Labour Relations Board
Saskatchewan

UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION, Applicant v. UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 035-06; October 28, 2008
Vice-Chairperson, Angela Zborosky; Members: Brenda Cuthbert and Duane Siemens

For the Applicant: Gary Bainbridge
For the Respondent: John Beckman, Q.C.

Arbitration - Deferral to – On preliminary application, Board reviews nature of the dispute between the parties and concludes dispute relates to alleged violation of *The Trade Union Act* and not something that arbitrator empowered to deal with nor could impose suitable remedies in the event of a finding of a breach of the collective agreement - Board accepts jurisdiction and directs hearing on the merits.

***The Trade Union Act*, ss. 5(d), 5(e), 11(1)(a), 11(1)(c) and 25.**

REASONS FOR DECISION

Background:

[1] University of Saskatchewan Faculty Association (the "Union") is the certified bargaining agent for all academic employees employed by the University of Saskatchewan (the "University" or the "Employer") with various exceptions and has represented this bargaining unit for approximately thirty years. More specifically in relation to this application, the Union represents individuals holding faculty appointments in the extension division of the University. The Union and Employer have entered into several successive collective agreements with the last such agreement being effective July 1, 2002 to June 30, 2005.

[2] On March 20, 2006, the Union filed an unfair labour practice application against the Employer in which the Union alleges that the Employer committed several unfair labour practices. Specifically, the Union asserts that, while bargaining for a revised collective agreement, the Employer sent a confidential memo directly to the employees in the extension division, including the Union's members, concerning a significant restructuring of that division that would see its disestablishment and the creation of two

new entities in its stead. In that direct communication, the Employer sought the employees' feedback without the involvement of the Union and invited the employees to meetings to discuss the restructuring. The Union alleges that the Employer directly communicated with bargaining unit members to the exclusion of the Union as bargaining agent and did so in a manner that was threatening and coercive. In addition, the Employer's written communications indicate that it intends to continue to communicate any changes directly to the employees, all of which the Union alleges circumvents its representation rights and amounts to a failure by the Employer to bargain in good faith. The Union also asserts that the Employer improperly re-classified positions and/or made a unilateral determination as to which bargaining unit affected employees of the extension division would be placed in. The Union alleges a further failure to bargain in good faith by reason of the Employer's failure to disclose a material fact during collective bargaining, specifically, its apparent intention to disestablish the extension division. The Union maintains that all of these actions constitute violations by the Employer of ss. 11(1)(a) and 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[3] The Employer filed a reply to the application taking the position that the application is unfounded and precipitous in that the plan to restructure the extension division is only at the stage of academic approval where University Council examines academic grounds and program considerations for a restructuring. The Employer claims that there has been no decision made as yet to restructure the extension division and therefore no decisions have been made concerning any possible staffing changes or placement of any employee in one bargaining unit or another. The Employer states that any possible staffing changes mentioned in the documentation are tentative and speculative. Only if the plan is approved at the academic stage and is considered by the Board of Governors will the Employer consider any necessary changes to staff or terms and conditions of employment. In that case the Employer says that any collective bargaining issues will be appropriately addressed well before any disestablishment of the extension division. The Employer states that it is clear in the documentation that the collective agreements would be followed and the Employer will work with the bargaining agents.

[4] Also in its reply the Employer claims that any communications with staff have been in furtherance of and in accordance with its management rights contained in

the collective agreement. The Employer states that the Union was aware of both the developing proposals and discussions regarding the extension division and the meetings the Employer intended to hold with staff at which the Union had a representative present. The Employer believes that the Union is exceeding its authority under the *Act*, is usurping the statutory authority of University Council to direct the University's academic affairs and is attempting to influence the University's academic priorities by invoking labour relations remedies.

[5] Lastly, the Employer takes the position in its reply that the dispute raised by the application should be dealt with through grievance-arbitration proceedings because: (i) the collective agreement dictates the rights of employees and the Union upon reorganization or closure of an academic program; and (ii) the resolution of the dispute requires an interpretation of the collective agreement.

[6] Prior to the hearing, the Employer notified the Board that it wished to raise a preliminary objection that the Board should defer to arbitration. With the agreement of the parties, the Board heard only the arguments concerning the preliminary objection at the hearing on August 28, 2006. At the close of the hearing on August 28, 2006 the Board reserved its decision and adjourned the hearing in order to consider the preliminary objection and provide written reasons. The Board, having sufficient information before it to make a determination on the question of whether to defer to arbitration, provides the following written reasons on that preliminary issue.

Facts:

[7] At the hearing the parties agreed that the following documents should be provided to the Board to assist it in making a decision on the preliminary issue: (i) the collective agreement; (ii) the confidential memo dated January 27, 2006 from the provost's office to the faculty and staff of the extension division; (iii) the enclosure to that memo titled "Strategic Directions for the Extension Division;" (iv) the March 16, 2006 notice of motion before University Council with a document entitled "The Extension Division: Impact of the Outreach and Engagement Foundational Document and Transition to New Organizational Structures;" and (v) "A Framework for Action, University of Saskatchewan Integrated Plan 2003-07," published as a supplement to the May 14, 2004 issue of *On Campus News*. The Board has found that these documents, along with the

pleadings, are sufficient to determine and assess the nature of the dispute between the parties, in order to rule on the preliminary objection.

[8] The operation of the University is governed by *The University of Saskatchewan Act, 1995*, S.S. 1995, c. U-6.1. Under *The University of Saskatchewan Act, 1995*, the University has three governing bodies: the Senate, University Council, and the Board of Governors. The University Council, composed of elected faculty and administrative officials, is the body which governs the academic affairs of the University. The Board of Governors is "responsible for overseeing and directing all matters respecting management, administration and control of the university's property, revenues and financial affairs." Before the Board of Governors makes a decision to establish or disestablish colleges, schools, departments, etc., it must, in most cases, have the approval of University Council for the proposal. The approval of University Counsel for such establishment or disestablishment is based only on considerations of whether it is appropriate to do so on academic grounds.

[9] The extension division of the University has existed for approximately 95 years and provides a range of academic services such as credit and non-credit outreach learning programs to those unable to attend University on a full-time or on-campus basis, a graduate program in continuing education, instructional design support to other faculty, and community development. Although not specifically a college, the extension division is treated as such through its collegial structure and under the collective agreement. The extension division includes both faculty and non-faculty employees belonging to the Union, Canadian Union of Public Employees, Local 1975 and the Administrative and Supervisory Personnel Association. At the time of the hearing there were 11 faculty members within the scope of the Union in the extension division, including seven "extension specialists" and four faculty members holding a professorial academic rank.

[10] In approximately 2003, all academic and administrative units of the University carried out an integrated planning process during which there was a review of the roles and responsibilities of the extension division. An "integrated plan" was developed and approved by the University Council and Board of Governors and published in 2004. The integrated plan identified that extension and outreach activities "must be reconsidered, refined and refocused." The plan also provided for a process to

be followed to explore new models of outreach and engagement, that is, to have the University, through University Council, develop a "foundational document on outreach and engagement," and indicated that, in the future, measures would be taken to reassign the work of the extension division to better integrate its activities with the priorities of other colleges and units.

[11] Following the development of the integrated plan, the provost's office undertook a campus-wide discussion on outreach and engagement in order to create the foundational document for consideration by University Council. In January 2006 the provost developed a document entitled "Strategic Directions for the Extension Division" which sets out detailed proposals for the reorganization of outreach and engagement (i.e. the work of the extension division) and generally suggests that extension could be better carried out through the colleges and departments rather than as a separate extension division. In that document it was proposed: (i) that the extension division be disestablished with academic responsibilities for outreach and engagement shifting to the colleges and departments; (ii) that the New Learning Centre ("NLC") be established to provide administrative support for the colleges and departments; and (ii) that the Centre for Continuing and Distance Education ("CCDE") be established. The Strategic Directions for the Extension Division document was prepared by the planning committee of University Council, which committee would in turn determine whether the proposals would be placed before University Council for its consideration only as to whether there existed academic grounds for a reorganization of extension delivery.

[12] Prior to sending the Strategic Directions for the Extension Division document to the planning committee of University Council, the provost sent a draft copy to the faculty and staff of the extension division along with his January 27, 2006 memorandum marked "confidential." In the memorandum, the faculty and staff were invited to attend a meeting on February 1, 2006 to discuss the document and proposed changes to extension delivery. The memorandum also invites employees to provide written feedback to the provost and vice-president academic's office, which feedback, including that gained from the meeting, might be incorporated into the final document considered by the planning committee. The memorandum indicates that after the final document is provided to the planning committee, the planning committee would provide it

to University Council no later than April 20, 2006. Relevant portions of the memorandum from the provost and vice-president academic read as follows:

> *As you look the enclosed document over, I am sure that some of you will be worried or concerned about your future and the future of your colleagues. I appreciate that the enclosed document does not spell out all the details of the new arrangements; some of these will need to be worked out over the coming months as the new organizational structures crystallizes. I will be bringing some members of the Integrated Planning Office as well as Human Resources Division with me to assist me in addressing some of the issues that I anticipate you will raise. Let me assure you, however, that provisions outlined in collective agreements, whether these are Faculty Association, ASPA, CUPE, will be followed as we move to implement new structures.*
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> *. . .*
>
> *In the interim, I am in the process of establishing an Implementation Oversight Team which will assist me in facilitating transitions to the new arrangements. . . . The Implementation Oversight Team will be charged with building financial and budgetary plans and identifying human resource implications. Addressing individual staff concerns, including development of a definitive timeline for organizational arrangements, will be a priority for this group.*
>
> *. . . the University wishes to set a new course, one which will meet the fiscal challenges we are facing, but also one which supports new opportunities and directions. I believe there is substantial expertise within the Division which should be shared more broadly with the University. I will work with you to ensure that the University is aware of this expertise and that it is included, to the extent this is possible, in the new organizational structures we will be creating together over the coming months.*

[13] The Union states that it was not invited to the February 1, 2006 meeting by the Employer but, as it was previously informed by its members that such a meeting was to take place, the Union, on January 26, 2006, advised the Employer that its representatives would be in attendance. Later in the afternoon of January 27, 2006, the Employer also provided the Union with a copy of the January 27, 2006 memorandum and the draft document. The Employer states that it did give notice of the meeting to the Union, although it does not advise of the date of such notice. The Employer states that a representative of each bargaining unit attended the meeting. The Employer further states

that the dean of extension delivery sent a memo to the bargaining agents, including the Union, on February 2, 2006, inviting input from the bargaining agents and that the Union responded by indicating its appreciation for the University's willingness to receive its input.

[14] The Union states that the Strategic Directions for the Extension Division document clearly indicates that there will be new organizational structures in place of the existing structure in the extension division. The eight-page document describes the proposed new structures and the reasons for changing the structures in some detail. The Union indicates that the following excerpt (at 3) is particularly important to its claim:

> *As indicated above, like other continuing education units in Canada, the centre will be staffed with professional continuing education and support personnel, not faculty appointments.*

[15] The Employer states that the Strategic Directions for the Extension Division document was only intended to address the academic merits of the proposals and not any financial or labour issues, noting that it specifically states in the document that the "University administration . . . undertakes to discuss detailed operational plans with the members of the Extension Division and to work with them, their union representatives . . . to develop a transitional plan for all personnel."

[16] Following the meeting described above and the receipt of feedback, the planning committee of University Council brought the restructuring proposals forward to University Council by way of written notice dated March 16, 2006, which included a document similar to the Strategic Directions for the Extension Division document (dated March 8, 2006). The notice indicated that the motions for approval of the proposals would be made at the April 2006 meeting of University Council. There were a number of changes made to the March 8, 2006 document provided with the March 16, 2006 notice. One change of note, at 3, states: With the likely exception of the Director, no faculty appointments are anticipated in the centre.

[17] The Union filed this application on March 20, 2006.

[18] In its application, the Union makes several allegations of violations of ss. 11(1)(a) and 11(1)(c) of the *Act* by the Employer. In order to understand the precise nature and scope of the dispute before us, the understanding of which is necessary to a determination of the preliminary objection that we should defer to arbitration, we will set out this portion of the Union's application in its entirety:

> *4. (n) These communications directly with the Association's membership to the exclusion of the Association, and the subsequent motion to the Planning Committee of Council, constitute violations of the Act in several material particulars.*
>
> *(o) First, the communications directly to the membership that the Extension Division would be "disestablished," leading to "worries" and "concerns" by the employees regarding "the transition" are communications of a threatening and coercive nature. The comments in the enclosure to the Memorandum are leading to a chilling effect on Extension Division employees, for those comments seek to dissuade such employees from exercising their rights under the collective agreement to transfer to the new CCDE on the theory that the new Centre will not be staffed by faculty appointments, when no such agreement has been reached with the Association, nor any such order made by this Board.*
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> *(p) Second, in the March 8th Notice of Motion to University Council, the plan is for the establishment of a Transition Team charged with the "responsibility to address individual staff concerns and to ensure that information about organizational and human resource implications of the transition plan are communicated regularly and directly with faculty and staff in the Extension Division." The University is failing to bargain with the Association by seeking to bargain directly with members of the Association. The proposals for change to the Extension Division will fundamentally affect the terms and conditions of employment of existing Association members, and in seeking the solicitation of comments directly from individual employees who are most affected by these proposed changes and communicating directly to faculty with respect to these changes, the University seeks to circumvent the representation rights held by the certified bargaining agent of those members, being the Association.*
>
> *(q) Third, the University's actions in seeking to change the terms and conditions of employment of the Association's members through the University Council, as opposed to through the Association, are a clear rejection of the Association's role as certified bargaining agent, fail to recognize the application of the certification order to the Extension Division, and therefore*

constitute a failure to bargain with the Association. The University Council has neither the authority nor mandate to amend the terms and conditions of employment for University employees and is not the employer's bargaining agent. This failure to bargain directly with the Association is aggravated in this case by the fact that the parties are currently engaged in bargaining collectively, making this an opportune time for the employer to address these proposed changes directly with the Association in bargaining, which it failed to do.

(r) *Fourth, the employer's failure to advise the Association at bargaining of the intended demise of the Extension Division amounts to a failure to disclose a material fact likely to have an impact on the bargaining unit during the term of the agreement being negotiated, and therefore constitutes bargaining in bad faith. Moreover, by advising a select group of the Association's membership of this fact on a "confidential" basis while not advising the Association at bargaining has the effect of undermining the Association's exclusive authority.*

(s) *Finally, the employer's unilateral decision to place employees in one bargaining unit or the other – or out of scope altogether – amounts to a failure to bargain with the Association. As the Association's certification order amounts to an "all-employee" unit, the University is obliged to place all academic employees in scope of the Association unless it has obtained either the agreement of the Association not to do so, or it has received an order form this Board pursuant to s. 5(m) of the Act.*

[19] In its reply to the application, the Employer states that it does not accept the Union's characterization of either the memorandum or the Strategic Directions for the Extension Division document. The Employer claims that the memorandum did not state that there would be new organizational structures to replace the extension division, only that there was a proposal to do so to be taken to the planning committee of University Council and that the collective agreements would be followed as "we move to implement new structures." The Employer states that an intention to "disestablish" the extension division has not been formed because disestablishment requires the endorsement of University Council on academic grounds and the approval of the Board of Governors, neither of which had occurred as of the date of the application.

[20] With respect to the allegations of a violation of the *Act* through the past and intended future communication with the Union's members, the Employer takes the

position that these communications have been in furtherance of and in accordance with the management rights clause of the collective agreement. The Employer states that in 2005 the faculty had requested the opportunity to provide input concerning the restructuring plan and, since then, the focus has been entirely on academic program considerations and not on transitional employment considerations. Only after University Council makes a decision will changes be implemented at which time the Employer will work with the bargaining agents and comply with the collective agreements to develop a transition plan.

[21] In its reply, the Employer also denies a failure to bargain in good faith. It states that the notice of motion makes it clear that financial and administrative issues, such as terms and conditions of employment, lie outside the mandate of University Council and that it is too soon to tell whether there will be any terms and conditions that will need to be bargained. With respect to the allegation that the University failed to disclose a material fact during collective bargaining, the Employer states that the Union was aware of the developing proposals and discussions concerning the extension division and that, in any event, there is nothing yet to bargain until after University Council makes its decision. The Employer also denies placing employees in one bargaining unit or another and says that any information in the documents concerning staffing is tentative and speculative.

[22] The Employer concludes in its reply as follows:

> *4. (e) It is the position of the University that this Application is precipitous and unfounded, as University Council is not being asked to approve any changes to the terms and conditions of employment. University Council is only being asked to decide whether or not the proposals for reorganizing extension at the University serve the academic priorities and purposes that University Council has identified and approved in the Integrated Plan and in the Foundational Document on Outreach and Engagement. If University Council approves the restructuring proposals on academic grounds, then the financial, administrative, and collective bargaining issues will be appropriately addressed long before the proposed disestablishment of the Extension Division in July 2007. By bringing the Application at the academic approval stage, it is the position of the University that the Association is:*

> *(i) exceeding the authority granted it under The Trade Union Act and the Certification Order, which is restricted to bargaining the terms and conditions of employment of its members;*
>
> *(ii) usurping the statutory authority of University Council to direct the University's academic affairs; and*
>
> *(iii) improperly invoking labour relations remedies to influence the academic priorities of the University.*
>
> *(f) It is also the position of the University that the dispute between the parties is more appropriately a matter for grievance arbitration. The Collective Agreement between the University and the Association contains provisions that dictate the rights that the Association enjoys regarding the reorganization or closure of academic programs or units. It is the position of the University that the planning process followed to the date of this Reply is fully sanctioned by the Collective Agreement. In correspondence to the University, the Association has taken the position that the University has breached the terms of the Collective Agreement. Thus, the resolution of this dispute will require an interpretation of the Collective Agreement. The Application should, therefore, be deferred to the grievance procedure agreed to by the parties for settling disputes concerning the alleged breach of the Collective Agreement.*

Arguments:

[23] Mr. Beckman, on behalf of the Employer, filed a written brief which we have reviewed. He argued that the Board should defer the application to the grievance arbitration process under the collective agreement. The Employer argued that the Board has consistently deferred disputes where the essence of the dispute involves the construction of the collective agreement or where the dispute cannot be decided until the meaning and application of the collective agreement has been determined, relying on s. 25 of the *Act* that requires that all disputes concerning a collective agreement, including disputes about the application of a collective agreement, be resolved through arbitration. The Employer relies on *Canadian Union of Public Employees, Local 59 v. City of Saskatoon*, [1990] Fall Sask. Labour Rep. 77, LRB File Nos. 155-89, 026-90, 043-90 to 045-90, which articulated the policy reasons for deferral – to avoid the prospect of doubly incurring the expenditures of time, money and emotional strain litigating before two tribunals with the prospect of inconsistent determinations.

[24] The Employer relied on the following cases as examples where the Board has deferred applications under ss. 11(1)(a) and 11(1)(c) of the *Act* to grievance arbitration: *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation*, [2000] Sask. L.R.B.R. 17, LRB File No. 162-99 and *Administrative and Supervisory Personnel Association v. University of Saskatchewan*, [2005] Sask. L.R.B.R. 541, LRB File No. 070-05 (where the Board determined that an arbitrator must decide whether the collective agreement had been breached in order to find a contractual obligation to bargain and a subsequent finding of a failure to bargain in good faith) and *7-Eleven Canada Inc. v. United Food and Commercial Workers Union, Local 1518*, [2001] B.C.L.R.B.D. No. 19.

[25] The Employer argues that the application before us is more properly the subject of grievance arbitration in that, because the University has not yet made a decision to close the extension division or transfer its employees, there is no obligation on the Employer to bargain collectively. In essence, the application is precipitous and should therefore be dismissed.

[26] The Employer points out that its deliberations on academic grounds concerning the extension division are consistent with and authorized by *The University of Saskatchewan Act, 1995* as well as by the collective agreement between the parties, in particular, the following management rights clause in article 3:

> ***3. MANAGEMENT RIGHTS***
>
> *3.1 The Association recognizes the right of the Employer to plan, co-ordinate and direct the resources, assign duties and to manage the affairs of the University provided that all decisions and actions taken are not inconsistent with the provisions of this Agreement.*
>
> *3.2 Concerning disputes that arise over matters that are within the bilateral jurisdiction of the Employer and the Association, absences of specific reference within the Collective Agreement shall not be interpreted to mean that either the Employer or the Association has unilateral or superior right to determine what is the proper decision or course of action. The Joint Committee for the Management of the Agreement*

> *shall be used as the vehicle for resolving such disputes.*
>
> *3.3 The waiver of any provisions of this Agreement or the breach of any of its provisions by any of the parties shall not constitute a precedent for any further waiver or for the enforcement of any further breach.*

[27] The Employer argues that it is wrong for the Board to involve itself in the University's academic affairs as they are outside the scope of the collective agreement and relies on *University of Saskatchewan v. Professional Association of Interns and Residents of Saskatchewan*, [2002] 10 W.W.R. 426 (Sask. C.A.), a decision which quashed an arbitration board's decision on its jurisdiction to decide a dispute between the parties. The Employer characterized the actions of the parties as strictly an academic debate and stated that, in such a context, there can be no unfair labour practice.

[28] The Employer argues that the Union's application is premised on the assumption that the University does not have the right to carry out the academic planning process in the manner that it has. Because that assumption depends upon the interpretation of the collective agreement and whether and to what extent the collective agreement limits the University's rights in this regard (particularly given the rights the University has to carry out such planning under *The University of Saskatchewan Act, 1995*), the application must be deferred to arbitration. Furthermore, the Employer argues, articles 30 and 31 of the collective agreement (attached as an addendum to these Reasons for Decision) contemplate the closure/reorganization of a college by prescribing, at length, processes and rights of employees upon such closure/reorganization. The University denies that it has breached articles 30 and/or 31 and states that, if the Union believes differently, it should file a grievance. The Employer also submits that if the Union is unhappy with the prescribed processes, it should renegotiate those provisions of the collective agreement and not expect the Board to create rights not contained in the collective agreement.

[29] The Employer argues that it has in no way repudiated the collective bargaining relationship, indicating it agrees that, if change is to occur, the Employer will honour the terms of the collective agreements. The Employer urged the Board to not

become involved in this mature collective bargaining relationship and participate in the details of collective bargaining.

[30] Mr. Bainbridge, on behalf of the Union, also filed a brief which we have reviewed. The Union argues that the three criteria in the leading case of *United Food and Commercial Workers Union v. Westfair Foods Ltd., et al.* (1992), 95 D.L.R. (4th) 541 (Sask. C.A.) have not been met and therefore the Board should decline to defer the dispute between the parties to the grievance arbitration process.

[31] In relation to the first of those criteria, the Union argues that the dispute between the parties in the application before us is not the same as it would be if a grievance was filed under the collective agreement. The Union acknowledges that the fact the Union has not filed a grievance under the collective agreement is not determinative of this criteria. The Union takes the position that its complaints in the unfair labour practice application, as set out in paragraphs 4(o) to (s) above, are not allegations of a breach of the collective agreement but rather are allegations of discrete forms of unlawful conduct by the Employer for which the Union seeks a sanction of a disciplinary or regulatory flavour. The Union summarized the Employer's alleged violations of the *Act* as follows: (i) communicating with employees in a threatening and coercive manner; (ii) failing to bargain with the certified bargaining agent and thereby undermining it; (iii) bargaining directly with employees regarding their terms and conditions of employment; (iv) failing to disclose material facts during collective bargaining; and (v) making unilateral decisions as to scope without applying to the Board pursuant to s. 5(m) of the *Act*.

[32] Secondly, on the question of whether an arbitrator is empowered to deal with the dispute, the Union submits that, by reference to article 2.1 of the collective agreement, the "purpose" of the collective agreement is, as it was found to be in the *Westfair* case, *supra*, to facilitate the peaceful resolution of disputes and grievances regarding terms and conditions of employment rather than to discipline the Employer for wrongful acts. The Union referred to the definition of a grievance in the collective agreement noting that, for a grievance to exist, the grievor must be able to point to terms in the collective agreement that are the focus of the complaint. The Union states that there are no such terms of employment in issue in the unfair labour practice application (i.e. it has no complaint that articles 30 and/or 31 of the collective agreement have been

breached) as the Union's complaint is not about the collective agreement but rather the Employer's collective bargaining relationship with the Union, a matter over which the Board has exclusive jurisdiction.

[33] In relation to the third criteria, the Union argues that there is no suitable or equivalent remedy available through the arbitration process because an arbitrator cannot make a finding that the *Act* has been violated nor can an arbitrator make a cease and desist order. Further, an arbitrator cannot enforce the certification order by compelling the Employer to bargain collectively with the Union.

[34] The Union relies on the following decisions in support of its assertion that its first three allegations can only be dealt with by the Board: *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 that an arbitrator had no jurisdiction over a s. 11(1)(c) complaint that the employer failed to recognize the union as the exclusive bargaining representative and failed to make every reasonable effort to conclude an agreement as the parties required no interpretation of the collective agreement); *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [1993] 4th Quarter Sask. Labour Rep. 158, LRB File No. 240-93 (where the Board determined that a clause in the collective agreement dealing with pensions indicated an intention that such a matter would be bargained, thereby indicating that a failure to recognize the union's exclusive status to bargain such an issue was within the jurisdiction of the Board and not an arbitrator); and *Canadian Union of Public Employees, Local 1975 v. Saskatchewan Indian Federated College*, [2003] Sask. L.R.B.R. 217, LRB File No. 245-02 (where the Board held that it was within its jurisdiction to determine that part of an application that involved the repudiation of the collective bargaining process as the Board is the guardian of that process).

[35] The Union also argues that its fourth allegation, that of the Employer's failure to disclose material facts during collective bargaining, relates to the Employer's conduct during the current round of bargaining and has nothing to do with the collective agreement. The Board found such conduct to be in violation of the *Act* in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa, Inc*., [2002] Sask. L.R.B.R. 235, LRB File No. 172-00 and *Saskatchewan*

Government Employees Union v. Government of Saskatchewan, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87.

[36] Similarly, the Union argues that its fifth allegation regarding the Employer's unilateral decisions concerning scope is a type of complaint often dealt with by the Board (see, for example, *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre*, [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 & 234-90). Such a complaint stems solely from the certification order and not the collective agreement and, therefore, only the Board can determine it.

[37] The Union noted that much of the Employer's argument focused on the merits of the application and whether the facts before us could constitute an unfair labour practice. The Union urged the Board to assume that the facts in the application are true for the purposes of this preliminary issue and took the position that there is no threshold the Union must meet in order to have the application heard.

[38] Although the Union suggests that the documents tend to show that the decision to disestablish the extension division has been made, regardless, the Union is not concerned with the decision itself but rather the Employer's actions during the process of making the decision. The Union submits that, in carrying out the academic planning process, the Employer must still comply with any contractual obligations as well as any other legislation, such as the *Act*. The fact the parties have a mature collective bargaining relationship is irrelevant to the question of jurisdiction.

[39] Mr. Beckman made further submissions in reply to the Union's argument. In relation to the Union's argument that the Employer must disclose facts during collective bargaining, the Employer points to article 10.6.3 of the collective agreement which states "The parties agree to make available to each other, upon written request . . . such information as is necessary for negotiation . . . [a]ny dispute over what is necessary . . . shall be resolved by arbitration."

[40] In response to the Board's request that the Employer address the criteria for deferral set out in the Court of Appeal decision in *Westfair, supra*, the Employer submitted that: (i) the Union's complaints are the same whether brought as this unfair

labour practice application or as a grievance; (ii) the arbitrator is empowered to deal with the dispute and the collective agreement covers all matters raised in the unfair labour practice application – allegations concerning improper communications can be dealt with under article 4 (the recognition clause), articles 30 and 31 deal with many issues raised by the Union (and contemplate communication with employees concerning lay-off and severance) and article 10.6.3 deals with information to be provided in bargaining; and (iii) a reasonable remedy under the collective agreement is available.

[41] The Employer submits that the Board should examine the merits of the Union's complaint at least to some degree and determine whether a certain standard for founding the application has been met. The Employer argues that, given the mature collective bargaining relationship, the Board should not be drawn into this complaint. The essence of the dispute is an academic one and there is a separation between what is appropriate under the *Act* and collective bargaining and what is appropriate in the academic matters that go before University Council and the Board of Governors. In the Employer's opinion, what has occurred does not engage the *Act*, although it may engage the collective agreement. Further, it is the Employer's view that it would be very rare for an unfair labour practice to arise in an academic debate because the employees, including the provost, are communicating in their capacity as academicians.

Statutory Provisions:

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

> *5 The board may make orders:*
>
> *(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;*

. . .

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;

. . .

25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a questions as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.

(1.1) Subsections (1.2) to (4) apply to all arbitrations pursuant to this Act or any collective bargaining agreement.

(1.2) The finding of an arbitrator or arbitration board is:

(a) final and conclusive;

(b) binding on the parties with respect to all matters within the legislative jurisdiction of the Government of Saskatchewan; and

(c) enforceable in the same manner as an order of the board made pursuant to this Act.

Analysis:

[43] The Board has followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised in an

application to the Board involve the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process. The Union urges the Board not to defer and to allow the application to proceed to a full hearing on the merits.

[44] The Union asks the Board, for the purposes of determining the preliminary objection, to assume that all of the facts set out in the application are true. The Union takes the position that, to do otherwise, would do an injustice by not allowing the Union to prove its case at a full oral hearing. In the Board's view, it is unnecessary to make such an assumption when considering the preliminary issue before us. In determining whether deferral to arbitration is appropriate, the Board is only concerned with the *nature* of the dispute before it – the Board's consideration of the facts is only to understand the background for and nature of the dispute before it. As such, it is quite conceivable that the parties' versions of the facts and their positions on the relevance of certain evidence will differ.

[45] It follows that the Employer's argument that the application should be held to a certain standard of proof in order for the Board to allow it proceed to a full hearing is without merit. On the whole of the Employer's submissions, it appeared to be a request for dismissal of the application without a hearing (perhaps on the basis of lack of evidence or arguable case) under the guise of a request for deferral to arbitration. The Board does not consider the strength or weakness of an applicant's case when determining whether to defer to arbitration. As stated, it is the nature of the dispute that is important to the determination of whether a dispute might be better dealt with in arbitration, not the strength of either party's position in relation to that dispute. It is simply irrelevant whether an application might not "carry the day" or is speculative. In addition, the fact that the parties are in a mature collective bargaining relationship bears no relevance to the issue before us – while the parties to a mature collective bargaining relationship may well have a detailed grievance procedure with which they are experienced, that does not mean that each party does not owe the other obligations under the *Act*.

[46] In making our decision, we are mindful of the points raised by the Employer that, at the time of the alleged unfair labour practices, the Employer was

engaged in an academic planning process. However, in our view, the Union is not disputing the University's right to carry out that process under either *The University of Saskatchewan Act, 1995* or the collective agreement but, rather, it takes issue with certain actions and conduct of the Employer while engaged in that process. Therefore, we need not interpret the collective agreement to decide whether the University has the right to engage in the academic planning process – it may be assumed that it does. Suffice it to say, even if the University is obligated by other legislation and the collective agreement to engage in an academic planning process in consideration of disestablishing the extension division (i.e. it is legally sanctioned and under the University's exclusive purview), the conduct of the Employer while engaging in that process is still subject to the scrutiny of the Board, as the University has concurrent obligations under the *Act*. Whether that conduct will ultimately be found in violation of the *Act* is a matter to be dealt with by the Board upon a full hearing of the merits and it is not an issue before us on this preliminary objection.

[47] In *University of Saskatchewan* (LRB File No. 070-05), *supra*, a recent decision involving the Employer, the Board set out the three-part test prescribed in *Westfair*, *supra*, and analyzed the rationale and practical justifications for deferral, at 550 and 551:

> *[27] Several of the case authorities on the issue of deferral refer to the following three-part test enunciated by the Saskatchewan Court of Appeal in Westfair Foods Ltd., supra:*
>
> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
>
> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[28] The rationale for deferring to the grievance and arbitration procedure was described in United Food and Commercial Workers v. Western Grocers, a division of Westfair Foods Ltd., [1993] 1st Quarter Sask. Labour Rep. 195, LRB File No. 010-93 at 196 and 197:

> *In Canadian Union of Public Employees v. City of Saskatoon, LRB File Nos. 155-89, 026-90, 043-90, 044-90 and 045-90, the Board laid out a number of principles which might help to determine whether deference to arbitration would be appropriate. The Board considered what would justify deference to a private decision-making tribunal by a labour relations board deriving its mandate from statute. It found the answer in the nature and objectives of The Trade Union Act itself. Since the primary purpose of the statue is to foster and promote sound collective bargaining, the fruit of that bargaining – a collective agreement in which the parties have set out their respective rights and obligations – should be given a full and expansive role in relation to whatever disputes arise between an employer and a trade union. If the parties have decided in the course of collective bargaining to submit disputes concerning certain aspects of their relationship to a forum of their own creation, it is appropriate that a labour relations board allow the tribunal an opportunity to adjudicate the dispute. Support for this view was found by the Board in United Food and Commercial Workers v. Valdi Inc. (1980) 11 CLLC 729 (Ont. LRB) and St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paperworkers Union (1986) 86 CLLC 12, 184 (S.C.C.)*

[29] Also in the City of Saskatoon decision, supra, the Board stated its view that deferral to the grievance and arbitration process "does not do violence to that scheme but, rather, enhances it" and provided a practical justification for exercising the discretion to defer at 82 and 83:

> *This is particularly emphasized by the reality that, in the absence of a deferral scheme, the parties would face the prospect of doubly incurring the expenditure of time, money and emotional strain litigating essentially the same issue before two tribunals with the unacceptable prospect of inconsistent determinations. The deferral scheme discourages undue litigation and forum shopping.*

> *More importantly, it avoids the prospect of equally enforceable yet inconsistent determinations.*
>
> *Finally, it has the compelling positive effect of enhancing and encouraging the collective bargaining process by forcing the parties to utilize the procedures, processes and remedies by which they have agreed to govern themselves through the collective bargaining agreement.*

[48] In making its argument that the Board should not defer to arbitration, the Union relies on three cases, all of which were discussed in the Board's decision in *University of Saskatchewan* (LRB File No. 070-05), *supra*. Although the Board in that decision distinguished these cases from the application then before it, the Board's analysis of these cases is helpful. The Board stated at 554 to 556:

> *[35] The Union also relies on the Saskatchewan Power Corporation decision (LRB File No. 022-88), supra, stating that the Board, in that case, ruled that whether or not a bonus payment to employees violated the collective agreement was irrelevant, as the question before the Board was whether the bonus payment amounted to a violation of the Act. The situation in that case is clearly distinguishable from the situation before us. In that case the employer and the union were in the process of bargaining the renewal of a collective agreement when the employer, while pleading poverty at the bargaining table, delivered a $1000 cash bonus to its employees. The Board characterized the payment as one for services, not a gift. The Board, in assuming jurisdiction over the dispute, characterized the dispute as one where the employer's conduct amounted to a refusal to recognize the union as the exclusive bargaining representative of the employees and a failure to make every reasonable effort to reach a collective bargaining agreement with the union, thereby amounting to a failure to negotiate in good faith. . . .*
>
> *[36] The Union relies on the Saskatoon Board of Police Commissioners decision, supra, to support the proposition that an arbitrator's jurisdiction to rule on an allegation that the employer bargained directly with employees in relation to the offering of an early retirement package is limited by the terms of the collective agreement. In that case the Board recognized that the parties intended the early retirement plan to be a term or condition within the scope of what was to be bargained by them based on a reference in their collective agreement that the parties agreed to negotiate in relation to "pension and related matters." The Board went on to observe that it was not clear from the collective*

agreement what sanctions would ensue upon a finding of a violation of that provision but that its existence reinforced the obligation on the employer to negotiate with respect to that issue. The Board concluded that the employer was in breach of s. 11(1)(c) by offering the early retirement plan to the employees without first bargaining the same with the union. The Board ordered the employer to cease implementation of the program and to stop discussing it with the employees, subject to the outcome of negotiations with the union . . . the issue of deferral was not before the Board in the Saskatoon Board of Police Commissioners decision, supra, as it was not argued by the parties. As such, it is our view that the comments made by the Board and referred to by the Union at the hearing were not made in the context of the issue of deferral. Furthermore, the Board, in that case, expressed the view that it could not see how an arbitrator could provide an appropriate sanction for the breach of a provision in the agreement to negotiate "pension and related matters" and that only the Board could order the parties to bargain. . . .

[37] The Union also cited the decision of Saskatchewan Indian Federated College, supra, where the Board deferred to arbitration that portion of the dispute that dealt with the interpretation of a letter of understanding but made a finding of an unfair labour practice in relation to the employer's conduct in repudiating part of the letter of understanding. The Union argues that the claim in that case is comparable – that the employer negotiated the collective agreement and then denied its status as a collective agreement. This Saskatchewan Indian Federated College case is clearly distinguishable on the basis that the Board's decision to exercise its jurisdiction under the Act in that case rested on the finding that the employer refused to implement the terms of a letter of understanding which were not in dispute between the parties. The Board stated at 224:

> *In the Board's view, the Employer's conduct in not making any retroactive payments at the time provided for in the Letter of Understanding amounted to a repudiation of the collective bargaining process. The Employer negotiated the Letter of Understanding with the Union; it acknowledged that retroactive pay was owing to employees even on its interpretation of the collective agreement; it was asked by the Union to make such payment to employees in accordance with the terms of the Letter of Understanding; and it refused to do so without explanation.*
>
> *The Board finds that the Employer failed to bargain in good faith and repudiated the Letter of Understanding by failing to carry out that part of the*

> *Letter of Understanding that is not in dispute between the parties – i.e. the retroactive pay that the Employer agrees is owing to the employees. This aspect of the Employer's conduct clearly falls within the Board's jurisdiction as the guardian of the process of collective bargaining under the unfair labour practice provisions contained in s. 11 of the Act. The grievance and arbitration process cannot directly remedy this aspect of the application.*

[49] In considering the issue of deferral, applications fall to be decided primarily on their facts. Although the fact situations in the above three decisions are quite different than that before us, they stand for the proposition that the Board will take jurisdiction over ss. 11(1)(a) and 11(1)(c) complaints where it is apparent that the allegation is one that the employer has failed to recognize the exclusive bargaining status of the union in circumstances where the obligation to bargain or to recognize the union does not first depend upon a finding of a violation of the collective agreement or a determination of what documents form part of the collective agreement. In the *University of Saskatchewan* decision (LRB File No. 070-05), *supra*, the Board, relying on *Saskatchewan Power Corporation* (LRB File No. 162-99), *supra*, *International Brotherhood of Electrical Workers, Local 2067 v. SaskPower*, [1998] Sask. L.R.B.R. 95, LRB File No. 312-97 and *Canadian Union of Public Employees v. University of Saskatchewan and University of Regina*, [2004] Sask. L.R.B.R. 45, LRB File Nos. 246 & 247-03, found deferral appropriate because it could not determine whether there was an obligation to bargain until an arbitrator determined what documents formed a part of the collective agreement and whether the collective agreement had been violated.

[50] To the extent that the Union's application relates to the alleged violation of ss. 11(1)(a) and (c) of the *Act*, the first three of its allegations (concerning improper communications, failing to bargain and direct bargaining with the employees) do not involve a prior determination of what documents form part of the collective agreement or whether the collective agreement has been violated. These allegations relate to employer conduct that has nothing to do with the terms and conditions in the collective agreement. As the allegations refer primarily to the exclusive status of the Union as a bargaining agent, there is no need to establish an obligation to bargain.

[51] With respect to the Union's fourth allegation, that the Employer failed to disclose material facts during collective bargaining, that relates to the Employer's conduct during the current round of negotiations and therefore the obligation to bargain is already established – it involves only the question of whether the standards of disclosure, outlined by the Board in previous decisions, have been met.

[52] Lastly, with respect to the fifth allegation, that the Employer made unilateral decisions as to scope without bargaining with the Union or applying to the Board pursuant to s. 5(m) of the *Act*, the scope and nature of the obligation to bargain exclusively with the Union on this issue has been outlined by the Board and relates to the certification order issued by the Board.

[53] Utilizing the three-part test in the *Westfair Foods Ltd.* decision, *supra*, the Board has decided that it is not appropriate to defer to the grievance arbitration process for the following reasons.

(i) It is not the same dispute.

[54] The essence of the dispute between the parties in the unfair labour practice application is whether the Employer has failed to bargain in good faith or has intimidated, threatened or coerced employees in the exercise of their rights under the *Act* by: (i) communicating with employees in a threatening and coercive manner; (ii) failing to bargain with the certified bargaining agent and thereby undermining it; (iii) bargaining directly with employees regarding their terms and conditions of employment; (iv) failing to disclose material facts during collective bargaining; and (v) making unilateral decisions as to scope without applying to the Board pursuant to s. 5(m). These allegations are very clearly different than any possible grievance that could be filed under the collective agreement. While the Employer pointed to relevant terms in the collective agreement that might form the basis of a dispute between the Union and the Employer in the factual circumstances before us, the central focus of the dispute is ss. 11(1)(a) and (c) of the *Act* and not the terms and conditions of employment prescribed by the collective agreement.

[55] For example, the Employer pointed to articles 30 and 31 of the collective agreement as governing the dispute saying that the parties have agreed on extensive

process and rights in the event of disestablishment of a college. While we agree that the parties have so provided, the Employer conduct in issue is not that it has breached the rights the employees have in terms of notification, transfer, lay-off and severance, but rather the Employer's conduct in having communicated (and evidencing an intention to continue to communicate in the future) directly with employees about those possibilities in a manner that is coercive or threatening and was done without the involvement of the Union. The provisions in article 30.3 (that "the parties recognize that the reorganization of academic units include . . . dissolution of . . . Colleges, must be formally approved by Council") and in article 31.2 that contemplate lay-offs where an academic program is discontinued, are not in dispute between the parties. The Union accepts that University Council must approve this decision and takes no issue with University Council's power to consider such an issue on academic grounds. What the Union does not accept is that, in so doing, University Council can ignore its obligations under the *Act*. Similarly, the notices to employees and the Union and the information to be provided to them in cases of lay-offs due to discontinuation of a program, contemplated by articles 31.3 and 31.5.2, are not the central focus of the dispute before us.

[56] The Employer also pointed to article 4 of the collective agreement, the recognition clause, as covering the Union's complaints over improper and coercive communications with employees. In our view, it is highly doubtful that such a provision could be used in this manner but, in any event, the central focus of the dispute is not a breach of that term of the collective agreement but rather a complaint specifically covered by the words of s. 11(1)(a) of the *Act*. With regard to the Union's other complaints about the Employer's failure to recognize the exclusive status of the Union, it is our view that such an obligation arises through the certification order and that the recognition clause is only a formal recognition of that Board order.

[57] Article 10.6.3 of the collective agreement which requires the provision of information necessary for bargaining is also not the central focus of the dispute before us. It speaks to information the Union specifically requests whereas the allegation before us is premised on the Board's past interpretation of s. 11(1)(c) that it includes a positive obligation on the Employer to disclose material facts about changes that will probably be implemented during the life of the collective agreement and may affect terms and

conditions of employment (as set out in the *Government of Saskatchewan* decision, *supra*).

[58] With regard to the Union's allegation concerning the Employer's unilateral decisions as to scope, the Employer did not reference a provision of the collective agreement which could cover such a dispute. In our view, what the Union seeks to enforce in this regard arises from the certification order and not the collective agreement. In addition, only the *Act* prescribes a method for dealing with scope issues through an "employee" determination under s. 5(m) or, if unilateral action is taken without the agreement of the parties, an unfair labour practice application under s. 11(1)(c) of the *Act*.

[59] In summary, the allegations before us in the unfair labour practice application are not the same disputes as any that might be brought as a grievance under the collective agreement.

(ii) The collective agreement does not empower the resolution of the disputes.

[60] In our view, the collective agreement does not empower the resolution of the disputes through the grievance arbitration procedure. For the reasons stated above, not only are the disputes not the same in the unfair labour practice application as they would be under the collective agreement, the terms of the collective agreement do not appear to cover the allegations raised by the Union. While the collective agreement contains a grievance procedure, it is designed for the peaceful resolution of disputes over alleged violations of its terms, none of which appear to be in dispute before us. The Union's claims are of a regulatory or disciplinary nature and are within the purview of the *Act* and not the collective agreement. An arbitrator cannot consider the provisions of the *Act* and whether they or any of them have been violated by the Employer.

(iii) Remedies under the collective agreement not a suitable alternative.

[61] The Board is of the view that there are no suitable remedies available to an arbitrator upon finding a breach of the terms of the collective agreement in the circumstances of this case. As stated, the Union seeks findings of violations of the *Act*

and an arbitrator cannot make such findings. Unlike the situation before the Board in the *University of Saskatchewan* (LRB File No. 070-05) decision, *supra*, the Union's allegations do appear to assert that the Employer is engaging in a course of conduct designed to interfere with the exclusive bargaining status of the Union. Here, the Union seeks to have the Employer disciplined and its conduct regulated. If the allegations of the Union are true, a disciplinary sanction appears necessary to be an effective remedy. Further, the orders sought by the Union suitable to a finding of a violation of the *Act*, such as a cease and desist order, are not available to an arbitrator. In addition, only the Board can enforce a certification order by compelling the Employer to bargain in good faith.

[62] On a final note, the Employer's argument that the application is precipitous because it is only at the academic stage and no decisions have been made about the disestablishment of the extension division and how that affects the employees is without merit. Once again, that is an argument that goes to the merits of the Union's claim. We have determined that the Board has jurisdiction over the conduct of the parties to the extent that those matters are covered by the *Act*, regardless of the fact that the Employer (and perhaps the employees) are involved in an academic planning process sanctioned and contemplated by *The University of Saskatchewan Act, 1995* and, to some extent, by the collective agreement. As previously stated, we find that this fact alone does not prevent the Board from hearing the application. At a hearing on the merits of the Union's application, it is open to the Employer to make the argument that the Union's complaints are precipitous. Such an argument simply has no relevance in relation to our ruling on the preliminary issue of whether the dispute should be deferred to grievance arbitration.

[63] The Employer's preliminary objection that the Board should defer to the grievance arbitration process provided for in the parties' collective agreement is hereby dismissed. The Union's application will therefore proceed to a full hearing on the merits.

[64] Brenda Cuthbert, Board Member, dissents from this decision and may issue written reasons in due course.

DATED at Regina, Saskatchewan, this **28th** day of **October, 2008.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson