Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. SOBEYS CAPITAL INC. operating as Sobeys Garden Market, Respondent

LRB File No. 128-05; October 21, 2005
Vice-Chairperson, Angela Zborosky; Members: Gloria Cymbalisty and Marshall Hamilton

For the Applicant: Drew Plaxton
For the Respondent: Brian Kenny, Q.C.

Collective agreement – First collective agreement – Practice and procedure – Board reviews practice of appointing Board agents on applications for first collective agreement assistance – Appointment of Board agent will be ordered in camera by Board where, on face of pleadings, apparent that statutory precondition(s) met – Oral hearing will only be held where apparent from pleadings that serious question exists as to whether one of preconditions met – Board appoints Board agent.

***The Trade Union Act*, s. 26.5.**

REASONS FOR DECISION

Background:

[1] Sobeys Capital Inc. operating as Sobeys Garden Market (the "Employer") operates and manages several retail grocery stores in Saskatchewan and, particular to this application, in Moose Jaw, Saskatchewan. On February 9, 2004, United Food and Commercial Workers Union, Local 1400 (the "Union") became certified to represent a unit of employees of the Employer. Since that date the parties have bargained collectively for the purposes of reaching a first collective bargaining agreement.

[2] On July 12, 2005 the Union filed an application (LRB File No. 128-05) pursuant to s. 26.5 of *The Trade Union Act* R.S.S. 1978, c. T-17 (the "*Act*") seeking various orders including the appointment of a Board agent to assist the parties in reaching a first collective agreement, the filing of a report by the Board agent and the imposition of terms of a collective bargaining agreement by the Board or through the appointment of an arbitrator for that purpose. The grounds upon which the Union relies in support of such orders are that the parties have bargained collectively but have been unable to conclude the terms of a collective agreement, that the parties require the

assistance of the Board to conclude an agreement in a timely fashion and that more than 90 days have passed since the Board made an order under s. 5(b) of the *Act* (as part of the certification Order). In support of the application the Union filed a list of the issues in dispute between the parties as well as a document it prepared which is an amalgamation of the parties' offers, the progress of negotiations up to the last bargaining meeting held on March 11, 2005 and its last offer on the disputed items. In the Employer's reply to LRB File No. 128-05 application, the Employer takes the position that the parties should be left to continue their collective bargaining and that it is not appropriate for the Board to intercede in negotiations at this time by appointing a Board agent.

[3] On July 13, 2005, the Union filed an application pursuant to ss. 5, 5.3, 18 and 42 of the *Act* for interim relief, seeking, *inter alia*, the appointment of a Board agent to assist the parties in the resolution of their first collective agreement failing which the agent would investigate and report back to the Board. The Union requests that the Board grant these orders without the necessity of an oral hearing whether as a typical interim order or as a preliminary proceeding. The Union maintains that there is a serious issue to be tried in that collective bargaining has broken down, that it is appropriate to assist the parties and that it has met the requirements of s. 26.5(1.1)(c)(iv) of the *Act.* The Union asserts there is irreparable harm because the parties have been bargaining in excess of one year and that, even if the applicant was successful with its first application for first collective agreement assistance (which is currently in the process of being heard by the Board), a final determination of that application will not be made until over two years from the date of the certification Order, thereby defeating the purposes of the *Act*.

[4] As indicated, the application in LRB File No. 128-05 is not the Union's first application to the Board requesting assistance pursuant to s. 26.5 of the *Act* with respect to the Employer and this bargaining unit. On August 23, 2004 the Union filed an application (LRB File No. 218-04) requesting similar forms of relief but on different grounds. The grounds that are asserted in that application include that the Union had taken a strike vote and/or that the Employer had committed an unfair labour practice. With regard to the latter, the Union had previously filed an unfair labour practice application on July 8, 2004, amended December 24, 2004 (LRB File No. 189-04). LRB File Nos. 189-04 and 218-04 were scheduled to be heard together. Hearings on those applications are currently in progress.

[5] The Employer filed replies in relation to both LRB File Nos. 189-04 and 218-04, denying that the Employer committed unfair labour practices and putting at issue whether the Union had met the pre-requisites for an order for the appointment of a Board agent, specifically maintaining that the Union did not take a proper strike vote and that the Union, even if it established that the Employer committed an unfair labour practice, had not shown that it was appropriate for the Board to intervene by appointing a Board agent.

[6] The Board commenced hearing LRB File No. 189-04 on November 29, 2004 and the Board heard LRB File Nos. 189-04 and 218-04 at the same time on December 6, 2004, January 26, 27, 28, 2005, April 26, 27, 28, 29, 2005 and June 9, 2005. The hearing is scheduled to resume on October 31, 2005.

[7] What appears to have been the impetus for the Union filing a second application for first collective agreement assistance (LRB File No. 128-05) is an amendment to the *Act* that was proclaimed in force on June 17, 2005. That amendment added a new ground upon which a union or employer could request relief pursuant to s. 26.5. Section 26.5(1) of the *Act* was repealed and replaced in part with the following:

> ***26.5****(1) If the board has made an order pursuant to clause 5(b), the trade union and the employer, or their authorized representatives, must meet and commence bargaining collectively within 20 days after the order is made, unless the parties agree otherwise.*
>
> *(1.1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
>
> *…*
>
> *(c) one or more of the following circumstances exists:*
>
> *…*
>
> *(iv) 90 days or more have passed since the board made an order pursuant to clause 5(b).*

[8] In addition to the above mentioned applications, there is an unfair labour practice application involving the Employer and the Employer's retail stores in other municipalities covered by other certification Orders involving this Union (LRB File Nos. 283-04, 004-05 and 005-05) which is scheduled to be heard in January 2006. Allegations in this unfair labour practice application center around interference with the Union and its representation of its members for the purposes of encouraging activities contrary to the Union's interest such as the making of rescission applications; interference, intimidation and threatening employees in their exercise of rights under the *Act*; a failure to bargain collectively; discrimination regarding terms and conditions of work with the view of discouraging union activity; and a unilateral change in conditions of employment without bargaining the same with the Union. Specific allegations include a failure to comply with union security, unilateral changes in terms and conditions of employment including a failure to contribute to a deferred profit sharing plan and a failure to continue a practice of providing automatic pay raises based on hours worked, the holding of elections for the occupational health and safety committee in order to remove a member of the bargaining committee and the removal of duties from and the cutting of hours of certain employees.

[9] The Board heard this application for interim relief on August 19, 2005. The application proper has not yet been scheduled to be heard however the Employer has agreed to allow the Union to use any of the dates currently scheduled to hear the applications in LRB File Nos. 189-04 and 218-04.

Evidence:

[10] In support of the application for interim relief, the Union filed an affidavit of Don Logan, sworn June 12, 2005, and asked that we also consider the pleadings and proceedings in relation to this application and the applications on LRB File Nos. 189-04 and 218-04 and 283-04, 004-005 and 005-05. Prior to the hearing, the Employer filed an affidavit of Suzanne Orieux-Koroluk, sworn August 18, 2005, and also asked that we consider the proceedings in relation to LRB File Nos. 189-04 and 218-04 and the evidence adduced at the hearings of those applications. The following is a review of the affidavit material filed.

<u>Affidavit of Don Logan</u>

[11] Mr. Logan deposed that he is employed as a collective bargaining representative with the Union and is responsible for negotiating collective bargaining agreements with the Employer. Mr. Logan indicated that, on February 11, 2004, after obtaining the certification Order, the Union served on the Employer a maintenance of membership demand pursuant to the *Act*. The parties exchanged correspondence and, after some difficulties obtaining dates for bargaining, the parties set May 20, 2004 as the first meeting for the purpose of negotiating a collective agreement. Due to difficulties in obtaining a bargaining date from the Employer, the Union wrote to Saskatchewan Labour on April 5, 2004 requesting the assistance of a conciliator. George Wall was appointed conciliator on April 21, 2004.

[12] The Union filed an unfair labour practice against the Employer on July 8, 2004 (LRB File No. 189-04) alleging a violation of ss. 3 and 11(1)(a)(b) and (c) of the *Act*. The application was amended December 24, 2004 to add further allegations of a similar nature. In that application, which was attached to Mr. Logan's affidavit, the Union outlined the difficulties it was having with the Employer with respect to bargaining and alleged that the Employer was continuing to avoid meaningful negotiations, that there had been no progress made, and that the Employer had failed to provide information in order for the Union to prepare proposals and to properly communicate with its members. Specifically, the Union outlined details of the failure of the Employer to provide some of the information the Union requested about the employees, such as wage rates, classifications and benefit plans, including a pension plan and profit sharing plan, all necessary for bargaining, despite repeated requests in writing and at negotiating meetings. In LRB File No. 189-04 the Union also alleged that the Employer failed to respond or to respond in a timely matter with respect to setting a first date for bargaining. It was this failure to respond that led the Union to request the appointment of a conciliator. The request for a conciliator did however prompt the Employer to contact the Union and the parties agreed to set May 19 and 20, 2004 as dates for bargaining. Difficulties occurred when the parties met including the inability to proceed with negotiations on May 19, 2004 because of the absence of Bill Humeny, the Employer's spokesperson, and the Employer's insistence on using May 20, 2004 to only exchange proposals while setting other dates to begin negotiations. The Employer also indicated at that time that the Union must either withdraw its request for a conciliator or the

Employer would not meet to negotiate without the conciliator present and, further, that the Employer would not permit the Union to switch its spokesperson to facilitate the setting of earlier bargaining dates. Additional bargaining dates were set for June 21 and 22, 2004 and August 25 and 26, 2004, however the dates set in June were not used due to the illness of the Employer's spokesperson. The Employer refused alternate dates in June because the conciliator could not be present.

[13] The Union amended its unfair labour practice application in LRB File No. 189-04 on December 24, 2004 to include additional allegations that the Employer had continued to fail to bargain in good faith, including a continued failure to provide any information or accurate information; the proposal of a scope clause that virtually excludes casual employees from the provisions of the collective agreement; the obstruction of negotiations by failing to agree to non-contentious provisions which the Employer has agreed to in bargaining with the Union at other stores owned by the Employer, without providing a legitimate reason; engaging in tactics that waste time during negotiation meetings; and adding new demands during the course of bargaining.

[14] Also attached to Mr. Logan's affidavit is a copy of the application filed by the Union on August 23, 2004 pursuant to s. 26.5 of the *Act* (LRB File No. 218-04) seeking assistance with obtaining a first collective bargaining agreement on the basis that the parties had been unable to conclude a collective agreement and would not likely be able to do so in a timely fashion without the Board's assistance. The Union referred to a strike vote it held on March 7, 2004. The Employer's reply to this application indicated that the Employer viewed the application as premature and maintained that the parties should be permitted to continue to bargain on their own without Board intervention. The Employer also denied that the Union had met any of the prerequisites for intervention including the taking of a valid strike vote, a lock-out by the Employer or the finding of an unfair labour practice.

[15] Mr. Logan deposed that LRB File No. 189-04 initially came on for hearing on November 29, 2004 at which time some preliminary matters were dealt with. LRB File No. 218-04 first came on for hearing on December 6, 2004 at which time it was combined for hearing with LRB File No. 189-04. On subsequent dates preliminary matters were dealt with and the hearings formally commenced on January 26, 2005. Mr.

Logan stated that he commenced his examination in chief on January 26, 2005 and continued through January 27 and 28, 2005 and on April 26, 2005. His cross-examination commenced in the afternoon of April 26, 2005, continued for four additional hearing dates and is not yet complete. Mr. Logan deposed that he expects his testimony will continue for an additional number of hearing dates and that counsel for the Employer has indicated that it will be calling evidence at the hearing as well. Dates currently scheduled for the continuation of these hearings are October 31, 2005, November 18, 2005 and December 5 through 9, 2005.

[16] Mr. Logan also outlined in his affidavit that the parties met to negotiate in 2004 on May 20, August 26, September 15, October 29, November 9 and 10 and December 3, 7 and 17 and in 2005 on January 18 and 19, February 28 and March 10 and 11, 2005, and had further dates set for August 30 and 31, 2005, although counsel for the Union advised at the August 19, 2005 hearing that the dates of August 30 and 31, 2005 had been cancelled due to the ill health of the Employer's spokesperson and that no new dates had been scheduled for the continuation of the negotiations.

[17] Finally, Mr. Logan deposed that the conciliator, Mr. Wall, has continued to participate in negotiations, that it has been more than 120 days since his appointment, that no collective bargaining agreement has been reached to date and that more than 90 days has passed from the date the certification Order was made. Mr. Logan believes that the assistance of the Board is necessary to allow the parties to achieve a first collective bargaining agreement in a timely fashion.

Affidavit of Suzanne Orieux-Koroluk

[18] Ms. Orieux-Koroluk deposed that she is employed by the Sobey's West Division of Sobey's Capital Inc. in the position of manager of human resources and learning for Saskatchewan, having occupied the position since September 13, 2004. Her duties and responsibilities include dealing with a variety of human resource issues including the negotiation and administration of collective agreements and specifically negotiation of the collective agreement on behalf of the Employer at its store in Moose Jaw. She is familiar with the course of negotiations prior to her appointment to this position, has sat at the bargaining table since that time and has been present for all

hearings before the Board in relation to the proceedings outlined earlier in these Reasons for Decision.

[19] Ms. Orieux-Koroluk deposed that she does not accept that collective bargaining between the parties has broken down, stating that the parties continue to meet as schedules permit and they have made progress at every meeting. She attributed the slow pace of bargaining to Mr. Logan's conduct, believing that the Union is not genuinely committed to reaching a collective agreement though the process of negotiations but rather that the Union intended from the outset to have the Board intervene in the process. Her grounds for such a belief are as follows: (i) the Union conducted its strike vote on March 7, 2004 for the purpose of bringing this application before the Board and before the parties held their first bargaining session; (ii) the Union requested and received the appointment of a conciliator prior to the first bargaining session; (iii) the Union has repeatedly indicated that it will switch its spokesperson with no concern for the lack of continuity that would result; (iv) the Union has insisted on the automatic inclusion of clauses agreed to at other store locations without regard for the context in which the clauses were agreed to and without providing a rationale for its position while the Employer has indicated that its automatic acceptance of proposals is not a reasonable approach due to the negotiations at other stores being at different stages and there being differences between the stores; (v) the Union has failed to provide reasons for its bargaining positions; (vi) the Union has made an excessive number of complex conditional or packaged proposals which are difficult to respond to and are unreasonable; and (vii) the Union has refused to devote time to difficult or contentious issues or to establish a subcommittee to resolve these issues between bargaining sessions.

[20] Ms. Orieux-Koroluk believes that the Union, and Mr. Logan in particular, have attempted to create conditions that would lead to the Board intervening in the collective bargaining process.

Arguments:

[21] Mr. Plaxton, on behalf of the Union, requested the appointment of a Board agent to assist the parties with their negotiations and, should the parties fail to obtain an agreement, to investigate and report back to the Board on the issues of whether the Board should intervene and conclude the terms of the collective agreement and what the terms of that collective agreement should be. Mr. Plaxton maintained that the amendment to s. 26.5 of the *Act* to include as a precondition to the Board's intervention that the parties have met within 20 days and that 90 days have passed since the date of the certification order signals a change in the approach the Board should take with respect to first collective agreement applications and, in particular, the appointment of a Board agent. Mr. Plaxton invited the Board to change its practice from a "mediation breakdown" model (similar to that adopted by the British Columbia Labour Relations Board in *Yarrow Lodge Ltd. And Bevan Lodge Corporation* (1993) B.C.L.R.B. No. B444/93) to one of "no-fault" or "automatic intervention" (as adopted by other jurisdictions and described in that case). He argued that the legislature intended that the Board deal with these applications as expeditiously as possible to normalize the collective bargaining relationship and avoid the delays that often occur in the collective bargaining process and first collective agreement applications, the results of which include the possibility that the employer is "bargaining to the open period" where an employee may bring an application to decertify the union.

[22] Mr. Plaxton described the current process for these applications as including an initial hearing to determine whether the applicant has met one of the preconditions as well as to determine whether the applicant has established that it is appropriate for the Board to intervene through the appointment of a Board agent. If the Board's ruling favours the applicant, the Board usually appoints a Board agent to assist the parties in bargaining and, if the parties fail to reach a collective agreement within 60 days of the appointment of the agent, the agent reports to the Board with recommendations concerning whether the Board should intervene to conclude the collective agreement and, if so, the appropriate terms of that collective agreement. The matter then returns to a hearing before the Board where the Board answers the question whether it should intervene and, if it so determines, the Board imposes the terms of the collective agreement. Mr. Plaxton speculated that if an employer opposes the application at each step, it would take one to one and one half years to obtain a collective agreement.

[23] Mr. Plaxton argued that the amendment to this provision of the *Act* should prompt the Board to revisit its process as well as the test to be used to determine whether it will order the appointment of a Board agent. He argued that, at the stage where the applicant requests the appointment of a Board agent, the Board should no longer engage in a full hearing on the question of whether the Board should intervene where, on the face of the application, one of the preconditions in s. 26.5(1.1)(c) is met. The exception to this rule would be where the applicant relies on s. 26.5(1.1)(c)(iii) where the precondition is that there is a finding of an unfair labour practice under s. 11(1)(c) or 11(2)(c) and "in the opinion of the board , it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement…." The Union argued that, as long as one of the other three preconditions is met, the appointment could be made without a hearing and perhaps *in camera* by a panel of the Board. He argued that, assuming it is the desire of both parties to achieve a collective agreement, no party suffers prejudice as a result of this process because it is the Board that makes a final determination on the question of whether the Board should intervene after receiving a recommendation on this aspect through the Board agent's report. Such a process would be more efficient given that the Board is not required to answer the same question twice (at the stage of the request for the appointment of an agent and at the stage of the possible imposition of the terms of a collective agreement) and because a Board agent can more efficiently investigate the matter in the first instance. Mr. Plaxton relies on the Board's decision in *Prairie Micro-Tech Inc. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95 and s. 42 as authority for the appointment of a Board agent in these circumstances.

[24] With regard to the specific amendment adding s. 26.5(1.1)(c)(iv) to the *Act*, Mr. Plaxton argued that, upon the request of either party, a Board agent should automatically be appointed once 90 days has elapsed from the date of the certification order. Alternatively, he argued that the passage of the 90 days should act as a presumption that there has been a breakdown in negotiations and that an agent should be appointed unless that presumption is rebutted by extreme or unusual circumstances such as the applicant holding one meeting in the first 20 days and then waiting until 90 days has elapsed in order to make an application under s. 26.5. Such an approach by the Board would motivate the parties to negotiate diligently with a view to reaching a

collective agreement and eliminate the possibility of an employer negotiating to the open period.

[25] Mr. Plaxton maintained that, on this application for interim relief, the evidence established an arguable case that the Union is entitled to the appointment of a Board agent because it has met the pre-condition in s. 26.5(1.1)(c)(iv) and because of the substantial length of time over which bargaining has occurred, the fact that the parties next scheduled bargaining sessions of August 30 and 31, 2005 had been cancelled and the Employer had suggested the next available dates were in October, which is some seven months since the parties last met. In support of its argument the Union referred the Board to the following cases: *Canadian Union of Public Employees v. Del Enterprises*, [2004] Sask. L.R.B.R. 156, LRB File Nos. 087-04 to 092-04; *D & G Taxi Ltd. (c.o.b. Capital Cab 2000)*, [2004] Sask. L.R.B.R. 347, LRB File Nos. 244, 245-04 & 246-04; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Watergroup Companies Inc.*, [1992] 1st Quarter Sask. Labour Rep. 68, LRB File No. 011-92.

[26] In its interim application, the Union asserted that there was a serious issue to be tried. Collective bargaining has broken down and the Board's assistance to the parties in reaching a collective agreement is appropriate. The Union maintains that uncontroverted facts establish that it has met the requirements of s. 26.5(1.1)(c)(iv) and as such an agent should be appointed without the necessity of a full hearing. The Union maintained that irreparable harm would be suffered by the Union if a Board agent were not appointed, given the length of the negotiations and the delay in the proceedings associated with the first collective agreement application (LRB File No. 218-04) where the Employer has put in issue whether the Union has met the pre-conditions for obtaining an appointment of an agent, such that the Union, provided it is successful, will not be able to obtain a first collective agreement until well more than two years following the date of certification. Mr. Plaxton asserted that the parties are bargaining toward a second "open period" since the date of the certification Order. Given the lack of progress in negotiations, continued support for the Union becomes an issue and makes the Union vulnerable to a rescission application. The Union argued that the order should be granted absent compelling reasons to the contrary because, if the order is not granted and this matter is subject to the ordinary course of hearings, the purpose of

achieving an expeditious settlement of a first collective bargaining agreement is defeated. Regarding the suggestion that the Union is requesting the whole of its relief on this interim application, Mr. Plaxton argued that the appointment of a Board agent is only one step in the process of a first collective agreement application and therefore the relief is not final in nature.

[27] In the alternative, the Union advanced the argument that the request for an interim order in the circumstances of this case is interlocutory but not injunctive in nature. It could be considered a preliminary or procedural application as it would result in an order to fulfill a provision of the *Act* rather than an order to prevent a violation of the *Act.* Although no authority was cited for this proposition, the Union argued that a different test should apply for this type of interlocutory relief in that it should not be necessary to show that there is a serious issue to be tried or that labour relations harm will result if the order is not granted. In addition, urgency is not an appropriate consideration as it would lead to anomalous results. For example, on the 91st day following bargaining, the application may not be considered urgent because the parties have not bargained for a long period of time, yet an applicant might also be denied where the application was brought after two years of bargaining because, if it truly was urgent, the applicant would have applied sooner. The Union argued that the appointment of a Board agent is an interim or procedural order that could be made summarily without an oral hearing on the merits pursuant to the Board's newly enacted powers, specifically ss. 18(h) and (q). Section 18(h) allows the Board to "order preliminary procedures . . ." while s. 18(q) provides the Board with the power "to decide any matter before it without the holding of an oral hearing." While the Union urged the Board to consider a new process whereby a Board agent could be appointed in these circumstances *in camera*, without the necessity of a hearing, the Union brought this interim application as this appears to be the first opportunity for the Board to consider the amendment to s. 26.5 and how the amendments to s. 18 concerning the Board's powers might be used to carry out the intent of the legislative amendments to s. 26.5 and change the Board's process of applications under the first collective agreement provisions.

[28] Mr. Plaxton advised that the Union undertakes to withdraw the applications in LRB File Nos. 189-04 & 218-04 should it be successful with this application.

[29] On behalf of the Employer, Mr. Kenny argued that it is not appropriate for the Board to intervene at this time. He argued that the proceedings are duplicitous to the first collective agreement application in LRB File No. 218-04 (which is in the process of being heard by the Board) and that the pace of bargaining and the fact that a first collective agreement has not been obtained are as a result of the conduct of the Union. Mr. Kenny argued that it has been the intention of the Union to deliberately create conditions that would cause the Board to intervene by appointing a Board agent. Specific to the interim application, he argued that the application is not a true interim application in that the relief sought is the same as that sought on the main application, that is, it is in the nature of final relief. He also argued that the Union has not established the requisite urgency to entitle it to an interim remedy.

[30] Mr. Kenny argued that, despite the amendment to s. 26.5 of the *Act*, the Board's decision whether or not to intervene is still discretionary in nature in that the wording at the outset of s. 26.5 remains the same as it was prior to the amendment, specifically that "Either party may apply to the board for assistance in the conclusion of a first collective agreement, and the board <u>may</u> provide assistance pursuant to subsection (6), if . . ." [<u>emphasis added</u>]. The referral to a Board agent should not be automatic, as the Union suggests. It was argued that interference in collective bargaining by the appointment of a Board agent is an extraordinary remedy and therefore the Board must still be persuaded that it is appropriate in all of the circumstances to intervene. It was argued that the exercise of this discretion is judicial in nature and should only be made after an oral hearing of all the evidence. In *Prairie MicroTech, supra,* the Board stated that the former s. 26.5(1) in its entirety asks the question of whether assistance is appropriate because the goal is promoting collective bargaining, not replacing it. Mr. Kenny argued that the legislature must have been aware of the process the Board used with these types of applications and therefore the fact that there were no other changes to s. 26.5 suggests that the Board should continue to follow the procedure it has adopted and applied for a number of years. Mr. Kenny also pointed out that the legislature has provided no further guidance as to how or under what circumstances the Board agent

should be appointed and, in fact, the legislation has never indicated a process that involves the appointment of a Board agent, which further supports the Employer's argument that the Board should continue to follow its usual process despite the amendment in s. 26.5 (1.1).

[31] Mr. Kenny argued that the change to s. 26.5(1.1)(c)(iv) is not evidence that the legislature intended that the Board should expedite these applications and provide for the automatic appointment of an agent. It merely provides another trigger for a party to make an application to the Board. He pointed out that there are other pre-conditions that allow a party to apply to the Board within a period shorter than the 90 days post certification order as provided for in s. 26.5(1.1)(c)(iv) and gave as an example the pre-condition that the Union has held a strike vote, a provision which has been contained in s. 26.5(1.1)(c) since its inception. A strike vote has always provided a party with the ability to make an application to the Board yet the Board has still found it necessary to exercise its discretion to appoint a Board agent only where it thought it appropriate.

[32] The Employer also pointed out that the Union is asking the Board not only for assistance with the *conclusion* of the collective agreement but also with its step-by-step negotiation and that is not appropriate. Further, it was argued that it is not appropriate to intervene where the Union has created points of controversy in the proceedings with a view to creating conditions that would allow for Board intervention.

[33] The Employer relied on *Re Athabasca Catering Limited Partnership and U.S.W.A., Local 8914*, [1999] Sask. L.R.B.R. 430, LRB File No. 116-99 to support the proposition that interim relief is a discretionary remedy and that the right to claim such relief must be clearly established. The Employer also urged the Board to deny the Union a remedy on the basis that it did not come before the Board with "clean hands." In exercising its discretion the Employer asked the Board to consider the multiplicity of proceedings, including the redundancy of the interim application with the main application on this file, as well as the proceedings in the Union's first application for first collective agreement assistance in relation to LRB File No. 218-04.

[34] In addition, the Employer took the position that the Union has not established the necessity for interim relief nor that it acted without delay in seeking that relief and, as such, the dispute should only be heard after a full hearing on the merits. The Employer relied on *Hotel Employees and Restaurant Employees, Local 206 v. Chelton Suites Hotel,* (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Indian Gaming Authority Inc. c.o.b. Painted Hand Casino,* [2003] Sask. L.R.B.R. 378, LRB File Nos. 067-03 to 069-03 & 083-03 to 085-03; *Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership,* [2000] Sask. L.R.B.R. 223, LRB File No. 079-00; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Northern Steel Industries Ltd.,* [2002] Sask. L.R.B.R. 304, LRB File No. 114-02.

[35] Mr. Kenny also argued that the Union has not met the test for interim relief established in *Hotel Employees and Restaurant Employees, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operation Ltd. o/a Regina Inn Hotel and Convention Centre*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. The Employer maintains that the Union has not established an arguable case in that collective bargaining has not broken down (as evidenced by progress being made at each bargaining session) and because further dates for meetings have been scheduled. A number of items are left to be negotiated and Board intervention at this stage would be in the step-by-step negotiations and not just in relation to the "conclusion" of a collective agreement. Any delay that has occurred in negotiations is as a result of the conduct of the Union and therefore the fact that negotiations are taking a long time cannot form the basis of an "arguable case." In addition, the significant length of the hearing on the first application for first collective agreement assistance results from the Union proceeding with a case that it has made large in scope, complex, and the subject of a range of trivial issues.

[36] The Employer also asserts that, even if the Union could establish an arguable case, it has not met the onus upon it to establish that it would suffer greater labour relations harm if the order were not granted compared to the harm that would be suffered by the Employer if the order were granted. The delay in negotiations has been caused by the Union and significant labour relations harm would occur if a party is

permitted to deliberately manufacture problems in the bargaining process in an attempt to have the Board intervene. The Board should not reward the Union for its conduct in this case.

[37] The Employer suggested that, absent evidence of a change of intent in the legislative amendment, should the Board wish to change its process in relation to the appointment of agents on an application for assistance with a first collective agreement, the Chairperson could do so under the newly enacted provision of s. 17(1.1), which reads as follows:

> *17(1.1) The chairperson of the board may make regulations prescribing rules of procedure for matters before the board, including preliminary procedures, and prescribing forms that are consistent with this Act and any other regulations made pursuant to this Act.*

Given that the Chairperson has not prescribed any new rules or forms for these types of applications it is not open to the Board to change its process by way of this interim application.

[38] The Union denied the Employer's argument that the Union manufactured conditions to allow for the appointment of a Board agent and stated, in any event, that does not provide a reason not to appoint an agent as an agent would provide the most efficient and expedient method to investigate the matter and make a recommendation to the Board taking into account both the conduct of the Union and the Employer. This process would result in a better use of the Board's time and resources. The Union also pointed out that, in *Prairie Micro-Tech, supra,* the Board stated that the process is not "fault-driven" but rather a question of whether negotiations have broken down.

[39] With respect to the Employer's argument that the wording at the outset of s. 26.5(1.1) that "the board *may* provide assistance…" indicates that the appointment of an agent is a discretionary exercise, the Union responded that the appointment of a Board agent is merely "*assisting*" the parties in obtaining a collective agreement. The Union argued that it is not until the stage of the final hearing, if the parties have not been able to negotiate a collective agreement with the assistance of a Board agent, that the Board exercises its discretion to decide whether it will "*intervene*" by imposing the terms

of a collective agreement. It is at that point that consideration may be taken of whether it is appropriate to intervene by imposing the terms of a collective agreement. Mr. Plaxton stated that it appears that the Board has in the past imported the phrase ". . . and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement. . . ." in s. 26.5(1.1)(c)(iii) into its interpretation of s. 26.5(1.1)(c)(i) and (ii) as well and that the amendment in s. 26.5(1.1)(c)(iv) provides the Board with an opportunity to confine that test only to subsection (iii) as it is written. In any event, the Union argued that, even if the Board finds that it must exercise its discretion regarding the appointment of a Board agent, it can do so without an oral hearing.

[40] Regarding legislative intent of the amendment in s. 26.5(1.1)(c)(iv), the Union countered that the legislature must have considered that the time delay in obtaining collective agreements was unacceptable given the provision of the *Act* that allows a rescission application to be brought within a year of the certification order and every year thereafter. The Union asserted that it was the intent of the legislature that the employees have the opportunity to work under a collective agreement prior to decertifying and therefore the legislation should be read in a manner that expedites the appointment of a Board agent and the imposition of a collective agreement if the parties cannot agree on its terms. In addition, the Union stated that it brought this application as an interim one given that that is currently the only process available to parties to have a matter determined quickly.

[41] The Union argued that the relief it seeks, the appointment of a Board agent or the reporting back to the Board, is not final in nature. The imposition of terms of the collective agreement is the final relief afforded by s. 26.5, while the appointment of a Board agent is interim or interlocutory in nature – it is only one step in the process of obtaining assistance with a first collective agreement.

[42] The Union acknowledges that, without the exercise of the Board's discretion, there may be some conflict created by the provisions of s. 26.5(6) requiring 120 days to pass from the appointment of a conciliator and s. 26.5(1.1)(c)(iv) that the applicant is automatically entitled to the appointment of an agent upon the passage of 90 days from the certification order, but that the provisions could be read together so that,

upon an application such as this, it would be in the discretion of the Board whether to send the parties back to conciliation until the 120 days had passed or appoint the Board agent.

[43] In response to the Employer's argument regarding s. 17(1.1), the Union argued that, until such time as rules are prescribed, the Union still has the statutory right to bring this type of application and the Board entertains several types of applications, including a first collective agreement application, an interim application and a reference of dispute application, despite there not being any forms prescribed by regulation.

[44] The Employer argued that an interim application is not the appropriate forum in which to appoint a Board agent or make a determination concerning the effect of the amendments on the process the Board has used to determine applications for assistance with a first collective agreement. Counsel for the Employer argued that, in fairness to stakeholders, any changes to the process should be promulgated. The Union requested that, if the Board determines that the Union is not entitled to the appointment of a Board agent upon an interim application, the Board should establish guidelines for a new process or outline an approach for obtaining such an appointment in an expedited fashion.

Statutory Provisions:

[45] Relevant provisions of the *Act* include the following:

> *5. The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or substantially similar unit of employees, unless the*

board, on the application of that trade union, considers it advisable to abridge that period;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.

17(1.1) The chairperson of the board may make regulations prescribing rules of procedure for matters before the board, including preliminary procedures, and prescribing forms that are consistent with this Act and any other regulations made pursuant to this Act.

18 The board has, for any matter before it, the power:

…

(h) to order preliminary proceedings, including pre-hearing settlement conferences;

. . .

(q) to decide any matter before it without holding an oral hearing;

26.5(1)If the board has made an order pursuant to clause 5(b), the trade union and the employer, or their authorized representatives, must meet and commence bargaining collectively within 20 days after the order is made, unless the parties agree otherwise.

(1.1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:

(a) the board has made an order pursuant to clause 5(a), (b) or (c);

(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and

(c) one or more of the following circumstances exists:

(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;

(ii) the employer has commenced a lock-out;
(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6);
(iv) 90 days or more have passed since the board made an order pursuant to clause 5(b).

(2) If an application is made pursuant to subsection (1.1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.

(3) An application pursuant to subsection (1.1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

(4) All materials filed with the board in support of an application pursuant to subsection (1.1) must be served on the other party within 24 hours after filing the application with the board.

(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:
(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and
(b) serve on the applicant a copy of the list and statement.

(6) On receipt of an application pursuant to subsection (1.1):
(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and
(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:
(i) conclude, within 45 days after undertaking to do so, any term or terms of a first collective bargaining agreement between the parties;
(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.

(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:
(a) evidence adduced relating to the parties' positions on disputed issues; and
(b) argument by the parties or their counsel.

(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement

> *concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.*
>
> *(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*
>
> *(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*
>
> *42 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring the compliance with provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Decision:

[46] Prior to considering the Union's entitlement to interim relief, it is necessary to examine the nature of first collective agreement applications, the process used by the Board in determining entitlement to a remedy under s. 26.5, how that process has developed since its enactment in 1994 and the role of a Board agent under these provisions.

[47] In one of the first applications to come before the Board requesting a remedy under s. 26.5, in *Prairie Micro-Tech, supra*, the Board appointed a Board agent to explore whether any of the outstanding issues between the parties could be resolved and, further, to report to the Board on the progress of the process and to make recommendations to the Board concerning which issues would appropriately be the subject of arbitration by the Board. The Board noted that while "these recommendations would not be binding on the Board, they would clearly be of considerable value in helping the Board to decide at what point arbitration would be appropriate and what its scope would be." The Board determined that it was appropriate to appoint a Board agent prior to any threshold consideration by the Board of whether it was appropriate to intervene. At 52, the Board stated that the purpose of the Board agent function is to:

> *… assist the parties in exploring whether … any or all of the issues outstanding between them may be resolved.*
>
> *The other would be to report to the Board on the progress of this process, and to make recommendations to the Board concerning issues which might appropriately be the subject of arbitration by the Board. Though these recommendations would not be binding on the Board, they would clearly be of considerable value in helping the Board to decide at what point arbitration would be appropriate, and what its scope would be.*

[48] The most recent comprehensive analysis of these issues is contained in a series of decisions issued by the Board involving the Saskatchewan Indian Gaming Authority Inc. ("SIGA" or "the employer") and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("CAW" or "the union"), all of which were upheld on judicial review by the Court of Queen's Bench for Saskatchewan.[1]

[49] The first decision of the Board between these parties rendered January 25, 2001 (*National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 42, LRB File No. 092-00) involved an application filed by CAW on March 30, 2000 seeking the Board's assistance in concluding a first collective agreement. At approximately the same time as the application for first collective agreement assistance was filed, both the union and the employer filed unfair labour practice applications. The union had been certified on November 30, 1999 and, at the time of filing its application for first collective agreement assistance, the parties had met for collective bargaining on two occasions in March 2000. The essence of the employer's reply was that the application was premature and that the parties should be left to continue bargaining. The parties reached an agreement concerning the unfair labour practice applications

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[1] *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 42, LRB File No. 092-00; *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 704, LRB File No. 092-00; *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [2002] Sask. L.R.B.R. 16, LRB File No. 092-00; *Saskatchewan Indian Gaming Authority Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and Saskatchewan Labour Relations Board*, [2002] Sask. L.R.B.R. c-25, LRB File No. 092-00 (Sask. Q.B.)

and continued to bargain with the assistance of a conciliator. Having failed to conclude a first collective agreement, the union proceeded with the hearing of the application for first collective agreement assistance.

[50] When the matter first came before the Board, then Chairperson Gray outlined the background to first collective agreement applications, commenting on the difficulties encountered in attempting to negotiate a first collective agreement where the relationship between the employer and the union is developing and often characterized by mistrust and suspicion. Further difficulties were outlined at 50 and 51, as follows:

> *The time frame set out in the Act for reviewing the representative status of the certified trade union also contributes to the difficulty in reaching a first collective agreement. Section 5(k) of the Act permits the bringing of an application for rescission in the eleventh month following the issuing of a certification order, whether or not a collective bargaining agreement has been reached. Unions generally attempt to structure negotiations in order that a collective agreement can be achieved in the first year after certification.*
>
> *On occasion, employers are also aware of the open period and will structure negotiations with the union to ensure that no agreement is reached prior to the open period at which time an employee or group of employees may bring a rescission application to the Board to terminate the union's representation rights. The employer's bargaining conduct can be described as negotiating to rescission. Traditionally, the union's bargaining strength was tested by its ability to achieve a first collective agreement either through the traditional mechanism of strikes or its ability to resist a lock-out.*
>
> *In recognition of the difficulties facing unions and employers in first agreement settings, the Act was amended in 1994 to empower the Board to assist the parties in achieving a first collective agreement: see s. 26.5 of the Act above.*

[51] Upon a review of the authorities, the Board summarized the approach of the Board to s. 26.5 applications and the principles to be applied at 53:

> *Our Board interpreted s. 26.5 of the Act as permitting Board intervention in a first collective agreement setting when negotiations have broken down. The Board stressed that "the overall purpose of the provision is to intervene, where the situation warrants it, in an attempt to preserve the collective bargaining relationship, and the ability of the trade union to*

> *continue to represent employees"; see Prairie Micro-Tech Inc., supra, at 49.*
>
> *The mechanism for intervention that has been developed by the Board relies on the use of trained conciliators as Board agents to intervene in the process for the purpose of assisting the parties to achieve a first agreement. Failing agreement, the Board agent to report to the Board on two questions: first, should the Board intervene in the dispute or should the parties be left to their own devices; and second, if the Board agent concludes that the Board should intervene, what terms should the Board impose on the parties. The majority of the applications for first collective agreement are resolved with the assistance of the Board agent. When the matters are not resolved and are forwarded to the Board with a report, the Board will conduct a hearing to determine if it should intervene and if so, on what terms. At this stage of the proceedings the parties are asked to address the matters raised in the Board agent's report and to indicate their agreement or disagreement with the proposals contained in the report. Most frequently, the Board imposes the provisions recommended by the Board agent as they best reflect the agreement that would have been reached by the parties on their own accord without Board intervention.* [emphasis added]

[52] Also in *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 42, LRB File No. 092-00, the Board acknowledged that regardless of which precondition the applicant says it has met (in the former s. 26.5), whether it is the taking of a strike vote, the commencement of a lock-out, or a determination of bad faith bargaining against either of the parties, "the Board is required to determine that it is appropriate to assist the parties in the conclusion of a first collective agreement." In the *SIGA* case, the parties had resolved unfair labour practice applications under ss. 11(1)(c) and 11(2)(c) by agreeing, in part, that the preconditions in s. 26.5(1) (as it then was) were waived, except that the parties retained the right to argue the need for first contract assistance. The Board determined that the parties had properly agreed to proceed with the application for first agreement assistance through a reference of dispute under s. 24 of the *Act*, without the requirement of meeting all of the preconditions set out in s. 26.5(1). The employer took the position that in any event, the application was premature. The Board responded as follows at 58:

> *As we have set out above, the Board's normal procedure on receipt of an application for first collective agreement assistance is*

> *to appoint a Board agent who is asked to assist the parties in concluding a first agreement, and failing which, to report to the Board on (1) whether the Board should intervene in the collective bargaining process by imposing a collective agreement, and (2) if so, what terms should be imposed. In making these assessments, the Board agent must assess if the parties can achieve a collective agreement if left to their own devices. This is a version of the question raised by SIGA in these proceedings. In our view, it is best left to the Board agent to assess and to report back to the Board in due course.*

[53] The Board in that case proceeded to make the "usual order" appointing a Board agent to assist the parties in concluding a first collective agreement and, failing which, to answer the two questions indicated above and report back to the Board within a period of 60 days or within such further time extended by the Chairperson of the Board.

[54] Following the first hearing, the Board agent performed his duties pursuant to the Board order and filed a report with the Board in June 2001. The union notified the Board that it accepted the report while the employer indicated it did not accept the agent's report and that it took the position that the Board should not intervene in the dispute. As such, a further hearing was held before the Board in August 2001 and a decision was rendered by the Board on September 18, 2001 (*National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 704, LRB File No. 092-00). At the hearing in August 2001, the employer had raised three preliminary issues, one of which was whether or not the Board should intervene and impose a first collective agreement. The Board outlined the procedure used to assist parties with the conclusion of a first collective agreement at 707 through 709:

> *Over the course of hearing first collective agreement applications, the Board has instituted a practice of appointing Board agents, who generally are senior labour relations officers from the Labour Relations, Mediation and Conciliation Branch, Saskatchewan Labour, to carry out two main tasks: (1) to assist the parties to conclude a first collective agreement; and (2) after a certain number of days, to report to the Board on (a) whether or not the Board should intervene in the collective agreement dispute; and (b) if so, what collective agreement terms should be imposed by the Board. If the Board agent is successful in assisting the parties*

> *to conclude a first collective agreement, the Board is informed by the parties that settlement has been reached and the application before the Board for first collective agreement assistance is withdrawn by the party who filed the application. Where the Board agent is not able to assist the parties to resolve all of the outstanding issues, the Board agent will file his or her report with the Board indicating, first of all, his or her opinion on whether the Board should intervene in the dispute, and if so, on what terms. The parties are provided a copy of the Board agent's report by the Board and are asked to advise the Board if they agree or disagree with the Board agent's recommendations, and if so, which recommendations. A hearing is then held by the Board to determine (1) should the Board intervene in the dispute (if this remains an issue between the parties); and (2) if so, what collective agreement terms should the Board impose. In relation to the second issue, the Board directs the parties to focus on the question of why the Board agent's recommendations should not be imposed.*
>
> *As a result of the practice of appointing Board agents, the Board is provided with recommended terms of settlement from a neutral third party who has been in discussion with the parties and who has a good ability to judge (a) where the parties would settle, if settlement could be achieved; and (b) what is fair and reasonable in the circumstances.*
>
> *The appointment of Board agents to assist parties to a first collective agreement application has proven to be successful. In the 26 applications that have been filed with the Board since the enactment of s. 26.5, six were settled by the intervention of the Board agent. In six cases, the Board resolved the collective agreement application by imposing various terms. In three of these six cases, the Board's intervention was related to very few terms as the parties had resolved most of the outstanding matters with the Board agent. In three cases, the Board refused to intervene in the dispute. Four cases were adjourned sine die by the parties for a variety of reasons, including settlement by the parties without assistance from the Board. Six cases have been withdrawn, again for a variety of reasons, including settlement by the parties on their own accord.* [emphasis added, footnotes omitted]

[55] Section 26.5 of the *Act* does not specifically provide for the appointment of the Board agent as part of the process of concluding a first collective agreement. It has however become an important part of the process. At 709 and 710 the Board referred to the origins of its authority to appoint a Board agent to assist the Board in determining whether it will intervene by imposing a collective agreement and if so, what the terms of that collective agreement will be:

The Board examined its authority to appoint Board agents in Madison Inn, [1996] Sask. L.R.B.R. 777, LRB File No. 053-96, at 781-2 as follows:

> *The first issue raised by counsel for the Employer is whether the appointment of a Board agent for this purpose is consistent with s. 26.5. Counsel argued that, while s. 26.5 (6) allows the Board to direct the parties to conciliation if they have not already availed themselves of that process, the only options open to the Board following any conciliation process are either to conclude a term or terms of a collective agreement, or to appoint an arbitrator to conclude an agreement. The terms of the legislation do not allow any role for a Board agent to carry out the kind of tasks contemplated in the terms of reference set out for Mr. Cuddington.*
>
> *In our view, this argument is based on a rather narrow understanding of the authority of the Board to manage our own procedure in the most effective way, and in a way which makes most effective use of resources. The statute specifies several ways in which the Board may approach an application for first contract arbitration. We may direct the parties to avail themselves of the conciliation process, which we understand to mean the making of a request to the Department of Labour for the appointment of a conciliator employed by that Department. Once this process has continued for a specified period without resulting in a concluded first agreement, the Board may either undertake to "conclude ... any term or terms of a first collective bargaining agreement," or may appoint an interest arbitrator to perform this task.*
>
> *We do not read these provisions as precluding the steps which the Board has taken here. For one thing, a provision which envisions that the Board may "conclude" a term or terms of a collective agreement does not seem on its face to restrict us to conducting an adjudicative or quasi-judicial proceeding - though, as we have indicated all along, we do contemplate holding a hearing or more than one hearing at which the parties may make representations concerning the appropriateness of imposing certain terms of a collective agreement.*
>
> *In any case, it would, in our opinion, place unreasonable limitations on the effectiveness of the*

Board as an administrative tribunal charged with advancing the legislative objectives contained in The Trade Union Act to interpret the statute as restricting the Board to employing adjudicative hearings as the exclusive means of obtaining information, exploring possibilities for settlement, or determining subsidiary or policy issues. In connection with some applications, we have made use of the offices of the vice-chairperson and certain members of the Board, as well as other agents, to carry out these important roles.

It is true that The Trade Union Act, unlike legislation in some other jurisdictions, does not specify all of the circumstances under which the Board may delegate these tasks. It must be remembered that the Act is an open-textured and flexible instrument, which creates considerable latitude for the Board to determine the most effective way of conducting our affairs. Within the statute itself, however, there are at least some clues that the legislature contemplated that the Board would develop a range of procedures and mechanisms to support our work. Section 18 of the Act, for example, confers upon "duly appointed agents" powers under The Public Inquiries Act which are the equivalent of those conferred upon the Board and its members:

> *18 The board and each member thereof and its duly appointed agents have the power of a commissioner under The Public Inquiries Act and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.*

As we suggested to the parties in an exchange which took place at the hearing of these objections, the Board has found the appointment of a Board agent a useful mechanism in connection with applications under s. 26.5. In some cases, such an agent may be successful in assisting the parties to reach an agreement by acting as a mediator or conciliator. In other cases, the agent may at least help the parties to refine the issues, or to reduce the number of issues which will be submitted to the Board for consideration at a hearing.

When the Board finally comes to hear an application under s. 26.5, we are departing somewhat from our usual role as a guarantor of vigorous collective

> *bargaining. It represents an interference in the bargaining process, premised on the existence of one of the preconditions set out in s. 26.5(1)(c). On the basis of a review of the jurisprudence and literature concerning first contract arbitration in other jurisdictions, the Board, in a decision in Prairie Micro-Tech, supra, set out some guidelines to indicate an overall approach to this remedy. In these guidelines, we indicated our intention to intervene only in a restrained and selective way, and not to utilize this remedy in a way which would make it a substitute for bargaining between the parties.* [emphasis added]

[56] In *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 704, LRB File No. 092-00, the Board proceeded to outline the two stage process for a determination of this type of application, specifically noting that the role of the Board agent "is to act in a mediation capacity and reporting capacity" and in so doing the Board agent "greatly enhances the Board's role in carrying out the legislative intent of s. 26.5," at 710 and 711:

> *There are two stages to the process of hearing an application for first collective agreement assistance under s. 26.5 of the Act. In the first stage, the Board must determine if it will provide assistance to the parties. In order to determine this question, the Board must initially determine that the factors listed in subparagraphs (a), (b), and (c), are present before proceeding further with the application. In the present case, that determination was made by the Board in its earlier Reasons for Decision (see [2001] Sask. L.R.B.R. 42).*
>
> *In addition to the statutory requirements set out in s. 26.5(1)(a) to (c), the Board must also decide the broader question, that is, whether or not there are sound labour relations reasons that would justify Board intervention in the collective bargaining process. In the Prairie Micro-Tech Inc. case, supra, the Board indicated that intervention is not automatic upon finding that the initial requirements set out in s. 26.5(1)(a) to (c) are met. Although the Board could intervene in any situation where the strict requirements of s. 26.5(1) are present, in keeping with the policy of facilitating, and not replacing, collective bargaining, the Board will scrutinize each case to determine if there are sound labour relations reasons for Board intervention. Some of these factors were set out in Prairie Micro-Tech Inc. at 49 quoted above.*

> *The Board agent's report assists the Board in making the determination that there are sound labour relations issues justifying intervention. These reasons may be stated in a detailed fashion in the report itself or may be inferred from the information provided in the report, such as the type and number of issues remaining in dispute, the number of meetings held between the parties, the length of the bargaining process, the complexity of the outstanding issues, and the like. The Board agent's report will provide one source of information on which the Board will rely to make the determination as to whether or not it ought to intervene in the bargaining process.*
>
> *Once a determination has been made to intervene in the bargaining process, the Board will turn again to the Board agent and will consider the recommendations made by the Board agent for settling the terms of the collective agreement.* [emphasis added]

[57] The Board proceeded to make it clear that the question of whether to intervene is properly dealt with at the hearing stage pursuant to s. 26.5(7), following the receipt of the Board agent's report. The Board stated at 712:

> *In our view, the hearing process contemplated under s. 26.5(7) is designed to elicit each party's position on the disputed matters, including the issue of whether or not the Board ought to intervene to determine the terms of their collective agreement. On the threshold question of whether or not the Board should intervene in the collective bargaining process, the Board needs to know how each party views the state of their collective bargaining; what their estimate is of the likelihood of success if left to their own devices; what efforts they have made on their own to conclude an agreement; what the main stumbling blocks are; and how they would propose to resolve them without Board assistance. This information can be given to the Board through a witness called by each side or through representations made by their counsel. There need not be any great degree of formality to explaining either party's position on this threshold question. In addition, the Board will refer to the Board agent's report for an understanding of the efforts made to date by the parties, the items left outstanding, the complexity of the problem and the like. The Board may also refer to the proceedings that have occurred between the parties as part of its assessment of the threshold question.* [emphasis added]

[58] Further Reasons for Decision were issued by the Board on January 21, 2002 (*National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2002] Sask.

L.R.B.R. 16, LRB File No. 092-00) at which time the Board concluded that bargaining had broken down between the parties and that it was appropriate to assist the parties in the conclusion of their first collective agreement. The Board proceeded to impose the terms of that collective agreement.

[59] The employer in the *SIGA* cases proceeded to the Court of Queen's Bench with an application for judicial review in relation to the three sets of Reasons for Decision referred to above. Several issues were raised concerning the Board's process and determination of the applications; including the issue of whether the Board had improperly delegated authority to the Board agent by having the Board agent assess and provide a report on the questions of whether the Board should intervene in the collective bargaining dispute and if so, upon what terms. The employer's position was that the *Act* did not provide for such a delegation and that the Board exceeded its jurisdiction by having the Board agent carry out the Board's function. After referring to several of the passages from the Board's Reasons for Decision, as also reproduced above, the Court concluded at c-47:

> *The significant factor in the Board's use of a Board agent follows from the nature of the agent's function. The Board agent in this matter was not appointed to actually conclude the terms of the collective agreement between the parties. Here, Mr. Stevens was appointed to make recommendations to the Board. Both parties were provided with the Board agent's report, and were given the opportunity in hearings before the Board to address all of the recommendations contained in the Board agent's report. They were able to do this either through the calling of evidence or cross-examination, and argument. The record discloses that the Board hearing convened on September 24, and continued September 25, September 26, and October 3 of 2001. These hearings ultimately led to the Board's reasons for decision on January 21, 2002.*
>
> *On examining both the philosophical basis for the Board's utilization of a Board agent, and the actual use made of the Board agent, in this instance, I am led to the conclusion that the Board did not improperly delegate its powers to the Board agent, by ordering the Board agent to make his own assessment on the collective bargaining matters, and thereafter provide a report to the Board on outstanding issues. Ultimately, the decision was that of the Board and not the Board agent. In essence, I consider the utilization of the Board agent to be a procedural matter within the jurisdiction of the Board. Unless the Board were to abdicate its ultimate decision-making responsibility to the Board agent, the*

> *matter does not become a jurisdictional one whereby the Board could be said to have lost jurisdiction.* [emphasis added]

[60] The reasons for providing an extensive review of the Board's Reasons for decision in the *SIGA* case and the Court's decision on judicial review are twofold. First, it is apparent that the procedure the Board has used under s. 26.5 is to initially appoint a Board agent to attempt to resolve the collective bargaining dispute between the parties and, failing this, to report to the Board on two issues: (1) whether the Board should intervene by imposing a first collective agreement; and (2) if so, what the terms of that collective agreement should be. It is also apparent that this procedure has been common practice for a number of years spanning numerous applications filed with the Board. In fact, since the *SIGA* decisions, the Board's experience with first collective agreement applications has changed little from the summary provided by the Board in that case. Secondly, it is apparent upon reading the Court's decision on judicial review of the *SIGA* cases that the Board's authority and its practice to appoint a Board agent to consider both the questions of whether the Board should intervene by imposing a first collective agreement and if so, on what terms, are clearly matters of Board procedure that are entirely within the Board's jurisdiction to decide. As long as the Board does not abdicate its decision-making responsibility to the Board agent on these two questions, it is open to the Board to appoint a Board agent without first having made any threshold determinations on those issues.

[61] This point was most directly illustrated in a recent application before the Board. In *Service Employees International Union, Local 333 v. Lutheran Sunset Home of Saskatoon and Lutheran Sunset Home Corp. o/a Luthercare Communities – Villa Royale Care Home, Luther Riverside Terrace Personal Care Home and Support Group, and Trinity Homes* [2005] Sask. L.R.B.R. ---, LRB File Nos. 104-04 to 108-04 (not yet reported), on an application for first contract assistance, the employer argued against the intervention of the Board on the basis that (1) the appointment of a Board agent "presupposes" that the Board will intervene; and (2) there is no guarantee the Board agent understands that the Board's role in these applications is to take "a cautious and minimalist approach" to intervention. While noting that the Board's approach to applications for first collective agreement assistance has evolved since the enactment of this provision in 1994 and has become more standardized, the Board considered the purpose of the provisions as stated in *Prairie Micro-Tech, supra*, and determined that the

employer's arguments were without merit at the stage where an applicant seeks the appointment of a Board agent. The Board stated at ---:

> *The assertion that the appointment of a Board agent to perform the functions stated in these cases "presupposes" that the Board will intervene has no merit. The report of a Board agent is not binding upon the Board, and the parties are given the opportunity to make representations to the Board urging the exclusion of items the Board agent recommended for consideration or the inclusion of others, or that the Board decline to intervene in the first collective agreement at all. In many cases that have come before the Board under this provision in the intervening years, the Board has come to various conclusions as to how to proceed based on the facts of each case, including, inter alia, declining to intervene at all, declining to appoint a Board agent and proceeding directly to a hearing, and declining to follow some or all of the recommendations of the Board agent.*
>
> *Similarly any suggestion that a Board agent does not necessarily understand the Board's role under s. 26.5 is without merit. The Board's practice is to appoint persons well experienced in labour relations, mediation, the structure, purpose and object of the Act, collective bargaining and the Board's process.*
>
> *In the present case, the Union has met the criteria set forth in s. 26.5(1) of the Act to apply to the Board to request assistance – the certification Order contains an order pursuant to clause 5(b) of the Act, the parties have bargained collectively and have failed to conclude a first collective agreement and the Union has taken a successful strike vote. However, the Board lacks information upon which it can assess the appropriateness of rendering assistance. As a result, the Board will appoint a Board agent to report to the Board within 60 days of the issuance of the Order on the terms described therein.*

[62] The Board disagrees with both counsel for the Employer and the Union regarding their description of the current process of the Board regarding the appointment of a Board agent. It is clear on the basis of the authorities before us that the Board is not required, as part of a threshold determination, to answer the question of whether it is appropriate to intervene prior to appointing a Board agent. A review of the case law also indicates that appointing a Board agent is not considered to be "intervening" in the collective bargaining dispute. In fact, the usual order for the appointment of a Board agent includes a requirement to report to the Board on whether assistance is appropriate, failing the resolution of the outstanding issues between the parties. To

answer that question at this time as part of a threshold determination in addition to determining whether one of the pre-conditions have been met in s. 26.5(1.1) is redundant and duplicitous in that not only is the Board agent required to consider and report to the Board on that question, but here the Board is being asked to make the same determination twice – once at the initial phase of the hearing (because the employer has raised the issue of prematurity) and again at the final stage following receipt of the report of the Board agent. It is an ineffective use of the Board's time and resources to engage in this inquiry twice. Furthermore, the fact that a rescission application may first be brought in the open period preceding the anniversary date of the certification order and the fact that the Board is permitted to impose a first collective agreement only for a period not exceeding 2 years, suggests that first collective agreement applications should not become bogged down by a process which answers the same question twice.

[63] The Board agents appointed by the Board to make an inquiry into whether the Board should intervene and, if so, on what terms, are experienced in labour relations, collective bargaining, mediation and the structure, object and purposes of the *Act* and are thus properly qualified to embark on this inquiry. In appointing a Board agent, the Board is not abdicating its responsibility to make a determination on the issue of whether intervention is appropriate. The Board is making a procedural decision to utilize the assistance of a Board agent to explore and report on the issue of whether intervention is appropriate and, if necessary, it is the Board that, after a hearing involving the parties, makes a final decision whether to intervene and if so, on what terms.

[64] There is nothing in the amendments to s. 26.5 that signifies that there should be a change to this process. The amendment to s. 26.5(1) by adding 26.5(1.1)(c)(iv) merely provides another precondition which an applicant can choose to rely upon to make an application for first collective agreement assistance.

[65] We have determined that the argument of prematurity is unmeritorious at this stage of an application for first collective agreement assistance and that there is no requirement that we determine that negotiations have broken down or that it is appropriate for the Board to intervene in order to appoint a Board agent. Therefore, it is only necessary that the applicant show that it meets the following preconditions to entitle

it to an order for the appointment of a Board agent: (1) that the Board has made an order under clause 5(a)(b) or (c); (2) that the union and the employer have bargained collectively and have failed to conclude a collective bargaining agreement; and (3) that either (i) the union has taken a valid strike vote, (ii) the employer has commenced a lock-out, (iii) the Board has made a determination under s. 11(1)(c) or s. 11(2)(c) and it is appropriate to assist the parties in the conclusion of a first collective agreement, or (iv) 90 days have passed since the making of an order under s. 5(b).

[66] It is apparent by the Union's use of an interim application in this case that there was confusion about the process to be used to have this matter determined. Although it is the Board's view that an interim application should not be used as the means of obtaining the appointment of a Board agent, because all the above stated preconditions have been proven on uncontroverted facts in the affidavit evidence filed, we find that there is nothing to be gained by requiring the parties to proceed with a hearing of the main application. In order to fulfill the objectives of the *Act* in the context of this application, the Board finds it appropriate to appoint a Board agent to inquire into the issues of: (1) whether the Board should intervene in the collective bargaining process by imposing a collective agreement; and (2) if so, what terms should be imposed. The usual order for the appointment of a Board agent will issue with the requirement that the Board agent report back to the Board within 60 days or such further period of time upon an extension being granted by Vice-Chairperson Zborosky.

[67] On this application the Employer has raised the issue that the application is premature and that the Union has manufactured the preconditions solely for the purpose of obtaining the appointment of a Board agent. As we have stated, such an argument is unmeritorious at this stage, however, it is open to the Employer to raise such an issue with the Board agent if the parties are unable to conclude a collective agreement. The Board agent may explore that issue, among others, when making a recommendation on the question of whether the Board should intervene in the collective bargaining dispute. Should the parties be unable to reach a collective agreement and it becomes necessary for the matter to proceed to a hearing before the Board, it is open to the Employer, if it wishes, to continue to rely on that argument and request that the Board make a determination in that regard.

[68] In the future, on an application for first collective agreement assistance, the appointment of a Board agent will be ordered if, on the face of the application and the reply filed by the parties, it is apparent that the above stated preconditions are met. Such an order will be made *in camera* by the Board. An oral hearing will rarely be required and it is anticipated that a hearing will only be held where it is apparent from the pleadings that there is a serious question as to whether one of the preconditions stated above has been met. At the initial stage, the Board maintains the discretion to order the parties to proceed with conciliation if they have not previously done so, or if 120 days have not passed since the date the conciliator was appointed, although it is clear by the wording of 26.5(6) that this not a requirement or precondition to the appointment of a Board agent.

DATED at Regina, Saskatchewan this **21st** day of **October, 2005.**

LABOUR RELATIONS BOARD

Angela Zborosky, Vice-Chairperson