The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant, v. WAL-MART CANADA CORP., Respondent

LRB File No. 166-10; March 14, 2012
Vice-Chairperson, Steven Schiefner; Members: Mr. Ken Ahl and Mr. John McCormick

For Applicant Union: Mr. Drew Plaxton
For Respondent Employer: Mr. John R. Beckman, Q.C. and Ms. Catherine A. Sloan

Collective Agreement - First Collective Agreement - Union seeks assistance from Board in concluding first collective agreement with employer - Board appoints agent to inquire into whether or not Board should intervene and, if so, on what terms - Board agent meets with parties and recommends intervention by Board but is unable to make recommendations on important provisions for first collective agreement - Board concludes that Union's application is premature and that insufficient collective bargaining has occurred to enable or justify intervention through imposition of first collective agreement.

The Trade Union Act, s. 26.5.

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** In these proceedings, the United Food and Commercial Workers Union, Local 1400 (the "Union") has made application to the Saskatchewan Labour Relations Board (the "Board") and seeks assistance in concluding a first collective agreement with Wal-Mart Canada Corp. (the "Employer") with respect to a unit of employees working at the Employer's store in Weyburn, Saskatchewan.

[2] Although the labour relations history of this particular workplace has been recounted in numerous decisions of this Board arising out of various applications involving these parties, the events and circumstances relevant to these proceedings were summarized by this panel (as of February 8, 2011) the first time this particular application came before the Board in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.,* (2011) CanLII 27607 (SK LRB), LRB File No. 166-10:

***Background**:*

[3] *The Union's certification application was filed with the Board on April 19, 2004.[1] On December 4, 2008, a panel of the Board (hereinafter the "original panel") rendered a decision; determined the appropriate composition of the Statement of Employment; and concluded that the Union enjoyed the support of the majority of employees in the appropriate bargaining unit.[2] In concluding that the Union enjoyed the majority support of affected employees, the original panel relied upon the card-based evidence of support filed by the Union at the time the certification application was filed with the Board.*

[4] *At the time the Union filed its application for certification (on April 19, 2004), and at the time argument on the Union's application before the original panel concluded (on December 13, 2005), The Trade Union Act, R.S.S. c.T-17 (the "Act") did not mandate that a representative vote be conducted and the Board's practice at the time was to determine whether or not a trade union enjoyed the support of a majority of the employees in a bargaining unit on the basis of card evidence of support (i.e. membership/support cards). At that time, the Act only compelled a representative vote in limited circumstances; circumstances not present before the original panel. However, in May of 2008 and before the original panel of the Board rendered its decision on the Union's certification application, s. 6 of the Act was amended so as to require a representative vote by secret ballot before a certification Order could be granted. However, no representative vote within the meaning of s. 6 of the Act (as amended) was conducted by the original panel, who, as indicated, relied on the card-based evidence of support filed by the Union with its certification application.*

[5] *On December 15, 2008, the Employer filed an application for reconsideration with the Board alleging the original panel erred in certifying the Union. Prior to a hearing on its application for reconsideration, the Employer sought and obtained, by Order of the Board dated December 24, 2008, a partial stay of obligations on the Employer respecting disclosure of employee information. In addition, the Union sought and obtained an Order of the Board dated January 16, 2009 compelling the parties to meet and bargain collectively. The Employer and the Union met for purpose of collective bargaining on February 4, 2009 and March 4, 2009.*

[6] *On March 26, 2009, the Board rejected the Employer's application for reconsideration, concluding that the changes to s. 6 of the Act (that became effective on May 14, 2008) did not apply to applications filed with the Board prior to the change in legislation.[3]*

[7] *On March 27, 2009, the Employer applied to the Saskatchewan Court of Queen's Bench seeking judicial review of this Board's decision to designate the Union as the certified bargaining agent.[4] On March 31, 2009, the Saskatchewan Court of Queen's Bench issued a stay of the Board's certification Order. On June 23, 2009, the Saskatchewan Court of Queen's Bench concluded that the Board erred in relying on membership cards for purposes of determining whether*

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1 LRB File No. 069-04.

2 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. at Weyburn, Saskatchewan, operating as Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada, et al.*, [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04, 122-04 & 124-04 to 130-04 (inclusive).

3 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04.

4 Q.B.G. No. 387 of 2009.

or not the Union enjoyed majority support in certifying the Employer's store in Weyburn. Simply put, the Court concluded that the amendments to s. 6 of the Act ought to have been given retroactive application by the Board and, thus, the Board erred in failing to conduct a representative vote. The Board's certification Order dated December 4, 2008 was quashed and the matter was remitted back to the Board.[5]

[8] *On July 22, 2009, the Union filed an application with the Saskatchewan Court of Appeal seeking to overturn the decision of the Court of Queen's Bench.*[6] *On October 14, 2010, the Court of Appeal granted the Union's application, concluding that the changes to s. 6 of the Act did not apply to applications filed and argued before the Board prior to the change in legislation.*[7] *In so doing, the Court of Appeal re-instated the Board's certification Order.*

[9] *As a result of the intervening proceedings, the status of the Union's certification Order can be summarized as follows:*

Period:	*Status of Certification Order:*
December 4, 2008 to December 23, 2008:	*Union certified to represent employees.*
December 24, 2008 to March 30, 2009:	*Partial stay imposed by Board. Obligation to bargain collectively but restriction on Employer's obligation to disclose employee information and membership cards.*
March 31, 2009 to June 22, 2009:	*Stay of Certification Order imposed by Court.*
June 23, 2009 to October 13, 2010:	*Certification Order quashed by Court.*
October 14, 2010 to present:	*Union certified to represent employees.*

[10] *The circumstances involved in these proceedings are unique in a number of respects. Firstly, there was a not-insignificant delay in the original panel rendering its decision on the Union's certification application and during this period a number of things changed, including relevant provisions of the Act.*

[11] *Secondly, a number of intervening factors have limited the Union's practical capacity to represent its members following certification. Although the Union has been certified to represent the employees in this bargaining unit for over two (2) years, the Union's authority to do so has been either restricted or entirely vacated for all but a few months of that period.*

[12] *Finally, very little in the form of collective bargaining has occurred between the parties. The first collective bargaining session (on February 4, 2009) was primarily limited to the members of the respective bargaining teams introducing themselves to each other. During the second session (on March 4, 2009), the bargaining teams exchanged initial proposals involving non-monetary terms for a collective agreement and agreed to the date for a third bargaining session. The third collective bargaining session was cancelled following the stay imposed by the Saskatchewan Court of Queen's Bench on March 31, 2009. No further collective bargaining occurred between the parties following the stay and the subsequent quashing of the Board's certification Order.*

[13] *As indicated, the Board's certification Order was reinstated by the Saskatchewan Court of Appeal on October 14, 2010. The Union's application for first collective agreement assistance was filed with the Board on October 15,*

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5 See: *Wal-Mart Canada Corp v. United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 247, (CanLII).

6 C.A. 1811 of 2009 (*United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp, et. al.).*

7 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04.

> *2010; the day after the decision of the Court of Appeal. Obviously, no collective bargaining could or did take place during that limited period of time before that application was filed. On October 15, 2010, the Union wrote to the Employer advising that the Union would like to begin collective bargaining again and asked the Employer for information as to when the Employer's bargaining representatives would be available to do so. However, on October 22, 2010, the Employer wrote to the Union and advised that it was assessing its position regarding collective bargaining in light of the Union having filed an application seeking the assistance of the Board toward the conclusion of a first collective agreement. Suffice it to say, no collective bargaining occurred between the parties following the filing of the Union's application for first collective agreement assistance.*
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> ***[14]*** *Simply put, since the Union has been certified to this workplace, the parties have met for collective bargaining on two (2) occasions, the culmination of which was the exchange of initial collective bargaining proposals involving non-monetary items.*
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> ***[15]*** *With respect to the list of issues in dispute (and statements of the positions of the parties relative to the issues in dispute), the Union filed a copy of the respective collective bargaining proposals exchanged between the parties in March of 2009. In its application, the Union took the position that no items had been agreed to by the parties and thus all issues remained in dispute, including monetary proposals (which had not been the subject of any collective bargaining between the parties). In its Reply, the Employer took the position that there was no list of issues in dispute because everything was in dispute and there was no "last offer" from either party because the only offers that had been exchanged between the parties had been their initial offers from March of 2009.*
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> ***[16]*** *The parties appeared before the Board on January 11 and 24, 2011 in Regina, Saskatchewan, at which time the Board heard argument on its authority and the appropriateness of the Board appointing an agent to meet with the parties and to report to the Board on the status of collective bargaining between the parties. In support of its application, the Union relied on the material filed in its application and in LRB File No. 184-10. The Employer's Reply was filed on January 18, 2011. The Union also filed and relied upon the affidavit of Mr. Norman Neault dated January 21, 2011.*

[3] After reviewing the legislative history and purpose of s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") (the authority by which this Board is authorized to intervene in collective bargaining through imposition of a first collective agreement) and after considering the events and circumstances relevant to the Union's application, we concluded on February 8, 2011, that it was appropriate to appoint an agent in this application. However, in appointing an agent, we made the following comments in response to the Employer's argument that it was premature for this Board to intervene in <u>any</u> form in these proceedings, including the appointment of a Board agent, because of the lack of collective bargaining that had occurred between the parties prior to the Union filing its application with the Board:

[34] *The Employer's argument on this point is not without merit. Certainly, very little in the form of collective bargaining has occurred between these parties. A number of forces have conspired to interfere with and delay the Union's desire to represent the members of this bargaining unit, including the original panel's delay in rendering a decision on the Union's certification application, the intervening changes that occurred to the Act prior to the original panel's decision, and the lack of transitional provision in the legislation to aid in the temporal application of those changes. Multiple court proceedings were required (the last of which concluded on October 14, 2010) to resolve the issue of whether or not the original panel was correct in its December, 2008 decision to certify the Union. While the resolution of this important issue took some time and during this period the Union's practical capacity to represent its members was frustrated, the Board is not prepared to (for purposes of these proceedings) ascribe any blame to either party for the delay which has occurred in these proceedings or for the limited progress that has occurred at the bargaining table.*

[35] *Simply put, through no fault of their own, the parties have accomplished little more than introductions and an initial exchange of proposals at the bargaining table since the workplace was certified over two (2) years ago. Furthermore, the parties haven't even started bargaining with respect to monetary issues. However, having considered this Board's jurisprudence with respect to the appointment of Board agents in first collective agreement applications and the purpose for which such agents are appointed, we have concluded that the lack of progress at the bargaining table is not an impediment to the appointment of a Board agent.*

[36] *Firstly, through amendments made to the Act in 2005*[8]*, the circumstances wherein the Board is authorized to intervene in the collective bargaining process was expanded (some may argue dramatically). In 2005, sub clause 26.5(1.1)(c)(iv) was added to the Act, which provision allows the Board to intervene in the collective bargaining process merely upon the passage of ninety (90) days since the Board granting a certification Order (provided the parties have bargained collectively).*

[37] *Secondly, through a number of decisions of the Board, including Sobeys Capital Inc., supra, and Winners Merchants International L.P. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, [2006] Sask. L.R.B.R. 275, 2006 CanLII 62959, LRB File No. 225-05, this Board has adopted a general preference for the routine appointment of Board agents in the first stage of hearing first collective agreement applications that (upon a cursory review) appear to satisfy the statutory preconditions for intervention set forth in s. 26.5. In the present case, those statutory preconditions include that the Union has been certified to represent the employees at this workplace; that the parties have commenced collective bargaining and have been unable to reach a collective agreement; and in excess of ninety (90) days have occurred since the Board granted its certification Order. In our opinion, the lack of substantive collective bargaining is one of many factors to be considered by the Board agent in both working with the parties and reporting to the Board. However, we are not satisfied that it ought to be an impediment to the appointment of a Board agent. In our sixteen (16) year history with first collective agreement applications, the Board has not experienced a "flood" of applications and we doubt that this determination will alter that fact. If it does, a future panel may well wish to revisit the issue of whether or not some threshold level of collective bargaining is*

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[8] *The Trade Union Amendment Act, 2005*, S.S., c.30. s.7.

> *required before the Board should exercise its discretion to even appoint a Board agent. However, today is not that day.*
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> ***[38]*** *At this early stage in the proceedings, it is difficult to assess whether the unique circumstances of this collective bargaining relationship make it more likely or less likely that the intervention by the Board is appropriate or necessary. It is hoped that a Board agent, as a neutral third party, can assist the Board with that very question. For these reasons, we believe that the appointment of a Board agent is appropriate in these proceedings and consistent with the general preference of the Board in proceeding with s. 26.6 applications.*

[4] In accordance with this Board's usual practice, the Board agent's appointment included a requirement that he/she report back to the Board within ninety (90) days or such further period upon an extension being granted by Vice-Chairperson Schiefner. The person assigned to functions as a Board agent in these proceedings was Mr. Jim Jeffery, a Senior Labour Relations Officer with the Ministry of Labour Relations and Workplace Safety[9].

[5] Upon assuming his duties, Mr. Jeffery contacted the parties and arranged dates for the resumption of collective bargaining. The parties' first meeting with Mr. Jeffery was on April 4, 2011 and, in total, the parties met for collective bargaining on eight (8) different occasions. The Employer's bargaining team consisted of Ms. Catherine Sloan, solicitor and Mr. Rick Boleck, Vice-President of Labour Relations for the Employer. Mr. Boleck was from Ontario and traveled to Saskatchewan for collective bargaining. The Union's bargaining team consisted of Ms. Anouk Collet, a National Representative for United Food and Commercial Workers and alternating Mr. Norm Neault, the Union's President, and Mr. Darren Kurmey, the Union's Secretary-Treasurer. Ms. Collet was from Quebec and she also traveled to Saskatchewan for collective bargaining.

[6] On May 3, 2011, Mr. Jeffery reported to the Vice-Chairperson seeking an extension of this mandate. In his report, Mr. Jeffery indicated that progress was occurring at the bargaining table. In the words of Mr. Jeffrey "*[t]he time spent has not been fruitless, as the parties have been able to conclude agreement on a modest number of issues*". On this occasion, both parties agreed that an extension of Mr. Jeffery's appointment was appropriate. On May 4, 2011, Mr. Jeffery's mandate was extended for an additional period of sixty (60) days.

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[9] Although the Board originally named Mr. F.W. Bayer, the Board Registrar, as the agent in these proceedings, in accordance with the authority granted to him, Mr. Bayer delegated his authority to Mr. Jeffery on or about February 14, 2011.

[7] In May of 2011, Mr. Jeffery sought additional meeting dates from the parties but was able to secure only a few dates for the resumption of collective bargaining. As a result, Mr. Jeffery attempted to facilitate a conference call between the parties but, through a communication error, the Union failed to participate. Nearing the end of his extended mandate, and without any collective bargaining having occurred during this period, Mr. Jeffery requested a further extension of his appointment. A hearing was convened by the Vice-Chairperson to hear submissions from the parties as to whether or not the Board agent's mandate should be extended. Although the Employer agreed to an extension of the Board agent's mandate, the Union objected. After hearing from the parties, the Vice-Chairperson declined to extend Mr. Jeffery's appointment as Board agent. As a result, Mr. Jeffery sought final submissions from the parties in writing and prepared his report to the Board.

[8] Mr. Jeffery filed his report with the Board on or about July 8, 2011. In this report, Mr. Jeffery recounted his experience with the parties, he commented on his impressions as to the status of collective bargaining and the efforts made by the parties to achieve a collective agreement, and he provided his recommendations with respect to intervention by the Board.

[9] Upon receipt of the Board agent's report, the matter was set down for hearing on November 8, 2011 at stage-two (i.e.: a determination as to whether or not the Board should exercise its discretion to intervene). However, at the outset of the hearing, the Employer took the position that the within proceedings were stayed by operation of law because of related proceedings taking place before the Saskatchewan Court of Appeal. In the alternative, counsel for the Employer asked the Board to exercise its discretion to adjourn the proceedings pending resolution of the matters in issue before the Court of Appeal. In a decision[10] dated December 6, 2011, we concluded that the proceedings taking place at the Court of Appeal did not preclude this Board from proceeding with the within application. We also concluded that more harm would ensue if the Employer's adjournment request was granted that if it were denied. In the result, we denied the Employer's request that these matters be adjourned. On January 4, 2012, the Employer applied to the Saskatchewan Court of Appeal seeking essentially the same remedy from the Court that was denied by this Board. In a decision[11] dated January 13, 2012, the Employer's application was dismissed by the Court of Appeal.

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[10] See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp*., (2011) CanLII 78586 (SK LRB), LRB File No. 166-10.

[11] See: *United Food and Commercial Workers, Local 1400 v. Wal-mart Canada Corp., et. al.*, (2012) SKCA 2 (CanLII), CA No. 2181.

[10] The parties appeared before this Board next on January 19, 2012. At this time, it was agreed by the parties that the Board would first consider whether or not it ought to intervene pursuant to s. 26.5 of the *Act* and would defer to another day the issue of how the Board might intervene (in the event the Board concluded that intervention was appropriate and necessary).

[11] The Union called Mr. Norm Neault, the President of the United Food and Commercial Workers, Local 1400. Mr. Neault confirmed that the parties met for collective bargaining on two (2) occasions prior to the Union's first collective agreement application. Mr. Neault testified that during these meetings the parties introduced their respective bargaining team and exchanged initial proposals. While additional dates for bargaining were agreed to by the parties, no bargaining occurred after the Court of Queen's Bench suspended and then later quashed[12] the Union's certification.

[12] Mr. Neault testified that the parties met on eight (8) occasions for collective bargaining following the appointment of the Board agent. Mr. Neault confirmed that all of these meetings took place in April of 2011 and that no collective bargaining occurred between the parties during the period of time that the Board agent's mandate was extended for an additional sixty (60) days. In Mr. Neault's opinion, no significant movement on the part of the Employer occurred during collective bargaining. While Mr. Neault described collective bargaining as initially cordial, a number of irritants arose during collective bargaining that escalated tensions at the bargaining table.

[13] Firstly, at the first collective bargaining meeting on April 4, 2011, the Union asked the Employer for its wage rates and benefit plans and policies. Mr. Neault indicated that the Employer expressed reluctance in providing this information to the Union believing that at least one of the Union's bargaining team, Ms. Collet, who had been involved in collective bargaining with the Employer's store in Saint-Hyacinthe, Quebec, should already have this or similar information. The Union representatives were frustrated by the Employer's response because the Employer expected the Union to get information that it felt was necessary for collective bargaining from another local of the United Foods and Commercial Workers Union. Furthermore, the information that the Union was expected by the Employer to use involved a store in another province and would need to be translated from French. Mr. Neault indicated that

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[12] See: *Wal-Mart Canada Corp v. United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 247, (CanLII).

the Union received a copy of the Employer's 2009 wage scale during proceedings before this Board in LRB File No. 177-10. However, Mr. Neault indicated that the Union wanted more current information from the Employer. In cross-examination, Mr. Neault admitted that the Employer provided the Union with a copy of its policies on bereavement leave and leaves of absence on April 7, 2011 and that the Employer answered specific questions from the Union regarding its policies and benefits. The Employer also provided the Union with a copy of its wage scale on April 8, 2011. Nonetheless, Mr. Neault felt that the Employer wasn't voluntarily providing the Union with all the information the Union felt it needed for collective bargaining. Simply put, the Union had to make specific requests for the information it wanted, when the Union wanted the Employer to simply provide all of its policies. As Mr. Neault described it "*asking for the information on [the Employer's] policies was like a fishing expedition"*.

[14] Secondly, during collective bargaining, the Union sought greater access for Union representatives to the workplace. While the Employer resisted such access, the parties did agree that access to the workplace by Union officials would be the subject of bargaining. During bargaining, the parties discussed permissible and non-permissible access to the workplace by Union representatives. However, on or about April 27, 2011, a representative of the Union attended to the workplace in what the Employer believed was a violation of the agreement between the parties regarding permissible and non-permissible access. On April 28, 2011, while the Union apologized, the Employer refused to participate in collective bargaining for much of that day and, when collective bargaining resumed, the Employer gave notice to the Union that it intended to rely upon *The Trespass to Property Act*, S.S. 2009, c.T-20.2, and would prosecute representatives of the Union attempting to access the workplace. Mr. Neault described the Employer's action as "*threatening*" and testified that the tone at the table was decidedly tense between the parties thereafter. As Mr. Neault described it "*the incident had a chilling effect on collective bargaining*".

[15] Mr. Neault testified that the Union is the bargaining agent for a number of units of employees in the retail sector. Mr. Neault indicated that it had a standard template for collective agreements with employers in the retail sector and that this template is modified during collective bargaining based on negotiations and the policies, benefits and wages of each particular employer. In cross-examination, Mr. Neault admitted that the Union had wanted to use its standard template and that the Employer took the position that the Union's standard template for

collective agreements would not work for it because of a number of operational factors that the Employer considered were unique to its stores, including its sophisticated scheduling procedure.

[16] Mr. Neault testified that the Union has had little communication with or from any of the employees within the bargaining unit since the unit was certified by this Board. Mr. Neault testified that none of the employees in the bargaining unit came forward to assist the Union or to participate in collective bargaining with the Employer. Mr. Neault indicated that he wasn't surprised with the limited communication from employees and attributed the lack of communication and participation by members of the bargaining unit to fear of reprisal by the Employer and the Union's lack of access to the workplace to communicate with its members. In cross-examination, Mr. Neault admitted that the Employer agreed to post notices prepared by the Union regarding any meetings the Union wished to hold with members of the bargaining unit (provided such meetings did not occur in the workplace). However, the Union declined the Employer's offer.

[17] Mr. Neault testified that, generally speaking, it takes approximately ten (10) to twelve (12) rounds of good collective bargaining for the Union to negotiate a collective agreement with a retail employer and that this can take up to a year and a half to complete. Mr. Neault testified that the sticking points in collective bargaining are usually wages and benefits. But that sometimes other issues, such as an acceptable grievance procedure, can also become a stumbling point to obtaining a satisfactory agreement between the parties.

[18] Mr. Neault stated his opinion that, without intervention by this Board, negotiations with the Employer would go on forever. Mr. Neault expressed his belief that the Employer was just surface bargaining with no real intention or desire to conclude a collective agreement with the Union. Mr. Neault's frustration with collective bargaining with the Employer extended to his belief that the Board agent could not do much more with the parties in terms of helping them achieve a voluntary collective agreement.

[19] The Employer elected to call no evidence.

[20] Mr. Jeffery, in his report to the Board, indicated that while the parties were unsuccessful in voluntarily concluding a collective agreement with his assistance, they agreed on approximately fourty (40) proposals or provisions (or portions of provisions) for a collective

agreement. On the other hand, these proposals tended to involve the interstitial language in a collective agreement that is often not particularly controversial. On substantive matters, little agreement was achieved by the parties.

[21] In his report to the Board, Mr. Jeffery recommended that the Board should intervene to assist the parties in concluding their first collective agreement. Mr. Jeffrey appears to have based this recommendation on two (2) observations he made while at the table with the parties:

1. The length of time that has elapsed since the Union began its organizing drive (i.e.: being over seven (7) years) and the ongoing dispute with respect to the Board's certification Order arising out of Mr. Button's rescission application[13].
2. Mr. Jeffery's observations that the relationship between the parties was strained and his disappointment in the effort both parties put forth in collective bargaining. As Mr. Jeffery put it "*[t]o be frank, I was disappointed with the effort put forth by the parties. Positions were, for the most part simply restated, with minor amendments. … The parties have given no indication that they would find the accommodations or concessions necessary to conclude a collective agreement. The Employer was resistant to accepting any of the typical union security clauses, such as seniority rights and access rights, For its part, the Union was still seeking the "promised land", and unwilling to withdraw proposes on significant cost issues, including health and benefits, retirement benefits and others*."

[22] In furtherance of his recommendation that the Board should intervene in collective bargaining (through imposition of terms of a first collective agreement between the parties), Mr. Jeffery made recommendations on approximately fifty-one (51) proposals or clauses that were negotiated by the parties but upon which they could not agree. On the other hand, it should be noted that Mr. Jeffery declined or was unable to make recommendations to the Board on approximately thirty (30) proposals or clauses, including most of the contentious issues in dispute between the parties. For example, Mr. Jeffery was unable or unwilling to make recommendations on provisions dealing with the Union's general access to and activities at the workplace[14], scope of bargaining unit work[15], notice or pay in lieu of notice on layoff[16], overtime

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13 LRB File No. 177-10.
14 Articles 5.55(c) and 5.07 of the Union's proposals.
15 Article 5.13 of the Union's proposals.
16 Article 9.05 of the Union's proposals.

pay[17], annual vacation[18], worker's compensation supplement[19], health and welfare benefits[20], automatic wage escalator and premium[21], training for promotions[22], severance pay[23], and the all important schedule of wages.

[23] Finally, it should be noted that the parties are not in agreement with the Board agent's recommendations on the items where he did make recommendations on specific bargaining proposals. For example, the Union objects to a number of Mr. Jeffery's recommendations where he did not accept or where he modified the Union's proposals. Similarly, the Employer objects to a number of Mr. Jeffery's recommendations where he did not accept or where he modified the Employer's proposals. Simply put, few of Mr. Jeffery's recommendations were satisfactory to the parties.

Argument of the Parties:

[24] The Union agreed with the Board agent's recommendation that we ought to intervene by imposing a first collective agreement between the parties. The Union argued that a number of factors supported intervention by the Board, including the fact that the Union applied for certification in 2004; that it had to wait until 2008 before a certification Order was issued by this Board; that this Board's certification Order was subsequently stayed, then quashed and not reinstated until October 14, 2010. The Union relied upon the decision of this Board in *Saskatchewan Government Employees' Union v. Namerind Housing Corporation*, [1998] Sask. L.R.B.R. 542, LRB File No. 189-97, as standing for the proposition that the passage of time is a factor that may be considered by the Board in deciding to intervene pursuant to s. 26.5 of the *Act* and impose a first collective agreement.

[25] The Union also argued that the Employer was not willing to bargain in good faith. Rather, the Union argued the Employer was merely going through the motions, engaging in surface bargaining and delaying the progress of collective bargaining through litigation; all the while waiting for the Union to be decertified. The Union pointed to the Employer's litigation in its original certification application and its recently failed efforts to stay these proceedings as evidence from which this Board could infer an underlying strategy of delay on the part of the

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17 Article 11 of the Union's proposals.
18 Article 12 of the Union's proposals.
19 Article 15.02 of the Union's proposals.
20 Article 15.05 of the Union's proposals.
21 Articles 17.07 & 17.15 of the Union's proposals.
22 Article 18.04 of the Union's proposals.
23 Article 22 of the Union's proposals.

Employer. The Union also pointed to the Employer's proposals at the bargaining table; proposals that the Union viewed as unreasonable. The Union argued that, without this Board's intervention, it would be impossible for the parties to achieve a first collective agreement given the history of the relationship between the parties and the Employer's ongoing resistance to unionization at any of its stores and its specific efforts to resist the Union's efforts to represent the employees at its store in Weyburn, Saskatchewan. The Union took the position that, without assistance from the Board, further collective bargaining between the parties would be fruitless and the employees would never know the benefits of union representation.

[26] The Union argued that this Board ought to intervene and asked this Board to set the matter down for consideration of the terms that this Board ought to impose in the first collective agreement. The Union argued that the absence of recommendations from the Board agent on various proposals, including a number of key proposals, ought not be seen as an impediment to intervention by this Board. In this regard, the Union argued that at least three (3) options were available to the Board. The Board could hear from the parties and impose a collective agreement based on the terms we deemed appropriate or (in the alternative) the Board could remit the matter back to the Board agent to continue working with the parties or (in another alternative) the Board could also order arbitration by a single arbitrator either with respect to the whole of the collective agreement or any particular provisions which this Board felt unable to impose (such as the matters for which no recommendations were made by the Board agent).

[27] The Employer argued that the Union's first collective agreement application was premature and that it was merely filed as a tactical manoeuvre in anticipation of a rescission application coming forward by members of the bargaining unit. The Employer argued that intervention by the Board is unnecessary and inappropriate as there has been no breakdown in bargaining. In this regard, the Employer pointed to the fact that the Union filed its first collective agreement application with the Board the day after its certification Order was restored by the Saskatchewan Court of Appeal and, at that point in time, only two (2) days of collective bargaining had occurred between the parties.

[28] The Employer argued that this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95, described s. 26.5 of the *Act* as being a vehicle used sparingly by the Board to intervene only where circumstances demand it and not, as in this case, to shore up a potential

imbalance in bargaining power. The Employer argued that in *Prairie Micro-Tech, supra*, this Board recognized that if it were to intervene too often or too quickly, intervention by the Board would quickly become a substitute for collective bargaining and that parties would no longer compromise or make difficult decisions at the bargaining table; rather they would merely position themselves for arbitration. The Employer argued that, if the Board were to intervene under the present circumstances, where so little bargaining had occurred, it would have a corrosive and chilling effect on all collective bargaining in the province.

[29] The Employer argued that the mere lapse of time since the Union became certified to represent this unit of employees can not be the sole basis for intervention by this Board, particularly when the hiatus in collective bargaining was largely due to inherent and unavoidable delays in the various Court challenges involved in this case. The Employer took the position that collective bargaining had barely began at the time the Union filed its application and that insufficient bargaining took place for it to have even been possible for the parties to have concluded a collective agreement let alone for an impasse to have occurred. Simply put, the Employer argued the mere fact that the Union's certification Order was quashed for a period of almost a year and a half should not be a basis for intervention by this Board in light of the failure of the Union to establish that a breakdown or impasse in collective bargaining had occurred between the parties.

[30] The Employer noted that important issues, such as wages and benefits, were not even discussed by the parties beyond each party simply outlining their respective positions. On this point, the Employer pointed to the Union's position on wages. In its proposals, the Union had asked for a $3.00 per hour increase for all employees retroactive to December 4, 2008 plus an additional $2.00 per hour increase across the board for each year of the collective agreement. In his report, Mr. Jeffery noted that the parties spent little time in his presence bargaining collectively on the issue of wages and that the Union did not even provide its rationale for its wage proposal until July 4, 2011. The Employer argued that this is evidence that collective bargaining on important issues such as wages and benefits was still in its infancy and that nothing close to an impasse could have occurred if the parties have not even had time to seriously discuss these kinds of issues.

[31] The Employer asked that the Union's first collective agreement application be dismissed and that the parties return to collective bargaining in the ordinary course.

Relevant Statutory Provisions:

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

> ***First collective bargaining agreements***
> *26.5(1) If the board has made an order pursuant to clause 5(b), the trade union and the employer, or their authorized representatives, must meet and commence bargaining collectively within 20 days after the order is made, unless the parties agree otherwise.*
> *(1.1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
>
> > *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> >
> > *(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> >
> > *(c) one or more of the following circumstances exists:*
> >
> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
> > >
> > > *(ii) the employer has commenced a lock-out;*
> > >
> > > *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6);*
> > >
> > > *(iv) 90 days or more have passed since the board made an order pursuant to clause 5(b).*
>
> *(2) If an application is made pursuant to subsection (1.1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.*
> *(3) An application pursuant to subsection (1.1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.*
> *(4) All materials filed with the board in support of an application pursuant to subsection (1.1) must be served on the other party within 24 hours after filing the application with the board.*
> *(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:*
>
> > *(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and*
> > *(b) serve on the applicant a copy of the list and statement.*
>
> *(6) On receipt of an application pursuant to subsection (1.1):*
>
> > *(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and*
> > *(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:*
> >
> > > *(i) conclude, within 45 days after undertaking to do so, any term or terms of a first collective bargaining agreement between the parties;*

> *(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.*
>
> *(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:*
>
> *(a) evidence adduced relating to the parties' positions on disputed issues; and*
>
> *(b) argument by the parties or their counsel.*
>
> *(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.*
>
> *(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*
>
> *(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*

Analysis:

[33] Section 26.5 was enacted as part of the October 1994 amendments[24] to the *Act*. In *Prairie Micro-Tech, supra*, the Board considered this provision for the first time and adopted a two (2) stage procedure for hearing and making determinations with respect to s. 26.5 applications. The first stage involves the appointment of an agent. The mandate of the Board agent is to perform two (2) separate yet related tasks. Initially, the Board agent's function is that of a conciliator. He/she attempts to assist the parties in their collective bargaining process by encouraging (and often helping) them to resolve whatever collective bargaining issues may be in dispute and by encouraging (and often suggesting) the kind of compromises that are necessary to obtaining a first collective agreement. If, after working with the Board agent, the parties are still unable to agree on the terms of a first collective agreement, the Board agent's function then becomes that of an *amicus* to the Board. In this latter capacity, the agent reports to the Board on the progress of collective bargaining and makes recommendations firstly on whether or not the Board should intervene to assist the parties to conclude a first collective agreement and, if so, on the potential terms of said intervention.

[34] The second stage in the proceedings occurs following receipt of the Board agent's report. The Board agent only has the power to make recommendations and this occurs only if the parties are unable to agree on their own as to the terms of a first collective agreement.

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[24] *The Trade Union Amendment Act, 1994*, S.S. c.47 s.15.

Although of valuable assistance to the Board in understanding the issues in dispute between the parties, the Board agent's report is not binding on either the Board or the parties. The final determination as to whether or not it is appropriate for the Board to assist the parties through intervention is that of the Board and this determination occurs only at the second stage in the process.

[35] As noted, the parties have agreed that we should first consider the question of whether or not any further intervention by this Board pursuant to s. 26.5 of the *Act* is appropriate and/or necessary in these proceedings. In the event we agree that some form of further intervention by this Board is appropriate and necessary, the parties would be granted the opportunity to call evidence and make argument as to the nature of said intervention and/or the specific terms that may be or ought to be imposed by the Board in a first collective agreement.

[36] In the *Prairie Micro-Tech* decision, this Board reviewed the origins of first contract arbitration, the nature of statutory provisions in other jurisdictions, and the jurisprudence and academic commentary in which the character and scope of first contract arbitration had been discussed. The Board went on to outline the general conclusion it reached from its review:

> *A number of features can be identified, however, from examining the experience in other jurisdictions than our own. We can see, for example, that all of the legislative initiatives which have been put in place represent an acknowledgment of the peculiar problems which can arise in the context of an infant collective bargaining relationship. A review of the jurisprudence shows that the problem which most often gives rise to the use of first contract arbitration is the obduracy or illegal conduct of an employer who is determined to thwart or ignore the trade union. Other problems may also threaten to destroy the relationship, such as, for example, the emergence of an insoluble industrial dispute, or roadblocks created by the incompetence or inexperience of negotiators on either side.*

[37] In *Prairie Micro-Tech, supra,* the Board also considered the threshold criteria for Board intervention as set forth in s. 26.5 (at that time[25]) and made the following observation:

> *Section 26.5 as a whole allows the Board to make the determination as to whether assistance with the first agreement is appropriate. It is our opinion that, in assessing the circumstances of any application, the Board should be mindful of our overall objective of promoting - rather than replacing - collective bargaining. The occurrence of an industrial dispute, or the commission of one or more unfair labour practices under Section 11 (1)(c) or 11(2)(c), do not in themselves confer on either party an automatic entitlement to the imposition of a first contract. Even in the*

[25] A fourth criterion, being the passage of 90 days or more since certification, was added in 2005. See: *The Trade Union Amendment Act, 2005*, S.S. 2005, c30, s.7.

> *context of the conclusion of a first agreement, an industrial dispute may be a tolerable component of a course of bargaining which is essentially healthy.*
>
> *In our view, the overall purpose of the provision is to intervene, where the situation warrants it, in an attempt to preserve the collective bargaining relationship, and the ability of the trade union to continue to represent employees.*
>
> *. . .*
>
> *It is impossible to say how hard or soft this Board would be in its application of these criteria in any particular circumstances. Clearly, the conduct of the parties, the course of bargaining, the effectiveness of third party intervention, and other factors would all have an effect on the degree to which it is appropriate to intervene. What we are trying to signal here is that this Board intends to take a cautious approach to providing assistance with the conclusion of first collective agreements, and that we will do everything we can to ensure that the onus continues to rest on the parties to reach a solution through bargaining.*

[38] Since the *Prairie Micro-Tech* case, this Board has been called upon to intervene in collective bargaining on a modest number of occasions. For example, in *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1997] Sask. L.R.B.R. 68, LRB File No. 053-96, the Board agreed to intervene by imposing terms involving thirteen (13) articles of a first collective agreement between the parties. In the *Madison Development Group* case, the Board agreed to intervene approximately twenty-seven (27) months after certification of the union[26] but did not elaborate on the "*troubled history of the relationship*" between the parties other than to say that their "history" did not lead the Board to have confidence that the parties would be able to conclude an agreement in a timely and constructive fashion without assistance.

[39] In *International Union of Operating Engineers, Local 870 v. Rural Municipality of Coalfields No. 4*, [1998] Sask. L.R.B.R. 280, LRB File No. 326-97, the Board agreed to intervene in collective bargaining by imposing the last two (2) items that remained in dispute between the parties approximately one (1) year after certification. In the *R.M. of Coalfields* case, the Board noted that the parties had negotiated almost the whole of a collective agreement and, despite intense bargaining on these last two (2) issues, the parties were at an impasse. In agreeing to intervene, the Board noted that further delay in achieving a collective agreement between the parties, when only two (2) items remained as "deal breakers", was highly undesirable and risked the erosion of an otherwise healthy relationship between the parties. In *Saskatchewan Government Employees' Union v. Namerind Housing Corporation*, [1998] Sask. L.R.B.R. 542, LRB File No. 189-97, the Board agreed (albeit reluctantly and contrary to the recommendation of

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[26] See: LRB File No. 189-94. Certification Order dated October 7, 1994.

the appointed Board agent) to intervene at a point that was approximately twenty-seven (27) months after certification. At the time the Board agreed to intervene, the primary issue in dispute was the employer's monetary package. In agreeing to intervene, the Board noted that the normal tools available to the parties to overcome their impasse (i.e.: strike or lock-out) were not readily available because of the small size of the bargaining unit, the reduction in funding, limited financial options available to the employer, and the sensitive nature of the relationships between the employees, the employer and their client groups. In *Off The Wall Productions Ltd v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1999] Sask. L.R.B.R. 393, LRB File No. 209-98, the Board agreed to intervene by imposing the few remaining matters in dispute between the parties approximately twenty-one (21) months after certification[27].

[40] In *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2002] Sask. L.R.B.R. 16, LRB File No. 092-00, the Board agreed to intervene in collective bargaining approximately twenty-six (26) months after certification, and following extensive and protracted negotiations by the parties. In this case, the Board concluded that, despite the concerted efforts of the parties (including significant movement on the part of the union), bargaining had broken down and the parties were unlikely to reach a collective agreement if left to their own devices. In this case, the Board observed that the remaining issues were few but complex and would have been difficult to resolve even in a mature bargaining relationship. In *International Union of Operating Engineers Hosting and Portable and Stationary, Local 870 v. Rural Municipality of Estevan No. 5*, [2003] Sask. L.R.B.R. 544, 2003 CanLII 62857 (SK LRB), LRB File No. 034-03, the Board agreed to intervene in collective bargaining in circumstances where the parties had made substantial progress in collective bargaining and had concluded all but two (2) outstanding issues. In the *R.M. of Estevan* case, the Board observed that the last two (2) remaining issues in dispute were relatively minor and more than eighteen (18) months had passed since certification.

[41] On the other hand, in *Board of Education of the Tisdale School Division No. 53 v. Canadian Union of Public Employees, Local 3759*, [1996] Sask. L.R.B.R. 503, LRB File No. 078-96, the Board declined to intervene in collective bargaining approximately two (2) years after certification because it felt that the parties had not yet encountered the kind of difficulties in bargaining sufficient to justify intervention by the Board. In the *Tisdale School Division* case, the

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[27] See: LRB File No. 257-97. Certification Order dated October 7, 1997.

Board noted that mere frustration and disappointment at the difficulties confronted in negotiating thorny issues, such as wages, did not justify intervention by the Board. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa*, [2001] Sask. L.R.B.R. 345, LRB File No. 193-00, the Board declined to intervene in collective bargaining between the parties based on a number of factors, including the recommendation of the Board agent, and the fact that the parties had not engaged in meaningful discussions with the Board agent; rather the parties had withheld possible settlement proposals based on their perception that they would get a "better deal" from the Board. At the time of the Board's decision, it was approximately seventeen (17) months after certification.

[42] Certain conclusions can be drawn from a review of these and other cases regarding the circumstances under which this Board will intervene in collective bargaining pursuant to s. 26.5 of the *Act*.

[43] Firstly, intervention by the Board takes two (2) forms. The first form of intervention is the appointment of a Board agent who, at least initially, performs the function of a conciliator and whose initial mandate is to assist the parties in concluding their own collective agreement. The second form of intervention involves the Board imposing the terms of a first collective agreement on the parties or appointing an arbitrator to do so (also known as "first contract arbitration"). See: *Prairie Micro-Tech, supra*.

[44] Secondly, different tests are used by this Board depending on the form of intervention. Generally speaking, at the first stage, this Board has been willing to routinely appoint an agent whenever the threshold requirements of s. 26.5(1.1) are satisfied. In this regard, it should be noted that in *United Food and Commercial Workers Union, Local 1400 v. Sobeys Capital Inc.*, [2005] Sask. L.R.B.R. 483, 2005 CanLII 63023 (SK LRB), LRB File No. 128-05, the Board telegraphed that an agent could even be appointed by an *in camera* panel of the Board if no serious issues existed, and that the pending application satisfied the requirements of the *Act*. However, in notable contrast, intervention by imposing the terms of a first collective agreement is neither routine nor automatic. Rather, at the second stage of an application, the imposition of the terms of collective agreement by the Board is reserved for circumstances where negotiations between the parties have broken down (or reached an impasse) and where there are sound labour relations reasons that justify intervention by the Board. In this regard it is noted that first agreement arbitration is intended to reinforce, but not to replace, good faith collective

bargaining by the parties. See: *Prairie Micro-Tech, supra*. As this Board stated in the *Madison Development Group* case, first contract arbitration was not intended to provide a means of escape from the difficulties of vigorous collective bargaining or as a means of achieving better terms or conditions in a first contract than one might expect as the result of bargaining in a new relationship. Because of these concerns, this Board has demonstrated reluctance to intervene through imposition of the terms of a first collective agreement except in the clearest of cases.

[45] The third conclusion that may be drawn from these cases is that intervention by the Board (in the form of imposing the terms of a collective agreement) has generally only occurred following extensive, if not protracted, negotiations by the parties. See: *Saskatchewan Indian Gaming Authority Inc., supra*. This Board has been unwilling to impose the terms of a first collective agreement where one party or the other is merely disappointed with or frustrated by progress at the bargaining table. See: *Tisdale School Division, supra*. Similarly, the Board has been unwilling to impose the terms of a first collective agreement where the parties have failed to engaged in meaningful collective bargaining but rather have merely positioned themselves for what they hope is a better deal from the Board. See: *Temple Gardens Mineral Spa, supra*.

[46] Fourthly, although the nomenclature may imply otherwise, this Board does not have a history of imposing the whole of a first collective agreement. In the *Prairie Micro-Tech, supra*, this Board theorized that, while it was possible for the Board to impose an entire collective agreement under the authority of s. 26.5, it would take seriously egregious conduct on the part of an employer and/or a particularly bleak outlook as to the state of collective bargaining, before such a remedy would be contemplated by the Board. Intervention by the Board (in the form of imposing the terms of a collective agreement) has generally only involved the few remaining items in dispute between the parties when an impasse occurs. See: *R.M. of Coalfieds, supra, Saskatchewan Indian Gaming Authority Inc., supra, and R.M. of Estevan, supra*. Arguably, the time constraints for intervention imposed on this Board and on an arbitrator by s. 26.5 make impracticable the imposition of terms on anything other than a few, focused issues.

[47] Finally, while the report of the Board agent provide valuable assistance in understanding the state of collective bargaining and the efforts the parties have made toward concluding an agreement on their own, the Board is not required to follow the recommendations of the Board agent. See: *Namerind Housing, supra*.

[48] Having considered the arguments of the parties in the present application and for the reason set forth herein, we have concluded that further intervention by the Board pursuant to s. 26.5 of the *Act* is premature at this point in time. In coming to this conclusion, we acknowledge that the Union has experienced many disappointments and frustrations in its unwavering efforts to represent this particular unit of employees. However, the evidence also clearly and unequivocally establishes that collective bargaining between the parties is still in its infancy and that it had barely began at the time the Union filed its application seeking intervention from this Board. In this regard, we note that so little bargaining has occurred between the parties that Mr. Jeffery was unable or unwilling to make recommendations on almost all matters of substance in dispute between the parties, including on the monetary issues. We also note that the collective bargaining that occurred between the parties fell far short of what Mr. Neault testified could be expected for employers in the retail sector. In our opinion, insufficient collective bargaining has occurred between the parties to justify further invention by the Board.

[49] The Union argued that the unusual delay it has experienced in representing this workplace should motivate this Board to intervene. While we acknowledge that the Union began its organizing effort at this workplace in 2004, in our opinion, the passage of time for purpose of s. 26.5 is better measured from the date of certification; not the date of application. See: *Namerind Housing Corp, supra*. In this regard, we note that it has been approximately thirty-nine (39) months since the Union was certified and that this is a significant period of time for the employees of a newly certified workplace to go without the benefits of a first collective agreement. Not only do the employees of this workplace; employees who originally supported the Union's application for certification; not have a first collective agreement, arguably they have enjoyed few (if any) of the benefits of representation in the many months since the Union was certified by this Board. Nonetheless, in our opinion, the passage of time alone can not justify intervention by the Board; particularly so when this Board has not ascribed any blame to either party for the delay which has occurred.

[50] While delay is a factor to be considered by the Board, other factors, such as the current state of collective bargaining, the efforts made by the parties to conclude a collective agreement on their own, and the reasons an impasse has arisen, are equally if not more important. In the present case, collective bargaining between the parties has barely begun and little effort appears to have been made by either party to conclude a collective agreement. More

importantly, the parties haven't even had meaningful discussions on monetary issues and the Board agent's report is of little assistance on these matters. In our opinion, the passage of time alone, even if significant, does not outweigh the obligation on the parties to first attempt to conclude their own collective agreement.

[51] We also note that the Union argued that the Employer's conduct in excluding it from the workplace had undermined its ability to represent the employees in the workplace. In addition, the Union argued that the Employer's positions on various bargaining proposals were "unreasonable" and indicative of mere surface bargaining. Simply put, the Union took the position that the Employer had no real intention of concluding a collective agreement and that it was merely waiting for an inevitable rescission application to remove the Union from the workplace.

[52] As we have previously indicated, we are disappointed that the Employer's non-solicitation policy does not make better accommodation for representatives of the Union in the workplace. However, our disappointment in the Employer's application of its non-solicitation policy is not the same thing as a finding of a violation of the *Act* and, thus far, this Board has not found the Employer to have violated the *Act* in the application of its non-solicitation policy. Access to the workplace was the subject of collective bargaining between the parties and it is not apparent that the Employer's conduct or its positions at the bargaining table were so unreasonable or that the Employer was sufficiently uncompromising in collective bargaining that this Board could reasonably infer a failure to bargain on its part or the kind of obduracy or illegal conduct necessary to justify intervention by this Board.

[53] In our opinion, the parties haven't spent enough time at the table for this Board to make any reasonable inferences other than to observe the obvious; that the parties have commenced collective bargaining, have exchanged initial proposals, have found some agreement on basic language issues, and have barely begun discussions on the typically thorny issues in dispute in any collective bargaining relations; namely, benefits and monetary issues. All of this, including the tensions that arose between the parties while at the table, is entirely consistent with the early days of collective bargaining.

[54] The Union may well have a valid reason to doubt the Employer's commitment to the goal of concluding a collective agreement. Nonetheless, collective bargaining must be

allowed to run its course. In this application, the Union appeared to be taking the position that collective bargaining with this particular employer would be a waste of its time and sought the assistance of this Board to avoiding the necessity of having to doing so. In our opinion, to intervene under these circumstances would be contrary to our jurisprudence and would signal that intervention by this Board pursuant to s. 26.5 of the *Act* had become an automatic right. We would, in effect, be signaling the Board's willingness to intervene irrespective of whether or not the parties have attempted to conclude a collective agreement by their own means. In our opinion, doing so would have a harmful effect on collective bargaining in this province and would discourage any parties from engaging in meaningful collective bargaining if they believed they might achieve a better deal from the Board or through arbitration and were willing to take that risk. In this regard, we note that labour boards across Canada have cautioned about the "chilling", "corrosive" or "narcotic" effect of imposing collective agreements without asking the parties to first make reasonable efforts to conclude an agreement on their own. See: *Yarrow Lodge Ltd. v. Hospital Employees Union; Bevan Lodge Corporation v. Hospital Employees Union; Louisiana-Pacific Canada Ltd. v. Communications, Energy and Paperworkers Union of Canada*, (1994) 21 C.L.R.B.R. (2nd) 1, B.C.L.R.B. No. B444/93. See also: *Prairie Micro-Tech, supra*.

[55] Further complicating the Union's request for assistance is that it is essentially asking this Board to impose the whole of a collective agreement not just the few remaining matters that this Board typically sees in first collective agreement applications. While it is theoretically possible that we could agree to do so pursuant to s. 26.5, the more obvious conclusion is that the Union's application seeking first collective agreement assistance is premature. With all due respect, the limited work done by the parties at the bargaining table in the present application provides a wholly inadequate foundation for this Board or an arbitrator to impose anything close to the range of issues that are in dispute between the parties; particularly so within the time constraints for intervention set forth in s. 26.5. As indicated, our agent was unable or unwilling to making recommendations on most of the substantive matters in dispute between the parties based on the limited bargaining that had occurred. This Board is now being asked to do that which our agent could not; to know what would provide a fair and reasonable settlement under the circumstances or what the parties might have achieved in collective bargaining had they been successful and to do so essentially for the whole of a collective agreement. In our opinion, the parties haven't done enough bargaining to provide a reasonable foundation for this Board to further intervene into their relationship; particularly so on the broad range of issues that are still in dispute between the parties.

[56] As we indicated in our Reasons for Decision when we agreed to appoint a Board agent, it was difficult for us to then assess whether the delays that occurred in the Union becoming certified and the lack of collective bargaining that had occurred between the parties made it more likely or less likely that intervention by the Board would be appropriate and necessary. We now have the benefit of hindsight and the observations of our agent having worked with the parties at the bargaining table. In this regard, we note that Mr. Jeffery "*was disappointed with the effort put forth by* ***both parties***" (emphasis added). As he put it in this report to the Board, "*Positions were, for the most part simply restated, with minor amendments.*" From these comments, it would appear that the prospect of first contract arbitration may well have caused the parties to position themselves for intervention by the Board rather than motivate them to get on with the job of collective bargaining.

[57] As these proceedings have unfolded, it has become apparent that some basic threshold level of collective bargaining appears necessary before this Board ought to intervene in any form pursuant to s. 26.5, including through the appointment of a Board agent. With the best of intentions, the appointment of a Board agent prior to meaningful bargaining occurring between the parties appears to have caused the very "narcotic" or "chilling" effect that labour boards have sought to avoid. Collective bargaining can be very frustrating and is often punctuated by many disappointments for the participants. However, first contract arbitration is not, and has never been intended as, a substitute for collective bargaining. The imposition of a first contract is not automatically available to either party. Rather, it is a tool used sparingly by this Board in the event collective bargaining reaches an impasse and intervention by the Board is necessary because the parties are either unable or unwilling to fulfill their primary responsibilities under the *Act*; namely to conclude a collective agreement on their own.

Conclusion:

[58] In the present case, we are not satisfied that sufficient collective bargaining has occurred between the parties to make intervention by this Board even possible (let alone appropriate) or that an impasse has occurred sufficient to make intervention by this Board necessary to preserve the collective bargaining relationship. Furthermore, we are certainly not satisfied that the Employer's conduct has been so egregious or that the outlook as to collective bargaining is so bleak that it would be appropriate or necessary (assuming that it were even possible) for this Board to impose the terms of an entire collective agreement or anything close

to the range of issues that are still in dispute between the parties without first expecting the parties to attempt to resolve some of these issues themselves through collective bargaining.

[59] For the foregoing reasons, we decline to further intervene in collective bargaining between the parties at this time. Rather, we encourage the parties to return to the bargaining table to complete the task they have been statutorily assigned.

[60] In coming to this conclusion, we acknowledge that intervention by this Board may become necessary at some point in time depending on the continued course of collective bargaining. We are also mindful that a very significant quantum of time has passed since certification of the Union. To which end, we have concluded that the dismissal of this application ought not prevent the Union from making a similar application pursuant to s. 18(n) of the *Act* if the Union deems it desirable or necessary to do so within the period specified therein.

[61] Board Member McCormick dissents from these Reasons for Decision.

DATED at Regina, Saskatchewan, this **14th** day of **March, 2012.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

Reasons for Dissent:

[62] **Mr. John McCormick**: I have read the decision of the majority and, with all due respect, I believe this Board should intervene in the present application. Firstly, in my opinion, there has been an inordinate delay in both the Union obtaining its certification Order from this Board and in the concluding a first collective agreement with the Employer. I am also of the view that the Employer has engaged in a conduct that has successfully impeded the Union's capacity to represent the employees of this particular workplace; employees who have told this Board that they wish to be represented by the Union. In this regard, the evidence that the Employer had not

permitted the Union to have reasonable access to the workplace to communicate with their members and then threatened the Union during collective bargaining with prosecution under *The Trespass to Property Act*, supra, was particularly troubling for me. In my opinion, the Employer's conduct not only impeded the Union but also would have sent a chilling effect through the workplace by signaling to the employees that the Union is an unwelcome stranger to their workplace.

[63] In concluding that this Board should intervene in the present application, I do not wish to signal that first contract arbitration is now a substitute for good faith collective bargaining as I agree with the majority that first contract arbitration is not an automatic right. However, in my opinion, this is a unique case and somebody has to do something to ensure that the employees of this particular workplace have an opportunity to experience the benefits of collective bargaining and to know that it is ok to belong to a trade union before they are called upon to revisit the representation question.

[64] In concluding that this Board should intervene in the present application, I also acknowledge the concerns of the majority that the Union is essentially asking this Board to impose the whole of a collective agreement and that we do not have recommendations from the Board agent on many of the substantive issues in dispute between the parties. However, I do not agree that these concerns ought to prevent intervention by the Board if we conclude (as I have) that intervention is necessary and appropriate. In my opinion, it would be possible for this Board to determine what would be a fair and reasonable settlement of the matters in issue and impose a first collective agreement and to do so within the period of time prescribed in s. 26.5 of the *Act*. Our evidentiary foundation may be inadequate. However, the alternative of not intervening in the present application is, in my respectful opinion, worse.

[65] For the foregoing reasons, I would set this matter down to hear evidence and submissions from the parties on the terms to be imposed by the Board in their first collective agreement.

Mr. John McCormick,
Board Member