SERVICE EMPLOYEES INTERNATIONAL UNION (WEST), Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, CYPRESS REGIONAL HEALTH AUTHORITY, FIVE HILLS REGIONAL HEALTH AUTHORITY, HEARTLAND REGIONAL HEALTH AUTHORITY and SASKATOON REGIONAL HEALTH AUTHORITY, Respondents

- and -

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. GOVERNMENT OF SASKATCHEWAN (MINISTRY OF HEALTH), SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, KEEWATIN YATHÉ REGIONAL HEALTH AUTHORITY, MAMAWETAN CHURCHILL RIVER REGIONAL AUTHORITY and KELSEY TRAIL REGIONAL HEALTH AUTHORITY, Respondents

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, REGINA QU'APPELLE REGIONAL HEALTH AUTHORITY, SUN COUNTRY REGIONAL HEALTH AUTHORITY, PRAIRIE NORTH REGIONAL HEALTH AUTHORITY, SUNRISE REGIONAL HEALTH AUTHORITY and PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY, Respondents

LRB File Nos. 092-10, 099-10 & 105-10, April 10, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Duane Siemens and Joan White

For the Applicant, SEIU-West:	Mr. Drew S. Plaxton.
For the Applicant, SGEU:	Ms. Crystal L. Norbeck.
For the Applicant, CUPE:	Ms. Juliana K.J. Saxberg.
For the Saskatchewan Association of Health Organizations and all Respondent Regional Health Authorities:	Ms. Leah A. Schatz.
For the Government of Saskatchewan:	Mr. Curtis W. Talbot.

Unfair Labour Practice – Communication – During collective bargaining, both employers and three trade unions engage in extensive communication campaigns – Both employers and trade unions comment to the public as well as directly to employees regarding the status of collective bargaining, proposals being discussed at the table, and their respective views and opinions – Employers communicate with public through advertising and press releases – Employers communicate directly with employees through letters, posters and material in the workplace bargaining - Trade unions allege that communications by employers interfered with, threatened and/or coerced employees in the exercise of protected

rights – Board reviews recent amendment to s. 11(1)(a) of *Trade Union* Act regarding employer communications – Board concludes that changes to *Trade Union Act* signal a greater tolerance by the legislature in capacity of employees to receive information and views from employers without being interfered with, intimidated or coerced – Board finds that legislation seeks to avoid employer conduct that would compromise or expropriate the free will of employees in the exercise of protected rights - Board finds that portions of employers' communications dealing with retroactive pay violated s. 11(1)(a) of *Trade Union Act* because employers' information was misleading – Board finds that combined effect of misinformation and the "spin" that was placed on message would have interfered with employees of reasonable intelligence and fortitude.

Unfair Labour Practice – Interference – During collective bargaining, both employers engage in media campaigns and communicate directly with employees regarding the status of collective bargaining – Employers communicate that their collective bargaining proposals are reasonable and competitive and encourage health care workers to vote on its offer - Trade unions allege that conduct of employers interfered in administration of trade unions - Board not satisfied that employers' conduct violated s. 11(1)(b) of *Trade Union Act*.

Unfair Labour Practices – Failure to Bargain in Good Faith – Trade unions allege that employers violated duty to bargain in good faith by failing to disclose their initial wage offer when asked and by failing to provide costing information for unions' proposal – Board finds that employers and trade unions agreed to two stage collective bargaining and agreed not to negotiate wages and benefits until second stage – Board finds that there was no obligation on employers to disclose wage proposals until parties entered second stage of bargaining – Board also finds there was no onus on employers to provide costing information to unions for their proposals – Board not satisfied that employers violated s. 11(1)(c) of *Trade Union Act*.

Unfair Labour Practices – Failure to Bargain in Good Faith – Trade unions allege that employers refused to bargain after they delivered comprehensive proposal to unions – Board not satisfied that employers refused to bargain with unions – Board finds that employers increased their wage offer and modified their position on contentious items – Board also finds that employers had the right to hold firm on their positions at the table – Board concludes that duty to bargain in good faith does not guarantee that trade unions will receive a steady stream of progressively better offers from employers.

Unfair Labour Practices – Direct Bargaining – Trade unions allege that employers attempted to circumvent trade unions and to bargain directly with employees because employers engaged in a pattern of issuing press releases describing their proposal immediately upon

making their proposals at the bargaining table – Board finds that trade unions are not only permissible source of information for employees about status of collective bargaining and proposals being discussed at the table – Board finds that parties were engaged in pitched battle to win and maintain support of public - Board not satisfied that employers violated duty to bargain in good faith by simultaneously issuing press releases with their collective bargaining proposals.

Unfair Labour Practices – Surface Bargaining – Trade unions allege that employer failed to bargain in good faith when it modified its position on retroactive pay during collective bargaining – Board concludes that, while communications by employers about their retroactive pay proposal fell outside the sphere of permissible employer communications, employer proposal on retroactive pay was not an attempt to sabotage collective bargaining.

Unfair Labour Practices – Communications – During collective bargaining, trade unions sponsor postcard writing campaign to encourage government to increase available funding for health care workers and/or to intervene in collective bargaining – Premier and Minister of Health respond in writing to individuals who sent postcards, some of whom were health care workers - Trade union alleges that communications by Minister were threatening, intimidating and/or coercive to health care workers – Board concludes that government is not bound by s. 11(1)(a) of *Trade Union Act* – In alternative, Board concludes that Minister was not acting as agent of employers when his correspondence was sent.

Unfair Labour Practices – Aiding and Abetting – Trade union alleges that government counselled or procured commission of violation of *Trade Union Act* by writing or approving communications used by employers found to be in violation of *Trade Union Act* – Board concludes that government not bound by s. 12 of *Trade Union Act* – In alternative, Board finds that clear and compelling evidence required to sustain violation of s. 12 of *Trade Union Act* – Board not satisfied that government officials were the guiding mind behind communications that were found to be unlawful.

Unfair Labour Practices – Aiding and Abetting – Trade union alleges that government interfered in collective bargaining through imposition of a financial mandate – Board concludes that government not bound by s. 12 of *Trade Union Act* – In alternative, Board not satisfied that imposing restrictions on incremental funding for publicly- funded organizations was contrary to *Trade Union Act*.

The Trade Union Act, ss. 11(1)(a), (b) & (c) & s. 12.
The Interpretation Act, 1995, s. 14.

INDEX

Background 5
Facts 8
Relevant Statutory Provisions 35
Analysis of Allegations against SAHO and the Respondent Employers 36
Did SAHO and Respondent Employers violate s. 11(1)(a)? 36
Position of the Parties 36
Analysis of s. 11(1)(a) and 2008 Amendment 42
Circumstances of Impugned Employer Communications 51
Evaluation of Impugned Employer Communications 52
Did SAHO and the Respondent Employers violate s. 11(1)(b)? 56
The Allegations 56
The Board's Jurisprudence with respect to s. 11(1)(b) 57
Conclusions with respect to alleged violations of s. 11(1)(b) 58
Did SAHO and the Respondent Employers violate s. 11(1)(c)? 60
Board's Jurisprudence with respect to s. 11(1)(c) 60
Refusing to Disclose Information 65
Refusing to Bargain 67
Timing of Press Releases/Direct Bargaining 68
Insufficient Authority to Negotiate 69
Receding Horizon Bargaining/Surface Bargaining 73
Analysis of Allegations against the Government of Saskatchewan 75
Is the Crown Bound by *The Trade Union Act*? 75
Did the Government violate s. 11(1)(a)? 75
Did the Government violate s. 12? 77
Conclusions 79

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** All three (3) of the applicant trade unions have filed applications with the Saskatchewan Labour Relations Board (the "Board") alleging that various unfair labour practices were committed by some or all of the named respondents during their last round of collective bargaining (the "2008 Round"); bargaining that ultimately resulted in new collective agreements for each of the applicant trade unions covering the period April 1, 2008 until March 31, 2012.

[2] The Service Employees International Union (West) ("SEIU-West") filed its application[1] with the Board on July 23, 2010. The Saskatchewan Government and General Employees' Union ("SGEU") filed its application[2] with the Board on July 29, 2010. The Canadian Union of Public Employees ("CUPE") filed its application[3] with the Board on August 5, 2010. While the three (3) applications were not identical, they bore sufficient similarities that on February 16, 2011, the Board agreed that all proceedings ought to be heard concurrently. The allegations against the respondents are both broad-ranging and overlapping. Nonetheless, the genesis of all of the allegations is conduct that occurred during the 2008 Round of collective bargaining. The applicant trade unions collectively allege that Saskatchewan Health-Care Association (more commonly known as the Saskatchewan Association of Health Organizations or "SAHO") and the named regional health authorities committed the following violations of *The Trade Union Act*:

1. That SAHO and the respondent employers violated s. 11(1)(a) by interfering with, intimidating, threatening or coercing employees in the exercise of rights conferred pursuant to the *Act* by one or more of the following means:
    - Through communications that, while directed to the media or the public, were misleading, intimidating, threatening and/or coercive for health care workers with respect to the exercise of their rights under the *Act;*

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1 See: LRB File No. 092-10.
2 See: LRB File No. 099-10.
3 See: LRB File No. 105-10.

- Through direct communication with health care workers in a manner that was misleading, intimidating, threatening or coercive with respect to the exercise of their rights under the *Act*;
- Through communication that tried to convince employees to accept SAHO's collective bargaining proposals and/or to demand a ratification vote from the applicant trade unions.

2. That SAHO and the respondent employers violated s. 11(1)(b) of the *Act* by interfering in the administration of the SEIU-West, SGEU and CUPE, or any of them, by one or more of the following means:
    - By attempting to bargain directly with affected employees respecting terms and conditions of their employment.
    - By trying to convince employees to accept SAHO's bargaining proposals and/or by encouraging members of the bargaining unit to demand a ratification vote from the applicant trade unions.

3. That SAHO (and thus the respondent employers) violated s. 11(1)(c) by refusing or failing to bargain in good faith toward the conclusion of a collective agreement by one or more of the following means:
    - By refusing to provide SEIU-West, SGEU and CUPE with the financial information they required when requested by representatives for the respective unions.
    - By refusing to bargain with the applicant trade unions after tabling its final offer or, in the alternative, by placing conditions in its willingness to engage in collective bargaining.
    - By not providing sufficient authority to its negotiators at the commencement of collective bargaining.
    - By engaging in a pattern of simultaneously issuing press releases when it presented its collective bargaining proposals at the table.
    - By modifying its position on retroactive pay such that it reduced its offers and/or proposals at the table.
    - By attempting to unilaterally control and changing the bargaining agenda and procedures and/or by failing to follow through with the bargaining procedures that SAHO proposed.

[3] In its application, SGEU has also alleged that the government of Saskatchewan committed the following violations of *The Trade Union Act*:

1. That the government of Saskatchewan violated s. 11(1)(a) of the *Act* by communicating directly with health care workers in a manner that was misleading, intimidating, threatening or coercive with respect to the exercise of their rights under the *Act;*

2. That the government of Saskatchewan violated s. 12 of the *Act* by taking part in, aiding, or counseling SAHO and the respondent employers to commit violations of the *Act.*

[4] The Board began hearing evidence on May 2, 2011. SEIU-West called members of its bargaining team from the 2008 Round of collective bargaining; namely, Mr. William Robert (Bob) Laurie, the union's Director of Collective Bargaining and Enforcement, and Ms. Shawna Colpitts, the union's Director of Political Action and Education. SEIU-West also called other members of its bargaining unit, including Mr. Mike Murphy and Ms. Tracy Lynn Fradett. Finally, SEIU-West called Ms. Barbara Cape, the President of SEIU-West. SGEU called members of its bargaining team in the 2008 Round, including Mr. Daniel Edward (Danny) Hinds, Mr. Bart Beckman, and Ms. Teresa (Tracy) Sauer. Finally, CUPE called the members of its bargaining team in the 2008 Round, including Ms. Suzanne Posyniak, a CUPE National Representative, Mr. Gordon Campbell, President of CUPE's Health Care Council, Ms. Sandra Seitz, Mr. Larry Staff and Mr. Darcy Bucsis.

[5] In reply, SAHO called Mr. Jardon Jakuboski, Ms. Gloria Wall, and Mr. William Allan Parenteau. Each of these individuals was part of SAHO's bargaining team and each played a role at one or more of the bargaining tables involved during the 2008 Round of collective bargaining. SAHO also called Mr. Ryan Smith, who was SAHO's Director of Compensation, and Ms. Susan Antosh, who was its president.

[6] The government of Saskatchewan elected to call no evidence relying instead on the material it filed in its Reply.

[7] These proceedings involved a near forensic examination of the conduct of the parties during the 2008 Round of collective bargaining. Having considered the not-insignificant volume of evidence presented by the parties, together with fulsome argument from able counsel, we have concluded that one (1) aspect of the allegations made by the applicant trade unions is

well founded. While we are satisfied that neither SAHO nor any of the respondent employers engaged in any conduct at the table that involved a violation of *The Trade Union Act*, we have concluded that portions of certain communications issued by SAHO and the respondent employers were patently inaccurate. In our opinion, the information communicated by SAHO and the respondent employers regarding an amended proposal for retroactive pay was misleading. Furthermore, SAHO's information about its amended proposal was amplified by an implied message that health care workers would lose money if they didn't accept SAHO's collective bargaining proposals. In our opinion, the combined effect of this misinformation and the "spin" placed on their messages took SAHO and the respondent employers outside of the sphere of permissible communications. We, therefore, have concluded that SAHO and the respondent employers committed an unfair labour practice during the 2008 Round of collective bargaining by interfering with employees while exercising rights conferred pursuant to the Act. As a consequence, the applications are granted, in part, as against SAHO and the respondent employers. However, in our opinion, the allegations made by SGEU against the government of Saskatchewan must be dismissed. Our reasons for coming to these conclusions are set forth herein.

Facts:

[8] The applicant trade unions presented a large volume of documentary and oral evidence in the prosecution of their applications. The Board heard evidence from numerous witnesses who recounted in great detail the events that occurred during the 2008 Round of collective bargaining; negotiations that ultimately resulted in collective agreements for health care workers but not without a measure of disappointment, frustration, tension and hard work. Collective bargaining took place over a period of approximately twenty-three (23) months commencing in September of 2008 and concluding in August of 2010. It is far beyond the scope of these Reasons for Decision to attempt to summarize all of the events that occurred during this period. Practicability dictates that we have focused our summary of the facts on those events that we find to be relevant to the determinations we have made herein.

[9] These proceedings involve collective bargaining in the health care sector. By virtue of the so-called "Dorsey Reorganization"[4] and subsequent provincial legislation[5], each of

[4] See: "Reorganization of Saskatchewan's Health Labour Relations", the Report of the Health Labour Relations Reorganization Commission, January 15, 1997.

the applicant trade unions represents a wide range of health care workers in a variety of job descriptions within specific health care regions. These positions include special care aides, licensed practical nurses, diagnostic and therapeutic technologists, food service workers, laundry and housekeeping personnel, activity personnel, maintenance staff, sterile processing workers, operating room technologists, administrative personnel and clerical staff.[6] In total, CUPE represents approximately 12,000 health care workers in five (5) regions of the Province[7]; SEIU-West represents approximately 11,000 health care workers in four (4) regions[8]; and SGEU represents approximately 2,000 health care workers in three (3) regions[9]. Collectively, the applicant trade unions represent over 25,000 health care providers working throughout this province.

[10] It should be noted, however, that while the applicant trade unions represent a broad spectrum of health sector employees, they do not represent them all. For example, the applicant trade unions do not represent registered nurses, registered nurse practitioners, and registered psychiatric nurses (collectively hereafter referred to as "nurses"), who are represented on a provincial-wide basis by the Saskatchewan Union of Nurses. In addition, they do not represent health care practitioners, who are represented by the Health Sciences Association of Saskatchewan or a small unit of laundry workers in the Regina Qu'Appelle Region represented by the Retail, Wholesale and Department Store Union, Local 568.

[11] The respondent employers are all regional health authorities operating in their respective regions of the province. Pursuant to s. 12 of *The Health Labour Relations Reorganization (Commissioner)* Regulations, R.S.S., c.H-0.03, Reg. 1, SAHO is designated as the bargaining agent on behalf of the respondent employers for purposes of collective bargaining. In other words, by legislative design, SAHO is responsible for collective bargaining in the health care sector.

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[5] See: *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03. See also: T*he Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S., c. H-0.03, Reg. 1.

[6] In the nomenclature used in the health sector, these employees are often referred to as "*health services providers*", a term flowing from the Dorsey Reorganization. In these Reasons for Decisions, we prefer the less precise but more common expression of "health care workers".

[7] Namely, the Regina Qu'Appelle Regional Health Authority, the Sun Country Regional Health Authority, the Prairie North Regional Health Authority, the Sunrise Regional Health Authority, and the Prince Albert Parkland Regional Health Authority.

[8] Namely, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, and the Saskatoon Regional Health Authority.

[9] Namely, the Keewatin Yathé Regional Health Authority, the Mamawetan Churchill River Regional Authority, and the Kelsey Trail Regional Health Authority.

[12] Some history is helpful in understanding the matters in issue in these proceedings. Prior to the Dorsey Reorganization, which occurred in 2002, there were well over a hundred different employers of health care workers in this Province, with these employees being represented in a variety of bargaining units. Following the Dorsey Reorganization, the number of employers was dramatically reduced and larger bargaining units for health care workers were established, as was a system of provincial-wide collective bargaining. Each of the applicant trade unions now has one (1) collective agreement covering all the health care workers it represents.

[13] Even prior to moving to this new structure of collective bargaining, the applicant trade unions and the respondent employers realized that there were many inconsistencies in the job qualifications, differences in expectations with respect to required skills, efforts and responsibilities, and significant inconsistencies in wage rates and working conditions for similar positions at different locations. In 1999, the parties agreed to develop and enter into a process of evaluating health care jobs. It was agreed that a job evaluation plan would be developed and this plan would be a vehicle to rationalize and standardize qualifications, working conditions and wage rates for health care workers. It was intended that the plan would be administered jointly by the respondent employers and the applicant trade unions. The goal of the joint job evaluation plan was to achieve some degree of consistency and parity in wages and benefits paid to employees in the health care sector. While the parties agreed to the terms of a joint job evaluation plan in 2001, it took some time for the parties to agree on the implementation of that plan. An implementation agreement was achieved by the parties in 2004. Thereafter, the parties began the Herculean task of implementing the new plan for a workforce in excess of 25,000 health care workers.

[14] A considerable amount of effort was put into implementing the joint job evaluation plan by the parties and, following its implementation (which took several years), it was agreed that, to avoid inconsistency creeping back into their respective collective agreements, collective bargaining for the applicant trade unions would be accomplished in two (2) stages. Firstly, the parties would engage in collective bargaining at individual bargaining tables, whereat each provider union would bargain individually with SAHO with respect to issues specific to that particular union and the employees that it represents. Secondly, at some point in the bargaining process, the parties (from all three (3) individual bargaining tables) would then move as a

"coalition" to one (1) "common" table. While there was no specific agreement between the parties as to the kind of proposals that must be negotiated at the common table, there appears to be a general acknowledgement that certain issues should not be negotiated at the individual tables. The most obvious example of the items generally withheld from discussions at the individual tables were items that could affect the integrity of the joint job evaluation plan, including adjustments to wages and/or wage scales, shift premiums and other economic allowances. The parties first used this new process in their 2004 Round[10] of collective bargaining.

[15] The significance of the foregoing is that, while the parties have a very mature bargaining relationship and have negotiated many very detailed collective agreements, the process of collective bargaining now in use by the parties is relatively new; having only been used in a few rounds of collectively bargaining.

[16] As with most areas of health care in this province, the regional health authorities are almost exclusively funded by the provincial government. Simply put, the provincial government determines how much money the respondent employers have available to spend in their respective regions on health care. The employers then seek to deliver the best health care they can within their envelope of available funding. One (1) of the restrictions placed on SAHO by the regional health authorities in collective bargaining is the requirement that SAHO not agree to any proposals for which funding is not available. SAHO relies on in-house analysts like Mr. Smith (and others) to help it cost the proposals it is negotiating on behalf of the respondent employers to ensure that the future costs of any collective agreement that it negotiates will fall within the funding envelope established by the provincial government. As over seventy percent (70%) of the government's investment in health care goes toward salaries, there can be no doubt that the quantum of funding from the provincial government has a direct impact on collective bargaining in the health care sector.

[17] It was acknowledged by the parties that funding for health care is one of the single largest areas of expenditure for the government of Saskatchewan and that, collectively, annual funding from the provincial government for the respondent employers is measured in the billions of dollars. Because of the quantum of provincial money involved, officials in the

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[10] The bargaining between the parties that resulted in collective agreements dated April 1, 2005 to March 31, 2008.

Ministries of both Finance and Health monitor collective bargaining, sit as observers at the various bargaining tables, and provide advice to Cabinet through one or more advisory committees, including the Personnel Policy Secretariat.

[18] Prior to the 2008 Round of collective bargaining, the applicant trade unions began a process to identify and priorize collective bargaining proposals. The applicant trade unions each sought proposals from their respective membership and each had their own procedure for vetting and ranking their proposals in terms of relative priority. Most of these proposals were aimed at promoting working conditions for health care workers, improving their compensation and benefits, and enhancing their job security. However, there can be little doubt that a prominent goal for the applicant trade unions was to achieve a monetary settlement similar to that which had been previously achieved by the Saskatchewan Union of Nurses[11] . Going into the 2008 Round, the monetary gains that had been achieved by nurses were seen by other health sector employees as significant. Correctly or incorrectly, health care workers went into collective bargaining viewing the quantum of wage increases being proposed for them as a measure of the extent to which the government of Saskatchewan and the respondent employers "*valued*" their services. The applicant trade unions adopted this approach during collective bargaining; they communicated this message to SAHO at the table; they repeated and reinforced this message in communications with their members; and it was a reoccurring theme in most of their public communications.

[19] SAHO also initiated its own process to develop collective bargaining proposal. However, there were two (2) components to SAHO's process. Firstly, SAHO sought out proposals from the respondent employers. The proposals coming from the health regions tended to involve either clarification of language in their respective agreements or proposals intended to implement what the employers saw as efficiencies in the workplace (or more accurately designed to remove inefficiency caused by limitations in the employers' discretion in the management of its employees). Secondly, SAHO sought out its economic mandate (confirmation as to the amount of funding that would be available from the provincial government for settlement of these particular collective agreements). To coordinate proposals from the respondent employers, together with the economic interest of the provincial government in collective bargaining, an *ad hoc* committee was formed comprised of five (5) representatives

from various health regions and (3) representatives of the government of Saskatchewan. This body was commonly referred to as the "Health Labour Relations Council" or "HLRC". The representatives on the HLRC from the respondent employers were either Chief Executive Officers or Vice-Presidents of Human Resources. The representatives on behalf of the government were officials from the Ministries of Health and/or Finance.

[20] The HLRC was the vehicle through which the labour relations interests of the respondent employers were coordinated with the economic interests of the provincial government. It was the HLRC from whom SAHO sought approvals for its collective bargaining proposals, as well as the strategies it intended to employ in advancing its position at the table. On the other hand, the economic mandate came directly from the provincial government. Ms. Antosh worked directly with government officials on matters of funding. Ms. Antosh testified that only the provincial government (specifically Cabinet) could increase the quantum of funding that would be available to the respondent employers over the course of the collective agreements.

[21] Prior to the commencement of collective bargaining, Ms. Antosh was advised by government officials as to how much funding would be available for settlement of these particular collective agreements. Ms. Antosh testified that SAHO did not receive a wage mandate or anything associated with specific salary increases. Rather, SAHO was provided with an "economic" mandate, which was described in terms of the total amount of money (or "cash") that was available for settlement of these particular collective agreements, together with limits in funding for particular years (or "lift") during the life of the collective agreements[12]. Obviously, well aware that health care costs were increasing and the applicant trade unions would be expecting to make economic gains on behalf of their members, the focus of the government's deliberations on health care funding was on how much incremental funding would be made available for agreements with the applicant trade unions. Other than through efficiencies in the workplace (which appear to be very difficult to achieve in the health care sector), incremental funding from the province is the sole vehicle through which wage increases and other economic benefits are

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[11] The Saskatchewan Union of Nurses had previously settled a four year collective agreement, which provided for wage increases, market supplement payments, increased premiums, shift differential and other benefits equally approximately a thirty-seven percent (37%) increase in wages and benefits.

[12] An explanation of nomenclature may be of assistance. "Cash" is the term used to describe the total quantum of increased funding arising out of changes or enhancements to a multi-year collective agreement over the entire term of that agreement, including one (1) time payments. "Lift" is the term used to describe the ongoing effect an increase in one (1) year will have on subsequent years. In a multi-year agreement, the total lift of that agreement is the summation of the lift for each of the individual years, plus end-loading (increases in wages and benefits that are set to

funded. However, as indicated, the funding that was provided by the province was not correlated to specific wage increases. Rather, the funding approval that was provided to SAHO was defined in terms of cash, with some restrictions being placed on annual lift. How this funding would be spent was to be determined through collective bargaining with each of the applicant trade unions.

[22] Once Ms. Antosh had received the economic mandate from the province, SAHO then began working with the respondent employers to determine how this funding should be allocated. SAHO's analysts developed costing models based on these discussions and these models tried to include all financial implications for the respondent employers arising out of its collective bargaining proposals. Ms. Antosh testified that the challenge for the respondent employers was to provide optimal health care services within the limits of their available funding. Thus controlling costs and obtaining efficiencies in the workplace were two (2) goals of the respondent employers going into collective bargaining. On the other hand, they were also aware of the need to maintain salaries that were competitive when compared to other Western provinces in order to recruit and retain health care workers. SAHO went into collective bargaining with the goals of controlling costs, obtaining certain desired efficiencies, and using "competitiveness" as the benchmark for measuring wage increases.

[23] Ms. Antosh testified that she did not take part in any of the face-to-face negotiations with the applicant trade unions. Rather, her role was; to coordinate communications with the HLRC and the Province; to make recommendations to the HLRC on collective bargaining strategies; to obtain funding approval from the Province; and to priorize items for SAHO various bargaining teams. Subject to approval from the HLRC on labour relations matters and subject to approval from the government as to the economic mandate, Ms. Antosh had final decision-making authority for collective bargaining with the applicant trade unions during the last round of collective bargaining. Ms. Antosh was also the final approving authority for any communications used by SAHO or the respondent employers.

[24] Ms. Antosh testified that it was SAHO's practice to prepare a communication strategy going into each round of collective bargaining and that it did so for the 2008 Round. SAHO was aware that the respondent employers had been granted an expanded right to

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occur on the last day of an agreement). Lift provides a measurement of how much the annual cost of a collective agreement is rising. Cash provides a measure of the total cost of a collective agreement.

communicate facts and opinions in 2008[13] and that it intended to exercise that right in the 2008 Round. As collective bargaining continued, SAHO updated its communications strategy concomitant with events unfolding at the table. The focus of SAHO's strategy going into the 2008 Round was to utilize communications as a vehicle to both update the public and keep public opinion on its side during what was anticipated to be a difficult round of collective bargaining. SAHO also intended to communicate with health care workers to ensure that they understood the position of the respondent employers and to correct any errors or misconceptions about its proposals caused by union officials. The following excerpts from the communication strategy prepared by SAHO in September of 2008 (prior to the commencement of collective bargaining) are instructive as to SAHO's intentions going into collective bargaining:

> ***Communications Strategy***
>
> *The Unions will be trying to win public support when they ask for what has already been given to SUN. SAHO will be maintaining the position that wage negotiations are influenced by the ability to recruit and retain employees in competitive markets. SAHO's approach will be to provide accurate, balanced information based on evidence, not anecdotal information.*
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> . . .
>
> *The communications challenge evolves as the collective bargaining process moves through its stages. Prior to bargaining, the challenge is to achieve pre-emptive balancing of the unions' key messages with strategic messaging on behalf of the employers. During bargaining, the primary challenge is to provide timely and accurate information to key stakeholders without jeopardizing progress in negotiations. It may be possible to also help advance the bargaining agenda.*
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> . . .
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> *The provider groups have already positioned themselves as expecting increases similar to those negotiated with SUN. SAHO consistently communicated that wage adjustments are negotiated based on the employers' needs to remain competitive within the selected marketplace for positions and these key messages should be reinforced. SAHO will need to inform the public that "pattern bargaining" does not imply replication of the outcome in another bargaining unit with different market imperatives.*
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> |---|---|
> | *CUPE, SEIU, SGEU Members* | *During collective bargaining, union members are not always aware of the content of the proposals of their bargaining union. With health region communicators, opportunities could be explored for keeping provider group union members apprised of their union's position* |

[13] Through *The Trade Union Amendment Act, 2008*, c.26 (assented to May 14, 2008).

	and proposals. Public promotion of the working-together web site should encourage union members to access the site for balanced information.
Public	*The public will glean most of its information from media reports prior to, during and subsequent to collective bargaining. Surveying the public early in the process to gauge the level of understanding of complex issues and bargaining concepts will provide some direction in creating appropriate key messages. A second survey when monetary proposals are being discussed will be helpful in consideration of ongoing messaging.*
Media	*The public (and by extension, its elected representatives) will evaluate the progress of collective bargaining and the bargaining parties' positions by statements in media reports and accompanying editorial comment. Journalists will be seeking up-to-date, timely and accurate reports. Effective management of media messages will help to minimize external pressures on the bargaining process.*

[25] The actual communications engaged in by SAHO and the respondent employers will be discussed later in these Reasons for Decision. However, at this stage it is sufficient to note that, going into the 2008 Round, SAHO intended to utilize communications (both to the public and directly to employees) as a vehicle to explain and support its collective bargaining strategies.

[26] There was another external factor that influenced the 2008 Round of collective bargaining. This new factor was the introduction of *The Public Service Essential Services Act*, which became effective on May 14, 2008. This new legislation both impacted the ability of the parties to engage in lock-outs or work stoppages and it imposed new obligations on the parties to negotiate essential services agreements. The impact of this legislation will be discussed later in the Reasons for Decision. At this point, it is sufficient to note that this new legislation had an impact on collective bargaining.

[27] Collective bargaining began in September/October of 2008 with the first rounds of meetings at the individual tables. The parties each presented their respective proposals. Neither SAHO nor the applicant trade unions included information on wage proposals with their initial packages. While there was some effort at the outset of collective bargaining to agree on what types of matters would be discussed at the individual tables and which matters would be reserved for the common table, no formal agreement was achieved by the parties, other than the

agreement that they would maintain two (2) stages for bargaining as they had in the 2004 Round. The parties met regularly throughout the fall of 2008. Much of the time was spent reviewing the packages that had been tabled and exchanging information and providing explanations.

[28] In addition to collective bargaining, the parties were also involved in discussions regarding essential services and the implementation of their respective obligations flowing from *The Public Service Essential Services Act*. While SAHO initially was involved in coordinating information related to implementation of this new legislation in the health care sector, SAHO took the position that compliance with the new legislation was the responsibility of the individual regional health authorities. As a consequence, the applicant trade unions began dealing directly with the health regions regarding essential services agreements. It is noted that these negotiations were taking place at the same time as the applicant trade unions were bargaining with SAHO for new collective agreements. While there were a number of discussions around essential services, none of the respondent employers were successful in negotiating an essential services agreement with the applicant trade unions during the period of time relevant to these proceedings. The applicant trade unions felt that attempting to develop essential services agreements covering over 25,000 workers, while simultaneously negotiating new collective agreements, was beyond their resources. In addition, the legislation became the subject to a legal challenge to determine its compliance with the *Canadian Charter of Rights and Freedoms*. For purposes of these proceedings, it is sufficient to note that the parties did not have essential services agreements in place at any time when collective bargaining was taking place.

[29] At the outset of collective bargaining, the applicant trade unions asked SAHO for an agreement from SAHO that it would refrain from any communications in the media relative to the status of collective bargaining. SAHO considered but declined this request. Simply put, SAHO went into the 2008 Round intending to utilize communications as a vehicle to explain and support its collective bargaining strategies and it was not prepared to modify its position in that regard.

[30] The first communication regarding the status of collective bargaining was issued by CUPE on September 12, 2008 immediately after the first few days of collective bargaining. It was a bargaining update by CUPE to its membership. This communication described collective bargaining in the following terms:

> *SAHO and the health employers tabled an extremely regressive package that would negatively impact your quality of life in areas of retention, mobility, health and safety, workload, union representation and participation, discipline, seniority, postings and vacancies. In short these proposals reflect a desire to utilize workers as they see fit with little regard to your working lives, your job security and your hard won rights.*
>
> *Your bargaining committee voiced strong opposition to SAHO's backward plans to effectively wipe out the historical gains we have achieved in previous rounds of bargaining.*

[31] Each of the applicant trade unions provided regular updates to their membership on the status of collective bargaining and the proposals being discussed at the bargaining table. For the most part, this information was technical and merely reported on the clauses being discussed with SAHO and the result of those discussions. However, on some occasions, the updates provided by the applicant trade unions contained a subjective element. For example, in its updates on the status of collective bargaining, CUPE described SAHO's conduct at the bargaining table to its members as "*hostile*", "*transparent trickery*" and a "*waste of our time, our money, our patience*".

[32] The first public communication in the 2008 Round occurred in November of 2008. CUPE paid for a public advertisement in various newspapers commenting on the current round of collective bargaining with SAHO.

[33] Progress was being made on a number of language issues at the individual tables and a number of proposals were either agreed to or the parties agreed to revert to existing language. On the other hand, SAHO's bargaining team also rejected many of the changes or enhancements proposed by the applicant trade unions. Simply put, SAHO said "no" to a number of enhancements desired by the unions, indicating that SAHO was "*not prepared to go there*" in the 2008 Round. In a bargaining update dated October 4, 2008 to its memberships, CUPE was critical of SAHO's willingness to say "no". CUPE described the respondent employers as having a "*poor vision and negative disposition*" and telegraphing to its membership that collective bargaining would be a "*bitter pill caught in the throat of health care workers*". SEIU-West in a press release dated November 17, 2008, blamed the new *Public Service Essential Services Act* for the lack of progress in contract talks with SAHO. Many of the witnesses for the applicant trade unions testified as to their perception that *The Public Service Essential Services Act* had

emboldened SAHO and the respondent employer, making them more willing to say "*no*" to the enhancements and improvements desired by health care workers.

[34] It should be noted that soon into the bargaining process (fall of 2008), the applicant trade unions began asking for information as to SAHO's monetary proposals (i.e.: wage increases and other economic enhancements SAHO intended to propose). Notwithstanding that they had not disclosed their monetary expectations, the unions felt they needed to see SAHO's monetary offer or, at least, its initial monetary offer in order to make informed decisions at the individual tables. The applicant trade unions wanted SAHO to table its entire collective bargaining package, which would include its monetary offer, before the parties moved to the common table. SAHO advised the unions that it was not prepared to do so. In December of 2009, CUPE walked away from the table indicating that it was not possible for it to continue bargaining at the individual table in the absence of SAHO's entire package of proposals, including SAHO's monetary proposals. This sentiment was echoed by each of the unions. SAHO's first public communication in the 2008 Round was a press release dated December 8, 2008 advising the public that CUPE had walked away from the bargaining table. After a short hiatus during which both parties made public statements regarding their respective views, collective bargaining resumed.

[35] At several points while the parties were bargaining at the individual tables, each of the applicant trade unions sought an early indication from SAHO as to the monetary offer it would be making when the parties moved to the common table. By March of 2009, all of the unions had demanded to know what SAHO's monetary proposal was going to be. On each occasion, SAHO declined to do so indicating that its monetary proposals would be part of a complete package of proposals and would not be tabled until the parties moved to the common table. Whether or not SAHO was required to or should table its monetary proposal prior to moving to the common table was a recurring dispute between the parties during the 2008 Round of collective bargaining.

[36] Another recurring dispute between the parties involved changes proposed by SAHO to implement "efficiencies" in the workplace. SAHO proposed four (4) changes to the existing collective agreement intended to implement efficiencies, these included such things as: (1) changes to the call-in system (casual hours of work); (2) changes related to annual vacation; (3) changes to the payout provisions for statutory holidays; (4) changes related to bidding on

temporary positions. The applicant trade unions viewed the employers' efficiencies as undermining entitlements that had been achieved in previous rounds of collective bargaining and, thus, they represented "concessions". The unions took the position that concessions of the nature proposed by SAHO had to be "bought" by the health regions (i.e.: obtained in exchange for other economic gains). The fact that SAHO had proposed concessions reinforced the unions' belief that they needed to know what kind of monetary proposals were going to be on the table. Simply put, even though they were still bargaining at the individual tables, the applicant trade unions demanded to see, at least, SAHO's UUinitial monetary proposal. SAHO responded by indicating that it would only table its monetary proposal as part of a complete package when the parties moved to the common table. SAHO suggested two (2) options to the unions; (1) the parties could move to the common table; or (2) SAHO would agree to "pool" any economic savings that accrued from the efficiencies being proposed by the employers at the individual tables and then add the money from that "pool" to the monetary proposal when the parties moved to the common table. It should be noted that, other than SGEU, who agreed to a modified version of one (1) of SAHO's proposed efficiencies/concessions, none of the efficiencies/concessions that were proposed by SAHO were agreed to by the unions either at the individual tables or at the common table.

[37] The costing of proposals also became an issue during collective bargaining. Because of the large number of employees affected by the changes being proposed at the table, the parties were well aware that even a very small change in their collective agreements could costs millions of dollars. As indicated, there were a number of enhancements proposed made by the applicant trade unions that were rejected by SAHO; indicating that it was not interested in pursuing those proposals in the 2008 Round. Nonetheless, the applicant trade unions asked SAHO to prepare costing information for all of its proposals and SAHO declined to do so. While SAHO was prepared to provide the unions with costing information for its proposals, it was not prepared to have its staff analyze the costs of all of the proposals made by the applicant trade unions. Simply put, SAHO was not prepared to have its analysts prepare costing information for those proposals that SAHO was not prepared to entertain in the 2008 Round.

[38] Collective bargaining continued at the individual tables through the winter and spring of 2009. Progress was made at the individual tables, with a number of proposals being discussed, counter-proposals being made, and with productive discussions taking place. While many of the same issues and concerns were common to all three (3) tables, each of the

applicant trade unions took their own approach to collective bargaining. For example, CUPE felt that the absence of a monetary proposal from SAHO was untenable and, in winter/spring of 2009, CUPE advised SAHO that it would be seeking a strike mandate from its membership. In response to the information that CUPE would be seeking a strike mandate, SAHO advised that the health regions (in which CUPE was the bargaining agent) would be issuing essential services notices[14] to affected employees. Essential service notices were issued to employees in June of 2009 about the same time as CUPE was conducting their strike vote. Some employees who received essential services notices were confused as to whether or not they were eligible to participate in the strike vote. CUPE circulated information to their membership clarifying the right of all employees (whether designated as essential or not) to participate in its strike vote. The fact that a strike mandate was being sought by CUPE was the subject of press releases and comments in the media by both CUPE and SAHO, as was the fact that essential services notices had been served on affected employees. CUPE received a strike mandate with 88% support from its membership in June of 2009. In its public communications following the strike vote, CUPE described SAHO as having an "*arrogant attitude*" and its health care workers were receiving "*second-class treatment*" in collective bargaining.

[39] In June of 2009, the parties were still bargaining at the individual table. The applicant trade unions continued to request that SAHO table its monetary package (prior to moving to the common table). SAHO declined to do so but did indicate that when it tabled its general wage increase, it would also include special market adjustments[15] for certain job classifications. No actual amounts or further parameters were provided by SAHO at that time. In June of 2009, the SEIU-West held a rally in Saskatoon to bring attention to the fact that its members had been working without a contract for approximately fifteen (15) months and that SAHO and the government had yet to make a monetary proposal at the table. Following this rally, the then Minister of Health, the Honourable Mr. Don McMorris, issued a press release wherein he challenged the parties to "*redouble*" their efforts to reach new collective agreements.

[40] Bargaining continued at the individual tables in June and July of 2009. Progress was made. However, a common theme of witnesses for the applicant trade unions was that they felt under considerable pressure at this point in the bargaining process to reduce the number of

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[14] Notices pursuant to section 9 of *The Public Service Essential Services Act*.

[15] Special market adjustments or market adjustment factors involve temporary increases to the rate of pay applied to specific classifications of positions. Typically, these adjustments deal with short term anomalies in the availability of vs. demand for employees in certain positions that may be temporarily hard to recruit.

outstanding proposals they had on the table to enable to the parties to move to the common table. There was also considerably more media involvement by all the parties, with each of the parties conducting interviews with the media regarding the status of collective bargaining, the outcome of CUPE's strike vote, and the delivery of essential services notices to affected employees.

[41] In August of 2009, SAHO provided the applicant trade unions with certain costing information. However, SAHO repeated its position that it would not be preparing costing information on a number of the unions' proposals; proposals which SAHO had rejected. In August of 2009, the parties began preparing to move to the common table. At this point in time, the parties had been bargaining at the individual tables for nine (9) months and the unions were frustrated with how long it was taking to obtain a monetary proposal from SAHO. On the other hand, SAHO was frustrated with how many proposals the unions still had on the table, including many with significant monetary implications.

[42] The parties met for the first time at the common table on September 22, 2009. At this meeting, SAHO tabled its monetary proposals. The general wage increase offered by SAHO was 9.25% over a four (4) year contract. Special market adjustments were proposed by SAHO for three (3) classifications of positions. SAHO also proposed an expedited process for dealing with the reclassification of Licensed Practical Nurses. SAHO tabled its monetary proposals as part of a complete package of proposals, which included the items agreed to at the individual tables, together with SAHO proposals on the items that were still being negotiated, such as the four (4) efficiencies/concessions which had been proposed by SAHO. Retroactivity was described in SAHO's September 22, 2009 proposal in the following terms:

> *Retroactivity*
> *All employees on staff as of date of signing of the Collective Agreement, shall be eligible for retroactive wage adjustments based on all paid hours with an Employer party to this Collective Agreement.*
>
> *Except as otherwise provided in this Collective Agreement, all Articles take effect on the date of signing of the Collective Agreement.*

[43] Immediately after the parties broke from the table on September 22, 2009, SAHO issued a press release outlining, in general terms, its monetary proposals. SAHO also placed advertisements in most daily and weekly newspapers in Saskatchewan indicating it had made a

monetary offer to the applicant trade unions. These ads conveyed a message that the wages being proposed by health care employers were "*competitive*". In addition, SAHO placed a series of short radio advertisements containing essentially the same message. The unions issued their own press releases in response to SAHO's monetary proposals. The unions viewed SAHO's monetary offer as inferior to the settlement that had been achieved by the Saskatchewan Union of Nurses and they were very disappointed. The theme of the unions' message in its public communications and to health care employees was that SAHO's monetary offer was "*insulting*".

[44] The applicant trade unions did not table a monetary proposal or any other proposals on September 22, 2009. The parties resumed bargaining at the common table in October of 2009. The unions rejected the monetary proposals contained in SAHO's September 22, 2009 package of proposals and tabled their own collective document of proposals at the coalition table on October 14, 2009 but did not table a specific monetary proposal. At the same time, the unions were conducting information sessions with their respective memberships.

[45] At this point in time, collective bargaining was occurring both at the common table and at the individual tables. During October and November of 2009, SAHO made a number of amendments to its original September 22, 2009 settlement proposal. Each of these included modest enhancements to the employers' original offer and/or modifications to language or the efficiencies/concession. For example, SAHO expanded the number of classifications to receive a market adjustment factor. The applicant trade unions repeatedly rejected the monetary component of SAHO's offer. Although agreement was achieved on a number of language issues, the position of the unions was that they wanted a wage increase comparable to that achieved by the Saskatchewan Union of Nurses; they wanted market adjustment factors applied to more classifications; and they wanted SAHO to remove the four (4) efficiencies/concessions for the package. The unions conducted a rally at the Saskatchewan Legislative Building, circulated communications to their respective membership, and engaged in various media interviews; all in an effort to garner public support and to pressure SAHO to modify its position and the government to make more money available.

[46] In November of 2009, SAHO paid for a series of radio advertisements. A transcript of one advertisement is as follows:

> *SAHO and health care employers value all health care workers. We're committed to competitive wages. The right people, in the right place, at the right time. SAHO provided a comprehensive package to the unions in September. Employers remain committed to a timely settlement. The unions have not demonstrated the same commitment. Proposals tabled by SAHO are focused on having residents, clients and patients the first priority. The unions call these rollbacks. Why? What are the unions' priorities? Visit working-together.info.*

[47] The applicant trade unions were upset with these advertisements for two (2) reasons; (1) the message in the advertisement inferred that the unions were not committed to obtaining a timely settlement; and (2) although not directed to employees, the message directed interested persons to go to SAHO's website, entitled "www.working-together.info". This website had been created by SAHO for the 2008 Round, was accessible by the general public (and thus employees), and contained pages of information from SAHO regarding its collective bargaining proposals, together with research and other information assembled by SAHO to support its position. SAHO had not previously utilized a website in previous rounds of collective bargaining.

[48] On November 25, 2009, the applicant trade unions provided their first specific monetary proposal to SAHO; being 15% over three (3) years. SAHO countered by again amending its September 22, 2009 package and, in doing so, increased its monetary offer to 9.40% (over 4 years). The parties remained at impasse as to the monetary component but continued bargaining at both the individual and common table on other items. Both SAHO and the unions continued their respective public communications. SAHO began expanding the information available on its website, including research that had been conducted by its staff. For example, the SAHO website displayed a graph depicting the respective year over year percentage increases in the consumer index compared to the cumulative monetary increases paid to the health care workers and out-of-scope staff. The unions found this information objectionable for two reasons: (1) SAHO had included increases in benefits as well as wages in their calculations; and (2) SAHO refused to provide the applicant trade unions with the data to support its graphs.

[49] Collective bargaining continued on November 27, 2009. Tensions at the table were increasing, with the applicant trade unions believing that the monetary proposal being presented by SAHO did not demonstrate that the respondent employers "*valued*" their employees or, more accurately did not "*value*" health care workers to the same degree that had "*valued*" nurses. An exchange took place at the bargaining table on November 27, 2009, during which the applicant trade unions took offence to a statement made by SAHO's lead negotiator.

On or about December 1, 2009, an advertisement appeared in the local papers wherein the applicant trade unions personally named SAHO's lead negotiator and were critical of the comments he made at the table. When the parties next convened for collective bargaining, SAHO's representatives were upset that the name of a member of its bargaining team had been used in the unions' advertising. Negotiations broke down. Thereafter, SAHO made application to the Minster of Advanced Education, Employment and Labour seeking the appointment of a conciliator. While the Minister declined to appoint a conciliator, the parties voluntarily agreed to participate in conciliation efforts with the assistance of a third party (mediator).

[50] The parties worked with and through the mediator during January of 2010 for approximately two (2) weeks. During this period, the parties did not meet for face-face negotiations but they did refine their respective proposals, make counter-proposals, and periodically agreed to revert to existing language; through a form of shuttle diplomacy using the mediator. During this process, the applicant trade unions made substantial reductions in the number of changes and enhancements they were pursuing. However, the parties remained at an impasse with the main items of contentions being the quantum of the monetary proposal, the number of classifications that would receive a market adjustment factor, and SAHO's proposed efficiencies/concessions.

[51] On January 27, 2010, SAHO tabled (through the mediator) what SAHO described as its "final offer". SAHO's final offer included a wage increase of 9.50% over four (4) years and an expansion in the number of classifications that would receive a market adjustment factor. SAHO's final offer also included its proposed efficiencies/concessions and a change in its position with respect to the application of retroactive pay. The following provisions of SAHO's offer are relevant:

> *This Memorandum of Agreement which constitutes full and final settlement of the terms of the Collective Agreement for the period April 1, 2008 to March 31, 2012.*
>
> . . .
>
> *All proposals in this Memorandum of Agreement are conditional upon acceptance of this package in its entirety.*
>
> *If this package is not accepted by March 31, 2010 then retroactive pay will cease to accrue effective April 1, 2010.*
>
> . . .

> *Retroactivity*
>
> *All employees on staff as of date of signing of the Collective Agreement, shall be eligible for retroactive wage adjustments based on all paid hours with an Employer party to this Collective Agreement. Employees who have moved between employers covered by the Collective Agreement shall apply to their previous employer for that portion of the retroactivity.*
>
> *Employees who have retired from any Employer party to this Collective Agreement, shall, upon application to their employer, be eligible for retroactive wage increases based on all paid hours up to and including the date of retirement.*
>
> *All applications for retroactive pay must be made within 30 calendar days of the signing of the Collective Agreement.*

[52] In its final offer, SAHO was only agreeing to pay retroactive pay up to April 1, 2010. It was not agreeing to pay retroactive pay for any hours worked after that point. Ms. Antosh testified that SAHO's reason for including this provision was to encourage the applicant trade unions to conclude collective bargaining before the end of the provincial government's budget cycle (March 31st).

[53] Immediately following the delivery of SAHO's final offer to the unions, two (2) things happened; firstly, conciliation ended; and secondly, SAHO issued a press release indicating that it had tabled a final offer to the applicant trade unions. In its press release, SAHO asked the unions to "*take the offer to their membership for a vote*". SAHO also directed anyone seeking further details on its proposals to go to SAHO's website. On SAHO's website, a detailed narrative of its final offer was included, including SAHO's rationale and/or objectives with respect to various disputed issues in its offer. For example, the narrative on SAHO's website with respect to retroactive pay was as follows:

> *Each employee will receive a one-time retroactive payment of about 10% of their wages for the period April 1, 2008 to the present. For full time employees this is approximately $2,500 - $10,000. Accumulation of retroactive pay ends on March 31, 2010. Retirees are eligible upon application.*

[54] In the days that followed, both SAHO and the applicant trade unions were engaged in extensive media communications around the fact that SAHO had delivered a final offer. The theme of SAHO's press releases and communications was that the parties were still too far apart and that the offer that it had made on behalf of health care employers was "*fair*" and "*competitive*". The theme of the press releases and communications made by the applicant

trade unions was that the offer was "*disgraceful*" and that tabling a final offer was "*disingenuous and heavy handed*". The unions were particularly critical of SAHO for tabling a final offer while the parties were engaged in conciliation efforts. The unions wrote directly to the chief administrative and financial officers of their respective health care regions and asked that SAHO's final offer be rejected by the respondent employers. In addition, the unions provided an analysis and critique of SAHO's final offer in a number of detailed communications to their respective memberships.

[55] In February of 2010, SAHO began placing a series of advertisements in most daily and weekly newspapers in Saskatchewan. These advertisements commented on various aspects of SAHO's final offer. For example, the text of an ad describing retroactive pay was as follows:

> *Retroactive Pay for workers without a contract for two years.*
>
> *Retroactive pay is not a bonus or an entitlement, but is negotiated with each contract.*
>
> *SAHO's final offer includes retroactive pay for employees for year one and year two of the contract, totaling about 10% of an employee's annual salary. (4% for year one 2008-2009, and 4% carried into year two 2009-2010 and the additional 2% for year two 2009-2010).*
>
> *There is no accumulation of retroactive pay after March 31, 2010.*
>
> *Employees who retired after April 1, 2008 may apply for retroactive pay that accumulated on hours worked up to March 31, 2010.*
>
> *For full time employees the retroactive pay may be between $2,500 to $10,000.*
>
> *Visit www.working-together.info to calculate retro pay.*

[56] SAHO's website contained all of the information contained in its media advertisements, together with SAHO's rationale for the positions it was taking at the bargaining tables. In addition, SAHO's website also included an online calculator which employees could use to calculate the quantum of retroactive pay they would be losing on a monthly basis after April 1, 2010. The applicant trade unions objected to the information contained in SAHO's ads and on its website related to its retroactive pay proposal. Firstly, the applicant trade unions felt that SAHO's information misrepresented SAHO's proposal on retroactive pay as a fact and not merely a proposal put on the table by SAHO. Secondly, the unions felt that SAHO's advertisements encouraged employees to go its website and to obtain information directly from

SAHO rather than to get their information from the unions. Thirdly, the unions disputed the accuracy of SAHO's retropay calculator and other information contained on SAHO's website.

[57] In February of 2010, the applicant trade unions engaged in a series of local meetings with members of their respective bargaining units. Employees were not asked to vote on SAHO's final offer. The leadership of the unions did, however, come to the conclusion that their members were not satisfied with SAHO's final offer based on the comments they received during these meetings. On March 6, 2010, the unions wrote to SAHO and indicated that their respective memberships had rejected SAHO's final offer and asked to continue negotiating.

[58] The parties did not return to the bargaining table. However, informal discussions took place between the parties with the assistance of another third-party facilitator. No resolution was achieved as a result of this process. The applicant trade unions continued to press SAHO to return to the bargaining table and to increase its monetary offer. SAHO advised the applicant trade unions that it was prepared to engage in further collective bargaining, provided that such discussions fell within certain parameters that had been outlined at both the bargaining table and during information discussions. Simply put, SAHO took the position that it had placed all of its available financial resources on the table and, while it was prepared to continue bargaining with the unions as to how these resources would be spent, it was not prepared to bargain outside of its financial mandate (to increase the size of its monetary offer). The unions took the position that the parties should return to the bargaining tables and that no conditions should be imposed on doing so. The parties were again at an impasse and the March 31, 2010 deadline for retroactive pay expired.

[59] During April of 2010, the parties exchanged correspondence and met at least once at the bargaining table. On May 3, 2010, SAHO tabled an addendum to its final offer. In its addendum, SAHO withdrew and/or modified the language to its contentious efficiencies/concessions but the wage component was essentially the same, as was SAHO's provision on retroactive pay. SAHO asked the applicant trade unions to take its amended offer to their membership for a vote. SAHO also reminded the unions that its deadline had expired and that "*employees are currently working at 2007-2008 wage rates as retroactive pay ceased to accrue effective April 1, 2010*".

[60] In April of 2010, SAHO and the applicant trade unions were both engaged in public advertising campaigns, as well as media relations. SAHO was heavily advertising in most of Saskatchewan's daily and weekly newspapers. The applicant trade unions were also advertising but on a much smaller scale. Both were relying on the media to communicate their respective messages. The theme being advanced by the applicant trade unions in their ads was that SAHO's offer was *"putting health care at risk*" and "*playing favourites*" (by not giving the same increases that were given to nurses). SAHO's advertisements included the following information on its offer to health care workers:

> *A competitive offer of 9.5% .. shouldn't health care workers vote?*
>
> *9.5% over 4 years*
> *"SAHO and the employers have offered health care workers represented by CUPE, SEIU-West and SGEU a reasonable and competitive final offer of 9.5% over four years. British Columbia recently settled a two year agreement with the same workers for a 0% general wage increase.*
>
> *Final offer and addendum*
> *We met with the unions and asked them to specify their concerns with the final offer. They have offered no solutions to conclude a collective agreement, other than to demand more money. SAHO has now presented an addendum to the final offer to clarify our proposals and amend language that addresses concerns that have been raised. We've also withdrawn several proposals.*
>
> *Average of $250 / month*
> *The outcome of SAHO's proposals is that Saskatchewan health care workers will be paid competitive salaries. They will receive retroactive pay for hours worked between April 1, 2008 and March 31, 2010. But right now, they're working for 2007-2008 wages and no longer accumulating retroactive pay. For an employee with full time hours, this represents an average of $250 for every month without a contract since April 1.*
>
> *We don't understand why there is still a delay in concluding a collective agreement. SAHO, and the employers we represent, believe the employees should be given the opportunity to vote on the final offer and addendum."*

[61] Early in 2010, SAHO began preparing a series of posters and tent-cards that were distributed to health regions, who in turn placed the poster throughout their respective facilities. The posters were placed in entrances, public spaces, hallways, lunchroom and cafeterias. The tent-cards were placed on tables in lunch rooms and cafeterias. Initially, the message in the posters and tent-cards focused on the fact that SAHO had made a final offer and explained how its proposed efficiencies/concessions would work. The applicant trade unions objected to the

content in this material, as well as the fact that employees were being disciplined for removing these materials from the workplace. In April of 2010, the number of posters and tent-cards began to increase and the content of the material began to include the message that SAHO's offer was "competitive" and that employees were no longer accruing retroactive pay. Witnesses for the applicant trade unions testified that by May of 2010, SAHO's posters and tent-cards were everywhere in health care facilities. In cafeterias and lunch rooms, for example, there were two (2) or three (3) tent cards on very table in the room. An example of one (1) poster placed in workplaces reads as follows:

Impacts to Employees

of not ratifying the final offer and addendum:

Retroactive pay is proposed for hours worked between April 1, 2008 and March 31, 2010. Accumulation of retro pay ended April 1, 2010.

- If the final offer had been ratified b March 31, 2010, employees would have received 7.5% more in general wages (4% for 2008-2009; 2% for 2009-2010; 1.5% for 2010-2011) with an additional 2% on April 1, 2011, to bring the total increase to 9.5% over 4 years. Presently employees are not receiving the 7.5% wage increase.
- For full time employees, the monthly amount not payable because retro pay ceased to accumulate April 1, 2010 is, on average, $250 / month. As of June 30, this will be 3 months or approximately $750.
- For those classifications with proposed market adjusted rates, there is an increased economic impact. The monthly amount not payable to these classifications, because retro ceased to accumulate April 1, 2010 is approximately*:
  - Medical Radiation Tech (MRT)
    $450/month or $1350 as of June 30
  - Combined Lab X-ray Tech (CLXT)
    $840/month or $2520 as of June 30

* assumes full time employees at top step in classification, proposed market adjusted rate if contract was signed by April 1, 2010

Documents illustrating further examples are posted at

www.working-together.info

[62] The applicant trade unions objected to both the content contained in these posters and tent-cards, as well as the number of them that we placed in health care facilities.

[63] On May 11, 2010, the applicant trade unions made a comprehensive counter-proposal to SAHO. In this offer, the unions included a wage proposal, together with a number of desired enhancements. On May 12, 2010, SAHO rejected the unions' counter-proposal. In a press released issued by SAHO that same day, SAHO made the following comments on the unions' counter-proposal:

> *The most recent proposal from the unions demands additional financial resources, including differentials and premiums. A review of these demands by SAHO indicates that current rates are competitive. SAHO believes that higher premium rates are not necessary and, compared to applying financial resources to general wage increases, do not benefit the employee group as a whole. "What the unions have recently demanded will significantly increase the cost of the collective agreement by over $80 million, and ongoing costs would be in excess of $45 million per year after March 31, 2012," stated Susan Antosh, President and CEO of SAHO.*
>
> *"There is no competitive rationale for expanding the financial resources that have already been tabled. We have stated this to the unions over and over again. At this late stage in the process, we are disappointed that the unions persist in seeking additional financial considerations despite an already competitive package," said Antosh. SAHO maintains that the final offer and addendum is fair, and competitive, with comparable markets and that employees should have the opportunity to vote on it.*
>
> *Background information is available at www.working-together.info.*

[64] The following is an example of a newspaper advertisement paid for by SAHO that appeared in the local papers in May of 2010:

> ## *Shouldn't health care workers vote?*
>
> ### *Agreement on wage rates*
> *"SAHO and the employers have offered health care workers represented by CUPE, SEIU-West and SGEU a reasonable and competitive final offer of 9.5% over four years. The unions seem to be in general agreement over these wage rates.*
>
> ### *Significant additional demands*
> *The unions' demands, in addition to the pay increases, would add over $80 million to the cost of SAHO's proposed offer – an offer that's already competitive with similar western Canadian health care markets.*
>
> ### *Further delays at the expense of employees*

> *SAHO has proposed health care workers receive retro pay for hours worked between April 1, 2008 and March 31, 2010. Right now, they're working for 2007-2008 wages and no longer accumulating retroactive pay. For a full time employee, this is an average of $250 for every month without a contract since April 1.*
>
> *The unions have been aware since January that retroactive pay would cease to accumulate on April 1. Further delays from the unions in settling a contract are at the expense of our employees.*
>
> *Shouldn't health care workers vote?*
> *SAHO, and the employers we represent, believe the employees should be given the opportunity to vote on the final offer and addendum."*

[65] The applicant trade unions objected to this information on the basis: (1) that SAHO's estimate of the cost implications of their offer was grossly exaggerated; (2) that SAHO was impugning the union's willingness to compromise and/or its position during collective bargaining; (3) that SAHO was encouraging members to vote on SAHO's offer; an offer which the Union's had rejected.

[66] In May and June of 2010, the applicant trade unions conducted another round of meetings with their respective memberships. As before, health care workers were not asked, and did not, vote on SAHO's offer. Following these meetings, the unions advised SAHO that the direction they had received from the membership was "*to bargain*". During this same period, SAHO was paying for a series of radio advertisements indicating, *inter alia*, that health care workers should be given an opportunity to vote on SAHO's final offer.

[67] In late June of 2010, SAHO's wrote directly to all health care workers affected by collective bargaining with the applicant trade unions. As SAHO administered payrolls for each of the health regions, it had the home address for all of the employees and it sent a letter to them at their homes. The letter contained the following information with respect to the status of collective bargaining:

> ***To our valued health care employees,***
>
> *We understand your frustration with the extended contract negotiations. When it became apparent to SAHO that the conciliation process, requested in December 2009, was not going to result in a settlement, a final offer was tabled to your union. We asked your union to let you vote on the offer. SAHO, who represents the employers at the bargaining table, became aware that there were misunderstandings about the proposals and that specific employer proposals were a particular problem for some employees. Accordingly, in May, SAHO*

> *proposed an addendum to the final offer to clarify the language and its application in the work place and to withdraw some proposals. The remaining language proposals are few in number and mostly impact the CUPE bargaining unit. The employers believe the CUPE agreement should be more consistent with the SEIU and SGEU agreements.*
>
> *SAHO has included general wage increases that will assist in ensuring that wage rates are competitive with rates for similar jobs in western Canadian markets. The employers have not proposed adjustments to shift differential, weekend premium or earned leaves, as these are currently competitive. SAHO has however, indicated to your union that we could reallocate a portion of the general wage increase to the premiums if the unions proposed that it would better meet your needs.*
>
> *SAHO proposed that retroactive pay would cease to accumulate effective April 1, 2010. Your union has known this since January when the final offer was presented. SAHO presented it this way to encourage a timely end to concluding a collective agreement. You are now working for 7.5% less than you would have been receiving had the agreement been ratified by March 31, 2010.*
>
> *We have advised your union that the offer will not increase – SAHO has tabled a fair and competitive wage rate and language to enhance the ability to provide quality care to our patients, residents and clients. We think employees should have the opportunity to vote on the final offer and addendum. We encourage you to voice your opinions to your union.*
>
> *To read the final offer and addendum and view documents that illustrate competitiveness in comparable markets, please see the web site at www.working~together.info*
>
> *Sincerely,*
>
> *Susan Antosh,*
> *on behalf of Saskatchewan Health Regions*

[68] The parties met in July and August of 2010. Both parties kept up their media campaigns, with the parties continuing to deliver essentially the same messages as before. During this period, the applicant trade unions prepared postcards to be used by supporters and health care workers. These postcards were addressed to Premier Brad Wall and asked him "*to get back to the table and negotiate a fair deal with Saskatchewan's health providers".* The Premier and the then Minister of Health replied to those persons who sent postcards. The letters from Minister Don McMorris contained the following information:

> *Premier Brad Wall has forwarded to me a copy of your postcard regarding the contract talks involving the Saskatchewan Association of Health Organizations (SAHO) and health provider unions. I appreciate that you have taken the time to inform us of your views about this matter.*
>
> *Our government values all health care employees and the work they do, both directly and indirectly, with respect to patient care.*

> *I understand that the four-year contract offer proposed by SAHO includes the following:*
>
> - *General wage increases of 4%, 2%, 1.5% and 2%, maintaining competitive wages relative to western Canadian markets;*
> - *Provision for retroactive pay; and*
> - *Market adjusted rates for specific classifications.*
>
> *The market adjusted rates have been offered for those classifications that have been deemed difficult to recruit. We believe that competitive wage rates being offered will assist recruitment and retention of employees.*
>
> *I assure you that we are interested in SAHA and the provider unions reaching a collective agreement. It is our view that the provider unions should give the offer serious consideration and allow their members to vote on the contract.*
>
> *It is important to note that as of April, 2010, retroactive pay no longer accrues. What this means is that on ratification of an agreement, union members will receive retroactive pay up to March 31, 2010, only.*
>
> *If employees have any questions or concerns about SAHO's offer, they are encouraged to discuss them with their union executive, which bargains on their behalf.*

[69] In June of 2010, CUPE invited the then Minister of Health to the bargaining table, hoping that his presence would "*jump-start*" what they perceived as stalled health-care contract talks. In July of 2010, the Minister Don McMorris wrote to the CUPE declining its offer.

[70] The parties met for collective bargaining in July of 2010. The applicant trade union's asked SAHO to enhance its monetary offer and SAHO declined to do so. While SAHO was prepared to discuss re-allocating available funding, SAHO was not prepared to discuss proposals that would further increase the total cost (cash) of its final offer. SAHO took the position it had all of its financial resources on the table and that there was no competitive reason to increase the total compensation in its offer. The parties were again at an impasse.

[71] Although the parties were at an impasse, informal communications continued to take place; both directly between the parties and at times with the assistance of a third party. In early August of 2010, the parties decided to return to the table in the hope that a compromise was achievable. The informational discussion had signaled that a compromise was achievable if the province could increase available funding; if SAHO was prepared to withdraw its remaining efficiency/concession proposals; if SAHO was prepared to reinstate full retroactive payments; and if the applicant trade unions would agree to abandon their remaining enhancements. The

parties met on August 12, 2010. Following a protracted session of collective bargaining that went well into the evening, a compromise was ultimately achieved. The parties arrived at a tentative agreement(s) that was subsequently ratified by health care workers and the respondent employers.

[72] At the point the parties achieved their tentative agreement(s), they had been engaged in collective bargaining for approximately twenty-three (23) months. The process had attracted significant media attention and both sides had engaged in media campaigns. During the process of collective bargaining, SAHO engaged in extensive use of electronic and print media to convey its message to the public. On the other hand, the applicant trade unions tended to rely on public rallies, press releases and targeted advertisements. In terms of direct communications, SAHO relied upon its website, posters and tent cards in workplace, and, at least one (1) letter sent to the homes of health care workers. The applicant trade unions conducted over three hundred (300) meetings with their membership and distributed countless bulletins and updates to health care workers. All three (3) of the unions had obtained strike mandates from the membership. However, no strike notices were served nor was any strike action taken.

Relevant Statutory Provision:

[73] The relevant provisions of *The Trade Union Act* provide as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;*
> >
> > *(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;*
>
> . . .
>
> *12. No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of the Act.*

Analysis of Allegations against SAHO and the Respondent Employers:

[74] The applicant trade unions allege that SAHO and the respondent employers committed (both individually and collectively) a number of violations of *The Trade Union Act* during the 2008 Round of collective bargaining. We will deal with each of the alleged violations in turn.

Did SAHO and the Respondent Employers violate section 11(1)(a) of *The Trade Union Act*?

Position of the Parties:

[75] The applicant trade unions allege that SAHO and the respondent employers violated s. 11(1)(a) of *The Trade Union Act* during the 2008 Round. Firstly, the unions argue that SAHO used its public communications, including paid advertisements, press releases, media interviews and letters to the editor of local newspapers, as a vehicle to communicate with health care workers and that these communications, when viewed objectively, ought to be seen as intimidating, coercive and/or threatening. In addition, the unions argue that SAHO communicated directly with employees through posters and tent-cards in the workplace and through letters that were sent to the homes of health care workers and that the message contained in these communications would have been perceived as intimidating, coercive and/or threatening by employees of reasonable fortitude. In addition, the unions argue that SAHO's advertisements, posters and tent cards, as well as the letter that was sent to employees in June of 2010, contained seriously misleading information. Specifically, the unions note that SAHO's message indicated that the limit it proposed in its final offer on retroactive pay accrual was a fact (agreed to or otherwise), not just a position SAHO had taken at the bargaining table. The unions argue that this information was false and that it was repeated by SAHO a number of times, in both its public communications and in its communications directly to employees. The unions also argue that this misinformation was often communicated with a threatening statement. For example, a letter to the editor authored by Ms.Antosh and published in the Regina Leader-Post stated that "*The unions have been aware since January that retro pay would cease to accumulate (after April 1, 2010). Further delays in settling a contract are at the expense of*

health care workers." The unions argued that SAHO's statements would reasonably have been perceived as threatening, intimidating and coercive by employees. The unions argue that there is really no other way the employee could have perceived these messages other than as a threat.

[76] The applicant trade unions also point to the reference in Ms. Antosh's June letter to employees wherein she stated that SAHO's final offer would not change and where she encouraged employees to contact their unions and demand that the final offer be submitted to a ratification vote. The unions also pointed to SAHO retro-pay calculator in its website which purported to allow employees to calculate how much money they were "*losing*" because its final offer had not been ratified. The unions argue that collectively these messages were coercive, intimidating and/or threatening to health care workers because the reasonable assumption was that they were going to lose money and continue losing money if they didn't accept SAHO's final offer.

[77] Counsel on behalf of CUPE argued that the controlling test for determining whether or not communications by an employer during bargaining for the renewal of a collective agreement are offensive in the eyes of *The Trade Union Act* is the decision of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Credit Union*, [1997] Sask. L.R.B.R. 454, LRB File No. 090-06. In particular, counsel for CUPE relies on the following comments of the Board in that decision:

> *We have said earlier that an employer who chooses to communicate with employees concerning issues which are the subject of bargaining with the trade union representing those employees must be exceedingly careful in framing those communications. We have stated our view that, in assessing such communications, the question is not whether the communication is a legitimate exercise of freedom of expression, but whether there is anything about the communication which may have a coercive impact on employees or interfere with their ability to exercise their rights under this Act, taking into account the imbalance of power between employees and their employer.*
>
> *In this connection, we do not think it is necessary that the Union adduce evidence to show that individual employees have, in fact, suffered coercion or intimidation resulting from the communications. As we have pointed out in the past, the assessment of the effect of the communications is generally an objective one, and does not depend on the ability of the complainant to produce evidence of a subjective impact on employees. In any case, the essence of the Union complaint in this case is not that the communication was of a coercive nature, though this is the character of the allegations made in many cases of this kind. The allegation in this instance is that the misinformation in the first paragraph of the memorandum constituted interference in the relationship*

> *between the employees and their bargaining agent, because it cast doubt on the strategy being followed by the Union at the bargaining table.*

[78] Counsel on behalf of SGEU pointed to the decision of this Board in *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1997] Sask. L.R.B.R. 198, LRB File Nos. 226-95 & 329-96, as authority for the proposition that communications to the public or in the media may have coercive effects on employees and, if they do, they represent a violation of s. 11(1)(a) of the *Act*. In particular, counsel for SGEU relies on the following comments of the Board in that decision:

> *Collective bargaining can be a sensitive process. The positions and strategies adopted by each party are largely focused on persuading or influencing the other party. In this respect, their exposure to public scrutiny may be both incomprehensible to a wider audience, and dangerous to the bargaining objectives of the parties. For this reason, seasoned representatives of parties involved in collective bargaining relationships often place an embargo on discussion in public or through the press of bargaining developments.*
>
> *We therefore do not share the view attributed to Mr. Humeny in the newspaper story of October 29, 1996, that an employer has some inherent right to free expression in the press. Such expression is amenable to scrutiny in the same terms as other forms of employer communication. If it could be established that an employer was cynically or willfully manipulating media coverage as part of a strategy of communication with employees, it would be a matter of considerable concern to this board. Though the negotiations in this case have been subjected to an unusual degree of discussion and scrutiny in public, owing to the application for first contract arbitration, we do not accept that this has the effect of liberating the representatives of the Employer entirely from the limits placed on communication by the Act.*

[79] Counsel on behalf of SEIU-West argued that the applicable jurisprudence of this Board for determining whether or not communications by an employer are offensive in the eyes of *The Trade Union Act* was set forth in the decision of this Board in *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. The United Group – Taxi Division*, [2009] C.L.R.B.R (2nd) 1, 2009 CanLII 20026 (SK LRB), LRB File Nos. 052-07, 053-07 and 117-07. In that decision, the Board reviewed numerous previous decisions of the Board dealing with permissible and impermissible communications by employers, including *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1990] 5 C.L.R.B.R. (2nd) 254, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87; *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Fall Sask. Labour Rep. 28, LRB File Nos. 250-88 & 290-88; *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Co. Ltd.,* [1991] 9 C.L.R.B.R. (2nd) 228, [1990] Fall Sask. Labour

Rep. 68, LRB File No. 207-89; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa*, [2007] Sask. L.R.B.R. 87, 2007 CanLII 68775 (SK LRB), LRB File No. 162-05; *United Food and Commercial Workers Union, Local 1400 v. Cornerstone Credit Union*, 2008 CanLII 47043 (SK LRB), LRB File No. 024-08.

[80] Counsel on behalf of SAHO took the position that the past jurisprudence of the Board regarding permissible and impermissible employer communications must be modulated to reflect the 2008 amendment to *The Trade Union Act*; noting that s. 11(1)(a) was specifically amended in 2008 to add the phrase; "*but nothing in this Act precludes an employer from communicating facts and its opinions to its employees.*" SAHO argues that the operative test for the application of s. 11(1)(a) is now whether the impugned communication has the objective effect of: attempting to bargain directly with employees; attempting to undermine the union's ability to represent its membership; or interfering with, restraining, intimidating, threatening or coercing an employee of reasonable fortitude and intelligence in the exercise of a right granted to that employee pursuant to the *Act*.

[81] Counsel on behalf of SAHO encourages this Board to look to the decisions of the Alberta Labour Relations Board for guidance on the interpretation of s. 11(1)(a), arguing that Alberta has legislation similar to s. 11(1)(a) following the 2008 amendment. Specifically, Counsel relies on the decisions of the Alberta Board in *Local 424 of the International Brotherhood of Electrical Workers v. Stuve Electric Ltd., et.al.*, [1989] Alta. L.R.B.R. 69; *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW – Canada) Local No. 1227 v. E.D.O. Canada Limited*, [1992] Alta. L.R.B.R. 202; *International Brotherhood of Electrical Workers, Local Union 424 v. Force Electric Ltd.*, [1997] Alta. L.R.B.R. 27; and *Re: Medical Imaging Consultants*, [1999] Alta. L.R.B.R. LD-065. Counsel argues that these decisions demonstrate that employers in Alberta are entitled to communicate with their employees within broadly defined limits provided that the contents of such communications do not constitute coercion, intimidation, threats, promises or undue influence.

[82] Counsel on behalf of SAHO also encourages this Board to look to the decisions of the British Columbia Labour Relations Board arguing that British Columbia also has legislation similar to s. 11(1)(a). Specifically, Counsel relies on the British Columbia Board in *Convergys Customer Management Canada Inc. v. B.C. Government and Service Employees' Union* [2003] 90 C.L.R.B.R. (2nd) 238, 2003 CanLII 62911 (BC LRB); and *RMH Teleservices International Inc.*

v. B.C. Government and Service Employees' Union, et. al., [2005] 114 C.L.R.B.R. (2nd) 128, 2005 CanLII 24889 (BC LRB). Counsel argues that the decisions stand for the proposition that employers in British Columbia are entitled to communicate with their employees and that an employer's communication will only come into violation of the *BC Code* if it is found to be intimidating or coercive in the context in which it occurred. Furthermore, provided that impugned communications are not themselves intimidating or coercive, they will not violate the *British Columbia Labour Relations* Code even if they express bias or views that are unreasonable. Counsel argues that the BC Board has taken the position that it will not police the accuracy or reasonableness of the views expressed by employers unless it can be shown that those views were a "*deliberate lie*". In particular, counsel for SAHO relies on the following comments of the British Columbia Board in *RMH Teleservices International Inc., supra*:

> *[**54**] The expression of anti-union views by an employer to its employees during the course of a union organizing drive is obviously a sensitive matter, but in our view the test under the legislation is not whether the employer was engaged in an anti-union "campaign". In our view, the legislative intent in the amendments was to broaden employer expression rights and to further informed choice. Accordingly, if the campaign takes place in written form and the views expressed are not in themselves coercive or intimidating, the Board has in effect found that the fact that they could be characterized as an anti-union campaign by the employer would not be sufficient to render them coercive or intimidating: see Convergs, supra; and Excell, supra.*

[83] Counsel on behalf of SAHO argues that the legislative intent of the amendment that occurred to s. 11(1)(a) in 2008 was to permit a broader right for employers to communicate with their employees than existed under the former legislation. Thus, counsel argues that this Board's jurisprudence on permissible and impermissible communications must be modified. Counsel argues that the case law in other jurisdictions, notably British Columbia and Alberta, can provide a useful guide for this Board in determining the new boundaries of permissible employer communications.

[84] SAHO acknowledges that it used radio and newspaper advertisements during the 2008 Round of collective bargaining and that it did so in order to communicate its position to both the public and to employees. SAHO also acknowledges that it sent an "open letters" to numerous newspapers and that it sent a letter directly to employees at their homes. Counsel on behalf of SAHO argues that all of these communications were factual and/or consistent with SAHO's opinions regarding the status of collective bargaining and the positions it had taken at

the table. SAHO argues that all of its communications fell squarely within the post-amendment boundaries of s. 11(1)(a) as communications of facts and opinions regarding collective bargaining at the time those communications were made. Counsel argues that most of the messages in SAHO communications were merely an explanation of its proposals, including information about retroactive pay, wages, benefits, multi-site work, client-focused home care and re-employment options. Counsel argues that the testimony of Mr. Smith demonstrated that the numerical and statistical information it produced and published was accurate.

[85] SAHO takes the position that, as a public service provider, health care employers are obligated to ensure that the public is informed as to the status and progress of collective bargaining. In addition, SAHO takes the position that it felt obligated to ensure that employees were provided with facts and SAHO's opinions regarding collective bargaining in order to properly focus and contextualize what it saw as "biased" information being given to employees by the applicant trade unions about the bargaining process. Finally, counsel for SAHO notes that the applicant trade unions were not sitting on the sidelines when SAHO was conducting its media campaign. Rather, the unions were actively participating in their media campaigns and they were placing their own "spin" on the facts and opinions there were expressing, both in the pubic arena and to their membership.

[86] The government of Saskatchewan also takes the position that the past jurisprudence of the Board regarding permissible and impermissible employer communications must be modulated to reflect the 2008 amendment to *The Trade Union Act*. The government argues that the decisions of this Board must be modified not only because of the amendment that occurred in 2008 but also to reflect the values enshrined in *The Canadian Charter of Rights and Freedoms*, including the free speech rights of employers. The government argues that the previous jurisprudence of this Board was too narrow and placed too many restrictions on the right of employers to communicate with their employees. The government takes the position that employers have their own views and interests on collective bargaining matters and ought to be free to share those views with their employees for the purpose of both sharing information and attempting to persuade employees to accept a point of view. To which end, the government of Saskatchewan argues that the 2008 amendment to *The Trade Union Act* signaled that employers are free to share their genuinely held opinions on collective bargaining issues except to the extent that the result of sharing those opinions (or facts, as the case may be) is to

significantly or seriously compromise the ability of employees to exercise the rights conferred pursuant to the *Act*.

[87] With respect to the allegations by SGEU against it, the government of Saskatchewan takes the position that it is not bound by *The Trade Union Act* except in its role as an employer. The government argues that, since SGEU is not alleging that the Crown is an employer in its application, there is no basis on which a finding by this Board may be made against it. In the alternative, the government denies that any actions by its officials violated the *Act*.

Analysis of s. 11(1)(a) and the 2008 amendment to The Trade Union Act:

[88] To begin our analysis, it may be helpful to place s. 11(1)(a) in a larger context. The employees of a particular workplace have the right to be collectively represented by a trade union of their choosing in their dealings with their employer regarding the terms and conditions of their employee. Simply put, employees have the right to form, to join, and to bargain through the trade unions of their choosing. These rights are not unlimited but they are rights that are recognized as a protected associational activity within the meaning of s.2(d) of the *Canadian Charter of Rights and Freedoms*. These rights are also recognized, protected and regulated by various legislative regimes governing labour relations across Canada.

[89] Not all labour legislation is the same and, in designing a particular labour relations regime, each legislature has the right to make its own policy choices in balancing the interests of employers, the interest of employees, and the interests of trade unions. Section 11(1)(a) of *The Trade Union Act* is a clear example of how difficult these policy choices can be. This provision seeks to balance a number of laudable yet clearly competing interests; including the interests of employers (the right to freely communicate with the employees regarding matters directly affecting its business interests, its current activities, and its plans for the future); the interests of employees (the right to exercise their associational rights free from coercion, intimidation or undue influences); and the interests of trade unions (the right to represent their membership as their exclusive bargaining agent). This provision has been amended a number of times over the life of *The Trade Union Act*, with the legislature of the day modifying the balance being placed on these competing interests. Subject to compliance with *Charter* values, deference is unquestionably owed to the policy choices that have been made by the legislature in designing and changing Saskatchewan's labour relations regime. See: *Saskatchewan Federation of*

Labour, et.al. v. Saskatchewan (Province of), 2012 SKQB 62 (CanLII). See also: *Saskatchewan (Province of) v. Saskatchewan Federal of Labour, et.al.*, 2013 SKCA 43 (CanLII).

[90] The legislative purpose of s. 11(1)(a) is to regulate the conduct and actions of employers. Underlying this provision; a provision that places restrictions on an employer's right to communicate with its employees; is the belief[16] that an employer's superior economic position, its capacity to influence the economic lives of its employees, and its control over work conditions invariably and inherently leads to a disproportionate influence or import being given to the views expressed by it. It must be noted that s. 11(1)(a) does not enumerate specific actions or conduct that is prohibited. Rather, the section prohibits any actions by an employer that has a particular effect. Simply put, the provision prohibits conduct, by communication or otherwise, that would have the effect of interfering with, restraining, intimidating, threatening or coercing an employee in the exercise of the rights they enjoy under *The Trade Union Act*. The legislative goal of the provision is to prevent employers from compromising or expropriating the free will of employees in the exercise of their protected rights. While employers are free to communicate with their employees, that freedom may not be used to deter, intimidate or deceive employees.

[91] As noted, not all labour legislation is the same. While all legislatures have consistently recognized the need to protect employees from coercive or intimidating behaviour by employers, a review of labour legislation from other jurisdictions demonstrates varying degrees of tolerance for the capacity of employees to receive information and views from their employers.

[92] Similarly, a review of past amendments to *The Trade Union Act* reveals that the scope of permissible communications by an employer has changed in Saskatchewan over the years moving along a policy continuum that has seen differing emphasis being placed by subsequent legislatures on the need to accommodate the "freedom of speech" interests of employers and the tolerance for the capacity of employees to receive information and views from their employers without being unduly influenced. At times, the scope of permissible communications by an employer has been expanded through legislative intervention, such as it was during the period from 1983 through until 1994. At times, the scope of permissible communications has been restricted, such as it was during the period from 1994 through until

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[16] This analytical approach was recognized by Mr. Justice Learned Hand in *National Labour Relations Board v. Federbush Co., Inc.*, 121 F. 2d 954 (2nd Circ. 1941).

2008. Following each legislative change, parties before this Board speculated that each of the amendments represented major shifts in the landscape of permissible and impermissible employer communications. However, as was noted by this Board in *United Food and Commercial Workers Union, Local 1400 v. Cornerstone Credit Union*, 2008 CanLII 47043 (SK LRB), LRB File No. 024-08, this Board's interpretation of s.11(1)(a) following each legislative change has tended to be more moderate than some may have hoped and others may have feared. See also: *Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) v. The United Group – Taxi Division*, [2009] 167 C.L.R.B.R. (2nd) 1, 2009 CanLII 20026 (SK LRB), LRB File Nos. 052-07, 053-07 and 117-07. Nonetheless, there can be no doubt that this Board's interpretation of s. 11(1)(a) have been responsive to the changing wishes of the legislature.

[93] In 2007, this Board conducted a comprehensive review of its jurisprudence on the application of s.11(1)(a) at that time in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*, 2007 CanLII 68,775 (SK LRB), [2007] Sask. L.R.B.R. 76, LRB File No. 162-06. In doing so, the Board made the following observations regarding permissible employer communications and the test(s) applied by the Board for determining when communication by an employer go beyond the bounds of permitted speech:

> *[**43**] The first decision of the Board which analyzed the test to be applied under s. 11(1)(a) was the Saskatoon Co-operative Association case [Saskatchewan United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited, [1983] Sask. Labour Rep. 29, LRB File Nos. 255-83 and 256-83]. In that case, the Board examined the lawfulness of several employer communications during the course of the parties' negotiations for the renewal of a collective agreement. The Board determined that the examination of the communication is not limited to determining whether the subject matter is prohibited or permitted under the Act, and stated at 37:*
>
> > *…but that is not to say that any particular subject is invariably prohibited (or permitted) under The Act. The result is that the Board's inquiry does not end once the subject being discussed is identified and categorized as permitted or prohibited. Instead, it concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by The Act.*
>
> *[**44**] The Board described a two-part test in the following terms at 37:*
>
> > ***The Board's approach is designed to ascertain the likely effect on an employee of average intelligence and fortitude.** That kind of **objective approach** by its very nature eliminates insignificant conduct, since trivialities will not likely influence an average employee's ability to*

freely express his wishes. ***It also necessitates an inquiry into the particular circumstances of each case, because it recognizes that the effect of an employer's words and conduct may vary depending upon the situation****.*

For example, in Super Value, a division of Westfair Foods Ltd. and Alberta Food and Commercial Workers Union Local 401 (1981) 3 Can LRBR 412 this Board commented on the special susceptibility of most employees to employer comment and conduct during a union organizing campaign.

The Ontario Labour Relations Board also examines the objective factors of what has occurred and draws reasonable inferences to determine the probable effect of employer conduct upon employees of average intelligence. In Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Greb Industries Limited (1979) OLRB, February, 89 at 98 the Board stated:

> *"In evaluating conduct which leads up to the holdings of a representation vote so as to determine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their true wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impuned conduct has deprived the employees of the ability to freely express their true wishes . . .* ***The effect of impuned conduct upon the employees is determined by looking at the objective factors of what has occurred and drawing reasonable inferences as to what is a more probable effect of such conduct upon the employees in all these circumstances*** *. . .* ***This is an objective test. The Board's approach is to determine the likely effect of the impuned conduct upon an employee of average intelligence and fortitude****."*

*[**45**] The Board went on in Saskatoon Co-operative Association to apply the test to the communications in question, utilizing the objective test and considering the context in which the communications took place. The Board stated at 40:*

> *The Board has considered the circumstances surrounding the communications in this case in an effort to determine their probable effect. All of the communications occurred during the strike and, with the exception of the second and third communications, all of them were received by employees while they were on the picket line. In that situation it cannot be said that the employees were a highly sensitive captive audience for the employers' representations. The employers' communications were directed to the employees as a group and made no effort to isolate them from each other or from their union representatives who had ready access to the picket lines.*
>
> *The Board heard a great deal of evidence regarding alleged inaccuracies in the written communications. It finds that the first and second communications were substantially accurate, and that in the circumstances they did not likely interfere with the average employee's ability to form his own opinion or to reach his own conclusions. Nor were they of the kind that could reasonably support an inference of improper employer motive.*

[emphasis in original]

[94] The Board in *Temple Gardens Mineral Spa, supra*, then went on to quote from portions of this Board's decision in *Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90. In our opinion, this decision is helpful in understanding the Board's jurisprudence on permissible and impermissible communications by an employer at a time when s. 11(1)(a) read much as it does today:

> *Counsel for the Union argued that Section 11(1)(a) and (c) prohibit an employer from communicating with his employees about any matters that are the subject of collective bargaining, whether the communication in question is accurate or inaccurate. We do not agree. This Board has repeatedly taken the position that the Union's argument in this regard is not in keeping with the express terms of Section 11(1)(a) of The Trade Union Act nor has it generally been accepted by Labour Boards throughout Canada.*
>
> *It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication:*
>
> > *(a) does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;*
> >
> > *(b) does not amount to an attempt to undermine the union's ability to properly represent the employees; and,*
> >
> > *(c) does not interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any rights conferred by the Act.*
>
> *See: inter alia, UFCW v. Saskatoon Co-operative Association Limited LRB 255-83; RWDSU v. Canada Safeway LRB 392-85; Saskatchewan Government Employees' Union v. Government of Saskatchewan LRB 250-88 and 290-88; SJBRWDSU and Teamsters v. Dairy Producers Co-operative Limited LRB 181-89; CUPE, Local 59 v. City of Saskatoon LRB 253-89.*
>
> *The determination of whether, in the particular circumstances, a communication has interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of a right conferred by the Act is an objective one. The Board's approach in such cases is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude.*
>
> *An employer is not considered to have bargained directly with his employees, or failed to have negotiated in good faith with the union by fairly and accurately informing employees of its version of the negotiations taking place; see: Saskatoon Co-op (supra); Dairy Producers Co-op (supra).*
>
> *The Union also argued that proposals like the present one are fairly and accurately put to its membership in the normal course and therefore meetings such as were held by the Employer in this case were at once unnecessary and*

> *interventionist and constituted an attempt to circumvent the Union as bargaining agent or otherwise undermine its ability to represent its employees.*
>
> *In the present case, the Employer was careful to provide a measured and consistent explanation of the status of negotiations and the proposals which were previously put to the Union's bargaining committee. At the time that the communications occurred, the Employer was faced with the Union's impending meeting to vote on its proposal and the forceful position taken by the negotiating committee that they would not recommend its passage. The committee did not intend to remain neutral; nor are they required to do so. Quite the contrary, they made clear their intention to attempt to convince the employees to vote against the Employer's proposal. All things being equal, it was this committee who would be burdened with the responsibility of presenting the Employer's last proposal to the employees. This would be done against a backdrop of some lingering resentments that remained from the negotiating sessions surrounding the previous collective agreement.*
>
> *The Employer, meanwhile, believed that acceptance of the proposal was crucial to the continued economic viability of the Company in Saskatoon. When all of the circumstances are viewed through the prism of reality, one can hardly be surprised that the Employer wished to ensure that its proposal was put to the employees accurately, fairly and in a positive manner prior to their voting on the same. In doing so, the Employer was careful to ensure that the employees were provided with the same information that the bargaining committee had and that nothing occurred at the meetings with the employees that would amount to bargaining directly with them. In our view, he was successful in ensuring that both took place.*
>
> *In conclusion, we find nothing in the documents or in the oral presentation made by Jolly, in and of themselves, which indicates an attempt by the Employer to either bargain collectively with the employees or to circumvent the Union in the collective bargaining process. Further, there is nothing in the Employer communication, either oral or written, that could interfere with, restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude in the exercise of any rights conferred by the Act.*

[95] The decisions we have quoted, as well as the decisions cited by the parties, are helpful in illuminating this Board's past jurisprudence with respect to permissible and impermissible communications. The principles of statutory interpretation[17] required this Board to presume that the legislature had "*perfect knowledge*" when it amended *The Trade Union Act*. In other words, the legislature was aware of this Board's jurisprudence on the interpretation of s. 11(1)(a) at the time it amended the *Act*. The principles of statutory interpretation also requires this Board to presume that meaning was intended by the words that were added to s. 11(1)(a). In other words, these additional words were not mere surplusage.

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[17] Sullivan on the Construction of Statute, Ruth Sullivan – 5th edition.

[96] Our conclusions as to the effect of the 2008 amendment to s. 11(1)(a) of the *Act* are three (3) fold:

1. In our opinion, the substantive test for determining whether or not impugned conduct represents a violation of s. 11(1)(a) is much the same as it was prior to the 2008 amendment. The test continues to involve a contextualized analysis of the probable consequences of impugned employer conduct on employees of reasonable intelligence and fortitude. We also note that the change to s. 11(1)(a) did not substantively alter the kind of prohibited effect that the legislature seeks to avoid. The legislature seeks to avoid employer conduct that would compromise or expropriate the free will of employees in the exercise of their rights under *The Trade Union Act*.

2. The change to s. 11(1)(a) clearly signaled a greater tolerance by the legislature for the capacity of employees to receive information and views from employers without being interfered with, coerced or intimidated (i.e.: without their free will being compromised or expropriated). A corollary of this conclusion is a generally weakening of the historic presumption that all communications by an employer are invariably and inherently coercive or intimidating for employees.

3. The change to s. 11(1)(a) has interpretive implications for a number of provisions in *The Trade Union Act*. The words that were added to s. 11(1)(a) are applicable to any section of the *Act* wherein a violation can be committed by means of an employer communication, including the balance of s. 11(1) and s. 9.

[97] We will discuss each of these conclusions in turn.

[98] In amending *The Trade Union Act* in 2008, the legislature did not alter the description of prohibited conduct in s. 11(1)(a). In our opinion, following the 2008 amendment, the Board begins its analysis of impugned employer conduct, much as it has in the past, by considering the conduct in light of the circumstances occurring at the time. If the Board is satisfied that the probable effect of the employer's conduct would have been to interfer with, restrain, intimidate, threaten or coerce an employee in the exercise of protected rights, a violation of the *Act* will be sustained. This test continues to be an objective one. The Board's approach continues to be to determine the likely or probably effect of an impugned conduct upon

the affected employees. In doing so, we assume those employees are reasonable; that they are intelligent; and that they are possessed of some resilience and fortitude. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment*, [2012] 205 C.L.R.B.R. (2nd) 139, 2011 CanLII 72774 (SK LRB), LRB File Nos. 107-11 to 109-11 & 128-11 to 133-11. In our opinion, the kind of prohibited effect which s. 11(1)(a) seeks to avoid is conduct by an employer that would compromise or expropriate the free will of employees in the exercise of their rights under *The Trade Union Act*.

[99] In our opinion, the 2008 amendment to s. 11(1)(a) expanded the scope of permissible employer communications under *The Trade Union Act*. With this amendment, the legislature has confirmed that trade unions are not the only permissible source of information for certified employees. Although the amendment did not change the description of prohibited conduct in s. 11(1)(a), it undoubtedly signaled a greater tolerance by the legislature for the capacity of employees to receive information and views from their employers without being interfered with, intimidated or coerced. In our opinion, to interfere with an employee in the exercise of his/her rights now requires conduct intended to compromise or expropriate that employee's free will. For example, the mere fact that an employer has communicated facts and opinions to its employees and those employees may have been influenced by those views and opinions; even agree with those views; should not now automatically lead to a finding of interference, let alone employer coercion or intimidation. The prohibited effect targets a higher threshold than merely influencing employees in the exercise of their rights.

[100] Furthermore, the historic presumption that all employer communications are inherently and inevitably intimidating or coercing for employees can not stand in face of the 2008 amendment to s. 11(1)(a). It may well be that a power imbalance exists in a particular workplace or that a particular group of employees are vulnerable for one reason or another to the wishes or influences of their employer. However, it is no longer appropriate for this Board to begin its analysis of the impugned employer conduct by presuming that employees are inherently or inevitably susceptible to the expropriation of their free will by an employer. In our opinion, absent evidence of an unusual power imbalance in the workplace, we start from the presumption that employees are capable of receiving a variety of information from their employer; of evaluating that information, even being aided or influenced by that information; without necessarily being improperly influenced, threatened, intimidated or coerced by that information. Absent evidence of a particular vulnerability of employees, we start from the

presumption that employees are capable of weighing any information they receive, including information from their employer, and will make rational decisions in response to that information. In blunt words, in evaluating the probable affect of impugned communication by an employer, we do not assume that affected employees are timorous minions cowering in fear of their masters.

[101] The context in which an impugned communication occurs continues to be fundamental to evaluating the probable effect of that communication in two (2) ways. Firstly, contextualizing an impugned communication helps evaluate the probably effect of that communication on employees of reasonable fortitude. Considering the context within which an impugned communication occurs help the Board determine if an otherwise ambiguous statement may convey a subtle message or have a different meaning in that particular context. Secondly, the circumstances in which an impugned communication occurs also guides the Board in determining the approach it will take to intervention. An analysis of the Board's jurisdiction reveals that communications occurring during an organizing campaign or during a rescission application have generally been subject to a more rigorous review by the Board. During an organizing campaign or at any time when the representational question is before employees, the Board has generally been highly alert to subtle signs of employer interference, intimidation, coercion or threats. For example, communications from an employer about the relative benefits of unionization have been found to convey a subtle message of intimidating or coercive effect when made during an organizing campaign. See: *Super Valu, a Division of Westfair Foods v. United Food and Commercial Workers, Local 401*, [1981] 3 Can. LR.B.R. 412, LRB File No. 121-81.

[102] On the other hand, a much more "*laissez faire*" approach has been taken to employer communications at times when employees are not deciding the representational question. For example, the Board has historically been reluctant to insert itself into the collective bargaining process as a censor of communications between parties. See: *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*, [2007] Sask. L.R.B.R. 87, 2007 CanLII 68775 (SK LRB), LRB File No. 162-05; *Unite Here Union, Local 41 v. West Harvest Inn*, 2008 CanLII 68748 (SK LRB), LRB File No. 127-07. See also: *Regina Public Library Board v. Canadian Union of Public Employees, Local 1594*, LRB File No. 001-12. Collective bargaining is emotionally-charged and difficult even for experienced negotiators. As a consequence, the

Board has generally adopted a *laissez faire* approach when dealing with both employer and trade union communications occurring during collective bargaining and particularly so with respect to communications that occur at the table in the heat of the moment. Collective bargaining would undoubtedly grind to a halt in a flood of applications to this Board if we erroneously allowed ourselves to become the arbitrators of civility at the bargaining table.

[103] Our final conclusion as to the implications of the 2008 amendment is that the words that were added to s. 11(1)(a) affected more than just that particular provision. The words that were added to s. 11(1)(a) are "*but nothing in this Act precludes an employer from communicating facts and opinions to its* employees". In our opinion, these words, by definition, apply to any section of the *Act* wherein a violation can occur as a result of employer communications. For example, in *Gordon Button v. United Food and Commercial Workers, 1400 v. Wal-Mart Canada Corp.*, (2011) 199 C.L.R.B.R. (2nd) 114, 2011 CanLII 100501 (SK LRB), this Board modified its interpretation of s. 9 of *The Trade Union Act* in response to the 2008 amendment to s. 11(1)(a). The 2008 amendment may not have changed the language of the other provisions of the *Act* but it certainly can be seen as having a modulating effect on the interpretation of a number of provisions of the *Act*. For example, while an employer continues to be prohibited from coercing or intimidating their employees in the exercise of protected rights; from interfering in administration of a labour organization; and from circumventing the union and bargaining directly with employees with respect to the terms and conditions of their employment; the provision of facts and opinions to employees, *simpliciter*, can not now represent a violation of *The Trade Union Act*. In evaluating the impugned conduct of an employer, the Board must now be more restrained in the inferences it takes as to the probable effect of impugned communications if those communications merely involve the reasonable expressions of facts or opinions.

Circumstances of the Impugned Employer Communications:

[104] As we have noted, impugned employer communications must be evaluated within the context within which they occurred. In the present applications, we note that all of the impugned communications from SAHO and the respondent employers flowed from matters that were occurring at the collective bargaining table. We note that the parties were negotiating for the renewal of three (3) collective agreements in a very mature bargaining relationship. In addition, most of the impugned communications occurred at times when the

parties were at an impasse at the bargaining table. Furthermore, the parties ultimately achieved agreement and new collective agreements were ratified and signed.

[105] We saw nothing in the evidence from which this Board could conclude that an unusual power imbalance exists between the respondent employers and health care workers. Nor did we see any basis upon which we could find that health care workers are particularly vulnerable to the opinions and views expressed by either SAHO or the respondent employers. To the contrary, in light of the extensive collective agreements in place and the security enjoyed by health care workers pursuant to those agreements, an inference of vulnerability would be very difficult to draw.

[106] In our opinion, the circumstances dictate that we adopt a *laissez faire* approach to the review of the impugned communications.

Evaluation of the Impugned Employer Communications:

[107] In our opinion, SAHO had the right to engage in strategic or tactical communications, both with the public and health care workers about the status of collective bargaining and the proposals being discussed at the table. In today's day and age, it is improbable to imagine that collective bargaining in the health care sector or with any large publicly-funded institution will not take on a public dimension. In addition, SAHO and the respondent employers had the right to respond to what it perceived as misinformation being provided to employees and/or the public by the applicant trade unions. Employers are not required to sit gagged and bound merely because a particular issue may touch on matters of labour relations or collective bargaining. Employers have the right to communicate their views to the public, through media, through advertising and now through electronic means, such as webpages, and social media. Employers also have the right to communicate facts and opinions to their employees. As we have noted, trade unions are not the only permissible source of information about the status of collective bargaining and the proposals being discussed at the table.

[108] In our opinion, when viewed objectively and when an appropriate *laissez faire* attitude is maintained by the Board, we find that the majority of the content of the public communications, including SAHO's paid advertisements, its press releases, media interviews of its representatives and the letters to the editor of local newspapers, fell within the sphere of

permissible communications. In our opinion, the majority of these communications (and there were many of them), when viewed objectively, would not have been seen as intimidating, coercive and threatening to an employee of reasonable fortitude. Similarly (and more importantly), we were not satisfied that the majority of the messages contained in the communications that were directed to employees, through posters and tent-cards in the workplace, and or through the letters that were sent to the homes of health care workers, when viewed objectively, would have been perceived as intimidating, coercive or threatening by employees of reasonable fortitude. We have no doubt that the communications were influential (for some informative and others annoying) but, as we have indicated, s. 11(1)(a) seeks to avoid conduct that can compromise or expropriate an employee's free will; not actions that merely inform a debate or advocate a position.

[109] On the other hand, we have determined that portions of some of these communications went beyond the sphere of permissible communication. Some of the messages communicated by SAHO that described the retroactive payments were misleading. For example, SAHO's advertisements in April of 2010 stated that "*Right now, they're working for 2007-2008 wages and no longer accumulating retroactive pay*". In other communications, SAHO stated that "*you are no longer accruing retroactive pay*" (after April 1, 2010) as though the limit it proposed in its final offer on retroactive pay accrual was a fact, not a position taken by SAHO at the bargaining table. In some of SAHO's communications, such as the letter sent directly to "valued health care employees" in June of 2010, retroactive pay was described more accurately in terms of being a "proposals". However, on several occasions, SAHO and the respondent employers used language that implied that SAHO's proposal regarding retroactive pay was something other than what it was; merely a position it had taken during collective bargaining.

[110] It is important to note that SAHO's proposal on retroactive pay contained within its January 27, 2010 offer was a modification of its earlier position, which did not include a temporal limit on retroactive pay. Prior to modifying its position, the parties were not in dispute on that particular issue. The reason that health care workers were "*no longer accruing retroactive pay*" was because SAHO modified its position on retroactive pay at the bargaining table. By modifying its position, SAHO made retroactive pay the subject of collective bargaining. In our opinion, the communications by SAHO and the respondent employers implying otherwise was a significant misrepresentation of the facts. In this regard, the communications by SAHO and the respondent employers regarding its retroactive pay proposals were similar to impugned

communications by the government of Saskatchewan regarding the state of collective bargaining between the provincial government and SGEU involving the "transfer issue" in *Saskatchewan Government Employees' Union v. Government of Saskatchewan, et.al.* [1990] Sask. L.R.B.R. 307, LRB File No. 109-98.

[111] While the *laissez faire* approach would not see this Board routinely standing in judgment of the accuracy of each and every factual statement made by an employer to its employees during collective bargaining or the "reasonableness" of views that may be expressed, a significant misrepresentation of the facts (whether intentional or not) about what is occurring at the bargaining table can easily interfere with an employee in the exercise of protected rights. While employers and trade unions may see the same facts differently and they may express their views from differing perspectives (i.e.: they may place their own "spin" on their message), the views given by employers must not patently misrepresent significant facts or contain knowingly false information. Misinformation by an employer, by its very nature, is injurious to the free will of employees.

[112] In addition to the inaccuracies in describing the issue of retroactive pay in its communications, the implicit message conveyed to employees regarding retroactive pay was that they were losing money and that they would continue losing money if the applicant trade unions didn't accept SAHO's final offer. SAHO was even brash enough to direct employees to an online calculator it prepared to help them determine the approximate amount of money they were losing every month because of the delay in concluding a collective agreement. These messages were repeated several times in both SAHO public communications and in its communications directly to employees. While SAHO and the respondent employers have the right to explain their proposals to employees and to respond to what they perceived as misinformation being communicated to the public and to health care workers by the unions, employers may not patently misrepresent significant facts in their communications. We are satisfied that the communications from SAHO and the respondent employers with respect to retroactive pay were inaccurate and, in the context within which this information was given, would have misled employees. Furthermore, the issue of retroactive pay was a significant bargaining issue at the table and SAHO and the respondent employers amplified their message on retroactive pay by telling health care workers they were losing money. In our opinion, the combined effect of this misinformation and the "spin" that was placed on SAHO's message would have interfered with employees of reasonable intelligence and fortitude. While the legislature

may have dictated a greater tolerance for the capacity of employees to receive information and opinions from their employers, the 2008 amendment to s. 11(1)(a) did not license mendacity. While it may not have been SAHO's intention to seriously mislead health care workers in their communications, in our opinion, the misinformation that was contained in numerous communications, coupled with the amount of "spin" that was placed on the message regarding retroactive pay, took SAHO and the respondent employers outside the scope of permissible communication.

[113] For the forgoing reasons, we find that SAHO and the respondent employers violated s. 11(1)(a) of the *Trade Union Act* during the 2008 Round of collective bargaining.

[114] It should be noted that the applicant trade unions also argued that various other aspects of the communications that occurred during the 2008 Round of collective bargaining represented violations of *The Trade Union Act*. We were not persuaded by these arguments. For example, we were not satisfied that the statistical information contained in SAHO's communications was seriously misleading, including the calculations contained within SAHO's retropay calculator, the western averages, or the quantification of the cost of the proposals from the applicant trade unions. Mr. Smith testified as to how this information was calculated. We are satisfied that these calculations were based on accepted statistical methods. While it is clear that other methodologies could have been used to calculate this information, it would be inappropriate for this Board to evaluate the reasonableness of the methodologies used by SAHO once we were satisfied that an accepted statistical method had been used.

[115] We were also not satisfied that the placing of posters and tent cards in the workplace represented a violation of the *Act*. While we believe that placing this material in the public areas of hospitals and care facilities represented a significant error in judgment on the part of SAHO and the respondent employers, it was not a violation of the *Act* to do so. In our respectful opinion, SAHO's posters and tent cards risked provoking concerns and uncertainty, possibility even fear, in patients and their families about the continuity and quality of health care because of the possibility of labour unrest. Given the volume of this material that was placed in hospitals and care homes, it is reasonable to assume that, even if patients didn't see the information, their families would likely have. While posting information about the status of collective bargaining in the workplace is not a violation of the *Act*, *per se*, the decision to do so in

the health sector seems misguided. It may not have represented a violation of s. 11(1)(a) to cause uncertainty in patients and their family, but doing so was an error in judgment. In our respectful opinion, patients and their families should not be unnecessarily drawn into labour disputes.

[116] The applicant trade unions also argue that SAHO and the respondent employers attempted to undermine the unions' ability to properly represent their members in their communications and that they attempted to bargain directly with employees with respect to the terms and conditions of their employment. The applicant trade unions argue that doing so represented a violation of s. 11(1)(a). In our opinion, neither SAHO nor the respondent employers undermined the applicant trade unions' ability to properly represent their respective members. Furthermore, we were not satisfied that either SAHO or the respondent employers attempted to bargain directly with employees through their communications. However, even if we had been satisfied otherwise, in our opinion, doing so would not have represented a violation of s. 11(1)(a). While in the past there may have been occasions when the Board treated all impermissible communication as a violation of s. 11(1)(a)[18], in our opinion, allegations of this nature are more properly analyzed as potential violations of s. 11(1)(c).

Did SAHO and the Respondent Employers violate section 11(1)(b) of *The Trade Union Act*?

The Allegations:

[117] In their applications, each of the applicant trade unions alleged that SAHO and the respondent employers violated s. 11(1)(b) of the *Act* by attempting to bargain directly with affected employees respecting terms and conditions of their employment; by trying to convince employees to accept SAHO's bargaining proposals; and/or by encouraging members of the bargaining unit to demand a ratification vote from the applicant trade unions. The applicant trade unions argue that the message conveyed to health care workers by SAHO and the respondent employers was that they should vote on the SAHO's offer(s). The unions note that SAHO repeated this message several times in both its public media activity and its communications directed to employees. The unions argue that doing so was an obvious attempt to bully employees and to force the unions to take a particular action (hold a ratification vote). In addition, the unions allege that the communications from SAHO and the respondent employers

[18] See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Credit Union*, [1997] Sask. L.R.B.R. 454, LRB File No. 090-06.

tended to blame the unions for failure in concluding a collective agreement because of their intransigence. The unions allege that SAHO openly invited health care workers to question their leadership's collective bargaining strategies and demand a ratification vote. The applicant trade unions argue that the cumulative effect of these actions was to undermine the unions and to interfere in their internal administration. In reply, SAHO and the respondent employers deny that any of their conduct represented a violation of s. 11(1)(b) of *The Trade Union Act*.

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

[118] Section 11(1)(b) of *The Trade Union Act* has been considered by this Board on relatively few occasions. In *Saskatchewan United Food and Commercial Workers, Local 1400 v. Federated Co-operatives Ltd*, [1985] May Sask. Labour Rep. 30, LRB File No. 213-83, the Board described the legislative purpose of this provision as follows:

> *Section 11(1)(b) of The Trade Union Act prohibits an employer from interfering with the formation or administration of any labour organization. The Canada Labour Relations Board considered the phrase "interference with the formation or administration of a trade union" as it appears in Section 184(1)(a) of The Canada Labour Code in National Association of Broadcasting Employees and Technicians v. A.T.V. New Brunswick Limited (C.K.C.W.-T.V.) 1979 3 CLRB 342 and stated at p. 346-7:*
>
> > *The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collection of money, expenditure of this money, general meetings of the members, etc. In a word, all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arm's length.*
>
> *A union's right to discipline its own members is as much an administrative function of the union as the election of its officers. Section 11(1)(b) prohibits an employer from interfering with that function. Interference could occur in a number of ways. Some of the most obvious include, for example, attempting to bribe, intimidate or improperly influence witnesses or union officials involved in discipline proceedings.*

[119] This definition was quoted with approval by this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400*, [1995] 3rd Quarter Sask. Labour Rep. 140, LRB File Nos. 246-94 and 291-94. The Board further commented on the legislative purpose of s. 11(1)(b) as follows:

> *In our view, this passage suggests the appropriate focus for this section. We see it as intended to protect the integrity of the trade union as an organization, not to speak to all of the types of conflict which may arise between a trade union and an employer in the course of their dealings. Insofar as meetings between an employer and employees are permissible – and we have outlined the perils which they face on other grounds – it is to be expected that they will be planned by the employer so that the persuasive impact of the information conveyed will be maximized. This in itself, however annoying, does not constitute "interference with the administration" of a trade union within the meaning of Section 11(1)(b).*

[120] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canada Safeway Limited, et. al.*, [1995] 3rd Quarter Sask. Labour Rep. 170, LRB File No. 093-95, this Board adopted the above descriptions of the legislative purpose of s. 11(1)(b) and came to the following conclusions with respect to the application of this provision:

> *We have stated above our view that not every instance of employer conduct which has an effect which is not expected, welcomed or approved of by a trade union constitutes "interference" of a kind which is prohibited under Section 11(1)(b). This comment seems equally applicable to an allegation of an infraction of Section 11(1)(b). In the relationship between a trade union and an employer, there will be many occasions when the strategy pursued by the union does not have the anticipated result, or the union must make concessions in the face of the superior bargaining power of the employer. This is the nature of collective bargaining. It cannot be the case that every action of an employer which does not serve the best interests of the trade union can be viewed as an infraction of Section 11(1)(b). As we indicated in the cases cited above, this provision must, in our view, be taken to govern conduct which threatens the integrity of the trade union as an organization, or creates obstacles which make it difficult or impossible for the trade union to carry on as an organizational entity devoted to representing employees.*

Conclusions with Respect to the Alleged Violations of s. 11(1)(b):

[121] In our opinion, the allegations of the applicant trade unions that SAHO and the respondent employers violated s. 11(1)(b) must fail. Firstly, we are not satisfied that SAHO bargained directly with health care workers during the 2008 Round of collective bargaining. In our opinion, the information that was communicated to employees all flowed from events that occurred at the bargaining table. We saw no evidence to suggest that SAHO or the respondent employers had communicated information about a proposal that had not been presented at the bargaining table or that they otherwise attempted to circumvent the applicant trade unions and bargain directly with health care workers. Even if such were the case, in our opinion, such conduct is more properly regulated under s. 11(1)(c) and not 11(1)(b).

[122] Secondly, we were not satisfied that SAHO's actions in attempting to convince employees that they should accept its bargaining proposals was a violation of s. 11(1)(b). In light of the communications by the applicant trade unions, both in the public and directly to health care workers during the 2008 Round, they could hardly be surprised that SAHO and the respondent employers felt the need to communicate their position directly to employees. The communications by the applicant trade unions were disparaging of SAHO generally, as well as the proposals being presented on behalf of the respondent employers and the conduct of SAHO's bargaining team at the table. The parties were engaged in a pitched battle to win and maintain the support of the public and to convince health care workers that their respective positions were reasonable. Such is the nature of collective bargaining. Each side tries to convince the other of the reasonableness or necessity of their respective positions.

[123] Employers have their own views and interests on matters of collective bargaining and are free to share those views with employees if only for the reason that they may wish to persuade employees to accept the employers' point of view. The fact some health care workers contacted their union after hearing or reading the messages delivered by SAHO and the respondent employers, or even that they may have questioned the strategies employed by their unions, is not indicative of a violation of s. 11(1)(b). While the applicant trade unions may have wished that they were the sole source of information for health care workers, the fact that they weren't; that SAHO and the respondent employers expressed their own views to employees; can not reasonably be said to have "threatened" the unions' integrity as labour organizations; neither can the fact that the views and opinions being expressed by SAHO and the respondent employers made the jobs of the applicant trade unions more difficult. The purpose of s. 11(1)(b) of *The Trade Union Act* is to protect trade unions from interferences such as bribery, intimidation of witnesses, or interferences in the election of officers and other officials. Section 11(1)(b) is about threats to the survival or independence of a trade union. It is not about protecting trade unions from the often unpleasant reality of collective bargaining, from all manner of conflict with employers, or from dissent within their ranks even if that dissent resulted from being influenced by the views and opinions expressed by an employer.

[124] For the same reasons, we were not satisfied that encouraging health care workers to vote on SAHO's proposals or encouraging health care workers to speak to the union about a ratification vote was a violation of s. 11(1)(b). SAHO believed that its proposed changes to the collective agreements were reasonable and that its monetary offer was competitive. On at

least two (2) occasions, SAHO asked the applicant trade unions to take their offer for a vote believing that a majority of health care workers would accept SAHO's offer even if the leadership of the unions was not satisfied. The unions declined to do so. Such is the nature of collective bargaining. In the event of impasse, each argues that the other is responsible for the deadlock because of the other's intransigence, ineptness or unreasonableness. SAHO communicated the same message to health care workers that it had at the table; that employees should vote on its offer. The fact that SAHO did so, should not have come as a surprise to trade unions with the kind of experience enjoyed by the applicants. In our opinion, the fact that some health care workers may have agreed with SAHO and wanted a ratification vote is not indicative of a violation of s. 11(1)(b). All the evidence demonstrates is that some health care workers were influenced by the information being conveyed by SAHO and the respondent employers.

[125] In our opinion, there is no basis to conclude that the conduct of either SAHO or the respondent employers during the 2008 Round of collective bargaining undermined the independence of the applicant trade unions or ever constituted a real threat to their survival as labour organizations. Thus, this aspect of the applications must be dismissed.

Did SAHO and the Respondent Employers violate section 11(1)(c) of *The Trade Union Act*?

[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 <u>not</u> 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:*
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> > *. . . 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.*
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> *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:*
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> > *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.*

[135] Each of the applicant trade unions alleged that SAHO breached its duty to bargain in good faith in a number of ways. We will address each of these allegations in turn.

Refusing to Disclose Information:

[136] The applicant trade unions take the position that SAHO violated s. 11(1)(c) of *The Trade Union Act* when it refused to disclose its financial mandate in the early stages of collective bargaining and when SAHO refused to provide the unions with costing information for all of its proposals. The unions argue that, without this information, they were unable to adequately comprehend and respond to the proposal being advanced by SAHO at the bargaining table. The unions rely on numerous decisions of this Board imposing an obligation on employers to disclose information during collective bargaining, including *SGEU v. Saskatchewan, supra*, United *Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited*, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1997] Sask. L.R.B.R. 787, LRB File Nos. 256-97, 266-97, 279-97, 308-97 & 321-97; and *United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc.*, [2006] Sask. L.R.B.R. 517, LRB File No. 081-06.

[137] We were not satisfied that it was a violation of *The Trade Union Act* for SAHO to refuse to table its monetary proposals while the parties were at the individual tables. The parties had agreed to bargain in two (2) stages and, did so, because they desired to maintain the integrity of their joint job evaluation plan. The *raison d'etre* of having a two (2) stage process was to prevent wages and other benefits from being negotiated individually with or by each union. Having agreed to this process, the applicant trade unions can not now complain to this Board that SAHO breached its duty to bargain in good faith by refusing to negotiate wages and other benefits individually with each union.

[138] The applicant trade unions argue that they needed to know SAHO's initial offer before they could evaluate the efficiencies/concessions being proposed by SAHO. In our opinion, this argument is specious for a number of reasons. Firstly, asking SAHO to disclose its initial monetary proposal while the parties were still at the individual tables would have, by definition, engaged the parties in collective bargaining regarding monetary items. It is improbably to assume that the quantum of SAHO's monetary proposals would not have dominated collective bargaining as soon as it was tabled. If SAHO's initial monetary proposal was "*insulting*" in the eyes of the unions in September of 2010, it is doubtful they would be viewed it otherwise if tendered mere as "information" earlier in the year. SAHO would have inevitably found itself engaged in explaining its monetary proposals and defending its position on wages and benefits while still bargaining at the individual tables; the very thing the parties had

agreed not to do. Secondly, while the applicant trade unions may have expected SAHO to "buy" the efficiencies/concessions, there is nothing in *The Trade Union Act* that requires an employer to do so. In light of the huge quantum of funding provided to health care by the tax payers of this province, it is possible that influences other than money may have motivated the unions to consider proposals aimed at promoting efficiencies in the workplace, even if doing so was concessionary in the eyes of health care workers. Thirdly, SAHO offered to "pool" the savings accrued from implementation of the efficiencies/concessions and to later add those moneys to its wage mandate. SAHO also offered to table discussion on the efficiencies/concessions until the parties moved to the common table. In our opinion, SAHO's responses to the concerns being expressed by the unions about needing to know SAHO's initial monetary offer were entirely reasonable and appropriate in the circumstances.

[139] We were also not satisfied that it was a violation of *The Trade Union Act* for SAHO to refuse to providing costing information for those proposals of the applicant trade unions that it was not prepared to entertain in the 2008 Round of collective bargaining. While we agree that SAHO was under an obligation to provide pertinent information to the applicant trade unions to enable them to comprehend and respond to its proposals, we are not satisfied that this obligation went so far as to require SAHO to provide costing information for the union's proposals. It could not have come as a surprise to the unions that all proposed enhancements to their collective agreements would need to be costed; that there would be a finite amount of money available from the provincial government; and that, even reasonable or good proposals, may well have to be rejected if there was insufficient funding. The unions take the position that it was SAHO's responsibility to quantify the cost of each of their individual proposals. We disagree. We are not satisfied that the duty to bargain in good faith in the health care sector, or any other sector, places a duty on employers to cost the proposals presented on behalf of employees at the bargaining table. In coming to this conclusion, we acknowledge that costing of proposals in the health care sector may well be a specialized area. For reasons of efficiency or otherwise, the parties may agree that costing will be done by a particular expert, such as Mr. Smith. However, in the absence of such an agreement, it was the unions' obligation to cost their own proposals just as it was their responsibility to devise, rationalize, prioritize and justify their own proposals.

Refusing to Bargain:

[140] The applicant trade unions argue that SAHO violated the duty to bargain in good faith when it refused to continue bargaining after it delivered its final offer to the applicant trade unions. The unions rely on the decisions of the Canada Labour Relations Board in *Canadian Commercial Corporation*, (1988), 74 di 175 (CLRB) and this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1997] Sask. L.R.B.R. 787, LRB File Nos. 256-97, 266-97, 279-97, 308-97 & 321-97 as standing for the proposition that employers are not entitled to adopt a "*take it or leave it and bloody well face the consequences*" scenario at the bargaining table. The applicant trade unions argue that SAHO's unwillingness to bargain and/or the restrictions it placed on bargaining after it delivered its final offer was indicative of a "*take it or leave it*" mentality in violation of the duty to bargain it good faith.

[141] With all due respect, we are not persuaded by this argument. Firstly, SAHO did continue to engage in the process of collective bargaining after it delivered its final offer. Unlike the circumstances before the Canada Labour Relations Board in the *Canadian Commercial Corporation* decision, SAHO did justify, explain and rationalize its bargaining positions. SAHO's monetary offer was based on competitiveness, its proposal on retroactive pay was intended to encourage prompt resolution of the agreements, and its proposals on efficiencies were well justified even if the applicant trade unions saw them as concessionary. Secondly, during the period when the applicant trade unions' allege that SAHO refused to bargain, SAHO amended its offer on a number of occasions. It increased its monetary offer and it modified and/or withdrew some contentious proposals. The duty to bargain in good faith does not guarantee that trade unions will enjoy a steady stream of progressively more attractive offers from an employer nor does it require an employer to continually replace each rejected proposal with increasingly more attractive ones. SAHO took the position that it had placed all of its economic resources on the table and it had the right to hold to a firm position. There is nothing in the evidence upon which this Board can reasonably conclude that SAHO's final offer, or any of its offers, and/or the positions it took with respect to further enhancements to those offers, were intended to subvert, frustrate or avoid the collective bargaining process. In our opinion, SAHO's conduct was indicative of hard bargaining; not subversive behavior.

Timing of Press Releases/Direct Bargaining:

[142] The applicant trade unions argue that SAHO's practice of issuing press releases immediately after or simultaneously with the tabling of its final offer and each

subsequent offer and/or amendment thereafter was a violation of the duty to bargain in good faith. The unions argue that SAHO's actions were intended to prevent the unions from seeking clarification or explanations from SAHO as to the nature of their proposal before the information was disclosed to health care workers. More over, the unions argue that SAHO's actions were calculated to ensure that SAHO's position was communicated to health care workers before the unions had any opportunity to update their members on what was happening at the bargaining table. The unions argue that simultaneously issuing press releases disclosing the content of its proposals to the public, pre-empted rational discusses at the bargaining table. For these reasons, the applicant trade unions argue that SAHO violated the duty to bargain in good faith.

[143] In the alternative, the applicant trade unions argue that SAHO's conduct in simultaneously issuing press releases, together with its media campaign and posters and tent-cards in the workplace, were an attempt to bargain directly with health care workers respecting the terms and conditions of their employment; by trying to convince employees to accept SAHO's bargaining proposals; and/or by encouraging members of the bargaining unit to demand a ratification vote from the applicant trade unions. The unions argued that all communications to employees about proposals at the bargaining table should be communicated through their representative trade union. Furthermore, the unions take the position that SAHO could not have been attempting to correct any misconceptions arising out of communications from the unions because SAHO was communicating with their members before the unions had any chance to communicate with their members. The unions argue that the only logical conclusion that can be drawn from SAHO's conduct was that it was trying to circumvent the unions and bargain directly with health care workers. The unions argue that, to preserve their role as exclusive bargaining representative for the employees, all communications to employees about collective bargaining from the employers must go through them.

[144] We are not satisfied that SAHO's actions in simultaneously issuing press releases concomitant with the tabling of major collective bargaining proposals was a violation of s. 11(1)(c) of *The Trade Union Act*. While we agree that collective bargaining is best conducted at the bargaining table, there can be little doubt that both sides in the 2008 Round were trying to control their respective messages regarding the status of collective bargaining in and through the media. SAHO used press releases and engaged in extensive use of electronic and print media to convey its message to the public, as well through it own website. The unions used public rallies, press releases and targeted advertisements. Each side was clearly trying to win and

maintain public support for their respective positions at the table. For the reasons already stated, we find that employers have the right to communicate their views as to the status of collective bargaining to the public and to employees. In our opinion, the obligation on SAHO arising out of the duty to bargain in good faith was to present its proposals at the bargaining table to the unions, which it did. See: *Canadian Union of Public Employees, Local 2128 v. Board of Education of the Bigger School Division No. 50 of* Saskatchewan, [2002] Sask. L.R.B.R. 497, LRB File Nos. 069-02 & 070-02. Upon doing so, we are not satisfied that SAHO's right to communicate facts and opinions about those proposals was subject to an implied period of embargo or that SAHO was required to give the unions the right of first comment.

[145] We are also not satisfied that SAHO's conduct was indicative of direct bargaining. As we have noted, the 2008 amendment to s. 11(1)(a) expanded the scope of permissible employer communications under *The Trade Union Act*. With this amendment, the legislature has confirmed that trade unions are not the only permissible source of information for certified employees. As we noted, the parties were engaged in a pitched battle to win and maintain the support of the public and to convince health care workers that their respective positions were reasonable. Such is the nature of collective bargaining. Each side tries to convince the other of the reasonable of their respective positions. Employers have their own views and interests on matters of collective bargaining and are free to share those views with employees even if the purpose of doing so is to persuade employees to accept the employers' point of view. In our opinion, the fact that SAHO attempted to convince health care workers that its proposals were reasonable, does not support the conclusion that SAHO was attempting to circumvent the unions and bargain directly with health care workers.

Insufficient Authority to Negotiate:

[146] The applicant trade unions also argue that SAHO's negotiators did not have authority to bargain on behalf of, or bind, the respondent employers and point to three (3) aspects of the 2008 Round that support this allegation. Firstly, the unions point to the testimony of Mr. Jakabowski that, while he knew that SAHO would be making a package of wage proposals (when the parties moved to the common table), when he began bargaining at the individual tables, he did not know what SAHO's wage proposals would be. The unions argue that, to satisfy the duty to bargain in good faith, negotiators must come to the table armed with authority to conclude an agreement, including knowledge as to the employer's wage proposals. The unions argue that, because SAHO's negotiators began bargaining without a specific

understanding of the wage proposals that were going to be made, SAHO breached its duty to bargain in good faith. Secondly, the unions point to the evidence that SAHO's negotiators routinely indicated that they did not have authority to agree to proposals being advanced by the unions and that they would need to seek instructions. Thirdly, the unions argue that the Health Labour Relations Council and/or the government of Saskatchewan were controlling the bargaining process. The unions argue that for good faith bargaining to occur, it is necessary for the true decision makers to be at the bargaining table. The unions rely on the decisions of this Board in *SGEU v. Saskatchewan and Mitchell, supra*; *International Brotherhood of Electrical Workers, Local 2067 v. SaskPower*, [1993] 1st Quarter Sask. Labour Rep. 286, LRB File No. 256-92; *University of Regina Faculty Association and Saskatchewan Indian Federated College*, [1995] 1st Quarter Sask. Rep. 139, LRB File No. 217-94; *United Food and Commercial Workers, Local 1400 v. Vision Security and Investigation Inc.*, [2002] Sask. L.R.B.R. 73, LRB File No. 219-01; and *United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc.*, 2006 CanLII 62946 (SK LRB), LRB File No. 081-06.

[147] We are not persuaded that SAHO violated its duty to bargain in good faith when its negotiators began bargaining at the individual tables without knowing the specifics of the wage proposals that SAHO intended to offer when the parties progressed to the common table. As noted, in the 2008 Round of collective bargaining, the parties had agreed to bargain in two (2) stages and, did so, because they desired to maintain the integrity of their joint job evaluation plan. The reasons for having a two (2) stage process was to prevent wages and other benefits form being negotiated individually with or by each union. Nonetheless, the unions argue that SAHO violated its duty to bargain in good faith because they didn't have a clear understanding of the wage proposals when they were bargaining at the individual table. We are unmoved by this argument. The unions argue that SAHO's negotiators needed to have knowledge of SAHO's wage proposals at a time when they would not be discussing wage proposals. In our opinion, the evidence demonstrated that SAHO's negotiators had the authority they needed regarding wages and other economic benefits, when they needed that authority; namely, upon moving to the second stage of the bargaining process; the common table.

[148] We are also not persuaded that SAHO breached its duty to bargain in good faith because its negotiators indicated at the table that they need to seek instructions before they could respond to numerous proposals presented by the applicant trade unions or because the unions were not permitted to bargain directly with the government of Saskatchewan

or the Health Labour Relations Council. In a large publicly-funded institution, the mandate for collective bargaining is obtained from more than one (1) source. The onus of SAHO was to obtain a mandate for the 2008 Round of collective bargaining and then bring proposals to the table within that mandate on behalf of the respondent employers. At the commencement of the 2008 Round, SAHO had a financial mandate from the government of Saskatchewan and a series of collective bargaining proposals from the respondent employers that had been vetted by the HLRC. During the course of collective bargaining, SAHO's mandate was modified in response to the course of collective bargaining. In our opinion, the circumstances in these proceedings are wholly distinguishable from the circumstances before the Board in *SGEU v. Saskatchewan and Mitchell, supra*; wherein the employer sent its negotiator to the table with neither sufficient information nor authority to engage in meaningful bargaining. In the present case, we are satisfied that SAHO had sufficient information and clear authority to enter into collective agreements with the applicant trade unions; albeit within specified parameters. We are also satisfied that SAHO had the authority to bind the respondent employers within the parameters of the authority that it received. The duty to bargain in good faith does not require negotiators to have an unrestricted authority to bind. If the proposals being made during collective bargaining exceed the authority granted to a negotiator, it is entirely permissible for that negotiator to indicate as much and seeking further instructions. We saw nothing in the evidence that indicated that SAHO's negotiators did not have authority to bind, within the parameters of the authority delegated to them. The fact that they were repeatedly required to seek instructions during the 2008 Round is not indicative of a lack of authority. It is merely evidence that limits had been placed on their authority, which is not inconsistent with the duty to bargain in good faith. Finally, the evidence demonstrated that SAHO's negotiators agreed to numerous proposals that were later adopted by the respondent employers. Ultimately, the parties agreed on the whole of three (3) collective agreements that were ratified by the respondent employers. As a consequence, the facts in the present applications are distinguishable from the facts in *URFA and Saskatchewan Indian Federated College, supra*, *UFCW v. Vision Security, supra*, UFCW *v. Impact Security, supra*.

[149] As for the role of the HLRC, it should be noted that this is not the first time this Board has heard an allegation that an employers' representative in the health care sector did not have sufficient authority to bargain for purposes of s. 11(1)(c) of *The Trade Union Act*. In *Canadian Union of Public Employees v. Saskatchewan Health-Care Association*, [1993] 1st Quarter Sask. Labour Rep. 137, LRB File No. 049-92, this Board rejected the union's argument

that the employers' then representative, the Saskatchewan Health-Care Association, lacked authority to bargain on behalf of various member health care institutions. In doing so, the Board made the following observations between the relationships between the government of Saskatchewan, employers in the health sector, and the employers' bargaining representative:

> *We have suggested earlier that there is a close connection between the decisions made by the Government of Saskatchewan in the health care field and the collective bargaining which takes place between the Saskatchewan Health-Care Association and the unions representing employees in its member institutions. Those institutions and organizations which operate in the public sector depend for their existence, their prosperity and the definition of their objectives on policy decisions which are made by the Government according to the exigencies of democratic accountability and public priorities. In collective bargaining terms, this means that both the course of bargaining and the substantive content of the ultimate agreements are influenced by the choices which are made by the politicians who are responsible for the setting of the public policy agenda.*
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> *In the case of bargaining between the Government and its own employees, this connection is of a fairly overt and direct nature. In the case of other public sector institutions, such as those which provide health care, the means by which this influence is exercised may be less direct. Nonetheless, the significance of governmental funding and policy decisions for collective bargaining in the health care sector is undeniable.*
>
> *In fact, the answer of Mr. Crosby to the allegation that his organization lacks the authority to bargain effectively with the employees of its members does not depend on a controversion of this proposition. He conceded without hesitation that the setting of budgetary allocations and the other funding decisions which are made with respect to health care play an important part in determining the parameters according to which bargaining will be conducted in this sector.*
>
> *The argument put forward on behalf of the Employer in this case was rather that the acknowledgement that there is a link between the financial and policy decisions of the Government and the course of collective bargaining does not conclude the inquiry concerning the independence and authority of the Employer when it comes to the negotiation of a collective agreement. Counsel argued that the Employer enjoys sufficient independence from the Government to determine, within the funding limits set, what priority will be given to various aspects of the operation of, for example, acute care hospitals, and what bargaining position should be adopted to ensure that the resulting collective agreements reflect those priorities.*
>
> *It is our view that there is nothing in the relationship between the Government and this Employer, or within the structure of the Employer as an organization, which prevents it from engaging in meaningful bargaining with the Union, or from concluding a collective agreement.*

[150] A similar conclusion was reached by this Board in 1993 in the *IBEW v. SaskPower* decision with respect to bargaining by a Crown corporation:

> *The Union alleges that the bargaining committee with which it has been negotiating does not have the actual authority to conclude a collective agreement, but that it is being directed by principals who are not at the bargaining table, namely the Crown Management Board and the Cabinet. This is an allegation which must be taken seriously, but in this case we find that it is not borne out by the evidence. The members of the Employer negotiating committee made it clear to the Union that they had to obtain approval for any changes in the collective agreement which would lead to monetary expenditure, but in our view the evidence did not establish that this robbed them of the ability to conclude an agreement at the bargaining table.*

[151] While the applicant trade unions may well have appreciated the opportunity to attend a Cabinet meeting or speak directly to the HLRC, we saw nothing in the evidence from which we could conclude that the Government of Saskatchewan (or the HLRC or the respondent employers) did not give SAHO and/or its bargaining teams sufficient or appropriate authority to conclude collective agreements with the unions. The obligation on SAHO, as the employers' bargaining representative, was to come to the table prepared to negotiate with the applicant trade unions; to have authority to negotiate and bind the respondent employers; and to communicate to their principals such information as may have been necessary to seek changes in their instructions if deemed necessary and desirable. As we have indicated, there was no onus on SAHO's negotiators to come to the table with an unrestricted mandate or a steady stream of progressively more attractive offers for the applicant trade union. In our opinion, the fact that SAHO said "no" to the unions or its negotiators had to seek instructions from their principals to modify their position at the table is not evidence of a lack of authority; it merely indicates that SAHO had a mandate and its negotiators were not prepared to exceed that mandate without authorization.

Receding Horizon Bargaining/Surface Bargaining:

[152] SEIU-West argues that SAHO breached its duty to bargain in good faith when it presented a proposal at collective bargaining that cancelled retroactive pay after April 1, 2010. The union notes that in its original wage proposals of August 22, 1009, SAHO had agreed to pay retroactive pay without any temporal limitation. However, in its "final offer" of January 27, 2010, SAHO changed its position and only agreed to pay retroactive pay up to March 31, 2010 but not there after. SEIU-West argues that this was done, not as part of the bargaining process, but rather to intimidate employees in an effort to force a ratification vote. The union argues that SAHO's modified position on retroactive pay was an example of "*receding horizon*" bargaining and, thus, a violation of the duty to bargain in good faith. SEIU-West relies upon the decision of this Board in *Morris Rod Weeder Co. Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and*

Department Store Union, Local 955, [1977] Sept. Sask. Labour Rep. 32, LRB File Nos. 451-77, 452-77 & 462-77, and the decision of the British Columbia Labour Relations Board in *Ladner Private Hospital Ltd. et.al., v Hospital Employees' Union, Local 180*, [1977] B.C.L.R.D. No. 18, in support of its assertion that SAHO's proposal on retroactive pay represented a violation of its duty to bargain in good faith.

[153] While we have concluded that SAHO and the respondent employers violated *The Trade Union Act* when they communicated in the public and to employees about their proposal on retroactive pay, we do not find that the proposal, itself, was indicative of "surface bargaining" or receding horizon bargaining or that making such a proposal was contrary to the duty to bargain in good faith. Firstly, when SAHO modified its position on retroactive pay, it did so as part of a package of proposals that included, among other things, an increase in its wage proposal. In our opinion, it can not be reasonably said that SAHO's proposal was retaliation for the applicant trade unions' refusal to put their previous offer to a vote or otherwise indicative of a desire to subvert, frustrate or avoid the collective bargaining process. SAHO both sweetened the offer and modified its position on retroactive pay in the same package of proposals. In our opinion, doing so was merely a bargaining strategy intended (rightly or wrongly) to encourage early resolution of collective bargaining. SAHO's retroactive pay proposal was not illegal and, in our opinion, it can not reasonably be concluded that SAHO's intention in making this proposal was to sabotage collective bargaining. Furthermore, we saw no evidence that SAHO's proposal on retroactive pay was contrary to industry standards in the health care sector. As a consequence, it is not for this Board to judge the reasonableness or efficacy of SAHO's proposal on retroactive pay. To do so, would see this Board interfering in the substance of collective bargaining and inconsistent with our general *laissez faire* approach to supervision of the process. While we find that SAHO and the respondent employers went outside the sphere of permissible communication in describing their proposal on retroactive pay, we do not find the proposal, itself, violated the duty to bargain in good faith.

Analysis of Allegations against the Government of Saskatchewan:

[154] In addition to joining with CUPE and SEIU-West in their allegations against SAHO and the respondent employers, SGEU also alleged in its application that the provincial government committed a number of violations with respect to the 2008 Round of collective bargaining. We will deal with each allegation in turn. However, the first threshold question is

whether or not (or the extent to which) the Crown is bound by *The Trade Union Act* with respect to any of the violations alleged by SGEU.

Is the Crown bound by *The Trade Union Act*?

[155] While acknowledging that the government of Saskatchewan is not bound by the *Act* with respect to any of its legislative actions, SGEU takes the position that the Crown is bound by the *Act* with respect to its allegations because SGEU believes that the government was acting as an agent of the respondent employer or acting on their behalf when the impugned conduct occurred

[156] Section 14 of *The Interpretation Act, 1995*, S.S. 1995, s.I-11.2, is relevant and provides as follows:

> ***Crown not bound***
> ***14*** *No enactment binds the Crown or affects the Crown or any of the Crown's rights or prerogatives, except as is mentioned in the enactment.*

[157] There is no general provision in *The Trade Union Act* that indicates that the government of Saskatchewan is bound by that statute. Nonetheless, a review of the statute would indicate that the *Act* applies to the Crown in two (2) ways; as an "employer" of its employees; and with respect to the delegated and administrative functions specified therein (not relevant to these proceedings). In all other respects, the government of Saskatchewan is not bound by the provisions of *The Trade Union Act*. In our opinion, the only two (2) provisions of *The Trade Union Act* that are operative with respect to the allegations made by SGEU against the Government of Saskatchewan are s. 11(1)(a) and s. 12.

Did the Government of Saskatchewan violate section 11(1)(a)?

[158] SGEU argues that the letter sent by the then Minister of Health, the Honourable Don McMorris, to various individuals violated s. 11(1)(a) for essentially the same reason that the communications by SAHO and the respondent employers regarding retroactive pay were found to be outside the sphere of permissible communication. SGEU points to that portion of the Minister's letter that reads as follows:

> *It is important to note that as of April 1, 2010, retroactive pay no longer accrues. What this means is that on ratification of an agreement, union members will receive retroactive pay up to March 31, 2010 only.*

[159] SGEU argues that the government of Saskatchewan either knew or ought to have known that some of (even the majority of) the individuals who wrote postcards to the Premier would be health care workers. SGEU notes that the evidence established that some of the individuals who received the Minister's letter were members of its bargaining unit. SGEU argues that, although the provincial government was not an "employer" with respect to the impugned communication, it was a "person acting on behalf of the employer" within the meaning of s. 11(1)(a). Therefore, SGEU argues that the Minister's letter violated s. 11(1)(a) because it would have reasonably been perceived as intimidating or coercive by the health care workers who received it.

[160] In our opinion, SGEU's allegation that the government of Saskatchewan violated s. 11(1)(a) of the *Act* must fail because the Crown is not the employer of the health care workers involved in the 2008 Round of collective bargaining. In our opinion, the government of Saskatchewan is not bound by s. 11(1)(a) other than in its capacity as an employer. Minister McMorris was not writing to the government's employees. He was writing to the public; to those individuals who wrote to the Premier; some of whom happened to be health care workers. SGEU argues that the provincial government fell within the jurisdiction of *The Trade Union Act* when it became involved in the 2008 Round of collective bargaining through funding, through imposition of a financial mandate, and through the involvement of its officials on the HLRC and at the bargaining table. With all due respect, we disagree. The government of Saskatchewan is only bound by *The Trade Union Act* to the extent that it agreed to be bound by that statute. In the case of *The Trade Union Act*, the government has only agreed to be bound as an "employer". This is a policy decision of the legislature and must be respected. The government's role as the primary funder of health care does not make it an employer of health care workers or an agent of the respondent employers. Similarly, the fact that the provincial government placed a restriction on the amount of incremental funding that was available for resolution of collective agreements in the 2008 Round did not make the government of Saskatchewan an employer of health care workers or an agent for them even if doing so had a significant impact on collective bargaining.

[161] Even if the Crown was bound by s. 11(1)(a), when Minister McMorris wrote his impugned letter, he was responding to a postcard writing campaign to the Premier. When Mr. McMorris responded, he was writing as an elected official in his capacity as Minister of Health. Minister McMorris did not write specifically to health care workers. He only wrote to those individuals who wrote to the Premier. Under these circumstances, it is not reasonable to conclude that Minister McMorris was "acting on behalf of" the respondent employers. Even if this hurdle could be overcome, the message contained in Minister McMorris' letter is different than the message communicated by SAHO and the respondent employers. While it may have left the same erroneous impression that SAHO's proposal on retroactive pay was a fact and not merely a proposal, the letter did not contain any of the amplification or "spin" that SAHO and the respondent employers placed on their communications. For example, the letter did not contain a message about how much money health care workers were losing because their collective agreement had not been ratified. In our opinion, the difference in the language used the Minister's letter is significant. However, we need not make a determination as to whether or not this difference alone would have brought the Minister's letter within the sphere of permissible employer communications because we find that Minister McMorris was not an agent of the respondent employers when he sent the impugned letters. Even if he was, the Crown is not bound by *The Trade Union Act* in that capacity.

Did the Government of Saskatchewan violate section 12?

[162] The final argument of SGEU was the government of Saskatchewan took part in, abetted, counseled or procured the violations of *The Trade Union Act* committed by SAHO and the respondent employers. SGEU asserts to the government did so in two (2) ways. Firstly, SGEU argues that the provincial government interfered with collective bargaining or exercised unlawful control over the process of collective bargaining through the imposition of a financial mandate or because the government of Saskatchewan had representatives on the HLRC and at the bargaining table. Secondly, SGEU argues that the provincial government took part in, counseled or procured a violation of s. 11(1)(a) by approving and/or writing the content of the impugned communications that SAHO and the respondent employers sent to health care workers, posted in the workplace and contained in their advertisements regarding retroactive pay.

[163] In the first instance, we are not satisfied that the government of Saskatchewan is bound by s. 12 of *The Trade Union Act*. However, even assuming that it is

bound, were are not satisfied that the government's involvement in the 2008 Round of collective bargaining represented unlawful interference in the process of collective bargaining with the applicant trade unions. The right of the provincial government to impose a financial mandate can not seriously be challenged in law or logic. For the reasons already stated herein, we saw nothing in the evidence from which we could conclude that the government of Saskatchewan did not give SAHO and/or its bargaining teams sufficient or appropriate authority to conclude collective agreements with the unions. The obligation on SAHO, as the employers' bargaining representative, was to come to the table prepared to negotiate with the applicant trade unions; to have authority to negotiate and bind the respondent employers; and to communicate to their principals such information as may have been necessary to seek changes in their instructions if deemed necessary and desirable. As we have indicated, there is no rational basis to conclude that the provincial government must give an unrestricted mandate or automatically approve all requests for incremental funding to enable SAHO's negotiators to agree to any offer that may come from the applicant trade union during the course of collective bargaining. While it might be convenient if SAHO was unconstrained by financial limitations in negotiating with the unions, it can not seriously be argued that it is a violation of *The Trade Union Act* for the government of Saskatchewan to place restrictions on incremental funding for publicly-funded institutions.

[164] Finally, even if the Board had been satisfied that the provincial government was bound by s. 12 (which we weren't), we were not satisfied that the evidence demonstrate that it was officials of the government of Saskatchewan who wrote those portions of the communications of SAHO and the respondent employers regarding retroactive pay that we found to be misleading or that it was officials from the provincial government who authored the impugned "spin" that accompanied those messages. While the evidence established that a number of government officials were involved in the creative and approval process for most of the communications issued by SAHO and the respondent employers during the 2008 Round, the evidence did not establish that it was provincial officials who authored the impugned message or the government of Saskatchewan specifically directed SAHO or the respondent employers to use those particular messages. Absent such evidence, responsibility for the misinformation and "spin" rests solely with SAHO and the respondent employers. In our opinion, to sustain a violation of s. 12, there must be clear and compelling evidence that it was provincial officials who were the guiding mind behind the unlawful messages communicated by SAHO and the respondent employers regarding retroactive pay. Having reviewed the not-insignificant volume of evidence presented in these proceedings, we could not reasonably come to that conclusion.

Conclusions:

[165] For the foregoing reasons, we find that SAHO and the respondent employers committed an unfair labour practice within the meaning of s. 11(1)(a) of *The Trade Union Act* with respect to the communications that occurred during the 2008 Round of collective bargaining regarding its proposals for retroactive pay for health care workers. However, in our opinion, all other allegations against SAHO and the respondent employers are not well founded and must be dismissed, as must all allegations by SGEU against the government of Saskatchewan.

[166] An Order of this Board will issue enjoining SAHO and the respondent employers from further violating *The Trade Union Act*. In light of the fact that the 2008 Round of collective bargaining has concluded and the parties ultimately achieved collective agreements, in our opinion, no further remedial relief is appropriate or necessary.

[167] Board members Duane Siemens and Joan White both concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this 10th day of April, 2014.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson