Labour Relations Board
Saskatchewan

SASKATCHEWAN INSURANCE, OFFICE AND PROFESSIONAL EMPLOYEES' UNION (COPE), LOCAL 397, Applicant v. SASKATCHEWAN GOVERNMENT INSURANCE, Respondent

LRB File No. 003-07; April 11, 2007
Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and John McCormick

For the Applicant: Rick Engel, Q.C.
For the Respondent: Michael Tomka

Arbitration – Deferral to – Employer argued that arbitration appropriate forum for dispute between parties – In order for arbitrator to have jurisdiction, must be dispute between parties concerning violation or interpretation of collective agreement – Board sees conduct complained of as being within jurisdiction of Board - Board notes that employer may present more complete argument on issue at hearing of final application.

Remedy – Interim order – Delay – Delay by union in bringing interim application not unreasonable – Union communicated objections to employer and subsequently adopted "wait and see" approach until employer took concrete steps – Once union learned that concrete steps taken, interim application filed without delay.

Remedy – Interim order – Criteria – On interim application, Board considers affidavit evidence for purpose of determining whether interim relief ought to be granted pending final determination, not for purpose of determining whether respondent has actually committed unfair labour practice – Board concludes that union has met two branches of test for granting interim relief – Board issues interim order.

***The Trade Union Act*, ss. 2(b), 3, 5(c), 5(d), 5(e), 5.3, 11(1)(a), 11(1)(c), 18(e) and 42.**

REASONS FOR DECISION

Background:

[1] Saskatchewan Insurance, Office and Professional Employees' Union (COPE), Local 397 (the "Union") is certified as the bargaining agent for all employees of Saskatchewan Government Insurance (the "Employer") and has been certified since

1946. The parties have negotiated successive collective agreements since that time and are currently subject to one with a term of January 1, 2004 to December 31, 2006. The parties have exchanged or are in the midst of exchanging proposals for a renewal of that agreement and, as of the date of the hearing of the interim application, had scheduled their first bargaining meeting for January 30, 2007.

[2] The Union filed an application on January 8, 2007 alleging that the Employer committed unfair labour practices in violation of ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"). The Union complained that the Employer had negotiated and continued to negotiate directly with employees through the establishment of a committee composed of in-scope and out-of-scope employees (including the president of the Employer), which had gathered employee-related information, made recommendations and taken steps to implement changes which related to the terms and conditions of employment of in-scope employees. The Union also complained that the Employer had undermined the collective bargaining process by promoting the initiatives of the committee, by unilaterally paying bonuses to employees without the involvement or knowledge of the Union and by failing or refusing to bargain these matters with the Union. The Union seeks various orders including a declaration that the Employer is guilty of an unfair labour practice, a cease and desist order, an order prohibiting the Employer from using in-scope employees on the subject committee, an order prohibiting the Employer from unilaterally introducing terms and conditions of employment not negotiated with the Union, an order for monetary loss and an order directing the Employer to post the Board's Reasons for Decision in this matter.

[3] As of the date of the hearing of the interim application, the Employer had not yet filed its reply to the application.

[4] The Union also filed an application pursuant to s. 5.3 of the *Act* seeking interim relief until the final hearing and determination of the application, including an interim order prohibiting the Employer from dealing directly with any employees represented by the Union in any meetings of the subject committee, an order prohibiting the Employer from implementing any changes to the terms and conditions of employment of the employees represented by the Union based on the recommendations of the subject committee, an order directing the Employer to bargain collectively with the

Union and an order directing the Employer to post any order made by the Board in this matter, along with its Reasons for Decision.

[5] In support of its interim application the Union filed the affidavit of Larry Sheffer, a senior staff representative of the Union. In reply to the interim application, the Employer filed the affidavits of Tamara Erhardt, the assistant vice-president of human resources and corporate services for the Employer, and Barbara Cross, who works as research officer 2, corporate consulting, for the Employer.

[6] Counsel for each of the parties was afforded an opportunity to make oral representations and arguments at the hearing of the interim application on January 17, 2007. We have reviewed the application, affidavits, exhibits and authorities filed on behalf of the parties.

Evidence:

[7] While some of the facts are in dispute, the following is a summary of the evidence contained in the affidavits. We will note the differences in the parties' evidence only where it is necessary to the determination of the interim application. This summary of evidence is not intended to fetter the discretion of the panel of the Board hearing the final application in this matter.

[8] In September 2005, in accordance with a practice that had been followed by the Employer for some time, the Employer conducted an employee survey with the assistance of a third-party consultant, primarily to understand how employees felt about different aspects of working for the Employer and, in particular, employee satisfaction. Following receipt of the results of the survey from the consultant, the Employer and specifically the president of the Employer, Jon Schubert, decided to establish a committee composed of in-scope and out-of-scope staff to study the survey results, gather further information and make recommendations for change to increase "employee satisfaction and engagement" in the workplace. After inviting employees to express interest in sitting on such a committee, Mr. Schubert established the committee which met for the first time on April 25, 2006. The committee was titled the President's Employee Engagement Team ("PEET") and the 15 members of PEET, chosen by Mr. Schubert, included himself, three other members of the executive of the Employer, a

member from each of the President's Youth Advisory Council ("PYAC") and the Aboriginal Advisory Network ("AAN"), as well as nine other in-scope employees whom Mr. Schubert felt were a representational cross-section of the Employer's employees.

[9] Although the Employer made an announcement about the establishment of PEET on its internal website used for employee communications, PEET was established without the knowledge or involvement of the Union and its representatives. Mr. Sheffer deposed that, following the first meeting of PEET, on April 27, 2006, a union member notified him of the existence of PEET and that it was seeking employees' feedback. Mr. Sheffer thereafter had several conversations with human resources personnel indicating that there were certain matters within the mandate of PEET that should be dealt with through the collective bargaining process. Ms. Erhardt, in her affidavit, stated that the Union, having full access to the Employer's internal website, would have been aware of PEET yet it did not object at that time to in-scope employees sitting on PEET. She further stated that PEET was not to function as a joint labour relations committee and therefore there was no need to seek the Union's endorsement for or input into the creation, mandate or composition of PEET. Ms. Erhardt also stated that PEET is limited to making recommendations to management and has no authority to implement any policies or procedures or to control any monetary issues. The mandate of PEET has never been to alter terms and conditions of employment. Similarly, Ms. Cross deposed that it was recognized from the outset that PEET had no authority to compel the implementation of any changes arising out of the employee feedback it gathered and that its sole function was to make recommendations for consideration by the Employer.

[10] Throughout the spring of 2006, the members of PEET examined the results of the employee survey done in 2005 and gathered further employee input regarding changes they wished to see in the workplace. It accomplished this through the establishment of an email address available for employees to email their information and ideas, through a letter to employees attaching a postcard for their comments (allowing confidential responses if the employees wished), through information posted on the Employer's internal website and through personal contact between PEET members and their fellow employees. Many of the employees' comments were posted

on the Employer's internal website. The Union was not invited to participate in this process.

[11] In his affidavit, Mr. Sheffer deposed that, on June 23, 2006, upon mistakenly receiving employee feedback meant for PEET from in-scope employees wanting better pay, he forwarded the employees' responses to PEET with a note which reiterated his concerns that negotiations over terms and conditions of employment should be handled by the Union and not a committee established by the Employer.

[12] In July 2006, a copy of PEET's draft report was sent to the Employer's senior management for review. Ms. Cross deposed that the purpose for doing this was to ensure there was nothing in the report that would interfere with the collective agreement or the bargaining process.

[13] In August 2006, PEET released a report which it sent to all employees and posted on the Employer's internal website. The report outlined PEET's findings and recommendations for change. The 18-page report focused on employee satisfaction and engagement and identified four primary areas that PEET viewed as being of concern to employees. They were: (i) career advancement opportunities; (ii) leadership and direction: (iii) tangible rewards; and (iv) value of work and contribution. PEET further identified six key issues affecting these areas of concern that should be addressed by the Employer. These issues were stated in the report as follows:

- Improve the job competition process;
- Better facilitate career advancement and movement within the corporation;
- Address indecisiveness and improve consistency in corporate decision making and actions;
- Improve communication within the corporation;
- Improve recognition for employees, including providing training and guidelines on recognition;
- Improve awareness of employee benefits and programs.

[14] While the report details PEET's findings and recommendations or "action items" in relation to each of the six issues or key factors affecting the four primary areas of concern identified by PEET, of most significant concern to the Union on the interim application are PEET's findings and recommendations in the areas of "career advancement" and "tangible rewards" and, specifically, the issues identified as the "job competition process" and the "recognition of employees." As such, we will limit our analysis to those areas even though other aspects of the report might be in issue at the hearing of the final application.

[15] With respect to "career advancement opportunities," PEET identified the primary concerns of employees as including: that "the job competition process is perceived by some as too difficult and inconsistent," that employees would like an opportunity to learn a job before being tested for it, that there should be "job shadows," that there were issues with movement from certain job classifications, that there was not enough focus on seniority and that there should be improved access to jobs based on education and suitability rather than seniority. Based on these responses, PEET identified two issues to be addressed, including "improve the job competition process" and "better facilitate career advancement and movement within the corporation."

[16] With respect to "tangible rewards," PEET identified that the primary concerns of employees related to salaries, including concerns that pay increases should be tied to company performance, that there should be a bonus plan, that there should be "pay or other tangible bonus for high performers," that wage increases had been too low, that benefit programs should be improved and that there should be an enhanced recognition program for long-term employees. In its report, PEET stated:

> *Of all the factors PEET looked at, tangible rewards is the most challenging to address. For in-scope jobs, changes to salaries happen through the collective bargaining process. The processes involved leave little room for PEET to impact salaries.*
>
> *However, the PEET Tangible Reward committee has recommended two ways the corporation can impact this factor:*
>
> - *improve recognition programs for employees*
> - *improve awareness of existing employee benefits and programs*

[17] PEET's report proceeded to deal with the previously identified six key issues or factors under the heading of "Recommendations." Portions of the report relevant to our analysis are as follows:

> ***Improve the job competition process***
>
> *Many SGI employees are not satisfied with the current job competition process. . . . In late 2003, work began on evaluation and recommendations for improving the process. That work has evolved into a Competition Review Process committee which is undertaking a comprehensive review of all aspects of job competitions at SGI. PEET met with a representative of the committee to get an update on its work. . . .*
>
> *Action items:*
>
> - *PEET recommends the Competition Review Process committee communicate with all employees at SGI . . .*
> - *PEET will meet at least twice per year with the Competition Review Process committee to get updates on its work and to ensure the committee's work is taking into consideration the key issues identified by PEET.*
>
> ***Better facilitate career advancement and movement within the corporation***
>
> *. . .*
>
> *Action items:*
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> *. . .*
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> - *. . . PEET will work with Human Resources to investigate expansion of existing internship programs and specialized training programs in business critical areas. Consideration will be given to where business need exists to develop people to move into positions, . . .*
>
> ***Improve recognition for employees, including providing training and guidelines on recognition***
>
> *. . . In other words, SGI could benefit greatly from better fostering a recognition culture within the corporation.*
>
> *The corporation has been aware of this issue for some time, and it has provided training and information to management staff on improving recognition. PEET will help SGI to build on that work.*
>
> *Action items:*

> - *SGI will allocate budget dollars that can be used by management staff to recognize employees'' achievements and efforts. Guidelines will be developed to aid management staff in the use of the budget dollars. The budget item will be added immediately, and guidelines will be prepared and distributed to management staff in the fall 2006.*
>
> *. . .*
>
> - *To ensure employees are actively working to build a culture of recognition within the corporation, PEET will work with the Performance Development committee on objectives and measures for recognition.*

[emphasis added]

[18] The Employer's evidence in the affidavits of Ms. Erhardt and Ms. Cross was that, in the last round of collective bargaining, changes to the job competition process were discussed and the Union and the Employer entered into a letter of understanding in which the Employer agreed to strike a committee of management representatives to review the competition process with a view to developing improvements.[1] Ms. Erhardt stated in her affidavit that, to the extent that employees raised concerns with the competition process, PEET recognized that the Competition Review Process Committee had already identified those concerns and had been working to address them. She noted that PEET's recommendations in this regard were therefore directed toward a communication strategy in relation to initiatives already underway, also noting that any changes to the competition process would be addressed in collective bargaining. In her affidavit, Ms. Cross deposed that PEET recognized it had no further role to play in this area except for recommending better communication to employees about the work of the Competition Review Process Committee and the obtaining of regular updates from the Competition Review Process Committee.

[19] Mr. Sheffer deposed that, on August 24, 2006, he viewed PEET's report on the Employer's internal website and thereafter sent an email to human resources personnel which, in essence, protested the work of PEET and asked the Employer to

[1] In appendix D, Letter of Understanding No. 8, in the collective agreement, the parties agreed that the Employer would complete a review of the competition process with a view to increasing the validity and consistency in assessment methodology and creating efficiencies in the selection process, while specifically identifying the objectives to be furthered.

negotiate with the Union as the sole collective bargaining agent for the employees. The Employer responded by indicating that it had "every intent to honour the collective agreement and bargaining process for those items requiring negotiation with the Union." Mr. Sheffer responded that the Union believed that collective bargaining was the forum where all the work of PEET belonged and that PEET "undermine[s] the agreed-upon processes between union and management."

[20] In accordance with the stated recommendations of PEET, the Employer did in fact immediately allocate budget dollars to employee recognition. It allocated a sum of approximately $145,000, which is representative of $100 per in-scope employee. Also in accordance with the recommendations of PEET, guidelines for use by managers in exercising their discretion to recognize employees and to spend money on employee recognition were developed and distributed to managers on December 5, 2006.

[21] The evidence indicated that at least some of the money budgeted for employee recognition was spent by management between August and December 2006, on both individual and group employee recognition. Mr. Sheffer deposed that the Union learned that at least five employees received gift certificates. Ms. Cross, on behalf of the Employer, also acknowledged use of the recognition budget in the time period August to December 2006, although she provided no details of the type of recognition given. It also appears, based on employee feedback contained in one of the exhibits attached to the affidavit of Ms. Cross, that a $25 bonus may have been given to a number of employees around this time period.

[22] Ms. Erhardt indicated that the guidelines for employee recognition state that recognition can take many forms, both non-monetary (emails/letters) and more tangible (gift certificates and lunches) but that the monetary value is not a primary consideration. She pointed out that the monetary value of the awards is negligible in comparison to the actual compensation and benefits paid to employees; a $100 gift certificate amounts to .02% of the average annual employee compensation. In her affidavit, Ms. Cross pointed out that the Employer and PEET have never referred to

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The parties agreed that the Union would be provided with a copy of this report and that the processes would be reviewed annually by the parties following its implementation.

employee recognition recommended by PEET as an “award” and that “awards” were not sought by employees through their input to PEET.

[23] Mr. Sheffer indicated in his affidavit that at no time was the Union involved in the work of PEET or its recommendations concerning employee recognition. The Union first became aware that the Employer had implemented “employee recognition awards” in the form of gift certificates when one of its members reported knowledge that five employees had received gift certificates ranging from $25 to $100. Mr. Sheffer deposed that he then immediately contacted the human resources department and a meeting was arranged with Mr. Schubert, president of the Employer, for the next day. Union and employer representatives had a short meeting on December 22, 2006 to discuss the monetary awards to employees. Mr. Sheffer deposed that, at this meeting, the Union indicated that the Employer’s actions constituted an unfair labour practice and would have a serious detrimental effect on collective bargaining set to commence in early 2007. Mr. Sheffer stated that the Union asked the Employer to retract the awards or sign a letter of understanding paying the same amount of money to all employees. He stated that Mr. Schubert indicated that the Employer would not change its position on the matter or enter into any agreement with the Union on the issue. Ms. Erhardt, in her affidavit, described a similar scenario concerning this meeting. She stated that the Union requested that PEET be discontinued and proposed a jointly negotiated recognition program. She stated that the Union’s position was that every employee be given the same amount of money for recognition if the occasion arose and Mr. Schubert stated that that was not the intention of PEET’s recommendation regarding employee recognition.

[24] In an email dated December 28, 2006, a manager of the Employer indicated that the recognition program was considered a “major initiative” of PEET and was “an on-going program, and throughout the year, employees will be recognized for their individual work, team work, contribution to customer service, etc.”

[25] Ms. Erhardt deposed that, when PEET’s report was posted on the internal website on August 23, 2006, the Union would have had access to the report and, specifically, would have had access to the report’s recommendation that a budget be created for the recognition of employee achievements and efforts -- yet the Union did not

raise any questions or concerns about the budget allocation. In November 2006 PEET released another communication to employees by way of the Employer's internal website containing a report on PEET's progress and, in that report, PEET confirmed that the employee recognition budget had been made available to management in August 2006. Ms. Erhardt stated in her affidavit that, even though the employee recognition budget was being used by the Employer in other ways with respect to both individual and group recognition during the time period August to December 2006, the Union did not complain until the end of December 2006. On January 9, 2007, the Employer gave the Union a copy of the guidelines upon the request of the Union, on the understanding that the guidelines were not to be distributed to in-scope employees.

[26] Mr. Sheffer's affidavit outlines a number of occasions when the Union communicated its position about PEET to its members. In September 2006 the Union posted a note on its website indicating that the Union was the sole collective bargaining agent of the employees and that it was the Union's objective to represent the interests of all employees and not just select individuals on PEET. On December 28, 2006, the Union emailed certain employees telling them they were doing a good job even if they did not get an award and saying that all issues of concern should be dealt with in collective bargaining. Mr. Sheffer deposed that the Union's members were concerned that that the Employer was using "hype and propaganda to promote the message of merit over seniority and impartiality" and were worried that PEET would undermine the collective bargaining process. He also deposed that "members have expressed cynicism that the SGI president does not respect the bargaining process and has no interest in engaging in meaningful negotiations to achieve a new Collective Agreement."

[27] In her affidavit, Ms. Erhardt indicated that it was the Employer's view that PEET was no different than other committees established by the Employer including the AAN and the PYAC both of which are composed of in-scope and out-of-scope employees. She stated that the Union had never objected to the composition of these committees or the fact that they make recommendations to improve working conditions and act in an advisory capacity to the Employer. Ms. Erhardt gave as an example a situation where the PYAC recommended the establishment of a "wellness account," a recommendation that was submitted to the Employer and the Union for consideration, and she pointed out that, where a recommendation of a committee requires negotiation

with the Union, such as the issue of the "wellness account," it will be forwarded to the appropriate parties.

[28] Ms. Cross deposed that since the employee recognition budget was established, the Employer has received only one letter of support and one email of objection to the budget item.[2] She stated that in November and December 2006 the Employer conducted a "mini-survey" of employees and determined that the employee satisfaction level had increased from 64.8% in 2005 to 70.9% in 2006, noting that this was a statistically significant increase and that it occurred following the year in which PEET had been struck and the Employer had begun to implement its recommendations.

[29] Ms. Cross deposed that PEET has targeted many recommendations and action items to be undertaken in 2007 and that it "would be extremely detrimental to the progress PEET has made, as evidenced by the recent employee survey that showed increased job satisfaction, to force PEET to stop pursuing these recommendations or to prevent SGI from any further implementation." Ms. Cross also deposed that if PEET and the Employer were required "to discontinue the recommendations to any implementation at this time" it "would discredit the work PEET has performed to date and be discouraging to employees." Ms. Cross also suggests that it would be ineffective for PEET to proceed without in-scope representatives, as their participation is essential to the objectives of improved employee engagement. PEET meets on a quarterly basis with its next meeting scheduled for March 2007.

[30] In addition to the Employer's obligation to bargain collectively with the Union by virtue of the certification order made pursuant to s. 5(c) of the *Act*, the collective agreement between the parties contains the following provision:

> *2.1 The Employer agrees to recognize the Union as the sole collective bargaining agent for the Employees covered by this Agreement and hereby consents and agrees to negotiate with the Union or its designated representatives in any and all matters affecting the relationship between the said Employer and its Employees.*

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[2] Although we note that in the exhibit attached to Ms. Cross's affidavit containing employee feedback on the internal website for the period April – June 2006, a number of employees have raised objection or criticism to the $25 bonus, the $25 bonus cheque, the $25 reward, or the $25 employee appreciation, etc. asking instead for a higher monetary bonus, better wage increases, profit-sharing, shift premiums, RRSP contributions, better benefit plans, etc.

Arguments:

[31] Mr. Engel, counsel on behalf of the Union, filed a written brief and copies of certain case authorities that we have reviewed. In its application, affidavits and brief filed at the hearing, the Union set out its allegations that the Employer is guilty of an unfair labour practice[s] and its arguments in support of those allegations. Essentially, the Union asserts that the Employer has undermined the collective bargaining process and the Union's status as the employees' exclusive bargaining agent through the Employer's creation of PEET, the actions taken by PEET including the making of recommendations and the Employer's implementation of some of those recommendations, which were all carried out without the involvement of the Union. Of particular concern to the Union on this interim application are those recommendations made and actions taken with respect to the job competition process and employee compensation in the form of the employee recognition program, the latter of which the Employer has implemented on the eve of collective bargaining for a renewal collective agreement. The Union believes that, without the intervention of the Board, the Employer will continue its initiative concerning changes to the terms and conditions of employment to the exclusion of engaging in proper collective bargaining with the Union.

[32] The Union submitted that it has met the appropriate test to be utilized by the Board on an application for interim relief as applied by the Board in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, that is: (i) that the main application reflects an "arguable case" or that there is a "serious issue to be tried," and (ii) that the labour relations harm in not granting interim relief outweighs any labour relations harm incurred by granting interim relief. This test has been followed in several decisions of the Board including *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99.

[33] Counsel argued that the Union has established an arguable case that violations of ss. 11(1)(a) and (c) of the *Act* have occurred. The Union intends to show at

the hearing of the final application that the Employer circumvented the bargaining process and undermined the Union's exclusive status by: (i) establishing PEET (consisting of members selected by the Employer and including out-of-scope members) to conduct an employee survey to identify the "real concerns" of employees (and not those represented by the Union), to communicate with in-scope employees and to make recommendations concerning terms and conditions of employment; and (ii) implementing an employee recognition program that distributed cash and other monetary awards to employees, a unilateral decision having financial consequences for the Union's membership.

[34] In support of its position that it has an arguable case, the Union cited the Board's decisions in *Construction and General Workers Union v Midway Sales*, [1988] Jan. Sask. Labour Rep. 35, LRB File No. 302-86, *S.I.O.P.E.U., Local 397 v. Saskatchewan Government Insurance*, [1987] Mar. Sask. Labour Rep. 48, LRB File Nos. 125-86, 126-86, 127-86 & 128-86 and *Saskatchewan Government Employees Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep. 51, LRB File No. 131-88 as support for the proposition that the Employer is in violation of ss. 11(1)(a) and 11(1)(m) by interfering with the employees' right to insist that any changes to their terms and conditions of employment be negotiated with the Union as their exclusive bargaining representative. In addition, on the final application the Union intends to rely on the decision of the Board in *Energy and Chemical Workers Union, Local 649 v. Saskatchewan Power Corporation*, [1988] Winter Sask. Labour Rep. 64, LRB File No. 022-88, where the Board found the employer guilty of an unfair labour practice pursuant to s. 11(1)(c) for paying $1000 to each employee (pro-rated for those working less than one year) while the parties were bargaining a renewal collective agreement, the Board having characterized the payment as a bonus and not a gift. In that case, the Board explained that the tactics utilized to make the payments undermined the exclusive status of the union and violated s. 11(1)(c). The Union also intends to rely on *Retail, Wholesale and Department Store Union v. Canada Safeway Limited*, [1991] 4th Quarter Sask. Labour Rep. 43, LRB File Nos. 177-90, 178-90, 227-90, 228-90, 229-90, 036-91 & 088-91 where the Board declared that the employer meeting with in-scope employees to notify them of a change to their duties (which would make them out-of-scope) and to explain a bonus system violated the *Act* even though the new duties did, in fact, make the employees out-of-scope.

[35] The Union argued that there are similarities between the present case and the case of *Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations*, [2002] Sask. L.R.B.R. 624, LRB File No. 057-02 where the Board found the employer guilty of failing to bargain in good faith by unilaterally implementing a market supplement program without negotiating it with the union. The Board found that the employer's conduct that was in violation of the *Act* included a request and encouragement of in-scope employees to participate by providing information and proposals to the committee and the issuance of the committee's report recommending wage supplements for some occupations.

[36] Counsel argued that all of the issues raised by the Union with the Employer in relation to the recognition program and the job competition process are included within the notion of matters that are subject to collective bargaining with the employees' exclusive bargaining agent. The Union rejects the Employer's assertion that because the Union has allowed the PYAC and AAN committees to operate without the Union's involvement that it should also not object to the work of PEET. The Union pointed out that, in the one example provided by the Employer concerning the PYAC and the wellness initiative, it must be noted that the committee presented the initiative to both the Employer and the Union for consideration and agreement. In addition, the Union rejects the suggestion of the Employer that because the value of the recognition given to employees was small it should be of little significance. The Union pointed out that neither it nor the Board knows the actual value of the recognition that has been given but that, in any event, the actual value of the recognition award is of no consequence to the determination before us.

[37] With respect to the balance of labour relations harm, counsel for the Union submitted that the balance of harm favoured the Union such that the Board ought to intervene to preserve the status quo. He submitted that, if PEET is permitted to continue its efforts particularly at this critical point in time when the parties are soon to commence collective bargaining, the employees will perceive the Union as an ineffective bargaining representative and the trust and respect for the Union necessary to conclude a revised collective agreement will be diminished. It is also for this reason that there is urgency to the Union's request for interim relief.

[38] The Union argued that the appropriate remedial relief to preserve good faith bargaining between the parties in the circumstances of this case included an order prohibiting the Employer from meeting with in-scope employees on PEET, an order prohibiting the Employer from distributing further bonuses or changing other terms and conditions of employment, an order directing the Employer to negotiate with the Union and an order that the Board's orders be posted in a prominent location or emailed to all employees.

[39] Mr. Tomka, counsel on behalf the Employer, filed a written submission and copies of case authorities, which we have reviewed. While the Employer accepts that the appropriate test for the Board to apply is that set out in the *Regina Inn*, case, the Employer pointed out that the onus is on the Union to meet procedural requirements necessary to bring such an application. The Employer submitted that the Board's power to grant interim relief is discretionary and may be refused for practical considerations. The Employer relied on *Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel*, [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 144-00 & 145-00, to support the propositions that the Union must establish that there is an urgent need for interim relief and that interim relief should not be granted where the practical effect is granting what the Union might hope to obtain on the final application because the power to grant interim relief is intended to be preservative and not remedial.

[40] The Employer presented a lengthy argument in support of its position that the Union had failed to establish that there was a "prima facie case of a breach of the *Act*." The Employer denied that it had committed an unfair labour practice through negotiating directly with in-scope employees by way of PEET. The Employer suggested that the Union's only real objection was to the implementation of PEET's recommendations concerning employee recognition, that is, five "tokens of appreciation" in the form of $100 gift certificates. The Employer denied that there was any relationship in the timing between the work of PEET and the fact that bargaining was scheduled to begin in January 2007. The Employer disputed that there had been any alteration to the collective bargaining process and pointed out that no such bargaining was occurring at the time of PEET's work and the implementation of PEET's recommendations. The Employer denied that it had refused to bargain these matters and pointed out that it

remains open to the Union to indicate it wishes to negotiate these matters in the up-coming round of bargaining. The Employer also submitted that the Union's evidence lacked sufficient detail to suggest there has been any intention to interfere with, discredit or act contrary to the Union's interests with respect to the work of PEET or the implementation of its recommendations, noting that PEET has no authority to require the Employer to implement its recommendations.

[41] The Employer indicated that it relies on the management rights clause in the parties' collective agreement to support its argument that the establishment of PEET, the taking of the employee survey and the development of recommendations is a proper exercise of management rights that are not abridged by any terms in the collective agreement. The Employer argued that PEET is similar in its formation and activities to the PYAC and the ANN, both of which operate without objection by the Union. The Employer indicated that it recognizes that matters and issues relating to wages, job competition and other terms and conditions of employment must necessarily fall outside the mandate of PEET and that no recommendations had been discussed or made in this regard by PEET.

[42] The Employer denied that the implementation of any recommendations of PEET would change terms and conditions of employment. With respect to the job competition process, PEET did not make any recommendations for changes to the process but rather only made recommendations concerning communication with a separate committee struck pursuant to the collective agreement to review the job competition process. With respect to compensation, the Employer pointed out that the guidelines for employee recognition include not only gift certificates but other tokens of appreciation such as verbal thank-you's, a note or card, being taken out for lunch or given flowers, etc. The Employer denied that providing such recognition constitutes a term or condition of employment (while acknowledging that it cannot unilaterally change terms and conditions of employment). The Employer submitted that employee recognition is not a "wage," relying on the definition in J. Sack and E. Poskanzer, *Labour Law Terms: A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1984). The Employer also denied that recognition was a "benefit" and, although it acknowledged that a benefit might be non-monetary, it would not include recognition or situations where an employee's pay structure was not greatly affected. In support of this

proposition, the Employer relied on the definition of “fringe benefit” contained in Black’s Law Dictionary and a number of arbitration decisions as well as a case dealing with pension and income tax legislation. The Employer took the position that the employee recognition given in this case was of a minimal monetary amount not affecting an employee’s pay structure and was therefore not a term or condition of employment requiring negotiation with the Union.

[43] The Employer distinguished the *Saskatchewan Power* case, *supra*, on the basis of the reasons why the Board characterized the payment as a “bonus” and not a “gift” - it was a sizeable bonus ($1000), tied to past work performance, treated like wages in the hands of the employees and given during the time the parties were engaged in collective bargaining. The Employer denied that those features are present in this case and would characterize the gift certificates in this case as a “gratuitous supplementary employee gift,” not given merely for work done and being small in monetary value. As such, it argued, negotiation with the Union was not required. The Employer argued that the Board has determined that bonuses are inappropriate when given during bargaining or during a decertification or certification drive (see *Communications, Energy and Paperworkers’ Union of Canada* v. *Hollinger Canadian Newspapers, LP, c.o.b. as the Saskatoon Star Phoenix*, [2001] Sask. L.R.B.R 689, LRB File No. 331-99 and *Manyk v. Communications, Energy and Paperworkers Union of Canada* v. *Hollinger Canadian Newspapers, LP, o/a The Saskatoon Star-Phoenix Newspaper,* [2002] Sask. L.R.B.R. 58, LRB File No. 246-01) but here there is no such certification or decertification drive ongoing, there is a collective agreement in place and the parties are not in the midst of collective bargaining.

[44] The Employer also submitted that the Board should apply the doctrine *de minimis (non curat lex)* or “the law does not concern itself with trifles” as it did in *United Food and Commercial Workers’ Union, Local 1400 v. Ne-Ho Enterprises Ltd.*, [1989] Winter Sask. Labour Rep. 78, LRB File Nos. 005-89, 022-89 & 024-89, where the Board dismissed an unfair labour practice allegation that the employer made an improper unilateral change when it charged employees $1.00 per day to plug in their vehicles at work. The Employer asserted that the gift certificates in this case were so small in monetary value (less than one tenth of one percent of average wages) that the Board should not concern itself with this matter.

[45] With respect to the potential for labour relations harm, the Employer argued that the Union has not established that harm to the Union by not granting an interim order will outweigh harm to the Employer if the order is granted. Specifically, the Union has not put forward a reasonable factual basis to support its position that there has been or will be an "immediate and forceful backlash from its members" or "uncertainty in the workplace." The Employer pointed out that it will suffer greater harm if an interim order is made in that stopping PEET's work will discredit the Employer, will cause employees to lack trust that the Employer will address their concerns when they are identified through a survey and will interfere with the Employer's efforts to effectively manage the workplace. In relation to its arguments on labour relations harm, the Employer relied on *Service Employees' International Union, Local 336 v. Swift Current District Health Board*, [1995] 1st Quarter Sask. Lab. Rep. 170, LRB File No. 011-95 and *Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc.*, [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.

[46] The Employer also disputed the propriety of the relief requested by the Union, arguing that the orders sought are too broad, the Union has failed to establish an arguable case for the types of relief requested and/or the relief requested is inappropriate as interim relief. With respect to the Union's request that the Employer post or email to employees any interim order made, the Employer stated that it did not object to such an order, *per se*, but that it may be unnecessary.

[47] The Employer argued that, should the Board grant any interim order, the status quo to be preserved was that which existed from April 2006 to the date of hearing; in other words, the Board should allow PEET to continue to function as it had over those nine months as the Union had not taken any action to stop PEET during that time period.

Relevant Statutory Provisions:

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

> *2. In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement,*

or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;

. . .

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

. . .

5 The board may make orders:

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

(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;

(e) requiring any person to do any of the following:

(i) to refrain from violations of this Act or from engaging in any unfair labour practice;

(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;

. . .

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

. . .

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*
> >
> > *. . .*
> >
> > *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
>
> *. . .*
>
> *18 The board has, for any matter before it, the power:*
>
> > *(e) to receive and accept any evidence and information on oath, affidavit or otherwise that the board in its decision sees fit, whether admissible in a court of law or not;*
>
> *. . .*
>
> *42 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Decision:

[49] As a preliminary matter, the Employer argued, although not strenuously, that the Union's application was premature in the sense that, if the conduct in question did amount to a change to the employees' terms and conditions of employment, the conduct would give rise to an alleged breach of the collective agreement and therefore the appropriate forum for the dispute would not be the Board but rather the grievance/arbitration process. In our view, in order for an arbitrator to have jurisdiction, there must be a dispute or difference between the parties concerning an alleged violation of the collective agreement or over a matter of interpretation of its terms. The Employer did not refer us to a term of the collective agreement that the Union could have alleged had been violated and we are not, in the circumstances, prepared to speculate

what that might be. In our view, the conduct complained of is, in its essential character, a dispute requiring determination under s. 11(1)(a) or (c) of the *Act* and, as such, is within the jurisdiction of the Board. The question before the Board at the hearing of the final application will be whether the Employer, through its conduct, failed to bargain collectively with the Union regarding matters over which it was obligated to bargain, and/or interfered with the employees' exercise of rights under the *Act*. One of the remedies ultimately sought is an order that the Employer bargain collectively with the Union, a remedy that is not available to an arbitrator. In any event, if the Employer feels strongly about this position, it will have the opportunity to present a more complete argument on the issue at the hearing of the final application, a course of action the Board found to be appropriate in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, where the Board stated at 394:

> *[63] For the reasons that follow, we have determined that the Board does have the jurisdiction to hear the applications proper. We do not agree that the issues raised by the applicants on the applications proper are within the exclusive purview of a collective agreement arbitrator and it is not for the Board on this application for interim relief to determine whether we ought to defer to the arbitration process. On such complex applications, it is advisable and preferred to make that determination after the presentation of evidence specifically directed to that issue as the parties may deem advisable. This can be done as part of the evidence adduced on the applications proper.*

[50] Also as a preliminary matter, we have determined that the application should not be dismissed for undue delay, as urged upon us by the Employer. The Employer argued that the Union, being aware of the creation of PEET and the involvement of in-scope employees on PEET from the outset, did not allege that the actions or the recommendations made by PEET constituted an unfair labour practice until it brought this application several months later, only having previously raised with the Employer that the Union was the sole bargaining agent for in-scope employees. The Employer pointed out that a number of recommendations arising out of PEET have been implemented or are in the process of being implemented, yet the Union had previously raised no objections to the implementation of those recommendations. The Employer also argued that the application lacked the requisite urgency because the Union did

nothing for nine months and only took action when the collective agreement was about to expire and it learned of the Employer's distribution of five gift certificates. The Union explained that it had initially attempted to persuade the Employer that its actions were improper and to encourage the Employer to bargain with it instead of allowing PEET to continue its work. The Union waited to see where the Employer was going with PEET and initially felt that any information PEET obtained might also be useful for the Union at the bargaining table. However, once the Employer began implementation of the recommendations of PEET and particularly the distribution of monetary awards to employees without the involvement of the Union, the Union felt the balance had shifted and it determined that it would suffer irreparable harm if the Employer were to continue such actions as the parties entered the collective bargaining process.

[51] In our view, the delay by the Union was not so long as to be unreasonable or to demonstrate that the matters in issue are not sufficiently urgent. While it appears that the Union is taking issue with all aspects of the establishment and operation of PEET, the fact that it did not take action by filing an unfair labour practice application until January 8, 2007 was understandable. The Union had no knowledge that employee recognition payments had been made to employees until late December 2006 and thereafter it acted without delay by filing the application on January 8, 2007. Prior to receiving that knowledge in December 2006, all that was posted on the intranet with regard to employee recognition (which we do not view as implied notice to the Union in any event) was that there would be employee recognition given with no indication of the guidelines for giving that recognition. It made sense that the Union would adopt a "wait and see" approach until the Employer took some concrete steps to act on PEET's recommendations and the Union could evaluate that action and its members' response. It is not true to say that the Union did nothing at all prior to January 8, 2007. It repeatedly communicated to the Employer its objection to the establishment, composition and work of PEET, indicating, as it did on the application, that the Union was the employees' exclusive bargaining agent and that the Employer was obligated to bargain the subject matter of PEET's recommendations with the Union through the collective bargaining process. We accept that this "triggering event," followed by a meeting with the Employer's president at which the Union was told that employee recognition would continue, caused the Union to perceive that the balance had shifted. This is particularly understandable because the parties were soon to be entering the

collective bargaining process. While the factor of delay could have an impact on the appropriate interim relief, it does not lead us to conclude that there has been excessive delay by the Union in bringing the unfair labour practice application and interim application.

[52] Turning to the merits of the interim application, we must assess the Union's request for interim relief on the basis of the test outlined in the *Regina Inn* case, *supra*, which has been followed by the Board on many occasions since the discretion and power to grant interim relief was added to the *Act* in 1994. In *Regina Inn* the Board described the test as follows, at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[53] This test has been confirmed in many subsequent decisions, including: *Chelton Suites Hotel*, *supra*; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Partner Technologies Incorporated*, [2000] Sask. L.R.B.R. 737, LRB File Nos. 290-00, 291-00 & 292-00; *Saskatchewan Government and General Employees' Union v. Saskatoon Group Home Inc.*, [2000] Sask. L.R.B.R. 22, LRB File Nos. 011-99 to 029-99; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Universal Reel & Recycling Inc*., [2001] Sask. L.R.B.R. 809, LRB File Nos. 226-01, 227-01 & 228-01; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Northern Steel Industries Ltd.*, [2002] Sask. L.R.B.R. 304, LRB File No. 114-02; *Heinze Institute*, *supra*; *Del Enterprises, o/a St. Anne's Christian Centre*, *supra*; *United Food and Commercial Workers, Local 1400 v. D & G Taxi Ltd*., [2004] Sask. L.R.B.R. 347, LRB File Nos. 244-04, 245-04 & 246-04; *Saskatchewan Joint*

Board, Retail, Wholesale and Department store Union v. Starbucks Coffee Canada, [2005] Sask. L.R.B.R. 593, LRB File Nos. 183-05, 184-05 & 185-05, and most recently, in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06.

[54] As stated in the Board's decision in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, although the Board considers detailed affidavit evidence and the parties' submissions, it does so only for the purpose of determining whether interim relief ought to be granted pending a final determination and not for the purposes of determining whether the Employer has actually committed any unfair labour practice. At 395, the Board stated:

> *[67] On an application for interim relief we are not charged with determining whether the allegations in the application have been proven but rather with whether the status quo should be maintained pending the final determination of the main application. This is in keeping with the principle that an interim order is intended to be preservative rather than remedial. As the Board observed in Chelton Suites Hotel, supra, an interim order must be consonant with the preservation and fulfillment of the objectives of the Act as a whole and of the specific provisions alleged to have been violated. The Board stated at 443:*
>
> > *Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.*

[55] In the present case, the Board has determined that the Union has met the two branches of the test for the granting of interim relief. It has established firstly that there is an arguable case and a serious issue to be tried and secondly that the balance of labour relations harm that might occur if an order is not granted outweighs the harm that might occur if an order is granted.

[56] With respect to the first branch of the test, we find that the Union has established that the application presents an arguable case and raises a serious issue to be tried. The test is not, as the Employer described it, whether the Union has established a *prima facie* case. The case law has clearly established that the test is whether there is an arguable case or a serious issue to be tried. We do not weigh evidence to make this determination, as we might if we were assessing the strength of a case or whether an applicant has established a "*prima facie*" case. The final application seeks to have the Board determine whether the Employer has committed an unfair labour practice or practices through the taking of the employee survey, the establishment and actions of PEET including the direct communications with the employees and the resulting implementation or intended implementation of PEET's recommendations by the Employer. The Union asserted that these actions involved an improper attempt by the Employer to influence the course of negotiations, circumvent collective bargaining and undermine the Union by the Employer's refusal to bargain the employees' terms and conditions of employment with the Union as the employees' exclusive bargaining representative, all in violation of s. 11(1)(c). The Union also alleged that the Employer violated s. 11(1)(a) by negotiating directly with in-scope employees over terms and conditions of employment and making unilateral changes to those terms and conditions. Based on the facts contained in the affidavits and the case law referred to by the parties, the Union has established an arguable case or a serious issue to be tried that the Employer has violated s. 11(1)(a) and/or s 11(1)(c) of the *Act*. Specifically, whether the Employer is permitted to establish committees consisting of in-scope employees and out-of-scope employees to obtain information from employees about their job satisfaction and opinions about changes to working conditions and then make recommendations for change is clearly subject matter falling within the jurisdiction of the Board to decide under these provisions of the *Act*. The Union has pled sufficient facts to show that there is a dispute under the *Act* and, at this stage, there is no requirement to prove actual detriment to its relationship with its members or actual interference with the bargaining process. It is also of no relevance that the parties were not engaged in collective bargaining at the time of the alleged conduct.

[57] In the context of the Union's complaint concerning the formation and actions of PEET and the Employer's implementation of its recommendations, the Union's allegations under ss. 11(1)(a) and (c) focus on two primary areas: the recommendations

concerning the job competition process and the implementation of the employee recognition program.

[58] With regard to the employee recognition program implemented by the Employer upon the recommendation of PEET, we also find that the Union has established an arguable case that the Employer is in violation of s. 11(1)(a) and/or (c). Section 11 (1)(c) makes it an unfair labour practice for the Employer to fail to bargain in good faith. Whether or not the Union is able to prove such a violation will depend first on a finding that the Employer was obligated to bargain with the Union over the terms or implementation of the employee recognition program. The decision in the *SaskPower* case, *supra*, illustrates a situation where a payment made to employees that was not provided for in the collective agreement was in violation of s. 11(1)(c). At the hearing of this interim application the Employer made extensive argument against such a finding. However, this is not a determination that we must make on an interim application and the Employer's argument serves only to illustrate that there is a serious issue to be tried with regard to the Employer's duty to bargain collectively concerning the employee recognition program or whether it can be negotiated directly with employees and unilaterally implemented either because it is not a term or condition of employment or because it was made in accordance with the Employer's management rights.

[59] With regard to the job competition process, PEET made a recommendation that requires better communication between the Competition Review Process Committee (a committee of management representatives established pursuant to a letter of understanding with the Union) and employees through PEET. Specifically, one of PEET's recommendations is that it will obtain regular up-dates from the Competition Review Process Committee to allow PEET to ensure that the committee operates with PEET's mandate in mind. While the Employer argues that this is merely a communication strategy designed to keep employees informed of a matter which they have identified is of significant concern to them, the actions of PEET and the Employer's position that PEET's role is appropriate in these circumstances make an arguable case that the *Act* has been violated. By inserting itself into a matter that is between the Union and the Employer under the collective agreement, it is arguable that PEET is usurping the role of the Union in its representation of employees. In other words, there is a serious issue to be tried over the question of whether the Employer, through the

Competition Review Process Committee should be communicating with employees through PEET instead of through the Union and whether the Competition Revie Process Committee, should be operating with the input of PEET rather than that of Union as the exclusive representative of the employees.

[60] We also reject the Employer's *de minimis* argument. Firstly, the argument ignores the whole of the Union's application in that the conduct complained of involves not only the distribution of the five gift certificates, but the entire process utilized by the Employer to get to that point, as well as the implementation of other recommendations of PEET which would include those related to the job competition process. Secondly, an assessment of the applicability of the *de minimis* argument necessarily involves the weighing of evidence, which we have determined is not a function to be exercised by the Board on an interim application. Lastly, we note that the Employer has been very careful in its affidavits and argument to refer only to the distribution of five gift certificates, which was the only information available to the Union concerning the extent of the Employer's distribution of monetary awards. It is our view that the Employer's reference to only five gift certificates is more by design than by a mere coincidence. Other evidence suggests that the distribution of monetary recognition is more widespread and we are not at all confident that we have before us a complete set of facts in terms of the type, number and value of the monetary awards distributed. Therefore, this argument should be considered only after a full hearing of the final application at which time the Board and the parties will have the benefit of full disclosure and the examination and cross-examination of witnesses.

[61] The Employer's argument that because the Union has not objected to the formation and operation of the PYAC and ANN committees, it could not object to PEET, while possibly affording a defence for the Employer at the hearing of the final application, is also without merit at this stage of the proceedings. We do note, however, that in the one example provided, the recommendation of the PYAC committee concerning the wellness account, the issue was sent to the Union as a matter to be negotiated. As such, it is arguable that the employee recognition program should also have been brought to Union to be negotiated.

[62] With regard to labour relations harm, the Union seeks the Board's assistance in the form of various interim orders intended to restrain the Employer's conduct and the work of PEET, for the following reasons: (i) the Union believes that its membership needs to be assured that its interests concerning the terms and conditions of employment are represented by members democratically selected within the Union and not by in-scope employees, hand-picked by the president, who purport to represent the interests of all employees; and (ii) the Union's status as the exclusive bargaining agent and the integrity of the bargaining relationship must be maintained by ensuring that changes to terms and conditions of employment are done through collective bargaining and not through direct dealings between the Employer and employees. The Union also argues that it is being forced to start the collective bargaining process in competition with PEET as the representative of the best interests of employees. The Employer argues that the balance of labour relations harm favors not granting an interim order because if PEET is not permitted to continue to function and the Employer is not permitted to act on its recommendations, the Employer will be discredited in the eyes of employees for failing to properly respond to employees' concerns as expressed in the survey and the Employer will lose its ability to effectively manage the workplace.

[63] It is our opinion that the balance of labour relations harm favours the granting of an order for interim relief. Preservation of the status quo, as far as is presently possible, will, if the Union is successful on the application proper, lessen any negative impact the Employer's actions had or will have on the Union and the employees in terms of the Union's possible effectiveness in collective bargaining as the exclusive representative of employees. In addition, if the Employer's conduct was to continue and that conduct was found to be improper, there might be no practical way to remedy the violation. For example, it would be difficult or impossible to order the return of the employee recognition awards or to erase the effects of any action taken by the Competition Review Process Committee acting on the basis of PEET'S mandate. This potential for harm is not outweighed by the potential for harm to the Employer if the order is granted. Presumably, the Employer can, as it did for many years prior to the establishment of PEET, effectively manage its workplace without the involvement of PEET and, to the extent that the employees might discredit the Employer for not acting on the survey results, it would be temporary in nature and an interim remedy could be designed to allow the Employer to continue PEET and act on the survey results as long

as it does not involve the participation of in-scope employees or the implementation of recommendations that affect terms and conditions of employment.

[64] With respect to the issue of proof of harm, the Union maintained that it had provided appropriate evidence of labour relations harm in the form of the reactions of employees to the actions of PEET and the Employer's changes to terms and conditions of work. The Union argued that the appropriate proof need not come in the form of an affidavit from every affected member and that its stated position on the type of harm caused should be acceptable proof. In our view, labour relations harm can be inferred from the nature of the alleged conduct. We accept that the negotiation of terms and conditions of employment directly with employees or their unilateral implementation, automatically results in the undermining of the Union. The fact that the parties are not currently engaged in collective bargaining is of no relevance to the impact of such conduct, although the fact that the parties are currently set to commence collective bargaining, makes the matter of sufficient urgency to justify an interim order.

[65] With respect to appropriate interim relief in this case, we are guided by the principles that an interim order is intended to be preservative rather than remedial and that an interim order must be consonant with the preservation and fulfillment of the objectives of the *Act* as a whole and of the objectives of the specific provisions alleged to have been violated.

[66] We wish to remark on the issue of what point in time represents the "status quo" to which we are returning the parties. The Employer argues that the status quo should be the period of time from April 2006 when PEET was established up to the point of the filing of the application. In our view, it would seem that the time period representing the status quo in a situation where the formation of PEET itself is in dispute, would be the time PEET commenced its work, that is, April 2006. However, given the continuing nature of the activities of PEET and the timing of the Union's application, it is in some respects impossible, practically speaking, to return the parties to the position they were in as of April 2006. In the circumstances of this case, an interim cease and desist remedy is most appropriate. Therefore, we will not require, on this interim order, that the parties "undo" what has been done since April 2006. Specifically, we will not at this time require employees to return employee recognition

awards received to the date of the Board's order of January 26, 2007, although that may be an issue that needs to be addressed by the Board on the hearing of the final application.

[67] One of the forms of interim relief requested by the Union was an order that that the Employer be prohibited from meeting with the in-scope employees on PEET. The Employer states that there is no arguable case for such an order as the Union had not objected to the overall focus of PEET and its objectives. The Employer pointed out that PEET addresses numerous other issues in addition to employee recognition, all falling within management rights, and that PEET met for several months without objection by the Union. In our view, the Union has objected to the overall focus of PEET, including its establishment, composition and actions and any delay in bringing this application was acceptable for the reasons outlined earlier. It is not necessary for the Union to establish an "arguable case" for a certain form of relief and we find that a remedy preservative in nature consonant with the fulfillment of the objectives of the *Act* is to order the Employer to cease all activities and efforts of PEET in so far as PEET includes the participation of in-scope employees. It is not sufficient to allow PEET to continue to function (even to deal with issues other than employee recognition) or to allow it to function on a restricted basis by preventing it from making recommendations because the composition and activities of PEET are also challenged by the Union. This order does not prevent the Employer from continuing to operate PEET in the meantime with out-of-scope personnel, subject to the Board's interim order to cease and desist from acting on recommendations, as discussed below.

[68] The Union also requested an order that the Employer be prohibited from distributing further bonuses or changing other terms and conditions of employment, arising out of PEET's recommendations. The Employer takes the position that this is inappropriate as an interim order, that the Employer has refrained from implementing changes to terms and conditions of employment and, specifically with respect to the employee recognition, that the Union has failed to establish an arguable case that these are terms or conditions of employment and not within management rights. Again, it is unnecessary for the Union to establish an "arguable case" for this specific remedy. In order to fulfill the objectives of the *Act* and the provisions alleged to have been violated, a cease and desist order is necessary to restrain the Employer's activity of implementing

any recommendations of PEET where those recommendations might impact on in-scope employees, until such time as the Board can determine whether the establishment and activities of PEET violate the *Act* as well as the scope of the Employer's obligation to bargain any recommendations of PEET. At this stage, it is impossible to separate out which recommendations can or cannot be implemented, or to state that only those that are monetary items cannot be implemented, because to do so would involve a premature finding by this Board of the scope of the Employer's obligation to bargain.

[69] In its argument, the Union suggested that it was open to the Board to make an interim order requiring the Union and the Employer to negotiate with respect to the terms and conditions of employment related to employee recognition and the job competition process. The Union argued that the present situation is distinguishable from that in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, because there the Board determined that such relief was final in nature but here the requirement to bargain collectively is a central component of the *Act* and the parties are set to begin collective bargaining shortly. With respect to the Union's request for an order that the Employer bargain exclusively with the Union regarding these matters, the Employer argues that such relief is not within the jurisdiction of the Board and is not an order properly made on an interim application, it having the practical effect of granting final relief (see *Tai Wan Pork*, *supra* and *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06).

[70] We disagree with the Union's position and follow the reasoning of the Board in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, to decline this remedy on the basis that to grant such an order would effectively determine the application on a final basis rather than be preservative in nature. One of the primary issues raised by the application and reply is whether the recognition awards given are a term or condition that is required to be negotiated with the Union. Unless the Board determines that they are, the obligation to bargain collectively does not arise. This determination can only be made following a

final hearing of the application proper. However, we do note that in *Service Employees International Union, Locals 299, 333 & 336, et al. v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06, the Board strongly encouraged the parties to negotiate the matters in dispute. We find it appropriate to issue the same encouragement to the parties here, particularly because they are soon set to enter the collective bargaining process to negotiate a renewal agreement.

[71] Lastly, the Union requested that the Board order the Employer to post a copy of its orders and email them to all employees. The Employer did not strenuously oppose this order stating only that it felt it was unnecessary. Posting of orders and reasons for decision is a common order made by the Board, particularly in circumstances where an employer's conduct toward employees is found to be improper or is to be restrained. It is the most convenient method of ensuring that the affected employees are aware of both the conclusion of the Board and its reasons for making the order(s) it has. This is particularly important where the union's reputation or effectiveness has been challenged by the conduct of the employer, a concern that exists in the present case. As such, given the size of the workplace and the fact that the Employer's communications with employees over the subject matter of this dispute have largely been through the Employer's internal website, we find it more appropriate and efficient to require the Employer to post the Board's Order and Reasons for Decision on that website. We therefore confirm the Order issued by the Board which required the Employer to immediately post the Order on the website and to post the Reasons for Decision on the website within three days of receiving the same. We also confirm the Board's Order to post a hard copy of the Order and Reasons for Decision in a location accessible to employees.

[72] Accordingly, the Board confirms the Order it made on January 26, 2007, in the following terms:

> **(1)** **THAT** the Respondent shall immediately cease all activities and efforts of the committee known as the President's Employee Engagement Team ("PEET") in so far as that committee includes the participation of the employees represented by the Applicant, pending the final hearing and determination of the within Application or until further order of the Board;

(2) **THAT** the Respondent shall immediately cease and desist the implementation of any of the recommendations of the PEET Committee which may impact upon any of the employees represented by the Applicant, including, but not limited to, any further award of money or item of monetary value under the employee recognition program, pending the final hearing and determination of the within Application or until further order of the Board;

(3) **THAT** should the Respondent voluntarily and in good faith negotiate with the Applicant with respect to the matters identified as being in issue on the within Application, the Respondent may apply to the Board to amend or vacate this Order before final hearing or determination of the within Application by the Board;

(4) **THAT** the Respondent shall immediately post an electronic copy of this Interim Order on the Respondent's internal website and post a hard copy of the same in the workplace in a location accessible to the employees;

(5) **THAT** within three (3) days of the receipt of the Board's Reasons for Decision in this interim application, the Respondent shall post an electronic copy of such Reasons for Decision on the Respondent's internal website and post a hard copy of the same in the workplace in a location accessible to the employees; and

(6) **THAT** the Board shall remain seized of this matter for the purposes of determining any issues associated with the implementation or interpretation of this Order.

DATED at Regina, Saskatchewan, this **11th** day of **April, 2007**.

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson