The Labour Relations Board
Saskatchewan

UNIFOR, Local 609, Applicant v. HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Respondent

LRB File No. 189-16; September 21, 2016
Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Brenda Cuthbert and Maurice Werezak

For the Applicant Union: Larry Kowalchuk and Filip Cupial, Student-at-Law
For the Respondent Employer: Kevin Wilson, Q.C. and Amy Gibson

Interim Application – **Unfair Labour Practice** – Union applies for interim relief enjoining the Employer from enforcing an over-time policy for its Labour Relations Officers. Union alleges the policy is a unilateral attempt to impose a change to the terms and conditions of employment which the Employer previously abandoned at the bargaining table.

Interim Application – **Unfair Labour Practice** – Employer asserts that this dispute involves the interpretation of the collective agreement and the Board should decline jurisdiction as set out in section 6-45 of *The Saskatchewan Employment Act*.

Interim Application – Arguable Case – Board determines that the Union has demonstrated the unfair labour practice application presents an arguable case. The Board reviews its case law and concludes that the Union's application meets the low threshold on this aspect of the test for interim relief.

Interim Application – Balance of Convenience – Union wants a return to flexible working hours for Labour Relations Officers pending disposition of unfair practice application. Board finds insufficient labour relations harm demonstrated. Union seeks the same remedy on this application as on its main application. Board concludes it is inappropriate to make such an order in an interim relief application.

Interim Application – Practice and Procedure – Union challenges admissibility of Employer's affidavit. Board reviews requirements for affidavits filed on interim relief applications. Board concludes some paragraphs should be excised but balance of affidavit admitted.

REASONS FOR DECISION

OVERVIEW

[1] UNIFOR, Local 609 [the "Union"] is certified as the bargaining agent for among others, five (5) full time Labour Relations Officers ["LRO"] employed by Health Sciences Association of Saskatchewan [the "Employer"].

[2] On June 1, 2016, the Union filed an unfair labour practice application against the Employer.[1] It alleges that in May 2016 the Employer unilaterally altered the working hours of the LROs by requiring them to keep regular office hours from 8:00 a.m. to 5:00 p.m. with an unpaid lunch hour. If a LRO needs to work outside these hours, he or she must obtain prior authorization from the Employer's Executive Director, Mr. Dean Job. This unilateral action by the Employer, the Union asserts, violates subsections 6-1(1)(e)(ii), 6-7 and 6-62(1)(d) of *The Saskatchewan Employment Act* [the "*SEA*"][2]. The Board is scheduled to hear this application on October 18 & 19, 2016 in Saskatoon.

[3] On August 22, 2016, the Union filed this application for interim relief pursuant to subsection 6-103(2)(d) of the *SEA*. It asserts that the Employer's allegedly unilateral actions altering the LROs working hours has affected morale among the staff and has denied reasonable accommodation on medical grounds to one of the LROs. The Union insists the Board's intervention is now needed to prevent further harm to its affected members.

[4] On September 6, 2016, the Board heard this application for interim relief. At its conclusion we reserved our decision.

[5] These reasons explain why the Board unanimously concludes that the Union's application for interim relief must fail. We are of the view that the Union has not demonstrated sufficient evidence of labour relations harm which would warrant early intervention by the Board in this dispute.

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[1] LRB File No. 125-16.
[2] SS 2013, c S-15.1.

PRELIMINARY PROCEDURAL ISSUE – ADMISSIBILITY OF AFFIDAVIT EVIDENCE

A. Introduction and Nature of the Union's Objections

[6] It is well-known that there are two (2) pre-requisites which have to be satisfied before the Board will take up an application for interim relief brought pursuant to subsection 6-103(2)(d) of the *SEA*. The first is that there must be an underlying application before the Board. See for example: *CUPE, Local 4836 v LutherCare Communities et al.*[3], and *CUPE, Local 4802 v Outlook Division Support Staff Association*[4]. This pre-requisite is plainly satisfied in this case. As has already been noted, the Union filed its unfair labour practice application on June 1, 2016.

[7] The second pre-requisite is that the party seeking interim relief – in this case, the Union – must serve and file a formal application for interim relief as well as affidavits in support. Again, this pre-requisite is satisfied. As noted above, the Union filed an application for interim relief on August 22, 2016. The Union filed two (2) affidavits in support of its application, namely the Affidavit of Russell Dixon dated August 19, 2016, and the Affidavit of Jennifer Bowes dated September 1, 2016.

[8] The Employer filed its Reply to the Union's application for interim relief on September 1, 2016. In support of this Reply, the Employer filed the Affidavit of Dean Job dated September 2, 2016. In his affidavit, Mr. Job identifies himself as the Executive Director of the Employer. The parties do not dispute that Mr. Job assumed his current position in May 2015.

[9] At the outset of the hearing, the Union challenged the admissibility of Mr. Job's affidavit and urged the Board to strike his affidavit in its entirety from the record. The Union's main objections are set out in paragraphs 1 to 3 of its Brief of Fact and Law as follows:

> 1. *First, we note that the Affidavit of Dean Job makes oath and says "that he has personal knowledge of the matters herein deposed to" and does not include the making of oath regarding matters not within his personal knowledge, for example on reasonable belief where not within his personal knowledge.*
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> 2. *We note that according to the Health Sciences Association of Saskatchewan ("HSAS") website that Mr. Job did not become employed with HSAS until May of 2015 when he became the Executive Director and that he was neither a previous*

[3] LRB File No. 043-09, 2009 CanLII 22876, at paras. 29-30.
[4] LRB File Nos. 112-05, 061-07, 2009 CanLII 7785.

member of HSAS nor employed in Saskatchewan at all in the previous two decades.

3. *In particular, we note the following in regards to the Affidavit of Mr. Job:*

    a. *In paras. 5-8, Mr. Job provides evidence that occurred prior to his being employed in Saskatchewan as Executive Director of HSAS and therefore he has no personal knowledge of that evidence related to HSAS and its bargaining positions, including giving evidence about the intent of HSAS proposals during bargaining at the table;*

    b. *In para. 13, Mr. Job gives evidence about a policy which existed several years prior to his becoming employed at HSAS and for which he has no personal knowledge;*

    c. *In para. 15, Mr. Job acknowledges he does not have personal knowledge of the matter therein deposed to;*

    d. *In para. 22, Mr. Job gives evidence of past practice which occurred prior to his employment with HSAS and for which he has no personal knowledge;*

    e. *In para. 30, Mr. Job gives an opinion as well as appearing to assert that he has personal knowledge of the level, effectiveness and qualify of members services provided by the Labour Relations Officers prior to the unilateral change he implemented, a period of time for which he has no personal knowledge;*

    f. *In para. 31, Mr. Job speculates about a risk of harm to the employer which he is unable to speculate about based upon his having no personal knowledge of that matter prior to his employment with HSAS to compare it to[.]*

B. Relevant Legal Principles

[10] In order to assess the merits of the Union's objections to Mr. Job's affidavit it is useful to summarize briefly the procedural requirements established by the Board for purposes of interim applications. The Union placed great emphasis on the Board's Decision in *LutherCare Communities*[5]. In that case, the Board took the opportunity to remind the labour relations community of these requirements. One requirement was the sufficiency of affidavits filed in support of the application for interim relief.

[11] In particular, the Board concluded that the principal affidavit filed by the Applicant in that case was deficient. Chairperson Love stated:

> *[The Union] filed an Affidavit of Will Bauer, National Representative of the Union. In Practice Directive No. 1, the Board says:*
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> > *The application will generally be determined on the basis of written materials filed by the parties and oral argument, but not the testimony of witnesses. The application should therefore be accompanied by a statutory declaration or affidavit, in which the deponent sets out those facts* ***lying within his or her personal knowledge*** *which will be relied upon to support the application.*
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> *Mr. Bauer's Affidavit contains factual material which is of limited value to the Board in reaching a conclusion as to whether or not an arguable case exists or what the balance of labour relations harm will be if the application is not granted. These basic requirements have been consistently cited by the Board and must be met before the Board will consider granting an application for interim relief.*
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> *Mr. Bauer's Affidavit contains considerable material which is not based upon his personal knowledge, but is based on information and belief or is argumentative. In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Loraas Disposal Services Ltd., [1997] Sask. L.R.B.R. 517, LRB File No. 208-97, at 523, the Board described its policy and practice respecting the form of admissible affidavit evidence in interim application as follows:*
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> > *It has been the practice of this Board to require that affidavits filed in an application for interim relief be based on personal knowledge. The Board does not permit cross-examination of witnesses on their affidavits as there is not sufficient time on an interim application to hear viva voce evidence. If viva voce evidence is necessary, the application or respondent should request an expedited hearing, which the Board can generally accommodate.*
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> *A number of recent applications to the Board seem to have forgotten this requirement. Applicants for interim relief must be mindful of this requirement since, failing to do so, may, in appropriate circumstances, result in their application being dismissed, such as that which occurred in Grain Services Union (ILWU-Canada) v Startek Canada Services Ltd., [2004] Sask. L.R.B.R. 15, LRB File No. 032-04. This is one of those appropriate circumstances. [Emphasis in original.]* [6]

[12] Since *LutherCare Communities* and the advent of the *SEA*, the Board has promulgated *The Saskatchewan Employment (Labour Relations Board) Regulations* [the "*Regulations*"]. The *Regulations* are intended to provide greater clarity respecting the processes before this Board. They do not purport to supersede Practice Note No. 1 but rather elaborate on procedural pre-requisites for applications initiated under the *SEA*.

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[5] *Supra* n. 3.
[6] *Ibid*., at paras. 32-35.

[13] Section 15 of the *Regulations* relates specifically to applications for interim relief. This provision sets out the requirements that govern the Union's objections to Mr. Job's affidavit and for this reason the relevant subsections are reproduced below:

> ***15*** *(1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*
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> *(a) an application in Form 12 (Application for Interim Relief) with the registrar;*
> *(b) an affidavit of the application or other witness in which the applicant or witness identifies with reasonable particularity:*
> *(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;*
> *(ii) the party against whom the relief is requested; and*
> *(iii) any exigent circumstances associated with the application or the granting of the interim relief;*
> *(c) a draft of the order sought by the applicant; and*
> *(d) any other materials that the applicant consider necessary for the purposes of the application.*
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> *(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or the witness's own knowledge to prove.*
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> *(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the bard may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.*
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> *(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.*

[14] Section 15 incorporates much of what is set out in Practice Directive No. 1 and it also elaborates on other aspects of these applications, most notably the Board's ability in "special circumstances" to admit affidavits or portions of affidavits based on information and belief and not personal knowledge. See: subsection 15(3).

[15] This Board has already ruled that case-law interpreting section 5(3) of *The Trade Union Act*[7] remains relevant when deciding applications for interim relief under subsection 6-103(e)(d) of the *SEA*. See especially: *Saskatchewan Joint Board, Retail, Wholesale and*

[7] RSS 1978, c T-17 [the "*TUA*"].

Department Store Union v Aaron's Furniture[8], and *Amalgamated Transit Union, Local 615 v Saskatoon (City)*[9]. The Board explained in *Amalgamated Transit Union, Local 651* as follows:

> *In our opinion, the legislative purpose and the policy restrictions associated with the exercise of the discretion set forth in s. 6-103(2)(d) are the same as that which was articulated by this Board in [Saskatchewan Government and General Employees' Union v The Government of Saskatchewan]. Simply put, the Board's authority to grant interim relief, the factors we take into consideration on interim applications, and the text employed in exercising our discretion have remained essentially unchanged following the repeal of The Trade Union Act and the proclamation of The Saskatchewan Employment Act.*[10]

[16] Simply stated, prior authorities respecting all aspects of applications for interim relief decided under the *TUA* remain good law unless they have been overtaken by more recent legislative changes or new developments in the Board's jurisprudence interpreting and applying the *SEA*.

[17] From these authorities, the following principles are applicable to the Union's objection. First, affidavits filed in support of an application for interim relief must be based on information within the personal knowledge of the affiant. This requirement has long been recognized by the Board in its' prior decisions and is now explicitly mandated by subsection 15(2) of the *Regulations*.

[18] Second, subsection 15(3) of the *Regulations* contemplates that an affidavit which is sworn on information and belief, and not personal knowledge, may yet be admitted if it is demonstrated that "special circumstances" exist for its admission. The Board has not considered what might qualify as "special circumstances" for purposes of this provision. No argument was advanced before us on the point so we decline to say anything more about it. Suffice it to say this provision appears to add a nuance to applications for interim relief which had not existed previously.

[19] Third, the Board will review an affidavit which contains statements that are not, or cannot be, based on personal knowledge of the affiant to assess whether the affidavit can stand with the offending portions excised or whether the affidavit must be struck in its entirety. In *Grain Services Union (ILWU-Canada) v Startek Canada Services Ltd.*[11], for example, the Board

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[8] LRB Files No. 265-15 & 268-15, 2016 CanLII 1307 (SK LRB), at para. 23.
[9] LRB File No. 211-14, 2014 CanLII 63994 (SK LRB)
[10] *Ibid*., at para. 39.
[11] LRB File No. 032-04, 2004 CanLII 65591 (SK LRB)

critically reviewed the supporting affidavit which contained numerous paragraphs based on hearsay or information and belief without identifying the basis for the statement. Ultimately, the Board concluded that "the impugned portions of the affidavit and application document are too extensive to selectively excise and yet support the interim application"[12]. As a consequence, the application failed because there was no other evidence that the Applicant could rely upon to support its request for interim relief.

[20] Contrastingly, in *United Food and Commercial Workers, Local No. 1400 v Wal-Mart Canada Corp.*[13], the Board critically assessed the supporting affidavit of the Employer's Reply. The Board concluded that three paragraphs contained information outside the personal knowledge of the affiant and, accordingly, must be struck. However, the Board went on to admit the balance of the affidavit into evidence.

[21] Fourth, it is apparent that striking an affidavit in its entirety because it contains information not founded on personal knowledge should be the remedy of last resort. The Board must be satisfied the offending paragraphs have so polluted the affidavit that it is not possible to rely upon what remains of the document. See especially: *Startek*.[14]

[22] Fifth, even if an affidavit is struck in its entirety for failing to comply with the requirement of personal knowledge, it does not follow that it will result in the application being dismissed or, in the case of a respondent, the failure of its defense. A good illustration of this reality is *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Loraas Disposal Services Ltd.*[15]. In that Decision which related specifically to the Union's application for interim relief, the Employer challenged the sufficiency of the Union's various supporting affidavits for the reason that they were not based on the affiants' personal knowledge. The Board disposed of this objection summarily. It noted that even though the affidavits in question failed to comply with the procedural requirement, the Union could rely on admissions contained in the Employer's supporting affidavit to prove its case. The Board stated:

> *In this instance, the Board finds that the essential evidentiary claims made by the Union were confirmed by the affidavit filed on behalf of the Employer. As such, it is not necessary for the Board to review the*

[12] *Ibid*., at para. 10.
[13] LRB File No. 069-04, 2009 CanLII 2047 (SK LRB)
[14] *Supra* n. 11.
[15] [1997] Sask. L.R.B.R. 517. LRB Files No. 208-97 to 239-97.

> *sufficiency of the Union's affidavit or make any rulings with respect to the credibility of the deponents.*[16]

[23] With these principles identified, the Board now turns to considering the Union's objections to the Job Affidavit.

C. Application of Principles and Disposition of Preliminary Objections

[24] After carefully considering the Union's objections to the Affidavit of Mr. Job, the Board has concluded that certain of these objections are well-founded. However, in our opinion these deficiencies are not substantial enough to warrant striking the entire affidavit. In this section we explain our disposition of the Union's preliminary objections.

[25] It is not disputed that Mr. Job assumed his current position with the Employer in May 2015. As a consequence, the Board concludes that detailed information respecting the bargaining history which took place prior to his employment is not within his personal knowledge. It follows that paragraphs 5, 6, 7 and 8 must be excised from the Job Affidavit.

[26] The Union challenges paragraph 15 of the Job Affidavit on the basis that it contains information based on information and belief. The Board was unable to find any assertions in this paragraph not based on Mr. Job's personal knowledge.

[27] However, in paragraph 16, there is an assertion based on information and belief which reads as follows: "I was informed and do verily believe to be true that HSAS's legal counsel requested a copy of the unfair labour practice complaint from the Union's counsel on May 27, 2016 and again on the morning of June 1, 2016 and was not provided a copy until 4:45 p.m. on June 1, 2016, after it had been filed with the Board earlier that day." The Board is satisfied that this sentence should be excised from the Job Affidavit as it is not based on personal knowledge. The remainder of paragraph 16 is admitted.

[28] The Union challenges paragraphs 19 and 20 of the Job Affidavit on the basis that it is argumentative and not based on personal knowledge. Respecting paragraph 19, the Board is satisfied that it replies to an affidavit submitted by the Union and is based on Mr. Job's personal knowledge. However, the Board agrees with Union's counsel that the third sentence in the paragraph – "The harm Mr. Dixon alleges is devoid of any detail" – can be characterized as

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[16] *Ibid.*, at 523.

argumentative. As a result this sentence should be excised. The balance of paragraph 19 is admitted into evidence.

[29] Respecting paragraph 20, the Board is satisfied that the first sentence is an innocent error for which counsel for the Employer took full responsibility during the hearing of this application. The correct information is non-controversial and it is not disputed that there are five (5) and not four (4) LROs as attested to in that sentence. While the balance of the paragraph is of questionable value to the Board, it is based on the deponent's personal knowledge. This paragraph will be admitted into evidence.

[30] The Union challenges paragraph 22 for the reason that it contains information not within the personal knowledge of the deponent. The Board disagrees with counsel's characterization of this paragraph. The nub of the Union's unfair labour practice application is that the memoranda issued by the Employer in April and May 2016 unilaterally altered the LROs' hours of work. The practice which pre-dated those memoranda clearly fell within the deponent's personal knowledge as Mr. Job's employment with Health Sciences Association of Saskatchewan began in May 2015, almost a year before the impugned memoranda were issued.

[31] Finally, the Union challenges both paragraphs 30 and 31 on the basis that the assertions made in those paragraphs fall outside the deponent's personal knowledge because they relate to events which took place prior to when he joined the Employer. Again, the Board does not agree with counsel's characterization of these paragraphs. The Board construes these paragraphs as referencing only the time frame of his employment. As Executive Director, he would possess direct knowledge of how well the office has functioned during his tenure. These paragraphs offer his personal observations on that topic.

[32] Accordingly, except for the paragraphs and portions of paragraphs, including Tab B of the Job Affidavit which the Board has excised, the balance of this affidavit is admitted into evidence. In our view, these deficiencies have not polluted the deponent's credibility to the point that the whole of his affidavit must be struck.

APPLICATION FOR INTERIM RELIEF

A. Relevant Legal Principles

[33] The Board's jurisprudence respecting applications for interim relief has been canvassed in many decisions, most recently in *Aaron's Furniture*[17]*.* Little value would be achieved were we to rehearse those authorities in detail here. It is useful, however, to review the general principles governing applications of this kind. A good summary of those principles may be drawn from the Board's Decision in *Saskatchewan Government and General Employee's Union v The Government of Saskatchewan*[18] as follows:

> *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Boards utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application.*
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> . . . . . .
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> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case".*
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> . . . . . .
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> *[32] The second part of the test – balance of convenience – is an adaption of the civil irreparable harm criteria to the labour relations arena….In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy.*[19]

B. Onus

[34] As with most applications under the *SEA*, the onus rests upon the applicant in this matter. This Board addressed this question most recently in *Moose Jaw Firefighters' Association Local 553 v Moose Jaw (City)*[20]. Invoking the Supreme Court of Canada's decision in *F.H. v McDougall*[21]*,* the Board concluded:

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[17] *Supra* n. 8.
[18] LRB File No. 150-10, [2010] CanLII 81339 (SK LRB) ["*SGEU*"]
[19] *Ibid*., at paras.30, 31 and 32. (Citations omitted.)
[20] LRB File No. 219-15; 2016 CanLII 36502 (SK LRB) ["*Aaron's Furniture*"]
[21] 2008 SCC 53, [2008] 3 SCR 41, especially at para. 49.

> *There was no disagreement between the parties that the Association bears the burden to prove the allegations of an unfair labour practice on a balance of probabilities. This means the Association must demonstrate to the Board that it was more likely than not the City failed to negotiate in good faith a resolution of the terminations of these dispatchers. [Emphasis added.]*[22]

C. Factual Background

[35] The Union filed two (2) affidavits supporting this application, namely the Affidavit of Russell Dixon dated August 19, 2016 and the Affidavit of Jennifer Bowes dated September 1, 2016.

[36] In his affidavit, Mr. Dixon deposed to the following factual matters which are salient to this application:

- *He has been employed as a LRO with the Employer since January 30, 2012 (para. 2),*
- *As a field staff member, he is required to work 112.5 hours in a three (3) week period This schedule permitted him to work flex hours in order to meet the needs of the Employer's members (para.3).*
- *The ability of LROs to work flex hours pre-dates his employment (para. 12).*
- *Effective May 24, 2016, the Employer "unilaterally" altered the hours of work for all LROs requiring them to work "essentially office hours" (para. 4).*
- *The Union filed an unfair labour practice application on June 1, 2016 alleging that the Employer's alleged unilateral action offended the SEA (para.5).*
- *The Union had requested that the Employer refrain from implementing the impugned change pending a decision by this Board on the unfair labour practice application. The Employer refused this request (para. 6).*
- *The Employer's alleged unilateral action has resulted in "poor morale" for the LROs and a "negative impact on the trust relationship with the employer" (para. 9).*
- *The new policy has "resulted in significantly less accessibility for the members" to the Employer's field staff (para. 10).*
- *The inability of LROs to adjust their work schedules as well as the loss of flexibility to schedule meetings with members "had a direct impact on our credibility in the workplace" (para. 11).*

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[22] *Supra* n. 6, at para. 82.

[37] In her affidavit, Ms. Bowes deposed to the following factual matters which are salient to this application:

- *She has been employed as a LRO by the Employer since August 5, 2014 (para. 1).*
- *Since the date of employment until May 24, 2016, she had been permitted "to average" her work hours over three week periods as she saw fit, provided she completed "a total of 112.5 hours per three-week period" (para. 2).*
- *On May 16, 2016, the Employer issued a memorandum stating that effective May 24, LRO working hours "would be from 8:00 a.m. to 4:30 p.m. with one-hour unpaid lunch breach to be taken between the hours of 11:00 a.m. to 2:00 p.m. daily, with lunch hours to be staggered between LROs to ensure lunch hour coverage" (para. 3).*
- *A copy of this memorandum was attached as Exhibit "A".*
- *On May 18, 2016 she commenced a medical leave from which she returned on August 16, 2016 (para. 4).*
- *On her return, she produced a letter from her physician which was attached as Exhibit "C". In it, her physician requested the Employer "to allow some flexibility for [Ms. Bowes'] work schedule to ensure further continuous recovery" (para. 4 and Exhibit "C").*
- *Since her return to work, the Employer "has refused to accommodate modified working hours outside of the new office hours of 8:00 a.m. to 5:00 p.m." (para. 5).*
- *On September 1, 2016, the Employer forwarded to her a letter and asked her to forward it to her physician. A copy of the Employer's letter was attached as Exhibit "E".*

[38] The memoranda referred to in the Bowes Affidavit lie at the heart of the Union's applications. Both were authored by Mr. Job. The first dated April 29, 2016 is entitled "HSAS Labour Relations Officers Hours of Work and Overtime". In the first paragraph, Mr. Job acknowledges that "there has been much discussion with regard to the issues of hours of work, banking of overtime and whether Labour Relations Officers ("LROs") have some unilateral ability to self-schedule daily and overtime hours".

[39] In the concluding paragraph of the memorandum, Mr. Job outlines what the Employer believes to be the policy respecting those issues which is compatible with terms set out in the collective agreement. He states:

> *To avoid any confusion or uncertainty, going forward, it is the expectation of HSAS that Labour Relations Officers adhere to the following, which we believe is consistent with the terms of the collective agreement:*
>
> 1. *HSAS retains the right to set hours of work of Labour Relations Officers to meet the needs of its members and the organization.*
>
> 2. *Hours worked will normally consist of 112.5 over a 3 week period. LROs may request a deviation from hours of work set by HSAS for operational or personal reasons.*
>
> 3. *As per existing policy (attached) overtime is to be pre-authorized by the Executive Director or Office Manager. There is no banking of overtime unless agreed to by the employer. Authorized overtime is paid pursuant to Article 15.4 of the collective agreement.*

[40] The policy referenced in the last subparagraph also formed part of Exhibit "A". This policy entitled simply "Overtime" indicates it was last revised in March 2008. It states:

> *The Executive Director or Office Administrator shall pre-authorize any overtime worked.*
>
> *HSAS staff will be compensated for authorized overtime worked, according to the prevailing collective agreement.*

[41] The second memorandum is dated May 16, 2016 and entitled "HSAS Labour Relations Officers Hours of Work and Pre-Authorization of Overtime". It stipulates hours of work for each LRO to come into effect as of May 24, 2016. It goes on to state that hours worked in excess of 7.50 per work day "are considered overtime and must be pre-authorized by the Executive Director before being worked by an LRO."

[42] The Employer filed one (1) affidavit in support of its Reply, namely the Affidavit of Dean Job dated September 2, 2016. Once the offending portions of this affidavit are removed, Mr. Job deposed to the following factual matters which are salient to this application:

- *The Employer is a union representing more than 3, 700 health care professions in all Saskatchewan's Health Regions, several privately owned ambulance services in Saskatchewan, and the Canadian Blood Services in Regina (para. 2).*
- *The Union and the Employer are governed by a Collective Bargaining Agreement effective January 1, 2013 to December 31, 2016 (para.3). This document was attached as Exhibit "A" to this affidavit.*
- *In September 2015, the Employer surveyed its membership and learned that more than 90% of the calls and e-mails were made during business hours between 8:00 a.m. and 5:00 p.m. (para. 11).*

- *On behalf of the Employer, he authored two memoranda addressing the Employer's office hours and overtime when the LROs were required to be at work. These memoranda were attached as Exhibits "G" and "H" to this affidavit (para. 15).*

- *As of September 2, the Employer has received eight (8) requests for various LROs "for approval to vary their hours of work and work overtime". Seven (7) of these requests were approved and the last was resolved by mutual agreement (para. 21).*

- *Various e-mail communications relating to these requests were attached to the affidavit as Exhibit "J".*

- *The Employer has attempted to work with Ms. Bowes and the Union representative, Kate McKinley to accommodate her medical condition has been met with "only limited co-operation" (para. 24).*

- *The Employer has not refused to consider adjusting her hours of work "if required for medical purposes" (para. 25).*

- *He spoke to Ms. Bowes on her return to work and advised the Employer would be flexible with her schedule "within the hours of 8:00 a.m. to 5:00 p.m.". Outside of those hours the Employer would require further medical documentation in order to assess what measures needed to be taken to accommodate her. During that conversation Ms. Bowes did not ask for further accommodation and as of September 2 had not made any such request (para.27).*

- *The Employer "remains prepared to have flexibility in hours of work to accommodate Ms. Bowes's medical condition, if that is required to accommodate any medical restrictions she may have" (para. 28).*

[43] The current Collective Agreement between the Union and the Employer which is set to expire on December 31, 2016 was introduced into evidence as an exhibit to the Job Affidavit. Neither party seriously disputed its accuracy or its admissibility in these proceedings. Two (2) articles in this document are relevant here.

[44] Article 14.2 relates to hours of work for LROs and states:

> *Field Staff – Full time Labour Relations Officers shall normally work one hundred twelve and a half hours (112.5) in a three (3) week period.*

[45] Article 15.4 relates to overtime compensation for LROs and states:

> *In lieu of overtime payment, each Labour Relations officer will receive fifteen (15) paid days off per year (credited at the beginning of each year). In the event a Labour Relations Officer (LRO) should terminate their employment prior to the end of the calendar year, the Employer will calculate how much paid time the LRO was entitled to be based on 1.25 days per month and either pay out the unused portion or recover any overpayment by deducting the amount owed from monies*

owed by the Employer to the LRO. Maximum usage of these fifteen (15) days will be five (5) days at a time.

[46] The final relevant document is the Union's unfair labour practice application dated June 1, 2016 which underpins this application for interim relief pursuant to subsection 6-103(2)(d) of the *SEA*. It alleges that the Employer's hours of work policy set out in the two memoranda referred to above is an attempt to resurrect and to implement unilaterally a proposal which the Employer had advanced at the bargaining table but subsequently withdrew.

D. Relevant Statutory Provisions

[47] The provisions of the *SEA* relevant to this matter read as follows:

> ***6-1(****1)(e) "collective bargaining" means:*
>
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
>
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
>
> *(iii) executing a collective agreement by or on behalf of the parties; and*
>
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union[.]*
>
> *. . . . .*
>
> ***6-7*** *Every union and employer shall, on good faith, engage in collective bargaining at the time and in the manner required pursuant to this Part or by an order of the board.*
>
> *. . . . . .*
>
> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> *. . . . . .*
>
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer[.]*
>
> *. . . . . .*
>
> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> *. . . . . .*
>
> *(e) make an interim order or decision pending the making of a final order.*

E. Has the Union Demonstrated an Arguable Case?

[48] The first part of the operative test for interim relief under the *SEA* asks the Board to assess whether the main application namely the Union's unfair labour practice application presents an arguable case. *SGEU* reminds us this is not a stringent standard. It requires that an applicant shows it is more likely than not the main application raises an arguable case.

1. The Union's Position

[49] The Union asserts that the recent policy reflected in the Employer's two impugned memoranda amount to a unilateral change in hours of work for the LROs without prior discussions with, or the consent of, the Union. It asserted that this recently implemented policy was similar, if not identical, to the proposal the Employer put on the table during the most recent round of bargaining and, subsequently, withdrew in order to achieve the current collective agreement.

[50] In support of this submission, the Union relies principally on this Board's decision in *UFCWU v Affinity Credit Union*[23]. In that case, the Board found that the Employer had unilaterally instituted a change in hours, a fact that the Employer did not controvert. This change took place when no collective agreement was in force and without prior consent of the Union. As a result, the Board determined that the main application presented an arguable case for ultimate determination at a later hearing. The Board concluded on this aspect of the test:

> *In applying the first part of the test, that is, whether the main unfair labour practice application reflects an arguable case under s. 11(1)(m) of [The Trade Union Act, RSS 1978, c T-17], the Board finds at a minimum that there is an arguable case under s. 11(1)(m). There is clearly a difference between the parties as to the applicable jurisprudence that the Board should follow in respect of the alleged breach of s. 11(1)(m). It is uncontradicted that the change was implemented unilaterally, which, in and of itself raises a question under s. 11(1)(m).*[24]

[51] The distinguishing factor between this application and *Affinity Credit Union*, of course, is here the Employer strongly disputes the Union's position that there has been any alteration in working hours for LROs, let alone a unilaterally imposed one.

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[23] LRB File Nos. 115-11 & 140-11, 2011 CanLII 61201 (SK LRB)
[24] *Ibid*., at para. 25.

2. The Employer's Position

[52] The Employer argues that the Union's unfair labour practice application discloses no arguable case and, as a consequence, this application for interim relief as well as the underlying main application should be dismissed. The Employer offers two (2) reasons for its position.

[53] First, the Employer argues that the Board lacks the jurisdiction to entertain this application. It submits that this dispute should go before an arbitrator since it involves the interpretation of the collective agreement and not an unfair labour practice. The Employer argues that the policy reflected in the two impugned memoranda simply clarifies the meaning of Article 14.2 of the Collective Agreement, and does not constitute a change in work hours for LROs. In any event, the Employer asserts that the Union is arguing the Employer is estopped from changing the LRO's hours of work or averaging their hours of work.

[54] The Employer relies on the decision of the Supreme Court of Canada in *Manitoba Health Care Professionals v Nor-Man Regional Health Authority Inc.*[25] in support of its position that the issues the Union is advancing here are more appropriately ones which ought to be adjudicated by a grievance arbitrator. In that case Fish J. for the Court approved of Paul Weiler's description, while he was Chair of the British Columbia Labour Relations Board, of the general purposes of arbitration. Chairman Weiler stated as follows:

> *The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action and the union officials are fully aware of it, and no objection is forthcoming, the only reasonable inference the employer can draw is that its position is acceptable.*[26]

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[25] 2011 SCC 59, [2011] 3 SCR 616.
[26] *Ibid*., at para. 50 quoting *Re Penticton (City) C.U.P.E. Local 608* (1978), 18 L.A.C. (2d) 307 (BC LRB), at 320.

[55] If the Employer is correct, the jurisprudence of this Board is clear: we must defer to a grievance arbitrator. In *Health Sciences Association of Saskatchewan v Five Hills Health Region*[27], for example, the Board explained at paragraphs 21, 23 and 28:

> *[21] The Board has a long history of deferral to the grievance arbitration process. In Administrative and Supervisory Personnel Association v University of Saskatchewan, [2005] Sask. L.R.B.R. 541, LRB File No. 070-05, the Board says at 550:*
>
> > *[26] The Board has followed a longstanding policy of deferring to the grievance and arbitration process contained in a collective agreement where the issues raised involved the interpretation or application of the terms of the collective agreement and where complete relief can be obtained through the arbitration process.*
>
> *. . . . . .*
>
> *[23] What is at issue here is how the collective agreement is to be interpreted. The argument revolves around the provisions of the agreement in respect of the various articles of the agreement and their proper interpretation.*
>
> *. . . . . .*
>
> *[28] What is clear is that the Board should not, in accordance with the longstanding policy outlined above, become embroiled in disputes in which the proper interpretation of the collective agreement is at issue. Those matters of interpretation have been reserved to boards of arbitration under s. 25 of [The Trade Union Act, R.S.S. c.T-17 [the "TUA"}].*

[56] The legislative direction for deference by this Board to grievance arbitrators in such matters previously set out in section 25 of the *TUA* is now found in section 6-45 of the *SEA*.

[57] Second, and in the alternative, the Employer argues that the Union is urging the Board to direct that the parties engage in mid-contract collective bargaining. The Employer relies principally on the Board's recent decision in *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*[28]*.* In that Decision, the Board reiterated and applied the general principle discouraging mid-term bargaining. It acknowledged that the operation of this principle could be harsh; however the Board at paragraph 60 went on to conclude:

> *Yet, this is a collateral effect of the necessary trade-off or quid pro quo occasioned by the Wagner model in order to ensure industrial relations peace during the life of a collective agreement. As a consequence, it is an accepted reality for employers and union alike.*

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[27] LRB File No. 021-08, 2008 CanLII 47042 (SK LRB)
[28] LRB File No. 229-15, 2016 CanLII

3. Decision on the Arguable Case Issue

[58] The Board has concluded that the Union has met its burden on the first aspect of the test for interim relief for the following two (2) reasons.

[59] First, evidence presented to the Board demonstrates there is merit to both sides. The Union's unfair labour practice application which in our view qualifies as a "certified declaration" referred to in *SGEU*[29], stipulates in part as follows:

> *During the bargaining between the Employer and the Union on September 25 & 26, 2013 and February 4, 2014, the employer had attempted to negotiate in a change to hours of work and averaging of hours into the collective bargaining agreement. Upon the rejection by the Union bargaining committee of this addition to the collective agreement, and the fact that the bargain was entering into its' 2nd year of talks, both the Union and the Employer withdrew their outstanding proposals in order to achieve a contract.*
> *. . .*
> *The Union here submits that the employer, during the process of collective bargaining, put forward wording as part of their bargaining proposal package and through the discussions at the bargaining table described that they wanted averaging of hours and accumulation of overtime to change in the collective agreement. The Union now believes that the Employer withdrew the working with the full intention of implementing these plans after a collective agreement was signed.*[30]

[60] If the Union can prove these allegations at a full hearing it may be that the panel of the Board which hears the matter might conclude the Employer committed an unfair labour practice when it issued the impugned memoranda earlier this year.

[61] On the other hand, if the Employer is correct and this dispute is truly about the interpretation of the current collective agreement then in accordance with the case-law referred to earlier, as well as section 6-45 of the *SEA*, this matter should go to grievance arbitration and the Board must decline jurisdiction.

[62] Second, and more significantly, the Board is aware that if it declines jurisdiction at this stage, this matter would be at an end. The Board acknowledges that the Union's evidence is equivocal, however, we are very mindful of the direction in *SGEU* that we should not weigh too

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[29] *Supra* n. 18, at para. 30.
[30] LRB File No. 125-16, Union's Unfair Labour Practice Application dated June 1, 2016, at para. 3.

finely "the relative strength or weakness of the applicant's case"[31]. Rather, "an application seeking interim relief need not demonstrate a probably [*sic*] violation or contravention of the *Act* as long as the main application reasonable demonstrates more than a remote or tenuous possibility"[32].

[63] It is our considered view that the Union has met this standard. We do not think it would be prudent to dismiss summarily the Union's unfair labour practice solely on the basis of the limited evidence presented at the hearing of this application for interim relief. That said, the panel of the Board which hears the main application will be alive to the jurisdictional arguments raised by the Employer.

F. Does the Balance of Convenience Favour the Issuance of an Order for Interim Relief?

[64] The second part of the operative test for interim relief under the *SEA* asks whether or not the balance of convenience favours the issuance of an interim order. This part of the inquiry is analogous to the test for injunctive relief utilized by superior courts in the civil context. Indeed, this Board's jurisdiction – in the sense of power – to order interim relief now found in section 6-103(2)(d) of the *SEA* emerges from that body of law.[33]

[65] Very recently, in *Aaron's Furniture*[34], the Board provided this helpful summary of what must be weighed on this part of the inquiry:

> *This factor [i.e. balance of convenience] is similar to the requirement that an applicant for interim relief must show that the labour relations harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.*[35]

1. The Union's Position

[66] The Union hangs its argument on this aspect of the inquiry on two (2) main points. First, it asserts that it is not possible to compensate its members in damages for the harm which Mr. Dixon and Ms. Bowers allegedly experienced as a result of the Employer's alleged recent

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[31] *Supra* n. 18, at para. 30.
[32] *Ibid*.
[33] See, especially: *Burkart et al. v Dairy Producers Co-operative Ltd.* (1990), 74 D.L.R. (4th) 694, 1990 CanLII 7774 (SKCA). See also: *Re Prairie Micro-Tech Inc*., LRB File No. 238-94, [1994] S.L.R.B.D. 62.
[34] *Supra* n. 20.

policy change. Second, it contends that the Employer has demonstrated no labour relations harm to its' operations should the LROs' hours of work be restored to the *status quo ante*.

2. The Employer's Position

[67] The Employer asserts that the Union has failed to satisfy its burden on this aspect of the inquiry for two (2) reasons. First, it submits that no evidence of labour relations harm has been demonstrated. In particular it relies on the Board's prior decisions in *Re Prairie Micro-Tech Inc.*[36] and *UFCW, Local 1400 v Arch Transco Ltd. and Buffalo Cabs (1976) Ltd., operating as Regina Cabs*[37]*.* In *Prairie Micro-Tech Inc.*, for example, the Board said this respecting the "irreparable harm" aspect of applications for interim relief:

> *[W]hat the Board is being asked to do is to issue an order for relief in circumstances where there is no opportunity for the parties to present evidence, and no full consideration can be given to the merits of the complaints enumerated in the application. Under these conditions, it is our view that the applicant must be required to show that there will be some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application. There are, no doubt, circumstances in which the Board would issue orders pursuant to Section 5.3 without putting the application such a test, but in this kind of case where we are being asked to issue an order without the benefit of a hearing, we feel it is necessary that the applicant provide us with a persuasive rationale for granting relief in the form of a description of the harm which will accrue to them if the order is not granted. [Emphasis added.]*[38]

[68] The Employer submits that neither the Dixon Affidavit nor the Bowes Affidavit disclose a "persuasive rationale" for an interim order. It notes the Dixon Affidavit contains only a bald assertion that he and the other LROs are experiencing difficulties occasioned by the new approach to hours of work and this is somehow affecting their "morale" and eroding "the trust relationship with the employer".

[69] Respecting Ms. Bowes' particular complaint, the Employer states that it has never denied medical accommodation to her. Indeed, the Employer asserts it is prepared to accommodate adjustments to hours of work if Ms. Bowes provides it with appropriate medical

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[35] *Ibid*., at para. 26.
[36] *Supra* n. 33.
[37] LRB File Nos. 241-04, 242-04 & 243-04; [2004] Sask. L.R.B.R. 327.
[38] *Ibid*., at p. 6.

information which it has requested. The Employer asserts further that it only learned from her affidavit that neither she nor the Union is prepared to co-operate with it to obtain this information.

[70] Second, the Employer contends that it, and not the Union, will suffer labour relations harm should this Board grant the Union's request for interim relief. It points out the vast majority of inquiries from members are received during regular working hours, and it is essential the office be adequately staffed to ensure members' concern are properly addressed.

[71] The Employer also asserts that since the over-time policy has been enforced LROs' requests to work over-time have been approved. Eight (8) requests have been forthcoming and seven (7) of them were approved. The eighth request was collaboratively resolved.

3. <u>Decision on the Balance of Convenience Issue</u>

[72] On this issue, the Board concludes that the Union has failed to satisfy its burden. Three (3) reasons have persuaded us that the Board's early intervention in this dispute is not warranted.

[73] First, the Board agrees with the Employer that the Union presented little, if any, evidence of labour relations harm, let alone a "persuasive rationale" – to quote from *Prairie Micro-Tech Inc.* – for ordering interim relief to avoid further prejudice to its members. At its highest, Mr. Dixon's evidence reveals that he and his colleagues are disappointed, and even frustrated, by the Employer's attempt to scrutinize more rigorously their hours of work. Yet, no concrete evidence was led as to how their dissatisfaction has impeded their ability to carry out their job responsibilities.

[74] The e-mails located at Tab J of the Job Affidavit demonstrate that over-time requests by LROs are, almost universally approved. Counsel for the Union contended that this fact demonstrated there was no need for enforcing an over-time policy. Yet, the converse is also true. If reasonable requests for over-time are regularly approved by the Employer's Executive Director or his delegate no undue harm or prejudice is incurred by the Union's members.

[75] These e-mails also demonstrate that as of the hearing date Ms. Bowes had not made a formal request to have her regular work hours altered to accommodate her on-going medical condition. Indeed, the e-mails demonstrate to the Board's satisfaction that the process of determining the appropriate level of accommodation for Ms. Bowes is on-going.

[76] As a result, the Union failed to persuade us that the factual information before the Board on this application supports its allegations of prejudice or harm flowing from the impugned actions of the Employer. This finding alone would be sufficient to dismiss the Union's application for interim relief. However, there are other reasons why this application must fail.

[77] Second, this Board has said on previous occasions that it is inappropriate to make an interim order which effectively gives the moving party most, if not all, of the relief it requests in its main application. In *SGEU*, the Board referenced its earlier decision in *Retail, Wholesale and Department Store Union, Local 455 v Tai Wan Pork Inc.*[39]

[78] In *Tai Wan Pork*, the Union's underlying application claimed the Employer committed an unfair labour practice when it failed to recall a number of employees at the conclusion of a labour dispute. The interim application sought their immediate reinstatement. The Board declined to make such an Order and directed an expedited hearing of the main application. The Board explained:

> *If an interim Order was granted by the Board, the remedial consequences of the main application would be complete, except perhaps for an assessment of some aspects of the monetary claim. This result dissuades the Board from proceeding solely on the basis of affidavit material and brief oral arguments. The issues are more complex both factually and legally and deserve a full hearing before remedial relief of this magnitude is granted. [Emphasis added.]*[40]

[79] In our opinion, the same result should obtain here. The Union is requesting that the Board order a return to the *status quo ante* which is the identical result it seeks on the main application. As in *Tai Wan Pork*, it is not appropriate for the Board to grant the Union full remedial relief on an interim application.

[80] Third, this is one of those cases like *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatchewan Indian Gaming Authority Inc. c.o.b. as the Painted Hand Casino*[41] where together the delay in bringing an interim application, the imminence of a hearing on the main application, and the lack of urgency requiring the Board's early intervention combine to defeat the application for interim relief.

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[39] LRB File No. 076-00, [2000] S.L.R.B.D. No. 21 ["*Tai Wan Pork*"]
[40] *Ibid*., at para. 15.
[41] LRB File Nos. 067-03, 068-03 & 069-03, 2003 CanLII 62861 (SK LRB)

[81] The Union's unfair labour practice application was filed on June 1, 2016 but the application of interim relief was not initiated until August 22, 2016, more than two (2) months later. As well, at the time the interim relief application was argued the hearing of the main application was scheduled to commence on October 18, 2016, a mere six (6) weeks in the future. Finally, as concluded earlier in this section the evidence presented to the Board of alleged harm which might flow to the Employer's LROs should the Union's request for interim relief be rejected is thin.

CONCLUSION

[82] Accordingly, for all these reasons the Union's application for interim relief in this matter is dismissed.

[83] In conclusion, the Board thanks counsel for their helpful presentations and written legal submissions.

DATED at Regina, Saskatchewan, this **21st** day of **September, 2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson