CITY OF SWIFT CURRENT, Applicant v. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1318, Respondents

LRB File No. 008-14; November 27, 2014
Chairperson: Kenneth G. Love, Q.C.; Members: Jim Holmes and Steven Seiferling

For the Applicant: Ms. Meghan McCreary
For the Respondents: Mr. Sean McManus

Unfair Labour Practice – Failure to Bargain in Good Faith – Applicant alleges that Respondent did not bargain in good faith with respect to the renewal of a collective bargaining agreement – Parties met only briefly and did not have substantive discussions prior to the Respondent serving notice of impasse pursuant to *The Fire Department Platoons Act*.

Unfair Labour Practice – Failure to Bargain in Good Faith – Board considers bargaining between the parties and finds that Respondent did not make suitable efforts to reach a collective agreement. Board finds failure to bargain in good faith.

Unfair Labour Practice – Remedy – Board considers options available to it regarding finding of failure to bargain in good faith – Board applies usual remedy which is to put parties in the position which they would otherwise have been if the failure to bargain in good faith had not occurred. Parties required to submit to collective bargaining and reference to interest arbitration determined to be *void ab initio*.

REASONS FOR MAJORITY DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: The International Association of Fire Fighters, Local 1318 (the "Union") s certified as the bargaining agent for fire fighters employed by the City of Swift Current (the "Employer").

[2] The Applicant filed an unfair labour practice application on January 15, 2014. This application alleges that the Applicant failed to bargain in good faith and, as a result, they had refused an/or failed to bargain to impasse, something the Respondents alleged was required pursuant to *The Fire Departments Platoon Act,* (the *"Platoon Act"*).[1]

[3] Prior to the hearing of this matter, the Board dealt with an application by the Respondent requesting that the Board exercise its discretion under Section 12.1 of *The Trade Union Act*[2] (the "*Act*") and refuse to hear the unfair labour practice applications as being outside the time limit for filing such applications. For Reasons dated March 13, 2014, the Board declined to exercise its discretion and permitted the application to proceed.

[4] Following a hearing on May 21, 2014, the Board issued Letter Reasons on June 11, 2014 wherein it appointed Mr. Jim Jeffery as Board Agent to:

> 1. *Meet with the parties as soon as possible to review with them the current state of negotiations between them and the issues that remain unresolved, and to continue to meet with them so long as, in his opinion, further meetings would no longer be productive;*
>
> 2. *Review with the parties the current state of bargaining proposals and which items, if any, can be resolved at this time;*
>
> 3. *Determine which items that the parties are unable to agree on and to assist the parties to reach an agreement with respect to those items; and*
>
> 4. *Report back to the Board as to the matters outlined above.*

[5] Mr. Jeffery reported back to the Board on August 25, 2014. In his report he said:

> *Upon receipt of the Board order, contact was made with the respective counsel representing the parties. It was agreed that counsel would not be participating at the meetings 1 was seeking to schedule, and the parties would be represented by the respective advocates from the City and the Local Union. 1 do wish to thank each of the counsel for their assistance in providing contact information, as well as collective bargaining documents. Your courtesy is appreciated. The dates of August 21 and August 22, 2014 were set aside for meeting with the parties in Swift Current.*
>
> *Collective bargaining had not taken place between the parties for a considerable length of time, nearly 22 months. The number of items that had not been*

[1] RSS 1978, c. F-14
[2] RSS 1978 c. T-17

> *concluded between the parties was substantive, although this should be tempered with the fact that the discourse across the bargaining table between the parties had been limited since October 23, 2012.*
>
> *The Union had approximately 23 unresolved tabled proposals, with many of these multifaceted as to their impact on the collective agreement. The Employer had approximately 16 unresolved tabled proposals, again with a number that were not singular in nature.*
>
> *The parties were successful in bargaining collectively and proceeded to resolve all of the outstanding matters between the parties, with the exception of the distributive issues. Much of the credit goes to the participants, who were able to work respectfully and collaboratively with each other in my presence. The relationship is one that bodes well for the future interaction between the parties and their ability to find resolve in the day-to-day issues that will arise.*
>
> *The substantive issues between the parties are the level of projected wage increases, the indices and their relation to the first class Fire Fighter rates, and the duration of the agreement.*
>
> *The Local Union points to interest arbitration decisions, with the City of Weyburn and IAFF Local, 2989, being the most recent and the one it views as being at minimum, the benchmark, and it proposes higher remuneration for Swift Current. The City proposes salary increases less than this, and proposes that it would maintain the historical relationship amongst the provincial fire services. The Union believes that there is an interest arbitration scheduled between the City of Yorkton and the IAFF in the near future, and a decision would provide further clarity relative to its demands.*
>
> *In circumstances where the prospect of interest arbitration is a possibility, the well documented "chilling effect" on collective bargaining is a factor. Positions are held closer, cards are not played, and stratagems are pursued for that eventuality. Interest arbitration is, by its nature, a blunt tool compared to unhindered collective bargaining.*
>
> *I wish both parties success in concluding their collective bargaining agreement.*

[6] The Board reconvened with respect to the determination of the Unfair Labour Practice on November 5, 2014. For the reasons that follow, the application is allowed and the referral to arbitration quashed.

Facts:

[7] The facts in this matter have never been in dispute. I have therefore reproduced the facts as presented in the Board's March 13, 2014 decision insofar as those facts pertained to the City of Swift Current.

[8] The City of Swift Current and the Respondent, Local 1318 ("Local 1318") began collective bargaining on October 22, 2012. They met again for bargaining on October 23, 2012. Following these two (2) bargaining sessions, the parties agreed to suspend negotiations for an unspecified period of time.

[9] On May 25, 2013, the Local 1318 sent a letter to the City of Swift Current which advised that Local 1318 referred all matters in dispute to a board of arbitration pursuant to Section 9(4) of *The Fire Departments Platoon Act*. The City of Swift Current did not accept that an impasse had been reached and reserved its right to apply to this Board to allege bad faith bargaining.

Application to Court of Queen's Bench

[10] On September 6, 2013, the Cities jointly applied to the Court of Queen's Bench for a determination of the following issues:

> *(a) Does the Court have jurisdiction to hear these applications?*
>
> *(b) Does the "opinion" of the party referring the negotiations to interest arbitration under section 9(4) of The Fire Departments Platoon Act have to be reasonably held?*
>
> *(c) Was the opinion of the party referring the negotiations to interest arbitration under section 9(4) of The Fire Departments Platoon Act reasonably held in this case?*

[11] In the Fiat issued on December 2, 2013, the Court said:

> *In my view, the legislature did not intend the court to exercise original jurisdiction over issues arising out of collective bargaining between fire fighters, and only fire fighters, to the exclusion of all other workers in Saskatchewan.*
>
> *For these reasons, I find that the court does not have jurisdiction to deal with the cities' complaint and that it must be addressed in the first instance by way of an appropriate complaint to the SLRB under The Trade Union Act.*

Issues to be determined:

[12] There are two issues to be determined by the Board. These are:

A. Has the Union committed an unfair labour practice by refusing to bargain in good faith?

B. If the answer to question A is yes, then, what remedy should the Board award?

Applicant's arguments:

[13] The Applicant filed a written argument which we have reviewed and found helpful.

[14] The Applicant argued that the Respondent had violated both the *Trade Union Act* and the *Platoon Act* due to the Respondent having made a premature referral of collective bargaining to interest arbitration. The Applicant argued that the Respondent had not negotiated in good faith with a view to the conclusion of a collective bargaining agreement as required by the legislative scheme related to collective bargaining for Firefighters.

[15] The Applicant also argued that before the terms of a collective agreement could be referred for interest arbitration, the referee must hold a reasonable opinion that a collective bargaining agreement could not be reached through negotiation. The Applicant then argued that if the Respondents had failed to bargain in good faith as required, then any opinion regarding the conclusion of an agreement through bargaining could not be reasonably held. Therefore, they argued, the provisions of the *Platoon Act* were not met and any notice given was invalid.

[16] The Applicant further argued that the Board had jurisdiction to declare the notice under the *Platoon Act* to be invalid by virtue of its incidental powers and the legislative scheme under which collective bargaining was to take place, and the Board's supervision of that bargaining through its authority to determine unfair labour practices.

[17] The Applicant relied upon the Court of Appeal decision in *Yorkton Professional Firefighters Assn., Local 1527 v. Yorkton (City)*[3] in respect of the requirement to bargain in good faith under the *Platoon Act*. It also relied upon *Wheat City Metals v. United Steelworkers of America, Local 5917*[4] and *Re: Westfair Foods Ltd.*[5]

[3] [2001] SKCA 128
[4] [2005] S.L.R.B.D. 19
[5] [2010] B.C.L.R.B.D. No 175

[18] The Applicant argued that an impasse must exist before a referral to interest arbitration can occur under the *Platoon Act*. They relied upon *R.W.D.S.U. and O.K. Economy Stores (a division of Westfair Foods Limited)*[6] and *Nunavut Teachers. Assn. v. Nunavut.*[7]

[19] The Applicant also argued that as a result of the repeal of *the Platoon Act as* a consequence of the proclamation of *The Saskatchewan Employment Act*, (the "*SEA"*) the Respondents no longer had access to interest arbitration due to population restrictions imposed pursuant to the provisions of the *SEA.* As a result, it argued the Board should declare the referral to interest arbitration under the *Platoon Act* to be invalid and order that the arbitration not proceed.

Respondent's Arguments:

[20] The Respondent also filed a written Brief which we have reviewed and found helpful.

[21] The Respondent argued that the wording of Section 9(4) of the *Platoon Act* and the legislative scheme of the *Platoon Act* should be interpreted as providing a broad and wide discretion as to when a party may refer the conclusion of a collective bargaining agreement to interest arbitration. The Respondent further argued that the Board should utilize a subjective test in making the determination.

[22] The Respondent also argued that since the legislation provided that a refusal to bargain would result in a referral to interest arbitration, that this showed a legislative intention that bargaining was not a precondition to referral to arbitration under the *Platoon Act*.

[23] Relying upon *Gordon Leaseholds Ltd. v. Metzger*[8] and *Williams v. A.G. Canada,*[9] the Respondent argued that the Board must determine whether the parties formed the opinion that further bargaining would not be productive, and, if that opinion was honestly held. Furthermore, it argued, relying upon *Fleishman v. British Properties Ltd.*[10] and *Roncarelli v.*

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[6] [1994] S.L.R.B.D. No 74
[7] [2010] NUCJ 13
[8] [1967] 1 O.R. 580
[9] [1983] 45 O.R. (2d) 291
[10] [1997] B.C.J. No. 2838 at paras 27 to 32

Duplessis[11] that the discretion exercised by the referee to arbitration should not be interfered with by the Board, even if the Board disagrees with the exercise of that discretion.

[24] The Respondent further argued that the legislature had provided a separate legislative scheme for fire fighters in the *Platoon Act* that the legislature did not intend for the provisions of *The Trade Union Act*, specifically the unfair labour practice for failure to bargain in good faith, to apply in respect of bargaining in that sector.

[25] The Respondent also argued that it had met the duty of bargaining in good faith. It argued that there was no attempt "to avoid reaching an agreement" as outlined in *R.W.D.S.U. v. Westfair Foods Ltd.*[12] Nor, it argued, had it bargaining in "bad faith", relying upon the decision in *R.W.D.S.U. v. Westfair Foods Ltd.*[13] Espousing similar arguments, it relied upon *University of Regina Faculty Assn. and Saskatchewan Indian Federated College*[14], *Sobey's Capital Inc.*[15] and *Madison Development Group.*[16]

[26] In respect to any remedy the Board may impose should there be an unfair labour practice found, the Respondent argued that given the report from Mr. Jeffery, it was clear that the parties are now truly at impasse. The collective agreement expired almost three (3) years ago. No provision is made under the new legislative provisions for concluding a collective bargaining agreement. The Respondent says that it should have access to the interest arbitration procedure in order to finalize its now long overdue collective agreement.

[27] The Respondent argued that the Board had broad remedial authority which would include allowing the dispute to be resolved through interest arbitration.

Relevant statutory provisions:

[28] The relevant statutory provisions are as follows:

The Trade Union Act

2. In this Act:

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[11] [1959] S.C.R. 121 @ 140
[12] [1993] S.LR.B.D. No. 58
[13] Supra Note 6
[14] [1995] S.L.R.B.D. No. 5
[15] [2004] S.L.R.B.D. No 30
[16] [1996] S.L.R.B.D. No. 2

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

. . .

11(2) It shall be an unfair labour practice for any employee, trade union or any other person:

. . .

(c) to fail or refuse to bargain collectively with the employer in respect of employees in an appropriate unit where a majority of the employees have selected or designated the trade union as their representative for the purpose of bargaining collectively;

Saskatchewan Employment Act

6-1(1) In this Part:

. . .

(e) "collective bargaining" means:

(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;

(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;

(iii) executing a collective agreement by or on behalf of the parties; and

(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;

. . .

6-87 *This Division applies to:*

(a) the union certified as the bargaining agent of a bargaining unit:

(i) comprised of only municipal firefighters in a city with a population of 20,000 or more as shown in the most recent census; and

(ii) only if the constitution of the union prohibits strikes in the

bargaining unit; and

(b) the employer of the firefighters mentioned in clause (a).

. . .

6-127*(1)In this section,* ***"former Acts"*** *means:*

(a) The Construction Industry Labour Relations Act, 1992 as that Act existed on the day before the coming into force of this section;

(b) The Trade Union Act as that Act existed on the day before the coming into force of this section;

(c) The Health Labour Relations Reorganization Act as that Act existed on the day before the coming into force of this section;

(d) The Fire Departments Platoon Act as that Act existed on the day before the coming into force of this section.

(2) Every person who was a member of the board on the day before the coming into force of this section continues as a member of the board until he or she is reappointed to the board, or another person is appointed in his or her place, in accordance with this Part.

(3) Every order, declaration, approval and decision of the board made pursuant to the former Acts continues in force as if made by the board pursuant to this Part and may be enforced and otherwise dealt with as if made pursuant to this Part.

(4) Every board of conciliation that was appointed pursuant to section 22 of The Trade Union Act, as that Act existed on the day before the coming into force of this section, and whose term of appointment had not expired on the day on which this section comes into force continues pursuant to this Part as if it were appointed pursuant to this Part, and every person who was a member of a board of conciliation whose term of appointment had not expired on the day on which this section comes into force continues as a member as if appointed pursuant to this Part.

(5) Every arbitrator, board of arbitration or arbitration board that was appointed pursuant to The Trade Union Act or The Fire Departments Platoon Act, as those Acts existed on the day before the coming into force of this section, and whose term of appointment had not expired on the day on which this section comes into force continues in office and may continue the arbitration in accordance with this Part as if the arbitrator, board of arbitration or arbitration board were appointed pursuant to this Part.

(6)All agreements, instruments and other documents that were filed with the board or the minister pursuant to the former Acts are deemed to have been filed pursuant to this Part and may be dealt with pursuant to this Part as if filed pursuant to this Part.

(7) Every special mediator who was appointed pursuant to The Trade Union Act, as that Act existed on the day before the coming into force of this section, and whose term of appointment had not expired on the day on which this section comes into force continues in office and may continue his or her duties and exercise his or her powers in accordance with this Part as if he or she were appointed pursuant to this Part.

> *(8) A trade division determined by the minister to be an appropriate trade division for the purpose of The Construction Industry Labour Relations Act, 1992, as that Act existed on the day before the coming into force of this section is continued and may be dealt with pursuant to this Part as if the division had been established pursuant to this Part.*
>
> *(9) The representative employers' organizations listed in Column 1 of the Schedule to The Construction Industry Labour Relations Act, 1992, as that Act existed on the day before the coming into force of this section:*
>
> > *(a) are continued as representative employers' organizations for the unionized employers in the trade divisions referenced in Column 2 of the Schedule to that Act; and*
> >
> > *(b) within 60 days after the coming into force of this section, the board shall issue orders that designate the representative employers' organizations listed in Column 1 of the Schedule to that Act for the trade divisions listed in Column 2.*
>
> *(10)The Lieutenant Governor in Council may make regulations respecting any matter or thing that the Lieutenant Governor in Council considers necessary to facilitate the transition from the former Acts to this Part, including:*
>
> > *(a) suspending the application of any provision of this Part; and*
> >
> > *(b) declaring that provisions of any of the former Acts are to apply to persons or any category of persons and respecting the conditions on which provisions of the former Act are to apply.*
>
> *(11) If there is any conflict between the regulations made pursuant to subsection (10) and any other provision of this Act or any other Act or law, the regulations made pursuant to this section prevail.*

. . .

> *Fire Department Platoon Act*
>
> *(4) If a meeting is not held within the time mentioned in subsection (3) or if the bargaining proceedings by the two parties have in the opinion of either party reached a point where agreement cannot be achieved, either party may by written notice to the other require that all matters in dispute be referred to a board of arbitration.*

Analysis and Decision:

Applicable Law

[29] The subject matter of this application, being collective bargaining between the parties, began on October 22, 2012 and culminated on May 25, 2013 when the Respondents provided notice referring all matters then in dispute to a board of arbitration to be established pursuant to Section 9(4) of the *Platoon Act*.

[30] The City of Swift Current first brought the question of whether the referral to arbitration was properly done to the Court of Queen's Bench for determination. In its decision dated December 2, 2013, the Court declined jurisdiction with respect to the matter, concluding that the matter should be dealt with by this Board.

[31] Following the decision of the Court of Queen's Bench, the City made this application to the Board on January 15, 2014. The Board first heard a preliminary objection to the Board's jurisdiction and ruled on March 3, 2014 that the application could proceed.

[32] Prior to the hearing of the unfair labour practice, *The Saskatchewan Employment Act* was proclaimed in force on April 29, 2014. That Act repealed the *Platoon Act* and substituted new provisions in that Act dealing with collective bargaining for fire fighters. One of those provisions[17] provided that interest arbitration would only be available to municipalities with a population of 20,000 or more. This impacted on the City of Swift Current because its population was below 20,000.

[33] Insofar as the unfair labour practice application is concerned, all of the facts and any accrued rights fall to be determined under *The Trade Union Act*. (The *TUA)* However, the impact of the legislative change must also be considered if an unfair labour practice is found to have occurred.

[34] Collective Bargaining for Firefighters is governed generally by the *TUA* in conjunction with the *Platoon Act*. The *Platoon Act* provides for access to interest arbitration for Firefighters whose Constitution precludes them from striking. These two *Acts* must be read together when dealing with collective bargaining by Firefighters and their employers.

Did the Union fail to bargain in good faith towards the conclusion of a collective agreement?

[35] The Board reviewed its jurisprudence with respect to the duty to bargain in good faith in its decision in *SEIU (West) et al. v. S.A.H.O. et al.*[18] In that decision, while considering Section 11(1)(c) of *The Trade Union Act*, the Board says at paragraphs [126] to [134]:

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[17] Section 6-87
[18] [2014] CanLII 17405 (SKLRB)

[126] *In their applications, the applicant trade unions also alleged that SAHO violated s. 11(1)(c) by refusing or failing to bargain in good faith toward the conclusion of a collective agreement; by having insufficient authority to bargain; and by refusing to provide the unions with information they allege they required for meaningful collective bargaining to take place. While acknowledging that it took hard positions on a number of issues during the 2008 Round, SAHO denies that it fail to bargain in good faith with the applicant trade unions or that it failed to comply with any concomitant obligation imposed upon it pursuant to s. 11(1)(c) of The Trade Union Act.*

The Board's Jurisprudence with respect to the Application of s. 11(1)(c):

[127] *The duty to bargain in good faith was well described in 1996 by the Supreme Court of Canada in its decision in Royal Oak Mines Inc. v. Canada (Labour Relations Board) and Canadian Association of Smelter and Allied Workers, Local 4, [1996] 1 S.C.R. 369, 1996 CanLII 220 (SCC), 133 DLR (4th) 129. At paragraphs 41 and 42, the Court said:*

> *Every federal and provincial labour relations code contains a section comparable to s. 50 of the Canada Labour Code which requires the parties to meet and bargain in good faith. In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code. In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*
>
> *Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*

[128] *Together, s. 11(1)(c) and s. 11(2)(c) impose companion obligation on both employers and trade unions in organized workplaces to bargain in good faith and to make reasonable effort to conclude a collective agreement. A secondary (but not less important) purpose of s. 11(1)(c) is to secure the union's position as the exclusive bargaining agent for organized workers and to compel the employer to negotiate with the union (as opposed to directly with the employees) in good faith with a view to conclusion of a collective agreement.*

[129] *While ss. 11(1)(c) and 11(2)(c) of The Trade Union Act clearly imposes a duty on the parties to bargain in good faith and makes it a violation of the Act to fail to do so, the practice of this Board in enforcing these obligations has historically been one of measured restraint. Simply put, the Board takes the position that it is not our role to supervise or monitor too closely the bargaining*

strategies adopted and employed by the parties provided that they genuinely engage in the process. This restraint has grown from the desire of the Board to permit the parties to define and develop their own collective bargaining relations and to avoid interference in the balance of economic power that may exist between the parties. See: Noranda Metal Industries Ltd. Canadian Association of Industrial, Mechanical and Allied Workers v. Noranda Metal Industries Limited, [1975] 1 Can. L.R.B.R. 145. See also: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, A Division of Westfair Foods, [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92.

[130] *The reality of collective bargaining is that it is a process of resolving conflict through conflict. While The Trade Union Act may regulate that conflict, it also contemplates that a power struggle may well occur between employers and trade unions. The purpose of collective bargaining is to bring the parties together in a setting where they can present their proposals, justify their positions, and search for common ground. Although the parties may have expectations that particular proposals will be agreed to, or that certain kind of concessions will never by asked of them, or that issues will be discussed in a particular order, or that a particular result will be achieved within a certain period of time, there is no guarantee that such will be the case. Each party has the right to attempt to achieve an agreement on terms that it considers advantageous and to adopt strategies intended to advance its own self interests. The parties also have the right to hold firm in their respective positions. The results of collective bargaining flow from the skill of the negotiators, from the prevailing social and economic realities of the day, from the relative strength of the parties, and from their willingness to exercise their respective strength.*

[131] *The function of this Board is to ensure that the parties engage in a process of collective bargaining; that they agree to meet; that they come to the bargaining table prepared to enter into a collective agreement and/or resolve the issues in dispute between the parties through collective bargaining; that their negotiators have authority to bind their principals; that they explain their proposals and disclose relevant and necessary information that could affect their collective bargaining relationship; and that they not misrepresent the facts or their proposals to the other party. See: Saskatchewan Government Employees' Union v. Government of Saskatchewan and the Honourable Bob Mitchell, [1993] 1st Quarter Sask. Labour Rep. 261, LRB File No. 264-92. Simply put, it is the responsibility of the Board to ensure that the parties engage in a process of collective bargaining; it is not the function of this Board to ensure that a particular substantive result is achieved or avoided through collective bargaining.*

[132] *The parties are best able to fashion the terms of their relationship and, in the event of impasse in collective bargaining, each has recourse to economic sanctions. Each round of collective bargaining is a new beginning and many external factors can influence the relative economic power (or perception thereof) of the parties. As a consequence, this Board does not judge the "reasonableness" of the proposals advanced by the parties at the bargaining table unless we conclude that the proposals being advanced or the positions being taken by a party are indicative of a desire to subvert, frustrate or avoid the collective bargaining process. While holding firm on proposals or hard bargaining is permissible, surface bargaining or merely going through the motions of collective bargaining without any real intention of concluding a collective agreement is not consistent with the duty to bargain in good faith. The difficulty of distinguishing "hard bargaining" from subversive behavior was acknowledged by this Board in Saskatchewan Government Employees' Union v. Government of Saskatchewan & Saskatchewan Association of Health*

Organizations, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98 wherein the Board made the following comments:

> *In mature bargaining relationships, such as this one, it is often difficult for the Board to discern if the bargaining behaviour falls within the realm of "tough, but fair" or if it crosses over into an unacceptable avoidance of collective bargaining responsibility. In Canadian Union of Public Employees v. Saskatchewan Health-Care Association, [1993] 2nd Quarter Sask. Labour Rep. 74, LRB File No. 006-93, the Board described this dilemma in the following terms, at 83:*
>
> > *. . . when an allegation of an infraction under s.11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that process, while at the same time, not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether the conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.*
>
> *In Saskatchewan Government Employees Union v. Government of Saskatchewan et al., [1982] May Sask. Labour Rep. 44, LRB File No. 563-81, the Board considered whether a party is entitled to require the other party to discuss and negotiate individual items during collective bargaining. In that instance, the union alleged that the government refused to bargain collectively with respect to the union's proposals on dental, disability and pension plans. The Board adopted the principles set out by the British Columbia Board in Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union, [1978] 1 CLRBR 60 and held that it is not a per se violation of the duty to bargain in good faith to refuse to discuss a specific item at the bargaining table. The British Columbia Board stated as follows, at 80:*
>
> *The legal duty to bargain imposed by the Labour Code is a single, global obligation to negotiate a settlement of an entire collective agreement. Section 6 does not create a set of separate duties to bargain, duties which are attachable to each of the items placed on the bargaining table by the other side. While making bona fide and reasonable efforts to settle a collective agreement with the CPU, the Bureau is legally entitled to refuse to discuss with the CPU the one issue of pension benefits for retired workers. That stance leaves it up to the union membership to decide whether retiree benefits are sufficiently vital to their conditions of employment that they should take strike action in order to change the Bureau's mind.*

[133] *In SGEU v. Saskatchewan & SAHO, supra, the Board went on to make the following conclusions following an extensive survey of jurisprudence:*

In summary, the cases demonstrate that while Boards generally will not delve into the reasonableness of the bargaining positions taken by either party during

> *collective bargaining, Boards may find that a specific proposal does constitute bad faith bargaining if: (1) the proposal contains some illegality; (2) the proposal in itself or in conjunction with other conduct indicates a subjective unwillingness to conclude a collective agreement; and (3) the proposal is or should be known to go against bargaining standards in the industry and to be generally unacceptable to either include or refuse to include in a collective agreement, i.e. it has the effect of blocking the negotiation of a collective agreement.*
>
> ***[134]*** *The final observation that we would like to make regarding collective bargaining is that the duty to bargain in good faith also imposes certain peripheral obligations on an employer, including the duty to disclose pertinent information during the course of collective bargaining. The duty imposed on employers to make disclosure was succinctly described by this Board in Saskatchewan Government Employees' Union v. Government of Saskatchewan, (1989), 5 C.L.R.B.R. (2nd) 254, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87, as follows:*
>
> > *It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly, and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:*
> >
> > *(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;*
> > *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;*
> > *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and*
> > *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.*

[36] The first bargaining session between the parties occurred on October 22, 2012 and, based upon the agreed statement of facts, lasted approximately one (1) hour. During that initial meeting, the parties discussed some housekeeping issues, the Applicant presented its opening bargaining proposals and provided some brief clarification of those proposals.

[37] A second bargaining session occurred on October 23, 2012. During that bargaining session, the parties discussed non-monetary items as well as wage rates for Firefighters in other municipalities, including Regina and Yorkton. They also discussed the

possibility of a one-year deal to bring the Firefighters up to the wage level enjoyed by the Firefighters in Yorkton. The Respondent responded that it preferred to have a longer term agreement.

[38] Following this bargaining, the parties agreed to a significant hiatus from bargaining of at least six (6) months prior to negotiating wage rates. This was done to allow the parties to benefit from the outcome of Firefighter negotiations in other municipalities. No further bargaining occurred.

[39] On May 27, 2013, the Respondent advised the Applicant by letter that it was referring all matters in dispute to a Board of Arbitration pursuant to Section 9(4) of the *Platoon Act*.

[40] The Board has taken judicial notice that, on May 10, 2013, *The Saskatchewan Employment Act* was considered by the Standing Committee on Human Services of the Saskatchewan Legislature. On that date, the committee recommended to the legislature that clause 6-88 of Bill 85 (which was the Bill enacting *The Saskatchewan Employment Act*) be amended to strike out "population of 15,000" and substituting "population of 20,000".

[41] As a result of this proposed amendment, the ability of Firefighters in municipalities whose population was less than 20,000, which included Swift Current, to seek interest arbitration, was removed. The Legislature passed the Bill, with the proposed amendment on May 15, 2013. It received royal assent that same day.

[42] Section 9 of the *Platoon Act* provides for collective bargaining with respect to Firefighters. Where a notice to bargain has been provided,[19] bargaining in good faith is required to commence within fifteen days following notice being given.[20]

[43] The *Platoon Act* does not contain a definition of "bargaining in good faith". The definition of that term must be determined from the provisions of the *TUA*[21] and the jurisprudence of this Board and the Courts. What constitutes a failure to bargain in good faith is also not

[19] Section 9(1)
[20] Section 9(3)
[21] See the definition of "bargaining collectively" in Section 2(b) of the *TUA*.

provided for in the *Platoon Act*, but is left to be determined again as an unfair labour practice[22] under the *TUA*.

[44] The *Royal Oak Mines* decision from the Supreme Court is instructive as to the conduct expected of those engaged in the collective bargaining process. Not only must the parties "honestly strive to find a middle ground between their opposing interests", but also, they must "approach the bargaining table with good intentions". Additionally, they must "make every reasonable effort to enter into a collective agreement".

[45] The Court goes on to say that "the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured on an objective standard". To illustrate the difference, the Court says:

> *It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*

[46] Viewed objectively, the efforts of the Respondent in this case do not meet the prescribed standard. The parties met only once (October 23, 2012) for real bargaining. At that time, they agreed to take a significant break in negotiations to await results from bargaining in other municipalities. However, less than two (2) weeks after passage of *The Saskatchewan Employment Act*[23] by the Legislature, and the potential[24] removal of their right to seek interest arbitration, the Respondents unilaterally served notice that all matters of dispute should be resolved through arbitration.

[47] It is also noteworthy that upon appointment of the Board agent, the parties were able to continue collective bargaining with the Agent's assistance and were able to resolve all outstanding issues apart from wage rates and terms of the collective agreement. In his report to the Board, Mr. Jeffery noted:

> *In circumstances where the prospect of interest arbitration is a possibility, the well documented "chilling effect" on collective bargaining is a factor. Positions are*

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[22] See Sections 11(1)(c) and 11(2)(c) of the *TUA*

[23] *It must be noted that the Saskatchewan Employment Act was to come into force upon proclamation. That did not occur until April 29, 2014.*

[24] *Upon proclamation of the legislation.*

> *held closer, cards are not played, and stratagems are pursued for that eventuality. Interest arbitration is, by its nature, a blunt tool compared to unhindered collective bargaining*.

[48] This paragraph suggests that no significant progress could be made between the parties on the significant issue of wages and the term of the contract due to the prospect of interest arbitration being invoked for that purpose.

[49] It also makes it clear that the Respondents were not prepared to negotiate wage rates with the Applicant. Its actions make it clear that they immediately moved the resolution of that issue to interest arbitration upon any future right to interest arbitration being removed by the passage of *The Saskatchewan Employment Act*. Even with the assistance of Mr. Jeffery, they maintained their position that the setting of wage rates should be determined through arbitration rather than through collective bargaining.

[50] In their arguments, the parties took diametrically opposed positions regarding the state of mind of the instigator of the reference to arbitration under the *Platoon Act*. The Applicant took the view that the test should be an objective where the party who refers disputes to arbitration under Section 9(4) must "reasonably" hold the view that an agreement cannot be reached. The Respondents argued for a subjective standard of review.

[51] With respect, we must agree with the Applicant in their views. To adopt a subjective standard to such an important determination would, we submit, make the legislation meaningless insofar as any requirement to attempt to bargain collectively. The legislature, in enacting the *Platoon Act* cannot be considered to have put these provisions in legislation just to have them ignored by either party who, for whatever reason, reasonable or not, determines that it cannot or does not wish to bargain for the purposes of reaching a collective agreement.

[52] It is clear, from the clear meaning of the words that the legislature intended that the parties seek to resolve their differences by collective bargaining towards a renewal of their collective agreement. The *Act* provides for notice to bargain collectively, provides a default if either party refuses to bargain and finally, if an agreement cannot be achieved, for a referral to arbitration. Underscoring all of this is the requirement that the parties bargain collectively.

[53] We find, therefore, that the Respondent failed in its duty to bargain in good faith with the Applicant by serving notice to refer the outstanding issues to arbitration rather than continuing to bargain.

Remedy for the Breach of the Duty to bargain in good faith

[54] The Applicant asserts that, in the event the Board finds that the Respondent failed to bargain in good faith, that the referral to interest arbitration should be declared null and void. The Applicant argued that the parties had not reached an impasse[25] and therefore the notice of referral of the dispute to interest arbitration was improper.

[55] The Applicant also argued that the intention of the legislature, which was not to allow Firefighters in municipalities like Swift Current to have access to interest arbitration, was clear. It argued that since the Respondent cannot now serve notice[26] that the arbitration should not now be permitted to continue.

[56] The Applicant argued that the Board enjoys the authority to quash the notice of referral to arbitration pursuant to its ancillary powers as set out in Section 6-103 of *The Saskatchewan Employment Act*.

[57] The Respondent argued that in the face of a finding that the Respondent had failed to bargain in good faith that the Board, nevertheless, has the authority to impose a remedy which is necessary to attain the purposes of the *Act*, "or that are incidental to the attainment of the purposes of the *Act*".

[58] The Respondent argued that it would serve no labour relations purpose to return the parties to the position they were in prior to the service the notice of referral to arbitration. This was due, they argued to the passage of time since this matter first began. They argued the normal term of a collective agreement is three (3) years and the three (3) years for this collective agreement would expire on December 31, 2014.

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[25] As described by Mr. Justice Cameron in *Yorkton Professional Fire Fighters Assn., Local 1527 v. Yorkton (City)* [2001] SKCA 128 (CanLII)

[26] As a result of the proclamation of the Saskatchewan Employment Act.

[59] The Respondent argued, relying upon, *inter alia*, *Royal Oak Mines v. Canada (Labour Relations Board)*[27] and *Burkart v. Dairy Producers Co-operative Limited*[28] that the Board had broad remedial authority to ensure that the current arbitration process could continue.

Remedy:

[60] The Board's authority with respect to a remedy is generally to place the parties into the position they would have been but for the commission of the unfair labour practice. In so doing, the Board is aware that any remedy framed must have a labour relations purpose, that is, generally speaking, to insure collective bargaining and fosters a good and long term relationship between the parties to the dispute.

[61] A remedy may, in appropriate circumstances, be punitive in nature, insofar as it seeks to return, for example, a dismissed employee to his position with pay. Or, in the case of a union member who has not been properly represented in grievance proceedings to have their grievance heard by a board of arbitration.

[62] The Applicant says that the best remedy in this case is to return the parties to the bargaining table to continue their collective bargaining. They say that the legislation had now made it clear that smaller municipalities should resolve their outstanding issues by collective bargaining without access to interest arbitration.

[63] The Respondent says that the status quo would be to allow them to continue to have one last resort to interest arbitration. They argue that they had accrued the right to have outstanding issues resolved by interest arbitration under the former *Platoon Act* and should be permitted to continue that process, notwithstanding the finding of an unfair labour practice.

[64] In coming to our determination with respect to remedy, we have taken the following factors into consideration:

1. The parties were able to conclude many items with the assistance of the Board's agent. Mr. Jeffery.

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[27] [1996] 1 S.C.R. 369
[28] [1991] 87 Sask. R. 241

2. The fact that the parties are now almost three (3) years from the date for renewal of their collective bargaining agreement.
3. The provisions of *The Saskatchewan Employment Act*
4. What will best serve the interests of the parties to achieve labour relations harmony and a re-instatement of their long standing relationship?

[65] It is noteworthy that the parties were able to resolve many issues with the assistance of Mr. Jeffery. It is also instructive that he noted that "interest arbitration is, by its nature, a blunt tool compared to unhindered collective bargaining". He based this statement upon the well documented "chilling effect" on collective bargaining that occurs when there is a possibility for interest arbitration to resolve those issues upon which the parties cannot, or chose not to bargain.

[66] The parties are now almost 3 years from the expiry of their collective agreement. By now, settlements or interest arbitrations will have determined both the term of the renewal contract and the general wage adjustments which have been determined in similar municipalities. Given the passage of time, the Respondents believe that it would be easier to allow the arbitration process to continue rather than imposing a remedy which would require the parties to return to the bargaining table.

[67] The current provisions of *The Saskatchewan Employment Act* preclude access to the interest arbitration process to the Respondents due to the population size of Swift Current. As a result, the bargaining process established by the Act would be determined in accordance with Division 8 of Part VI of that *Act*.

[68] Section 6-33 provides, in part, as follows:

> *6-33(1) If an employer and a union are unable, after bargaining in good faith, to conclude a collective agreement, the employer or the union shall provide a notice to the minister that they have reached an impasse.*
>
> *(2) As soon as possible after receipt of a notice pursuant to subsection (1), the minister shall appoint a labour relations officer or a special mediator, or establish a conciliation board, to mediate or conciliate the dispute.*

The above requirements must be fulfilled before any strike or lockout can occur. Furthermore, forty-eight (48) hours notice of a strike or lockout must also be given.

[69] The Constitution of the Respondent prohibits strikes in the bargaining unit. This was a precondition to the invoking of interest arbitration under the *Platoon Act*. Additionally, there is some uncertainty[29] over the impact of Essential Services legislation and its applicability to the Firefighters in this case.

[70] The decision in this case is neither black nor white. It must be tempered with the labour relations realities between the parties. They have had almost three (3) years of litigation, first before the Court of Queen's Bench, then before this Board where the Board is now making its third decision related to this matter. The Firefighters in Swift Current have been without a collective agreement for the entire period and the parties have incurred considerable expense in their litigation. It is important for the parties to achieve a resolution prior to commencement of a new round of collective bargaining.

[71] It is, we think, clear that the Firefighters "jumped the gun" by their referral to interest arbitration, seeking to avoid being caught without that right if *The Saskatchewan Employment Act* had been proclaimed during the course of their negotiations. The Respondent takes the view that an arbitrated settlement would be the best for its members. The Applicant city takes the opposing view, suggesting that a better solution would be a negotiated solution.

[72] Mr. Jeffery appears to agree with the Applicant's view of the matter. The current legislation would require the parties be given access by the Minister to a labour relations officer, a special mediator, or a conciliation board to assist them with their negotiations.

[73] There is a transitional provision within the *SEA* which deals with ongoing arbitrations under the *Platoon Act*. Subsection 6-127(5) provides as follows:

> *(5) Every arbitrator, board of arbitration or arbitration board that was appointed pursuant to The Trade Union Act or The Fire Departments Platoon Act, as those Acts existed on the day before the coming into force of this section, and whose term of appointment had not expired on the day on which this section comes into force continues in office and may continue the arbitration in accordance with this Part as if the arbitrator, board of arbitration or arbitration board were appointed pursuant to this Part.*

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[29] The constitutionality of *The Public Service Essential Services Act*, S.S. 2008 c. P-42.2 has been called into question in *Saskatchewan Federation of Labour et al v. Saskatchewan*. This case has been heard by the Supreme Court of Canada whose decision is currently reserved. S.C.C. File No. 35423

[74] This provision clearly permits arbitrations begun under the now repealed provisions of the *Platoon Act* to be continued to their conclusion. Had we found that the Respondents had not committed an unfair labour practice with respect to its failure to bargain in good faith, this provision would permit the arbitration to continue.

[75] This provision could be read to permit even an improper reference to arbitration under the *Platoon Act* to be continued and may be considered to be a direction from the legislature that that should occur. However, with respect, we do not believe that to be the proper interpretation of the provision. In order for the arbitration to be continued, we believe that the process instigating that arbitration process must be shown to have respected the terms of the *Platoon Act*, and in particular, the requirement that the parties bargain in good faith. To continue a process instigated by a party who failed to bargain in good faith, in our opinion, rewards those parties who do not "honestly strive to find a middle ground between their opposing interests", "approach the bargaining table with good intentions", or "make every reasonable effort to enter into a collective agreement".[30]

[76] On balance, we believe that the interests of the parties are best served by a return to the bargaining table. It is perhaps trite to say that "the best agreement is a negotiated agreement". In this case, assuming a three year term for the contract, the wage comparables will, by now, be well known to both parties. It should not, in our judgment, be difficult to achieve a resolution of the wage issue outstanding between them with the benefit of full hindsight. Additionally, given the time which has passed, the parties should not have difficulty determining if they wish to commence bargaining afresh in 2015, or if they would prefer to add some time to their agreement to provide some bargaining relief.

[30] See *Royal Oak Mines, [1996] 1 S.C.R. 369, 1996 CanLII 220 (SCC), 133 DLR (4th) 129*

[77] With that determination, we hereby order that the notice given by the Respondent pursuant to the *Platoon Act* be declared to be *void ab initio* as a consequence of the failure by the Respondent to bargain collectively and thereby commit an unfair labour practice. The parties shall recommence collective bargaining effective immediately. The interest arbitration scheduled to be held in December of 2014 shall not proceed. The services of Mr. Jeffery will be made available to the parties to assist them in their negotiations should the parties wish him to assist.

DATED at Regina, Saskatchewan, this **27th** day of **November, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

Member Seiferling concurs with this decision.

DISSENT OF JIM HOLMES

1. I have read the majority decision and respectfully cannot agree.

2. I agree the key questions are:

   Did the Union bargain in good faith?

   If not, what is the appropriate remedy?

Bargaining in Good Faith

3. It is clear from the agreed facts that the bargaining was not extensive; there had been a long suspension of talks.

4. The bargaining history as it was described to the Board was no model of full and frank discussion. But, in my opinion, it did not amount to a failure to bargain in good faith.

5. A finding of a failure to bargain in good faith is notoriously difficult.

6. *. . . when an allegation of an infraction under s.11(1)(c) is brought before us, the Board is faced with the somewhat delicate task of evaluating the bargaining process to determine whether there is any employer conduct which endangers or threatens to subvert that*

process, while at the same time, not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves. The distinction between process and substance has a will-o'-the-wisp quality at the best of times, but this is particularly the case where a tribunal is trying to discern whether the conduct goes beyond the generous limits of the tolerable in collective bargaining, or whether it merely reflects a permissible exploitation of strength or skill by one party to gain advantage over the other.[i]

7. Labour Relations Boards are consistently and properly reluctant to oversee the details of the parties' bargaining behavior.

8. The Board has held that there "are no rules for the bargaining process." While the parties to the process may have some expectations based on their past bargaining experiences "that issues will be discussed in a particular sequence, or that there will be particular proportionality between proposal and counterproposal or the other can always expect to achieve improvements in its favour, the Board will not impose sanctions if there are deviations from the anticipated course of bargaining or proposals.[ii]

9. "There are, as we have intimated earlier, no rules for the process as such. Though the parties may have expectations, based on their past experience, that issues will be discussed in a particular sequence, or that there will be a particular proportionality between proposal and counterproposal, or that one party or the other can always expect to achieve improvements in its favour, there are no sanctions attached to deviations from the anticipated course. The parties may be required to adjust their expectations according to changed conditions or changes in their relative bargaining strength. They may apply any combination of rational persuasion, deployment of economic power, or other inducements which is sanctioned by the law. Each of the parties may combine and recombine their own proposals and those put forward by the other party in an attempt to find the formula which will lead to an agreement. This process may be messy, it may be unscientific, it may be unpredictable, it may on occasion be brutal, but it is bargaining. The essence of bargaining is that each party is trying to achieve an agreement on terms which are advantageous, and may adopt whatever strategy it considers likely to bring about this result. If one party makes an error in assessing relative bargaining strength, choosing economic weapons, selecting appropriate timing or deciding which combination of proposals might bring about movement in the direction it desires, this in itself is not suggestive that the other party has committed an unfair labour practice. If positions are changed, or proposals withdrawn, or uncompromising resistance adopted, there is not necessarily any infraction of The Trade Union Act. It is only if these clues suggest to the Board an attempt by an employer to avoid reaching an agreement or an actual refusal to recognize the trade union as a bargaining agent that the Board may draw the conclusion that an employer is guilty of failing or refusing to bargain collectively.[iii]

10. In my view, the key determinate of an unfair labour practice is whether the behavior of either party is likely to prevent the reaching of a collective agreement.

11. Most of the case law deals with strike or lock out situations or agreements negotiated in the shadow of work stoppages. In these situations, a party's ability to reach the collective agreement it wants, will be decided by its perceived or actual exercise of its economic power of strike or lock out to compel the other party to a satisfactory compromise.

12. Striking or locking out is not separate from bargaining in good faith. Striking or locking out is an attempt to shift the power dynamics. They are an infrequent, but normal part of the process.

13. Starting strike or lock out by the parties before all possible resolvable issues are resolved is not an unfair labour practice. In my 28 years of experience as a negotiator, the eventual resolution of disputes is facilitated by the ability of the parties to build some momentum by the resolution of some less contentious issues. Going into a strike with only the critical issues on which the parties feel they have little or no room for further compromise is the least likely scenario to produce a settlement and most likely to produce a long bitter work stoppage. Waiting for a complete stalemate or impasse before striking is a desperate last resort and likely to end badly.

14. Both parties may retain proposals they feel have little chance of success, in hopes these may be part of larger compromise producing more important gains. Also, the parties almost always have an imperfect knowledge of where the other party *might* compromise, especially if the pressure is increasing. Improbable proposals may succeed.

15. The timing of a work stoppage is one of the key elements of negotiations. Unions want to bring pressure to bear when the employer is most vulnerable, the employer commences lock out when it feels most secure and the union members are vulnerable.

16. A third common feature of collective bargaining is that when different bargaining units bargain with different employers in the same industry or sector, one set of negotiations may set a pattern that then becomes the template for all subsequent negotiations, perhaps with some minor modifications. This may mean the subsequent negotiations may be quite short, often a day or less. Pattern bargaining can be very efficient, but sometimes one party or the other may want to deviate from the pattern. These disputes can become quite difficult.

17. All of the above observations are commonplace but they are important in setting the context for this dispute.

18. Bargaining between City Fire Departments and Firefighters was governed not only by the Trade Union Act but also the *Fire Departments Platoon Act.* (the *Platoon Act)*

19. The *Platoon Act* provided that the Union might voluntarily forego (through Union constitutional amendment) the right to strike and opt for binding arbitration.

20. (15) Subsection (13) shall apply only if and while the constitution of the local labour union of which the full-time fire-fighters are members contains a provision prohibiting a strike by the members of the local labour union.

21. Under that *Act, b*inding arbitration is the alternative to strike or lock out and is part of the collective bargaining process.

22. ***Collective bargaining and arbitration***

> ***9*** *(1) Where a collective bargaining agreement between the full-time fire-fighters and the city, or any board, commission or other body established to manage, control and operate the fire department, is in force, either party to the agreement may, not less than thirty days nor more than sixty days before the expiry date of the agreement, give notice in writing to the other party to terminate the agreement or to negotiate a revision thereof, and thereupon the parties shall bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*
>
> *…*
>
> *(3) Within fifteen days after a notice has been given under subsection (1) or a request has been made under subsection (1) or a request has been made under subsection (2) the two parties shall meet and bargain in good faith.*
>
> *(4) If a meeting is not held within the time mentioned in subsection (3) or if the bargaining proceedings by the two parties have in the opinion of either party reached a point where agreement cannot be achieved, either party may by written notice to the other require that all matters in dispute be referred to a board of arbitration.*

23. The requirements for getting to arbitration in the *Platoon Act* are not rigorous. Notice must be served. The parties can then refer to arbitration if there have been no meetings within 15 days of notice to bargain, or if one party is of the opinion negotiations will not produce an agreement. (*Section 9 (4))*

24. In the *Trade Union Act*, the fact of no meetings would almost certainly be a failure to bargain in good faith. Not bargaining at all is explicitly recognized in the *Platoon Act* and does not bar access to arbitration.

25. The necessary preliminary steps in the Trade Union Act for rights arbitration or first contract arbitration are more rigorous.

26. In Section 25 (1) the grievance procedure must be exhausted before rights arbitration.

27. In Section 26.5, before first contract interest arbitration, there must be collective bargaining and one or more of: a strike vote, a lock-out, an unfair labour practice or the elapsing of 90 days since certification. There are detailed provisions for the submissions of proposals to this Board, a determination by the Board if conciliation will be ordered, and the possible appointment of a single arbitrator.

28. In my opinion, "*the opinion of either party reached a point where agreement cannot be achieved*" cannot mean an absolute inability to reach an agreement. Either party could always reach an agreement by acceding to all the proposals of the other party. The belief must mean an agreement cannot be reached on terms acceptable to the referring party.

29. The *Platoon Act* does not require that all possible resolvable issues must be resolved prior to arbitration. Nor does the *Trade Union Act* require this level of resolution prior to strike or lock out, or first contract arbitration or indeed even rights arbitration.

30. It may be that a party will find it advantageous to resolve many issues rather than leave them to the arbitrator. Or a party may resolve issues to make a favourable impression on the Arbitrator.

31. Or a party may retain many issues for the Arbitrator because it may have faith (perhaps exaggerated) in the force of its arguments. Or the belief that if the arbitrator rejects some of its proposal, the Arbitrator may compensate by accepting other more important proposals.

32. In this way, entering into arbitration is very much like entering into a work stoppage. My experience includes the negotiation of hundreds of collective agreements including five strikes and two interest arbitrations. The difference is that arbitration will always produce a settlement. There is no such safety net in a work stoppage.

33. Just as in negotiated settlements reached under the shadow or reality of work stoppages, the parties to Arbitration may miscalculate. But it is not the role of the Labour Relations Board to intervene unless the conduct of one or both of the parties prevents a collective agreement from being reached.

34. In my opinion, the reason Labour Relations Boards give such emphasis to meeting and discussing is that without these activities *and without the safety net of interest arbitration,* it is highly unlikely the parties will ever reach an agreement. The absence of full and frank discussion is often the best evidence of a parties unwillingness to reach a collective agreement. This concern does not arise when disputes are resolved by interest arbitration.

35. The referral to interest arbitration guarantees an agreement will be reached. It likely won't satisfy either party completely, and one party may even find it disagreeable, but there will be a collective agreement.

36. It is this certainty that made binding arbitration attractive to many commentators on labour relations.

37. These commentators often overlooked the disadvantages of arbitration. Arbitration shifts the responsibility for the agreement from the parties to the arbitrator. The parties may be reluctant to make difficult compromises, gambling for a favourable ruling from the arbitrator. This is the "chilling effect".

38. It may be a chilling effect on the willingness of the parties to compromise, but it may act as a warm security blanket for the negotiators who evade the responsibility for difficult compromises, unfavorable agreement terms or the losses of a work stoppage.

39. Arbitration is a comparative or precedent based process. The terms of the arbitrated agreement are unlikely to deal boldly with changing circumstances and are unlikely to produce creative solutions.

40. These problems are not unique to the current dispute. They are inherent in a system of binding arbitration.

41. But this inherent flaw is counter-balanced by the security provided by arbitrated settlements for the public's need, in this case for fire protection.

42. To return to the case before us, there was no requirement for the Union to resolve all the "easier" issues before referral to arbitration.

43. The evidence in the Agreed Statement of Facts, jointly submitted by Counsel to this Board, shows the union's priority was a significant catch-up requiring a change in the previous ratio for calculating the wages of Swift Current Firefighters compared to Regina Firefighters.

44. The Affidavit (Tab 1) of Tim Marcus, Deputy Chief Administrative Officer and Chief Financial Officer, City of Swift Current, identifies amongst others; Wilf Steckler, labour relations consultant and Susan Motkaluk, Chief Administrative Officer on behalf of the City, and Lorne West, IAFF Vice-President, District 6.

45. In Mr. Marcus' Affidavit, paragraph 8 identifies Exhibit F "a true copy of the City's notes from the meeting taken by Wilf Steckler," labour relations consultant for the City.

46. On page 2 of Tab 1 Exhibit F

47. *Lorne* West, (IAFF President, District 8) explains the Union's position ending with *"historically 75% of the CPI of Regina & wages were 75% of Regina - now CPI in Swift Current is 90% of Regina. Small town Alberta 1st class FF - $92,000"*

48. Susan Motkaluk, (Chief Administrative Officer City of Swift Current) "*agree we need to move in the right direction"*

49. Affidavit of Lorne West, Vice President IAFF District 8. Tab 2 Paragraph 8.

50. "*…I indicated to the City that the main for the parties would be the monetary package. After a discussion on the issues, the talks turned to a specific discussion of wages. Ms. Motkaluk did not disagree with the union's position that the firefighters needed a "catch-up" component to the wages package but did not agree with utilizing the Union's cost of living argument with Regina…"*

51. This exchange is recorded in Mr. West notes TAB 2 A page 11/12

52. -good full discussion regarding wages and what are appropriate comparables.

53. Susan Motkaluk *objected to Union suggestion 90% of Regina was accurate CPI"*

54. In paragraph 9 of the Affidavit:

55. *…I was asked by Mr. Wilf Steckler, the City Labour Relations Consultant, to step out into the hallway for a discussion during break. In the hall way, Mr. Steckler indicated that the City understood that there needed to be a catch up in wages for Union members, but the City had already done so in the last agreement and was anxious to bargain ahead of some of the smaller municipalities with IAFF locals. It was clear to me in my discussion with Mr. Steckler that the City was not prepared to set the lead rate for smaller Saskatchewan cities.*

56. In West's notes page 12/12 this exchange is recorded as:

> *Employer gets it about catch up*
> *Arbitration best for both sides*
> *possible 1 year? if less money*
> *But can't be over Yorkton or possibly slightly more Everyone knows catch up will be needed with arbit? going on in Regina*

57. In summary, the City agreed catch-up was necessary but did not agree with the size or the new ratio proposed by the union. The City also expressed an unwillingness to set a bargaining precedent for other similar sized municipalities.

58. Resolving all or even most of the "easier issues" was not going to resolve the key issues of wages and length of the Agreement.

59. In his Affidavit, Mr. West states in paragraph 10 fourth sentence *"Ms. Motkaluk very clearly stated that she acknowledged that arbitration may be the only option to find a settlement on wages."*

60. It is not necessary for this Board to rule on the correctness of bargaining positions of either party. The positions taken were not so extreme that either party could be found to be blocking reaching an agreement.

61. In my opinion each party sincerely believed other settlements might ease their difficulty in finding an agreement.

62. This suspension of talks was not an improper act by either the Union or the City. Their jointly agreed adjournment was perfectly logical for them to wait to see if other settlements would provide assistance in the resolution of the significant gap between their positions.

63. Mr. West's affidavit clearly shows he believed two representatives of the employer told him separately, one privately and one in front of the committees, that arbitration might be necessary to get an agreement.

64. At paragraph 11, Mr. West states that he was informed by Mr. Braun, the local Union President, that informal approaches to the City in February 2013 revealed the City was still waiting for other settlements.

65. On May 29, 2013 the Union referred the matter to arbitration.

66. The referral to arbitration guaranteed a collective agreement would be reached.

67. This is no different than a Union or Employer serving notice of a strike/lockout at the time it believes most advantageous to it, even if all possible bargaining progress has not been exhausted.

68. In my opinion, there was no Unfair Labour Practice because there was a genuine intention to reach a collective agreement and therefore no failure to bargain in good faith.

a. REMEDY

69. No further action is required. The parties have agreed (the City without prejudice to its right to bring this application) to Dan Ish as arbitrator. (Affidavit of Lorne West, Agreed Statement of Facts Tab 2.) I can "judicially" note Dan Ish is a respected and experienced arbitrator agreed to by the parties in many industries or sectors for over 35 years. Dismissal of this application will result in a collective agreement being ordered by Mr. Ish.

70. In the alternative, if an unfair labour practice had been committed, the Board has established six guidelines for fashioning a remedy. [iv] (Note that although Section 11 (1) (c) dealing with employer failure to bargain and 11 (2) (c) Union failure to bargain are not exact mirror images, they are effectively the same.)[v]

71. *1. The overriding goal of the Board in designing an appropriate remedy is to place the Union and its members in the position they would have been in but for the Employer's breach of the Act (Loraas Disposal Services Ltd. supra);*

72. The remedy does not place the injured party, the employer in this case, in the position it would have been in except for the violation of the *Act.*

73. If the referral to arbitration was an unfair labour practice, then the date of the illegal act was May 25, 2013, the date of the Union referral to arbitrate.

74. The situation of the injured party on May 25, 2013 was they had the right to further negotiations to attempt to resolve the outstanding issues. This right was fully realized on August 21 and 22, 2014 with assistance of Mr. Jeffery the Board Agent pursuant to the Board order of June 11, 2014.

75. Mr. Jeffery reported "*The parties were successful in bargaining collectively and proceeded to resolve all of the outstanding matters between the parties, with the exception of the distributive issues."*

76. Mr. Jeffery describes the remaining differences between the parties as the appropriate comparators.

77. *The Local Union points to interest arbitration decisions, with the City of Weyburn and IAFF Local, 2989, being the most recent and the one it views as being at minimum, the benchmark, and it proposes higher remuneration for Swift Current. The City proposes salary increases less than this, and proposes that it would maintain the historical relationship amongst the provincial fire services. The Union believes that there is an interest arbitration scheduled between the City of Yorkton and the IAFF in the near future, and a decision would provide further clarity relative to its demands.*

78. Although the possible comparators had changed due to some more comparators emerging, this is the situation the parties occupied on May 25, 2013. Notably, the City remains unwilling to accept the comparators proposed by the Union.

79. On May 25, 2013, the parties' access to interest arbitration would not disappear until the proclamation of the *Saskatchewan Employment Act* (SEA) on April 29, 2014, 339 days later.

80. To remove access to arbitration puts the parties in the position they were in on April 29, 2014, not May 25, 2013.

81. 2. The remedy should support and foster the encouragement of unionized workplaces and the encouragement of healthy collective bargaining, which the Board has on numerous occasions found to be the underlying purpose of the Act (Loraas Disposal Services Ltd. supra for example);

82. Depriving the firefighters of a speedy resolution of their collective agreement does not support and foster unionized workplaces nor does it encourage healthy collective bargaining. This current collective agreement is now 3 years past its expiry date. It is common ground of counsel that three years is the normal length of an arbitrated settlement. In my opinion, it is desirable for this collective agreement to be resolved by the arbitrator agreed upon by the parties. They can then begin bargaining for the new agreement knowing at the outset the legislative framework.

83. *3. The remedy should not be punitive in nature (Royal Oak Mines Inc. v. Canada (Labour Relations Board) 1996 CanLII 220 (SCC), 1996 CanLII 220,(S.C.C.) [1996] 1 S.C.R. 369;*

84. At paragraph 59, the majority award identifies the remedy as punitive thus violating guideline 3.

85. The Board in exceptional cases can impose punitive sanctions. This is not an exceptional case. Wadena School Unit was an extraordinary case.[vi] In that case, the Employer published its refusal to bargain in the local newspaper, insisted on two illegal conditions to negotiate further, resiled without explanation on its wage offer, and refused to supply necessary information to the Union. The Board ordered the parties back to the table, the withdrawal of the illegal proposals, the provision of the necessary information and ordered compensation for lost wages during the period of the illegal activity. All of these orders were remedial, not punitive.

86. In my opinion the majority is wrong at paragraph 59. The majority cites the examples of paying lost wages to an illegally dismissed employee or the payment of arbitration costs of an employee who was not fairly represented. These are restorative measures to compensate the injured party for monetary losses or costs incurred by the violation. The Applicant in this case made no application for monetary loss or costs, and apparently there were none.

87. In my opinion, depriving the Respondent of access to interest arbitration is punitive.

88. ***4.The remedy should not infringe on the Canadian Charter of Rights and Freedoms and, specifically should not require a party to 4.make statements that it does not wish to make (Royal Oak Mines Inc. supra);***

89. The majority award does not currently infringe on a party's Charter Rights. The issue of access to interest arbitration of public employees has been argued before but not yet decided by the Supreme Court.

90. 5. There must be a rational connection between the breach, its consequences and the remedy (Royal Oak Mines Inc. supra);

91. The remedy is not rationally connected to the breach. The breach deprived the Employer of its right to further negotiations. The Board Order of June 11, 2014, and the assistance of the Board Agent, fully rectified this breach.

92. 6. The Order must be within the Board's jurisdiction as defined by the Act.

93. ***Saskatchewan Employment Act*** Section 18 ***Transitional matters*** *6-127 (5) Every arbitrator, board of arbitration or arbitration board that was appointed pursuant to The Trade Union Act or The Fire Departments Platoon Act, as those Acts existed on the day before the coming into force of this section, and whose term of appointment had not expired on the day on which this section comes into force continues in office and may continue the arbitration in accordance with this Part as if the arbitrator, board of arbitration or arbitration board were appointed pursuant to this Part*

The effect of the remedy is contrary to the Legislation since it retroactively terminates the right to binding arbitration.

In summary, in my opinion there was no failure to bargain. The Union sincerely believed that interest arbitration was the only way to reach an acceptable agreement. The experience with Mr. Jeffery suggests the Union belief was right, but it did not have to be right, just sincere. In my opinion, the remedy proposed by the majority is unnecessary, punitive, and unlikely to foster good labour relations

Jim Holmes, Board Member

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[i] *Canadian Union of Public Employees v. Saskatchewan Health-Care Association [1993] 2nd Quarter Sask. Labour Rep. 74, LRB File No. 006-93, 83*

[ii] *Retail, Wholesale and Department Store Union v. Westfair Foods Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 57, LRB File No. 007-93 cited in Canadian Union of Public Employees, Local 1881 v Kamsack (Town), 2011 CanLII 81864 (SK LRB) paragraph 25

[iii] RWDSU vs. Westfair Foods [1993*] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 157-93 page 174* cited in Barrich Farms (1994) Ltd. v. United Food and Commercial Workers, Local 1400, 2009 CanLII 69340 (SK LRB) paragraph 36

[iv] *Amalgamated Transit Union, Local 588 v. Firstbus Canada Limited* 2007 CanLII 68764 (SK LRB), 2007 CanLII 68764. at paragraph 9 cited in *Petite v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555*, 2009 CanLII 27858 (SK LRB), paragraph 91.

[v] **11**(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:
…
(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;
11 (2) It shall be an unfair labour practice for any employee, trade union or any other person
…

(c) to fail or refuse to bargain collectively with the employer in respect of employees in an appropriate unit where a majority of the employees have selected or designated the trade union as their representative for the purpose of bargaining collectively;

[vi] Canadian Union of Public Employees, Local 3078 v. Board of Education of The Wadena School Division No. 46 of Saskatchewan, 2004 CanLII 65618 (SK LRB)