SECURITAS CANADA LIMITED, Applicant v UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 073-17; December 22, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Maurice Werezak and Laura Sommervill

For the Applicant: Gordon D. Hamilton
For the Respondent: Dawn McBride

Unfair Labour Practice – Failure to Bargain – Employer alleges Union refused to bargain collectively because it did not agree to conducting some, if not most, of the collective bargaining negotiations through the use of video-conference – Union concerned that it does not have the technological capacity or expertise to conduct bargaining effectively by video-conference – Board concludes that Union did not commit an unfair labour practice contrary to subsection 6-63(1)(c) of *The Saskatchewan Employment Act*, and dismisses Employer's application.

Unfair Labour Practice – Failure to Bargain – Employer seeks direction respecting the appropriateness of bargaining by video-conference – The Board reviews its jurisprudence setting out its role to supervise the collective bargaining process – Board concludes the method by which collective bargaining is to be conducted is for the parties to decide by mutual agreement.

Unfair Labour Practice – Remedy – Board exercises its ancillary jurisdiction under clause 6-103(2)(c) of *The Saskatchewan Employment Act*, and directs the parties to commence collective bargaining within 30 days of the Board's Order.

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Securitas Canada Limited [Employer] brings this application pursuant to clause 6-63(1)(c) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*] alleging that United Food and Commercial Workers, Local 1400, [Union] committed an unfair labour practice. In its formal Unfair Labour Practice application filed with this Board on April 28, 2017, the Employer alleges:

> *The Applicant has attempted to schedule collective bargaining meetings with the Respondent Union to negotiate terms for the Saskatoon bargaining unit but the Union has refused to make itself available, it is submitted that Union's refusal to meet and commence collective bargaining is a breach to section 6-63(1)(c) of The Saskatchewan Employment Act.*

[2] The Union is the certified bargaining agent for the Employer's employees in and within a 25 mile radius of the City of Saskatoon pursuant to an Order of this Board dated November 7, 2003. The Union disputes the Employer's allegations, asserting that it is prepared to open collective bargaining with the usual exchange of proposals; however, it is not willing to undertake this exchange by way of video-conferencing without a firm commitment from the Employer to future dates when bargaining would take place face-to-face. This stance, the Union asserts, does not constitute an unfair labour practice.

[3] As the hearing progressed, it became apparent that the Employer sought a direction from this Board that collective bargaining by way of video-conferencing was appropriate, while the Union resisted this kind of bargaining collectively preferring instead that more traditional method of face-to-face bargaining.

[4] Regrettably, as a consequence, no collective bargaining has yet taken place between these parties respecting a renewal of the current collective agreement, which has now expired.

[5] For the reasons that follow, the Board concludes that while the Union's conduct here comes perilously close to an unfair labour practice, it would not foster the bargaining relationship of these parties were we to make such a finding. However, the Board exercises its jurisdiction pursuant to clause 6-103(2)(c) of the *SEA*, and directs the parties to commence collective bargaining within 30 days of the Board's Order.

FACTUAL BACKGROUND

[6] The hearing of this application took place on October 18, 2017. The panel reconvened by telephone conference and heard counsels' final arguments on November 1, 2017.

[7] Two (2) witnesses testified at the hearing. Mr. Lance Kelly, Vice-President (Western Canada), Securitas Canada testified on behalf the Employer. Mr. Norman Neault, President of the Union testified on its behalf.

A. Employer's Evidence

[8] Mr. Kelly advised the Board that he has been employed as the Employer's Vice-President (Western Canada) since July 2015. In that capacity, he is responsible for bargaining collective agreements with the Union for its employees in Western Canada, including Saskatchewan. He is assisted in this task by Mr. John Coletti, the Employer's Vice-President (Human Resources). Mr. Coletti works out of the Employer's principal office in Canada which is located in Toronto, Ontario.

[9] Mr. Kelly testified that in recent months the Employer has successfully achieved collective bargaining agreements respecting other units of its employees in Saskatchewan represented by the Union. For example, in January 2017, the Employer concluded bargaining respecting a unit of employees in Regina, and in February concluded bargaining a first collective agreement with a unit of I.T. employees at the Boundary Dam in Estevan.

[10] Mr. Kelly went on to explain that the Employer's experience of collective bargaining with this Union respecting its Saskatoon bargaining unit has been difficult. He particularly pointed to his experience bargaining the previous collective agreement. He stated that for part of that process, he personally attended in Saskatoon for five (5) days; however, during that period the parties met for "only for 10 minutes" each day, and then the Union would go away to discuss what had transpired in those short meetings for the remainder of the day. In Mr. Kelly's estimation, this process of collective bargaining was, in his words "a colossal waste of time".

[11] On cross-examination, he acknowledged that historically the Employer had bargained in respect of both the Regina and Saskatoon units, together. However, the parties chose in 2017 to uncouple these negotiations and bargain a collective agreement for each bargaining unit separately.

[12] Mr. Kelly acknowledged as well that the Employer has not previously undertaken collective bargaining by video-conferencing. The Employer decided to experiment with collective bargaining by video-conference after it had utilized this format to conduct meetings of its senior managers in Canada. He testified that the Employer found this format to be very efficient; however, admitted the true motivation for such a move was economic. He testified that of all the unions the Employer bargained with, only United Food and Commerical Workers, Local 832 in Manitoba, to date, appeared willing to bargain with the Employer by way of video-conferencing. He anticipated that opening the collective bargaining process by video-conference would, in his words, "get the ball rolling".

[13] A long e-mail chain of correspondence among Mr. Kelly, Mr. Coletti and Union representatives was introduced into evidence. It is not necessary to reproduce all of these communications. Only those e-mails or letters most relevant to the issue on the unfair labour practice application will be reviewed here.

[14] On August 10, 2106, Ms. Lucy Figueiredo, the Union's Secretary-Treasurer provided notice to Mr. Coletti that the Union intended to commence collective bargaining respecting the Employer's Saskatoon office, and asked him to "provide the Union with the Employer's available bargaining dates at your earliest convenience".

[15] As the Employer was bargaining other collective agreements with the Union in the intervening months, no formal response was made to this particular inquiry.

[16] On February 10, 2017, the Union's representative, Mr. North e-mailed Mr. Coletti apologizing for the delay in forwarding to him a draft of the new collective agreement for the Regina,

[17] On February 13, 2017, in the context of a discussion respecting the recently bargained collective agreement for the Employer's Regina office, Mr. North inquired of Mr. Coletti, in passing, if the Employer had "dates for Saskatoon, yet?"

[18] Subsequently, on February 25, 2017, Mr. North again corresponded with Mr. Coletti respecting potential dates for commencing collective bargaining with Union for the

Employer's Saskatoon office. For purposes of this application, the relevant portion of this Mr. North's letter reads as:

> *Further to my email correspondence of February 13, and February 21, please indicate your availability for bargaining dates in Saskatoon before the close of business on Wednesday, March 1. Respectfully the Company's delay in indicating its availability for each unit, coupled with its position regarding bargaining each unit separately, has obstructed the Union's efforts to efficiently negotiate new Agreements with the Company. Absent receipt of available dates, I will turn my mind to the other avenues available to the Union, including (but not limited to) filing an Unfair labour practice application.*

[19] On March 1, 2017, Mr. Kelly on behalf of the Employer replied to Mr. North as follows:

> *Good morning, Mr. North:*
>
> *The company is committed to commencing collective bargaining as soon as possible.*
>
> *However John [Colatti] and I have significant impediments as it pertains to our travel schedules and other company commitments. These impediments are making it difficult to schedule the time required to be in Saskatoon.*
>
> *We are prepared to engage in collective bargaining using the tools available to us to get it underway.*
>
> *Namely we would like to schedule a video conference to exchange our initial proposal's on March 16th at 9:00 a.m. CST.*
>
> *We would have the balance of the day to respond to each others proposal's [sic]. We have the video conferencing systems available for this purpose.*

[20] Shortly after receiving Mr. Kelly's e-mail, Mr. North replied that same day and wrote in part:

> *I will speak with Lucy about this proposed videoconferencing exchange ASAP and (if agreeable) we can schedule a meeting with our committee prior to that.*

[21] On March 2, 2017, Ms. Figueiredo wrote to both Mr. Kelly and Mr. Coletti and stated that it is the Union's practice to "bargain face to face". However, she went on to state that:

> *We are willing to participate in a video conference call if we have a commitment from the employer to reciprocate and actually attend further meeting in a timely fashion. This means that want [sic] to have dates and times scheduled for those subsequent meetings within a reasonable amount of time.*

[22] Mr. Kelly testified that at no time did the Employer state it would only bargain collectively by way of video-conferencing. He asserted that he made this point in his e-mail to Mr. North dated March 6, 2017 as follows:

> *The company is available on the 16rh of March to commence bargaining via video conference.*
>
> *We will look to set further dates at that time.*
>
> *If you would like to propose some dates for further video conference session's we will happily confirm our availability. We are committed to begin and continue the bargaining sessions via video conference ASAP.*
>
> *Again I must reiterate your inflexibility to agree to commence bargaining is only serving to frustrate the process.*

[23] Mr. Kelly testified further that commencing bargaining by video-conferencing would permit the Employer to get a better understanding of how much time would genuinely be required to bargain a collective agreement in respect of its Saskatoon office. He explained that Saskatoon was different from the Employer's Regina office because there were more staff and clients in Regina. This meant that if he attended personally to bargain in Regina, his time could be utilized more productively there.

[24] Subsequently, on March 14, 2017, Mr. Kelly wrote to Mr. North as follows:

> *I would like to propose the following dates if you could confirm if any work for you. These would be via Video conference.*
>
> *April 25-26, May 1-2, 9-10, 15-16.*
>
> *I will forward a webinar invite to you for the 16th Shortly.*

[25] That same day, Mr. North replied to Mr. Kelly and advised him that "given the gaps between the dates, and the fact that all of the dates are proposed to be via video-conferencing, I don't believe the Union will be agreeable to your proposed schedule." He went on to state: "As a 'heads up', I think we'll expect someone with authority to settle to personally attend in Saskatoon. Video-conferencing was seen as an extraordinary measure in the interest of commencing bargaining quickly with your personal attendance to follow."

[26] The next day – March 15, 2017 – Mr. Kelly wrote to Mr. North as follows:

> *Just so we are clear the union will not be attending the video conference on Thursday?*
>
> *I would like to reiterate that the company continues to be committed to bargaining a collective agreement and the union continues to frustrate the process by continuing to have unrealistic demands.*
>
> *The cost to the company to attend Bargaining sessions in person are quite high and as such we have made available 9 days to bargain via video conference and the union is refusing to participate.*

[27] Mr. Kelly admitted that this was the first time he had raised with the Union the issue of costs to the Employer to have both Mr. Coletti and himself attend personally in Saskatoon. He also testified that the Union did not sign on to participate in the video-conference on March 16, 2017.

[28] The final communication relevant to this application referenced by Mr. Kelly is Mr. North's response to Mr. Kelly dated March 20, 2017. It is reproduced in full below:

> *Good morning Lance,*
>
> *Thank you for your correspondence.*
>
> *Bargaining by videoconferencing was available as a stop-gap measure in order to obtain a full schedule of bargaining dates in a timely way. The only reason I had considered bargaining via videoconference was respect for the time constraints you originally indicated as the reason you could not attend; you later indicated other reasons for wanting to bargain via videoconference, which I don't find persuasive. These circumstances will likely raise concerns for my colleagues and my members; when I discuss this with them, I'd like to be able to explain your perspective to them (the conclusion they might draw is that you've been trying to mislead the Union in order to derive a benefit for the Company).*
>
> *Bargaining via videoconference alone was never an option, and this was clearly expressed in my communications with you. Videoconferencing limits communication in a number of was (for example, influences on eye contact and other nonverbal cues due to communication through a camera, et cetera), and I am uncertain of its efficacy. Given that you cannot (or will not) arrange bargaining dates before June, I don't see any reasons to videoconference for any portion of bargaining.*
>
> *With respect to saving costs for the Company (which I acknowledge is a valid goal), I will seek authorization from Mr. Neault and Ms. Figueiredo to bargain the Coronach and Saskatoon units together; although this is somewhat different from what we had contemplated before (i.e. bargaining all four units together), and we would need to allocate enough time to bargain two units together.*
>
> *To be clear, bargaining via videoconference is not an option; if we could have arranged to follow-up bargaining dates in a timely way, the benefit might have*

> *outweighed the adverse effect on the bargaining process, but at this point I think I'll need to conduct bargaining the way it's always done.*

[29] Mr. Kelly testified that following receipt of this communication, Mr. Neault reached out to Mr. Coletti on April 7, 2017, and offered a compromise. In an attempt to minimize the financial burden to the Employer generated by face-to-face collective bargaining, he proposed that Mr. Kelly who resided in Calgary attend personally, while Mr. Coletti participate by way of video-conference.

[30] Mr. Kelly admitted that he was uncertain whether Mr. Neault's e-mail to Mr. Coletti came to his attention before or after the Employer had filed this unfair labour practice application.

B. Union's Evidence

[31] Mr. Neault was the only witness called by the Union. Currently, he serves as the Union's President, a position he has held since 2009. He outlined his most recent experience bargaining collectively with the Employer respecting units in both Regina and Estevan. Both of these collective agreements had been negotiated, and achieved, through face-to-face bargaining. In his opinion, both rounds of bargaining had been productive. The negotiations in Regina, for example, concluded in approximately five (5) days. He stated he had no reason to believe that bargaining a collective agreement in respect of the Saskatoon office would have been any different.

[32] He testified that the Union had very limited IT capacity. For example, it had only one (1) lap-top computer capable of video-conferencing which would make it very difficult for the Union's bargaining team to participate meaningfully in the bargaining sessions. He stated that historically, the exchange of initial proposals between the Union and the Employer had always been done face-to-face.

[33] Finally, Mr. Neault advised the Board that the only experience the Union had with video-conferencing was participating in webinars when various members of the staff would congregate around the lap-top to watch. Unlike Local 882 in Manitoba, which Mr. Neault estimated had approximately twice the membership of Local 1400, the Union had neither the

capacity nor the capability to conduct collective bargaining negotiations by way of video-conferencing.

ISSUE

[34] In the Board's view the issue on this application is narrow: did the Union commit an unfair labour practice contrary to clause 6-63(1)(d) of the *SEA* by refusing to commence collective bargaining with the Employer by way of video-conference?

RELEVANT STATUTORY PROVISIONS

[35] The particular provision of the *SEA* invoked by the Employer reads as follows:

> ***6-63(1)*** *It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> *. . . .*
>
> *(c) to fail or refuse to engage in collective bargaining with the employer respecting employees in a bargaining unit if a certification order has been issue for the unit[.]*

[36] Other provisions of the *SEA* relevant here are:

> ***6-1****(1) In this Part:*
>
> *(a)* ***"bargaining unit"*** *means:*
>
> *(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or*
>
> *(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining[.]*
>
> *. . . .*
>
> *(d)* ***"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 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 employee shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*
>
> *. . . . . .*
>
> ***6-26****(1) Before the expiry of a collective agreement, either party to the collective agreement, neither party to the collective agreement may give notice in writing to the other party within the period set out in subsection (2) to negotiate a renewal or revision of the collective agreement or a new collective agreement.*
>
> *(2) A written notice pursuant to subsection (1) must be given not less than 60 days nor more than 120 days before the expiry date of the collective agreement.*
>
> *(3) If a written notice is given pursuant to subsection (1), the parties shall immediately engage in collective bargaining with a view to concluding a renewal or revision of a collective agreement or a new collective agreement.*

[37] The powers given to this Board by the SEA that are most relevant on this application read as follows:

> ***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 the subsection (1), the board may do all or any of the following:*
>
> *. . . . . .*
>
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act[.]*

ANALYSIS

A. <u>Onus</u>

[38] In this matter, the Employer bears the onus to demonstrate on a balance of probabilities that the Union has breached clause 6-63(1)(c) of the *SEA* and, for that reason, committed an unfair labour practice. In order to satisfy this onus, the Employer must present evidence that is "sufficiently clear, convincing and cogent".[1]

[1] *F. H. v McDougall*, 2008 SCC, [2008] 3 SCR 41, at para. 46.

B. Did the Union commit an Unfair Labour Practice?

1. Employer's Submissions

[39] The Employer relied on the following legal authorities: *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*[2] [*Securitas, 2015*]; *Murray v Saskatoon (City)*[3] [*Murray*], and a book chapter in The Negotiator's Desk Reference – Noam Ebner, "*Negotiation Via Videoconferencing*" [Ebner].

[40] In a nutshell, the Employer argued that the Union's refusal to open collective bargaining by way of video-conferencing was tantamount to refusing to bargain collectively, and a violation of section 6-63(c) of the *SEA*. The Employer pointed to *Securitas, 2015* to underscore its argument that the Union had not altered its' bargaining posture since that time, and, further, that the Union's demand the Employer provide a complete schedule for future bargaining dates was inappropriate.

[41] One (1) of the unfair labour practices alleged in *Securitas, 2015* was that the Employer had frustrated the collective bargaining process by having its initial proposals delivered to Union negotiators by an individual with very limited authority to bargain. The Board rejected this allegation. On this aspect of the case, former Vice-Chairperson Schiefner determined as follows:

> *[37] In our opinion, the evidence did not demonstrate a failure or refusal on the part of the Employer to engage in collective bargaining with the Union. The Union, as was its right, demanded that the parties commence collective bargaining within the time constraints set forth in s. 6-24(a) of the [SEA]. The purpose of this provision is to enforce discipline upon the parties (typically employers) in a newly certified workplace to ensure that they commence collective bargaining on a timely basis. However, neither ss. 6-24(a) nor 6-62(1)(d) of the [SEA] guarantee that a particular process will be followed once the parties commence collective bargaining. While the Union understandably wanted to fast tract [sic] negotiations with the Employer for the employees at the Rocanville potash mine site, the [SEA] does not guarantee that such will be the case. There is no statutory authority upon which a trade union can demand that collective bargaining be concluded before a certain event, within a specified period of time or upon a timetable that it may desire.*
>
> *[38] The Employer's actions were consistent with the pattern of bargaining that had occurred on October 14, 2014 and not inconsistent with the first day of bargaining in many organized workplaces. In some cases, the parties accomplish*

[2] 2015 CanLII 43767, LRB File No. 246-14 (SK LRB)
[3] (1951-52), 4 WWR(NS) 234, 1951 CanLII 202 (SKCA)

> *little more on the first day of collective bargaining than introductions and agreement on the basic rules for collective bargaining, it is also common for parties to digest and evaluate the other's proposals before returning to the table. With all due respect to the Union's clear desire to fast track collective bargaining for the Rocanville employees, the parties only engaged in one (1) collective bargaining session and this one (1) session provided a wholly inadequate evidentiary foundation for the conclusion that the Employer's actions were contrary to the duty to bargain in good faith and/or that it was seeking to subvert or frustrate collective bargaining with the Union…*
>
> *. . . . . .*
>
> *[42] As this Board has previously noted, it is not our function to ensure that trade unions are able to achieve a particular substantive result in collective bargaining; rather, it is the function of this Board to ensure that employers don't avoid, frustrate or subvert the process (intentionally or otherwise). While the duty to bargain in good faith requires employers to come to the table prepared to resolve issues in dispute through collective bargaining. It does not guarantee that a particular process will be followed…*[4]

[42] More particularly, the Employer asserts that there is nothing wrong with conducting collective bargaining negotiations by way of video conference. Indeed, it may be the wave of the future. In the 21st Century video-conferencing is becoming more common in judicial proceedings, *e.g*. to permit witnesses who reside long distances away from the place of the hearing to provide their testimony. Counsel for the Employer also submitted an article penned by Noam Ebner, a law professor at Creighton University's Law School. While Professor Ebner acknowledged a number of drawbacks to negotiating in this way – some of which mirrored concerns the Union raised before the Board – he, nonetheless, encouraged acceptance of negotiating by way of video-conference through better education of legal professionals, practical experience, and advanced and enhanced technology.

[43] When asked by the Board if he could point us to any authority in which a labour board in Canada had addressed the question of collective bargaining by this method, counsel for the Employer with his usual candour admitted that he could not, adding it wasn't for want of searching! It would appear, therefore, that this particular question is a matter of first impression for this Board.

[44] In conclusion, counsel for the Employer seeks the following remedial relief:

- A declaration that the Union committed an unfair labour practice contrary to subsection 6-63(c) of the *SEA* by refusing to commence or to engage in collective by way of video-conferencing;

[4] *Supra* n. 2, at paras. 37-38, and 42.

- A direction that the parties commence collective bargaining within such time frame as the Board deems appropriate, and

- A direction that at least some of the collective bargaining negotiations should proceed by way of video-conferencing.

2. The Union's Submissions

[45] The Union relied on the following judgments: *Royal Oak Mines Inc. v Canada (Labour Relations Board)*[5] [*Royal Oak*], and *Barrich Farms (1994) Ltd. v United Food and Commercial Workers, Local 1400*[6], [*Barrich Farms*] a decision of this Board.

[46] Counsel for the Union began by submitting that the Board should assess its sincerity to enter into bargaining in good faith on a subjective basis. She cited *Royal Oak* as authority for this proposition. In particular, she invoked these oft-cited paragraphs from Cory J.'s majority opinion for the Court:

> *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 the 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 facts. 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 in 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.*[7] *[Emphasis added.]*

[47] When this standard is applied, counsel submitted that the Union sincerely attempted to open the collective bargaining process. It served the Employer with its Notice to

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[5] [1996] 1 SCR 369
[6] 2009 CanLII 69340, LRB File Nos. 051-09 & 072-09
[7] *Supra* n. 5, at paras. 42-43.

Bargain on August 10, 2016. Discussions ensued between the parties. The Union wished to bargain agreements for both Regina and Saskatoon together. The Employer did not. Negotiations on the Regina collective agreement commenced in early January 2017, and were completed in approximately five (5) days.

[48] Shortly after this, the e-mail exchange recounted above took place. Counsel for the Union submits that this factual chronology demonstrates that subjectively the Union made good faith efforts to bargain. Indeed, if there is any impediment to commencing bargaining in respect of the Saskatoon unit it rests on the Employer and its unreasonable demand that some, if not most, of the bargaining sessions be conducted by way of video-conferencing.

[49] Respecting the Employer's desire to conduct a number of the bargaining sessions by way of video-conferencing, the Union had two (2) responses. First, it lacks the necessary expertise and equipment to pursue this method successfully. It owns a laptop with limited video capabilities. To conduct negotiations it would require all members of the bargaining committee congregating around the small camera. This would limit the full participation of the bargaining team members and would deny negotiators the ability, for example, to observe the body language of members of the Employer's bargaining team.

[50] Second, after learning that the Employer's true motivation for proposing to conduct some bargaining sessions by video-conferencing was financial, the Union President, Mr. Neault proposed having Mr. Kelly participate in person while Mr. Colatti could participate by way of video-conference. The Employer's response to the Union's proposal was to initiate this unfair labour practice application.

3. Analysis and Decision

[51] As noted earlier, this is not the first time these parties have sought the intervention of this Board to effectively "kick start" the collective bargaining process. However, in *Securitas, 2015*, the Board dismissed the Union's Unfair Labour Practice application.

[52] This current application invites us to enter the fray yet again. After reviewing the evidence presented at the hearing, and the helpful oral and written submissions of counsel, the Board finds that the Employer has not met its burden to prove that the Union more likely than

not committed an unfair labour practice through evidence that is "sufficiently clear, convincing and cogent". Our reasons follow.

[53] To begin, the analysis set out in three (3) prior Board Decisions proved to be helpful and informed the discussion that follows. In *Retail Wholesale and Department Store Union, Local 454 v Westfair Foods Limited, operating a Division of Western Grocers*[8] – a decision cited in *Barrach Farms* – the Board said this respecting its role in policing the procedural niceties of the collective bargaining process:

> *Canadian labour relations boards did not follow American authorities in the direction of adopting this distinction between mandatory and permissive bargaining issues, and continued to view their role as one of supervising the procedural aspects of bargaining. From the many Canadian decisions which have described the role of labour relations boards in this connection, one example which seems fairly to represent the general position is the following statement from the decision of the Canada Labour Relations Board in CKLW Radio Broadcasting Ltd., 77 CLLC 16, 110 at 16, 784:*
>
> > *The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy or an indicia, among other things of bad faith. Because collective bargaining is a give and take determined by threatened or exercises power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a gentle fashion.*
>
> *Canadian boards, including our own, have stressed on many occasions that bargaining is not a process conducting according to "the Marquess of Queensbury rules", that they are not there to prevent either party from taking a hard position and insisting on it, and that the list of issues which parties choose to discuss must be formulated between them.*[9] *[Emphasis added.]*

[54] Shortly after that in *Retail, Wholesale and Department Store Union, Local 454 v Westfair Foods Limited, operating a Division of Western Grocers*[10], former Chairperson Bilson elaborated as follows:

> *In considering an allegation that an employer has failed or refused to engage in collective bargaining as required by the statute, the Board must, of course, take into account a wide range of factual components which are part of the bargaining environment at the time the application is filed, and part of the relationship between the parties, but the essential question which must be asked is whether*

[8] [1993] 1st Quarter Sask. Labour Rep. 286, LRB File No. 256-92.
[9] *Ibid*., at 290-91.
[10] [1993] 3rd Quarter Sask. Labour Rep. 162, LRB File No. 157-93.

> *the picture composed of these factual elements shows that the employer is not trying to conclude a collective agreement.*
>
> *There are, as we have intimated earlier, no rules for the bargaining process as such. Though the parties may have expectations, based on their past experience, that issues will be discussed in a particular sequence, or that there will be a particular proportionality between proposal and counterproposal, or that one party or the other can always expect to achieve improvements in its favour, there are no sanctions attached to deviations from the anticipated course. The parties may be required to adjust their expectations according to changed conditions or changes in their relative bargaining strength. They may apply any combination of rational persuasion, deployment of economic power, or other inducements which is sanctioned by law. Each of parties may combine and recombine their own proposals and those put forward by the other party in an attempt to find the formula which will lead to an agreement. This process may be messy, it may be unscientific, it may be unpredictable, it may on occasion be brutal, but it is bargaining.*
>
> *The essence of bargaining is that each party is trying to achieve an agreement on terms which are advantageous, and may adopt whatever strategy it considers likely to bring about this result…[Emphasis added.]*[11]

[55] Finally, in *Barrach Farms*, the Board was confronted by an allegation by the employer that the union, which incidentally is the Union involved in this matter, committed an unfair labour practice by refusing to present its monetary proposals at the outset. This, the employer asserted, effectively frustrated the collective bargaining process. The Board disagreed and dismissed the application. In the course of its Reasons for Decision, the Board stated:

> *[34] Although the Board has held that there are no particular set of rules for the process that must be followed by the parties, the board expects that parties to have at least one (1) common objective; that being to achieve a collective agreement. Both the substance of that agreement and the process utilized by the parties to conduct their negotiations are in the hands of the parties and will vary with the uniqueness of the particular circumstances. This Board has repeatedly stated its restraint in intervening in negotiations between parties. The legislative mandate to bargain in good faith is predicated on the assumption that the parties are best able to define the terms of their relationship and the rules that will govern the workplace.*[12]

[56] Applying the various considerations set out above, the Board is of the view that this dispute has been generated by serious misunderstandings or, perhaps, more accurately, miscommunications between the Union's representatives, most notably Mr. North, and Mr. Kelly, the Employer's representative. We have arrived at this conclusion for the following reasons.

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[11] *Ibid*., at 174.

[57] First, the Union served its Notice to Bargain on the Employer in August 2016. Intially, it was desirous of bargaining for two (2) units as had been the practice historically. However, subsequently, the parties chose not to do so, and, proceeded to negotiate collective agreements for other units represented by the Union, apparently with little difficulty. This evidence demonstrates to us that when viewed subjectively the Union, at least at the outset, was desirous of commencing collective bargaining as soon as reasonably possible.

[58] Second, after the two (2) collective agreements referred to in the previous paragraph were concluded, the Union inquired about commencing collective bargaining respecting the Saskatoon unit. At this point, the e-mail exchange between Mr. North and Mr. Kelly that forms the core of the evidence began. An objective reading of this correspondence, however, persuades us that both the Union and the Employer share responsibility for the difficulties in initiating the bargaining process in Saskatoon.

[59] Third, the Board agrees with the Employer that some of the correspondence received from the Union and authored by Mr. North is unduly inflammatory. It is regrettable, for example, that in his February 25, 2017 communication to Mr. Kelly, Mr. North raised the spectre of the Union filing an unfair labour practice should the Employer not comply with its demand to provide it with a roster of dates for bargaining by a specific date, *i.e.* March 1, 2017. It is should not occasion surprise, therefore, that receipt of this communication would get the Employer's hackles up.

[60] Counsel for the Employer asked the Board to draw an adverse inference against the Union in accordance with *Murray v Saskatoon*[13] because it failed to call Mr. North as a witness, even though he attended the hearing. *Murray* holds that in such circumstances a tribunal may draw the inference that such a failure means the testimony of the witness in question would not assist the party that did not tender them as a witness. The Board agrees that it would have been preferable to have heard from Mr. North, directly.

[61] Fourth, by the same token, the Employer's position respecting bargaining by way of video-conferencing set out in a number of Mr. Kelly's e-mails, most notably his communication to Mr. North dated March 15, 2017, may fairly be construed as indicating the

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[12] *Supra* n. 6, at para. 34.
[13] *Supra* n.3.

Employer's preference was that most of the bargaining sessions should proceed by way of video-conference.

[62] Fifth, when the financial cost to the Employer for personally attending in Saskatoon to negotiate a new collective agreement was first raised with the Union, Mr. Neault, subsequently, proposed a compromise to Mr. Coletti. In an e-mail dated April 7, 2017, he suggested that Mr. Kelly personally participate in the bargaining sessions, while Mr. Coletti appear by video-conference. Admittedly, Mr. Neault did not copy Mr. Kelly on his e-mail and, further, Mr. Kelly testified that he could not remember if he had seen this communication prior to, or after, the Employer filed is unfair labour practice application. In our view, this is of the little moment. The fact is that the Union through Mr. Neault did offer an option that if accepted might have resolved this stalemate.

[63] Sixth, the Union presented evidence that it harboured serious reservations about whether it possessed the technical capacity, and the requisite technology to bargain effectively were it to proceed by way of video-conferencing. (We will have more to say about bargaining by this method below.) As set out above, this Board has reiterated on numerous occasions that the process and the method by which collective bargaining will proceed is "in the hands of the parties and will vary with the uniqueness of the particular circumstances"[14]. The fact that the UFCW, Local 882 is willing to utilize this method illustrates the wisdom of this approach. As described by Mr. Neault, it is a much large bargaining agent and has far more technological resources. This stands in contrast to the "particular circumstances" of the Union in this matter.

[64] For all of these reasons, the Board concludes that the Employer has failed to satisfy its burden to prove the Union more likely than not committed an unfair labour practice through evidence that is "sufficiently clear, convincing and cogent". The Employer's Unfair Labour Practice application is, accordingly, dismissed.

C. <u>Collective Bargaining by Video-Conference</u>

[65] As a final matter, the Board will address briefly the issue about which the Employer desired some direction from us, namely is bargaining by way of video-conference an appropriate way to pursue collective bargaining.

[66] In keeping with the tenor of this Board's jurisprudence, some of which is outlined above, it is not our role to stipulate whether a particular method by which collective bargaining may be conducted is appropriate or not. The Board acknowledges that there may be practical and pragmatic reasons for the parties to choose video-conferencing as an alternative to face-to-face bargaining. What is critical, in our view, is that whatever method the parties select it should be a choice acceptable to both sides. Indeed, it is expected that in order to comply with the statutory obligation[15], not to mention the constitutional right[16], to collectively bargain in good faith, parties will take all reasonable steps to accommodate each other.

[67] Counsel for the Employer stated that his research did not disclose any case in which collective bargaining by way of video-conference had been considered or even discussed. Neither did the independent research conducted by the Board. The Board acknowledges that today courts and some administrative tribunals[17] are more willing to permit testimony from witnesses to proceed by way of video-conference than in the past. However, it is a fact that even in those settings attendance by video-conference remains the exception rather than the rule.

D. Remedy

[68] Although the Board has dismissed the Employer's unfair labour practice application, we are, nevertheless, of the view that we should also exercise our jurisdiction under clause 6-103(2)(c) of the *SEA* in this matter. For ease of reference, this provision is reproduced below:

> ***6-103****(2) Without limiting the generality of the subsection (1), the board may do all or any of the following:*
> *. . . . . .*

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[14] *Barrach Farms*, *supra* n. 6, at para. 34.
[15] The *SEA*, section 6-7.
[16] See especially: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2007 SCC 27, [2007] 2 SCR 391, at para. 67:

> *[67] Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(d) [of the Canadian Charter of Rights and Freedoms] guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations. [Emphasis added.]*

[17] See *e.g.*: *United Food and Commercial Workers, Local 1400 v Neptune Securities Ltd.*, 2017 CanLII 20088, LRB File No. 233-16 (SK LRB) where at para. 6, this Board reiterated its policy that personal attendance by witnesses was the rule. This case was reversed on judicial review but not on this point, see: QB No. 1567 of 2017, Judicial Centre of Regina dated July 20, 2017.

> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act[.]*

[69] The Board notes that more than a year has passed since the Union served its Notice to Bargain on the Employer. To date, the parties have not even commenced bargaining through the exchange of proposals for reasons that, in our view, are not compelling. As a result, and in order to end the stalemate, the Board pursuant to clause 6-103(2)(c) deems it appropriate to direct the parties to commence collective bargaining within 30 days from the date of our Order.

ORDERS OF THE BOARD

[70] The Board makes the following Orders pursuant to sections 6-63 and 6-103 of the *SEA*:

1. **THAT** the Employer's Unfair Labour Practice application brought pursuant to clause 6-63(1)(c) is dismissed.

2. **THAT** the Employer and the Union are directed to commence collective bargaining within thirty (30) days of the date of this Order.

[71] An appropriate Board Order will accompany these Reasons for Decision.

[72] The Board extends its gratitude to counsel for their written and oral submissions. They were very helpful to us in our deliberations.

[73] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **22nd** of **December, 2017**

LABOUR RELATIONS BOARD

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