Labour Relations Board
Saskatchewan

WINNERS MERCHANTS INTERNATIONAL L.P., Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File No. 225-05; September 6, 2006
Vice-Chairperson, Angela Zborosky; Members: Gloria Cymbalisty and Marshall Hamilton

For the Applicant: Sue Barber
For the Respondent: Larry Kowalchuk

Reconsideration – Criteria – Board reviews first, fourth and sixth criteria for reconsideration - Board concludes that original panel properly interpreted law and general policy considerations relating to first collective agreement applications and declines to refine or expand upon original decision – Board dismisses application for reconsideration.

Reconsideration – Criteria – Breach of natural justice - Board concludes that original panel's discretion not fettered by policy or practice of Board relating to first collective agreement applications – Board dismisses application for reconsideration.

***The Trade Union Act*, ss. 13.**

REASONS FOR DECISION

Background:

[1] This is an application by Winners Merchants International L.P. (the "Employer"), filed with the Board on April 20, 2006 for reconsideration of an Order of the Board dated April 5, 2006, in LRB File No. 225-05, appointing a Board agent pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*") to assist the parties in the resolution of a first collective agreement and, failing which, to report to the Board on the issues of whether the Board should intervene to assist the parties in concluding their first collective agreement and the proposed terms of that first collective agreement.

[2] The original application was made by Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") on November 30, 2005. The application asserted that the Union was certified to represent a unit of employees of the

Employer on October 27, 2004, that collective bargaining commenced March 18, 2005, that employees voted in favour of strike action on August 14, 2005 and that the parties had been unable to conclude a first collective agreement as of the date of the application. The application was considered by a panel of the Board, *in camera*, chaired by Chairperson, James Seibel. The *in camera* consideration resulted in the Board issuing an order, in the usual form, appointing a Board agent to assist in the resolution of a first collective agreement and report to the Board on whether the Board should intervene to assist the parties to conclude a first collective agreement and, if so, the terms that the Board should impose.

[3] Upon the filing of the original application the Employer initially took the position that the application was not filed in proper form and that it would not file a reply until the application was amended to comply with the provisions of s. 26.5 of the *Act*. Following a conference call hearing with the Board's Executive Officer, Reasons for Decision were issued on February 22, 2006 which required the Union to amend its application to conform to the requirements of s. 26.5 (3) of the *Act* by including "a list of disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues." The Union filed its amended material in accordance with the Order of the Executive Officer on March 15, 2006. The Employer then filed its material in response on March 31, 2006 and, taking the position that it was inappropriate for the Board to intervene, requested a hearing.

[4] Following receipt of the Employer's response to the application, the Board Registrar advised the parties that the application would be considered *in camera*, in accordance with the Board's practice as set out in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Sobeys Garden Market*, [2005] Sask. L.R.B.R. 483, LRB File No. 128-05.

[5] The Employer's application for reconsideration, filed on April 20, 2006, asks for reconsideration on the following grounds:

> *(1) The decision turns on conclusions of law and general policy which were not properly interpreted by the Board;*

> *(2) The Board, in camera, failed to properly consider, interpret and apply the provisions of s. 26.5 of The Trade Union Act to the application before it;*
>
> *(3) The Board, in camera, failed to properly determine whether the preconditions for the appointment of a Board agent have been met;*
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> *(4) The Order, granted in camera, constitutes a significant error of law;*
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> *(5) The Board is without jurisdiction, in camera, to make such an order;*
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> *(6) The Order, granted in camera, is based upon a misapprehension and a misapplication of the material presented to the Board;*
>
> *(7) The Order, granted in camera, represents a significant decision of the Board and a significant departure from long-standing jurisprudence of the Board and the Board may wish to refine, expand upon or otherwise change its approach to the consideration interpretation and application of the provisions of s. 26.5 of The Trade Union Act;*
>
> *(8) The decision of the Board, in camera, is tainted by a breach of natural justice;*
>
> *(9) Such further and other grounds as counsel may advise and this Board allow.*

[6] The Employer also requested that an alternate panel of the Board hear its application for reconsideration.

[7] It is helpful at this stage to set out a portion of the Board's decision in the *Sobeys* case, *supra*, to which the Board Registrar referred the parties, as the basis for consideration of the original application *in camera* by a panel of the Board. In that case the Board stated the procedure as follows, at 512 and 513:

> *[65] . . .* ***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).***
>
> *. . .*
>
> *[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.*
> [***emphasis added***]

[8] This application for reconsideration was heard on June 6, 2006, at which time the Board heard the oral arguments of the parties.

Statutory Provisions:

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

> *18 The board has, for any matter before it, the power:*
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> *…*
>
> *(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.

Arguments:

<u>Employer</u>

[10] Counsel for the Employer, Ms. Barber, requested that the Board reconsider the *in camera* Order it granted on April 5, 2006 as it made the Order without first hearing the Employer's submissions considering the necessity of an oral hearing on this application. The Employer argued that, because this application is the first considered by the Board since the rendering of its decision in the *Sobeys* case, *supra*, (wherein the Board expressed an intention to consider future applications for first collective agreement assistance *in camera*, at the initial stage where the Board considers appointing a Board agent), reconsideration is appropriate because the decision constituted a significant policy decision of the Board.

[11] With respect to the test to be met for an order appointing a Board agent, the Employer submitted that the *Sobeys* case is distinguishable on its facts from the present case and, as such, it is not appropriate for the Board to intervene in this case and appoint a Board agent. The Employer argued that, in the *Sobeys* case, 17 months had passed between the date of certification and the s. 26.5 application while, in the present case, only 13 months had passed, nine of those since the date the Union requested that the Employer commence collective bargaining. In addition, in the *Sobeys* case, it was necessary for the union to have Saskatchewan Labour appoint a conciliator to get the bargaining started and there was evidence that the employer had failed to bargain meaningfully, had failed to provide information to the union about bargaining and had engaged in a pattern of canceling meeting dates and refusing to propose alternate dates.

[12] The Employer submitted that the following are the matters at issue on the application for reconsideration: (1) the test which must be met in order for the Board to appoint an agent pursuant to s. 26.5 of the *Act*; and (2) whether the Board may appoint an agent pursuant to s. 26.5 of the *Act in camera*. At the hearing, the Employer filed a written argument, which the Board has reviewed.

[13] The Employer argued that the decision of the Board in *Sobeys*, *supra*, is wrong. The Employer urged upon the Board an interpretation of the precondition in s. 26.5(1.1)(b) (that "the trade union and the employer **have bargained collectively and have failed to conclude** a first collective bargaining agreement") consistent with the test

applied by the Board with respect to the provisions in s. 43 (10) of the *Act* which deal with an employer's ability to effect a technological change (as interpreted by the Board in *Regina Exhibition Association Limited. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1997] Sask. L.R.B.R. 787, LRB File Nos. 256-97, 266-97, 279-97, 308-97 & 321-97, and *Acme Video Inc. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1998] Sask. L.R.B.R. 126, LRB File Nos. 148-97 & 170-97). The relevant portions of s. 43 to which the Employer makes a comparison read as follows:

> *(8.1) On receipt of a notice pursuant to subsection (8), the employer and the trade union shall meet for the purpose of bargaining collectively with respect to a workplace adjustment plan.*
>
> *. . .*
>
> *(8.3) Not later than 45 days after receipt by the trade union of a notice pursuant to subsection (2), the employer or the trade union may request the minister to appoint a conciliator to assist the parties in bargaining collectively with respect to a workplace adjustment plan.*
>
> *. . .*
>
> *(10) where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:*
>
> > *(a) a workplace adjustment plan has been developed as a result of the bargaining collectively; or*
> >
> > *(b) the minister has been served with a notice in writing informing the minister that the parties* ***have bargained collectively and have failed to develop*** *a workplace adjustment plan.*
>
> . . . .
>
> [***emphasis added***]

[14] The Employer pointed out that the Board held in the *Regina Exhibition* and *Acme Video* cases, both *supra*, that "bargaining collectively" with respect to a workplace adjustment plan pursuant to s. 43 (10) carried with it the same degree of effort

that was expected when parties were negotiating a collective agreement and that "bargaining collectively" is as defined in s. 2 (b) of the *Act*, that is, "negotiating in good faith with a view to the conclusion of a collective bargaining agreement . . ." The Employer observed that, in those cases, the Board proceeded to assess the level of effort of the parties through their compliance with the duty to bargain collectively, noting that it was necessary for the parties "to engage in a serious, determined and rational discussion of the proposals that are put forward, including discussions of the economic or other justifications for objecting to the proposals and of alternatives to the rejected proposals" and that a simple exchange of proposals was insufficient to satisfy the duty to bargain collectively. The Employer also noted the comparisons the Board made when analyzing s. 43 (10)(b) in the *Acme Video* case to the test for conduct that would constitute "collective bargaining" under s. 11(1)(m). An employer may defend an allegation of an unfair labour practice pursuant to s. 11(1)(m), concerning a unilateral implementation of terms and conditions of work, by proving that the parties have "bargained to an impasse." The test for "impasse" is that there must be "objectively discernible signs, that further bargaining would not be fruitful and that the bargaining difficulties are so entrenched that there is no point in trying to achieve anything further by that route." In the *Acme Video* case, the Board utilized the same approach when interpreting the requirement to "bargain collectively" in s. 43(10), that is, that the duty to bargain collectively a workplace adjustment plan is discharged when the parties have bargained to an impasse.

[15] The Employer pointed out that the statutory language used in s. 26.5(1.1)(b) that "*the trade union and the employer* ***have bargained collectively and have failed to conclude*** *a first collective bargaining agreement,*"" is virtually the same as that used in s. 43(10)(b), that being, "*that the parties* ***have bargained collectively and have failed to develop*** *a workplace adjustment plan*." Counsel argued that a proper comparison can be made between s. 43(10) and s. 26.5, noting that the Legislature did not make a distinction in the degree of effort required of the parties when bargaining collectively, whether it be for a first collective agreement or a workplace adjustment plan. On the basis of this similarity of language and of the analysis used in the *Regina Exhibition* case and the *Acme Video* case, both *supra*, the Employer submitted that, in order for the Board to make a determination as to whether it should intervene and assist the parties in reaching a first collective agreement pursuant to s.

26.5 of the *Act*, it must apply the same test for "bargaining collectively" as set out in ss. 43 and 11(1)(m). This would require the Board to determine, prior to appointing a Board agent, that the parties have bargained to an impasse.

[16] The Employer also argued that a precondition requiring the parties to have bargained to impasse is consistent with the Board's ruling in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.* [1996] Sask. L.R.B.R. 36, LRB File No. 201-95, where the Board outlined general principles concerning applications under s. 26.5 and commented at 49:

> *The first two conditions permit either party to apply to the Board* ***if bargaining has broken down*** *and a strike is in the offing, or a lock-out has occurred.*
> [***emphasis added***]

[17] The Employer also re-produced excerpts from Hansard wherein the most recent Bill to amend the *Act*, including an amendment to the provisions of s. 26.5 and the addition of a specified power in s. 18(q) which allows the Board to render a decision without an oral hearing, was debated in the Legislature and in the Standing Committee on the Economy. The Employer argued that these excerpts provide further evidence of support for its position that there must be some type of “negotiating breakdown” in order for the Board to intervene pursuant to s. 26.5 and therefore a hearing before the Board is necessary to determine the question of whether there has been such a negotiating breakdown that would support intervention by the Board.

[18] It was on the basis of the above that the Employer submitted that the Board had misapplied s. 26.5 by appointing a Board agent without a hearing at which evidence on the issue of whether the parties had bargained to an impasse could be introduced and the issue could be determined.

[19] With respect to the issue of whether the Board may appoint an agent pursuant to s. 26.5 out the *Act in camera*, the Employer argued that the practice proposed in the *Sobeys* case, *supra*, amounted to a breach of natural justice. In the Employer's view, despite the power of the Board in s. 18(q) to decide any matter before

it without the holding of an oral hearing, it is a breach of natural justice for the Board to not permit a party an opportunity to be heard if a party so requests. The Employer also argued that any involvement by the Board, whether through an agent or otherwise, impacts on the collective bargaining process and is therefore not merely a procedural matter as it was characterized by the Board in *Sobeys, supra*. Further, the Employer pointed out that the wording of s. 26.5 makes it obvious that there is a grant of discretion to the Board to determine whether it will intervene, and that this discretion is not unlimited. The Employer submitted that by implementing a practice to appoint a Board agent (as outlined in the *Sobeys* case, *supra*) the Board has adopted an inflexible policy which fetters its ability to consider individual cases with an open mind or on their own merits. The Employer argued that a policy requiring a delegate to exercise its discretion in a particular way might be illegally limiting the ambit of its power, thereby committing a jurisdictional error capable of judicial review. In this regard, the Employer relied on the text, Jones & De Villars, *Principles of Administrative Law*, 4th ed. (Scarborough: Carswell, 2004) at 192 and *Lloyd v. British Columbia (Superintendent of Motor Vehicles)* (1971), 20 D.L.R. (3d) 181 (B.C.C.A.).

[20] The Employer also pointed out that the decision of Allbright J. in *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 (Sask. Q.B.) made it clear that the Board has a duty to conduct its proceedings under s. 26.5 in accordance with the principles of procedural fairness and natural justice.

[21] The Employer did not dispute that the Board is entitled to appoint a Board agent to assist on s. 26.5 applications but argued that the Board must grant the parties an opportunity to have a hearing to determine whether the circumstances are appropriate for the appointment of a Board agent and to examine the evidence to confirm that the prerequisites of s. 26.5 have been met. The Employer says this is particularly important in this case where the Board has permitted the application to be made by letter without the force of a statutory declaration and because it is necessary for the Board to hear evidence to make a determination whether the parties have bargained to impasse.

[22] At the hearing of the reconsideration application the Employer also raised an issue concerning the appointment of Kelly Miner as the Board's agent in this matter. Counsel for the Employer stated that there *might* be a reasonable apprehension of bias on the part of her client because Ms. Miner was formerly employed by the Union, however, because the Employer did not yet have specific information concerning Ms. Miner's employment history including details of her current employment with the Board and her prior involvement with the Union, it was not relying on this factor as a ground for this reconsideration application. Counsel for the Employer merely wished to put the Board on notice that it might make such an argument in the future on this application. The Employer indicated that the doctrine of reasonable apprehension of bias applies in relation to Ms. Miner, as Board agent, as she is subordinate in the decision-making process. Also, in the Employer's view, this factor illustrates a further reason why the Board should have an oral hearing on this application in that it would afford an opportunity for the Employer to make an argument over *who* should be appointed as Board agent.

Union

[23] Counsel for the Union, Mr. Kowalchuk, took the position that reconsideration of the Board's Order of April 5, 2006 is not appropriate. He argued that the Employer is essentially asking the Board to reconsider its decision in the *Sobeys* case, *supra*, not the present case, and this is improper.

[24] The Union's counsel argued that there had been no breach of the principles of natural justice through the appointment of a Board agent as the agent is only involved in investigation and holds no decision making power.

[25] Counsel for the Union noted that he was legal counsel to the union involved in the application in which the Board rendered a decision in *Prairie Micro-Tech*, *supra*, the case relied on by the Employer to support the argument that a pre-condition to the appointment of a Board agent is a determination that there has been a breakdown in negotiations. Counsel for the Union noted that that was the first decision of the Board in relation to s. 26.5 and that the Board made its decision *in camera* with no argument having been presented by either him or counsel for the employer on that application.

Counsel for the Union also noted that the Board has made numerous *in camera* decisions, without the express consent of the parties, particularly with respect to certification applications and that the Board's power to do so has gone unchallenged.

[26] The Union opposed the argument of the Employer that the precondition in s. 26.5(1.1)(b) requires the parties to bargain to impasse before a Board agent is appointed. As "bargaining collectively" is defined in the *Act*, it is expected that it would be interpreted in the same manner in every place it is utilized in the *Act*, however, it is necessary to understand the context in which the phrase "bargaining collectively" is used in each provision of the *Act* in which it appears as well as the purpose of the provision in which it is contained. In the s. 43 technological change provisions, the failure to reach a workplace adjustment plan following collective bargaining between the parties results in the ability of the employer to effect the technological change or, in other words, it allows the employer to unilaterally change the terms and conditions of work. The Union pointed out that the same holds true for s. 11(1)(m) in that the employer can unilaterally implement changes to terms and conditions of work following the exhaustion of its duty to bargain collectively. The result of a failure to conclude a first collective agreement following collective bargaining by the parties pursuant to s. 26.5 does not involve a unilateral implementation of terms and conditions of employment, but rather presents an opportunity for either party to apply for first collective agreement assistance.

[27] The Union also pointed out that the definition of "collective bargaining" in s. 2 (b) does not in itself require that the parties reach an agreement. Section 26.5(1.1)(b) contains two elements: (i) whether the parties have bargained collectively; and (ii) whether they have failed to conclude a first collective agreement. The Union argued that the Employer had not taken issue with those two discrete questions. Counsel for the Union suggested that the purpose of the Employer's application for reconsideration and its argument that the Board should hold a hearing to determine whether the parties had bargained to impasse, is to delay -- to cause the parties to be without a collective agreement and the Union to appear ineffective when the anniversary of the effective date of the certification Order arrives at which time employees may attempt to decertify the Union.

[28] With respect to the comments made by the Employer concerning the appointment of Ms. Miner as the Board's agent, Counsel for the Union expressed dismay and indicated that he felt it improper that the Employer would raise such an allegation of reasonable apprehension of bias without any facts supporting the same. The Union asked that the Board give no credence to that argument as the Employer raised the possibility of a reasonable apprehension of bias but clearly indicated that it was not relying on it as an argument in support of its request for reconsideration. Counsel for the Union argued that the information the Employer seeks in order to consider the issue of reasonable apprehension of bias, such as Ms. Miner's employment history, would have been easily obtained by the Employer, yet it failed to do so in advance of the reconsideration hearing.

[29] Counsel for the Union commented that the Board had either caused a delay in these proceedings or had allowed the Employer to do so. He noted that the Union's application for first collective agreement assistance was filed with the Board in November 2005 yet the Union was still waiting for the Board to "do something" with the application. Union counsel noted that, when the Employer objected to the form of the Union's application, the Board's Executive Officer made a decision upholding the Employer's objection yet, when the Board made the *in camera* Order appointing a Board agent on April 5, 2006, the Board agent did not even contact the Union but allowed the application for reconsideration to proceed instead. Counsel for the Union questioned the Board agent's actions in not contacting the Union to at least determine where the parties were at in bargaining and in not making a recommendation to the Board on the appropriate terms and conditions of a first collective agreement. Counsel for the Union submitted that it was unfair that the Board acted quickly on the Employer's objection to the form of the Union's application and to scheduling the reconsideration application but the Board did not schedule a hearing concerning the Union's request for certain interim orders made in relation to the application in January 2006.

[30] Counsel for the Union questioned why the Board was not holding a hearing into the merits of the Union's application for first collective agreement assistance to impose the terms and conditions of a first collective agreement. Counsel submitted that the amendments to s. 26.5 were intended to speed up the process of first collective agreement applications yet there has been significant delay with this application. The

Union sees the reconsideration application as a further delay by the Employer and says that the Employer's threat that it might raise the issue of reasonable apprehension of bias concerning the appointment of Ms. Miner as the Board's agent illustrates an intent to further delay the proceedings at some future point in time. The Union urged the Board to combat the delay by simply setting a date for hearing on the questions of whether the Board should intervene and the specific terms of a first collective agreement that the Board should impose on the parties. Counsel for the Union noted that the appointment of a Board agent to first assist the parties and report to the Board is not a legislative requirement of s. 26.5 and took the position that, if the only dispute concerns the appointment of a Board agent, the Union wishes to "skip that step" as it does not wish to have the Board engage in a process that takes the Union into the open period (in which a decertification application could be made) while the employees are unable to strike.

Employer's Reply

[31] In response to the arguments of the Union, counsel for the Employer wished to make it clear that the integrity of Ms. Miner is not at issue, nor is the Board's or its decisions.

[32] As concerns the issue of delay during the proceedings on the application, counsel for the Employer attempted to clear up any confusion concerning the course of events since the Union's filing of the application in November 2005. She asked the Board to review the January 17, 2006 correspondence to the Board from the Union's legal counsel and her response to that letter, as counsel for the Employer. Counsel for the Employer also noted that, at her suggestion, the Board's Executive Officer held a conference call on January 20, 2006 to deal with the Employer's objection to the form of application used by the Union. The Executive Officer rendered a decision on February 22, 2006 requiring the Union to comply with the provisions of the *Act* with respect to the material filed with its application. Counsel for the Employer argued that it is inappropriate to suggest that the Employer may not avail itself of any legal arguments it has in relation to the application and she noted that, in the particular circumstances of this case, the Employer was successful with its objection to the form of the Union's

application and the Union was required to re-file material in accordance with the provisions of the *Act*.

[33] The Employer objected to the Board making a decision to proceed directly to a hearing on the merits of the application and to impose terms of a collective agreement, without first having evidence of the status of bargaining between the parties.

Analysis and Decision:

[34] Prior to analyzing the arguments made concerning the Employer's application for reconsideration, we feel compelled to address the criticisms raised in argument by counsel for the Union concerning the Board's handling of the proceedings to date on this application, as well as the argument that the Board should proceed directly to a hearing to impose a first collective agreement, which would have the effect of rescinding the Board's Order appointing a Board agent in this matter.

[35] Firstly, it is necessary to render a full factual account of the proceedings to date gained through information contained in the pleadings, the Board's file and information received from the parties. The Board is aware that the Union was first certified on October 27, 2004, yet it did not send a notice to bargain to the Employer until February 2005. On August 14, 2005 the Union held a strike vote and, on November 30, 2005, the Union filed an application with the Board for first collective agreement assistance. On December 1, 2005, the Board sent a copy of the application to the Employer for a response. On December 14, 2005, counsel for the Employer contacted the Board Registrar expressing a concern regarding the Union's form of application and also requesting an extension of time to file its response to the application. The Board Registrar advised counsel for the Employer that she was unable to grant such an extension. On December 14, 2005 and again on December 15, 2005, counsel for the Employer corresponded with counsel for the Union, copies of which correspondence were sent to the Board, and indicated that it would file its response with the Board once the Union had properly complied with the terms of s. 26.5(3) and provided the Board with a properly sworn application attesting to the prerequisites contained in s. 26.5.

[36] The Board next received a letter from counsel for the Union dated January 19, 2006 wherein the Union pointed out that the Employer had failed to comply

with s. 26.5(5) and indicated that it did not understand why a hearing had not been scheduled for the application. In this correspondence, counsel for the Union asked the Board for an expedited hearing, an interim order imposing the Union's last offer as a collective agreement, an order that the Board refuse to accept any future filings by the Employer and that the Board schedule the application to be heard within 14 days. On January 19, 2006, the Board received a letter from counsel for the Employer responding to counsel for the Union's letter. Counsel for the Employer, with reference to her correspondence of December 14 and 15, 2005, also noted that, in a conference call held in December 2005 with the Board's Executive Officer concerning another application between the parties before the Board (LRB File No. 150-05), counsel for the Union had raised the issues surrounding this particular application (LRB File No. 225-05). As the purpose of the conference call was not to discuss LRB File No. 225-05, the Board's Executive Officer invited counsel for the Union to schedule a conference call to discuss LRB File No. 225-05. Also, in her letter of January 19, 2006, counsel for the Employer pointed out that the Union had not availed itself of this opportunity and suggested that the Board schedule a conference call to deal with the issue.

[37] The Board therefore scheduled a conference call between the parties to this application on January 20, 2006. During the conference call, the Executive Officer heard the arguments of the parties concerning the issue of whether the Union had filed materials in the appropriate form pursuant to s. 26.5 and whether s. 26.5 required a sworn application by the Union instead of merely an application in the form of a letter. On February 22, 2006 the Executive Officer issued a written decision which directed the Union to, within 14 days, file materials that met the requirements of s. 26.5, specifically, that the Union file a list of disputed issues and state the Union's position on those issues. The Executive Officer also ruled that the form of the application as a letter was acceptable to the Board.

[38] The Union filed its materials on March 15, 2006 (which we note was one week later than the deadline imposed by the Board) and the Employer filed its response to the Union's application on March 31, 2006. When filing its response, the Employer requested that the Board hold a hearing, indicating that it intended to argue that it was inappropriate for the Board to make an order at that time. On April 4, 2006 the Board Registrar corresponded with the parties in words to the effect that, because there

appeared to be no issue concerning the preconditions to be met pursuant to s. 26.5(1.1), the Board would proceed to consider the application *in camera* as per the practice outlined in the *Sobeys* case, *supra*.

[39] On April 5, 2006 the application was considered by an *in camera* panel of the Board and a standard order appointing a Board agent was issued on that day. The Order was sent to the parties by mail on April 10, 2006 (*in camera* orders are usually mailed to the parties the same day they are made however, in this case, the short delay occurred because there was an intervening weekend and because the panel that issued the Order did so in Saskatoon, thereby necessitating a few additional days to have the Order processed in the Board's office in Regina before being sent to the parties). On April 10, 2006 counsel for the Employer wrote a letter to the Board indicating that, despite what the Board said in the *Sobeys* case, the Employer wanted the opportunity to make an argument before the Board that it had "a right to a hearing." On April 11, 2006 the Board corresponded with the Employer indicating that, if the Employer did not agree with the recommendations made by the Board agent concerning the question of whether the Board should intervene or concerning the appropriate terms which would form a first collective agreement, the Employer would have an opportunity to state that position when the Board conducts a hearing into those issues after receiving the Board agent's report.

[40] The Employer then filed its application for reconsideration on April 20, 2006. Following receipt of the application, the Board sent out scheduling information forms to the parties on April 20, 2006 with a request that the parties file their scheduling information within ten days. Counsel for the Employer filed its scheduling information form on May 1, 2006 and, when the Union failed to file its scheduling information form within the time mandated, the Board Registrar, on May 5, 2006, proceeded to set a date for hearing the application for reconsideration based on the first date the Employer indicated it was available in its scheduling information form. That date for hearing the reconsideration application was set as June 6, 2006, the day on which the Board heard the application.

[41] Due to the allegations that Union counsel made concerning the inaction of the Board agent, it is necessary to comment on the attempts the Board agent made to

carry out her duties pursuant to the Order of the Board issued April 5, 2006. Being aware that the Order was sent to the parties on April 10, 2006, the Board agent, Ms. Miner, attempted to contact, by telephone, counsel for the Employer as well as Brian Haughey, the Union's representative, to obtain the dates the parties were available to meet with her and a suggestion on a location for the meetings. Counsel for the Employer was out of town and Ms. Miner therefore left a message to return her call. On April 11, 12 and 13, 2006 Ms. Miner and Mr. Haughey exchanged email messages during which exchange Ms. Miner received the Union's dates of availability, a working copy of the collective agreement and information about past meeting locations. On approximately April 13, 2006, Ms. Miner received a return telephone call from counsel for the Employer at which time counsel indicated that she needed to speak to her client to obtain instructions. Ms. Miner next spoke to counsel for the Employer early the following week (approximately Monday, April 17, 2006) and advised counsel for the Employer of the Union's available dates. At this time, counsel for the Employer indicated she had not yet received instructions from her client. Following receipt of the Employer's application for reconsideration on Thursday, April 20, 2006, Ms. Miner contacted Mr. Haughey indicating that she saw no other choice than to hold matters in abeyance until the reconsideration application was heard but that if Mr. Haughey felt otherwise, he should take any steps he felt appropriate. There was no further action taken by the Union by the date of hearing of the application for reconsideration.

[42] On a review of the factual account of the proceedings to date, we must disagree with the characterization made by counsel for the Union that the Board and the Employer are responsible for the delay in these proceedings. Firstly, matters that occurred between the date of the certification Order in October 2004 and the Union's filing of its application for first collective agreement assistance on November 30, 2005, were matters between the parties and were not the subject of any Board proceedings. Once the application was filed with the Board, it was processed in a timely manner by Board staff and a request of the Employer for an extension for filing its response was not granted. In our view, when the Employer took the position on December 14 and 15, 2005, that it would not file its response until a proper application with proper supporting materials were filed by the Union, it was incumbent upon the Union to advise the Board of its position; whether it wished the application to proceed directly to a hearing or whether a conference call should be scheduled with the Board's Executive Officer to

deal with the issue in advance of a hearing. The Board did not receive a request from the Union to schedule a conference call and while the Board's Executive Officer (in a conference call dealing with an unrelated application between the parties) invited the Union's counsel to request a conference call regarding this application, the Union's counsel did not make such a request.

[43] On January 19, 2006 counsel for the Union corresponded with the Board and at that time requested an expedited hearing and certain interim orders. Before the Board could act on the request that the matter be set for a hearing, counsel for the Employer wrote to the Board the next day, January 20, 2006, requesting that a conference call be scheduled to deal with the outstanding issues. (We also note that the Board would not have been able to entertain the Union's application for interim orders in the form it was filed; by letter without supporting affidavit evidence and not in compliance with the Board's procedures for interim applications.) The Board Registrar properly and promptly scheduled a conference call with the Board's Executive Officer for that same day. It is our understanding that only the objections of the Employer were raised or dealt with in the conference call and that the Union did not raise the issues contained in its correspondence of January 19, 2006. In our view, the requests made by counsel for the Union in his January 19, 2006 letter no longer needed to be acted upon by the Board given what had transpired in the conference call and the conclusions in the written decision of the Executive Officer on February 22, 2006. The Union then filed its materials one week later than ordered by the Executive Officer. The Employer filed its response in a timely manner following receipt of the Union's material and the Board then heard the application *in camera* at its earliest opportunity, some five days following receipt of the Employer's response.

[44] We also find that the criticisms of the Board agent were unjustly made. As soon as the parties were sent the Board's Order the Board agent contacted the parties with a view to scheduling meetings to begin providing the parties with assistance to conclude a collective agreement. The Board agent exchanged information with the Union's representative, directly contrary to the Union's counsel's representations at the hearing that the Board agent had made no contact with the Union. It was nine days into the Board agent's contact with the parties that the Board received the Employer's application for reconsideration. We find Ms. Miner's conduct in discussing the issue of

holding the matter in abeyance with the Union's representative, given that the reconsideration application had been filed, and then doing so, having received no objection from the Union's representative, to be entirely appropriate. The Board processed the application for reconsideration in a very timely manner and acted appropriately in scheduling the reconsideration application for hearing for June 6, 2006.

[45] While it is the intention of the Board to process and determine first collective agreement applications in a timely manner for the reasons espoused in the *Sobeys* case, we find that the Employer's actions in challenging the form of the Union's application and the materials filed with its application were not inappropriate. It is a fundamental tenet of our justice system, of which the Board is a part, to allow parties to mount legal challenges and defences to the claims of others. With respect to filing of the reconsideration application, we see no inordinate delay on the part of the Employer in making this claim or of the Board staff in handling it. While the Board is on alert for frivolous applications or defences that are an apparent attempt to delay proceedings and will take steps to attempt to remedy those, we do not view the Employer's application as taken in this vein. This is the first occasion on which the Board has followed the procedure it set out in the *Sobeys* case to consider such applications *in camera*.

[46] At the hearing, the Union urged the Board to forgo the step of appointing a Board agent (given the Employer's objections to the appointment of a Board agent and the desire of the Union to obtain a collective agreement quickly), and issue an order that the parties proceed directly to a hearing to determine whether the Board should intervene by imposing a collective agreement and by determining what those terms should be. It is not entirely clear whether the Union made this submission in defense to the Employer's position that it did not want a Board agent appointed (so neither does the Union) or whether the Union was effectively requesting that the Board issue an order that the parties proceed to a full hearing on the merits. Regardless of the purpose of the submission, we are not persuaded by the Union's position. Firstly, if the submission is considered in the nature of a request for an order, such could only be accomplished through an application for reconsideration that would permit this panel of the Board to consider rescinding the Order appointing the Board agent, and issuing a new order directing the parties to proceed to a hearing. Secondly, whether the submission is a defence or a request, the Board's practice of appointing a Board agent at the outset of

the proceedings of a first collective agreement application has proven successful and it is in the Board's discretion whether to make such an appointment, regardless of whether either or both parties request or desire the involvement of a Board agent.

[47] Numerous decisions of the Board illustrate that there are important purposes in appointing a Board agent to assist in the process of first collective agreement applications. The most important purpose is that it provides an opportunity for the parties to settle their collective agreement with the assistance of a neutral third party and without the direct intervention of the Board. The Board agent's role is to attempt to assist the parties in working out an agreement they can live with (or at least reduce and refine the issues which remain unsettled). It is trite to say that it is more likely that both parties will be satisfied with an agreement that they have made rather than one imposed upon them. The Board's agents have been highly successful in assisting parties to reach a collective agreement, a vast majority of the applications over the last twelve years have not required any Board intervention through the imposition of terms of a collective agreement. The other primary purpose of the appointment of a Board agent is to assist the Board by making recommendations concerning the issues of whether the Board should intervene and, if so, what specific terms the Board should impose. The Board agent is in a unique position to make those recommendations having participated in the negotiations between the parties. Should a mediated settlement of the collective agreement not be achieved, the Board will hear the evidence and submissions of the parties on these issues at a hearing. At such a hearing, the Board agent's report is a valuable resource for the parties and the Board, saving time and further resources. In the *Sobeys* case, *supra*, the Board noted that, although s. 26.5 does not specifically provide for the appointment of a Board agent as part of the process for concluding a first collective agreement, it has become an important part of that process and, at 505, quoting from *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, noted:

> *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.*

[48] The *Sobey's* case, *supra*, also made it clear that the discretion of whether to appoint a Board agent remains with the Board, and that in future cases, *"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*." On the basis of the reasoning in *Sobey's,* and as is implicit in the history of the Board's approach to first collective agreement applications, the Board will, almost invariably, order the appointment of a Board agent at the initial stage of proceedings in a first collective agreement application and that such an order is not dependent upon either or both parties' desire for the appointment of a Board agent. In this case, the Union did not specifically request the appointment of a Board agent in its application as a method of assistance that the Board could provide, although we do know, however, that upon the Board's Registrar advising the parties that the application would proceed *in camera* as per the practice outlined in *Sobey's*, *supra*, the Union did not indicate that it objected to that approach. The original panel that heard this application *in camera* apparently decided that it was an appropriate case in which to appoint a Board agent to assist the parties and/or make recommendations to the Board and, while there were no reasons given by the original panel for making such an order, there is no basis for us to interfere with the original panel's decision. For the reasons that follow in this decision, it is our view that the Board may set its own procedure for first collective agreement applications and that procedure, at least at the outset, typically involves the appointment of a Board agent as a matter of course, whether or not the same is requested by the parties.

[49] It is for these reasons that we decline to rescind the Order appointing a Board agent and proceed directly to a final hearing of the application. There may well be situations in the future where the Board declines to appoint a Board agent at the outset of the proceedings (whether or not the parties have requested the appointment of a Board agent) and proceeds directly to a hearing on the question of whether it should

intervene and, if so, impose the terms of a collective agreement, however those situations will be rare and there is nothing significant in the circumstances of this case that would warrant such an approach.

[50] Turning to the application for reconsideration made by the Employer, it is necessary to first understand the limited scope of such an application. The Board described the criteria applicable to an application for reconsideration in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, as follows, at 107-108:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster.*
> *. . .*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
>
> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
> *. . .*
>
> *In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*
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> *In Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR*

> *532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
>
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> 4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[51] In the present case, counsel for the Employer appeared to rely upon the first, fourth, fifth and sixth grounds, however, because of the manner in which the Employer structured its argument, we will assess the first, fourth and sixth grounds together, followed by consideration of the fifth ground.

[52] In essence, the primary ground for reconsideration by the Employer involves the assertion that, because there was no oral hearing, the Employer was unable to introduce evidence on a factual point of controversy. That factual point of controversy relates to the Employer's assertion that the precondition in s. 26.5 (1.1) (b), that the

parties have bargained collectively and failed to conclude a collective agreement, means that the Board is required to determine whether the parties have bargained to impasse. In order for the Employer to make this assertion, however, it must satisfy either ground four or six, that the original decision turned on a conclusion of law or general policy under the *Act* that was not properly interpreted by the original panel or that the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change.

[53] With respect to the fourth ground, it is our view that the original panel that granted the *in camera* Order appointing a Board agent properly interpreted the law and general policy considerations concerning s. 26.5 applications based on the Board's extensive case law and, in particular, the *Sobeys* case, *supra*. In *Sobeys*, the Board provided a clear direction that the Board would consider s. 26.5 applications, at the initial stage where the appointment of a Board agent is being considered, *in camera*, provided the pleadings made it clear that the preconditions in s. 26.5 (1.1) had been met (see *Sobeys*, *supra*, at 513). Those preconditions, as set out at 512 of the *Sobeys* decision, which, on the face of the pleadings in this case, appear to have been met, are as follows:

> *[65] . . . 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).*

[54] The Employer also argued that the facts in the *Sobeys* case are distinguishable from those in the present case, and referenced the length of time the parties had been bargaining, that the union in *Sobeys* required the appointment of the conciliator to get bargaining started, and that the union made an allegation that the employer was acting in a way to delay the proceedings. Excerpts from the *Sobeys* case make it clear that these alleged distinguishing facts were actually in controversy in the

Sobeys case but, in any event, were not relevant to the Board's decision to appoint a Board agent and therefore cannot support this ground for reconsideration. Those excerpts from the *Sobeys* case are outlined as follows at 512 and 513:

> *[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] .. . 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.*

[55] We are therefore left to analyze whether the Employer has established, as a ground for reconsideration, that the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, or expand upon (referred to as the sixth possible ground in the *Remai Investments* case quoted above). While the decision of the original panel was precedential in the sense that it was the first occasion on which the Board had considered and granted an *in camera* order appointing a Board agent (aside from those cases where the parties consented to such an order), an analysis of this ground necessarily involves a direct consideration of the *Sobeys* case, *supra*. Therefore, in some respects, it amounts to a reconsideration of the Board's

decision in that case. Whether that is appropriate when the reconsideration application arises on this application is a question we will leave for another day. Suffice it to say, we are prepared to examine whether the circumstances of this case and the arguments made on reconsideration cause the Board to wish to revise, expand upon, or change the policy decision made in the *Sobeys* case and applied in the case before us.

[56] We wish to note that, in our view, just as the panel held in the *Sobeys* case, the Board's determination that a Board agent could be appointed without any consideration of whether it is appropriate to "intervene," has been a longstanding practice of the Board. During an extensive review of the authorities, the Board stated in part at 501 through 505:

> *[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.*
>
> . . . .

[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.*

. . . .

[54] . . . 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.*
>
> . . . .

[57] In our view, therefore, the only precedential part of the *Sobeys* case, that was applied in this case by the original panel was that such orders, specifically, the appointment of a Board agent, would now be determined *in camera* on the basis of the application and reply filed by the parties.

[58] The Employer argued that the Board, in determining whether the preconditions of s. 26.5(1.1) have been met so as to entitle the applicant to the appointment of a Board agent, must necessarily consider whether, factually, the applicant has met the precondition in s. 26.5 (1.1) (b), that is whether the parties have "bargained collectively and failed to conclude a collective agreement." The Employer disputed the position of the Union that it had met this precondition and argued that the Board, when it made the determination that this precondition was met, improperly interpreted the test to be applied. Specifically, the Employer argued that the Board should have conducted an inquiry into whether the parties had *bargained to impasse* and that, to do so, the Board must hold an oral hearing to hear the evidence and argument of the parties on this point. The Employer argued that such a determination could not be made *in camera* by the Board.

[59] The Employer's basis for asserting that the true test for s. 26.5(1.1)(b) is a finding that the parties have bargained to impasse is through comparison of the language in ss. 43(10) and 11(1)(m) and the manner in which those sections have been interpreted by the Board.

[60] Section 43(10) of the *Act* sets out certain rights and protections for unionized employees should their employer implement a technological change. In addition to certain requirements of notice of the technological change and the nature of its impact, an employer, upon the request of a union, must bargain collectively and attempt to agree on a “workplace adjustment plan.” A workplace adjustment plan may include provisions with regard to alternatives to the proposed technological change, amendments to the collective bargaining agreement, employee counseling and retraining, notice of termination and severance pay, early retirement benefits, and a bipartite process for implementing the workplace adjustment plan. While the *Act* requires the parties to bargain collectively a workplace adjustment plan, it does not

require that the parties reach an agreement on a workplace adjustment plan before the implementation of the technological change. This is provided for in s. 43(10) which states as follows:

> *43(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:*
>
> > *(a) a workplace adjustment plan has been developed as a result of bargaining collectively; or*
> >
> > *(b) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plan.*
> >
> > *. . .*

[61] Section 11(1)(m) states that an employer commits an unfair labour practice in circumstances where there is no collective bargaining agreement in force and the employer unilaterally changes terms and conditions of employment without bargaining collectively respecting the changes. Section 11(1)(m) does not prohibit the employer from implementing a unilateral change but it can only do so where it has exhausted the duty to bargain collectively. They Employer argued that the duty is exhausted once the parties have "bargained to impasse," although, in our view, it is not quite clear from the Board's case law that "impasse" is the test.

[62] The Employer relied primarily on the Board's reasoning in its decision in *Acme Video*, *supra*, to support this argument. In *Acme Video*, the Board had occasion to consider the application of s. 43 of the *Act* in circumstances where an employer decided to relocate 70% of its warehousing operations outside Saskatchewan resulting in a substantial number of employees losing their jobs. The employer had properly given the union and the Minister of Labour at least 90 days notice of this intended technological change. The union alleged that the employer failed to bargain collectively with regard to the implementation of the technological change, contrary to ss. 43(8) (8.2), (8.3) and (10) and 11(1)(c). In its request to the employer to bargain collectively for the purposes of developing a workplace adjustment plan, the union proposed alternatives to the proposed technological change, requested numerous changes to the

collective bargaining agreement, requested the disclosure of extensive financial and operations information and information regarding the employer's proposed change, all for the purposes of negotiating the workplace adjustment plan. The parties met briefly at which time the employer took the position that it was not required to meet with the union, negotiate changes to the collective bargaining agreement or provide the information the union requested. The employer then requested the appointment of a conciliator and, after the parties met with the conciliator on two occasions, the employer gave notice to the Minister pursuant to s. 43(10)(b) that it had bargained collectively but had failed to develop a workplace adjustment plan. The employer accordingly unilaterally implemented the technological change.

[63] There being no dispute between the parties that the relocation of the warehousing operations out of the province constituted a technological change, the central issue for the Board's determination was whether the employer "bargained collectively with regard to a workplace adjustment plan" as required by s. 43 (8.1). The Board began its analysis with a review of s. 2 (b) of the *Act* as follows at 141:

> *"Bargaining collectively" is defined in s. 2 (b) as "negotiating in good faith with a view to the conclusion of a collective bargaining agreement." The Board agrees with the position put forward by both the Union and the Employer in this case that collective bargaining has the same meaning under s. 43 as it does under other provisions of the Act, although its purpose is somewhat different. Under s. 43, the purpose of collective bargaining is to develop as "workplace adjustment plan", which, although it is not defined in the Act, has as its possible topics those items enumerated in s. 43 (8.2) of the Act. A workplace adjustment plan may include agreements as to alternatives to the proposed technological change; it may amend the collective agreement; and it may address severance, retraining and other job loss issues.*

[64] The Board, after noting that the technological change provisions are "designed to expand the sphere of joint governance between the union and an employer" by requiring the parties to collectively bargain a workplace adjustment plan, whether mid-contract or during renewal bargaining, outlined its approach to the "duty to bargain in good faith" where there is an allegation of a violation of s.11(1)(c). The Board characterized the application as follows at 144:

> *The present application alleges that the Employer failed in its duty to bargain collectively in two regards. First, it alleges that the Employer did not provide the Union with the information it required in order to negotiate a workplace adjustment plan. Second, it alleges that the Employer failed to fulfill the duty to bargain in good faith by making every reasonable effort to enter into a workplace adjustment plan with the Union before the Employer unilaterally implemented the technological change. The Board will consider each issue separately.*

[65] The Board, in determining whether the employer had met its duty to bargain collectively for the development of a workplace adjustment plan prior to implementation of the technological change, found it necessary to expand on the principles outlined in the *Regina Exhibition Association Ltd.* case, *supra*. The Board quoted from that decision in *Acme Video* at 147:

> *Bargaining collectively with respect to a workplace adjustment plan carries with it the same degree of effort that is expected when parties are negotiating a collective agreement. A simple exchange of proposals is insufficient to satisfy the duty to bargain. It is necessary for the parties to engage in a serious, determined and rational discussion of the proposals that are put forward, including discussions of the economic or other justifications for objecting to the proposals and of alternatives to the rejected proposals. Such bargaining must occur before the technological change can be effected under s. 43 (10) of the Act, which states:*
>
> *. . . .*

[66] The Board went on to expand on the analysis in the *Regina Exhibition Association Ltd.* case, *supra*, by a comparison to the analysis used by the Board in s. 11(1)(m) cases as both ss. 43(10)(b) and 11(1)(m) require "bargaining collectively" as a precondition to unilateral employer action. The Board stated, at 148 and149:

> *It may be useful to expand on the analysis set forth in the Regina Exhibition Association Ltd. case, supra. The Board interprets s. 43(10)(b) as requiring as a precondition to unilateral implementation of technological change by the employer that the parties have "bargained collectively". If collective bargaining has not occurred, notice cannot be given to the Minister without which notice the employer is unable to implement the technological change. The Board then looks to similar provisions in the Act to determine what will constitute "collective bargaining" in the context of s. 43. In this instance, the Board notes the similarities between the unilateral implementation of a technological change, which is*

> *contemplated by s. 43(10)(b), and the unilateral implementation of a term or condition of employment during and no contract period which is permitted by s. 11(1)(m) of the Act. Both provisions require, as a precondition to unilateral employer action, that "collective bargaining" has been engaged in by the parties. Section 11 (1)(m) of the Act provides as follows:*
>
> > *11(1) It shall be an unfair labour practice for an employer, an employer's agent or any other person acting on behalf of the employer:*
> >
> > > *(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

[67] The Board proceeded to undertake an extensive review of its decisions concerning the conduct that will constitute "collective bargaining" under s. 11(1)(m) and, in particular, examined *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores (a Division of Westfair Foods Limited)*, [1994] 2nd Quarter Sask. Labour Rep. 131, LRB File No. 039-94, concluding at 152-153 (of the *Acme Video* decision, *supra*):

> *At 150, the Board came to the following conclusion:*
>
> > *It is clear from careful reading of the Board decisions cited above, however, that the Board did regard it as necessary for the employer defending a unilateral implementation to establish, by some objectively discernible signs, that further bargaining would not be fruitful and that the bargaining difficulties are so entrenched that there is no point in trying to achieve anything further by that route. In the Canada Safeway decision, supra, though the Board concluded that a finding of impasse might not be required, they also found that an impasse had occurred by any standards, which spared them the necessity of describing circumstances other than impasse which might meet the requirements. In the passage quoted from the Dairy Producers' Co-operative decision, supra, an important conclusion for the Board was that "forcing the*

> *parties to continue to bargain the wage proposals . . . would serve no purpose."*
>
> *In the Canada Safeway case, supra, the Board stated clearly that a strike or lockout is not the only possible indication that bargaining has outlived its usefulness to a degree of which will allow an employer to implement changes without reaching agreement with the union. The Board accepts that there may be circumstances were bargaining is not serving a useful function. In University of Saskatchewan Faculty Association v. University of Saskatchewan, LRB File No. 254-88, the Board said:*
>
> > *The parties may not be obliged to meet if all they are doing is clearly restating their respective positions, there is no hope of settlement, and continue dialogue would serve no useful purpose.*
>
> *It is our view that even if the word impasse itself is suggestive of a set of criteria which are not contained in the Saskatchewan legislation, it is not open to an employer simply to elect unilateral implementation as a means of exerting pressure on the trade union, without the existence of a situation in which it is possible for the Board, as an objective observer, to conclude that the obstacles to further bargaining are so severe that the employer is justified in taking this step.*
>
> ***In our view, a similar approach should be taken to s. 43(10)(b). In order for an employer to serve notice to the Minister under section 43(10)(b) stating that the parties have "bargain collectively and failed to conclude a workplace adjustment plan", the employer must be able to point to some "objectively discernible signs that further bargaining would not be fruitful and that the bargaining difficulties are so entrenched that there is no point in trying to achieve anything further by that route,":*** *O.K. Economy Stores, supra.*
> [***emphasis added***]

[68] In order to determine whether it is appropriate to draw an analogy between ss. 43(10) and 11(1)(m) and s. 26.5 as proposed by Employer, it is important to understand the purpose of the sections to which the Employer is attempting to draw

comparisons. Section 3 of the *Act* is crucial to the interpretation of the purpose of the *Act* and must be considered when interpreting other provisions of the *Act*. It states:

> *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.*

[69] The *Act* itself sets out a scheme to facilitate employees' right to choose to belong to and participate in the activities of a union and it protects them from actions which impede these goals. Once a union is selected by employees, the union enjoys exclusive bargaining status on behalf of those employees and the *Act* is designed to promote and foster the collective bargaining relationship.

[70] The purpose of s. 26.5 is to allow either party to a newly certified bargaining relationship to access the assistance of the Board in reaching a first collective bargaining agreement. One of the preconditions to accessing that assistance is that the parties have "bargained collectively and failed to conclude a collective bargaining agreement." In our view, this purpose differs substantially from the purposes in ss. 43(10)(b) and 11(1)(m).

[71] In our view, the purpose and intent of s. 26.5 and ss. 43 (10) and 11(1)(m) are so substantially different that to adopt the proposition that "bargaining collectively" under s. 26.5 means that the parties must have bargained to impasse as required by ss. 43(10) and 11(1)(m) (if that is in fact the test under those sections) is not at all appropriate. Sections 43 (10)(b) and 11(1)(m) permit the employer to implement a technological change or a unilateral change to the employees' terms and conditions of employment once the employer has exhausted the duty to bargain collectively. The consequences of a failure to exhaust that duty may result in an unfair labour practice finding. Under both of these provisions, the employer is offering up as a defence to the "unilateral employer action" (in the words of the *Acme Video* case) that the parties have bargained collectively. Conversely, the precondition in s. 26.5(1.1)(b) that the parties have "bargained collectively" is not a prerequisite to the unilateral action of the employer

but rather a threshold determination for access to the assistance of the Board to reach a first collective agreement. In other words, s. 26.5 is facilitative in that it provides a process for employees to obtain a collective agreement, first through an attempt by the employer and union to agree on its terms with the assistance of a Board agent and, failing such agreement, it provides a process whereby the Board might ultimately impose a first collective agreement.

[72] Aside from the differences in purpose between s. 26.5 and ss. 43(10) and 11(1)(m) which would suggest that there is no requirement under s. 26.5(1.1)(b) that the parties have bargained to impasse, it is apparent that the Board has developed certain tests to determine whether it will impose a collective agreement on the parties. Prior to imposing a collective agreement, the Board must make an assessment of whether it is appropriate to intervene and do so. The relevant question in this case is "when" the Board will make that assessment.

[73] The argument that the Board should require proof that the parties have bargained to impasse before it intervenes misapprehends the purpose of a Board agent in s. 26.5 applications. The appointment of a Board agent is a creature of Board process; it is not legislatively required. The use of a Board agent to assist the parties in settlement of their first collective agreement and, failing which, to report to the Board with a recommendation as to whether the Board should intervene and, if so, what terms and conditions should be imposed, was approved by the Saskatchewan Court of Queen's Bench in the *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 (the "SIGA" case). This aspect is discussed in *Sobeys*, *supra*, at 509 and 510:

> *[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] . . . 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.*

[74] In our view, the argument of the Employer that the Board should assess whether the parties have bargained to impasse before appointing a Board agent is premature in the same sense as the argument in *Sobeys*, *supra*, that the Board should assess whether it is appropriate to intervene before appointing a Board agent. As stated in *Sobeys*, *supra*, at 507, 508, 511 and 512, the Board is not intervening at the stage of the appointment of a Board agent:

> *[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]

. . .

[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.*
[***emphasis added***]

[75] At this first stage of s. 26.5 proceedings, the Board is merely making an assessment whether to appoint a Board agent, not whether to intervene by imposing a collective bargaining agreement. The threshold for the determination of whether to appoint a Board agent is obviously lower than it would be at the second stage, where the question before the Board is whether the Board should intervene by imposing a first collective agreement and, if so, the terms of that collective agreement. The consequences to the parties of an order of the Board at the first stage, as opposed to the second stage, are very different. At the first stage, the parties are provided an opportunity to reach a first collective agreement with the assistance of a neutral third party, the Board agent, acting in the role of a conciliator/mediator. The Board agent has only the power of making recommendations and this occurs only if the parties are unable to agree on the terms of their collective agreement. There are good reasons for the lower threshold at the stage of the appointment of a Board agent. In *Sobeys*, *supra*, the Board noted at 502 and 503:

> *[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.*
> [***emphasis added***]

[76] Other provisions of the *Act* suggest that the process for a determination under s. 26.5 should occur in a timely fashion and without delay. For example, in s. 26.5(5) the respondent to the application must file a list of issues in dispute and a statement of their position on those issues as well as the party's last offer on those issues within 14 days of receiving the material filed by the applicant. Also in s. 26.5(6)(b) the Board (or an arbitrator appointed by the Board) must conclude the term or terms of a first collective bargaining agreement between the parties within 45 days after undertaking to do so. Therefore, at the stage of an appointment of a Board agent, it is appropriate that the Board make a merely cursory or perfunctory assessment of whether on the face of the pleadings, the parties appear to have met the stated preconditions.

[77] The Board in *Sobeys* found that this could be done *in camera* and this therefore rules out any lengthy inquiry as to the nature and state of the collective bargaining between the parties. We see no error by the Board in following such a process nor by the panel that heard this original application *in camera*, nor do we see any justification for changing, refining or expanding upon the test utilized by the Board, as it was set out in *Sobeys*, *supra*. The reason for a cursory or perfunctory assessment is grounded in the policy considerations referred to above and as enshrined in s. 3 of the *Act*.

[78] The appointment of a Board agent causes no prejudice to the Employer in this case. The stage of the Board's consideration of the appointment of a Board agent is simply not the right time to raise the argument that it has. In *Sobeys*, the Employer's argument that it was premature to appoint a Board agent was rejected by the Board. At 513, the Board stated:

> *[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.*

[79] Although the Board has developed a test to address the question whether it is appropriate to intervene by imposing a first collective bargaining agreement, it remains open to the Employer to make an argument at the hearing of the second stage (provided the parties are unable to conclude a collective bargaining agreement with the assistance of the Board agent) that the condition in s. 26.5(1.1)(b) that "the parties have bargained collectively and failed to conclude a collective bargaining agreement" requires that the Union prove that the parties have “bargained to impasse.” In our view, at the second stage, such an argument might be relevant, or at least an argument that the tests used for s. 11(1)(m) applications might be relevant. In the final Board decision in the SIGA case reported at [2002] Sask. L.R.B.R. 16, LRB File No. 092-00, the Board, after receiving the Board agent's report, considered the questions of whether the Board should assist the parties in the conclusion of their first collective agreement (i.e. whether it should intervene) and, after determining that it was appropriate to intervene, examined what the terms of that collective agreement should be. At 28, in answering the question of whether it was appropriate to intervene, the Board reviewed the *Prairie Micro-Tech* case, *supra*, noting that the Board indicated in that case that it would intervene when negotiations had “broken down,” and that there may be many reasons for a breakdown of collective bargaining including "the obduracy or illegal conduct of an employer who is determined to thwart or ignore the trade union," "the emergence of an insoluble, industrial dispute" or "roadblocks, created by the incompetence or inexperience of negotiators on either side." While the Board concluded that the *Act* does not require the

Board to determine the reasons why the process of collective bargaining has not been successful, the Board referred to its earlier decision in the SIGA case rendered September 18, 2001 (reported at [2001] Sask. L.R.B.R. 704, LRB File No. 092-00) at 711 of that decision, as follows:

> *[12] 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.*
>
> *[13] 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.*

[80] In the final decision in the SIGA case, the Board, when determining whether it was appropriate to intervene and impose a collective agreement, examined the question of whether the parties had "engaged in serious and genuine collective bargaining." The Board determined that there were a number of factors which led it to conclude that first collective agreement assistance should be provided to the parties. They were as follows: that the parties had engaged in extensive and protracted negotiations (the application was not premature); that the issues between the parties that remained outstanding were complex and difficult; that the bargaining had been atypical because of the First Nations context and because the employer was not a typical private-sector employer; and that the union had made significant moves in collective bargaining. With respect to that final factor, the Board found "that the Union's

assessment that collective bargaining is at an impasse is accurate, and that little would be gained by requiring the parties to return to the bargaining table." The Board concluded at 32:

> *[54] Overall, for the reasons stated above, we find that, despite their concerted efforts, collective bargaining has broken down between the parties. They are unlikely to reach a collective agreement if left to their own devices. Section 26.5 is designed to overcome the type of difficulties that prevent the achievement of a first collective agreement. In our view, it is appropriate for the Board to assist the parties to conclude a first collective agreement.*

[81] While we draw no conclusions concerning the issue of whether the Board must assess whether the parties have bargained to impasse before the Board may intervene, at the point in time when the Board conducts a hearing at the second stage following receipt of the Board agent's report, we know, that the Board in the SIGA case, *supra*, at least considered the union's position that bargaining had reached an impasse as one of the factors in its decision to intervene and impose a first collective agreement. In any event, what is obvious is that consideration of this factor was made only at the second stage hearing following receipt of the Board agent's report, where the Board determined that it must answer the "broader question, that is, whether or not there are sound labour relations reasons that would justify a Board intervention in the collective bargaining process" which the Board clearly stated was an inquiry in addition to the statutory requirements set out in ss. 26.5(1.1)(a) to (c) (see the SIGA case at 30).

[82] In further support of its argument that the parties must have bargained to impasse before a Board agent can be appointed, the Employer relied on the statements of then Chairperson Bilson in *Prairie Micro-Tech Inc., supra*. The quote from that decision, upon which the Employer relied to support its argument that there must be a breakdown of bargaining before they Board may render assistance, actually refers only to the manner in which the Board characterized the preconditions in ss. 26.5(c)(i) and (ii), and not the provision focused on by the Employer, that is, s. 26.5(1.1)(b). In any event, we note that the Board, in that case -- after stating that the overall purpose of s. 26.5 was "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" -- made no determination as to whether bargaining had broken

down or whether it should impose the terms of a collective agreement and proceeded to appoint a Board agent for two purposes. The first was to attempt to resolve the outstanding issues between the parties and, the second was, in the words of the Board at 52:

> *. . . 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.*

[83] The Board in *Prairie Micro-Tech Inc.*, *supra*, made it clear that, as it was the first occasion upon which the Board had interpreted s. 26.5 since its addition to the *Act* in 1994, the decision was intended to provide some of "preliminary guidelines" which the Board proposed "to adopt as a starting point for the consideration of applications filed under s. 26.5." What is apparent from the *Prairie Micro-Tech Inc.* case and subsequent Board decisions, is that the Board has repeatedly utilized the assistance of a Board agent in determining the question of whether it is appropriate for the Board to intervene and impose a collective agreement and that the Board will appoint an agent prior to any assessment of whether the collective bargaining has broken down. While the Board has perhaps developed and refined its approach to s. 26.5 applications during the intervening years, this aspect of its approach has largely remained constant during that time.

[84] In *Sobeys*, *supra*, the Board summarized the history of the Board's approach to these applications at 510:

> *[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.*

[85] The most recent application of the principles in the SIGA case just prior to the Board's decision in *Sobeys* was 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. 383, LRB File Nos. 104-04 to 108-04. The Board in *Sobeys* made reference to this case as follows at 510 and 511:

> *[61] . . . 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 12:*
>
> > *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.*

[86] As such, the proposition that the Board should refine its approach by considering whether the parties have bargained to impasse prior to the appointment of a Board agent would ignore the developments made by the Board over the last twelve years. It would be regressive (and potentially duplicitous) were we to refine or change the Board's approach to examine whether the parties have bargained to impasse at this stage of the appointment of a Board agent, only to examine whether it is appropriate to intervene when (and if) the matter returns to the Board following the assistance of the Board agent.

[87] In making its arguments, the Employer also relied on certain excerpts from Hansard containing comments in the Legislature and the Standing Committee on the Economy. There were essentially two amendments to s. 26.5 passed on May 25,

2005. A provision was added that required the union and employer to commence collective bargaining within 20 days of the certification of the bargaining unit. In addition, a precondition was added to the former s. 26.5(1) (now contained in s. 26.5 (1.1) (c)(iv)), that allowed the Board to conclude the terms of a first collective bargaining agreement where 90 days or more had passed since the date the certification order was made. Although in our view, the excerpts of Hansard do not support the Employer's position, given that the 90 day requirement merely expands the grounds upon which an applicant can rely to bring an application under s. 26.5 and does not change the intent of the section as a whole, the Board has held that, generally, excerpts from Hansard are not admissible. In *Saskatchewan Joint Board. Retail, Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, the Board stated at 728:

> *As a final matter, in making its ruling the Board was not influenced by the filing of the Hansard excerpt containing the Minister's speech to the Legislature on the second reading of the 1994 amendments. The Board is of the view that such evidence is not generally admissible to determine the intent of the Legislature and the Board will discourage the filing of such evidence.*

[88] The reasoning in the *Pepsi–Cola* case, *supra* was also applied to exclude consideration of certain excerpts of Hansard in *United Steelworkers of America, Local 5917 v. Wheat City Metals, a Division of Jamel Metals Inc.*, [2005] Sask. L.R.B.R. 189, LRB File No. 060-05. On the basis of these cases, we have declined to consider the excerpts of Hansard as evidence of the intention of the Legislature in relation to the amendments to ss. 26.5 and 18(q).

[89] The final argument raised by the Employer in support of its application for reconsideration is that the policy or practice developed by the Board in *Sobeys*, *supra*, that the Board will make a determination whether to appoint a Board agent based on the information contained in the pleadings, *in camera*, improperly fetters the discretion of future panels of the Board deciding this question. This argument appears to relate to the fifth ground in the *Remai Investments* case, *supra*. The Employer alleges that the original panel that heard this application had its discretion improperly fettered as a result of the policy or practice set out in the *Sobeys* case, *supra*. In this regard, the Employer focuses on the wording of s. 26.5(1.1) that the Board "may provide assistance" if

preconditions (a) through (c) have been met. In our view, this argument fails for two reasons. Firstly, and most fundamentally, the Employer's argument ignores the full wording in s. 26.5 (1.1) which reads "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: . .". Subsection (6) refers to the actual conclusion of the term or terms of a first collective bargaining agreement by the Board. Therefore, at the stage where the Board is considering whether to appoint a Board agent, the Board is not yet providing assistance pursuant to subsection (6). As previously stated, the Board approaches the application of s. 26.5 through two hearing stages: (1) whether the Board should appoint a Board agent; and (2) failing settlement of the first collective agreement between the parties with the assistance of the Board agent, whether the Board should intervene by concluding the terms of a collective agreement and if so, what are those terms. Also, as previously stated, the first stage, at which time the Board is considering the appointment of a Board agent, is not considered to be "intervening" and is not the stage at which the Board is exercising the discretion provided for in s. 26.5(1.1) to conclude the terms of the first collective bargaining agreement pursuant to subsection (6). The exercise of discretion pursuant to s. 26.5(1.1) is therefore reserved until consideration by the Board of whether to intervene, pursuant to a full hearing at the second stage. The policy or practice outlined in *Sobeys*, *supra*, speaks only to the Board's consideration whether to appoint a Board agent (the first hearing stage) and therefore does not have the effect of fettering the discretion of the Board on this application.

[90] In our view, it is arguable that it is not incumbent upon the Board to exercise any discretion with respect to the appointment of a Board agent and that the Board could decide to appoint a Board agent without any consideration of whether the preconditions in s. 26.5 (1.1) had been met. A strict interpretation of s. 26.5 (1.1) would suggest that the preconditions only need to be met upon consideration of the second hearing stage, that is, where the Board may actually provide assistance pursuant to subsection (6) to conclude the terms of a first collective agreement. However, the Board has developed a practice or policy which sets out a threshold test to be met to entitle an applicant to the appointment of a Board agent, that is, that on the face of the pleadings the preconditions in s. 26.5(1.1)(a) through (c) appear to have been met. Therefore, a second reason for the failure of the Employer's argument that the Board has improperly

fettered its discretion through the adoption of the policy in *Sobeys*, *supra*, is that the Board does, in fact, exercise its discretion whether to appoint a Board agent when it examines the pleadings to determine whether the preconditions appear to have been met before it appoints a Board agent. It is no less an exercise of discretion because it is performed by a panel at an *in camera* hearing on the basis of the material filed, rather than through an oral hearing. At this first stage, if it does not appear on the pleadings that the applicant has met the preconditions, the Board may exercise its discretion to hold an oral hearing to inquire into that issue or the Board may exercise its discretion to decline to appoint a Board agent at all.

[91] We also wish to make the observation that the policy outlined in *Sobeys*, *supra*, is not a policy or practice that fetters the discretion of future panels considering s. 26.5 applications but is rather a legal test applied by the Board to determine entitlement to the appointment of a Board agent. A legal test developed by the Board can be applied in a consistent manner by the Board in future cases without having the effect of fettering the discretion of the Board. In other words, a panel of the Board exercises its discretion when applying the legal test at an *in camera* hearing.

[92] On the basis of the above reasoning, we conclude that the original panel did not err when it appointed a Board agent *in camera* on the basis of the policy in *Sobeys*, *supra*. The very nature of that policy requires the exercise of discretion and the question of whether the Board “may provide assistance pursuant to subsection (6)" is not an inquiry the Board was bound to entertain at this first stage. At the time of exercising our discretion whether to appoint a Board agent, we are not deciding whether to intervene and impose the terms of a collective agreement. In fact, the Board agent investigates that very issue. The Board reserves its decision on that issue until after the parties have had an opportunity to resolve their collective agreement and the parties come before the Board in an adversarial manner to argue the appropriate terms of their first collective agreement.

[93] We also note that the original panel was not delegating any discretion to the Board agent to either decide whether to intervene or to conclude the actual terms of a collective bargaining agreement. That discretion remains for the Board should the matter return to the Board to be determined at the second hearing stage of the

proceedings. As previously stated, the delegation of authority to the Board agent to make an assessment and to provide a report on the questions of whether the Board should intervene and, if so, on what terms, is a matter of Board procedure within the Board's jurisdiction to decide, and approved by the Court of Queen's Bench in the SIGA case, *supra*, provided the Board does not ultimately abdicate its decision-making responsibility on those questions. The Board stated in *Sobeys*, *supra*, as follows at 512:

> *[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.*

[94] We wish to make a final note concerning the comment made by the Employer that it might raise the issue of its client's reasonable apprehension of bias resulting from Ms. Miner's appointment as the Board agent. Although not relied on by the Employer as a ground for reconsideration of the Board's original decision in this matter, we feel compelled to comment on the Employer's argument. Firstly, in our view, it was inappropriate for the Employer to raise this issue as a "warning" that it could rely on this argument in the future, presumably if the Board persists in the process under s. 26.5 and upholds the decision of the original panel. In any event, it is highly questionable whether a reasonable apprehension of bias arises in the circumstances. Ms. Miner's role as a Board agent does not place her in a position where she has the ability to make decisions regarding the rights of parties to this application. She does not make the decision of whether the Board should intervene nor does she make any decisions concerning the actual terms of the first collective agreement. Therefore, she is not a subordinate in the decision-making process, having only the power of recommendation. Those decisions remain for the Board to make should the application return to it at the second stage of the application and only if the parties are unable to conclude a first collective agreement. In addition, while the Board has a policy that Board members will not be assigned to matters involving parties with whom they were

previously associated or employed, the very nature of the composition of the Board requires that there be a restriction on the length of time this policy applies. The Board is composed of members with labour relations expertise and, as such, it is unavoidable and perhaps even expected that these individuals will at some point in the past have had an association with a party or parties who appear before the Board. As such the Board's policy applies for a one-year period from the date the member was so employed or associated. While it is doubtful that the Board's policy applies to Ms. Miner as an employee of the Board, because she does not have any decision-making power, if the policy were to apply, it has been met in the circumstances of this case. Ms. Miner had been an employee of the Board for two years as of the date of the Order appointing her as a Board agent in this case.

[95] The Employer indicated in its argument that, even though it is not relying on the doctrine of reasonable apprehension of bias as a ground for this reconsideration, the appointment of Ms. Miner as the Board agent, considering her prior affiliation with the Union, is a good reason why they Board must have oral hearings on first collective agreement applications. The Employer states that it should be entitled to attend at an oral hearing to be able to make submissions on "who" should be appointed as a Board agent. We see no such justification for an oral hearing on this basis. At the first stage of these proceedings where the Board is considering the appointment of a Board agent, it is open to the parties when they make their application, or file a response, to state an objection to or a preference for a certain individual being appointed as the Board agent. In the past, the Board has considered such requests of the parties in certain circumstances, for example, where a preference is stated for the conciliator or mediator who has previously worked with the parties to be appointed as the Board's agent.

[96] Given the Board's conclusion that the Employer has not established a basis for reconsideration on either of the fourth, fifth or sixth grounds, it also fails on the first ground, as there are no facts in controversy which would require further evidence be adduced. The original panel correctly decided this matter *in camera* and in our view, it did not require evidence of the bargaining status of the parties and specifically, it required no evidence concerning whether the parties have bargained to impasse, before it decided to appoint a Board agent. Therefore, on the basis of the above reasons, we

see no error by the original panel that decided this application and as such, the application for reconsideration is dismissed.

DATED at Regina, Saskatchewan this **6th** day of September**, 2006**.

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson