Saskatchewan
Labour Relations Board

WORKERS UNITED CANADA COUNCIL, Applicant v AMENITY HEALTH CARE LP and/or 7169320 MANITOBA LTD. operating as TIM HORTONS, Respondent

LRB File No. 014-21; May 13, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Laura Sommervill

Counsel for the Applicant, Workers United Canada Council: Michael MacDonald

Counsel for the Respondent, Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons: Brent M. Matkowski

First Collective Agreement Application – Section 6-25 of *The Saskatchewan Employment Act* – Application for conclusion of terms – Preliminary Issue – Whether Board has discretion to dismiss application or is required to make an order to conclude terms.

REASONS FOR DECISION

[1] Barbara Mysko, Vice-Chairperson: The Board has decided that it has discretion to dismiss, or not provide assistance pursuant to, an application that is filed in accordance with subsection 6-25(1) of *The Saskatchewan Employment Act* [Act], and that seeks a remedy pursuant to clause 6-25(6)(b), even if a period of 120 days has elapsed since the appointment of a special mediator.

[2] The Employer operates a Tim Hortons franchise in the Town of Canora, Saskatchewan. The Union, Workers United Canada Council, is the exclusive bargaining agent for an all-employee bargaining unit, pursuant to a certification order dated September 9, 2019 in LRB File No. 130-17.

[3] The Union applied to the Board in or around February 20, 2020 for assistance in concluding a first collective agreement, pursuant to subsection 6-25(1) of the Act.[1] In response to that application, the Board issued an order on June 18, 2020 that the parties jointly request the Minister to appoint a labour relations officer, special mediator, or establish a conciliation board to assist in concluding a first collective agreement between the parties. The parties did so and the

[1]LRB File No. 042-20.

Minister appointed a special mediator on August 24, 2020. The issuance of the order in that matter marked the conclusion of that application before the Board.

[4] The Union has returned to the Board to ask for additional assistance. This time, the Union brings its application pursuant to subsection 6-25(1), but says that 120 days have now elapsed since the appointment of the special mediator, and therefore it is incumbent on the Board to issue an order pursuant to clause 6-25(6)(b) and either conclude any term or terms of the first collective agreement or order arbitration for the same purpose. According to the Union, the Board does not have discretion under the Act to dismiss the application. There are only two options available to the Board, and those are the options set out at clause 6-25(6)(b).

[5] The Employer argues that the Board does have discretion to consider whether to proceed, and if appropriate, dismiss the application. The Board may consider evidence for this purpose. The Employer asks for an opportunity to present evidence in a hearing to consider whether the Board or an arbitrator should conclude any terms. According to the Employer, the Union has demonstrated its preference for an imposed agreement rather than a negotiated one. If the Union believes that it simply has to wait out the 120-day time period, then it has no incentive to bargain in good faith. The Employer believes that if the Board sent a different message, the parties would be able to make further progress on their own or with the continued assistance of a special mediator.

[6] The Employer states that the best collective agreement is a negotiated collective agreement. The Union counters that an agreement is better than no agreement at all.

[7] On Motions Day on April 6, 2021, the Board set a date for a hearing on the issue of whether it has discretion pursuant to this application or is constrained by the two options set out in clause 6-25(6)(b). That hearing was held on April 28, 2021. The parties filed thorough written submissions and made thoughtful oral arguments, for which the Board is grateful.

[8] The question before the Board necessitates an interpretation of section 6-25 of the Act, and in particular, clause 6-25(6)(b):

> ***6-25****(1) The employer or the union may apply to the board for assistance in the conclusion of a first collective agreement, and the board may provide assistance pursuant to subsection (6), if:*
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> > *(a) the board has issued a certification order or a collective bargaining order;*
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> > *(b) the union and the employer have engaged in collective bargaining and have failed to conclude a first collective agreement; and*

(c) one or more of the following circumstances exist:

(i) the union has taken a strike vote and the majority of those employees who voted have voted for a strike;

(ii) the employer has declared a lockout;

(iii) the board has made a determination pursuant to clause 6-62(1)(d) or 6-63(1)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective agreement;

(iv) 90 days or more have passed since the board made the certification order.

(2) If an application is made pursuant to subsection (1):

(a) an employee shall not strike or continue to strike and the union shall not declare, authorize or counsel a strike; and

(b) the employer shall not lock out or continue to lock out the employees.

(3) An application pursuant to subsection (1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.

(4) All materials filed with the board in support of an application pursuant to subsection (1) must be served on the other party within 24 hours after filing the application with the board.

(5) Within 14 days after receiving the information mentioned in subsection (4), the other party shall:

(a) file with the board a list of the disputed issues and a statement of the position of that party on those issues, including that party's last offer on those issues; and

(b) serve on the applicant a copy of the list and statement.

(6) On receipt of an application pursuant to subsection (1):

(a) the board may require the parties to request the minister to appoint a labour relations officer or special mediator to mediate the dispute or establish a conciliation board pursuant to section 6-29; and

(b) if a period of 120 days has elapsed since the appointment of the labour relations officer or special mediator or the establishment of a conciliation board pursuant to clause (a), the board may do any of the following:

(i) conclude, within 45 days after the date of the order, any term or terms of the first collective agreement between the parties;

(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective agreement.

(7) Before concluding any term or terms of a first collective agreement, the board or a single arbitrator may hear:

(a) evidence adduced relating to the parties' positions on disputed issues; and

(b) argument by the parties or their counsel or agent.

[9] Section 6-25 confers a power on the Board to assist the parties in concluding terms of a first collective agreement.

[10] In outlining the principles applicable to a question of statutory interpretation, the Employer relies on the description contained in *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII) [*Ballantyne*]:

> *[19] The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [Rizzo Shoes]. A number of principles set out in that case are applicable to the case at hand, namely:*
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> > *1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature (See: Rizzo Shoes at para. 87). (See also: Saskatchewan Government Insurance v Speir, 2009 SKCA 73 at para 20, 331 Sask R 250; and Acton v Rural Municipality of Britannia, No. 502, 2012 SKCA 127 at paras 16-17, [2013] 4 WWR 213 [Acton]).*
> > *2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent or if it is incompatible with other provisions or with the object of the legislative enactment (See: Rizzo Shoes at para. 27).*
> > *3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner (See: Rizzo Shoes at para. 21). This principle is enshrined in s. 10 of The Interpretation Act, 1995, SS 1995, c. I-11.2 (See: Acton at paras. 16-18).*
> > *4. Any doubt arising from difficulties of language should be resolved in favour of the claimant (See: Rizzo Shoes at para. 36).*
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> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*
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> > *1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*
> > *2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
> > *3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.*
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> *[21] In sum, in interpreting s. 123(1) of the Act, the ordinary meaning of the words of that provision must be read in the context of the Act as a whole and in the context of Part VIII in particular. It is also important to keep in mind the purpose of the Act and the legislature's intention in enacting the provision. The provision is benefit conferring and accordingly must be given a broad and purposive interpretation. It must also be interpreted in a manner that will not lead to absurdities. With this background in mind, I turn to the Commission's decision in this case.*

[11] Section 2-10 of *The Legislation Act* states:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*

> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[12] In determining ordinary meaning, a decision maker may consider "purpose, related provisions, drafting conventions, legislative presumptions and avoidance of absurdities": *Holt v Saskatchewan Government Insurance*, 2018 SKCA 7, at para 37; *Ballantyne*, *supra*.

[13] The Court of Appeal in *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII) outlined the order in which a decision maker should undertake the interpretative exercise:

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*

[14] Next, the Board will apply the principles of statutory interpretation to its interpretation of the provisions in issue. It will begin this exercise by forming an initial impression about the meaning of the provision from its text.

[15] Clause 6-25(6)(b) states that the Board "may do any of the following" and then sets out two avenues for the conclusion of terms. Similar permissive language, as indicated by the use of the word "may", is used in subsections (1) and (6). Subsection (1) states that the Board "may provide assistance pursuant to subsection (6), if" the following preconditions are satisfied. Subsection 6-25(6) is triggered only on receipt of an application pursuant to subsection (1). Clause (6)(a) states that the Board "may require the parties to request the minister" to appoint a dispute resolution professional or establish a board.

[16] The language of each of these phrases is generally consistent, and to the extent that the language reveals differences, those differences can be explained by the surrounding text. In subsection (1), the language precedes a list of preconditions. The Board may provide assistance if those preconditions are satisfied. In clauses (6)(a) and (b), the language precedes a description of the assistance that the Board may provide.

[17] Section 2-30 of *The Legislation Act* mandates the interpretation of "may" when contained in an enactment:

> ***2-30****(1) In the English version of an enactment:*
> *(a) "shall" shall be interpreted as imperative;*
> *(b) "must" shall be interpreted as imperative; and*

> *(c) "may" shall be interpreted as permissive and empowering.*
> *…*

[18] As per section 2-2 of *The Legislation Act*, subsection 2-30(1) is presumed to apply to the Act unless a contrary intention appears, as follows:

> ***2-2** Every provision of this Part applies to every enactment, whenever enacted, unless a contrary intention appears in this Part or in an enactment.*

[19] However, Professor Ruth Sullivan helpfully explains that interpretative provisions, such as section 2-30, are not a full answer to whether a particular provision signals permission or obligation. To identify the existence of the word "may" is to perform only one part of the interpretative exercise:

> *4.57 The assistance offered by these provisions is limited in that they do not address the two issues that repeatedly arise concerning the use of "may" and "shall". In fact, they make it harder to deal with those issues in so far as they imply that "may" and "shall" are opposites and create mutually exclusive categories. Both conceptually and in practice, permission and obligation are overlapping categories. An official who is obliged to do a thing is implicitly permitted to do it; an official who is permitted to do a thing may, in addition, be obliged to do it.* [2]

[20] Professor Sullivan offers three examples of situations in which the word "may" could be interpreted to create an obligation. The first of these is when the legislation confers a power:

> *4.60…*
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> - *Confer a power: "an official may do something…". The official is given a power to do something that he or she would not otherwise have the legal authority to do – conduct a search, issue a licence, make a legally binding regulation. In the absence of express or implied limitation, such a provision confers discretion. The official may decide whether to exercise the power.*

[21] Section 6-25 confers a power on the Board to provide assistance to the parties in concluding a first collective agreement. This is a power that the Board would not otherwise have. Unless there is an express or implied limitation, this suggests that the provision confers discretion and permits the Board to decide whether to exercise its power.

[22] The next example is described in the following way:

> - *Confer a power, subject to condition precedent: "an official may do something if …". The power may be exercised only if the conditions precedent are met. To that extent*

[2] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis), 2014.

> *the discretion is limited. The issue that arises is whether, once the condition is met, the official may decline to exercise the power.*

[23] Applied to the current case, the conditions precedent to an order pursuant to clause (6)(b) include those listed in subsection (1) and the period of 120 days, as referenced in clause (6)(b).

[24] Professor Sullivan explains that the decision maker should "determine whether there is anything in the statute or in the circumstances that expressly or impliedly obliges the exercise of the power".[3] The word "may" must be considered in context. The usual indicia of context apply – the purpose of the Act and Part, the related provisions, and the intention of the Legislature. In considering the context, it is necessary to consider whether there is an express or implied limitation on the discretion of the Board.

[25] The last example raises additional questions:

- *Introduce alternative courses of action that may be taken: "a person may do (a), (b) or (c)". Similar questions arise as in the previous bullet: is a power being conferred or merely limited or expanded? Are other courses of action impliedly excluded?*

[26] Given these explanations, it is necessary for the Board to consider whether there is anything in the Act or in the circumstances that expressly or impliedly obliges the exercise of the power. This requires a consideration of the purpose of the statute, the related provisions, and the intention of the Legislature.

[27] Before embarking on this broader analysis, however, it is also necessary to consider the additional language contained in section 6-25.

[28] First, clause (6)(a) is a permissive provision. There are no relevant grammatical differences between clauses (6)(a) and (b) that would suggest that (a) is permissive and (b) is mandatory. Both sets of remedies are awarded on an application pursuant to subsection (1). The same preconditions, as set out in subsection (1), apply in respect of both sets of remedies. The Union argues that the preconditions set out in subsection (1) are not assessed on an application for a remedy pursuant to subsection (6). This is simply not the case. The provision is clear that, in either case, the application is made pursuant to subsection (1). Contrary to what the Union suggests, the precondition of collective bargaining is not *res judicata* because it has not been considered in the specific context of a remedy requested pursuant to clause (6)(b).

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[3] At 4.62.

[29] Furthermore, the Union relies on *CUPE v N.B. Liquor Corporation*, 1979 CanLII 23 (SCC), 2 SCR 277 [*N.B. Liquor*] and *SEIU, Local No. 333 v Nipawin District Staff Nurses Association et al*., 1973 CanLII 191 (SCC), [1975] 1 SCR 382 for the proposition that a tribunal must be careful not to take into account improper criteria when exercising its discretion. The Union suggests that, to allow for consideration of matters outside the strict language of the preconditions in subsection (1) would be to allow for the consideration of improper criteria. However, section 6-25 allows the Board to intervene if an application is made based on the statutory preconditions. The statutory preconditions set the threshold for the making of the application and for the provision of assistance. There is nothing in the provision that suggests that, once the preconditions are satisfied, the Board must intervene.

[30] There is no deadline for the making of an order required to invoke subclauses (b)(i) and (ii). This stands in contrast with the 45-day deadline from the date of the order for concluding terms. The absence of a mandatory timeline for the making of the order required to invoke subclauses (b)(i) and (ii) is consistent with an interpretation that the Board sets its own process for assessing whether to make such an order.

[31] On this point, the Board has reviewed and considered the decision in *Arch Transco v United Steel*, 2017 CarswellSask 149 [*Arch Transco*], and does not find it persuasive. The analysis in *Arch Transco* is limited, perhaps in part, because the parties do not appear to have specifically raised the issue of the Board's discretion. At paragraph 10 of that decision, the Board found that, in contrast with the 45-day timeline from the date of the Board's "undertaking" under *The Trade Union Act*, the "new requirement which focuses on the date of the Order by the Board can significantly shorten the timeline, since under the former Act the 45-day period could be considered to have commenced only following a hearing or hearings".

[32] In our view, there is no substantive difference between these two timelines. The word "order" in subclause (b)(i) can refer to no other order than an order to conclude terms. To suggest that it refers to any other order required under section 6-25 could have the effect of contradicting the timelines that are set out elsewhere in the provision. Furthermore, there is no basis to conclude that a different timeline applies if the Board undertakes to conclude the terms than if it delegates that task to an arbitrator.

[33] Pursuant to the Act, whether it is the Board or the arbitrator that is chosen to conclude terms, it is incumbent on the Board to make an order to that end. Unlike the previous provision, the current provision is now clear that when the Board undertakes to conclude terms it is required

to make an order, just as it is required to do so when it decides to delegate that task to an arbitrator.

[34] Next, the Board will consider the statutory purpose. The analysis of statutory purpose focuses on Part VI of the Act. The overall purpose of Part VI is informed, in part, by section 6-4 of the Act, which reads:

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*

[35] The promotion and facilitation of good faith collective bargaining is a central purpose of Part VI. To find any success in bargaining, both parties must devote some time and resources to developing and employing the appropriate skills and cultivating the relevant relationships.

[36] On the other hand, the first round of bargaining is a particularly vulnerable time for a union. It is perhaps the first occasion for the union to demonstrate, in practical terms, its value to the members of the bargaining unit. Some members may remain skeptical about the benefits of unionization. A lack of success at the bargaining table – a failure to achieve results for the employees - can result in an erosion of the union's reputation, and leave the union vulnerable to decertification efforts.

[37] Employers may have concerns about managing a future workplace that is governed by a collective agreement. For this reason, employers are at times inclined to take advantage of this opportunity and undermine the union's efforts to reach an agreement. By prolonging the conclusion of a first collective agreement, an employer has the power to undermine the relationship between a union and its members.

[38] It is also true that, in some cases, either party will, due to lack of experience, competence, or trust, present obstacles to achieving progress in bargaining. Section 6-25 responds to all of these dynamics by providing an opportunity to either party to apply to the Board for assistance in bargaining a first collective agreement.

[39] When it comes to collective bargaining, the Board's role focuses on supervising the process rather than adjudicating the outcomes. The practical effect of this distinction was recounted by the Board in *Moose Jaw Firefighters' Association Local 553 v Moose Jaw (City)*, 2016 CanLII 36502 (SK LRB):

> *[97] Vice-Chairperson Schiefner then identified the Board's principal concerns when reviewing the conduct of the various parties – in this case the employer –when an unfair labour practice is brought under now section 6-62(1)(d) of the SEA. He stated:*
>
> > *The function of this Board is to ensure that the parties engage in a process of collective bargaining; that they agree to meet; that they come to the bargaining table prepared to enter into a collective agreement and/or resolve the issues in dispute between the parties through collective bargaining; that their negotiators have authority to bind their principals; that they explain their proposals and disclose relevant and necessary information that could affect their collective bargaining relationship; and that they not misrepresent the facts or their proposals to the other party…Simply put, it is the responsibility of the Board to ensure that the parties engage in a process of collective bargaining; it is not the function of the Board to ensure that a particular substantive result is achieved or avoided through collective bargaining.[24] [Emphasis added; citation omitted, and emphasis in original.]*

[40] The emphasis on the Board's role as a supervisor of process is consistent with the expectation that the parties will develop within their organizations the skills and relationships necessary to sustain a healthy and fruitful collective bargaining relationship over time. Section 6-25 provides an exception to the Board's usual role in relation to collective bargaining, out of a legislative recognition for the unique circumstances involved in bargaining a first collective agreement.

[41] The Union argues that a first collective agreement application is time sensitive, and it must therefore be addressed expeditiously and without unnecessary procedural obstacles to the conclusion of terms. In our view, the reality is slightly more nuanced than this, as follows.

[42] On an application pursuant to section 6-25, timing is relevant. A party cannot apply to the Board for assistance until one or more of the preconditions exist. In the absence of a strike, lockout, or determination pursuant to clauses 6-62(1)(d) or 6-63(1)(c), a party may apply only if 90 days or more has passed since the Board made the certification order. In this circumstance, the parties are expected to allow at least 90 days to pass before making an application. This threshold timeline implies an expectation that parties will use the time to attempt to make progress in concluding an agreement. After a dispute resolution process has been put in place pursuant to clause (6)(a), the parties are, again, constrained by a 120-day threshold timeline. Parties are not permitted to come back to the Board until they have invested the minimum allotted time.

[43] There is also some time sensitivity to an application pursuant to section 6-25, once made. At that time, the rights to strike and lockout are suspended. They remain suspended until the application is concluded and while a matter is pending before a labour relations officer or special

mediator or conciliation board.[4] If the application is brought pursuant to clause (6)(b), the conclusion of terms is subject to a 45-day deadline from the date of the order to conclude terms. Within the 45-day timeline, the Board or arbitrator may hear evidence and argument. The evidence that may be adduced relates to the parties' positions on the disputed issues.

[44] Unlike the process outlined in Part VII, the suspension of the right to strike pursuant to section 6-25 does not arise directly from a party's status (re public employer), and the absence of an agreement, but instead arises upon the making of the application pursuant to section 6-25. Initiating a strike following first collective agreement negotiations will pose unique challenges to a union but it is not foreclosed unless and until a party makes an application pursuant to section 6-25. Furthermore, if a party brings an application for first collective bargaining assistance for an improper purpose, for example, to unduly prevent a legal job action, then it seems overly restrictive to interpret section 6-25 as not providing for some discretion to dismiss an application brought for such a purpose.

[45] Finally, the suspension of the right to strike while the matter is pending before the special mediator does not mean that the Board is required to act immediately after 120 days has elapsed. In the current case, the Union made an application for a remedy pursuant to clause (6)(a), and that matter was spent when the Board issued its order. The Union was required to make a second application to request a remedy pursuant to clause (6)(b).

[46] Both parties compared section 6-25 with section 6-90 of the Act. Section 6-90 sets out the arbitration board procedures applicable to firefighters. In the Union's view, section 6-90 mandates collective bargaining as an explicit precondition to arbitration, and is distinct from clause 6-25(6)(b). Section 6-90 is subject to subsection 6-88(2), which states,

> *(2) Before any matter may proceed to arbitration in accordance with subsection (1), the employer and union governed by this Division shall:*
>
> > *(a) engage in collective bargaining in accordance with this Part; and*
> > *(b) if collective bargaining does not resolve the issues, engage in mediation or conciliation in accordance with Division 7.*

[47] The Board disagrees that the language of section 6-90 makes any difference in the current case. As explained, collective bargaining is a precondition both for making an application for

[4] See, clause 6-63(1)(b).

assistance in concluding a first collective agreement and for a remedy to be granted pursuant to clauses 6-25(6)(a) and (b).

[48] In summary, interpreting clause 6-25(6)(b) as providing for discretion is consistent with the Board's supervisory role over the collective bargaining process.

[49] Next, the predecessor provision, contained in *The Trade Union Act*, reads as follows:

> ***26.5****(1) If the board has made an order pursuant to clause 5(b), the trade union and the employer, or their authorized representatives, must meet and commence bargaining collectively within 20 days after the order is made, unless the parties agree otherwise.*
>
> *(1.1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
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> > *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> > *(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> > *(c) one or more of the following circumstances exists:*
> >
> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
> > > *(ii) the employer has commenced a lock-out;*
> > > *(iii) the board has made a determination pursuant to clause 11(1)(c) or (2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6);*
> > > *(iv) 90 days or more have passed since the board made an order pursuant to clause 5(b).*
>
> *(2) If an application is made pursuant to subsection (1.1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.*
>
> *(3) An application pursuant to subsection (1.1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.*
>
> *(4) All materials filed with the board in support of an application pursuant to subsection (1.1) must be served on the other party within 24 hours after filing the application with the board.*
>
> *(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:*
>
> > *(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and*
> > *(b) serve on the applicant a copy of the list and statement.*
>
> *(6) On receipt of an application pursuant to subsection (1.1):*

> *(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and*
> *(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:*
>
> > *(i) conclude, within 45 days after undertaking to do so, any term or terms of a first collective bargaining agreement between the parties;*
> > *(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.*
>
> *(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:*
>
> > *(a) evidence adduced relating to the parties' positions on disputed issues; and*
> > *(b) argument by the parties or their counsel.*
>
> *…*

[50] For the main purposes of the current application, the predecessor provision is substantially the same as the current provision. It is noted that the language in clause 6-25(6)(a) has changed, clarifying the process for the appointment of a dispute resolution professional or establishment of a conciliation board.

[51] In previous cases the Board has interpreted the language of the predecessor provision as providing discretion whether to grant the remedy requested: *RWDSU v Prairie Micro-Tech Inc*., 1996 CarswellSask 880 [*Prairie Micro-Tech*]; *Board of Education of Tisdale School Division v CUPE, Local 3759*, [1996] Sask LRBR 503; *UFCW, Local 1400 v Madison Development Group Inc*., [1996] SLRBD No 62; *CAW-Canada v SIGA*, [2001] Sask LRBR 42; *RWDSU v Temple Gardens Mineral Spa*, [2001] Sask LRBR 345; *RWDSU v Boardwalk Equities*, [2002] Sask LRBR 224; *Health Sciences Association of Saskatchewan v Medstar Ventures Inc.*, [2013] SLRBD No 4; *SGEU v Namerind Housing Corp*., [1998] Sask LRBR 542; *UFCW, Local 1400 v Sobeys*, [2005] Sask LRBR 483; *Winners Merchants International v RWDSU*, 2006 CarswellSask 839, 129 CLRBR (2d) 212.

[52] The Board has reviewed the foregoing cases, and all of the authorities filed, in full. The Union argues, that after *Prairie Micro-Tech*, the subsequent case law has been grounded in the reasoning of that original case, which did not interpret the provision in line with the modern principle of statutory interpretation. While the Board in *Prairie Micro-Tech* did not perform a highly textual analysis, its analysis of purpose was very well-informed and remains helpful, and its conclusions, drawn from the statutory purpose, support the interpretative process that this Board has undertaken.

[53] In *Prairie Micro-Tech*, then Chair Bilson provided the following assessment of section 26.5:

> *36 Over the lifetime of The Trade Union Act, this Board has on many occasions interpreted the provisions of the Act in light of what is, in our view, one of its primary objectives - the support of vigorous and sustainable collective bargaining relationships between employers and the trade unions which have been selected to represent their employees. In this connection, the Board has thought it appropriate to refrain from intruding unduly upon the bargaining relationships which lie under our supervisory eye, and from attempting to influence the outcome of the bargaining which takes place.*
>
> *37 Our reading of Section 26.5 is that this provision is consistent with the general approach we have taken, in that it is not intended as a substitute for the achievement of a first collective agreement by bargaining between the parties. Of the two models we have described above, it clearly belongs at the end of the spectrum occupied by the legislation in British Columbia, Ontario and the federal jurisdiction. By this we mean, particularly, that Section 26.5 calls upon the Board to make a series of threshold determinations concerning whether and when to intervene to assist the parties by imposing a term or terms of a collective agreement, and that the conduct of the parties and the state of the relationship are relevant considerations in making these determinations.*
>
> *…*
>
> *51 It is impossible to say how hard or soft this Board would be in its application of these criteria in any particular circumstances. Clearly, the conduct of the parties, the course of bargaining, the effectiveness of third party intervention, and other factors would all have an effect on the degree to which it is appropriate to intervene. What we are trying to signal here is that this Board intends to take a cautious approach to providing assistance with the conclusion of first collective agreements, and that we will do everything we can to ensure that the onus continues to rest on the parties to reach a solution through bargaining.*

[54] Although the extent of caution employed by the Board has, perhaps, varied with time and circumstances, this does not mean that the Board is now obliged to take up the remedies listed in clause (6)(b) whenever an application has been made in accordance with subsection 6-25(1), seeking a remedy pursuant to clause 6-25(6)(b), and the 120-day timeline has elapsed. The Board has not found anything in the related and surrounding provisions, the purpose of the statute, or the intention of the Legislature that expressly or impliedly obliges the exercise of the power to order the conclusion of terms.

[55] The process of bargaining for a first collective agreement is not comparable to other rounds, but the concerns with finality and timeliness must be balanced with the parties' obligations to bargain in good faith and the Board's supervisory role. Interpreting clause 6-25(6)(b) as providing for discretion is consistent with the Board's focus on ensuring that the onus continues to rest on the parties to reach a solution through bargaining.

[56] For the foregoing reasons, the Board finds that it has discretion to decide whether to make an order to conclude terms upon receipt of an application filed in accordance with subsection 6-

25(1) and clause 6-25(6)(b) of the Act. This matter will be placed on the Motions' Day schedule to determine next steps.

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

DATED at Regina, Saskatchewan, this **13th** day of **May, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson