**Labour Relations Board**
**Saskatchewan**

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 600-3, Applicant v. GOVERNMENT OF SASKATCHEWAN (COMMUNITY LIVING DIVISION, DEPARTMENT OF COMMUNITY RESOURCES), Respondent**

LRB File No. 238-05; September 17, 2009
Chairperson, Kenneth G. Love Q.C.; Members: John McCormick and Ken Ahl

For the Applicant: J. E. (Jay) Seibel
For the Respondent: Curtis W. Talbot

**Reconsideration – Applicant alleges Board erred in law or general policy – Proper interpretation of law or policy – Applicant alleges Board decision is precedential and amounts to significant policy adjudication – Board discusses criteria for reconsideration.**

**Respondent alleges that application is on moot point – parties have negotiated a letter of understanding as directed by decision – Board considers if decision raises sufficiently important issue to labour relations community to reconsider decision notwithstanding that it may be moot.**

**Mid-term bargaining. Board discusses Board decisions dealing with issue.**

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

## REASONS FOR DECISION

**Background:**

**[1]** **Kenneth G. Love,** Chairperson: The Canadian Union of Public Employees, Local 600-3 (the "Union") represents employees employed by the Government of Saskatchewan in the Community Living Division of the Department of Community Resources (the "Employer"), working at the Valley View Centre (a long term care facility for mentally disabled individuals) in Moose Jaw, Saskatchewan, with certain named exceptions. At the time of the events giving rise to the within application, the parties had just concluded the negotiation of a collective agreement with a term of October 1, 2003 to September 30, 2006.

**[2]** On December 21, 2005, the Union filed an application alleging that the Employer violated s. 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"), by unilaterally implementing a criminal record check policy ("CRC policy") that would or could impact the terms and conditions of employment of its members, without negotiating that policy with the Union.

**[3]** In its decision dated September 30, 2008, the Board found the Employer guilty of an unfair labour practice as alleged in the complaint (the "08 Decision"). On February 20, 2009, the Employer filed an application for reconsideration of the 08 Decision with the Board.

**[4]** A hearing was held in Regina on August 25, 2009. At that hearing, both parties agreed that the Board's usual two (2) step approach to the reconsideration process could be abridged and that the Board could deal with both steps in its decision. Secondly, the parties agreed that the statement of facts submitted jointly at the original hearing could be relied upon by the Board in these proceedings.

**[5]** The Board's 08 Decision suspended the operation of its Order for a period of ninety (90) days to permit the parties to collectively bargain a revised CRC policy. The parties did bargain collectively and did reach an agreement, which was embodied in a Letter of Understanding between the parties dated July 29, 2009. As a result of this resolution of the matter, counsel for the Employer raised a question regarding whether this rendered the decision moot, a question which counsel for the Union then argued should lead the Board to refuse to deal with the application for reconsideration.

**Facts and Evidence:**

**[6]** At the original hearing, the parties provided the Board with an agreed statement of facts. That statement was supplemented by the *viva voce* evidence of the Union's witness, David Stevenson, president of Local 600-3 of the Union, and the evidence of the Employer's witnesses: (i) Bridget McLeod, senior labour relations consultant with the Public Service Commission of the Government of Saskatchewan; and (ii) Don Zerr, director of labour relations with the Public Service Commission.

**[7]** The agreed statement of facts read as follows:

**(a)** *CUPE Local 600 is the bargaining agent for employees of the Employer in the Community Living Division (CLD) of the Department of Community Resources and Employment DCR.*

**(b)** *Pursuant to the notice to bargain served August 5, 2003, the parties entered into negotiation for renewal of their collective agreement (Document 1) and a new collective agreement was reached in January 2005 and ratified in March 2005 and signed April 7, 2005 (Document 2).*

**(c)** *The Parties also met in the fall of 2005 to negotiate the merger of the Saskatchewan Property Management Corporation (SPMC) and CLD CUPE collective agreements.*

**(d)** *The implementation of a revised criminal records check policy was not raised by the Employer during negotiations for the new collective agreement, nor was it discussed at the SPMC-CLD table.*

**(e)** *The Employer commenced an internal review of its existing criminal records check policy about February 2005 and implemented the revised criminal records check policy in the Saskatchewan Public Service effective September 7, 2005 (Document 3).*

**(f)** *A criminal records check policy was first introduced in the CLD in 1990-91, with an initial revision of October 19, 1994 (Document 4). Subsequently, a further revision took place effective March 24, 1997 (Document 5) and a third revision effective February 1, 2002 (Document 6). The initial policy and revisions were implemented without negotiation with the Union.*

**(g)** *All previous criminal check policies for CLD CUPE members applied only to new hires and not existing employees.*

**(h)** *As a result of the new policy implemented in September 2005, the following changes with respect criminal records checks were implemented by the Employer:*

*a. The policy not only applied to new employees, but also current employees, regardless of the nature of their appointment, in the position categories covered by the policy.*

*b. Three new position categories were added to those previous requiring criminal record checks: those employees*

*responsible for public money, those with the ability to modify IT systems; and those working with third party organizations.*

*c. Current employees must obtain a criminal records check within five years of September 2005 if they currently occupy a position requiring a criminal record check. Criminal record checks will be reviewed every five years for such employees continuing to occupy those positions.*

*d. If a current employee applies to a position requiring a criminal records check, even if they are presently in such a position, then they will be required to get a new check if they have not had one within the previous one year period.*

*e. The cost for current employees to obtain a criminal records check for their current position/appointment will be paid for by the Employer, as well as for employees moving to positions requiring criminal records checks as a result of an Employer-initiated action or for the cyclical updates of criminal records checks every five years.*

f. *External applicants and current employees applying to criminal records check positions are required to pay for their own checks (currently $35.00). The costs for these checks vary, but a routine criminal records check (name check) may be obtained through the Moose Jaw RCMP without cost.*

**(i)** *Since the policy revision, two grievances have been filed by CUPE respecting the requirement that the employee pay for the criminal record check on changing jobs. Both grievances were settled.*

**(j)** *The Employer has provided information to employees on its website with respect to the criminal records check policy. This documentation includes:*

*a. Question and Answers (Document 7)*

*b. Information Handout (Document 8)*

*c. Criminal Records Check Transmittal Form (Document 9)*

**(k)** *The Parties reserve the right to call further evidence in the hearing of this matter.*

**[8]** No new evidence was called by either party at the hearing to consider the application for reconsideration. Counsel for the Employer provided a copy of the Letter of Understanding between the parties related to the implementation of the CRC policy.

**IS THE ISSUE MOOT?**

**[9]** To his credit, the counsel for the Employer provided the Board with the Letter of Understanding between the parties which outlined the results of their negotiations concerning the revised CRC policy. Counsel argued, however, that notwithstanding the resolution of the issue, that if the Board took the view that the issue had been rendered moot by the Letter of Understanding, then, the Board would be leaving "in place jurisprudence" that the Employer submits is incorrect. He further argued that the original parties are in the best position to deal with the issue and that it was of sufficient importance that it should be reconsidered by the Board, notwithstanding that the original issue had now been resolved by agreement between the parties.

**[10]** Counsel for the Union argued that the case should be considered by the Board to be moot. He argued that the Board was not constrained by *stare decisis* and therefore, this case was dependent upon its unique facts and circumstances as found by the Board, and was, therefore, not precedential. He further argued that since the underlying dispute had now been resolved, the Board should not be concerned about any future precedential value of the decision.

**[11]** The Board dealt with a question of mootness in *Lisoway v. Canadian Union of Public Employees, Local 3078*[1]. In that case, the Board declined to deal with an issue which had been rendered moot. In that decision, the Board quoted from the Supreme Court of Canada decision in *Borowski v. A.G. Canada*[2], which decision provided the following guidance regarding moot issues.

> *The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical*

[1] [2005] CanLII 63084, LRB File No. 047-04
[2] [1989] CanLII 123 (S.C.C.), [1989] 1 S.C.R. 342 (S.C.C.)

> *effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.*

**[12]** Counsel for the Applicant argued that the case was important not only to the current Applicants, but also to the labour relations community generally. They further argued that if the Board were to take the course suggested by the Union, this "would leave in place jurisprudence that it submits is incorrect." In the Applicant's submission, leaving "the matter to be considered by other parties in the future creates uncertainty in the interim on the subject of management rights."

**[13]** Generally speaking, in similar situations to this, the Board would, dependent upon the particular circumstances in play in that case, agree that the Board's scarce resources can be better utilized by not dealing with issues that have been rendered moot as in this case. However, the Board recently[3] allowed a similar unfair labour practice application to continue, notwithstanding that it had been filed late.

**[14]** That application, by SGEU, relied upon the decision of the Board in this case in making the application. Since the Board will have to deal with the issue in that case, it is in the interest not only of the current parties, but also to the broader labour relations community that we consider the application at the present time. For that reason, the Board has determined to deal with the merits of the application.

## CRITERIA FOR RECONSIDERATION

**[15]** The criteria which the Board uses to determine whether to proceed to reconsider a decision are well established[4]. Those criteria are as follows:

> *In Western Cash Register v. International Brotherhood of Electrical Workers, [1972] 2 CLRBR 532, the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations*

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[3] *Saskatchewan Government and General Employees' Union v. The Government of Saskatchewan* [2009] CanLII 30466, LRB File No. 009-09

[4] See *Overwaitea Foods v. UnitedFood and Commercial Workers No C86/90, as adopted by the B oard in Remai Investments Corporation o/a Imperial 400 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93 at 107-08*

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

**[16]** In its application, the Employer relied upon criteria 4 and 6 above.

**Relevant Statutory Provisions:**

**[17]** Relevant statutory provisions include ss. 2(b), (d), 3, 5(i), 11(1)(c), 18(l) , & 42 of the *Act*, which provide as follows:

> *2. in this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*

*(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*

*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:*

*(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

*. . .*

*11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*

*(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*

*. . .*

*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:**

**[18]** Counsel for the Applicant argued that the Board erred in its decision when it applied a two (2) step test for determining whether an Employer's failure to bargain a policy is an unfair labour practice. The Applicant argued that the correct test for the Board to have applied was found innumerous rulings which flowed from *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.*[5] This decision, counsel argued, has been adopted in Saskatchewan by virtue of the decision in *United Food and Commercial Workers, Local Union No. 14 and Saskatoon Co-operative Association*[6].

**[19]** The Union argued that an "error of law" was not the basis for reconsideration as set out in criteria No. 4. Where an error of law has been committed by the Board, the Union argued that the proper remedy would be to make application to the Court of Queen's Bench to quash the decision.

**[20]** The Union also argued that the arguments now advanced by the Employer that the proper test should be as set out in KVP are, in essence, an attempt to re-argue the case on new grounds.

**[21]** The Board has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in *Grain Services Union v. Saskatchewan Wheat Pool et al.*[7]

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

**[22]** The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287*[8]:

> *…the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of*

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[5] [1965] 16 L.A.C.73 (Ontario Arbitration Board)
[6] Board of Arbitration (Mitchell, Tholl, Nichol) December 4, 2000, [2000] CanLII 26911
[7] [2003] Sask. L.R.B.R. 454, LRB File No. 003-02, at 456
[8] [2003] Sask. L.R.B.R. 288, LRB File No. 054-01, at 291

> *flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made."*

**[23]** The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et a*l[9]

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
>
> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
>
> *Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an*

[9] [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, at 107-108:

*automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.*

*In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> > *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> >
> > *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> >
> > *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> >
> > *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> >
> > *5. if the original decision is tainted by a breach of natural justice; or,*
> >
> > *6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

**[24]** The Applicant relied upon criteria Nos. 4 and 6 in making this application. Does the decision turn on a conclusion of law or general policy under the *Act* , which law or policy was not properly interpreted by the original panel? Or, is the original decision precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change? For the reasons that follow, the Board believes that each of these criteria is applicable. As a result, the Board wishes to reconsider its decision and to provide additional guidance to the labour relations community in respect of this decision.

**[25]** In reaching its conclusion, the original panel overlooked some fundamental tenants of the *Act*, as well as jurisprudence of the Board concerning mid-term bargaining.

**[26]** One of the principle tenets of the *Act* is that the parties are only required to bargain collectively during the open period provided for in ss. 33(4) of the *Act.* Furthermore, pursuant to s. 44 of the *Act*, there can be no strike or lock-out during the term of a collective agreement. Nor is there any general requirement in Saskatchewan, that once a collective agreement has been reached, that the parties must re-open that agreement to deal with any issue that may arise. Where an issue arises, it may be dealt with in a number of ways. These are:

**(a)** by virtue of the “technological change” provisions of s. 43 of the *Act;*

**(b)** by virtue of a re-opener provision in the collective agreement;

**(c)** by voluntary agreement to re-negotiate between the parties; or

**(d)** by submission by way of the grievance procedure where the issue impacts upon the already agreed upon provisions of the collective agreement.

**[27]** In the 08 Decision, the Board overlooked that the CRC policy needed to fall into one of the categories set out above, in order to be the subject of collective bargaining under the *Act* because there was a collective agreement in place.

**[28]** In *Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc.*[10], the Board considered the duty to bargain in good faith and outlined the limited circumstances in which parties are required to engage in mid term bargaining. Point 2 of the agreed statement of facts makes it clear that the parties had engaged in collective bargaining prior to the implementation of the revised CRC policy. Those negotiations had been successful and there was a new collective agreement in place when the policy was implemented.

**[29]** In the *Heartland Livestock case, supra*, the Board considered a similar situation to that faced by the original panel in this case. There, the Union alleged that the Employer committed an unfair labour practice by failing or refusing to bargain collectively "in regard to the treatment of employees affected by the sales of Heartland and Western Producer with respect to their membership in and participation in the SWP/GSU Pension Plan."

**[30]** In that case, the Board also considered if it was appropriate to defer the matter to arbitration, as was done by the original panel. As was the case with the original panel, the Board in *Heartland Livestock,, supra,* also determined that they would be able to deal with the issue and did not exercise their discretion to defer to arbitration.

**[31]** At paragraph [89] of the *Heartland Livestock case, supra* the Board says:

> *In certain cases a refusal to bargain may be a breach of an extant collective agreement, as where the agreement contains a provision for mid-term bargaining in certain circumstances. However, with few exceptions – for example, negotiating for the settlement of disputes and grievances, failure to comply with which is a violation of s. 11(1)(c) of the Act, and pursuant to s. 43, the technological change provisions of the Act – the Act does not expressly require an employer to bargain collectively with a certified union during the term of a collective agreement.*

[10] [2003] CanLII 62870, LRB File No. 003-02

> *Otherwise, under the Act, the parties are bound to bargain collectively only upon notice during the "open period" in the circumstances described in s. 33(4) for the renewal or revision of the agreement, or in the case of a first collective agreement imposed by the Board, s. 26.5(9).*

**[32]** The Board went on, in the *Heartland Livestock case, supra*, to explain the rationale and logic behind this statement. It recognized the harshness of this obligation as noted by the Board in *Communications Workers of Canada v. Northern Telecom Canada Limited, et al*[11]. In that case, the Board recognized that s. 33(4) of the *Act* "abrogated any contractual capacity to vary the statutory time frame", and concluded at p. 48, "that the employer's 'willingness to negotiate' despite the union's untimely notice to revise did not create a duty to bargain."[12]

**[33]** In *Heartland Livestock, supra*, the Board also distinguished an earlier decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd., et al.*[13] on the basis that this decision was "predicated, in large measure, upon the fact that the actions complained of occurred prior to the conclusion of a first collective agreement."[14]

**[34]** In the present case, the original panel got off course when it began its inquiry by answering the question "Is the CRC policy a term or condition of employment?." There is little doubt that such a policy could properly be the subject of collective bargaining between the parties. However, it is, we believe an erroneous "leap of logic" to use that analysis to then conclude that the fact that it can be a subject of collective bargaining means that it must be a subject of collective bargaining; and to then determine that the failure to reopen negotiations outside the open period amounts to an unfair labour practice is contrary to both the provisions of the *Act* and to the Board's previous jurisprudence as noted above. In Adams, *Canadian Labour Law, 2nd ed*[15] the author notes:

> *The purpose of collective bargaining legislation is to bring the parties to the bargaining table where they will present their*

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[11] [1995] October Sask. Labour Rep. 46, LRB File No. 062-85
[12] See Grain Services Union v. Saskatchewan Wheat Pool , supra, at paragraph [97]
[13] 1st Quarter Sask. Labour Rep. 111, LRB File No. 197-92
[14] See Grain Services Union v. Saskatchewan Wheat Pool, supra a paragraph [96]
[15] Canada Law Book , paragraph 10.1380 @ page 10-93

> *proposals, articulate supporting arguments and search for common ground which can serve as the basis for a collective agreement. The duty to bargain, no matter how phrased has been elaborated over time by labour boards to prohibit certain specific bargaining conduct, i.e. misrepresentations, and at times to censure a party's entire bargaining stance where "having regard to all the circumstances", a labour board concluded that the real object of the party is to avoid a collective agreement….*

**[35]** Further, Adams, at paragraph 12.420, explains the rationale for the insertion in some legislation, such as s. 43 of our *Act* to deal with issues that arise mid-contract.

> *Five jurisdictions have enacted specific provisions permitting bargaining over various types of mid-contract change. This legislation seeks to promote a "continuing duty to bargain" designated to allow the designated employee bargaining agency an identifiable opportunity to be consulted and offer input upon significant changes that occur during the term of a collective agreement. The goal is to preserve industrial harmony by having contentious issues settled as they arise rather than have them suppressed temporarily only to create stress between the parties and cause greater difficulties later on… The definition of "technological change" is very broad in the Saskatchewan statute and includes the "removal or relocation outside the appropriate unit by the employer of any part of the employer's work, undertaking or business".*

**[36]** Adams goes on at page 12-29 to note that in provinces where no such provision exists in their governing legislation, that "the ability to reopen a collective agreement in mid-term is limited. In general, it can be done only if there is a "re-opener clause contained in the collective agreement."

**[37]** Some jurisdictions, such as Manitoba and British Columbia have enacted an ongoing consultation provision to be included in collective agreements to allow for re-opening of collective agreements during their term. No such provision has been included in Saskatchewan's *Act*.

**[38]** In our view, the original panel also misdirected itself when it began the analysis of the provisions of the collective agreement at paragraphs [77] and subsequent paragraphs. In so doing, the original panel usurped the role and function of an arbitrator who would, of necessity, examine and resolve whether or not the revised policy was at

odds with the provisions of the collective agreement such that the enactment of the policy was a violation of the collective agreement, something which the original panel determined at the outset it should not do, when it decided not to cede jurisdiction to an arbitrator to deal with the complaint.

**[39]** In our view, the interpretation of the collective agreement and the impact of the revised CRC Policy on that agreement would be a matter best left to an arbitrator rather than something the Board should consider.

**[40]** This analysis by the Board lead, we presume, to the suggestion by counsel for the Applicant in the reconsideration, that the original panel had erred in law and had misapplied arbitral jurisprudence, as outlined in *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.*, *supra*.

**[41]** Furthermore, it would not be a breach of the duty to bargain in good faith where there was a difference of opinion between the parties as to whether or not a breach of the collective agreement had occurred or not. If that were the case, then any time a matter arose for adjudication by an arbitrator, such a disagreement would be subject to a complaint under s. 11(1)(c).

**[42]** In written submissions, counsel for the Union listed eight (8) cases where they suggested the Board had considered similar situations. However, none of those decisions directed itself to the principal issue in this case, which was the question of mid-term bargaining requirements of the *Act* and the Board's jurisprudence concerning mid-term bargaining. All of the cases cited, save one, and including the decision relied upon by the original panel in this case[16] were determined prior to the Board's decision in *Heartland Livestock, supra,* and therefore are of limited value given the Board's decision in that case.

**[43]** The only decision cited which post-dates the Board's decision in *Heartland Livestock, supra,* is *Saskatchewan Joint Board, Retail, Wholesale Department*

[16] Saskatoon City Police Association v. Saskatoon Board of Police Commissioners [1993] 4th Quarter Sask. Labour Rep. 158, LRB File No. 240-93

*Store Union v. Winners Merchants International L.P*[17]*.* As in the *Heartland Livestock* decision, *supra*, which distinguished the *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd.*[18]*, et al* decision, *supra,* this case is similarly distinguishable on the grounds that it dealt with a situation where no first collective agreement had been reached between the parties.

**[44]** The decision in *Heartland Livestock, supra,* was also reconsidered by the Board[19]. The Board upheld its decision on reconsideration.

**[45]** Given that the parties have already resolved this issue, no Order of the Board is required to give effect to this decision.

**[46]** Board member, John McCormick dissents from these Reasons. His written dissent will follow at a later date.

**DATED** at Regina, Saskatchewan, this **17th** day of **September, 2009.**

**LABOUR RELATIONS BOARD**

Kenneth G. Love Q.C.,
Chairperson

[17] LRB File No. 071-05, 120 C.L.R.B.R. (2d) 229
[18] See note 13 above
[19] [2003] CanLII 62871, LRB File No. 003-02