

REPORT

TO THE MINISTER OF ADVANCED EDUCATION EMPLOYMENT AND LABOUR

Regarding a review of Regulations SR194/74 and SR195/74 and the structure of collective bargaining between the University of Regina and the University of Saskatchewan, with specific reference to joint bargaining between the Universities and the Canadian Union of Public Employees (CUPE), Locals 1975 and 1975-1

I

In a letter of June 19, 2009, the writer was appointed to conduct an inquiry into the merits of Regulations SR194/75 and SR195/75 (the "Regulations") with respect to the collective bargaining structure at the University of Saskatchewan and the University of Regina. The letter provided, *inter alia*, the following mandate:

"To review the structure of Collective Bargaining as it presently exists between the universities and CUPE, Locals 1975 and 1975(1) and following consultations with the parties, assess the merit of these regulations from a labour relations perspective and develop recommendation(s) for the Minister's consideration."

II

HISTORY

A brief history is of assistance. In providing the same, I am grateful for - and will make liberal reference to - the informative brief provided by *CUPE Local 1975-01*. As indicated in the brief, the power plant employees at the University of Saskatchewan were first certified as the University of Saskatchewan's Employees' Union on April 10, 1945. Over the course of time, leading to June 1974, additional applications to the Labour Relations Board were made to represent other groups of employees at the university, including employees employed in the field of husbandry, poultry, maintenance, janitors and kitchen staff.

Prior to the implementation of the Regulations at issue here, there was a single university in

the Province - the University of Saskatchewan, with a Regina Campus. When the University of Regina was created in 1974, the University of Saskatchewan Employees' Union lobbied the Minister of Continuing Education to allow the Union to continue to bargain collectively with both University Boards at the same time. A briefing note sent to Minister MacMurchy, explained the background for the Regulations passed pursuant to the *University of Saskatchewan Act, 1974* and the *University of Regina Act, 1974*:

"These regulations are drafted mainly to accommodate the strong desire of the University of Saskatchewan Employees' Union to maintain itself as a single entity in spite of the separation of the two universities and, consistent with this, their desire to be able to bargain collectively with the two university boards at the one time. The regulations are written in such a way as to afford the same privilege of initiation of action to bargain jointly to the boards as well as to employee groups."

Orders in Council were passed to allow the union to bargain with both universities and, since then, the employees at the two universities have always bargained jointly.

In July, 1975 the Employees' Union at the University of Saskatchewan received its charter from the Canadian Union of Public Employees and became *CUPE, Local 1975*. In September 1975, the National Union issued a duplicate charter for *CUPE, Local 1975-01* at the University of Regina. In its brief, the Union suggests that the creation of the sub-local at Regina was done: "*... so that the union members at that university would be able to send two delegates to the CUPE national convention*".

Irrespective of the purpose for granting a separate charter for the locals at the two universities, there are presently two separate certification orders for the local at each university. The current certification for the University of Regina declares that a unit consisting of:

"All employees employed by the University of Regina except ... (a list of exclusions follows) ... constitute an appropriate unit of employees for the purpose of bargaining collectively."

and directs the University of Regina to bargain collectively with *CUPE, Local 1975* with respect to the employees described within the Certification Order. A similar separate and discrete current certification order for the University of Saskatchewan declares that:

"... all employees employed by the University of Saskatchewan, in the province of Saskatchewan, except: ... (a list of exclusions follows) ... are an appropriate unit of employees for the purpose of bargaining collectively".

While both Certification Orders are granted to CUPE Local 1975, the Union has historically represented the employees and administered the Collective Agreement via two discrete locals: 1975 (at the University of Saskatchewan) and 1975-01 (at the University of Regina). The current Collective Agreement, correspondingly, refers to both CUPE Locals 1975 and 1975-01.

While my mandate directs specific reference to joint bargaining between the Universities and the two named Locals, it should be pointed out that by virtue of Section 2(1) of the Regulations, “*any employee organization*”, as defined by Section 1(a), may give notice which effectively compels a university to bargain jointly with the board of governors of the other university, regarding the employees indicated in the notice. While the Regulations allow for joint bargaining, effectively upon request, no other employee organization, other than the CUPE locals discussed in this report, has utilized the provisions of the Regulations to require it.

III

MANDATE

Each aspect in the mandate provided is dealt with separately below.

1. Consultations

The mandate directs that I consult with the parties in this matter. I was both privileged and pleased to have met separately with, *inter alia*, representatives of each of the parties: CUPE, Local 1975; CUPE, Local 1975-01; University of Saskatchewan; and the University of Regina. I want to extend my warmest appreciation to the parties for their input and assistance.

I would be remiss if I did not point out that all of the parties were exceptionally helpful and provided candid observations and suggestions that I found extremely valuable. I am satisfied that if my recommendations in this report are implemented, the obvious ability of the individuals I met, as well as their professional and focused manner, will ensure that

collective bargaining at each university will proceed in a productive fashion.

2. *Review of the structure of Collective Bargaining as it presently exists between the universities and CUPE, Locals 1975 and 1975(1)*

Although the universities are two separate employers, and the union locals operate and administer the collective agreement separately, collective bargaining, with respect to employees represented by the two CUPE 1975 locals at the University of Regina and the University of Saskatchewan, has been done on a joint basis since the coming into force of the subject Regulations.

My consultations disclosed that, generally speaking, collective bargaining proceeds essentially on four separate tracks. Each of the universities prepares its bargaining positions independent of the other. Those positions are designed to deal specifically with the concerns of the individual university. Similar considerations apply with respect to both union locals. In short, the initial bargaining positions are structured by each of the locals, and both universities, to address/redress issues that arise specifically at each university. Prior to the commencement of joint bargaining, the parties meet to establish a single joint committee for each side of the table. It is apparent that the parties are all unhappy with the fact that this process has led to the establishment of a joint table that is becoming increasingly crowded. And, that negotiations, given the lack of joint positions, sometimes leads to unfocused and unwieldy bargaining, particularly when dealing with issues that exclusively affect only one university. I was made aware of incidents where - while in the midst of bargaining - parties who were not involved in the discussions relative to issues that applied at their university, simply left the room until the single issues were resolved by the affected parties. More details of the present structure of collective bargaining are discussed further below.

The parties currently have bargained a Collective Agreement for the period January 1, 2007 to December 31, 2009. If joint bargaining is to occur in the upcoming round, either party, in keeping with the Regulations, must serve an appropriate notice: “... *within the time period specified in Section 33, subsection (4) of The Trade Union Act...*”

That Section provides as follows:

(4) Either party to a collective bargaining agreement may, not less than 30 days or more than 60 days before the expiry date of the agreement, give notice in writing to the other party to negotiate a revision of the agreement and where a notice is given the parties shall forthwith bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

The provisions of Section 33(4) apply to the current collective agreement regardless of the existence of the Regulations in question here. Time, accordingly, is of the essence with respect to the implementation of these recommendations, in order to provide the parties with sufficient time and ability to prepare the appropriate notices to bargain regarding the next bargaining round.

3. Assess the merit of these Regulations from a Labour Relations perspective

To arrive at a conclusion in this respect it is necessary to evaluate the present bargaining unit structure and review its “*appropriateness*” as that term is understood in light of long standing and accepted labour relations principles and labour board jurisprudence.

The positions of the Canada Industrial Relations Board and the Saskatchewan Labour Relations Board with respect to the considerations to be addressed in determining the appropriateness of a collective bargaining unit are discussed below.

In *TVA Group Inc. v. Canadian Union of Public Employees, Local 687* (2000) CIRB No. 67 the Board states at page 22:

“The principles governing bargaining unit determination are well established and have been reiterated in countless decisions. Among the goals the Board attempts to achieve is to establish units that take into account both the employees’ and employer’s interests such that a balance in that respect is achieved. More specifically, units should provide the employer to the greatest extent possible with the flexibility to manage its operations in a more effective and efficient manner while at the same time providing employees with the best means of protecting their rights under the Code, as well as the greatest amount of flexibility in furthering their careers. Ultimately, the Board seeks to establish units that are viable and that allow for effective collective bargaining and harmonious labour relations

In *Canadian Merchant Service Guild v. Quebec Tugs Limited* (2003) CIRB No. 213, the Board provides guidance with respect to two significant aspects. Quoting from *ICBC (1974) 1 Can LRBR 403* it notes:

*“The point of certification under the Code is to secure collective bargaining for employees. Accordingly, the group on whose behalf this bargaining is to be carried on should include only those categories of employees whose interests can reasonably be reflected in one set of negotiations and **whose working conditions can be incorporated into one document.** ...”*

It then set out considerations for determining an appropriate unit. Quoting from *Air BC Limited (1990)* 81 di1 the Board notes as follows:

*“... in spite of the weight of the jurisprudence and other writings favouring the concept of the broader based bargaining, many of which are very scholarly to say the least, the fact remains that the determination of appropriate bargaining units is not a question of law, it is a factual determination that is dependent upon the particular facts and circumstances of each case. The most important consideration being the **community of interests of the employee groups.** Accordingly, notwithstanding the apparent persuasiveness of the preponderance of jurisprudence against fragmentation, this panel of the board concludes that it is in the best interest of labour relations at Air BC to establish a bargaining unit pattern which reflects the practice in the airline industry. This pattern will, in our respectful opinion, best balance the powers of the employer with the power of the various occupational groups of employees **who will be able to bargain directly with their employee about their specific community interests.**”*

The principles relied upon by the Canada Board are consistent with those enunciated by the Saskatchewan Labour Relations Board. In *UFCW, Local 1400 v. Ranch Ehrlo Society (2008) CanLII 65787 (SK L.R.B.)* The Board made the following comments at paragraphs 95-96:

“There are a number of Board decisions that set out the factors the Board should consider in determining whether a proposed bargaining unit is an appropriate one. While the Board prefers larger, more inclusive units and avoids fragmentation and the multiplicity of bargaining units, it will consider a range of factors to make its determination of whether the unit sought is an appropriate one. ...”

*“This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors, assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others, **(i)** whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; **(ii)** the community of interest shared by the employees in the proposed unit; **(iii)** organizational difficulties in particular industries; **(iv)** the promotion of industrial stability; **(v)** the wishes or agreement of the parties; **(vi)** the organizational structure of the employer and **(vii)** the effect that the proposed unit will have upon the employer’s operations; and **(viii)** the historical patterns of organization in the industry.”*
(numbers added)

The focus of this report will therefore be on determining whether or not the joint bargaining

unit, which the Regulations effectively create, is appropriate for the purpose of collective bargaining. In doing so I will broadly address the criteria as set out by the Saskatchewan Labour Relations Board in *UFCW (supra)*.

i. Whether the Proposed Unit of Employees will be Able to Carry on a Viable Collective Bargaining Relationship with the Employer

It is apparent from CUPE, Local 1975-01's brief that the Regulations were drafted largely to accommodate a strong desire of the employee's union to maintain viability in spite of the separation of the two universities. This concern revolved around the fact that the employee compliment at the University of Regina, at the time, was a meager one and joint bargaining would assist in protecting and expanding the rights of those employees in the collective bargaining process.

This criterion may well have been a consideration when the subject Regulations were passed in 1974. However, the "viability" criterion, as reflected in *Quebec Tugs (supra, at p. 7)*, is now focused on whether a newly created bargaining agent will have the necessary ability, within the bargaining unit proposed, to productively bargain and adequately defend the rights of its members within the unit. That said, none of the parties I met with suggested that either of the *de facto* operating locals would not be viable, on its own, to continue to enter into collective agreements or to adequately protect the interests of its employees at either university.

CUPE Local 1975-01 took the position that joint bargaining provided the kind of strength in numbers which could provide greater bargaining leverage for the unions. It is my view, with respect, that its concerns in this regard can be accommodated by coordinated bargaining between the two Locals should they determine that such would be beneficial.

Local 1975-01 now has in excess of 500 employees. The Union is led by informed and sophisticated labour relations officers, who clearly understand the nuances of negotiating the specific issues that affect it at the University of Regina. Given the size of the Union, the proven ability of its officers and the fact that the Collective Agreement currently in place

ensures that negotiations will not have to commence from “scratch”, there is simply no issue as to whether CUPE, Local 1975-01 and the University of Regina are able to carry on a “viable collective bargaining relationship” as that term is generally understood and interpreted in labour relations law.

ii. Community of Interest Shared by the Employees in the Proposed unit

The predominant issue, repeatedly raised and relied upon by the parties opposed to the continuation of the present bargaining structure, is the apparent lack of a community of interest shared by the employees in the joint bargaining unit. The concern expressed is understandable since, in this case, it is the most important consideration.

Apart from the fact that both employee units represent universities and that both universities are in Saskatchewan, there was frankly no serious attempt made to suggest that the two units shared a realistic community of interest in the current joint bargaining unit.

Other than the discussions which precede the joint bargaining sessions, there is no intervening administrative interaction between either the universities or the unions on labour relations issues.

The two universities focus on discrete interests. Each of the universities provide a diverse curriculum and an array of educational services which, individually, require employee complements that often do not fit into the compromised classification or categorization “moulds” contained in the Collective Agreement bargained jointly. This forces all parties to “force fit” employees into classifications which, according to one of the parties, “does not work”.

It was clearly apparent that the Collective Agreement, while a single agreement, is administered entirely and separately by each university and its respective local. Neither the unions, nor the universities, confer on or coordinate their grievances. There is no consultation or joint strategy regarding grievances that will be taken to arbitration. They do

not share arbitration processes, resources or, for that matter, supply one another with copies of the ultimate decisions. There is no shared discussion on employee/management issues which they encounter at their respective universities, nor a joint position on anything, except bargaining at the larger table when the Collective Agreement is up for negotiation.

Negotiations, in the last bargaining round, played out in such a fashion that an issue that neither of the parties had seen as significant - going in to bargaining - ultimately deflected negotiations and became the focal point for a strike which was finally resolved by mediation and arbitration. A review of the arbitration decision, filed on December 22, 2008, discloses that while there is a single Collective Agreement with both the University of Regina and the University of Saskatchewan and their respective Unions at the table, the interest arbitration dealt only with the issues as they affected the University of Regina and CUPE, Local 1975-01.

There was considerable discussion surrounding the strike; how it evolved; and, how it was ultimately resolved *via* arbitration. There is no need, here, to draw any conclusions with respect to why the strike occurred, except to say that each of the parties “blamed” the other for it and, to some extent, all of their positions have merit.

However, the strike, and its ultimate resolution in the arbitration award, discloses the bifurcation of interests between the parties, and the practical consequences of the same. While the University of Saskatchewan and Local 1975 were originally part of the arbitration process they reached a separate agreement prior to the commencement of the arbitration hearing. Neither party took part in the arbitration; nor are they named as parties in the arbitration award. The incongruity of these circumstances cannot be overlooked in the larger “community of interest” picture. This is particularly so when one considers that, in a normal collective bargaining relationship, the parties to an arbitration award are the parties to the Collective Bargaining Agreement and arbitrations taken with respect to the application and interpretation of the Collective Agreement apply to the entire agreement and all of those bound by it.

This lack of a community of interest on issues that effect the employees is also apparent in the Collective Agreement itself. While the current Collective Agreement is contained in a single document, a reading of the same reflects that significant portions of the Agreement are designed to deal exclusively with employees at either one university or the other: see, *inter alia*, Articles: 11, 12, 15, 17,18, 19, 23 as well as the Memoranda of Agreements. Given the above, and the parties' experience in arbitration as discussed, it is, at best, questionable if the jointly bargained collective agreement meets the principle enunciated in *Quebec Tugs (supra)* that it include only those categories of employees whose interests can reasonably be reflected in one set of negotiations or whose working conditions are incorporated thereby.

The lack of a community of interest is further reflected in the joint bargaining process. Each of the four parties choose their negotiating team, and the issues they want to negotiate at the joint table, separate and apart from the others. Although there is some procedural attempt to coordinate the issues that are going to be negotiated, in most respects, bargaining consists of each of the parties pursuing issues that reflect its own self interest, to serve its own purposes and to achieve its own goals at its respective university.

The employees themselves do not share a community of interests other than doing sometimes similar work at two separate universities. There is no intermingling of bargaining unit employees between the two universities. Nor do the employees ascend the promotional ranks based on a seniority structure that applies to both universities at the same time.

Given all of the above, it is my opinion that the employees at both universities do not share a sufficient community of interest to warrant an order directing the universities to bargain jointly with them.

iii. Organizational Difficulties in Particular Industries

In so far as both employee units at both universities have already been certified for collective bargaining, this criterion is not an issue.

iv. The Promotion of Industrial Stability

It goes without saying that given the problems discussed in the preceding criteria, the existing joint bargaining structure does not promote industrial stability.

In fact, the divergent strategy and positions taken by each of them with respect to the strike and the arbitration, reflects their failure to negotiate a collective agreement which addresses their divergent interests. The ability to enter into an agreement which does so is the very essence of collective bargaining and the industrial stability that it is meant to foster.

Although the problem has not yet openly arisen, joint bargaining may well put issues that are fundamental to the employees at the University of Regina - given that they are outnumbered approximately 5 to 1 - at the practical mercy of the interests of the employees at the University of Saskatchewan. In cases where a dispute arises and a vote is taken, those employees' interests, which are not shared, would be subsumed by the interests of the employees at the University of Saskatchewan. In point of fact, while the view was taken that the last strike was largely due to the issues that were at play only at the University of Regina, a strike could not have occurred but for the fact that the majority of employees at the University of Saskatchewan voted in its favour.

Finally, although largely anecdotal, it was suggested that the bargaining culture at the University of Saskatchewan is significantly different from that at the University of Regina. Such being the case, and given the financial realities of the day, the next round of bargaining could be a difficult one in which the process and culture of bargaining may well have a significant impact.

Given the observations thus far, I am of the view that the current joint bargaining structure does not promote "industrial stability" as that term is generally understood and applied in labour relations law.

v. The Wishes or Agreement of the Parties

The original review of the Regulations was requested by the Universities. It follows that each of them favour separate bargaining unit structures.

While *CUPE, Local 1975* did not take issue with the fundamental difficulties that are inherent in the current bargaining regime, nor the suggestion that the Regulations be repealed, neither did it agree to the same. It preferred instead to leave any recommendations in that respect to me.

CUPE, Local 1975-01 similarly acknowledged the difficulties inherent in the joint bargaining process however, it does not agree that the joint bargaining regime should be abandoned given its concern, as discussed earlier, that its bargaining strength may be diminished. While I understand and respect its opinion in this regard, my consultations did not disclose a continuing basis for that concern. In point of fact, given the differing bargaining cultures, the dichotomy of interests, the lack of a community of interest with the employees at the University of Saskatchewan and the significant membership imbalance between the two locals, a separate single bargaining unit at the University of Regina may better serve the employees there.

vi-vii. The Organizational Structure of the Employer and the Effect the Proposed Unit will have upon the Employer's Operation

Both employers are structured in a fashion to operate on a stand alone basis. As indicated, their respective bargaining issues are determined based on the needs of their own specific university. Representatives from both of the universities strenuously emphasized that joint bargaining, as it presently exists, prohibits them from fashioning bargaining positions which would allow them to negotiate with their union on emerging issues which form part of a broader growth plan at each university.

The budget constraints at each university differ. Budgeting for each is determined, *inter alia*, by student tuition, government grants, endowments and private contributions. Accordingly, their individual ability to make financial concessions on specific bargaining issue differs dramatically depending on the issue involved, the consequent cost and the

available allotment of funds based on the future plans at each university. The current bargaining regime significantly hampers the flexibility of each university to manage its operations in an effective and efficient manner as well as proceeding with its own planning priorities and bargaining with its union to achieve the same.

The current Regulations effectively superimpose an artificial bargaining structure over the organizational structure of the employer. A single bargaining unit specific to each university would recognize the operational realities and allow for both the universities and the unions to more effectively bargain the issues which are at play and which arise from within the individual university's actual operation.

viii. Historical Patterns of Organization in the Industry

The bargaining which has taken place at the universities in Saskatchewan, pursuant to the Regulations at issue, does not reflect a true "*historical pattern*" of bargaining at the university level.

To determine the same, considerable assistance can be drawn from universities in other provinces where bargaining is done without legislative intrusion. It appears that in all cases, bargaining units are certified for each university on an individual basis.

In point of fact, the parties were unable to provide a single example, across the country, where two separate universities chose, or were even otherwise legislatively compelled, to jointly collectively bargain. A number of discrete universities share the same unions however, there is no joint bargaining which takes place amongst them. While efforts are being made by the unions to cooperatively coordinate their bargaining (to underscore the obvious fact that the issues at one table will impact on the issues at another), bargaining is done independently on a university by university basis.

There is therefore no historical pattern of organization in the industry which supports the concept of joint bargaining at independent universities. On the contrary, the historical patterns at the universities in other provinces supports the organization of bargaining units

on a single university employer basis. That is the result which would be achieved in Saskatchewan if the subject Regulations were repealed.

4. RECOMMENDATIONS

It is apparent, based on the criteria enunciated by the Labour Relations Board, that the current structure of joint bargaining between the two universities, pursuant to the Regulations at issue, no longer accommodates sound labour relations principles or bargaining unit realities. Specifically, as discussed above, the bargaining structure created by the Regulations, militates against the principle that the group, on whose behalf bargaining is to be carried on, includes only “... *those categories of employees whose interests can reasonably be reflected in one set of negotiations and whose working conditions can be incorporated into one document.*” Furthermore, given the lack of a community of interest, the joint bargaining unit created by the subject Regulations, fails to provide either the universities with the flexibility to manage their operations in an effective and efficient manner or the employees at each university with the best means of protecting their rights, providing flexibility to pursue their careers and furthering their bargaining interests.

Given the above, it is my conclusion and assessment that there is no longer any merit, from a labour relations perspective, in maintaining the joint bargaining unit structure which the subject Regulations impose on the two universities and the unions. Therefore, there is no longer any merit, from a labour relations perspective, of maintaining the Regulations in question.

Accordingly, I respectfully submit the following recommendations:

1. That Regulations No. 194/74 and 195/74 be repealed as soon as possible to permit the parties to commence bargaining in compliance with *Section 33(4) of The Trade Union Act*;

2. That the CUPE, Local 1975 hereafter bargain solely with the University of Saskatchewan with respect to the employees that it represents under its current Certification Order granted by the Saskatchewan Labour Relations Board; and
3. That CUPE, Local 1975-01 bargain solely with the University of Regina with respect to the employees that it represents under its current Certification Order granted by the Saskatchewan Labour Relations Board.

All of which is respectfully submitted.

Richard I. Hornung, Q.C.
August 20, 2009