliver its March 28, 2005 final offer ultimatum, which recycled its March 9, 2005 offer of a five-year deal. Neither of the Employer's communications of April 1, 2005 indicate any change in this position on the point of collective agreement term, nor express any willingness to consider continuing negotiations, as per the Union's request early on April 1, 2005, on the basis of an agreement of three years or less. We are satisfied that in the circumstances the Employer remained insistent on its position without a realistic possibility of its being changed.

[111] Accordingly, we find that the Employer pressed to impasse its insistence that the collective agreement be for a term of five years.

The Unfair Labour Practice (s. 11(1)(c)) and the Status of the Lock-out

[112] Section 2(b) of the *Act* defines "bargaining collectively," in part, as "negotiating in good faith with a view to the conclusion of a collective bargaining agreement." Section 11(1)(c) makes it an unfair labour practice to fail or refuse to bargain collectively.

[113] The *Act* imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. On the employer's side, it cannot enter into negotiations with the intent of getting rid of the union. The parties are required to meet, to bargain in good faith and to make every reasonable effort to make a collective agreement, but the legislation does not require them to make an agreement. This does not mean that the parties must have common objectives with respect to the content of the agreement they may negotiate. However, they must both be intent on making an agreement. As the Ontario Board

succinctly stated in *Fashion Craft Kitchens*, [1979] OLRB Rep. Oct. 967, (referred to in *Aristokraft Vinyl Inc*., *supra*), at 970-71:

> *The Act is predicated on a realization that a trade union and an employer come to the bargaining table with divergent objectives, each party seeking to maximize its own self-interest.*
> *…*
> *While the parties have great latitude to advance their own position and force its acceptance upon their opposite number, they may not lawfully base their conduct on a deliberate intention to see that no collective agreement will be concluded…. However, a deliberate intention to frustrate bargaining is not always necessary to establish a breach of section 14 of the Act. There are two parts to the section. First there is the duty to meet and bargain in good faith – a requirement that takes into account the parties' motives and intentions. Secondly there is the requirement to make every reasonable effort to make a collective agreement.*

[114] Section 2(b) of the *Act* similarly refers to the two elements of negotiating in good faith and with a view to concluding a collective agreement.

[115] In *Canadian Commercial Corp*. *and PSAC* (1988), 74 di 175 (CLRB), (cited with approval by the Alberta Board in *Alberta Projectionists*, *supra*), the Canada Labour Relations Board opined, at 186-188, that it is bad faith bargaining if "a party took an adamant position that the other side accept what was in fact a condition contrary to the Code," stating further that,

> *Bad faith had been judged present in situations where one party has advanced a key position curtly and without any attempt to justify, explain or rationalize it; where there has been no serious discussion of the matter and the atmosphere created is one of "take it or leave it and bloody well face the consequences.*

[116] In the present case, we are satisfied that the Employer refused to make every reasonable effort to achieve a collective bargaining agreement. Aware that one of the Union's priorities in bargaining was a collective agreement of three years or less, it delivered its "take it or leave it" final proposal and, having been warned that the Union considered the pressing of a five-year term to impasse to be unlawful and ignoring (in fact, it did not acknowledge it at all) the Union's request to negotiate with respect to a shorter term agreement, the Employer refused to negotiate further and imposed the lock-out. Let alone accede to the request to discuss a shorter term agreement, there is no

indication on the evidence led, and particularly after the rejection of its March 9, 2005 proposal, that the Employer attempted to justify, explain or rationalize its insistence on a five-year term with no wage increases or its apparent aversion to discuss a shorter term. In our opinion, given our finding that it is unlawful to press to impasse the issue of the term of a collective agreement in excess of three years, the Employer did not bargain with a view to concluding an agreement.

[117] The use of lock-out as an economic weapon in collective bargaining is sanctioned by the *Act*, but the legitimacy of its use is dependent upon the purpose for which it is used. The purposive element of a lock-out is explicitly indicated in the definition of same in s. 2(j.2) of the *Act*, that is, action of the type described in the provision "for the purpose of compelling employees to agree to terms and conditions of employment."

[118] In *Regina Police Association v. Regina Board of Police Commissioners*, [1994] 3rd Quarter Sask. Labour Rep. 272, LRB File No. 250-93, the Board stated at 290 and 291:

> *The Board has pointed out on a number of occasions that action by an employer which has a negative impact on employees is not an unfair labour practice simply for that reason. In Retail, Wholesale and Department Store Union v. Weyburn Cooperative Association Ltd., LRB File No. 232-88, the Board considered whether a partial lock-out by an employer constituted an unfair labour practice under Section 11(1)(a) and (e) of the Act. The Board referred to earlier decisions of the Board in Retail, Wholesale and Department Store Union v. Bi-Rite Drugs Ltd., LRB File Nos. 335-86 and 336-86; and Retail, Wholesale and Department Store Union v. Pioneer Co-operative Association Ltd., LRB File Nos. 155-87 and 157-87, as examples of cases in which it had been decided that:*
>
> > *... a suspension of work or a refusal to employ a group of employees is not contrary to the fair labour practice provisions of the Act if it is for the purpose of compelling the union to agree to terms and conditions of employment.*
>
> *At another point in the Weyburn Co-operative decision, the Board said:*
>
> > *The explanation is that a lock-out, or for that matter the exercise of any other management right whether created by statute or contract does not*

> *become an unfair labour practice simply because it adversely acts employees.*
>
> *It is not merely the fact that an employer is attempting to exert pressure to influence the course of bargaining which renders the action an unfair labour practice under Section 11(1)(a). Much of the conduct of the parties to collective bargaining is aimed at this objective; it would be somewhat strange if it were not. An open admission by the Employer here that they took the step of reducing wages to "turn the tables" on the Union does not constitute a plea of guilty to violating The Trade Union Act. All industrial action is pursued in an attempt to influence collective bargaining, and as we have indicated earlier, part of the dynamic of industrial action is that it requires the party undertaking it to estimate how successfully it will be able to withstand the costs which industrial action impose.*

[119] Accordingly, the fact that a lock-out negatively impacts employees does not make its imposition unlawful and the Union has not so argued in this case. But the motivation for the lock-out is important. It may be imposed for proper or improper purposes. A lock-out aimed at inducing agreement over terms and conditions of employment is part of the collective bargaining process contemplated by the *Act*, but a lock-out aimed at dissuading employees from exercising rights under the *Act* is not lawful. It does not matter whether the latter aim is the sole or principal purpose of the lock-out or merely a minor or secondary objective. We accept the following statement by the Ontario Board in *Aristokraft Vinyl Inc.*, *supra*, at 809:

> *We are satisfied that if a lock-out is imposed by an employer "with a view to compel or induce his employees to refrain from exercising any rights … under this Act", it is illegal even if it is otherwise timely. …That aim need not be the sole, principal or predominant one of the lock-out. It is sufficient to establish that the lock-out is unlawful, regardless of timeliness, if unlawful intent forms even a part of the motivation for the lock-out. (See Westinghouse Canada Ltd., [1980] OLRB Rep. April 577 at 600-605, and in particular paragraphs 54-56).*

[120] In *Brookfield Management*, *supra*, the Ontario Board described the approach taken in *Aristokraft Vinyl Inc*. as the application of a "taint test" as follows, at paras. 89-90:

> *89. In general, "the Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement ... Too penetrating a review by this Board will only insert it as a third party in the bargaining arena*

> *to be tactically used by the negotiators, deferring their attention from the principal task at hand" (Radio Shack, [1979] OLRB Rep. Dec. 1220). The Board is generally concerned to monitor "the process of bargaining and not the content of the proposals advanced" (Radio shack, [1985] OLRB Rep. Dec. 1789, at 1798 paragraph 34). However, there are circumstances when the Board will intervene. One such circumstance is that described above in Aristokraft Vinyl Inc.. The Board adopts a taint test. If a demand to waive statutory rights forms any part of the demand pressed to impasse, then it is deemed to be motivated by reasons which are prohibited by the Act.*
>
> (Emphasis added)

[121] Counsel on behalf of the Employer argues that the Union left its objection to the lawfulness of the Employer's proposal regarding the term of the agreement to the eleventh hour and it ought to have raised such an objection immediately. We disagree. It is not incumbent on a union immediately to point out the possible illegality of a proposal. Indeed, as we have said, it is not the making of the proposal that is repugnant, it is the pressing of the proposal to impasse and the taking of industrial action thereon that is repugnant. It was permissible and made good sense in the pursuit of fair collective bargaining, for the parties to discuss the Employer's proposal for a five-year agreement. As observed by the Ontario Board in *Brookfield Management*, *supra*, at paragraph 96, a union may do so right to the point when the proposal is part of a final offer that is being pressed to impasse. It is also noted that the Union advised the Employer in the negotiations for the last collective agreement (in its counterproposal of January 10, 2002), during which the Employer proposed a four-year agreement, that it considered the maximum term of an agreement allowed by the legislation to be three years.

[122] It is important to note that in *Brookfield Management*, *supra*, the parties had each set the same deadline for conclusion of an agreement. That is, they had respectively advised the other that they intended to strike and to lock-out after midnight on the same date. It was in this context that the employer made its final offer containing the illegal proposal on the last day before strike action was to occur. On being informed by the union that the union considered the proposal to be illegal, the employer withdrew the offer and then imposed a lock-out. The offer that the employer next made when bargaining resumed soon afterwards did not contain the impugned provision. As pointed

out by counsel for the Union in his argument, in *Brookfield Management* at paragraph 103 (see excerpt, *supra*) the Ontario Board found that the parties were not at an impasse with respect to the impugned provision, and further found at paragraph 104 that it was not the purpose of the lock-out to enforce that provision:

> *104. I cannot conclude from the evidence that the purpose of the lock-out was to enforce paragraphs 10, 11 and 12 of the Discontinuance Agreement. In the circumstances the lockout was not unlawful.*

[123] However, the situation in *Brookfield Management*, *supra*, may be contrasted with that in the present case, where the Employer insisted from the commencement of bargaining that any collective agreement be for a six- and then a five-year term. It never indicated any willingness to bargain a collective agreement based on a term of three years or less. Its response after the Union expressed its opinion that insistence on a five-year term was unlawful and specifically requesting to bargain with respect to the shorter term, was to withdraw its final offer and impose the lock-out. Prior to the delivery of its March 28, 2005 final offer ultimatum, the Employer indicated an unwillingness to meet unless the Union made an offer, even though the Employer to that point had either refused or neglected to consider an agreement with a term other than five years. Neither of the Employer's communications of April 1, 2005 indicated any change in this position, nor expressed any willingness to consider continuing negotiations, as per the Union's request, on the basis of an agreement of three years or less or at all. Indeed, in its first communication that day the Employer stated that it had "*no option* but to proceed with issuing notice of lock-out" (emphasis added). In our opinion, there was another option: to return to the bargaining table and discuss an agreement based on a term not exceeding three years.

[124] That the matter of the term of the agreement was only one point that the Union objected to (and the Employer says it believed it to be a minor point in the Union's priorities in bargaining) is immaterial. It knew that the Union had made the term of a collective agreement of three years or less a priority, at least since March 9, 2005 yet it made essentially the same offer on March 28, 2005 that had been rejected by the Union on that earlier date at least in part because of the five-year term. At the time of imposing the lock-out, the Employer not only knew that the five-year term of the agreement had been part of the reason for the rejection of its earlier proposal, but had additionally been

put on notice by the Union that it considered the Employer's insistence on a five-year agreement to be unlawful.

[125] Unlike the situation in *Brookfield Management*, *supra*, where the Ontario Board found the parties were not at impasse with respect to the impugned term, in the present case the evidence indicates that the Employer was so wedded to a five-year agreement that it was not willing to discuss any other length of term. It is disingenuous of the Employer to say that the five-year length of the term of its proposal was not important to the Union, when it is axiomatic that the monetary provisions (whether in the form of wage increases, lump sum payments and/or enhancement of benefits) and the term of an agreement are so closely bound together that a change to one such aspect can and often does make all the difference to the palatability of the proposal for one party or the other.

[126] Accordingly, we find that the Employer committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* in pressing to impasse the issue of a collective agreement term exceeding three years, and that the lock-out was predicated upon, had its foundation in, and was imposed in furtherance of the unfair labour practice and is unlawful.

[127] As a final note, we wish to say that in making our decision we have not been influenced by the filing of the excerpts from Hansard. As stated in *Pepsi-Cola*, *supra*, at 728, the Board is of the view that such evidence is not generally admissible to determine the intent of the Legislature.

Remedy

[128] The issue of the remedy for an unfair labour practice for the failure to bargain collectively is not an easy one to resolve. It must be recognized that the Employer's final offer was illegal and has caused a delay in achieving an agreement through fair collective bargaining, as well, as monetary loss for the affected employees. To simply order that the Employer cease and desist does not practically remedy the situation created by the breach and the lock-out predicated thereon, nor does it deliver any recompense for the employees who have suffered loss as a result. Indeed, to simply order the Employer to cease the lock-out and order the parties back to the

bargaining table would in fact reward the Employer for its unlawful actions. The employees deserve to be made whole as a result of being unlawfully locked-out

[129] We therefore find and direct that an Order shall issue as follows:

(1) that the Employer is guilty of an unfair labour practice within the meaning of s. 11(1)(c) of *The Trade Union Act* in that it failed to bargain collectively with the Union by insisting to the point of impasse in bargaining that the term of a collective agreement be for a period in excess of three years and that the Employer shall cease and desist and refrain from further engaging in the unfair labour practice;

(2) that the Employer shall forthwith bargain collectively with a view to concluding a collective agreement with the Union and, in that regard as part of its negotiation of a collective agreement, the Employer shall not insist upon a term of agreement in excess of three years;

(3) that the lock-out of the employees imposed by the Employer is unlawful in that it was undertaken for the purpose of compelling the employees to agree contrary to the *Act* to a collective agreement for a term in excess of three years and that the Employer shall end the lock-out undertaken for such unlawful purposes and forthwith allow the employees to return to work without loss of seniority;

(4) that within fourteen (14) days of the date of this Order the Employer shall pay to each of the employees an amount equivalent to that which they would have earned as wages and benefits since the commencement of the lock-out to the day and time that the lock-out is ended, subject to deductions required by law;

(5) the Board retains jurisdiction to make orders with respect to the implementation of this Order and to determine the amount of monetary loss, in the event that the parties are unable to agree.

DATED at Regina, Saskatchewan, this **19th** day of **May, 2005**.

LABOUR RELATIONS BOARD

James Seibel
Chairperson