Government
of
Saskatchewan

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Dear Ms. Norbeck and Mr. Biden:

Re: LRB File No. 083-19 – Saskatchewan Government and General Employees' Union v Government of Saskatchewan, Public Service Commission

Background:

[1] On April 4, 2019 the Saskatchewan Government and General Employees' Union ["SGEU"] filed an Unfair Labour Practice Application[1] ["Main Application"] with the Board. It alleged that the Government of Saskatchewan, Public Service Commission ["Government"] has committed unfair labour practices contrary to section 6-7, subsection 6-41(2) and clauses 6-62(1)(d) and (r) of *The Saskatchewan Employment Act* ["Act"] by:

(a) Failing to comply with its obligations under the applicable collective bargaining agreement in unilaterally imposing testing which has already been found to be invalid;
(b) Failing to bargain in good faith with SGEU after both parties had agreed to engage in, and in fact engaged in, collective bargaining respecting the testing to be required of wildland firefighters for the 2019 fire season; and
(c) Failing to give effect to the agreement reached at the April 1, 2019 bargaining meeting.

[2] On April 4, 2019 SGEU also filed the Application for Interim Relief[2] ["Interim Application"] that is the subject of this Decision. It requested the following interim orders:

(a) An Interim Order prohibiting the Government from requiring non-grandfathered wildland firefighters to complete WFX-Fit fitness testing;
(b) An Interim Order prohibiting the Government from requiring grandfathered wildland firefighters[3] to complete an Arduous Test;

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[1] LRB File No. 082-19.
[2] LRB File No. 083-19.
[3] "Grandfathered" firefighters are those who were hired prior to April 1, 1999.

(c) An Interim Order requiring the Government to apply only the following testing requirements to wildland firefighters:
   (i) the Arduous Test for non-grandfathered wildland firefighters; and
   (ii) the Moderate Test for grandfathered wildland firefighters.

[3] The Interim Application was heard on April 15, 2019 by Chairperson Amrud and Board members Mike Wainwright and Bert Ottenson. At the hearing, the parties advised the Board that they are in agreement that, for the 2019 fire season, the Government will only require the grandfathered firefighters to pass the Moderate Test, as they have since 2015. At the conclusion of the hearing, the Board advised the parties that the Interim Application was dismissed, with Reasons to follow. These are those Reasons.

[4] These Applications represent another stage in an ongoing dispute between the parties that commenced on May 15, 2012, when SGEU filed four policy grievances that related to the introduction by the Government of a new fitness test for wildland firefighters, known as the WFX-Fit test. The grievances were considered by Arbitrator Daniel Ish, Q.C., who issued an Award on December 16, 2015[4]. The conclusions of the Arbitrator read as follows:

> *(1) The employer was not obligated to negotiate the general terms of the WFX-Fit test because it was not a condition of employment as contemplated by Article 3.1(A) of the collective agreement.*
> *(2) The employer breached the collective agreement by not honouring the 1999 Letter of Understanding concerning grandfathered employees. Any changes to the 1999 LOU must be negotiated.*
> *(3) The WFX-Fit test is discriminatory and is not a bona fide occupational requirement because the cut-score as set has a potential discriminatory adverse impact on females and older males. In other respects the WFX-Fit test is valid.*[5]

[5] The Government filed a Judicial Review Application with the Court of Queen's Bench, in which a decision varying the Arbitrator's Award was granted on October 14, 2016[6]. On June 15, 2018, the Court of Appeal[7] restored the Arbitrator's Award. On application by the Government, the Court of Appeal granted a stay of its decision pending disposition of the Government's application for leave to appeal that decision to the Supreme Court of Canada[8]. On March 21, 2019 the Government was denied leave by the Supreme Court of Canada.

[6] The timing of receipt of the decision from the Supreme Court of Canada was unfortunate. Fitness testing for the wildland firefighters was scheduled to commence during the first week of April. Based on the stay granted by the Court of Appeal, the Government and the firefighters had been preparing for the fitness testing for the 2019 firefighting season on the basis that the WFX-Fit test would be used.

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[4] *Saskatchewan (Environment) v Saskatchewan Government and General Employees' Union*, 2015 CanLII 85340 (SK LA).
[5] At paragraph 111.
[6] *Saskatchewan (Environment) v Saskatchewan Government and General Employees' Union*, 2016 SKQB 336 (CanLII).
[7] *SGEU v Saskatchewan (Environment),* 2018 SKCA 44 (CanLII).
[8] *Saskatchewan (Environment) v SGEU*, 2018 SKCA 96 (CanLII).

[7] What occurred between March 21 and April 4, 2019 is a matter of dispute between the parties. There was an exchange of correspondence, and a face-to-face meeting on April 1, 2019. The parties have significantly different interpretations of what was said and intended in these communications.

Relevant Statutory Provisions:

[8] The provisions of the Act relied on by SGEU in the Main Application are the following:

Interpretation of Part
6-1(1) In this Part:
. . .
(e) "collective bargaining" means:
(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;
(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;
(iii) executing a collective agreement by or on behalf of the parties; and
(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;

Good faith bargaining
6-7 Every union and employer 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.

Parties bound by collective agreement
6-41(1) A collective agreement is binding on:
(a) a union that:
(i) has entered into it; or
(ii) becomes subject to it in accordance with this Part;
(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and
(c) an employer who has entered into it.
(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:
(a) do everything the person is required to do; and
(b) refrain from doing anything the person is required to refrain from doing.
(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.
(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.
(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.
(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

Unfair labour practices – employers
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;*
>
> *. . .*
>
> *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*

[9] The power of the Board to make interim orders is set out in section 6-103 of the Act:

> ***General powers and duties of board***
> *6-103(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
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> *. . .*
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> *(d) make an interim order or decision pending the making of a final order or decision.*

[10] The Union relied on section 15 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"] in its preliminary issue:

> ***Application for an interim order***
> *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:*
> *(a) an application in Form 12 (Application for Interim Relief) with the registrar;*
> *(b) an affidavit of the applicant 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 considers necessary for the purposes of the application.*
> *(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 witness's own knowledge to prove.*
> *(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board 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.*
> *(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.*
> *(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place on which the application is returnable.*

> *(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application, along with the materials referred to in the application, on the party against whom the interim relief is claimed within:*
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> > *(a) subject to clause (b), at least three business days before the date set for the hearing; or*
> >
> > *(b) any shorter period that the executive officer may permit.*
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> *(7) Before the hearing, the applicant shall file proof of service of the application for interim relief mentioned in clause (1)(a).*

Preliminary Issue:

[11] At the hearing, SGEU raised a preliminary issue. It argued that portions of the affidavits filed by the Government should be struck as inadmissible because they do not comply with the requirement in subsection 15(2) of the Regulations that they must be confined to those facts that the witness is able of the witness's own knowledge to prove. It argued that paragraphs 3 to 13 of Karl Austman's affidavit should be struck as offending this requirement. He states in paragraph 2 that he has been involved in this dispute since March 2017, so he has no personal knowledge of anything that occurred prior to that date. SGEU also argued that anything in Austman's affidavit or Steve Roberts' affidavit that purports to be an interpretation of the Arbitrator's Award should be disregarded as irrelevant or accepted only on the basis that it is not binding but merely provides context for their actions.

[12] The Government argued that the affidavits of Austman and Roberts should be admitted in full. They contain no evidence that is provided on the basis of information and belief. The comments respecting their understanding of the Arbitrator's Award are in evidence to show their frame of mind during the parties' communications.

[13] SGEU's application to strike the noted paragraphs of Austman's and Roberts' affidavits is dismissed. None of them contravenes the requirements of subsection 15(2) of the Regulations.

Argument on behalf of SGEU on Interim Application:

[14] Both parties agree that the test to be applied by the Board in determining this application is well-established. SGEU referred the Board to *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) ["*SGEU v Sask*"]:

> *[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 Board 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. See: Hotel Employees and Restaurant Employees Union, Local 206 v.*

> *Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
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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 strength 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". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probably [sic] violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
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> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. 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. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*

[15] SGEU argued that its interpretation of the Arbitrator's Award and of the discussions between the parties following March 21, 2019 establish an arguable case to support the Main Application. It argued that, at the meeting on April 1, 2019, SGEU and the Government engaged in collective bargaining and reached an agreement that the Arduous Test would be used for the 2019 fire season, but then the Government reneged on that agreement and terminated the bargaining process. SGEU argued that the Government breached its duty to bargain in good faith by terminating the collective bargaining process they voluntarily entered into commencing on April 1, 2019. SGEU relies on subclause 6-1(1)(e)(iv) of the Act as its basis for arguing that the meeting on April 1, 2019 constituted collective bargaining.

[16] With respect to the balance of convenience, SGEU argued that the Board is to focus on labour relations harm. The labour relations harm they pointed to relates to the relationship between the parties and SGEU's ability to negotiate on behalf of its members. The Government should not be allowed to refuse to give effect to the agreement they collectively bargained on April 1, 2019. They also relied on the potential that employees could be denied work due to an inability to pass the WFX-Fit test and could suffer physical harm if required to undergo that testing. It stated that its members would suffer irreparable harm if the Government was allowed to proceed with what it described as reimplementation of WFX-Fit testing.

Argument on behalf of the Government on Interim Application:

[17] The Government is of the opinion that SGEU has not satisfied the first branch of the test for interim relief, in that it did not establish an arguable case. Based on its interpretation of the Arbitrator's Award, the Government says that it did not unilaterally impose testing that had already been found to be invalid. The Arbitrator did not find that the WFX-Fit test was invalid as a whole, but just with respect to the cut-score[9]. The Government revised the cut-score for the 2019 season. The Government argued that if SGEU believes that the new cut-score is inappropriate, their proper course of action is to file a grievance.

[18] The Government argued that it did not fail to bargain in good faith. The Arbitrator found that the Government is not required to negotiate testing for non-grandfathered firefighters. Therefore, SGEU established no arguable case with respect to that issue.

[19] The Government also stated that no collective bargaining occurred and no agreement was reached at the April 1, 2019 meeting. There are no minutes of understanding, letters of agreement, or any other documentation to support the existence of an alleged agreement.

[20] With respect to the balance of convenience, the Government argued that SGEU failed to establish any prejudice or labour relations harm that would be experienced if an interim Order was not granted. Relying on *Saskatchewan Joint Board, RWDSU v Prairie Micro-tech Inc.* [1994] SLRBD No 62, it argued that SGEU must "show some prejudice to them which cannot be fairly addressed if they are required to await the full hearing and determination of the main application"[10]. SGEU, it stated, failed to present any factual basis for prejudice that may result if an interim Order was not granted.

[21] On the other hand, the Government stated, it had established that it, its employees and the general public would suffer significant and irreparable harm should an interim Order be granted. Switching fitness tests at this late stage would delay the availability of woodland firefighters for the 2019 season. Changing the test would likely cause physical harm to some of the employees, as they have, since January 2019, been training to take the WFX-Fit Test, rather than the Arduous Test. Using the Arduous Test could result in unfair outcomes for employees, through risk of increased injury and fail rates. The Arduous Test does not qualify employees to work in other

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[9] The minimum time within which employees must complete the test.
[10] At page 5.

Canadian fire jurisdictions, therefore using it would cause them to lose out on the opportunity for increased income.

[22] The purpose of an interim Order, the Government argued, is to preserve the status quo pending a full determination of the Main Application. The status quo is the WFX-Fit test.

[23] The Government argued that there is no emergency, urgent or exigent circumstances requiring interim relief. If any employees are eventually found to have been wronged, they can be made whole through a monetary award.

[24] Finally, the Government noted, relying on *SEIU-West v Variety Place Association Inc.*, 2017 CanLII 43922 (SK LRB) ["*Variety Place*"], the Interim Application should be dismissed because the Order it requests is effectively the same as that sought in its underlying application.

Analysis and Decision:

[25] SGEU, as applicant, must satisfy the Board that its application meets both parts of the test described in *SGEU v Sask*: that the Main Application raises an arguable case of a potential contravention of the Act and that the balance of convenience favours the granting of an interim Order pending a hearing on the merits of the Main Application.

[26] The first issue for the Board to address is whether SGEU has established that the Main Application raises an arguable case of a contravention of the Act. That raises two questions:

- did the Government unilaterally impose testing that had already been found to be invalid?
- did the parties engage in collective bargaining and/or reach an agreement at their April 1, 2019 meeting?

[27] With respect to the first question, the parties have significantly different opinions as to the proper interpretation of the Arbitrator's Award. The Board notes, however, that throughout its argument, SGEU consistently misquoted paragraph 3 of the Arbitrator's conclusions, by neglecting to mention that it was the cut-score with which he was concerned, and omitting the last sentence of that paragraph: "In other respects, the WFX-Fit test is valid".

[28] With respect to the second question, as noted previously, the affidavits filed portray very different perspectives as to the content and intent of the parties' communications between the date of the Supreme Court's decision and the date these Applications were filed.

[29] As noted in *SGEU v Sask*, in considering the arguable case branch of the test, the Board is not to place too fine a distinction on the relative strength or weakness of SGEU's case. SGEU must just establish that there is more than a remote or tenuous possibility that it can prove its case at the hearing of the Main Application. The Board does not, at this stage, weigh conflicting evidence or make assessments of credibility of witnesses.

[30] Given the low bar that SGEU must meet to satisfy this branch of the test, the Board found that SGEU established that the Main Application raises an arguable case of a contravention of the Act.

[31] The second issue is whether the balance of convenience favoured a grant of interim relief pending a hearing on the merits of the Main Application. This is where SGEU's arguments fell down. The main issue the Board found with SGEU's arguments is that they were based on a false premise. The status quo for non-grandfathered firefighters is not the Arduous Test; the status quo is the WFX-Fit Test. As the Court of Appeal noted, the WFX-Fit Test has been used to test woodland firefighters since 2012.

[32] SGEU did not satisfy the Board that any irreparable or non-compensable harm would result if an interim Order was not granted. The Board took into consideration the fact that while this matter was wending its way to the Supreme Court of Canada, the Arbitrator's Award was stayed twice.

[33] First the Court of Queen's Bench, in granting a stay made the following comments:

> *… In this respect, it is notable that the loss any of the type 1 fire fighters will sustain is easily calculable in damages. I can only assume that the union and any of the affected fire fighters understood this when the arbitration hearing was delayed as long as it was. Having regard to the overall equities and justice of the situation at hand, I have no difficulty in concluding that the balance of convenience favours the granting of the order.*[11]

[34] The Court of Appeal noted that SGEU has throughout this dispute displayed no sense of urgency in having the fitness testing issues resolved:

> *The WFX-Fit test protocol, with its present cut score, was first implemented for the 2012 firefighting season and has been in place since then. After the Award Decision was released in December of 2015, Saskatchewan successfully applied to stay the decision in the Court of Queen's Bench (see the unreported fiat of Elson J., dated April 1, 2016). Thus, the present fitness protocol has been in place for seven firefighting seasons. In that context, as well, I note that two firefighting seasons passed because of adjournments granted to the Union before the Award Decision was rendered, which diminishes the Union's present arguments of urgency. It is anticipated that if a stay is imposed, one firefighting season, at most, will be affected before the Supreme Court can determine whether to grant leave. From the Union's submissions filed on this application, I note, too, that no employee has reported discrimination as a result of the use of the WFX-Fit test.*[12]

[35] Finally, while SGEU argued that the requested interim Order was different than the relief requested on the Main Application, it is very similar. The Board found the following passage from *Variety Place* to resonate here:

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[11] *The Government of Saskatchewan Ministry of Environment v The Saskatchewan Government Employees' Union* (1 April 2016) Regina, QBG 248/2016 (Sask QB) at page 10.
[12] *Saskatchewan (Environment) v SGEU*, 2018 SKCA 96 (CanLII) at para 21.

> *[50] The Board is also concerned, for other reasons, about granting interim relief in this case. As noted above, the Board has enunciated certain policies which help to curtail the numbers of applications for interim relief. For example, the necessity for interim relief must be urgent, and, generally, the relief that may be granted will not have the practical effect of granting what the applicant might hope to obtain on the main application.*
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> *[51] The relief sought by the Union in its interim application is effectively the same as the relief sought in the Unfair Labour Practice application, which is yet to be heard. Its prayer for relief in the interim application merely repeats the requested relief sought in the Unfair Labour Practice application. As noted by the Board in Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc.*
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>> *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.*
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> *[52] The case presented to the Board here is on all fours with the above statement from Tai Wan Pork Inc. The effect of the Board granting the interim relief sought would provide full remedial relief to the Union on the basis of an interim application based on Affidavit evidence and without a determination of the underlying issues advanced by the Union and the Employer, with respect to the merits of the case.*

[36] As a result, the Board determined that the balance of convenience did not favour the granting of an interim Order pending a hearing of the Main Application.

[37] The Interim Application is dismissed. This is a unanimous decision of the Board.

[38] The Board thanks the parties for the comprehensive arguments they provided, which the Board considered in making this decision.

Yours truly,

Susan C. Amrud, Q.C., Chairperson
Labour Relations Board