The Labour Relations Board
Saskatchewan

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. THE GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 150-10; December 9, 2010
Vice-Chairperson, Steven Schiefner; Members: Hugh Wagner and Ken Ahl

For Applicant Union: Ms. Juliana Saxberg
For Respondent Employer: Mr. Curtis Talbot

Technological Change – Interim Relief – Board applies two part test for interim relief – Board finds Union's allegation too remote and tenuous to demonstrate existence of arguable case – Board finds desired interim relief too vague and an insufficient nexus between impugned conduct and relief – Board not satisfied that balance of labour relations harm favours granting interim relief.

The Trade Union Act, ss. 5.3 and 43.

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: The Saskatchewan Government and General Employees' Union (the "Union") is the exclusive bargaining agent for approximately 11,000 in-scope employees of the Government of Saskatchewan (the "Employer"). These employees work in various ministries and agencies of the Government of Saskatchewan. Of significance for this particular application, the Union represents approximately 1,024 members actively employed with the Ministry of Government Services.

[2] On July 23, 2010, the Union filed an application with the Saskatchewan Labour Relations Board (the "Board") alleging that the Employer committed an unfair labour practice or otherwise violated *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") and/or *the Canadian Charter of Rights and Freedoms.*[1] The Union's application was amended on September 30, 2010. The Union's amended application reads, in part, as follows:

> *4. SGEU alleges that unfair labour practices and violations of The Saskatchewan Trade Union Act, R.S.S. 1978, c. T-17 and/or The Canadian*

[1] Application bearing LRB File No. 091-10.

Charter of Rights and Freedoms, has been and/or is being engaged in by the Respondent. These allegations are based upon the following facts:

(a) *SGEU is the exclusive bargaining agent for in-scope employees of the Ministry of Government Services, who fall within the SGEU Public Service/Government Employment (PS/GE) bargaining unit.*

(b) *On or about June 23 and 24, 2010, representatives of the Ministry of Government Services and the Public Service Commission met with a number of SGEU members employed by Government Services and informed them that their hours of work, shifts, and in some cases job locations would be changed on September 1, 2010, as a result of a new approach to the provision of cleaning services in various government buildings, pursuant to "phase one" of a Government-wide "greening initiative" which was one of six "Lean Management" strategy initiatives.*

(c) *During these meetings SGEU members were given the message that they had a choice but to accept the changes, or lose their jobs, and that the Government was looking for ways to reduce the size of the bargaining unit.*

. . .

(e) *The SGEU and the Government recently concluded the terms of a renewal Collective Bargaining Agreement covering the PS/GE Bargaining Unit. The "greening initiative"/Lean Management strategies and the impact it would have on bargaining unit members, was never raised or addressed at the table. SGEU was never provided with an opportunity to negotiate on behalf of its members with respect to these changes.*

(f) *The implementation of the "greening initiative"/Lean Management strategies will have a substantial impact on the terms and conditions of a significant number of SGEU PS/GE members' employment, including but not limited to their hours of work, work and shifts schedules, work locations, job duties, compensation and job security. A loss of bargaining unit positions through job abolishments, layoffs and/or other means is expected to result from the changes.*

(g) *In particular SGEU alleges that as part of the adoption of Lean Management/the "Greening initiative", Government Services has reassigned duties formerly performed by SGEU members, including but not limited to emptying desk-side recycling bins, outside the bargaining unit.*

(h) *SGEU further alleges that the Lean Management/"Greening initiative" introduced by Government Services included the introduction of "newer methods of cleaning with more efficient equipment and products."*

(i) *Following the announcement of the implementation of "phase one" of the "greening initiative"/Lean Management strategies, an SGEU representative contacted the Public Service Commission*

and Government Services and asked to be provided with copies of letters provided to SGEU members detailing their shift changes, and an "FAQ" document distributed with those letters. The Government and Public Service Commission refused to provide SGEU with those letters.

5. The Applicant SGEU submits that by reason of the facts hereinbefore set forth:

(a) The Respondent has interfered with, restrained, intimidated and/or coerced SGEU members in their exercise of their rights under the Trade Union Act, and in so doing has committed an unfair labour practice contrary to s. 11(1)(a) of the Act.

(b) The Respondent has interfered with, undermined or frustrated SGEU's administration and its representation of members, and in so doing has committed an unfair labour practice contrary to s. 11(1)(c) of the Act.

(c) The Respondent has failed or refused to bargain collectively with SGEU respecting terms and conditions of members' employment, and in so doing has committed an unfair labour practice contrary to s. 11(1)(c) of the Act.

(d) The implementation of Lean Management strategies including the "greening initiative" is a technological change that will impact a significant number of employees within the meaning of s. 43 of the Act, and the Respondent has failed to provide SGEU with the required notice under s. 43(2) of The Canadian Charter of Rights and Freedoms

(e) In failing or refusing to recognize SGEU as the exclusive bargaining agent of the affected members, and/or in failing to bargain collectively in good faith with SGEU with respect to the terms and conditions of employment of SGEU members, the Respondent has breached s. 2(d) of The Canadian Charter of Rights and Freedoms.

[6] SGEU seeks the following orders:

...

(e) A finding of Unfair Labour Practices under section 5(d) of The Saskatchewan Trade Union Act;

(f) A[n] Order directing the employer to cease and desist from engaging in Unfair Labour Practices, pursuant to section 5(e)(i) of The Saskatchewan Trade Union Act;

(g) An Order requiring the Respondent to bargain with SGEU with respect to the implementation of the "greening initiative"/Lean Management strategies and related matters, in accordance with Sections 5(c) and/or 43 of The Saskatchewan Trade Union Act;

(h) An Order fixing and determining monetary losses suffered by any SGEU members as a result of the Respondent's violation of The

Saskatchewan Trade Union Act, and in requiring the Respondent to compensate those members accordingly;

(i) *An Order directing the Respondent either to attach these Orders to an email to each in-scope employee and/or to post the Board's Orders in appropriate places in the workplace under section 5(e)(iii) of The Saskatchewan Trade Union Act;*

(j) *A Declaration that the Respondent has violated s. 2(d) of The Canadian Charter of Rights and Freedoms;*

(k) *An Order requiring the Respondent to compensate SGEU and its members for its violation of s. 29d) of The Canadian Charter of Rights and Freedoms, in accordance with section 24(1) of the Charter and section 42 of The Saskatchewan Trade Union Act; and*

(l) *Such further orders as may be just and reasonable.*

[3] On August 4, 2010, the Employer filed its Reply denying that it violated the *Act* or the *Canadian Charter of Rights and Freedoms*.

[4] On September 17, 2010, the Union filed the within application[2], being an application for interim relief pursuant to s. 5.3 of the *Act*.

[5] The Union's interim application was heard on October 6, 2010, in Regina, Saskatchewan. In support of their application, the Union filed the Affidavit of Kathy Mahussier and the Affidavit of Cory Hendricks. In response, the Employer filed the Affidavit of Chris Horsman.

Facts:

[6] The parties have a mature relationship, have a long history of successful collective bargaining, and have entered into many collective agreements. On March 3, 2010, the parties signed a Memorandum of Agreement to revise and update their collective agreement and this revised collective agreement was in force at all times relevant for these proceedings. Negotiations for the renewal/revision of this collective agreement took place in November and December of 2009 and January of 2010.

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[2] Application bearing LRB File No. 150-10.

[7] The Government of Saskatchewan owns and/or occupies numerous buildings across the province, including office buildings, equipment storage buildings, healthcare facilities, correctional centres, courthouses, and museums. The Ministry of Government Services manages the government's portfolio of improved properties and through these properties providing office space for various government agencies and ministries. This Ministry also services many of the operational needs of the tenants that occupy Government-owned properties. One (1) such operation need (and the subject of the within application) is cleaning.

[8] On or about June 22, 2010, representatives of the Employer met with representatives of the Union to brief the Union on changes the Ministry of Government Services intended to implement involving revised cleaning standards, recycling and waste management, and the expanded use of green cleaning products. The changes were described as being part of a new "Green" initiative of the Employer intended to pursue a goal of being more environmental sensitive and reducing the government's carbon footprint.

[9] As altruistic as its environmental goal may have been, the changes intended to be implemented by the Employer were anticipated to affect certain members of the Union's bargaining unit in a number of respects. Firstly, cleaning staff would be using new cleaning products; products believed to be both less harmful to the environment and more effective than products available in the past. With the new cleaning products, revised cleaning standards were also being implemented for cleaning staff. Secondly, cleaning staff would be performing their cleaning duties in major office buildings during the day rather than during the evening. Changing the time of the day when the cleaning staff were working was anticipated to save energy by allowing the lights in those buildings to be turned off during the evening when the buildings would be empty of both occupants and cleaning staff. Thirdly, concomitant with the implementation of a new waste management initiative, cleaning staff would no longer be responsible for emptying individual waste receptacles. Rather, individual waste bins would be emptied by the occupants as part of an enhanced recycling initiative as they sorted their waste material for recycling. Finally, supervisory responsibility for cleaning staff in buildings that switched to daytime cleaning was re-assigned to the building operators. As a result, the members of the bargaining unit who had supervisory responsibilities for cleaning staff (i.e.: during the night shift) would be subject to reclassification because of an anticipated reduction in their supervisory responsibilities with the switch to daytime cleaning.

[10] On or about June 24, representatives of the Employer met with affected staff in Regina, Saskatoon and Prince Albert to explain the changes generally and to provide the affected employees with information on how the changes would affect them, individually. Approximately, ninety-one (91) members of the Union's bargaining unit were affected by the changes. Ms. Kathy Mahussier attended the meeting held in Saskatoon on behalf of the Union. Ms. Cory Hendricks attended the meeting held in Regina on behalf of the Union. The Employer provided each affected employee with an individual letter explaining the impact of the proposed changes.

[11] The shift to daytime cleaning in major office buildings was implemented on August 30, 2010[3]. The Employer's revised cleaning standards, the new recycling and waste management initiative, and the expanded use of "Green" cleaning products were implemented on September 1, 2010.

[12] An unspecified number of affected employees requested accommodations associated with the changes being implemented by the Employer and those requests were considered individually and resolved. No evidence as to the nature of the accommodations or the resolution thereof was presented to the Board.

[13] The collective agreement in force between the parties contains detailed provisions dealing with employment security and possible job loss as a result of budgetary downsizing, transfer of services (devolution), reorganization and contracting out (hereinafter referred to as "Article 19"). These provisions impose notice obligations on the Employer in the event of job loss and specify the rights of affected employees.

[14] Finally, over the past number of years, the Government of Saskatchewan has embraced a culture of "Lean Management". Lean Management focuses on eliminating waste and increasing the efficiency in the workplace. Lean Management is generally described as a quality improvement approach that empowers people to innovate and eliminate work processes that do not produce value. No evidence of specific Lean Management projects or changes being implemented by the Employer as a result of Lean Management strategies was presented to the Board.

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[3] The change to daytime cleaning was not being implemented in all buildings managed by the Ministry of Government Services; only in fourteen (14) of the government's major office buildings.

Argument of the Parties:

[15] While the Union's main application was broader (alleging that the Employer committed an unfair labour practice and/or violated the *Canadian Charter of Rights and Freedoms*), for purposes of its interim application, the Union focused its argument on the allegation that the Employer's change to daytime cleaning in major office buildings, coupled with the Employer's revised cleaning standards, its recycling and waste management initiatives, together with expanded use of "Green" cleaning products by cleaning staff, collectively amounted to a "*technological change*" within the meaning of s. 43 of the *Act*. The Union took the position that the Employer violated this provision of the *Act* by failing to give the notice prescribed by the *Act* and by failing to bargain collectively with the Union with respect to a workplace adjustment plan prior to implementing the impugned changes.

[16] The Union took the position that the Employer had introduced equipment or material of a different nature or kind than previously utilized by cleaning staff. In this regard, the Union pointed to the evidence of new cleaning products being used by cleaning staff. In addition, the Union took the position that the Employer had removed or relocated part of the work of the bargaining unit outside of the bargaining unit. In this regard, the Union pointed to the evidence that work previously done by cleaning staff (i.e.: emptying individual garbage bins) was now being doing by occupants of buildings rather than by the cleaning staff. The Union relied on the decision of this Board in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Loraas Disposal Limited*, [1998] Sask. L.R.B.R. 1, LRB File No. 227-97, 234-97 to 239-97, as standing for the proposition that any "*diminution*" of the work performed by members of the bargaining unit satisfied the requirements of the *Act*. In addition, the Union relied on the decision of this Board in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Macdonalds Consolidated*, [1991] 2nd Quarter Sask. Labour Rep. 48, LRB File No. 078-91, as standing for the proposition that two or more individual changes, that are directly or indirectly related, can cumulatively amount to a technological change for purposes of application of s. 43 of the *Act*.

[17] Finally, the Union took the position that in excess of twenty percent (20%) of the total number of employees were affected by the above caption changes thus satisfying the requirements that the alleged technological changes affected a significant number of employees. To support this calculation, the Union relied on the evidence of the Employer that there were 140

permanent full-time and 86 permanent part-time employees directly involved in the provision of cleaning duties within the Ministry of Government Services, which consisted of approximately 1,024 employees in total (i.e.: 226 / 1024 = 22%). The Union argued that, for purposes of this calculation, only the employees in the portion of the bargaining unit working for the Ministry of Government Services should be utilized and not the total number of employees in the full bargaining unit. The Union argued that, to calculate the number of affected employees otherwise, would effectively allow the Employer to implement sweeping changes in the workplace without negotiating with the Union and thus would offend the purpose and spirit of s. 43 of the *Act*.

[18] The Union asserted that the Employer's "Green" initiatives and its "Lean" initiatives were interrelated initiatives of the Employer. Furthermore, the Union asserted that both of these initiatives were only partially completed and that several related changes that could affect the terms, conditions or tenure of employment of members of the bargaining unit were anticipated to be announced by the Employer in the future. In this regard, the Union pointed to the evidence of Ms. Mahussier that affected members were advised by representatives of the Employer at the information meeting held in Saskatoon on June 24, 2010 that the proposed changes were only "*phase one of a multi-year plan*" and the evidence of Ms. Hendricks that similar information was provided to members at the informational meeting held in Regina.

[19] The specific relief requested by the Union in its interim application was as follows:

> *5. SGEU seeks the following orders:*
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> *(a) An interim Order under Sections 5.3 and 43(6) of the Act, directing the Respondent to cease and desist from further implementing Lean Management strategies including the greening initiative" strategy, and/or from further changing the terms and conditions of SGEU members' employment, pending resolution of matters addressed in this Application;*
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> *(b) An interim Order requiring the Respondent to provide SGEU with the Notice required by s. 43(2) and (3) of the Act;*
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> *(c) A preliminary Order requiring the Respondent to provide SGEU with particulars of all phases of the "greening initiative"/Lean Management strategies, including the pre-implementation planning and design of this strategy and the impact it will have and/or has had on the terms and conditions of employment of any SGEU members, in accordance with ss. 18(a) and (b) of The Saskatchewan Trade Union Act;*

> (d) *A preliminary Order requiring the Respondent to provide SGEU with any and all documents related to the development and implementation of the "greening initiative"/Lean Management strategies, and the impact it will have and/or has had on the terms and conditions of employment of any SGEU members, in accordance with ss. 18(a) and (b) of The Saskatchewan Trade Union Act; and*
>
> (e) *Such further orders as may be just and reasonable.*

[20] The Union argued that, for purpose of its interim application, it need not prove that the impugned actions of the Employer satisfied the definition of a "technological change" affecting a "significant" number of its members, only that its application reflects an "arguable case" that those conditions are true and that greater labour relations harm will result should the Board fail to intervene pending a hearing of the matter. With respect to harm, the Union argued that the impugned "Green" changes implemented by the Employer had already injuriously affected members of the bargaining unit in various respects, including loss of seniority rights (in some cases), potential demotions for certain staff, potential job losses, and loss of shift differential. Furthermore, the Union argued that to allow the Employer to continue to implement further "Lean Management" initiatives would allow additional injury to members of the bargaining unit, including potential job losses through the elimination of vacancies.

[21] Counsel for the Union filed written submissions, which we have read and for which we are thankful.

[22] The Employer asked that the Union's application for interim relief be dismissed and did so for a number of reasons. Firstly, the Employer took the position that the Union failed to demonstrate the requisite urgency expected by the Board of parties seeking interim relief. In this regard, the Employer observed that the relief being sought by the Union was not to undo the impugned changes already implemented by the Employer but rather was to prevent the Employer from implementing further Lean Management initiatives. The Employer argued that, in light of the Union's acquiescence to the current status quo and the lack of evidence that any further specific changes were intended, there was no need, let alone urgency, for desired interim relief.

[23] Secondly, the Employer argued that the Union had failed to demonstrate an arguable case that the impugned changes implemented by the Employer were a technological

change within the meaning of s. 43 of the *Act*. In this regard, the Employer argued that the adoption of "Green" cleaning products was not the introduction of equipment or material of a different nature or kind than that previously used by the Employer. The Employer observed that cleaning products are constantly being improved and made more efficient. Similarly, the Employer argued that having the occupant of major office buildings empty their own individual waste receptacles is not removing or relocating any part of the Employer's work, undertaking or business outside of the bargaining unit. The Employer observed that, under the changes, the cleaning staff were still responsible for cleaning and waste management.

[24] Thirdly, the Employer argued that, even if the Board were to accept that the changes implemented by the Employer were a technological change, the Union had failed to establish that the terms, conditions or tenure of employment of a significant number of employees was likely to be affected by the change. In this regard, the Employer relied on the meaning of the term "*significant*" as defined pursuant to s. 3(4) of Saskatchewan Regulations 171/72 as being twenty percent (20%) of the total number of employees of the Employer. Furthermore, the Employer relied on the decision of this Board in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Westfair Foods Ltd*, [1993] 3rd Quarter Sask. Labour Rep. 79, LRB File No. 156-93, as standing for the proposition that the proper calculation of the number of affected employees is based on the whole bargaining unit of which the affected employees are members. To which end, the Employer argued that the whole bargaining unit consisted of approximately 11,000 members and, as such, took the position that the impugned changes did not approach the magnitude necessary to trigger the application of s. 43 of the *Act*.

[25] Fourthly, the Employer took the position that s. 43 was inapplicable with respect to the changes implemented by the Employer because the collective agreement between the parties contains provisions that specify the procedures to be following by the parties in the event of budgetary downsizing, transfer of services, reorganization and contracting out. The Employer argued that, because its collective agreement with the Union contained provisions specifically dealing with the issues that would be covered in a workplace adjustment plan, s. 43 was precluded from application pursuant to ss. 43(11) of the *Act*.

[26] Finally, the Employer argued that the evidence presented in support of the Union's application for interim relief did not demonstrate irreparable harm. The Employer pointed to the evidence that the Employer gave advance notice to affected employees of the

proposed changes and specifically put in place a procedure whereby accommodations could be requested by affected employees. The Employer noted that any requests for accommodation were resolved by the Employer. In addition, the Employer argued that there was no credible evidence of a connection between the Government's adoption of Lean Management strategies and the changes implemented by the Ministry of Government Services, including the change to daytime cleaning in major office buildings, the adoption of revised cleaning standards, the implementation of recycling and waste management initiative, or expanded use of "Green" cleaning products. The Employer argued that, absent evidence of a rationale connection to a technology change implemented in violation of s. 43 of the *Act*, it would be inappropriate for the Board to direct any remedy with respect to Lean Management. To which end, the Employer cautioned the Board against granting any of the other relief sought by the Union, including the Union's request for particulars of future phases of the Greening Initiative/Lean Management strategies or copies of the letters sent by the Employer to affected members of the Union's bargaining unit.

[27] Simply put, the Employer argued that the Union's application for interim relief should be dismissed in all respects. Counsel for the Employer filed a brief of law and argument which we have read and for which we are thankful.

Relevant Statutory Provisions:

[28] The relevant provisions of *The Trade Union Act* are as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
>
> . . .
>
> *43(1) In this section "**technological change**" means:*
>
> *(a) the introduction by an employer into the employer's work, undertaking or business of equipment or material of a different nature or kind than previously utilized by the employer in the operation of the work, undertaking or business;*
>
> *(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material; or*
>
> *(c) the removal or relocation outside of the appropriate unit by an employer of any part of the employer's work, undertaking or business.*

(1.1) Nothing in this section limits the application of clause 2(f) and sections 37, 37.1, 37.2 and 37.3 or the scope of the obligations imposed by those provisions.

(2) An employer whose employees are represented by a trade union and who proposes to effect a technological change that is likely to affect the terms, conditions or tenure of employment of a significant number of such employees shall give notice of the technological change to the trade union and to the minister at least ninety days prior to the date on which the technological change is to be effected.

(3) The notice mentioned in subsection (2) shall be in writing and shall state:

> *(a) the nature of the technological change;*
>
> *(b) the date upon which the employer proposes to effect the technological change;*
>
> *(c) the number and type of employees likely to be affected by the technological change;*
>
> *(d) the effect that the technological change is likely to have on the terms and conditions or tenure of employment of the employees affected; and*
>
> *(e) such other information as the minister may by regulation require.*

(4) The minister may by regulation specify the number of employees or the method of determining the number of employees that shall be deemed to be "significant" for the purpose of subsection (2).

(5) Where a trade union alleges that an employer has failed to comply with subsection (2), and the allegation is made not later than thirty days after the trade union knew, or in the opinion of the board ought to have known, of the failure of the employer to comply with that subsection, the board may, after affording an opportunity to the parties to be heard, by order:

> *(a) direct the employer not to proceed with the technological change for such period not exceeding ninety days as the board considers appropriate;*
>
> *(b) require the reinstatement of any employee displaced by the employer as a result of the technological change; and*
>
> *(c) where an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of his displacement.*

(6) Where a trade union makes an allegation pursuant to subsection (5), the board may, after consultation with the employer and the trade union, make such interim orders under subsection (5) as the board considers appropriate.

(7) An order of the board made under clause (a) of subsection (5) is deemed to be a notice of technological change given pursuant to subsection (2).

(8) Where a trade union receives notice of a technological change given, or deemed to have been given, by an employer pursuant to subsection (2), the trade union may, within

thirty days from the date on which the trade union received the notice, serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.

(8.1) On receipt of a notice pursuant to subsection (8), the employer and the trade union shall meet for the purpose of bargaining collectively with respect to a workplace adjustment plan.

(8.2) A workplace adjustment plan may include provisions with respect to any of the following:

> *(a) consideration of alternatives to the proposed technological change, including amendment of provisions in the collective bargaining agreement;*
>
> *(b) human resource planning and employee counselling and retraining;*
>
> *(c) notice of termination;*
>
> *(d) severance pay;*
>
> *(e) entitlement to pension and other benefits, including early retirement benefits;*
>
> *(f) a bipartite process for overseeing the implementation of the workplace adjustment plan.*

(8.3) Not later than 45 days after receipt by the trade union of a notice pursuant to subsection (2), the employer or the trade union may request the minister to appoint a conciliator to assist the parties in bargaining collectively with respect to a workplace adjustment plan.

(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:

> *(a) a workplace adjustment plan has been developed as a result of bargaining collectively; or*
>
> *(b) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plant.*

(11) This section does not apply where a collective bargaining agreement contains provisions that specify procedures by which any matter with respect to the terms and conditions or tenure of employment that are likely to be affected by a technological change may be negotiated and settled during the term of the agreement.

(12) On application by an employer, the board may make an order relieving the employer from complying with this section if the board is satisfied that the technological change must be implemented promptly to prevent permanent damage to the employer's operations.

Analysis:

[29] For purposes of its interim application, the Union focused its argument on the allegation that the Employer implemented technological change(s) in violation of s. 43 of the *Act* and sought interim injunctive relief directing the Employer to cease and desist from implementing further like changes, under the general headings of "Green" initiatives and/or "Lean Management" strategies. The Union also sought an Order that the Employer be directed to disclose its future plans and any documents that it may have with respect to further "Green" initiatives and/or "Lean Management" strategies. Having considered the evidence and arguments presented in these proceedings, we have concluded that the Union's application for interim relief ought to be dismissed.

[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the *Act*; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. See: *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: *Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre*, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the *Act*, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the *Act* and the specific objectives of the section allegedly offended.

[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable

case". See: *Re: Regina Inn, supra*. See also: *Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre*, 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: *Re: Macdonalds Consolidated, supra*. Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the *Act* as long as the main application reasonably demonstrates more than a remote or tenuous possibility.

[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: *Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd.*, [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: *Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership*, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al.*, [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited*, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and *International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911*, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: *Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc.*, [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.

[33] In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: *Tai Wan Pork Inc.*, supra.

[34] While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the *Act*, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.

[35] Turning to the case at hand, the policy objective of s. 43 of the *Act* is to ensure that members of organized bargaining units receive prior notice of a technological change intended to be implemented by an employer that is anticipated to affect the terms and conditions (and/or tenure of employment) of a significant number of employees in the workplace. The provision requires employers to enter into discussions with the bargaining agent for the affected employees about the impacts that are anticipated or likely to arise upon implementation of the proposed technological change. Employers have a variety of reasons for implementing operational changes in the workplace, including the introduction of new equipment, new materials and new operational practices. Section 43 does not prevent an employer from implementing technological change. However, should an operational change be of the **type** and of the **magnitude** prescribed by the *Act*, new obligations arise for an employer, including notice requirements and an obligation to engage in collective bargaining with respect to a workplace adjustment plan.

[36] It should be noted, however, that s. 43 does not provide a general basis for compelling mid-contract bargaining unless the particular change is of both the type and the magnitude prescribed by the *Act*. Similarly, s. 43 is not applicable if the parties have already negotiated procedures by which workplace issues[4] associated with technological change may be negotiated and settled. In addition, an employer may apply to the Board for relief from compliance with s. 43 to prevent permanent damage to the employer's operation.

[37] An examination of s. 43 of the *Act* reveals that it is nuanced and policy-laden. It imposes ancillary collective bargaining responsibilities upon the occurrence of particular circumstances; circumstances specifically defined by the legislature. To which end, the starting point for a determination as to whether or not this provision is applicable to a particular fact situation involves three (3) substantive questions:

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[4] Any matters with respect to which the terms and conditions or tenure of employment that are likely to be affected by a technological change.

1. Is the employer implementing (or about to implement) a "technological change" within the meaning of the *Act*?
2. Will that technology change affect the terms, conditions and tenure of employment of a "significant" number of employees as defined by Saskatchewan Regulations 171/72?
3. Does the collective agreement between the parties contain provisions that specify procedures by which the workplace issues associated with technological change may be negotiated and settled by the parties?

[38] This Board has supervisory jurisdiction with respect to the application of s. 43 and, thus, to the determination of these threshold questions in the event of a dispute. In addition, s. 43(6) delegates authority for the Board to grant interim relief pending a final determination by the Board on a s. 43 application. It is this latter authority (to grant interim relief) that the Union seeks to invoke in the within application.

[39] The Union alleged that the Employer's change to daytime cleaning in major office buildings, coupled with the Employer's revised cleaning standards, its recycling and waste management initiatives, together with expanded use of "Green" cleaning products by cleaning staff, collectively amounted to a "technological change" within the meaning of s. 43 of the *Act*. The Union took the position that the Employer violated this provision of the *Act* by failing to give the notice prescribed by the *Act* and by failing to bargain collectively with the Union with respect to a workplace adjustment plan prior to implementing the impugned changes.

[40] To invoke the Board's discretion, the Applicant must demonstrate an arguable case that the changes implemented by the Employer were of the "kind" and of the "magnitude" prescribed by the *Act*. While this Board has historically taken a generous approach to the "kind" of change necessary to trigger the application of s. 43, no matter how generous the Board may be, the evidence does not reasonably demonstrate an arguable case that the impugned changes implemented by the Employer were of the "magnitude" necessary to sustain a violation of the *Act*.

[41] The evidence presented in these proceedings indicates that ninety-one (91) employees were affected by the changes implemented by the Employer on August 31 and

September 1, 2010. The Union argued that, for purposes of its interim application, all employees in the Ministry of Government Services directly involved in cleaning, of which there are approximately 224, should be assumed by the Board to be likely to be affected by the impugned changes. In addition, the Union argued that, for purposes of calculating the percent of employees affected, the Board should not consider the size of the whole bargaining unit (i.e.: being approximately 11,000); but rather we should only consider those employees in that portion of the bargaining unit in the Ministry of Government Services (i.e.: approximately 1024).

[42] In *Saskatchewan Government Employees Union v. Department of Health of the Government of Saskatchewan*, [1987] Sept. Sask. Labour Rep. 41, LRB File No. 146-87, this Board concluded that, for purposes of calculating the magnitude of a technological change implemented by an employer, the number of affected employees is compared to the whole of the bargaining unit. See also: *Westfair Foods Ltd, supra*. Support for this conclusion may be found in the express wording of s. 3(4) of Saskatchewan Regulations 171/72, which reads as follows:

> *2(1) The number of employees deemed to be "significant" for the purpose of section 42 of The Trade Union Act, 1972 shall be:*
>
> > *(a) the number specified in writing in the collective bargaining agreement between the trade union representing such employees and the employer of such employees, or*
> >
> > *(b) the number determined by the method of determining the number of employees that shall be deemed to be "significant" as set out in writing in the collective bargaining agreement between the trade union representing such employees and the employer of such employees.*
>
> *(2) If a collective agreement between an employer and a trade union does not contain provisions specifying the number of employees or the method of determining the number of employees that shall be deemed significant for the purpose of the employees covered by that collective bargaining agreement, then section 3 of these regulations shall apply.*
>
> *18 Aug 72 SR 171/72 s2.*
>
> *3 The number of employees deemed to be "significant" for the purpose of section 42 of The Trade Union Act, 1972 shall be:*
>
> *(1) where an employer has from 2 to 9 employees inclusive, 2 employees;*
>
> *(2) where an employer has from 10 to 19 employees inclusive, 3 employees;*
>
> *(3) where an employer has from 20 to 29 employees inclusive, 4 employees; and*
> *(4) where an employer has 30 or more employees, 20 per cent of his total number of employees.*
>
> *18 Aug 72 SR 171/72 s3.*

[43] The regulations are not ambiguous. They impose a series of threshold points for determining whether or not the magnitude of a change is sufficient to trigger the application of s. 43 for small, medium and large (i.e.: employers with 30 or more employees).

[44] The Union argued that measuring the impact of a technological change on the whole of their bargaining unit (which involves over 11,000 members) permits the Employer to implement what would be considered massive changes for most workplaces. Rather, the Union argued that the impact of the change should be measured against the number of employees in the direct ministry that was affected by the change. With all due respect, proceeding in the fashion suggested by the Union would remove the clarity intended by the authors of the legislation and would be irreconcilable with the express wording of the regulations. The legislation both permits the parties to negotiate their own procedures dealing with the difficult issue of technological change in the workplace and creates a clear threshold for the application of s. 43 in the event the parties have not addressed this issue. While the parties have the capacity to strike their own balance, including the option of expanding the kind, or reducing the magnitude, of change necessary to trigger the kind of requirements found in s. 43 of the *Act*, the Board has no such latitude as our jurisdiction is defined by the legislation.

[45] The evidence in these proceedings indicated that ninety-one (91) employees were directly affected by the changes implemented by the Employer on August 31 and September 1, 2010, representing an impact on less than one percent (1%) of the bargaining unit. Even making the most generous assumption as to the scope of the impact (i.e.: that all cleaning staff employed by the Ministry of Government Services would be affected by the impugned changes), only 2.03% of the employees in the bargaining unit are likely to be affected by the proposed changes. Either way, the scope of the impact of the changes implemented by the Employer fell well short of the 20% mandated by s. 3(4) of the Saskatchewan Regulations 171/72. Simply put, even assuming that the changes implemented by the Employer were of the kind defined by s. 43, they do not come close to the magnitude necessary to trigger the section. In light of these observations, the Union's allegation that the Employer has violated s. 43 of the *Act* is too remote and tenuous to satisfy the Board as to the existence of an arguable case.

[46] The Employer took the position that Article 19 of the collective agreement in force between the parties set forth specific procedures by which the parties have already agreed on how the affects on members of the bargaining unit associated with "budgetary downsizing", "transfer of services (devolution)", "reorganization" and "contracting out" are to be resolved. As a consequence, the Employer argued that s. 43(11) precluded the application of s. 43 to the changes implemented by the Employer. While the provisions of Article 19 of the Collective Agreement are extensive and cover some of the matters that would be anticipated to be included in a workplace adjustment place (particularly those related to down-sizing and job-loss), having concluded that the Union's interim application ought not be granted for other reasons, in the interest of not pre-judging the main application, we decline to rule on whether or not Article 19 is sufficient to satisfy the requirements of s. 43(11). However, the existence of Article 19 may be taken into consideration by the Board in assessing the relative labour relations harm associated with the application.

[47] Turning to the second part of the test, even if we had been persuaded that the main application demonstrated an arguable case, we were not persuaded that the balance of convenience/harm favoured granting the interim relief sought by the Union in its application. Firstly, the Union was not seeking to undo the impugned conduct of the Employer, being the changes implemented on August 31 and September 1, 2010. Rather, the Union was essentially seeking a cease and desist Order for future changes yet to be announced by the Employer. The Board saw no evidence of any specific changes or plans of change that the Employer ought to be enjoined from implementing prior to a hearing on the merits. With all due respect, the injunctive relieve sought by the Union was too vague to be granted by the Board. In addition, the Board saw no evidence (other than hearsay evidence of limited probabitive value) as to how, or even if, the impugned "Green" changes implemented by the Employer in the Ministry of Government Services were related to the Lean Management strategies. As a consequence, the Union was seeking to enjoin actions of the Employer without evidence of a sufficient nexus between those actions and the impugned conduct giving rise to the alleged violation of s. 43.

[48] Secondly, the labour relations harm that the Union was seeking to avoid was either compensable or wholly disproportionate to the labour relations harm that would be likely to arise should the Board impose the kind of vague and sweeping injunction desired by the Union, particularly so in light of Article 19 of the collective agreement wherein the parties have already agreed on provisions dealing with any job loss likely to result from the changes implemented by

the Employer. Similarly, we were not satisfied that a sufficient sense of urgency was present to justify intervention by the Board prior to a hearing on the merits.

[49] For the foregoing reasons, even if we had concluded that an arguable case existed that the changes implemented by the Employer on August 30 and September 1, 2010 were technological changes implemented contrary to s. 43 of the *Act*, we would not have been persuaded to grant the relief sought by Union in its interim application.

Conclusion:

[50] For the foregoing reasons, the Union's application for interim relief must be dismissed.

DATED at Regina, Saskatchewan, this **9th** day of **December, 2010.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson