THE SASKATCHEWAN
LABOUR RELATIONS BOARD:
A FUNCTIONAL ANALYSIS

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THE SASKATCHEWAN LABOUR RELATIONS BOARD: A FUNCTIONAL ANALYSIS

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by

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ABSTRACT

The purpose of this thesis is to examine how the Saskatchewan Labour Relations Board functions as an administrative agency.

After describing how the Board originated, I will outline how it is empowered and constituted to facilitate collective bargaining by organized employees in this province, and the procedures it has formulated within the legislative guidelines. An assessment will then be made of the processes involved in Board decision-making and of the extent to which the Board has accommodated the interests of the parties who appear before it.

Board hearings essentially observe the adversary process, which enjoys both support and criticism, but which could be effectively augmented by a number of informal procedures. The informal decision-making process is governed by both precedent and common sense, and the very fact that it is not inhibited by extensive published guidelines provides considerable latitude for the exercise of discretion, and for free exchange among Board members. The recent restraint exercised by the Court of Appeal in reversing the Board seems to vindicate this approach. There is a greater preoccupation among members with seeing that justice is done rather than that their constituents are satisfied.

On the face of it, there could be a conflict between the desire of the Board to accommodate the parties on the one hand and to expedite matters on the other. A closer look, however, reveals
that the Board is more often than not serving the higher needs of industrial relations rather than the immediate needs of some parties. The extent to which the Board observes legal niceties depends largely upon the parties involved, as well as the need to expedite matters. Over the time period under observation, the Board has begun to make more efficient use of its time without seeming to sacrifice anyone's interests.

If there is a criticism to be made, it is that the Board has not been accessible to the parties. That is changing in the day to day context, through the use of the Executive Officer, but the Board also has a history of isolating itself from the parties in so far as policy-making is concerned. Criticism is generally ignored, and advice is seldom, if ever, sought. In this regard, some suggestions are offered for consideration.

As an administrative agency, the Board has gone a long way towards providing the speedy, efficient, inexpensive and specialized decision-making envisioned for it. Under its new Chairman, it is pointed in the direction of greater efficiency and accessibility.
ACKNOWLEDGEMENTS

I wish to express my gratitude to the following:

Robert W. Mitchell, Deputy Minister of Labour, for his patronage and continued interest;

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Nick W. Sherstobitoff, Q.C., Chairman, Saskatchewan Labour Relations Board, and all Board members and staff, for their warm reception and co-operation; and

Cheryl, my wife, without whose secretarial assistance I would still be floundering.
The focus of this study is the administrative practice and procedure of the Saskatchewan Labour Relations Board. Such an undertaking necessitates an appreciation of two things: first, the historical and political origins of the Board; and second, the fundamentals of administrative law which govern the Board's operations.

I am grateful to the authors of "The Structure and Behaviour of Canadian Regulatory Boards and Commissions: Multi-disciplinary Perspectives" for providing the basic methodological framework for this thesis.

In their study, it was suggested that the behaviour of administrative agencies is determined by a number of factors:

1) broad social and political values;
2) economic characteristics (applicable only to regulatory agencies);
3) the nature and mix of governing and political functions;
4) the legal and policy mandate;
5) the organizational "public interest" style of the agency;
6) the organizational structure; and
7) the personnel of the agency.

As the list runs from top to bottom, one experiences a sudden change in influence from "macro" to "micro", and it is an examination of the "micro" influences which will disclose the administrative practice and procedure of an agency.

Part 1 will provide a fairly detailed account of the first
days of the Board - followed by a description of its organization, powers and procedures as they presently exist. [subheadings (1), (3), (4), and (7), supra]. This background is particularly important because, although an administrative agency is intended to operate in an environment which is politically colourless, every such agency has "a peculiar chameleonic quality of taking on the colour of the substantive program to which it is attached". Reliance was placed on an examination of the standard historical sources in an attempt to objectively describe what the Board is, what it does and how it does it.

My second consideration - the administrative context in which the Board operates - is not as well understood as it should be, having regard to the importance of its influence. Very simply, "administrative law is the law concerning the powers and procedures of administrative agencies". These agencies are not courts and they are not legislative bodies, but they do have the authority of the government to adjudicate, to make rules, to investigate, to prosecute, and to act in other ways which affect the rights of private citizens. The term "administrative process" simply describes the methods by which these agencies carry out the tasks assigned to them by the legislature. Such agencies exist because of the need, inter alia, for a speedy, cheap and simple procedure to replace the judicial process.

A much more informal description of administrative law was provided by an associate of John Willis: "What we practice here is not law, but administrative law: we try to do what's sensible and then look around for some law to support it". Which description is more appropriate to the Saskatchewan Labour Relations Board
should become apparent in the course of this paper.

Part 2 will, therefore, present my assessment of the Board's organizational structure and internal work processes [sub-heading (6), supra]. Reliance here, and in Part 3, was placed on the case study approach. In consultation with the newly-appointed Chairman, an attempt was made to canvass the Board's range of activities through the observation of four consecutive sittings, with emphasis on the cases which were heard during the last week. What is said in Part 2 stems directly from what occurred during those hearings, and what was learned from discussions with the participants. With respect to the last week, I have also described what transpired in the in camera meetings which were held.

Part 3 represents the most subjective aspect of the thesis in that it attempts to describe the Board's position in relation to the public, and what the Board's conception is of its public interest [sub-heading (5), supra]. This entailed an examination of Board policies regarding how it hears and consults its constituents, how individual Board members, as well as concerned government officials, view the Board's administrative responsibility and how the Board actually behaves as a result of the above.

The end result will be an analysis of the Saskatchewan Labour Relations Board which does not follow the traditional "theological" approach of looking on only from the outside. My view from the inside cannot hope to be as penetrating as Paul Weiler's, 7 for example, since
he was the focal point of his own examination, but at least I will have been "where the action is".

2. Ibid, 214.


4. These sources included the following:
   a. Stat. Sask.,
   b. Stat. Can.,
   c. U.S.C.,
   d. speeches in the Sask. Leg. Assy.,
   e. policy statements by Minister of Labour,
   f. statements of policy in cases decided by the S.L.R.B.,
   g. correspondence written in conjunction with the drafting of The Trade Union Act, 1944,
   h. various secondary sources enumerated in detail in the footnotes to Part 1.


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1. BACKGROUND

1.1. Early History of the Saskatchewan Labour Relations Board

Labour relations boards in Canada are creatures of the legislation by which they are established. They derive from the law and their functions and responsibilities may from time to time be altered, extended or even terminated by the legislature in the jurisdiction in which they exist.\(^1\) In order to appreciate the impact of The Trade Union Act, 1944\(^2\), from which our Labour Relations Board derived its existence, it is necessary to briefly review the history of the legislation which had governed the trade union movement prior to that time.

The common law of England, reinforced by a number of statutes, made the organization of employees into a trade union a criminal offence. The law of Canada was equally restrictive, and it was not until 1892 that the Criminal Code was amended so as to no longer proscribe such activity.\(^3\)

At the same time as penal sanctions were removed, however, government intervention was imposed by federal statute. The Industrial Disputes Investigation Act\(^4\) imposed compulsory investigation of a dispute by a government-appointed board before a legal strike or lockout could take place. For the next eighteen years, this legislation governed industrial relations, not only in the federal jurisdiction,
but in all the provinces. It was not until 1925, in the leading case of *Toronto Electric Commissioners v. Snider*, that the Privy Council struck down the Act as being an intrusion upon the exclusive jurisdiction of the provinces to legislate in the area of civil rights of employees and employers. The Act was then amended in such a way that it could be adopted by reference by any province which might choose to do so. This was done in Saskatchewan by the *Industrial Disputes Investigations Act*.

The original enactment by Saskatchewan in the area of labour relations was the *Freedom of Trade Union Association Act*, which declared it to be lawful for employees to join trade unions and to bargain collectively. The unfortunate aspect of this legislation was that it did not impose any obligation on the employer to bargain collectively. The union's only recourse, therefore, was to strike to enforce its legal right. It may be fairly stated that industrial relations during the decade preceding the enactment of PC 1003 in 1944, was characterized by considerable bitterness.

February, 1944, represents a historic point in the development of labour legislation, not only in terms of substantive guarantees provided to employees seeking to associate themselves for the purpose of collective bargaining, but also because PC 1003 was the first single document in Canadian policy development which combined and integrated into a program of industrial relations control, complete
with administrative machinery, the American and Canadian approaches.

It is this administrative machinery created by PC 1003 which is most important for the purposes of this paper. A National War Labour Board was set up to deal with the questions surrounding representation and recognition, in the manner which the National Labour Relations Board had done in the United States since the enactment of the Wagner Act nine years earlier. As it had done in 1925, the Saskatchewan Legislative Assembly agreed to have the regulations made under that order in council apply to matters within its legislative jurisdiction.

When the war finally concluded, most of the provinces were faced with the dilemma of choosing among three alternatives, namely, to accept the federal approach and apply it internally insofar as the constitution would permit, to pass and apply legislation of their own identical to the federal legislation or to break out on their own and experiment. Saskatchewan had elected to pursue the third course of action even before the war ended. On November 10, 1944, The Trade Union Act received royal assent, and all preceding legislation was thereby repealed.

2. Origin of the Saskatchewan Trade Union Act

Since our own Trade Union Act bears such considerable resemblance to the Wagner Act, it may be useful to examine
the underlying philosophy of the American legislation.

The Wagner Act established on a permanent foundation the legally-protected right of employees to organize and bargain collectively through representatives of their own choosing. The heart of the Wagner Act was Section 7, which originally provided that:

Employees shall have the right to self-organization, to form, join or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(Note the similarity to Section 3 of our present Act.)

The remaining provisions of the Act were concerned with the implementation and enforcement of the three-fold right granted by Section 7.

Although the Wagner Act was partly an economic measure designed to enable industrial workers to raise their wages and improve their standard of living, it also embodied a conscious, carefully articulated program for minimizing labour disputes. Its sponsors held, and still believe, that enforcement of the guarantees of the rights to organize and bargain collectively is the best method of achieving industrial peace without undue sacrifice of personal and economic freedom.12

It should be pointed out, however, that the Wagner Act was not a complete labour code. It was intended to provide a foundation for a comprehensive system of industrial relations; but in 1935, its sponsors were concerned only
with the labour problems which seemed most urgent at the
time. Three limitations on that legislation should, therefore,
be noted:

1) The Wagner Act was primarily concerned with the
organizational phases of labour relations.

2) It was concerned exclusively with the activities of
employers which were thought to violate the rights
guaranteed by Section 7.

3) It left substantive terms and conditions of employment
entirely to private negotiation.

The enactment of the Taft-Hartley Act should not
suggest that the Wagner Act failed to achieve its intended
purpose. Rather, the Wagner Act may be said to have produced
results which were "too favourable". By 1947, the labour
movement in the United States had achieved considerable power,
which was causing the public some anxiety. Our Trade Union
Act, 1944, as amended, did not produce the same prolific
results; hence, the need for drastic curtailment never arose
in Saskatchewan.

One of the election promises made by the Honourable
T. C. Douglas in 1944 was the introduction of advanced labour
legislation in Saskatchewan. F. Andrew Brewin, a prominent
Toronto lawyer, was commissioned to draft the promised
legislation, and in doing so, he relied heavily upon the
Wagner Act.
It is interesting to note that the legislation proposed for Saskatchewan did not encounter any objections from the federal government prior to its enactment, and, in fact, seemed to be welcomed by those federal officials with whom it was discussed.16

When the bill was introduced on second reading, the Honourable C. C. Williams, then Minister of Labour, described its purpose in the following terms:

The Saskatchewan Government has announced its intention of enacting the most advanced labour legislation on the continent — and by advanced, I mean the fairest and most just. No labour legislation, no matter how necessary it may be, can be regarded as truly advanced or fair or just unless we have first of all clearly established the fundamental democratic rights of employees to organize and bargain collectively. Once these rights are clearly established, as they will be if this bill is passed, the workers of the province will be in a position to protect themselves. And the protection which they can give themselves is, in a democratic country, of infinitely greater value than any protection, no matter how necessary, which the Government can give them.17

3. Concept of the Saskatchewan Labour Relations Board

It is necessary to quote at length from the Minister's speech, supra, in order to fully appreciate the legislative context in which the Saskatchewan Board was assigned its broad powers:

The proposed Act, like the Dominion Regulations, is to be administered by a Board, but the Saskatchewan Board will have more adequate powers than the Boards administering the Dominion Regulations. Like the Dominion Boards, it will be able to determine what unit of employees is appropriate for collective
bargaining purposes and what trade union, if any, represents a majority of the employees in an appropriate unit. Unlike the Dominion Boards, it will also have the power to issue orders requiring any person to refrain from engaging in unfair labour practices, and as a necessary complement to this power, it will be able to order an employer to re-instate any employee who is illegally discharged and to order the disbanding of company unions.

If we were to make the enforcement of the unfair practices section in this Act subject to all the technicalities of the criminal prosecution, the result would merely be that the purposes of the law would largely be defeated. It is because this government is determined that the purposes of the law will not be defeated that we have copied the procedure which was instituted in the United States under the Roosevelt administration and which, after a decade of experience has been found to be highly satisfactory. Under modern conditions it is a highly complex matter to determine whether an unfair practice has been committed. For that reason we are entrusting this matter to a Board which will be able to build up specialized knowledge on the subject.

It is to be emphasized that there is nothing arbitrary about this procedure. It is true that semi-judicial functions will be given to the board, but in this we are not setting any precedents ....

The Board, though it will have the power to determine whether or not an unfair practice has been committed, will not, of course, have the power to impose penalties. It will merely have the power to order any person who is committing an unfair practice to cease doing so. ...

(What the Act did to give real force and effect to these orders was to provide for their filing with the Court of King's Bench, thereby rendering them enforceable as if they were orders of that Court.\footnote{18} This was considered by Mr. Brewin to be the most necessary aspect of the legislation.\footnote{19})

... In other words, the procedure is remedial rather
than punitive. This Government is not interested in punishing an employer for forming a company union or for discriminating against an employee for union activity, but it is interested in seeing that any employer who does form a company union will disband it, or that any employer who dismisses an employee for legitimate trade union activity will re-instate him with back pay.20 (underlining mine)

In concluding this section on the origin of the Labour Relations Board in Saskatchewan, I am going to rely on the words used by H. D. Woods in the introduction to his chapter "Labour Relations Boards - Public Policy".

Various approaches to the examination of labour relations policy as it has developed from the watershed date of 1948 ... (in Saskatchewan's case, 1944 would be more appropriate) .... could be used. In this volume the method used is to study the principal instruments and agencies established to implement policy in the belief that an analytical look at the structures, roles, responsibilities, authorities, and methods of operation of Labour Relations Boards.... will provide an integrated perspective of labour policy.21

It is such a perspective that I have gained from this functional analysis of the Saskatchewan Labour Relations Board.

1.2. Powers of the Board

The present Board derives its power entirely from the legislation under the authority of which it is established, namely, The Trade Union Act.22
1. Policy mandate and range of discretion as defined by legislation

As in the case of the *Wagner Act*, Section 3 of *The Trade Union Act, 1972* sets out the fundamental rights of employees to organize in, and to bargain collectively through, trade unions chosen by the majority of them. Simply put, it is the function of the Board to facilitate the achievement of these rights. The Board’s mandate is broadly set out in Section 41 of the Act in the following terms:

41. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any rules or regulations made under this Act or with any decision in respect of any matter before the board.

To enable it to carry out these powers and duties, the Board and each of its members has the power of a commissioner under *The Public Inquiries Act*. 23

In addition to these general powers, which are necessary to carry out investigations and to make decisions required by the Act, other sections of the Act which define the jurisdiction of the Board also establish its authority. Most of these powers are contained in Section 5, but it is also necessary to resort to other sections of the Act in which the Board is either permitted (by the use of the word "may") or required (as illustrated by the word "shall") to
do certain things.\textsuperscript{24}

The legislature has obviously attempted to protect the power of the Board by the insertion of Section 11 (5), which states that an order made by the Board shall be binding and conclusive of the matters stated therein, and Section 21, which prohibits any appeal from an order or decision of the Board. The success with which the latter section has met is discussed in greater detail in Part 2.3., infra.

The range of discretion would, therefore, seem to be rather broad in two respects: first, in terms of the wording used in Section 41; and second, in the absence of restrictive wording in the sections which specify the powers and duties of the Board (see Footnote 24). The extent to which this discretion is exercised is described in Part 2.1.5., infra.

2. Nature and mix of functions

The Board is clearly an adjudicative tribunal whose powers to regulate are "enabling" only.\textsuperscript{25}

According to Woods, a complete picture of the functions and responsibilities of any labour relations board can be seen only by examining all of the clauses of the particular act.\textsuperscript{26} What he attempted to do was categorize the more significant functions of the board as a means of presenting
a broad picture of its essential character. Those functions, in a Saskatchewan context, are as follows:

1) Functions related to representational and collective bargaining rights

The Saskatchewan Board becomes involved in questions of bargaining rights through its control over the certification process, which is one of two paths to the securing of bargaining rights in this province. The Board receives the application, decides on the appropriateness or otherwise for collective bargaining purposes of the unit, determines the number of members of the applicant union there are in the bargaining unit, conducts representation votes as required by the Act, and certifies the union if it meets the requirements.

There is also provision in Section 5(k) for the termination of bargaining rights by the Board.

2) Functions related to enforcement

The rights set out in The Trade Union Act are protected by prohibitions against unfair labour practices. In Saskatchewan, the problem of enforcement, as I have already indicated in Part 1.3., has been assigned to the Board.

The Board may make an order determining whether an unfair labour practice or a violation of the Act has
occurred, \(^{32}\) and also requiring the offender to refrain from engaging in such activity. \(^{33}\) This approach forecast a general tendency in Canada to increase the jurisdiction of labour relations boards and to discourage resort to the courts. \(^{34}\)

3) Functions concerned with actual bargaining or negotiation

Section 24 of the Act does provide for reference to the Board, with the agreement of both parties, of a dispute, and the finding of the Board shall be final and conclusive. This opportunity for the Board to hear "interest" disputes has not, however, resulted in any extensive involvement on its part in the area of negotiations. \(^{35}\)

4) Functions involving specific clauses in agreements

Unlike the case in some other jurisdictions, the Board does not serve as an agency through which certain statutory arbitration clauses required to be included in agreements are, in fact, included.

The Act does, however, provide for arbitration powers and procedure in the absence of same being included in the particular agreement if, and only if, there is a "no strike, no lock-out" clause and/or a provision for final settlement by arbitration, and gives the decision of the arbitrator the same force and effect as an order of the Board. \(^{36}\)

Section 33 provides for the continued operation of every agreement from term to term, the minimum length being one year, where no notice is given to terminate or negotiate a revision. \(^{37}\)
Where a union represents employees employed by one employer in two or more plants, Section 34 permits the Board, on application, to establish a common expiry date for the various agreements.

And, upon the request of the union, Section 35 provides for the inclusion of a statutory union security clause.

5) Functions concerned with union government

So long as the union is not functioning in a way which is patently illegal, the Board has seen fit to be unconcerned with its internal deliberations.38 There is, for example, no requirement for audited statements and other documents to be filed, nor is there provision for the Board to establish a trusteeship over any union in order to protect its local members from abuse of power exercised by the national/international head office.

Sections 36 and 37 do ensure the transfer and continuation of obligations, unless the Board otherwise orders, in the circumstances where a business is disposed of. Similarly, no existing agreement is to be influenced by any change in the form of a certified trade union.39

6) Functions involving labour relations and the courts

The principal causes of court action are:

a. failure to abide by an order of the Board which
has been properly filed with the court and is thereupon enforceable as a judgement of the court, and

b. an allegation that the Board has itself acted unlawfully.

It is not necessary for the parties to resort to the mechanism of prosecution where, for example, individual employee rights are denied or the employer refuses to bargain collectively. As already indicated, the Board is empowered under Section 5 to order the parties cease and desist from committing the particular violation. Section 13 gives such order; when filed, the same force and effect as an order of the court.

Although Section 21 purports to immunize the Board from appeal, there has been considerable review of Board decisions (Part 2.3. refers).

1.3. Board and Staff Organization

1. Relevant sections of the Act

Section 4(1) of the Act states that the Board is to be composed of five members appointed by the Lieutenant Governor-in-Council. One of these is to be named Chairman, and another, Vice-Chairman, and the membership is to be
made up in such a way that employers and organized employees are equally represented. One may assume from that that the Chairman is intended to be neutral, and in that regard, the appointment has, except in the first instance, always gone to a member of the legal profession. There is also provision in Section 4(7) for the appointment of alternate members. Two alternates are presently appointed to represent each side, but that will soon be increased to three.

Section 4(11) allows for the appointment of an Executive Officer who is to act as an agent of the Board and is to perform such duties as the Board may direct. Innis Christie commented on this provision as being a significant departure in the administrative process, and a very practical step for a small province with a part-time Board. Albeit that certain functions or powers have been delegated to the Executive Officer, the Board may, upon the request of an affected party, exercise its powers with respect to that matter as if the Executive Officer had not performed the delegated function. It is regrettable that limited use has been made of this appointment because of early misunderstandings of what the job entailed. Only in February of this year was a new Executive Officer appointed to fill a vacancy which had existed for over two years.

Such technical, clerical and secretarial assistance as the Board may require is to be provided by the Minister of Labour under the authority of Section 17(4). At present,
the Board has the support of four clerical personnel, the most senior of whom functions as its Secretary.

2. Formal relationship to the Minister and Department of Labour

Other than its dependence with respect to the appointment of its members and Executive Officer, the provision of a support staff and the approval of regulations made by it, the Board exists as an entity separate and distinct from both the Minister and the Department of Labour. The Department has the highest respect for the independent operation of the Board, and has scrupulously worked towards maintaining that position in the eyes of those whose interests are affected by what the Board does.

There is no hesitation among members of the Board to confirm that this is, indeed, the relationship.

3. Nature of the Board's make-up and how appointed

One of the most important facts about the composition of the Board is that it includes only one lawyer. Weiler suggests that this is just about the right balance in labour relations. The tri-partite composition is traditional in Canadian labour law, although it was originally the case that the Saskatchewan Board also included two representatives of the public at large. This arrangement has been dispensed with in the present Act. Another
interesting fact is that there is no legislative restriction on the number of years which members may serve. The present make-up of the Board is shown in Table 1.

As already indicated, the appointment of members to the Board is the function of the Lieutenant Governor-in-Council. In practice, the respective constituent groups are asked for nominations to fill a vacancy. In the case of an employee representative, the Saskatchewan Federation of Labour is asked; in the case of an employer representative, a mailing list of employers and employer organizations is used for the purpose of soliciting such nominations. Once these nominations are received, the Minister, in consultation with his Deputy, puts forward a recommendation to Cabinet. In this decision-making process, the two of them have always attempted to maintain geographic balance between the northern and southern halves of the province, and more recently have attempted to ensure that a representative of the Co-ops is on the Board. It is apparent that, as the Board sits more frequently, it is becoming increasingly difficult to solicit names. There is no evidence of any decline in quality, however, since both sides are aware (management more so than it used to be) of the importance of the Board's role.

Insofar as the appointment of the Chairman is concerned, the Department recently underwent an exercise of just that sort. Only lawyers in or from the province were
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<td>employee member (Jan/72)</td>
<td>United Transportation Union</td>
</tr>
<tr>
<td></td>
<td></td>
<td>employee alternate (Aug/72)</td>
<td></td>
</tr>
<tr>
<td>B. McDonald</td>
<td>Saskatoon</td>
<td>employee alternate (Dec/74)</td>
<td>Painters and Decorators Union</td>
</tr>
<tr>
<td>A.F. Fryers</td>
<td>Moose Jaw</td>
<td>employer alternate (Oct/76)</td>
<td>CPR (retired)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. Raycroft</td>
<td>Saskatoon</td>
<td>employer member (Oct/76)</td>
<td>Intercontinental Packers (retired)</td>
</tr>
<tr>
<td>C. Lyons</td>
<td>Saskatoon</td>
<td>employee member (temporary Jun/56)</td>
<td>Canadian Food and Allied Workers</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(regular Feb/58)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(temporary Feb/77)</td>
<td></td>
</tr>
<tr>
<td>D.V. Carr</td>
<td>Saskatoon</td>
<td>employer alternate (Mar/77)</td>
<td>Federated Co-op</td>
</tr>
<tr>
<td>F.H. Hoskins</td>
<td>Regina</td>
<td>employer alternate (Dec/74)</td>
<td>IPSCO</td>
</tr>
<tr>
<td></td>
<td></td>
<td>employer member (May/76)</td>
<td></td>
</tr>
</tbody>
</table>
considered. Cabinet reaction to the initial selection was obtained, following which the Saskatchewan Federation of Labour and selected management counsel were asked for their opinions. In the absence of strong objection, the present appointment was made.

The selection processes just described constitute but one illustration of how acutely aware the Department is of its "clientele" role. Once those appointments become effective, however, the role abruptly terminates, and the Department assumes its non-interventionist stance.

4. Staff functions

The role of the Executive Officer at the time of writing is very much a process of the incumbent "feeling his way". Having experienced disappointment in the use of his predecessors, there is reluctance on the part of some members to give too much scope to this position. On the other hand, there is considerable potential here for relieving the Board of some of its present work load, much of which is unnecessarily before it. The present Executive Officer, Graham Mitchell, has an extensive background in conciliation, and it would therefore seem natural to continue in this, as well as in an investigational, role, while remaining strictly accountable to the Board. There are also certain administrative functions which he could assume from both the Chairman and the Secretary.
In addition to the Executive Officer, there is a support staff, whose functions include the following:

1) receive and process applications in accordance with the Regulations,
2) prepare and summarize files for hearings,
3) make logistic arrangements for hearings,
4) record the proceedings of hearings and in-camera meetings,
5) prepare orders,
6) prepare reports on Board activities,
7) process accounts, and
8) deal with inquiries concerning Board activities.

Having regard to the highly technical and confidential nature of this work, the increasing number of applications before the Board and the very nature of the Board itself, moving as it does between Regina and Saskatoon and sitting only on a part-time basis, the support which is provided by this small staff is commendable.

5. Scheduled sittings and meetings

The Board, as already indicated, operates only on a part-time basis. Sittings are normally scheduled to commence in Regina on the first Monday of every month, and in Saskatoon, on the third Monday. The advantage of this arrangement is intended to be that members of the Board continue to function in their normal working environments so that they will not lose contact with the interests which they are appointed to
represent. The disadvantage is that a case load can easily accumulate, thereby resulting in unfortunate delay. The reality of the situation, which will be discussed in greater detail infra, is that sometimes neither end is achieved. The Board sat steadily from the first of the year until April 18, 1977. This went a long way towards disposing of the backlog, but it also did considerable damage to the Board's "part-time" image. As of April 18, 1977, the case-load was such that sittings could again be scheduled during alternate weeks.

In camera meetings are scheduled as required to deal with the caseload. When one imposes this obligation on top of the regular sittings, it is not difficult to appreciate why the Board has experienced recent problems in keeping members.

During the above-mentioned run of cases, the Board was unable to continue its practice of meeting regularly, alone or with its support staff, to discuss matters of procedure and policy. The presence of the new Executive Officer has, however, facilitated considerable informal discussion.

1.4. Procedures

1. Re applications

The rules governing the submission of applications
to the Board, and their handling by the Board, as well as the forms to be completed in conjunction therewith, are set out in Regulation No. 163/72.

Table 2 indicates the types of applications which the Board is empowered to hear, along with the relevant sections of the Act and Regulations, as well as the forms to be used.

Table 3 provides, in schematic form, an outline of steps to be followed in handling an application generally, as well as an application for certification, which digresses from the usual chain of events to a considerable extent.

If a vote becomes necessary under Section 6, the procedure set out in Table 4 is observed.

An impression of the volume of applications received by the Board, and their type and disposition, can be gained by reference to Tables 5 and 6.

As already indicated, it is the responsibility of the support staff, and in particular the Secretary, to receive and process these applications in accordance with Regulation No. 163/72. Applications are examined when received, and may be rejected if incomplete or improperly prepared. On receipt of a satisfactory application, the rules require the Secretary to ensure that all interested parties are made aware of the proceedings. For this purpose, the former Secretary prepared a number of form letters which are used
<table>
<thead>
<tr>
<th>Type</th>
<th>Section</th>
<th>Rule</th>
<th>Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Certification</td>
<td>5(a),(b),(c)</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>(2) Unfair labour practice</td>
<td>5(d),(e)</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>(3) Reinstatement</td>
<td>5(d),(f)</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>(4) Monetary loss</td>
<td>5(g)</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>(5) Company-dominated organization</td>
<td>5(h)</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>(6) Rescission or amendment</td>
<td>5(i)</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>(7) Exclusion on religious grounds</td>
<td>5(1)</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>(8) Rescission alleging fraud</td>
<td>16</td>
<td>12</td>
<td>8</td>
</tr>
<tr>
<td>(9) Reference of dispute</td>
<td>24</td>
<td>13</td>
<td>9</td>
</tr>
<tr>
<td>(10) Technological change</td>
<td>42</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Table 3</td>
<td></td>
<td></td>
<td></td>
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<td>---</td>
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<td></td>
</tr>
<tr>
<td><strong>Outline of Procedural Steps in Handling an Application</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Application filed with Secretary (with 2 copies)</strong></td>
<td>(Rule 14)</td>
</tr>
<tr>
<td><strong>Copy of application sent by Secretary to all interested parties</strong></td>
<td>(Rule 16)</td>
</tr>
<tr>
<td><strong>Certification</strong></td>
<td></td>
</tr>
<tr>
<td>(Rule 17) Intervenor may give notice to Board within 12/10 days—may include a counter-application for certification</td>
<td>(Form 10)</td>
</tr>
<tr>
<td></td>
<td>Employer or other interested party may reply within 12/10 days</td>
</tr>
<tr>
<td></td>
<td>(Form 11)</td>
</tr>
<tr>
<td>(Rule 19) Secretary forwards copy of intervention to applicant and employer</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Secretary forwards copy of reply to applicant</td>
</tr>
<tr>
<td>(Rule 21(3)) Secretary may ask employer to file statement of employment</td>
<td>(Form 12)</td>
</tr>
</tbody>
</table>

- 24 -
(Rule 21(4)) Secretary may require employer to permit an agent of the Board to interview employees and inspect records.

(Rule 21(5)) Copy of statement of employment is forwarded to Secretary.

Notice of hearing given by Secretary to all interested parties (Rule 23)

Hearing may be held anytime after 12 days following receipt of application by Board (Rule 24)

(Application may be adjourned even after hearing has commenced) (Rule 25)
TABLE 4

**Conduct of Vote**

Chairman appoints an agent (Rule 26)

Agent conducts vote per Rules 26 and 28 (Form 13)

Agent files report with Secretary, with copies to employer and union (Form 14)

Objection may be made to Secretary by any union or person affected within 3 days of last voting day (Form 15)
TABLE 5
APPLICATIONS TO SASK. LABOUR RELATIONS BOARD UNDER SEC. 5 OF TRADE UNION ACT
BY TYPE OF APPLICATION, 1945-1977

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Applications</th>
<th>Certification</th>
<th>Amendment or Rescission</th>
<th>Unfair Labour Practice</th>
<th>Reinstatement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1945</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1950-53</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1956-57</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1961-62</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1966-67</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1971-72</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976-77</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: (and monetary loss - first recorded in '65-66)
TABLE 6
APPLICATIONS TO SASK. LABOUR RELATIONS BOARD UNDER SEC. 5 OF TRADE UNION ACT
BY DISPOSITION, 1945-77

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Applications</th>
<th>Applications Granted</th>
<th>Applications Withdrawn</th>
<th>Applications Dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1945</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1952-53</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1956-57</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1961-62</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1966-67</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1971-72</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976-77</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
to ensure consistency, and these also form an important part of a massive procedural manual which she has prepared for the guidance of the staff in handling applications. An attempt was made to cut down on correspondence, but the unfortunate results of that attempt were to create some procedural uncertainty and to produce technical objections at hearings.

The Secretary has the authority of the Board to extend the time limit set down in the regulations, and she will do so, provided that no prejudice will arise to the parties affected by the particular oversight. I was pleasantly surprised to learn that the exercise of this prerogative does not produce great numbers of preliminary objections at hearings.

Scheduling of cases was personally attended to by the former Chairman, but has now become a function of the Executive Officer. Generally, applications are scheduled to be heard on the basis of "first come - first serve". Exceptions are made, however, where the livelihood of an individual is at stake; for example, reinstatement and monetary loss will go to the top of the list whenever possible. Once assigned to a given sitting, the applications are then arranged in such a way that the uncontested ones will be dispensed with first. Agendas are prepared ten days prior to the particular sitting, and are sent to the parties and their counsel, as well as to a limited
mailing list. The agenda is enclosed with a covering letter which advises the recipients that it constitutes official notice of the hearing. Should the parties not be prepared to proceed, they are asked to give the Board the earliest possible notice.

The procedure regarding applications concludes when the Secretary hands over the file to the Board, enclosing a summary of the contents relating to the particular application, as well as copies of all relevant documentation for each member of the panel.

To assist the staff in carrying out these procedures, the Secretary, as already indicated, has prepared a procedural manual which sets down the steps to be taken at each stage of the proceeding, and the forms and form letters to be used in conjunction therewith. Table 7 is an extract from the Table of Contents of this manual, and although it requires some up-dating, it is obviously invaluable to those persons who participate in this aspect of the administrative process. High on the list of priorities of the new Executive Officer and Secretary (when appointed), is a review of these, and other, procedures. There is simply too much time and paper being expended to deal with even the simplest application.

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TABLE 7
EXTRACT FROM
TABLE OF CONTENTS
OF BOARD PROCEDURAL MANUAL

I. CERTIFICATION

1. Application Form - Form 1.................................1
2. Receiving Applications........................................4
3. Processing Application.......................................7
4. Rough Summary................................................15
5. Final Notice for S of E.......................................16
6. Statement of Employment - Form 12..........................17
7. Procedure - Receipt of S of E...............................20
8. Tallying of S of E.............................................22
9. Reply - Form 11................................................24
10. Procedure - Receipt of Reply................................26
11. Procedure - Receipt of S of E and Reply at one time....28
12. Letters of Withdrawal - Evidence of Support...............29
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15. Drafting Board Orders - Dismissed........................36
16. Filing of Board Orders in Court............................38
17. Sending of Board Orders to Parties.........................39
18. Application Withdrawn.......................................41
19. Application Adjourned......................................42
20. Closing Files..................................................43
2. Re hearings

Although numerous sections of the Act allude to the conduct of hearings, nowhere does it say that a hearing must be held, and only in Section 19 is reference made to "proceedings". Some guidance is given in Rules 22 to 25 inclusive, but the basic questions of whether to hold a hearing and what format will be observed in the conduct of such a hearing seem to be left to the discretion of the Board. As a matter of practice, a hearing is conducted in every case of an application being properly received.

Hearings begin each first and third Monday at 10:00 a.m. (a recent change from 2:00 p.m.), and continue as long as required. The agenda is followed as closely as possible, and all of the proceedings are recorded.

Each day at the outset, parties are given the opportunity to speak to matters scheduled to be heard that day or even later in the week.

Once underway, the proceedings generally tend to follow the same pattern as one would expect to find in a civil court. The applicant presents his case and the respondent and any interveners are expected to reply using the established format of examination, cross-examination and re-examination, followed by argument. A degree of informality is apparent here in the sense that the above order of presentation is not always rigorously observed and the parties will always get the opportunity to say all they
want to even though they may have used up their turn.
Evidence is led and exhibits are filed in the same quasi-
judicial manner. Witnesses are always sworn.

At the conclusion of the hearing, the decision is
always reserved. Again, there is no legislative guidance
as to the manner in which the decision will be rendered.
As a matter of practice, the Board meets as soon after the
hearing of a particular application as possible and the
decision is provided to the Secretary for promulgation.
At this time, the Chairman will decide whether or not
written reasons are to be given.

I have intentionally provided the reader with only
the barest outline of the hearing and decision-making
processes at this point, since they will be the subject
of greater discussion in Part 2, infra.


3. By enacting 55-56 V., c. 29, ss. 516 & 517, the provisions of the *Trade Union Act*, 1872, which had freed unions from criminal liability as combinations in restraint of trade, were added to the *Criminal Code* without the former limitation to registered unions.


13. Ibid, 97-98.


16. Letter from C. C. Williams (then Saskatchewan Minister of Labour) to T. C. Douglas (then Premier), August 29, 1944.


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23. The Trade Union Act, 1972, s. 18.

24. Refer to Sections 2(f) & (g), 6,9,10,14,16,17,19,24,34,36,38 and 42 of The Trade Union Act, 1972.

25. See The Trade Union Act, 1972, s. 17.


27. The Trade Union Act, 1972, s. 5(a).

28. Ibid, s. 5(b).

29. Ibid, s. 6.

30. Ibid, s. 5(c).

31. Ibid, s. 11.

32. Ibid, s. 5(d).

33. Ibid, s. 5(e).

34. Woods, supra footnote 1, at 149; D.D. Carter, "The Expansion of Labour Board Remedies", Industrial Relations Centre Queen's University, Research and Current Issues Series No. 34, 1976.

35. Only one such dispute was heard in the year ending March 31, 1977. By "interest" dispute, I mean a disagreement over what ought to be included in a future agreement.


37. Note that Section 33 was recently amended by Bill No. 107 of 1976-77, following the decision of the Sask. Court of Appeal in Morris Rodweeder v Chris Banting et al (Feb. 21, 1977).

38. Oil Workers International Union, Local 595 v The British America Oil Co. Ltd. (1948), 1 SLRB 359.

39. The Trade Union Act, 1972, s. 38.

40. W.K. Bryden, the first Chairman, although not legally trained, had played an important part in producing the Act in his capacity as Special Advisor to the Minister of Labour.

41. This information was obtained in the course of a confidential interview, and the source may not be disclosed.


43. Confidential source.

44. The Secretary's position has been vacant since end-March, 1977.
45. Statement made by R.W. Mitchell, Deputy Minister of Labour, in the course of a personal interview.


47. The Trade Union Act, 1944, s. 4.


49. N.W. Sherstobitoff, a Saskatoon Lawyer, was appointed Chairman March 23, 1977.

50. Mitchell interview, supra footnote 45.

51. This information was obtained in the course of confidential interviews, and the sources may not be disclosed.

52. Five members of the Board (Peet, Hazen, Hoskins, Gerecke and Forsyth) have had to be replaced since this study was commenced in September, 1976.


54. Statistics taken from Department of Labour Annual Reports, 1945-76.
2. WORK PROCESSES AND POLICY DEVELOPMENT

This part attempts to describe how the Board is set up to make decisions and how, in fact, it makes those decisions. There are two aspects to the decision-making process: first, there is the formal decision-making body, which conducts its proceedings in an adversarial manner; and second, there is the more informal body which actually makes the decisions. Each of these bodies utilizes certain processes, and it is a description of these processes which represents the second essential element of this paper.

To avoid assessing the Board's processes and policies in a vacuum, I have had to make some comparisons, and even suggest ways of improving upon the present situation. This has also been done to put the Board into a perspective which will permit the reader to make his own assessment. I reiterate, however, that my objective in Part 2 is to reflect what the present Board is doing, and not how it should be doing it.

2.1 Formal and Informal Decision-making Structures and Processes

1. Reliance on the adversary system

As already indicated, the Board observes the adversary system in the conduct of its hearings, and it conducts a hearing in the case of each and every application. Delay, expense, reliance on technicalities and imbalance of expertise are criticisms of this approach which hardly require re-statement. Interestingly enough, the views of those who play a part in the hearing process - both Board members and counsel - as well as interested observers, are not consistent. Those who believe that the Board has failed
in its fundamental purpose of providing an informal adjudicative mechanism are outnumbered by those who contend that the absence of formality would permit animosities to bubble over, would render Board decisions subject to more frequent appeal and might even reduce the significance of the proceedings.

The Board can, to some extent, control the degree of formality which is observed, and where an unrepresented party appears before it, there is an obvious tendency for the Board to make him/her feel at ease. In one particular case, the applicant told the Board that he didn't know whether it was necessary to lead evidence. The Chairman examined the file, asked a number of questions and then concluded that nothing more was required of the parties. Where the two sides are represented by counsel, particularly where counsel are equally matched, the Board is more inclined to sit back and allow the proceedings to take their course. That course is usually as formal as one would expect to find in any courtroom. Simply put, the hearing will only become as formal as the parties choose to make it.

Where an imbalance of expertise arises, i.e. layman versus lawyer, the Board walks a very narrow line between helping the layman to present his case versus helping him to win his case. Because management uses a lawyer in almost every case, while labour often does not, the Board regularly faces this problem.

What alternatives are available to the Board? It is not surprising that a large number of administrative tribunals in this country have developed other models to at least supplement,
if not replace, the adversary system. Many of these are obviously not suited to the adjudicative-type of tribunal, but it is suggested that the following are applicable:

1) Pre-hearing discussion

The Executive Officer or a duly appointed agent of the Board could meet with the parties to determine such things as whether oral representations would actually be made at a hearing, whether it was the intention of the respondent to contest the application, whether the parties were more in need of the services of a conciliator or arbitrator and the anticipated length of the hearing. Such an approach would not only assist in the preparation of the agenda, but it might very well preclude the need for formal hearings in many cases. Tentative steps have been taken in this direction.

2) Hearings in Writing

Where the facts are relatively simple and the respondent has indicated that he will not contest the application, it is suggested that the Board could render its decision on the basis of materials filed with it, thereby avoiding the necessity of having the applicant appear before the Board simply to refer the Board to its filed materials. This approach is now being seriously considered by the Chairman.

3) Investigation

As distinct from the pre-hearing discussion referred to in 1), supra, the Board could be equipped to formally
investigate applications brought before it with a view to disposing of the matter without the formality of a hearing. The model for such an approach is that established by Paul Weiler, Chairman of the British Columbia Labour Relations Board. Without arguing the merits of the mandate given to the B.C. Board, there would appear to be certain circumstances in which applications before the Saskatchewan Board could be formally investigated by an officer appointed for the purpose, with a view to providing a confidential report to the Board. The Board could render its decision based on that report, or for example, in the case of an application alleging an unfair labour practice, the Board could decide whether it or a conciliator or an arbitration board was better suited to hear the matter. This approach would also prevent the use of an application to the Board as a bargaining tactic. Additional staff would obviously be required, but these could come from elsewhere in the Department of Labour.

4) Delegation of decision-making responsibility to the Executive Officer

As opposed to alternatives 1) and 3), supra, the Board could avail itself of the authority presently given it in Section 4 (12) to delegate to the Executive Officer the ability to make decisions in the field. A suitable illustration of this power would be the uncontested application for certification. At the time of writing, it is my understanding that the Chairman has directed the Executive Officer to look into the merits of greater delegation generally,
with a first step being interim certification in the construction industry.

The foregoing suggestions are not revolutionary, nor are they without criticism. There are those who feel that reliance on any of the above would tend to prolong the process, and there are others who see such attempts as interfering with the fundamental right to a hearing. My intention in enumerating these suggestions is not to encourage their adoption, but rather to point out that there are alternatives to the adversary system, whose disadvantages have already been briefly mentioned.

A recent statement by the Chairman to the effect that the hearing time of the Board is a scarce resource which must be carefully husbanded suggests to me that such changes are most likely. In fact, he intends to use the Executive Officer in particular to supplement the present approach.

2. Decision-making process following a hearing

Armed with their summary books and notes of the proceedings, the particular panel which has heard an application will attempt to meet in camera as soon as possible thereafter in order to render a decision. In many cases, this can be accomplished the same day, since huge gaps often appear in the agenda as the result of adjournments, withdrawals, etc. Only on those occasions when the notes of the individual members are in disagreement will the Secretary replay the tape of the proceedings. The Executive Officer usually attends,
along with the Secretary.

Generally speaking, the Chairman or Vice-Chairman, depending on who is presiding, will initiate the discussion of a particular application. Where the application is unopposed and is technically correct, the Board will generally approve it. Slight irregularities in the documentation are sometimes corrected by the Board itself. The Board is concerned about condoning sloppy practices, however, so a party may be surprised to find his application dismissed despite the absence of objection from the respondent or the Board at the hearing. Even in unopposed applications, there may still be discussion of what is proposed to ensure that a basis is being provided for good relations between the parties, e.g. the composition of a proposed bargaining unit.

In more complicated cases, the Chairman will generally set out the issues as he sees them, along with the various factors and alternatives which should be considered, particularly the legal ones. Having focussed on the essential aspects of the application, the Chairman will either set out himself what has been the practice of the Board, or he may invite the Vice-Chairman to do so because of his thirteen years' experience. A full discussion generally follows and concludes with a motion, vote and resolution on each issue. As much discussion as is necessary takes place, and it may even require a postponement for the purpose of obtaining legal advice. The latter has generally occurred in the absence of the Chairman, since he is the
only member of the Board who is legally trained. Considerable care is also taken in articulating the final decision, so as to minimize misunderstanding. A record is kept by the Secretary only of the results of the various motions; no record is kept of the actual discussion.

Once a conclusion is reached, the Board will then decide whether to provide written reasons. It used to be the practice that reasons could be requested by the parties. The present Chairman has, however, stated that the Board will only provide reasons where the Board itself deems it necessary. In that regard, he has given written reasons on four of the applications heard between the date of his appointment and June 8th, 1977. Whoever is presiding will write the decision in each case. A copy will be given to each of the members, and dissents or comments will be requested by a specific date.

A number of observations may be made about this process. The discussion really takes place in two stages: formal and informal, the latter involving two or three members while the others are preoccupied with something else or are absent. In each case, as might be expected, the discussion is dominated by the Chairman (or the Vice-Chairman, where he is presiding). Members are generally more outspoken where their particular constituent group is involved, e.g., the building trades, a manufacturing plant, etc.

The Chairman occasionally has to encourage a member to participate, but none of the members could really be described
as "shy".

Considerable reliance is placed on precedent, not only in the interests of consistency, but to avoid the need for repetitious discussion. In this regard, members look to the experience of the Chairman and Vice-Chairman. In fact, the Chairman often has to "educate" the newer members on matters of Board policy and legal interpretation. Although the Board is concerned with past practice, it will not hesitate to digress where an application merits special treatment. It may be observed here that the Board is not provided with as much assistance as it could be by counsel, who sometimes neglect to direct the Board's attention to the proper precedents.

On the point of representing interest groups, individual Board members do not seem to feel obliged to lobby on behalf of their particular interest in every case. This is probably more true in the case of the management representatives, since there is not the same consensus of interests as there is on the side of labour. Following heated discussions in some cases, there would seem to be genuine interest on the part of members to produce a result which is fair, and one which will not lead to a recurrence of the same kind of controversy. Once a decision of the majority has been reached, an individual member will not dissent in writing unless he is strongly opposed to the result. In this regard, most members are more concerned that the Board portray an image of unanimity rather than that they are seen by their respective constituencies as openly and vigorously representing their interests.
Although decision-making follows closely upon the heels of the hearing of an application, there are unfortunate delays in providing the decision to the parties. The small support staff can simply not turn them out any more quickly, and a further wait is experienced until they can be signed. Where reasons are to be provided, these must be mailed to the members who participated. Their comments aren't received until the next time the Board meets, and revision is often necessary. The absence of a Secretary at this time doesn't help matters.

Matters could be expedited in a couple of ways. Once a decision has been made, the parties could be advised by telephone, with the order to follow. Where reasons are being given, any discussion that needs to follow could be handled by conference telephone call.

3. Extent to which the Board monitors compliance

An order of the Board is given the same force and effect as a judgement of the Court of Queen's Bench if filed with the Registrar of that Court within fourteen days of its issue. This is another job of the support staff. The order having been filed, a question arises as to the extent to which it should be enforced by the Board itself by invoking the penalty provided for in Section 15(2). In a recent decision of the Saskatchewan Court of Appeal in SLRB v The Daschuk Lumber Ltd. et al, Chief Justice Culliton refused to overturn a
decision of Hughes, J., who had declined to invoke penal sanctions against the employer when it became apparent that the relief sought in the original applications to the Board had been satisfied. Since the main concern of the Board was, in his opinion, for the enforcement of its orders, Mr. Justice Hughes exercised his discretion in favour of the employer.

The members of the Board would naturally prefer that the parties voluntarily comply with its orders, and are generally opposed to playing an enforcement role. In light of the Daschuk decision, Board members generally agree that this aspect of the legislation could be strengthened; however, they are not in agreement as to how this can be achieved. If there is any consensus of opinion, it is to the effect that the court should retain the responsibility, and that it should be the parties themselves who choose whether to pursue this means.

4. Reliance on the common law rules of natural justice

Most Board members seem to be very aware of the broad notion that "justice must be seen to be done". To give the reader some indication of its relative importance, all of the members to whom I spoke attached a greater importance to it than to any obligation towards their respective constituencies—so long as their side receives a fair hearing. The new Chairman was equally impressed by this attitude.

One obvious application of these "rules" is a disqualification by the member himself where he has an affiliation with
a party, or when he has "insider knowledge" of the circumstances surrounding the application. None of the members could recall an instance in which a member had to be told that he was not able to hear a particular application. This proved not to be entirely accurate; for example, I observed the Vice-Chairman who is a former CUPE agent, sitting on numerous CUPE applications.

There are also occasions when the Board has to go "short" i.e. with four members, as well as times when the Vice-Chairman presides, that must make parties a little concerned.

A more favourable example was provided in a recent case. No one appearing for the respondent, the Board had issued an order for certification to CUPE Local 2070 in respect of certain employees in the Town of Wilkie. When it learned that the respondent's absence was due to a misunderstanding, the Board applied one of the fundamental rules of natural justice - the right to be heard - in rescinding its earlier order and setting the matter down at the next sitting.

One interesting area in which the rules of natural justice may be tested has to do with the anticipated employment of the Executive Officer. In dealing with and advising parties who may or may not eventually appear before the Board, he will be required to make a fine distinction between advising them based on his own experience as opposed to his intimate knowledge of Board decision-making. There is the equally important converse to that proposition, namely, whether what he has learned from the parties may be communicated to the Board to the possible prejudice of those parties' interests.
5. Exercise of discretion

The extent to which the Board is authorized to exercise discretion in certain circumstances has already been dealt with in Part 1.2., supra. The extent to which the Board actually does exercise that discretion is, quite naturally, subject to numerous variables. Suffice it to say that the Board is very much aware of its discretionary power, and does not hesitate to exercise it.

The most important discretionary act could very well be the negative one, i.e. not to hear an application. A recent illustration is to be found in a series of applications brought by RWSU Local No. 955 in respect of the discharge of a second group of employees by Morris Rod Weeder Co. Ltd. In an earlier number of applications respecting the discharge of the first group of employees, the Board agreed with the respondent that the matter was already before an arbitrator, whose decision in the matter should be solely binding. On the second occasion, however, the applicant had not pursued its arbitral remedy, and because there was no longer time to do so, the Board was faced with the prospect of leaving the employees without any hope of reinstatement. The latter decision is awaiting the outcome of the appeal of the first decision.

Rather than attempting to exhaustively illustrate the occasions on which I observed discretion being exercised, it might be more useful to examine whether that discretionary power has been properly used. An administrative process, by
its very definition, must entail informal discretionary action. Whether that discretion is being misused is, therefore, a matter of degree. What is misuse to one person in one set of circumstances is, to his opponent, often rather satisfying. Management is of the opinion that the exercise of Board discretion is clearly predisposed towards labour. Labour's reply is that the Act is labour-oriented and that the Board is simply exercising its mandate.

K. C. Davis has said that:

When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion to principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rule-making power.

Those who argue for or against the control of discretion cannot really quarrel with what Davis says, since he leaves it to the particular agency to decide how best and how quickly to go about structuring its own discretion.

It has been the practice of this Board to follow the second course of issuing adjudicatory opinions, and so long as some consistency is maintained, it is unfair to criticize that approach. The argument contra is that the dearth of such opinions has left the parties in a considerable state of uncertainty and subject to the arbitrariness of the Board. Again, the question of how much law is required is a matter of degree.
The ambivalence towards discretionary power is not peculiar to the parties who appear before the Board; the Board itself has, on occasion, agonized over having too much or too little discretion in particular circumstances. My examination of policy development on the subject of "employee status" in Part 2.2.3. infra, is fairly indicative of that. One Board member expressed it as follows: "We are faced with a win-lose proposition in which neither side is usually entirely correct, and it's our job to provide a workable solution - a compromise if necessary".

Perhaps the safest indicator of whether discretion has been exercised excessively is the record of the Board before the Court of Appeal. Since this will be the subject of more detailed discussion under Part 2.3., infra, it is necessary for present purposes to say only that the Board has earned the respect of that Court, having been reversed on only one occasion in the last several years.11

2.2 Policy Guidelines for Decisions

1. Guidelines provided by the legislation

The Trade Union Act is a classic illustration of the legislative approach: "Here is a problem. We've set out in the statute some very general policy guidelines: now go away and deal with it in the public interest".12
To enable the Board to "go away and deal with it", it has been empowered, in Section 17 (1), to "make such rules and regulations, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent".

As to the question of sufficiency of policy guidelines in the legislation itself, most Board members and counsel feel that the legislation is acceptable, and provides the Board with the desired amount of discretion. There are cases, however, where the absence of clear legislative direction in certain parts of the Act has posed a problem both for the Board and for the parties. An illustration of such a problem area will be dealt with in Part 2.2.d, infra.

A second criticism, which flows directly from the first, is that the parties are often forced to seek legal counsel to "read between the lines" of the Act.

2. Guidelines laid down by the Board

The guidelines which have been laid down by the Board fall under two separate headings, and have taken two distinctly different forms:

1) Procedural

The extent to which procedural guidelines have been promulgated has already been the subject of discussion in Part 1.4.1., supra. There is some criticism of the requirements for a statutory declaration in the application and reply, which is contrary to the practice in
civil courts, and of the lack of particulars in many cases; otherwise, they would seem to be sufficient to permit the parties to get themselves before the Board. Unless one regularly appears before that body, however, what happens thereafter can be somewhat uncertain.

The parties may turn to two sources for assistance: the Executive Officer or Secretary of the Board, or legal counsel. There would seem here to be an opportunity for the Board to better publicize the "rules of practice" by which it is guided. By way of illustration, I would refer the reader to the Practice Notes promulgated by the Labour Relations Board of Ontario. The detailed nature of such guidelines is clearly beyond the scope of this paper, and I also understand that the Executive Officer is considering the feasibility of producing such guidelines.

2) Substantive

Of greater importance is the development of substantive guidelines, which are presently provided exclusively through the medium of adjudication. A further limitation is imposed by the fact that the Board does not issue written reasons on every occasion. It could then be suggested that the lack of precedents forces the parties to go back to the Board time and again for resolution of the same kind of issue, since there is little in writing to assist them in making their own decisions.
It would be unfair to suggest that the Board has not formulated rules for its own observance. There is considerable reluctance, however, to articulate and publicize hypothetical rules for fear of inhibiting future discretionary action. There is also, of course, the restraint of time imposed on a part-time Board which simply does not permit the production of extensive jurisprudence.

The above criticisms tend to "lose water" when one sees an applicant making the same mistake on numerous occasions, even though the Board has provided guidelines in writing and has told him he's in error. I would like to believe that this is an exception rather than the rule, however.

There are solutions to this problem, if in fact it is a problem. I did get the feeling that some parties were before the Board for purposes which were strictly litigious, and that victory was more important than receiving a well-reasoned solution to the issue.

An obvious answer is the publication of Board decisions, and court cases arising therefrom, from 1955 to the present day. It is unfortunate that a shortage of funds should preclude the continuation of the first volume of the SLRB Reports, which has only recently been released.

Another obvious suggestion is to produce more reasons in writing. This would, however, undoubtedly require full-time employment of the Chairman. In many cases, it may
only be necessary to refer to the reasons given in an earlier case or to the particular argument which persuaded the Board.

More broadly, K. C. Davis suggests that:

Rules may be formulated through any one or more of the following methods: No participation by affected parties, consultations and conferences between the agency and the parties, consultation with advisory committees, written presentations of facts and arguments, oral arguments, and trial-type hearings.

Public participation in Board decision-making will be the subject of more detailed discussion in Part 3.2.2., suffice it to say that such participation requires considerably more time and resources than the Board presently has at its disposal. It may be feasible for the present approach to be supplemented by consultation, the extent of that consultation depending upon the magnitude of the particular issue and the extent of the labour-employer group to be influenced by it.

In its simplest form, it would involve the Board hearing representations from affected parties in a non-adversarial atmosphere, thereby ensuring a full disclosure of considerations without putting the interests of a particular party at stake. Mixed reaction was received to my suggestion.

There is, however, no question that the Board usually does follow its own precedents, so the parties may be guided accordingly. It is also quite prepared
to adopt precedents from other jurisdictions, although it clearly feels no obligation to do so. The room for distinction under the present arrangement, although it produces uncertainty, may also be another indicator of the "pure approach" toward industrial relations which still exists in this province.

3. Specific areas of policy development

Rather than attempting to examine all of the areas in which the Board has undertaken policy development, I intend to illustrate the two approaches which have been followed. To do so, it is necessary to go outside the time frame in which my empirical research was conducted.

A deliberate, planned approach has, to the best of my information, been used only once. In attempting to establish clear guidelines for determining the appropriateness of bargaining units in hospitals, nursing homes and other health care institutions, the Board considered oral and written representations from all concerned parties, then deliberated at great length, and finally articulated its policy in a representative case.

The more consistent approach has been to deal with each fact situation on its merits, sometimes disregarding its own precedents. This approach, often in the wake of changing legislation, is illustrated by an examination of "employee" status under the Act.
Criteria applied by the S.L.R.B. in the determination of appropriateness of bargaining units in health care institutions

a. Background

The sections of The Trade Union Act which presently govern the determination of appropriate bargaining units have not changed since 1944, except for the substitution of "trade union" for "representatives" in Section 3 and the amendment affecting the build-up principle (which is not relevant for these purposes) in Section 5(a):

3. Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for such purpose shall be the exclusive representatives of all employees in such unit for the purpose of bargaining collectively.

5. The Board shall have power to make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit. 14

Considerable latitude would seem to be permitted by the use of the words "unit appropriate for such purpose", and it appears from the outset that the Board looked upon its statutory power in just that way. In the Municipal Affairs case, 15 which has stood to this day as a cornerstone of Board policy, the following statement was made:
The Act, however, lays down no rules as to when a unit should be determined as appropriate, and whenever cases of this kind have arisen, the Board has attempted to make its decision in the manner which seems to accord best with the circumstances of the individual case.\(^\text{16}\) (underlining mine)

The Board went on to cite two principles:

(i) If the nature of the operations performed by a particular group of employees is sufficiently distinct that the wages, hours and other working conditions of the employees must necessarily be determined on a different basis than the wages, etc. of other employees of the same employer, then those employees may be regarded as a distinct unit for the purpose of bargaining collectively if they so desire.\(^\text{17}\) (The underlined part in fact, constitutes a separate principle.)

(ii) The principle of majority rule is both enunciated in Section 3 and accepted as a democratic principle. In the J. M. Sinclair Ltd. case,\(^\text{18}\) the Board translated its first statement of principle in the Municipal Affairs case into a test:

If it is possible for orderly collective bargaining to take place in respect of the employees in a subdivision of a plant or branch without reference to the remaining employees in a plant or branch, then it is in order to determine the subdivision to be an appropriate unit for the purpose of bargaining collectively.\(^\text{19}\) (underlining mine)

The decision also served to illustrate something of a collision between the principle of majority rule, articulated in the Municipal Affairs case and that of free employee choice, which prevailed in the Sinclair case (over two dissenting opinions).
b. Appropriate units in health care institutions

In the first of the reported series of hospital cases, St. Elizabeth's Hospital, the Board expressed itself on the issue of "fragmentation". Before permitting an exclusion from a bargaining unit which had already been deemed appropriate, the Board would have to satisfy itself that, as a result of changing circumstances, the bargaining unit in question was no longer appropriate. In a hospital bargaining unit, where continuity was particularly important, "very cogent reasons" would have to be adduced, including some evidence of detriment to either the employees or the employer.

Almost three years later, under a new Chairman, the Board, prior to giving a decision in the University Hospital case, asked for written and oral submissions on the fundamental question of what bargaining units were desirable in hospitals, nursing homes, etc. Individuals and groups (associations, employers and unions) were specifically asked to comment on five categories:

(i) general units,
(ii) nursing units,
(iii) paramedical or similar units,
(iv) the overall unit, and
(v) other units.
It is important to recall, before examining any of these submissions, that the Nipawin Union Hospital case was on its way to the Supreme Court of Canada at the time, the Board having been ordered by the Court of Appeal to determine the SEIU's application according to law. Although what the Board had to say in that case may be regarded as obiter, it was extremely relevant as a statement of policy:

The appropriateness of a proposed unit is always a matter of great concern to the Board. Many factors must be considered by the Board here and an applicant must always be prepared to justify that the unit proposed is an appropriate unit for bargaining purposes. While each application must be determined on its own facts, the Board is usually quite flexible here. Precedents as to past certifications cannot always be relied upon. It is acknowledged by all that technology is rapidly increasing and therefore a unit which may have been appropriate on a previous occasion is not necessarily appropriate today. Another factor which must be considered is the wisdom or desirability of a multiplicity of bargaining units among the employees of a given employer. Unless the contrary can be shown to be desirable the Board will seek to avoid a multiplicity of units. The facts of each application and each situation are, of course, paramount in reaching a decision here.

I believe it is safe to say that the Board, at this time, remained predisposed towards "employer" or "overall" units.

The major interest groups who participated in this exercise were inclined in four different directions:

(i) those who favoured overall units:
- S.G.E.A. 24
- C.U.P.E. 25

- 59 -
Numerous reasons were given in support:

(a) maximum bargaining strength;
(b) better co-ordination of needs of all employees, leading to better morale;
(c) less demand on the time of both sides;
(d) similar terms and conditions of employment throughout the province;
(e) wages are set by the provincial government in any event;
(f) the union can come to the table as an experienced equal; and
(g) the organization of hospital employees in other jurisdictions has tended along provincial lines.

S.G.F.A. did, however, point out the need for two-tier bargaining to accommodate the various occupational groups.

(ii) those who favoured three bargaining units - nurses, paramedical and service/others:
- Sask. Physical Therapists Association
- Health Sciences Association
- Sask. Nursing Assistants Association
- Sask. Registered Nurses Association
- various staff nurses associations and nurse groups

Their reasons were the following:
(a) community of interests,
(b) maintenance of the rights of minority groups, and
(c) past practice of allowing nurses to bargain separately.
(iii) combined plant-wide units with craft units on a restricted base in two groups (auxiliary and service, professional and technical) - Sask. Hospital Association

Numerous reasons were given, but none are new to this discussion. One interesting recommendation was made, namely, that the Board should exercise its discretion so as to protect the interests of minority groups while allowing the co-ordination of appropriate terms of employment.

(iv) no guidelines - S.E.I.U.

This submission was extremely critical of any attempt to establish guidelines which might restrict the flexibility intended by the legislation. Its influence on the Board's decision is noteworthy.

What was the outcome? I was advised that there are no written records of the Board's deliberations on this matter. It is necessary, therefore, to turn to the actual decision of the Board in the University Hospital case to see what happened. The three most relevant paragraphs of the decision could easily be interchanged with the extract which I made from the Nipawin Hospital case, supra. They read as follows:
The Board is of the general view that an overall employer unit is a desirable unit in such an institution. Having said that, however, the Board hastens to add that it is also of the opinion that it need not find such a unit to be the only appropriate unit. The Board, in the view which it takes of the matter, does not believe that it is called upon to determine the most appropriate unit — the duty of the Board is to determine a unit which can be appropriate for collective bargaining purposes.

The Board is of the view that no cut-and-dried formula can or should be laid down as to appropriate units in hospitals — the determination as to an appropriate unit must be made in each application on the basis of the factual situation in each case.

... all employees in a hospital institution are, in effect, health care workers, and should operate as a team to provide health care services. 32

The jurisprudence was neatly drawn together in the Pasqua Hospital case, 33 in which the Board cited with approval its earlier decision in the Department of Highways and Transportation case, 34 the University Hospital case and the Saskatoon Mechanical Maintenance Services case. 35 In denying certification of the applied-for unit, the Board was satisfied on the evidence that:

(a) fragmentation would result,

(b) there would be a loss of collective bargaining effectiveness,

(c) there was no great difference in working conditions, and

(d) there was a trend towards centralization in negotiations in health care institutions.

The Board declined to canvass the support of the employees concerned, on the ground that the overall majority in a democracy must govern.
2) "Employee" status under the Act

The Trade Union Act, 1944 defined "employee" as meaning "any person in the employment of an employer, except any person having authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, ..."\(^\text{36}\)

This wording produced three distinct problems for the Board:

a. Employee versus independent contractor

In *Glacial Rock Insulation Ltd.*\(^\text{37}\), a truck driver for the respondent company was held by the Board to be an employee on the basis of certain facts. Less than six months later, a contrary decision was reached on similar facts, based on several rather fine distinctions.\(^\text{38}\) A similar contrary result followed some eleven years later in *Willow Bunch School Unit No. 4.*\(^\text{39}\)

It was not until *The Dairy Pool*\(^\text{40}\) that the Board resorted to an examination of American jurisprudence, with the result that an owner-operator of a truck under contract to the respondent was held to be an employee.

It is of interest to note that one of the decisions relied upon by the Board, *Armour & Co.*\(^\text{41}\), provided the basis for the incorporation, in 1972, of the present Section 2 (f) (ii).

The situation was clarified by legislative amendment in 1972 in the form of Section 2(f) (iii). The
wording of that subsection derived from a recommendation made by the Saskatchewan Federation of Labour in 1966 to the effect that provision should be made for a person to be an employee for the purposes of the Act, notwithstanding that the terms of his contract of employment were such that in respect of liability for his acts or omissions, his relationship to his employer might be that of an independent contractor.\textsuperscript{42}

b. Management and confidants

The Board set out the test to be applied in Johnstone Dairies Ltd.:\textsuperscript{43}

A person who regularly acts on behalf of management in a confidential capacity is one who is regularly taken into the confidence of management (and can exercise discretion) in the formulation, interpretation and/or execution of company policy, and in particular (since the subject matter of the Trade Union Act pertains to labour relations) in the formulation, interpretation and/or execution of company policy relating to personnel matters. That is, he must be a person who, to some significant degree, exercises managerial functions on behalf of management.\textsuperscript{44}

The Board was accused by the Saskatchewan Federation of Labour in later years of tending to exclude persons whose actual connection with management was of a trifling nature. The Federation suggested that an amendment be enacted requiring proof than an employee regularly exercised substantial management functions in the area of employer-employee relations.\textsuperscript{45}

The 1972 amendment to Section 2 (f) (i) sought
to narrow the possibility of exclusion through the
use of certain key words (which are underlined in
the following quotation):
(f) "employee" means:

(i) any person in the employ of an employer
except any person whose primary responsibility
is to actually exercise authority and actually
perform functions that are of a managerial
character, or any person who is regularly
acting in a confidential capacity in respect
of the industrial relations of his employer;

c. Persons, the terms of whose contract "can be the subject
of collective bargaining"

The use of the seemingly "catch-all" provision in
Section 2 (f) (ii) appears to have caused the Board some
problem when an attempt is made to rely upon it in
conjunction with, or as an alternative to, Section 2
(f) (i). After concluding in Midwestern News Agency Ltd. that the employees in question did not exercise a
primary responsibility of performing managerial functions
and that they did not act in a confidential capacity
in respect of industrial relations, the Board went on
to say that it felt that Section 2 (f) (ii) applied.

It would seem, from the somewhat contradictory
results in Robert C. Myers and Regina Public Library
Board that the Board may choose to exercise its
"broad discretion" more in reliance on "gut reaction"
than on a strict consistency of reasoning.

The Board is largely of the opinion that the approach taken
by the draftsman in Section 2(f) places too much emphasis on
exclusions, which serve to invite objection from employers.
To relieve the uncertainty, the Board has lobbied for legislative change in the definition itself, or in the discretion which it may exercise in dealing with such objections. 49

2.3 Judicial review of board decisions

In the thirty-two years during which The Trade Union Act has been in operation, the Labour Relations Board has been responsible for interpreting and applying the provisions of a statute which was new to the field of law in this province. The Board, which is intended to be representative of both employers and employees (as well as the public until 1972), has been largely composed of persons who are not trained in the law. Anticipating that the Board might come under criticism for its layman's approach to the difficult questions of legal interpretation and procedure, the Legislature enacted Section 15 (now Section 21):

15. There shall be no appeal from an order or decision of the board under this Act, and the board shall have full power to determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or other proceeding whatsoever.

Despite the existence of this privative clause, the orders of the Board have, since its inception in 1945, been reviewed by the Court of Appeal on at least forty-seven occasions. The judicial review of SLRB proceedings has already been the subject of an extensive survey by several authors 50 and it will,
therefore, be my intention only to highlight changes in the attitude of the judiciary since 1945, and to bring the reader up to date.

Assuming that the decisions of the Court of Appeal may be relied upon as indicating the attitude of the entire judiciary, it has been suggested that three periods can be distinguished:

(1) 1945 to 1951, (2) 1953 to 1960 and (3) 1962 to the present day.\(^{51}\)

1. 1945-1951:

At the outset, the judicial attitude was characterized by both suspicion and misunderstanding of the functions of the Board. The Court of Appeal heard six cases, and in each one, the order of the Board was quashed. The members of the bench frequently alleged bias or bad faith on the part of the members of the Board on the ground that the Board was not exercising what the court assumed to be a "judicial" function.

This period concluded on the low note of the *Sisters of Charity, Province Hospital v SLRB*.\(^{52}\) While shortly disposing of the case on its merits, the trial judge went into an extended examination of the Board's decision-making process so as to enable the Board to "better perform the duties entrusted to it".\(^{53}\) The Court of Appeal supported his decision, but not necessarily his views. The line of cases preceding it, as well
as the particular decision, came under considerable criticism. 54

2. 1953-1960:

The fear of the Board's pro-union attitude seemed to abate during the second period, and the decisions of the Court of Appeal are characterized by a greater degree of tolerance. This attitude may have been encouraged by the speed with which the Legislature reacted to occasions of judicial intervention by amending the sections of the Act in question to make them inescapably explicit. For example, when the Court of Appeal held in *Dominion Fire Brick and Clay Products Ltd.* 55 that the Board had no status to appeal a quashing order, the Act was amended so as to give the Board that specific power. It is also suggested that the presence of Chief Justice Martin and Mr. Justice Culliton (as he then was) brought sufficient influence to bear on the Court to effect this change in attitude. 56

3. 1962-present:

It is during this period that the privative clause has finally been given full force and effect. The Court of Appeal has heard at least twenty-eight cases since 1962, and in only four of these has the result been unfavourable to the Board. 57

There was a certain amount of confusion for a time as the result of an unfortunately broad statement by Acting Chief Justice Culliton (as he then was) in *Regina v. SLRB*, *ex parte Tag's Plumbing and Heating Ltd.* 58
Where there is such a privative clause, I think the law is well settled that the Court in certiorari proceedings is restricted to determining whether or not the inferior court or tribunal acted within its jurisdiction (including matters akin thereto, such as bias, denial of natural justice, fraud, etc.), or whether there is error of law on the face of the record... (underlining mine).

In fact, the decision upon which Chief Justice Culliton relied, Farrel v. Workmen's Compensation Board ⁵⁹, did not provide authority for the latter ground for review.

The confusion was finally alleviated by the Supreme Court of Canada in SEIU, Local No. 33 v. Nipawin District Staff Nurses Association et al. ⁶⁰, where Dickson J. said at page 657:

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark upon an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the courts.

In fact, the point is now academic, since in no case following Tag's Plumbing and Heating has a Board order been quashed on the ground of error of law on the face of the record.
The restraint which has been exercised since the Supreme Court pronouncement makes it reasonably clear that the privative clause has achieved the force and effect intended for it by the Legislature in 1944. That intention simply was: "To permit an appeal from the Board to the courts would defeat the major purpose of setting up the Board, which is to keep matters out of the courts." 61

The present attitude of Board members toward judicial review appears to be a healthy one. None of them seem to be preoccupied with the possibility of review, and some actually welcome it as a means of resolving uncertainties of a substantive or procedural nature.

Management counsel are of the view that the Court of Appeal should provide stricter procedural safeguards over a Board that is, in their opinion, clearly pro-labour, but that response is to be expected.

2.4. Evaluation of Board Performance

1. By outsiders

Because labour relations is highly visible in Saskatchewan, one might think that the Board would be the subject of continuing criticism and controversy. In fact, I have found that not to be the case.

Complaints are directed at the Board from a number of different sources, which will be the subject of more detailed examination in Part 3.2., infra. Suffice it to say that
there is no formal mechanism for the hearing of complaints, whatever their source. As a matter of practice, the Board has chosen not to respond to complaints on an official basis, or even to air them at in camera sessions unless they have been referred to the Chairman by the Minister. The subject of the Board's responsiveness to its public will also receive more detailed examination in Part 3.2.

2. By itself

The Board, once again, is subject to time constraints which do not permit it the luxury of meeting more often than three or four times a year for the purpose of discussing policy, airing complaints, etc. In fact, the heavy scheduling up to mid-April, 1977 had entirely precluded such meetings.

There is general reluctance among members to establish internal criteria and processes to interpret and evaluate the Board's goals and performance. Besides not having the time and personnel to do so, there are other good reasons why such an exercise may not be necessary. The mere fact that it is a tri-partite Board ensures that opposing positions are respected. Second, because there is good rapport between members, a formal exercise in going through what the Board does informally each time it meets, might serve no useful purpose.

The B.C. Labour Relations Board has adopted a procedure which deserves consideration. A party who has appeared before a panel of that Board has fifteen days from the date of its decision to request reconsideration of the application from
a larger panel of the Board or, in cases of major policy significance, the full Board itself. Such appeals could serve as a useful indicator to the Board of trouble spots in the legislation or in Board policy. 62

The newly-appointed Chairman is inclined to think that reasoned opinions should diffuse much of the criticism, and is depending on informal feedback from the legal profession to apprise him of concerns.
1. File No. 360-77: Oliver Lodge (applicant) and SEIU (respondent), heard May 16, 1977.


3. This remark was made at the opening of the Saskatoon sittings on April 18, 1977, and has been reiterated numerous times since.

4. File No. 369-77: CUPE Local 2067 (applicant) and Kamsack and District Nursing Home Ltd. (respondent), heard May 16, 1977. The application was dismissed because it included in the proposed unit a registered nurse who was already in a certified unit.

5. This statement was made following the hearing of File No. 122-77 on April 21, 1977.


13. Davis, supra footnote 10, at 121.

14. The Trade Union Act, 1944.

15. United Civil Servants of Canada (Local No. 1) v His Majesty in right of Sask. (Dept. of Municipal Affairs) and the Sask. Civil Service Ass'n. (1945), 1 S.L.R.B. 24.


17. Ibid.


19. Ibid.


27. Submission undated.


32. University Hospital, supra footnote 21, at 486.

33. The Sask. Ass'n. of Medical Laboratory Technologists v The Board of Governors of the South Sask. Hospital Centre and Pasqua Hospital Employees Ass'n (S.L.R.B.) Jan 9, 1976.


36. The Trade Union Act, 1944, s.2(5).


38. Canadian Brotherhood of Railway Employees and Other Transport Workers, Division 186 v The Regina Cartage and Storage Co. Ltd. (1948), 1 S.L.R.B. 368.


41. (1945), 63 N.L.R. Bd 1200

42. Submission to the Labour-Management Legislative Review Committee of the Province of Saskatchewan on behalf of the Saskatchewan Federation of Labour (undated), at 26.


44. Ibid, 79.

45. SFL submission, supra footnote 42, at 25.


49. In the meantime, the Board has indicated its reluctance to exercise further discretion in the use of Section 2(g)(iii). See United Brotherhood of Carpenters and Joiners of America, Local 1867 v Telmed Construction Ltd. (SLRB, Nov. 5, 1974).


51. See Smith, supra footnote 50, at 2.


53. Ibid, 1047.

54. E.g., Cronkite, supra footnote 50.


56. Smith, supra footnote 50, at 8.


- 75 -

58. (1962), 34 D.L.R. (2d) 128; Norman, supra footnote 50, at 337.

59. (1961), 31 D.L.R. (2d) 177. In the words of Judson J. at p. 179, "... even if there was error, whether in law or in fact, it was made within the exercise of the jurisdiction and is not open to any judicial review, including certiorari."


61. The Trade Union Act, 1944 - Analysis of the Bill by Sections, at 11.

62. Weiler, supra footnote 2, at 209.

3. INTEREST ACCOMMODATION

3.1. Openness Versus Expedition

1. Hearings

The Act, as I have already indicated, does not require the Board to hold a hearing in any particular circumstances, nor does it require a hearing of a particular type. Section 18 of *The Trade Union Act* confers broad powers upon the Board, and Sections 18 and 19 permit it to circumvent the usual technical objections which accompany legal proceedings. What the Board has done in practice has already been described in Part 2.1.1., *supra*. What I propose to do now is examine that process to see whether, and to what extent, it accommodates the interests of the parties who appear before the Board.

Starting with the sittings of April 18, 1977, in Saskatoon, I observed four consecutive sessions of the Board, alternating between Saskatoon and Regina. The present Chairman had only recently been appointed, and so I hoped, by observing these hearings, not only to witness firsthand how the Board treats the parties before it, but also to hear any policy statements by the Chairman in this regard.

Proceedings had barely gotten underway on Monday, April 18, when my anticipation was rewarded. Having asked the parties assembled if there were any matters to be spoken to, the Chairman was immediately inundated with the usual
requests for adjournment which had been consented to by both parties, e.g. to keep the matter on the list while a settlement was being negotiated, or where one of the parties was indisposed. The Chairman's response was that the Board "was not coming here to sit on its thumbs", that courtesy must in future be shown to the Board by counsel and the parties, that the Board should be advised in advance of any requests for adjournment and that adjournments would not necessarily be granted in the future, even though on consent.

This might not sound as though the Board was putting the interests of the parties before its own, but it quickly became apparent that the Board's indulgence was being abused by requests which were not truly of an emergency nature, and that other parties were accordingly being deprived of the Board's services at that time. My observations of the process lead me to conclude that adjournments which are in the best interests of counsel are not always in the best interests of the parties. Disputed labour relations are, for the most part, transitory and volatile and require expeditious resolution. This may well be the Board's way of impressing that point upon counsel.

The response to one such request was to fix the matter for a later day in that week, and when the same reason was offered on the second occasion, the hearing was set peremptorily for the following day. In the absence of
the respondent, the application was heard and a decision handed down.\(^1\) It was an expensive lesson, since the entire Board had to stay over for only that reason, but the point was well made.

The declining number of adjournments reflected in Table 8 seems to indicate that the lesson has been learned. The corollary to this is the more efficient use of Board time, as indicated in Table 9.

Even though the Board makes every effort to minimize the expense involved\(^2\) by setting down uncontested applications to be heard at the start of the session, or at least the start of a new day, the mere fact that an applicant is required to appear simply to state that he is resting on the material filed suggests that needless expense is still being incurred, and that unnecessary time is being taken up on the agenda for this purpose. Of the thirty-six applications set down for that first week, nine of them, all certifications were uncontested. As Table 8 indicates, that figure represented the maximum number during the period under review, but consideration could surely be given to deciding such matters without the need for a hearing. Should certain questions come to mind when the Board is perusing the application, clarification could still be sought from the applicant without requiring him to formally appear.

The requests for adjournment and uncontested applications have in the past generally taken up Monday afternoon. An
## TABLE 8
### DISPOSITION OF APPLICATIONS SET DOWN
#### APRIL 18 - JUNE 10, 1977

<table>
<thead>
<tr>
<th>Set down</th>
<th>April 18-22 Saskatchewan</th>
<th>May 2-6 Regina</th>
<th>May 16-20 Saskatchewan</th>
<th>June 6-10 Regina</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withdrawn</td>
<td>1</td>
<td>2</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Adjourned</td>
<td>20</td>
<td>12</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td>- on consent</td>
<td>19</td>
<td>12</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>- opposed</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>- lack of time to hear</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>- procedural delay</td>
<td>-</td>
<td>-</td>
<td>5</td>
<td>-</td>
</tr>
</tbody>
</table>

### Heard

1. Certification 12 11 5 4
   - unopposed - rested 9 8 2 2
   - unopposed - evidence led 1 - 1 1
   - opposed 1 2 2 1
   - rested on evidence led at earlier hearing 1 - - -
   - vote ordered - 1 - -

2. Amendment 1 1 1 1
   - unopposed - 1 - 1 1
   - opposed 1 - - -

3. Rescission - opposed - - 1 -

4. Amendment and rescission 1 - - -
   - opposed - - - -

5. Unfair labour practice 2 1 2 1

6. Reinstatement - - 42 -
   - argument of preliminary objection only - - -

7. Monetary loss - - 42 -
   - argument of preliminary objection only - - -

8. Religious exclusion - - - 1
Notes:

1. Special sitting May 9 to hear File No. 013-77.

2. Proper notice not given to all respondents.

3. Special sitting May 26-27 to hear conclusion of File No. 236-77 and all of File No. 250-77.

4. Although this number may seem high, the point is that the Board was only taken by surprise by two of the requests.
### TABLE 9

**ACTUAL SITTING TIME OF THE BOARD**

**APRIL 18 - JUNE 10, 1977**

<table>
<thead>
<tr>
<th></th>
<th>Mon</th>
<th>Tue</th>
<th>Wed</th>
<th>Thur</th>
<th>Fri</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Saskatoon</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>April 18 - 22</td>
<td>1:07</td>
<td>1:21</td>
<td>2:11</td>
<td>2:05</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3:41</td>
<td>3:24</td>
<td>:07</td>
<td></td>
</tr>
<tr>
<td>Regina</td>
<td></td>
<td>1:29</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>May 2 - 5</td>
<td></td>
<td>1:07</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Saskatoon</td>
<td></td>
<td>1:07</td>
<td></td>
<td>1:19</td>
<td>:07</td>
</tr>
<tr>
<td>May 9</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regina</td>
<td></td>
<td>:22</td>
<td></td>
<td>2:22</td>
<td></td>
</tr>
<tr>
<td>May 16 - 20</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Saskatoon</td>
<td></td>
<td>2:05</td>
<td></td>
<td>1:38</td>
<td></td>
</tr>
<tr>
<td>May 26 - 27</td>
<td>2:19</td>
<td>2:27</td>
<td>1:38</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2:21</td>
<td>2:28</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes:

1. A special date was agreed to during the previous Saskatoon sittings.

2. Additional hearing time was required to finish two applications which had gotten underway May 19.
innovation was introduced at the Regina sitting commencing May 2, on which occasion the Executive Officer scheduled applications to be heard starting at 10:00 on Monday morning. On that same agenda, he broke each day's activities down into 9:30 and 2:00 p.m. start times in an attempt to avoid having the parties wait about for the entire day. What unfortunately happened was that valuable time was lost when none of the mornings was fully taken up by the applications set down. The latter practice has been discontinued.

Generally, the Board is prepared to revise its schedule to accommodate special requests.

Once the contested hearings get underway, it soon becomes apparent that the Board will avoid time-consuming formalities wherever possible, and that it will also avoid prejudicing the parties in its application of the rules of evidence. For example, the Board, where possible, will not require a party to read in documentation which has been filed with the Board, and where objections are raised as to the admissibility of certain evidence, the Board will almost always admit it subject to objection, except in the case where the documentation in question postdates the filing of the application or where confidences will be betrayed, e.g. where one party seeks to describe what was discussed with a conciliator. Many of these objections are now decided without a recess, thereby saving time.
Counsel will not always be restricted to speaking only when it is their turn, and it is not uncommon for the Chairman at various points in the proceedings, and certainly at the end, to ask the parties whether they have anything else to say bearing on the application. In addition to ensuring that the parties have fully exhausted their points, the Chairman will invite the other Board members to direct questions to counsel and witnesses. Most Board members are aware that in exercising this right they should not make a case for either of the parties. That is not to say, however, that the Chairman will not expose an argument which is clearly without merit.

Locus standi is not strictly applied, and anyone who has something relevant to say to the Board on a particular application will usually be heard. I suspect that this could cause some confusion where an intervenor appears without notice, and proceeds to introduce evidence for which neither of the other parties nor the Board are prepared. In those circumstances, I can only assume that the matter would be put over to allow a necessary exchange of information.

An interesting case on point was the recent application for certification by the United Steelworkers of America in respect of certain employees at Bird Machine Company of Canada Ltd. The Chairman held that five employees who sought to oppose the application were not only late
in filing their intervention, but had no status under Rule 18 (1). He did, however, agree to hear evidence which they might choose to give respecting events preceding the receipt of the application and pertaining to the issue of majority support. The employees were thereby prevented from really saying anything, but since they had already exercised their right of refusing to sign union membership cards, there's good reason to suggest that they were not prejudiced as a result. The Chairman confided that he was not entirely pleased with this result, and that he would make a policy statement at the earliest opportunity.

With respect to the degree of formality observed, the Board cannot possibly hope to please everyone. Less formality could result in a shouting match, while a greater degree of formality, although it might appeal to counsel, could very well produce greater emphasis on form than substance. The Board does not attempt to walk a straight and narrow path between these two extremes, and very often becomes more or less formal depending on the parties before it and the nature of the application. Laymen who have obviously never been before the Board are told that they may proceed as they see fit, subject to the right of cross-examination. Because only the Chairman is legally trained, a certain amount of restlessness can be detected among the other members when experienced counsel start jousting with the full repertoire of their legal skills. Conversely,
every effort is made to ensure that the unrepresented party is able to present his case without the benefit of such skills.

2. Access to information

The regulations presently provide for the distribution of certain documents filed with the Board to the interested parties; beyond that, at least until the present Executive Officer was appointed, the Board was virtually inaccessible. The security of certain information cannot be over-emphasized, but I am sure that a considerable amount of uncertainty could be dispelled by providing the parties with better access, not only to such things as the union's constitution and numbers of employees signed up, but also to guidance as to how they should proceed, or in fact, whether they should proceed. There is agreement among Board members on the second suggestion, but not the first.

Board members themselves are in favour of some sort of educational program to better inform the parties, and the availability of such things as practice notes and consolidated decisions could also undoubtedly be of assistance. An interim solution may be to publish "newsworthy" items on the front page of the agenda - something the Executive Officer intends to try on an experimental basis. The most important step in this direction, however, is the appointment of the present Executive Officer, who, merely by being available at a telephone, will provide a means of accommodating the
interests of the parties.

3. Ex parte consultation

It is generally agreed and accepted that the Executive Officer can play an important part in the resolution and/or verification of some matters before they come before the Board.

One illustration is the manner in which the agenda is now prepared. Although he relies on his intuition and experience in some cases, the Executive Officer will for the most part consult the parties before setting the applications down for hearing. A logical take off from this would be the involvement of a Conciliation Officer of the Department of Labour in certain kinds of disputes which probably should not be heard by the Board, e.g. alleged failure to bargain collectively.

Some parties, on the other hand, don't listen to the advice they do get. I shared the Executive Officer's frustration when he explained how an applicant could get around the mistake he had made in filing defective materials. Instead of calling the two employees to testify, however, he withdrew the application. In all fairness, had the application been rejected at the outset, it could have been resubmitted, thereby avoiding the entire problem.

Such consultation could also serve to get the parties
talking to each other, possibly minimizing or even eliminating hearing time.

I have already suggested that the Board could consult with interested parties in an attempt to resolve policy questions, rather than relying on the normal adjudicative process to produce guidelines. (Part 2.2.2., supra).

4. Proposals to provide better service

The parties who appear before the Board, as well as Board members and staff, agree that there are some ways in which the interests of the parties could be better accommodated. Some of these have already been mentioned, but are included here for the purpose of consolidation:

1) Dispense with hearings in the case of uncontested applications, particularly where the Board is satisfied with the material which has been filed.

2) A full time Board — a very popular idea — would probably be more expensive, would create some difficulty in recruiting and could subject Board members to political influence. Offsetting these disadvantages would be the ability of such a Board to contain the workload which often tended to overwhelm the former Board. Its agenda could be augmented with labour standards disputes as is done in Manitoba.

3) A logical alternative to a full-time Board is one made up of a greater number of alternates so as to permit empanelling. This could also be achieved by sitting with three members. One panel sitting in each of Regina
and Saskatoon should be able to accommodate the present workload without having to sit on a full-time basis, and should also be able to produce consistent results so long as Board policy and procedures were clearly defined. It would probably also require the appointment of a second Vice-Chairman from the management side, so as to be able to alternate on the second panel, or of a neutral Vice-Chairman. The Chairman is personally of the opinion that the workload does not warrant the use of panels.

4) An increase in the size of the support staff would not only facilitate the improved handling of applications, but would also permit the Board to expand upon the consultative and decision-making roles which the Executive Officer is assuming.

5) The provision of reasons in more cases, as well as the up-to-date consolidation of those reasons, could in the long run reduce the number of applications as the parties become more familiar with the guidelines which the Board has set down. The time and expense involved in both, however, are prohibitive. To achieve the former would require the full-time services of a Chairman, and it is my understanding that the latter can only be undertaken at the cost of about $30,000 per volume. What the Chairman intends to do is provide reasons where an explanation of policy is required or where the parties seem to be greatly troubled by the matter. Time will tell whether this is sufficient.
3.2 Participation

1. Who has influence

1) The Cabinet and the Minister of Labour

Although the political "sword of Damocles" may have hung heavily over the Board's head at one time, that no longer appears to be the case. There are occasional exchanges of ideas between the Minister or Deputy Minister and the Chairman, and the Department is responsible for budgeting for Board expenditures; otherwise, the relationship is as I described it in Part 1.3.2, supra. Policy statements are not made respecting Board activities and there is no evidence of close scrutiny of the Board.

That still wouldn't prevent the Chairman or the entire Board from being replaced in the event of a change in government as occurred in 1971 and 1964, respectively.

2) Constituent groups

Although the Saskatchewan Federation of Labour and the respective employers' associations have the power of recall, Board members do not seem to feel any pressure to perform accordingly. Board members have told me the longer they have been members, the more interested they have become in achieving the best outcome rather than being constituent adversaries.

I understand that formal consultation does take place between organized labour and the labour members, and a certain amount of criticism is also directed.
at them on a more personal basis. This is not so much the case with management members, if at all.

As to the pressure which may be brought to bear on the Board, labour is recognized as being a greater political force to be reckoned with, given the present government. That pressure must, however, be directed at the government. I do not believe that the Chairman would tolerate any pressure being brought to bear on him, directly or indirectly.

3) The media

The media no longer seems to be actively interested in what the Board is doing on a day-to-day basis. There was, inter alia, a rather extensive editorial comment in the Star-Phoenix on July 21, 1976, but the fact that the Board is no longer politically or judicially controversial has apparently led to the conclusion that it is no longer newsworthy.

2. How is interest determined

Once again, the Board relies on the adjudication process to determine the interests of the two constituent groups.

Unless the parties are asking for something which is clearly not in the best interests of employer-employee relations generally, they get what they want. A public hearing was held on only one occasion, as described in Part 2.2., supra, and, as I indicated earlier, the results of that exercise are questionable. Public hearings do provide a useful means
of gathering information, increasing public participation, aiding in decision-making and increasing the acceptability of decision-making, but it would seem that the last of these reasons is the only one which can safely be applied to the result of that particular hearing. That is not to say that the Board is un receptive; it is generally the experience of administrative tribunals in Canada that public hearings and briefs have had very little impact.

Although many Board members agree that such hearings are psychologically beneficial to the participants and could, in some cases, be useful, most feel they are of very little real value and often allow only selfish interests to be expressed. The time and expense involved makes such an approach even more prohibitive.

I personally think there is merit in more informal gatherings where interests can be expressed and misunderstandings resolved without forcing a decision. Reaction to this proposal was mixed among both Board members and practitioners.
1. File No. 248-77: Hotel, Motel, Restaurant Employees and Beverage Dispensers Union, Local 767 (applicant and Gateway Hotels Ltd. (respondent), heard April 22, 1977.

2. Although specific fees were not discussed with counsel, they are generally in the habit of billing at the same rate as if the case went to trial in civil court.

3. File No. 375-77: Retail, Wholesale and Department Store Union, Local No. 955 (applicant) and Morris Rod Weeder Co. Ltd. et al (respondent), heard June 8, 1977.


5. Members of the Board are presently remunerated as follows:

   - Chairman: $16,000 per annum plus $100 per half day plus expenses.
   - Vice-Chairman: $75 per half day plus expenses
   - Members and Alternates: $50 per half day plus expenses

6. Statement was made by R.W. Mitchell, Deputy Minister of Labour, in the course of a personal interview.
4. SUMMARY AND ANALYSIS

4.1 Summary

1. Methodology

The purpose of my thesis has been to examine how the Saskatchewan Labour Relations Board functions as an administrative agency. Part 1 has provided a fairly detailed account of the Board's fledgling days, followed by a description of its organization, powers and procedures as they presently exist. The development of the Board in a political context is particularly important, since every agency takes on the colour of the substantive program to which it is attached, and it must be attached to a substantive program. Part 2 has presented my assessment of the Board's organizational structure and its internal work processes; and in Part 3, I described the Board's relationship to its public and its conception of its public interest. Reliance in both of these parts was placed on the case study approach, producing, as an end result, an analysis of the Saskatchewan Labour Relations Board which does not follow the traditional "theological" approach of looking on from only the outside.
2. Origin and characteristics of the Board

Like every other labour relations board in Canada, ours is a creature of the legislation by which it is established, The Trade Union Act, 1944. Prior to that date, Saskatchewan had, like other jurisdictions in Canada, followed the Federal lead. Privy Council Order 1003 first combined and integrated the American and Canadian approaches to industrial relations, complete with administrative machinery. Saskatchewan was not far behind, however, and before the war had even ended, it broke out on its own and experimented with legislation which was as advanced as any ever enacted on this continent.

The Saskatchewan draftsman, Andrew Brewin, relied heavily upon the American Wagner Act, which established on a permanent foundation the legally protected right of employees to organize and to bargain collectively through representatives of their own choosing. That Act did not attempt to provide a complete labour code, and had to be subsequently amended to overcome the following limitations:

1) The Wagner Act was primarily concerned with the organizational phases of labour relations.

2) It was concerned exclusively with the activities of employers which were thought to violate the rights guaranteed to employees.
3) It left substantive terms and conditions of employment entirely to private negotiation.

The Taft-Hartley amendments were enacted to produce a "balancing of interests", and took steps to involve the government in ways intended to restrict the freedom of negotiation. The reasons why Saskatchewan did not pursue this corrective course will be dealt with in Part 4.2.1, infra.

When the legislation was introduced by the Honourable C.C. Williams, then Minister of Labour, it was described as an attempt to establish the fundamental rights of employees to organize and to bargain collectively, and having done so, the workers of the province would be left in a position to protect themselves. In administering the provincial legislation, a board was to be created with more adequate powers than the boards administering the dominion regulations, most important being the power to order employers to desist from committing further violations of the Act. This authority, however, was to be seen as remedial rather than punitive. The nature of this enforcement power will also be the subject of further discussion in Part 4.2.1, infra. One of the essential justifications for a specialized tribunal was to enable it to build up a specialized knowledge to deal with a subject matter which was seen to be highly complex. A second reason was to avoid the technicalities of criminal prosecution,
which was the approach taken in other jurisdictions.

The functions assigned to the Board have always been numerous and varied. There are, however, two common threads which run through them: first, wide discretionary power; and second, an obligation to provide a strict guarantee of the rights set out in Section 3 of the Act. The range of discretion is rather broad in two respects: first, in terms of the wording used in Section 41; and second, in the absence of restrictive wording in the sections which specify the powers and duties of the Board. A categorization of the more significant functions of the Board is a useful means of determining its essential character. These six functions relate to:

1) representational and collective bargaining rights,
2) enforcement,
3) actual bargaining,
4) specific clauses in agreements,
5) trade union government, and
6) labour relations and the courts.

This exercise further supports the conclusion which I will develop in Part 4.2, infra, that the role of the Board is to take the parties to the "bottom line" defined by Section 3, which will put them in a sufficiently favourable position to protect their own interests.
The present Board consists of five members, one of whom is a neutral chairman, while the other four equally represent employers and organized employees. One of the latter presently serves as Vice-Chairman, and three alternative members are appointed to each side. In terms of support staff, there is an Executive Officer who functions as an agent of the Board, a Secretary and a small number of clerical personnel. This small organization is dependent upon the Minister and Department of Labour only with respect to the appointment of its members and staff, the approval of its regulations and financial support. The selection of members is another illustration of the Department's acute awareness of its "clientele" role. Having made the Board operative, however, that involvement comes to an abrupt halt.

The Board sits on a part-time basis, with hearings scheduled for every first and third week of the month in Regina and Saskatoon, respectively. In camera meetings are scheduled as required to deal with the caseload.

The rules governing the submission of applications and their handling by the Board are set out in Regulation No. 163/72. The workload generated by applications during the fiscal year 1976-77 was the heaviest on record.

The rules respecting the conduct of hearings, as opposed to the handling of applications, are not quite so thoroughly defined. The basic questions of whether to hold a hearing
and what format will be observed in its conduct seem to be left to the discretion of the Board. As a matter of practice, a hearing is conducted in every case. Once under way, the proceedings generally tend to follow the same format as one would find in a civil court, except that the degree of formality is not as consistent.

3. Work processes and policy development

The Board conducts a hearing in the case of every application, and in so doing, observes the adversary process. The delay, expense, reliance on technicalities and imbalance of expertise are criticisms of this approach which are already well known. In addition to "informalizing" the process, the Board could turn to other models to at least supplement the adversary system. These include pre-hearing discussion, hearings in writing, investigation and delegation of decision-making responsibility to the Executive Officer. All of these will be the subject of further scrutiny in Part 4.2.2, infra. A recent statement by the Chairman to the effect that the hearing time of the Board is a scarce resource which must be carefully husbanded suggests to me that such changes are most likely.

The decision-making process which follows the hearing is considerably less formal, but usually observes a set routine. The Chairman generally leads the discussion, but is helped to a considerable extent by the Vice-Chairman, who is by far the
most experienced member of the Board. That is not to suggest that the Chairman dominates the discussion - every one has a say - but he is naturally the one to take the lead because of his legal experience in such matters. The Board will only provide reasons where deemed necessary. Discussion during the in camera sessions really takes place in two stages: formal and informal, the latter involving two or three members while the remainder are otherwise preoccupied. Individual members do not seem to feel obliged to lobby on behalf of their particular constituent groups; rather, there is a genuine interest in producing a result which is fair, and which will not lead to a recurrence of the same kind of controversy. Members are concerned with portraying an image of unanimity and with ensuring that justice is seen to be done by those affected by the decision-making. In achieving this result, one witnesses an interesting and often unpredictable blend of common sense and reliance on established guidelines.

Allowing justice to be seen to be done and guaranteeing the right to an impartial hearing are concepts which go hand in hand, and often also include discussion of the notion of the rule of law. For the most part, the Board walks the straight and narrow road prescribed by the first two ideals, although there are occasions when, for example, a Board member continues to sit when an application is being heard from a union with which he was formerly affiliated. Such is the exception rather
than the rule, however. The role of the Executive Officer in commuting between the Board and the parties may also pose a conflict of interest in given situations.

The rule of law is concerned with the exercise of discretionary power, which is the heart of the administrative process. Whether discretion is being misused is a matter of degree, and is also ambivalent, depending on the beholder. The American approach, as characterized by K.C. Davis, is suggested as the approach to be taken in assessing any Canadian tribunal, since we borrowed the whole concept of administrative agencies from the United States. He suggests that Boards should structure their discretion in their own way at their own pace, and it is difficult to criticize our own Board in light of those broad parameters. The Saskatchewan Labour Relations Board has elected to follow the second course suggested by Davis, namely, that of issuing adjudicatory opinions in preference to the making of rules and issuing of policy statements. The criticism which remains is that the Board has not issued these opinions in writing, which leaves the great majority of users uninformed. The Court of Appeal has, nonetheless, supported the Board's exercise of discretion, which suggests that they are not treading too far off the beaten track of the rule of law.

Another aspect of this same question is the fact that The Trade Union Act is a classic illustration of the legislative approach: Here is a problem. We have set out in the statute
some very general policy guidelines: now go away and deal with it in the public interest. Those legislative guidelines are generally regarded by all users as acceptable. The criticism, which originates with legal counsel from both sides, is that guidelines laid down by the Board itself are deficient. The procedural guidelines are reasonably well established, but not well publicized.

Of greater importance are the substantive guidelines, which, as I have already indicated, are provided exclusively through the medium of adjudication. It would be unfair to suggest that the Board has not formulated rules for its own observance. There is considerable reluctance, however, to articulate and publicize hypothetical rules for fear of inhibiting future discretionary action. There is also the restraint of time imposed on a part-time Board which simply does not permit the production of jurisprudence. The criticism that there is not enough "law" loses some water when one sees a party repeating mistakes in respect of which the Board has personally corrected him. There are other occasions when parties are before the Board for purposes which are strictly litigious — where victory is more important than a well-reasoned solution. Ways of resolving these criticisms will be suggested in Part 4.2.2, infra.
The two approaches which have been taken by the Board to formulate policy are illustrated at some length in the text of the paper. A deliberate planned approach has only been used once in attempting to establish guidelines for determining the appropriateness of bargaining units in hospitals, etc. The more consistent approach has been to deal with each fact situation on its merits, often in the wake of changing legislation. My examination of "employee" status under the Act is but one of the many examples of this approach.

Judicial review, as I have already indicated, has played an important part in the history of this Board. Despite the existence of the privative clause now contained in Section 21, the orders of the Board have, since its inception in 1945, been reviewed by the Court of Appeal on at least forty-seven different occasions. The attitude of the judiciary has undergone a considerable transformation during that time, however. The first six years were characterized by suspicion and misunderstanding. Then, from 1953 to 1960, we see a greater degree of tolerance emerging; and finally, since 1962, the privative clause has been given full force and effect. On only four occasions has an order of the Board been quashed by that Court, and in two of those instances, the Supreme Court of Canada reversed our Court of Appeal. The present state of the law is that mandamus and certiorari proceedings are restricted to determining whether
or not the Board acted within its jurisdiction, including matters such as bias, denial of natural justice and fraud. The attitude of Board members towards judicial review is similarly a healthy one. In some cases, it is welcomed with a view to resolving matters which are uncertain both to the Board and the parties.

No formal mechanism exists for evaluating Board performance, either externally or internally. There is general reluctance among members to establish criteria and processes to interpret and evaluate their goals and performance. In fact, this may not be necessary because of the degree of rapport which exists, combined with the fact that it is a tripartite Board.

4. Interest accommodation

The case study approach permitted me to observe first-hand how the Board treats the parties before it on a case-to-case basis, as well as to hear policy statements by the Chairman in this regard.

Requests for adjournment have been a sore spot for some time. These will no longer be granted as a matter of course. Not only has the result been a more efficient use of Board time, but on a broader plane, it is the Board's way of impressing upon counsel the fact that disputed labour relations are, for the most part, transitory and volatile and require expeditious solution. A second problem has to do with the large number of uncontested
applications, particularly for certification, which are set down for hearing and which require the parties to attend despite the fact that they are seldom, if ever, expected to contribute anything further.

Many accommodations are, nonetheless, made. The schedule can be revised to accommodate special requests. The Board will avoid time-consuming formalities wherever possible, and will also avoid prejudicing parties in its application of the rules of evidence. Many objections are decided without a time-consuming recess, as was formerly the case. Locus standii is not usually strictly applied, and every opportunity is given to the parties to express themselves, particularly where they are appearing without legal counsel.

The regulations provide for the distribution of certain documents filed with the Board to affected parties; beyond that, at least until the present Executive Officer was appointed, the Board was virtually inaccessible. I have made some recommendations in this area in Part 4.2.2, infra, but the most important corrective measure that could have been taken has to do with the appointment of the present Executive Officer, who, merely by being available at a telephone, will represent an important improvement in the accommodation of parties.

It is also generally agreed that the Executive Officer can
play an important part in the resolution and/or verification of some matters before they come before the Board. It will probably take some time, however, before his go-between role is generally understood and accepted.

Finally, I have looked at the extent to which interested parties participate in Board decision-making, either directly or indirectly. In terms of influence, the political "Sword of Damocles" no longer hangs heavily over the Board's head, although the potential certainly exists for the entire Board to be removed upon any change in government. Constituent groups do have a right of recall over their members, although there is no evidence of this causing any real pressure upon individuals. More formal consultation takes place between organized labour and its members, and there is always some degree of criticism being directed at members on an individual basis. No direct pressure is tolerated against the Board, however. The media are no longer as actively interested as they once were.

In terms of how interest is determined, I have already indicated that the Board has relied almost exclusively on the adjudication process. Unless the parties are asking for something which is clearly not in the best interests of employer-employee relations generally, they will get what they want. The one public hearing which was held appears to have had very little real value, and involved considerable time and expense. It is
not likely that the Board will repeat that exercise.

4.2 Analysis

1. Significance of the Board's mandate and powers

Innis Christie recently said:

"The special feature of labour relations law in Saskatchewan for the past twenty-five years has been the almost unswerving purity with which the Saskatchewan Trade Union Act has translated into law the basic concept common to all Canadian labour legislation."

This "basic concept" focuses on the right of employees to organize without interference and to require their employer to enter into collective bargaining with them. In this regard, labour relations boards are instrumental in determining the wishes of employees and in certifying their bargaining representatives.

In most Canadian jurisdictions, the trend has been and still is, to elaborate on the basic scheme, and by that elaboration to shrink the core of conflict around which Canadian labour relations law is constructed. On the basis of experience in the field and before labour boards and courts more prohibited employer practices have been specified, limitations have been placed on union organization tactics, the certification process has been elaborated, changes have been made in the provisions for conciliation, statutory terms for inclusion in collective agreements have proliferated, the individual employee has been protected in his relationship with the union and the permissible means of conflict have been subjected to some statutory definition and administrative control. But not in Saskatchewan.
Why have the ideals borrowed from the Wagner Act remained intact? The reader will recall that the Wagner Act was primarily concerned with the organizational phases of labour relations and that substantive terms and conditions of employment were left entirely to private negotiation. Those features are still characteristic of The Trade Union Act. The trade union movement in Saskatchewan has never achieved the prolific results enjoyed by its American counterpart during the last war. Conversely, it did not provoke the strong public reaction which resulted in the Taft-Hartley amendments. There are a number of reasons for this which I will briefly enumerate. An in-depth examination of their relative influence is beyond the scope of this paper. Shortly stated, and in my opinion, they are as follows:

1) Timing. The labour movement in the U.S. negotiated a "green light" to organize in exchange for uninterrupted support of the war production effort. Saskatchewan's non-agricultural contribution to World War II had levelled off at the point in time where its legislation came into effect.

2) Nature of the economy. Looked at as a whole, the United States is a highly industrialized nation. Saskatchewan, by any standard of comparison, is certainly not.

3) Size. In the twelve years following the enactment of the Wagner Act, the labour movement in the U.S. grew to five times
its size. In the thirty-three years since The Trade Union Act has been in effect, our trade union movement has only multiplied four times.

4) The government. Just as the Wagner Act was sponsored as part of Roosevelt's "New Deal", so The Trade Union Act, 1944, was part of Premier T.C. Douglas's campaign platform. There has been only one interruption in CCF/NDP government in the interim, and the amendments made during the Liberal tenure were largely rectified by the subsequent administration. The U.S. has tended to "balance the interests".

5) The sophistication of the parties. Saskatchewan, because of its largely agricultural economy, enjoys only the peripheral interest of both "big business" and "big unionism". Particularly in the absence of the former, the level of labour relations practice has not reached the "high-powered" state of many other jurisdictions in Canada, much less the United States.

What we are left with in Saskatchewan is a situation of government involvement only insofar as guaranteeing the fundamental rights to belong to trade unions and to negotiate are concerned. At that point, the parties may request assistance, but it is not imposed by legislation.

It has been suggested that this framework, which leaves the parties in Saskatchewan free to wield the weapons of
economic conflict in reaching agreement on the terms and conditions of employment, has produced an unfortunate result. One critic contends that such a trial of strength proves only who is stronger, not who is right. It could easily be added that the legislation, and therefore the Board, are lacking in credibility.

Before one criticizes the Saskatchewan approach, however, a comment should be interjected about the very nature of the Department of Labour generally. This comment, in the writer's opinion, applies, mutatis mutandis, to labour relations boards, since every administrative agency serves only as a vehicle for a substantive program. Unlike almost all other units of government, a Department of Labour is a "clientele department", i.e. one which is legally obliged to develop and maintain an orientation toward the interests that comprise that particular sector of the economy for whose benefit it is organized. Government agencies (using the term "agencies" in its broadest sense to include both the Department of Labour and the Labour Relations Board) constitute only one of the groups of actors in any industrial relations system, the others being management and workers, and if these latter two have worked towards the existing arrangement, perhaps criticism would be unfairly directed at legislation which has not required or facilitated greater agency
involvement.

Because amendments have not "proliferated", it should not be assumed that the fundamental precepts of trade union legislation in this province have not been tested, or that the role of the Saskatchewan Labour Relations Board has not undergone evaluation and change. One such exercise was the Labour Management Committee on the Construction Industry, which made several important recommendations respecting the Board's role in that context. In concluding its report, however, the Committee stated:

> It is our conviction after nearly two years of review that there is no substitute for free collective bargaining. There should be no government compulsion in this process in the construction industry. Government has a role to play, but that role, during contract negotiations, is to provide the parties with effective mediation machinery.

Limited attention was paid to this report in the enactment of The Trade Union Act, 1972. What the legislation did unequivocally endorse, however, was the concluding remark of the Committee cited above.

It would appear, therefore, that the Board's mandate remains confined to providing a strict guarantee of the rights set out in Section 3, with a clear intention of providing no legislative obstacles to free collective bargaining beyond the point of certification. And that
is why there has been no expansion into the area of strikes and picketing (as there has been in Nova Scotia and Ontario, for example); investigation (as there has been in Ontario and B.C., for example); or arbitration (as in B.C.). The general broadening of remedial authority which has occurred in several jurisdictions would simply be inappropriate to Saskatchewan's notions of voluntarism and unrestricted bargaining.

2. Recommendations

In the context of what has just been said in Part 4.2.1., supra, I propose to make recommendations which, in my opinion, will enhance Board procedures and policy development in the first instance, and will improve their image with respect to interest accommodation in the second:

1) Work procedures and policy development

   a. Augment the adversary process with the following procedures:

      (1) Prehearing discussion. The Executive Officer or a duly appointed agent could consult with the parties to determine whether a hearing is really necessary, whether oral representations will be made, whether the respondent will contest the application, etc.
(ii) Hearings in writing. Where the application will not be contested, the Board could render its decision on the basis of filed materials.

(iii) Investigation. Certain applications could be investigated with a view to mediating the dispute, or at least providing a confidential report to the Board which would indicate to it whether a hearing was, in fact, necessary.

(iv) Delegation of decision-making responsibility. The Executive Officer could be empowered to make decisions in the field, for example, with respect to certifications in the construction industry.

b. Post decision-making.

(i) The parties could be advised of the outcome of the Board's decision by telephone, with the order to follow.

(ii) Where reasons are being prepared, the contents of the draft order could be discussed by conference telephone call rather than waiting for the next occasion on which the Board members meet.

c. Enforcement of Board orders.

The present enforcement procedure whereby the order is filed with the Court of Queen's Bench has been picked up by other jurisdictions as being more
preferable than proceedings in Magistrate's Court. The Board could, however, indicate in the order
that it will retain jurisdiction to hear any questions regarding the interpretation of that order, rather
than allowing the matter to proceed to the courts.

d. Guidelines.

(i) Procedural guidelines could be promulgated in the same manner utilized by the Ontario Board, for example. Practice Notes would greatly assist the parties in understanding how the Board will deal with certain kinds of applications from a procedural point of view.

(ii) The Chairman has indicated that written reasons will be provided where a question of policy has arisen, or the issue has provoked considerable controversy between the parties. In my opinion, this should be sufficient. The written reasons which are available, however, should be consolidated in some form. It is not necessary that this be done in the elaborate manner of the first edition of the SLRB Reports.

(iii) The present approach to both types of guidelines could be supplemented by consultation with interested parties, the extent of that consultation depending upon the magnitude of the particular issue and the
extent of the group to be influenced by it. This
would simply involve the Board hearing representations
from affected parties in a non-adversarial atmosphere.
It is appreciated that the size of this Board and
this jurisdiction militates against the use of the
sort of elaborate approach suggested by the Administrative
Procedures Act in the U.S., but some form of discussion is
necessary to ensure that the decisions which are
going to influence large numbers are not made in
the narrow confines of a hearing.

2) Interest accommodation

Some of what was said in Part 4.2.2(1), supra, is
equally applicable to this heading, but will not be
repeated. In addition, the following suggestions are
offered:

a. Some sort of educational program could be under-
taken to better inform the parties. In addition to
publishing such things as Practice Notes, newsworthy
items might be published along with each agenda as
was suggested by the Murchison Committee. The
Chairman, Vice-Chairman and Executive Officer could
make it better known that they are prepared to speak
to interested groups about matters of general interest,
without going into the specifics of decided cases.

b. An alternative to the full-time Board,
which appeared at one point early this year to be necessary to cope with the increasing workload, would be to empanel smaller numbers to hear applications of lesser significance or difficulty. I do not urge a full-time Board, not only because of the expense and obvious objections involved, but because there no longer appears to be a need for one in light of the way in which the present Board has been able to expedite proceedings. By empanelling, however, the Board could accommodate these "bulges" in the schedule which have formerly wreaked havoc with its part-time image, and have resulted in considerable delays. Should the Board decide at some point to empanel, they would then also be in a position to adopt the procedure used by the B.C. Labour Relations Board whereby decisions of one panel may be appealed to another panel, or the entire Board where matters of policy significance are involved.

c. An expansion of the present service generally would alleviate much of the uncertainty. The use of other officers of the Department of Labour during the early handling of the application would be of some assistance to the Executive Officer. The provision of a library facility for both Board members and parties would enhance the Board's "open door" image.


4. Statistics provided by the Research Division, Dept. of Labour, indicate that union membership grew from 12,290 in 1945 to 85,537 in 1976.


7. The Report of the Labour Management Committee on the Construction Industry (The Murchison Committee, Sask., 1970) recommended that:

   a. public representation on the Board be discontinued and that the total membership be reduced from seven to five - this was enacted;

   b. a permanent Executive Officer be appointed and that he be given substantial authority to act when the Board is not in session, provided that his actions would be subject to review by the Board - this was done by legislative enactment, but has enjoyed limited use to date;

   c. the Board publish a monthly bulletin detailing the parties involved in cases before it, the subject matter in dispute and the nature of the decision given; further, that written reasons be given on request for every interpretation given of The Trade Union Act, whether that interpretation is an interim decision during the course of a hearing or is part of the final decision resolving the matter in issue - this was not enacted;

   d. all parties before the Board have access to all evidence presented to the Board - this was not enacted;

   e. an expeditious certification procedure be adopted affecting the construction industry - this was intended to be a part of the Executive Officer's duties;

   f. a pre-adjudication procedure be established for investigating and mediating unfair labour practice allegations - this was intended to be another of the duties of the Executive Officer;

   g. a list of trade union jurisdictions be drawn up to assist the Board in determining appropriate units as well as work assignments - this was not adopted; and

   h. the Board be empowered to accredit certain employer associations - this was not adopted.

8. Ibid, 22.


T.C. Douglas papers, held by the Saskatchewan Government Archives in Regina; 304 (7-10) LRB (Mar. '49 - Nov. '60) 304 (7-10) LRB (Jan. '45 - Feb. '46) 302 (7-8) Legislation (Jul '44 - Apr. '46)

Dunlop J.T., Industrial Relations Systems, 1953.


Lapointe M., "The Labour Relations Boards of Quebec and Canada From the Labour Viewpoint", in WCJ Meredith Memorial Lectures (1961 Series), at 7.


Submission to the Labour Management Review Committee of Saskatchewan by the Saskatchewan Federation of Labour, 1966.

"The Trade Union Act, 1944 - General Statement and Analysis of Bill by Sections", prepared for internal use by the Department of Labour, 1944.


Weiler P., "The Supervision of the Administrative Process", in In the Last Resort, 1975.


The appendices which follow will describe the seven applications heard by the Board in a particular week during the period under observation.

The sittings in question were rather short to begin with, with only twenty-four applications set down. Following the adjournment of thirteen of these, and the withdrawal of four others, I was left with a selection of cases which did not constitute as much of a cross-section of the Board’s normal work load as I would have liked. It was, however, the only opportunity I had to sit in on the in camera sessions of the Board. There were, nonetheless, several issues which produced policy statements by the Board, and the three routine applications did serve to illustrate a number of procedural issues.

For reasons of confidentiality, names of participants will not be disclosed.
1. Application

This was an application for amendment to an earlier Board order, received by the Secretary 189 days before the hearing.

The Board order certifying the union in 1969 described the unit in the following terms:

all full time employees employed by (the employer), in the Province of Saskatchewan, except the Town Clerk, the Town Superintendent, and a person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity.

The applicant sought to amend this wording to include "all employees employed by (the employer), in the Province of Saskatchewan". The applicant's reason for doing so was simply to supply coverage for part-time and casual employees of the employer. The applicant filed with the application two Application for Membership cards. A check of the evidence of support filed against the Statement of Employment indicated a total of thirty employees, four of whom were not eligible and twenty-six of whom were. Of these twenty-six, two were union supporters and twenty-four were non-union.

2. Pre-hearing

On December 17, 1976, counsel for the respondent wrote to the Secretary, enclosing an unsigned Statement of Employment...
and assuring that the original would be forwarded upon completion by the employer. The respondent further indicated that he was opposing the application in all respects. The completed Statement of Employment was subsequently forwarded on December 23, 1976.

The application had been adjourned on four preceding occasions, each time on consent.

3. Hearing

Counsel for the applicant and respondent advised the Chairman that the form of the amendment had been agreed to by the parties. That amendment was presented in writing to the Chairman, who advised the parties that the matter would be taken under consideration.

4. In Camera Discussion

There was general discussion of the unusualness of the order sought by the parties, but it was agreed that there was little alternative but to accept what the parties had drafted.

There was passing reference to an earlier application for amendment made by the same union. When the Board dismissed that application, there was a certain amount of bad publicity which followed in the newspapers.

A motion was made to grant the application. It was supported by all present.
5. Issues for Consideration:

a. expedition of proceedings versus accommodation of parties

b. need for a formal hearing where the parties are in agreement

c. exercise of discretion by the Board where the parties are in agreement

d. Board awareness of possible adverse publicity following a decision

e. desireability of pre-hearing investigation/consultation

f. compliance with the rules respecting pre-hearing documentation
APPENDIX B
CASE STUDY NO. 2

1. Application

This was an application for bargaining rights, received fourteen days before the hearing.

The following unit was proposed:

all millwrights, millwright apprentices, millwright welders, millwright riggers, and millwright foremen employed by (the employer), in the Province of Saskatchewan

The applicant estimated three employees in the proposed unit, and filed a declaration of membership dated May 19, 1977, covering three persons.

No Statement of Employment was filed.

2. Pre-hearing

Nil

3. Hearing

Counsel for the applicant rested on the material filed with the Board. In the absence of any questions from members of the Board, the Chairman advised that the matter would be taken under consideration.

4. In Camera Discussion

There was no discussion of the application. A motion was made that it be granted, and all were in favour.
The order issued by the Board was in the terms requested in the application.

5. Issues for Consideration:
   a. need for formal hearing in the absence of a reply from the respondent
   b. need for representation by counsel in the absence of any reply, particularly where small numbers of employees are involved
   c. need for investigation by the Board in the absence of a reply
1. Application

This was an application for bargaining rights, received eighteen days before the hearing.

The following unit was proposed:

all employees of (the employer) except the Executive Director

The applicant estimated five employees in the proposed unit, and filed three Application for Membership cards. A check of the evidence of support filed against the Statement of Employment showed a total of five employees, one of whom was not eligible. Of the four eligible, three were union supporters. The one member who appeared to be non-union was in fact signed up after the filing date of the application.

2. Pre-hearing

Nil

3. Hearing

The applicant, represented by a union agent, rested on its materials.

The respondent, represented by a staff member of the Public Service Commission, requested three additional exclusions: the Director of (the employer), The Executive Assistant to the Director and the part-time staff. The applicant was opposed to all of these on the grounds that the Director was not a
manager, that the Executive Assistant's position had been abolished and that the part-time employees were not yet employed.

The respondent, never having appeared before the Board, was advised by the Chairman that the usual procedure was to have questions and answers, but that he could proceed as he liked, subject to cross-examination.

Evidence was given by a member of (the employer) as well as by the Director regarding its organization and activities, and the duties of the employees sought to be excluded.

In summation, the applicant so much as admitted that the Director should be excluded, but reiterated that the position of Executive Assistant had not been abolished and that the build-up principle in the Act should be applied in respect of the part-time employees. The respondent contended that the Executive Assistant position was merely unfilled, and that when filled the incumbent would play an active role in labour relations matters. With respect to the part-time employees, he sought to rely upon the precedent established by the Board in certifying the bargaining unit at (a related institution).

4. In Camera Discussion

There was no discussion of the evidence or argument. A motion was made that the application be granted, excluding the Director. The motion was carried unanimously.
5. Issues for Consideration:
   a. need for pre-hearing discussion between the parties
   b. how the Board deals with an imbalance of expertise
   c. maintaining a degree of formality in keeping with the complexity of the application and the abilities of the respective parties
   d. expediency of decision-making
   e. need for more particulars in pre-hearing documentation
1. Application

This was an application for bargaining rights, received forty-six days before the hearing.

The following unit was proposed (as amended):

all employees of (the employer in a certain division), except office and supervisory staff

The applicant estimated one hundred thirty-eight employees in the proposed unit, and filed one hundred thirty-six Application for Membership cards. A check of the evidence of support filed against the Statement of Employment showed a total of one hundred thirty-eight employees, all of whom were eligible, and one hundred thirty-six of whom were union supporters.

2. Pre-hearing

Two replies were received:

a. from (the intervenor), advising that the union was the certified bargaining agent for all employees of the company at one of its plants and indicating that it wasn't opposing the application provided that it related only to employees of the employer at its two other sites. Otherwise, the reply indicated, the Labour Relations Board did not have jurisdiction since Section 5(k)(1) could not be complied with. The reply concluded by saying that it was made in a form
other than that prescribed by regulation by reason of the fact that the International Representative of the Union would not be available until after the deadline set for reply.

b. from (the employer), commenting that the certification should also exclude warehouse and technical staff, who have historically been excluded. That reply was followed by a letter from the respondent to the effect that it had no objection to the bargaining unit requested, provided it covered the employees for whom the union was voluntarily recognized as a bargaining agent under the current and preceding collective agreements. In Article 7 of the current agreement, the term "office staff", in his opinion, had been interpreted by both parties to include warehouse and technical employees, and office staff had been excluded from scope.

3. Hearing

Counsel for the applicant indicated that all parties had agreed to amend the proposed unit to exclude an additional number of employees.

The Chairman indicated that, so long as everyone was satisfied, it was fine with him.

4. In Camera Discussion

There was no discussion. A motion was made to grant the
application, incorporating the amendments which had been agreed to. The motion was passed unanimously.

5. Issues for Consideration:
   a. need for counsel to formally attend when agreement has been reached
   b. adherence to strict procedural requirements set out in the regulations
   c. accommodation by the Board where the parties are in agreement
   d. desirability of pre-hearing consultation
1. Application

This was an application for bargaining rights, received eighteen days before the hearing.

The unit proposed was as follows:

all secretaries and clerical employees employed by (the employer) in the City of Regina in the Province of Saskatchewan

The applicant estimated fifty employees in the proposed unit, and filed thirty-six Application for Membership cards dated on various occasions over a one and one-half month period. A check of the evidence of support filed against the Statement of Employment indicated a total of fifty employees, all of whom were eligible, and thirty-two of whom were union supporters. Not included in the total of union supporters was evidence of support filed on behalf of four persons whose names were not listed on the Statement of Employment.

2. Pre-hearing

Two replies were received:

a. from (the intervener), commenting that the applicant should be required to adduce evidence that it was a trade union, that the bargaining unit applied for was appropriate and that the employees applied for were in fact "employees".
b. from (the employer), expressing concern regarding the name of the applicant union, since the expression "administrative personnel" was accepted as referring to management, that the name of the employer should properly read (another name proposed), that a more appropriate unit would be "all secretaries and clerical employees, etc." and that the employer would not appear at the hearing.

3. Hearing

Counsel for the applicant indicated that he would prefer not to proceed if the intervenor, which was not present, did in fact want to make representations. A brief adjournment followed while the Executive Officer attempted to contact the agent who had filed the reply.

Having ascertained that the intervenor would not appear, the applicant called one of the employees in the proposed unit to give evidence as to how and why this organization of employees came into being, why they did not want to belong to the intervenor, the reason for the delay in making the application and the nature of the unit proposed for certification.

In attempting to satisfy the three-fold onus upon him, namely, that the organization in question was a trade union, that it was properly organized and that the unit proposed was appropriate, the applicant was faced with the difficulty that the executive of the alleged union had been elected by
individuals who had not yet signed membership cards. His efforts were directed at distinguishing the need for doing so on the basis that the minutes of the organizational meeting clearly condoned this approach and that the precise name of the union had not been known at this time so that cards could not properly be made up. One labour member took particular exception to this line of argument because he saw it establishing a precedent for subsequent applications.

The decision, as is always the case, was reserved.

4. In Camera Discussion

There was considerable discussion over the approach proposed by the applicant. It was suggested that the rules had been fairly established and that to change them now would create an uncomfortable situation, even though the Board might be accused of hair-splitting on this particular application. It was concluded that the applicant did have a proper means at his disposal to elect the executive of the union, and that he was well aware of the policy of the Board on this question, having made numerous similar attempts in the past. Compassion was shown for those people affected, but it was generally agreed that there was no alternative but to dismiss the application. A motion to this effect was unanimously carried.

The Chairman agreed that brief reasons in writing should be provided, as requested by the applicant, to the effect that an organization was not properly constituted where the members of the executive were elected by individuals who were not, in
fact, members of the union, and that this defect could not be overcome by the wording of the constitution.

The Chairman advised that a draft of his reasons would be sent to the members for their comment.

5. Issues for Consideration

a. protection of the interests of unrepresented parties
b. accommodation of interests versus established policy
c. extent to which Board policy is publicized and understood by the parties
d. rule making-adjudication interface
e. desirability of pre-application investigation/consultation
f. basis for written reasons
g. participation in decision-making of a member who was formerly affiliated with one of the parties
1. Application

This was an application under Section 5(1) of the Act to be excluded from trade union membership on religious grounds, received forty-seven days before the hearing.

On January 8, 1975, the Board had certified (the intervenor) for all employees employed by (the employer), with certain named exceptions, not including the applicant.

As a member of (a certain church), the applicant indicated in his affidavit that the attitude of his church in matters of labour conflicts was entirely neutral and that "the strife which is evident in a management-labour struggle is a denial of the fundamental principles of Christianity ...".

2. Pre-hearing

The employee's supervisor indicated in his reply that he supported the applicant's request. The union did not reply.

3. Hearing

Hearing of the application did not get underway until the Executive Officer had had the opportunity to contact the intervenor to ascertain whether there was any objection to the application. Having established that no one would appear, the Chairman then indicated to the applicant that the proceedings before the Board were reasonably informal, and that it was up to him whether he wanted to give evidence. In such a case as
this, the Chairman suggested strongly that he should.

The applicant then read a prepared statement outlining the nature of his religious beliefs and the objections which he had to union membership.

A number of questions followed from the Board in an attempt to clarify whether the applicant's belief was an individual one or was that of his church. The Chairman also took considerable pains to explain to the applicant how the principle of majority rule in the Act must take priority over freedom of choice, and that a dangerous precedent would be established if such exclusions were indiscriminately allowed.

The applicant then called his minister, who attested informally to what the applicant had said, and referred the Board to an exemption which had been granted several years earlier to a member of the same congregation who was employed at Morris Rod Weeder in Yorkton.

4. In Camera Discussion

Even before the application was heard, several members of the Board had engaged in an informal discussion as to what principles should be applied in the matter of exclusion on religious grounds.

Following the hearing, consideration was given to the precedent to which the Board was referred, and a comparison was made with the facts of the present case.

The Chairman was inclined to support the application on the basis of the applicant's sincerity, the earlier precedent established with respect to a member of the same congregation.
and the fact that the trade union did not oppose the application.

There was substantial discussion concerning the nature of (this particular church) and the criticism it has directed at trade unions generally, what effect should be given to the earlier decided case and the effect on the applicant's service in the church should his application be denied.

A motion was finally made that the application be granted, and all but one member voted in favour.

A further comment was made that the order should provide for the Board to designate a charity in default of agreement between the parties, and it was agreed that this be done.

5. Issues for Consideration:
   a. how the Board handles the inexpert applicant
   b. reliance on precedent versus the merits of the particular application
   c. interest accommodation: individual versus union
   d. exercise of discretion under Section 5(1) of the Act
   e. concern of the Board about proceeding ex parte
   f. articulating the wording of the order
   g. informal versus formal discussion among Board members
   h. representing constituent interests
   i. sufficiency of legislative guidelines
1. Application

This was an application alleging an unfair labour practice under Section 11 (1) (a), (b), (c), (f) & (g) of the Act, received twenty-eight days before the hearing.

The application alleged that the applicant, the duly certified bargaining agent for the employees in question, and the respondent had negotiated a collective agreement which was to have taken effect on (a certain date) for a period of two years, and that the employer had since refused to execute the said agreement.

2. Pre-hearing

In its reply, the employer denied that an agreement had been reached, and that although negotiations had been carried on, they were based on the express condition that the union would agree not to ask the company to terminate the employment of those employees who had crossed the picket line during a strike which took place at the employer's plant earlier in the year.

3. Hearing

The hearing got under way at 9:00 a.m. in order to accommodate counsel for the applicant, who had a later appearance to make
before another tribunal.

Counsel for the applicant called a union officer to give evidence surrounding the negotiations and events leading up to the eventual failure to conclude the agreement. In response, counsel for the respondent called the General Manager of the respondent company.

The evidence on both sides was not really in conflict, the essential question being whether the condition precedent established by the company and communicated to the union by the conciliator could be upheld.

A brief recess was required to decide whether the company would be permitted to ask the union officer whether disciplinary proceedings were in fact taken, and what those proceedings were. After some discussion, which will be referred to under heading 4, infra, the Chairman ruled that the respondent would be permitted to ask only whether the trade union bylaws or constitution permitted discipline for crossing the picket line, and what kind of penalties could be imposed, without referring to specific employees or inquiring as to whether discipline had been imposed.

In the course of examining his witness, counsel for the respondent was again cautioned that he was treading on dangerous ground in asking what was said during conciliation when both parties were not in attendance. He was instructed to avoid any reference to the conciliator, since doing so would be
setting a dangerous precedent.

In summing up, the applicant alleged that an agreement had been concluded and that the company was attempting to attach a condition which was illegal, which interfered in the administration of a labour organization and which required the trade union to abstain from exercising its seniority rights clause. Further, it was alleged that the company was not bargaining in good faith in taking such steps. The applicant relied specifically on the decision of the United States Court of Appeal (7th circuit) in *Universal Oil Products Company v NLRB* (1971), 65 LC 11, 677.

The respondent, in his turn, argued that the applicant was aware of the condition prior to the preparation of the draft agreement, that the condition did not prevent the trade union from disciplining its members, but rather from firing them, and that the exercise of rights in the administration of the union were not being interfered with. The respondent relied on a decision of the United States Court of Appeal (7th circuit) in *Allan Bradley Co. v NLRB*, 286 F. 2d. 442 (1961), in which the National Labour Relations Board was upheld in its decision to recognize the imposition of such a condition precedent.

In reply, the applicant indicated that the Bradley case had been specifically over-ruled by the Court of Appeal in the *Universal Oil* case.

4. In Camera Discussion

Once all of the members had had the opportunity to read the *Universal Oil* case, the Chairman opened the discussion by indicating
that case did specifically over-rule the Allan Bradley case and was directly on point, and although this Board was not obliged to follow it, it should be seriously considered. This was in fact a new issue for the Board, and there was some discussion as to the precedent it would establish for another case which was presently being heard. The Chairman believed that reasons should accordingly be given.

There was no real disagreement with the Chairman's assessment of the Universal Oil case. The concern seemed to be with the extent to which the Board's order should proscribe the activity of the employer. It was concluded that, discipline being a trade union matter, the company was not negotiating in good faith in imposing a condition precedent based on a matter that was not negotiable. There then followed a discussion as to the various heads under which an unfair labour practice should be found. A comment was made that sections such as 11(1)(f) are "mind bending".

A motion was finally made that the application be granted under heads (a), (b) and (c), but not (f) and (g). All agreed, although it was quite apparent that one member was dissatisfied with the end result. It was also interesting to note that a management representative commented that it appeared to be entirely management's fault, and a labour representative then proceeded to disagree with him. It was generally concluded, however, that the industrial relations situation at the site of this particular employer was not a healthy one.
5. Issues for Consideration

a. exercise of discretion: procedural and substantive

b. Board policy with respect to the internal operations of trade unions

c. responsibility of the Chairman to counsel Board members in matters of policy and legal procedure

d. Board's concern in not interfering in aspects of labour relations where confidence and discretion are of utmost importance

e. Board reliance on precedent established outside of the jurisdiction

f. rule making-adjudication interface

g. Board-staff relations during discussions

h. formal versus informal discussion

i. constituency loyalty versus bias-free decision-making

j. Board involvement in employer-employee relations

k. need for expediting the hearing where an unhealthy labour relations atmosphere exists