Ontario Labour Relations Board
Commission des relations de travail de l'Ontario

Our File Number / Numéro de dossier 1341-03-U
1431-03-M

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December 8, 2003

TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

Benjamin Blasdell, v. United Food and Commercial Workers International Union, Local 1000A, v. Loblaws Supermarkets Limited

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Benjamin Blasdell, v. United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C., Local 1000A, v. Loblaws Supermarkets Limited

I enclose herewith a copy of the Board's Decision dated December 8, 2003 in the above matter.

Sincerely,

Tim R. Parker

Tim R. Parker
Registrar

TRP/ml
Encl.

ONTARIO LABOUR RELATIONS BOARD

1341-03-U Benjamin Blasdell, Applicant v. United Food and Commercial Workers International Union, Local 1000A, Responding Party v. Loblaws Supermarkets Limited, Intervenor.

1431-03-M Benjamin Blasdell, Applicant v. United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C., Local 1000A, Responding Party v. Loblaws Supermarkets Limited, Intervenor.

BEFORE: Brian McLean, Vice-Chair.

APPEARANCES: Harry Kopyto, Les Jenkin, Sharon Brown and Benjamin Blasdell for the applicant; Ian Anderson, Kevin Corporon, Tony Soares, Sterling Seward, Wayne Robinson and Greg Sitch for the responding party; R. W. Kitchen and Ron Conliffe for the intervenor.

DECISION OF THE BOARD; December 8, 2003

1. Board File No. 1341-03-U is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") in which it is alleged that the responding party ("Local 1000A ") has breached section 74 of the Act. Board File No. 1431-03-M is a related application for an interim order.

2. The Board conducted a consultation on October 23, 2003 to determine the section 96 application. By decision dated October 8, 2003 the Board declined to deal with the interim order application.

3. The applicant is an employee of the intervenor, Loblaws Supermarkets Limited ("Loblaws"), at one of its grocery stores. He is represented in his employment relationship with Loblaws by Local 1000A.

4. Local 1000A is and has been party to a collective agreement with Loblaws (operating under several banners) for a bargaining unit which covers several thousand employees. That collective agreement has a term running from July 1, 2000 to July 1, 2006. The issues in this case arise out of Local 1000A's decision to agree to amend its collective agreement with Loblaws in the spring and summer of 2003 which, obviously, is well prior to the time when the parties would normally bargain amendments to their collective agreement. Many of the facts which underlie the application are not in dispute.

5. Loblaws is a large grocery store chain which operates stores throughout Ontario. It is a subsidiary of Loblaws Companies Limited, a publicly traded corporation which operates businesses in the retail food sector through a number of subsidiary companies throughout Canada. Prior to the events which are the subject of this application, the complex recognition clause in the collective agreement between Loblaws and Local 1000A was the following:

1.01 (a) The Company recognizes the Union as the exclusive bargaining agent for all persons it employs in any of its Loblaws Supermarkets Limited and Supercentre stores in Ontario excluding the City of Sudbury and the Townships of McKim, Nepean and Gloucester below the rank of Store Manager, Photo Lab Technician, Pharmacist and Assistant Store Manager.

(b) The General Merchandise Manager in new stores 80,000 square feet or larger and in stores listed in Article 20.01 shall be excluded from the bargaining unit.

(c) Managers of any new departments listed in Article 20.03 in new stores up to 100,000 square feet, in major refurbished stores up to 100,000 square feet, in stores greater than 100,000 square feet and in those stores listed in Article 20.01 shall be excluded from the bargaining unit.

(d) The Company also recognizes the Union as the exclusive bargaining agent for all persons it employs in any of its Loblaws Supermarkets Limited Free-standing Ziggy stores in Ontario, (excluding the Townships of Nepean and Gloucester) below the rank of Store Manager, Photo Lab Technician, Pharmacist, Assistant Store Manager and employees listed in 1.01(b) and 1.01(c).

(d) The Company also recognizes the Union as the exclusive bargaining agent for all persons it employs in any of its Loblaws Supermarkets Limited No Frills stores in Ontario (excluding the Cities, Townships and store locations listed in Article 1.01 (a) above) below the rank of store Manager, Photo Lab Technician, Pharmacist and Assistant Store Manager and employees listed in 1.01(b) and 1.01(c) All matters relative to Loblaws Supermarkets Limited No Frills employees shall be governed by Appendices "F'" and "G" of this Agreement.

6. The complexity of the recognition clause stems from the way Loblaws carries on its business and the way its employees have been organized by Local 1000A and other unions. Loblaws carries out its business through a number of different grocery store names or banners. These include "No Frills", "Real Canadian Superstores", "Ziggys", "Loblaws" and "Fortinos". Local 1000A and other unions have organized Loblaws on a store by store basis. Not all of the stores under each banner are unionized.

7. Loblaws is one of the strongest players in Canada's competitive supermarket sector. Nevertheless, Loblaws is always under business pressure. The Company faces stiff competition from other (largely unionized) large grocery chains, and, perhaps more intensely, from other non union chains (like Costco), individual stores and smaller operations.

8. Recently Loblaws has been particularly concerned about the challenge created by Wal-Mart's entry into the Canadian market. Wal-Mart is the world's largest retailer. Its success is based at least in part on its ability to cut costs and thus the prices it charges consumers for goods. Although one can never be sure about the effect of Wal-Mart on the marketplace in any location, generally Wal-Mart is blamed for the demise of many retailers both large and small.

9. It was common ground at the hearing that very few (if any) of Wal-Mart's employees throughout the world and in Ontario are represented by trade unions. This assists that company in keeping costs lower.

10. Wal-Mart's entry into the Canadian marketplace initially had little impact on Loblaws or other companies in the grocery store sector. Wal-Mart sold very few food items in its stores and Loblaws sold very few non-food items in its stores. Nevertheless, Wal-Mart has captured about 5% of food sales in Ontario since it began carrying on business in this province. Recently it became apparent that state of affairs might change. There were rumours in the financial press that Wal-Mart might purchase a Canadian grocery chain. More concretely, in November 2002, Wal-Mart announced that it intended to begin opening "Sam's Club" superstores in Ontario. Whereas standard Wal-Mart stores sell few food items, Sam's Club superstores have a fairly broad range of food items in addition to a large selection of non-food items. It became apparent to Loblaws that for the first time Wal-Mart will be, through Sam's Club, in (more or less) direct competition with Loblaws.

11. Loblaws developed a strategy to deal with the competition from Wal-Mart. That strategy appears to have crystallized in late 2002. Under the strategy, Loblaws would concentrate its energies on developing and expanding its own line of "Superstores", the "Real Canadian Superstore". Its Superstores would sell both food and a significant number of non food items. In December 2002 and January 2003, Loblaws's executives met with the leadership of UFCW International Union and interested locals including the president of Local 1000A, Kevin Corporon. In these meetings, Loblaws reviewed the critical changes in food retailing in the United States and Canada. This review came as no surprise to Local 1000A or the UFCW. UFCW has suffered first hand experience with the influence of Wal-Mart in the United States.

12. Loblaws advised the unions that it had made a strategic decision to invest in "Real Canadian Superstores" rather than in conventional stores. Real Canadian Superstores were to be characterized as stores with at least 35% of the store dedicated to department store type merchandise some of which includes home décor, bed and bath, toys, electronics etc. In other words, Loblaws was not just trying to protect its share of the grocery business, it was taking the fight directly to Wal-Mart in its core business of retail department store sales. Virtually all future growth in Ontario would take place under the new Real Canadian Superstore banner at the expense of stores under existing banners.

13. Loblaws advised the unions that it intended to open up to 40 Real Canadian Superstores in Ontario over the next three years. It also advised that the company had a number of options as to how the expansion could take place. Loblaws told the unions that it would prefer to open the new stores under an existing banner. However, to do so would require changes to the collective agreements to allow the new superstores to be more competitive with its non-union competitors like Wal-Mart. If the parties were unable to agree to amendments to the collective agreement, Loblaws would likely open the new stores under a new banner or an existing non-union banner, or a unionized banner where the collective agreement was less "rich".

14. On its face, Loblaws's threat to open the new superstores under a different banner would appear to be just the kind of situation that section 1(4) of the Act (the related employer provisions) was designed to prevent. However, the union obtained legal advice that it might well lose an application under section 1(4). That advice was given orally by in house counsel. The advice is based on the fact that Loblaws has operated its business under a number of different banners for a number of years. Some of the banners and/or stores are non-union and some stores have relationships with different unions. If there was to be a section 1(4) declaration which collective agreement would apply? Which union would get bargaining rights? Given the history of unionization in this business, would not an application under section 1(4) be seen as an improper attempt to expand bargaining rights? These were all issues which caused counsel to doubt whether Local 1000A would be successful before the Board on such an application.

15. The applicant did not directly challenge the legal advice that was provided to Local 1000A. He did, however, suggest that not enough care went into the analysis provided by counsel, in large measure because no written opinion was drafted. In the applicant's view, the advice was essentially worthless.

16. It is worth commenting on this aspect of the applicant's case at this point. First, there is nothing in section 74 of the Act that required Local 1000A to get legal advice at all in these circumstances. Second, having decided to get legal advice, there is nothing in section 74 of the Act that required it to get that advice in writing. Moreover, the issue before Local 1000A was one that frequently arises in the grocery store industry and one which it and its counsel are unquestionably very familiar. (Indeed I venture to say that other than the construction industry the Board gets more applications under section 1(4) or 69 of the Act from the grocery store sector than any other). I have no doubt, as Local 1000A asserts, that the issue of whether Local 1000A could file a successful application under section 1(4) or 69 of the Act has come up before in similar circumstances. There was certainly no need for counsel to provide a written opinion on law and issues that are so familiar. I therefore find nothing improper about the its conduct in this aspect of the case.

17. That is not to say that counsel's opinion was necessarily right. Loblaws's advice to Local 1000A that it could and would like to open the new stores under the Loblaws banner is a fact not present in most other cases involving s.1(4) which have come before the Board. However, I certainly cannot say that the advice was wrong in view of the way that Loblaws is organized and the other factors which influenced the legal opinion. In any event, the advice was certainly well within the standard required by section 74 of the Act. Whether or not it was in writing does not change that conclusion.

18. More importantly, I also have little doubt that regardless of its prospect of success on any application before the Board, Local 1000A's decision not to file a section 1(4) application and its response to Loblaws's proposal was influenced by the fact that it fundamentally agreed with Loblaws's analysis of the Wal-Mart threat and its strategy to cope with the competitive challenge. It agreed with Loblaws that any new superstore could not be competitive with Wal-Mart (or any other similar competitor) without lower wages than existed in the then collective agreement. In other words, success on an application under section 1(4) and or 69 of the Act would be a Pyrrhic victory. Local 1000A believed that the new stores would fail if they were saddled with the then collective agreement with the consequent loss of jobs and the damage to Loblaws's competitive position.

19. On the other hand, if Local 1000A went along with the Company's strategy it could guarantee that the new jobs would be occupied by Local 1000A members, thereby enhancing the union's strength and increasing its overall bargaining power. It could also do its best to negotiate the best collective agreement it could get while keeping Loblaws competitive. Most importantly, it could provide safeguards to those in the company's conventional stores who would lose their jobs when the superstores opened. (The Board notes that the existing collective agreement provides some job guarantees to employees of existing stores but they are limited, it is entirely possible that job losses would have exceeded the guarantees).

20. The applicant disagrees with Local 1000A's assessment of the Wal-Mart challenge. He argues that Loblaws is the most successful and powerful business in the Ontario grocery store sector. The applicant argues that Loblaws duped the union into agreeing to lower wages so that it could increase its profits. The applicant asserts that there was plenty of information available to

Local 1000A which suggested that Loblaws could compete with Wal-Mart without lowering wages. He provided the Board with a copy of stock market research which was very positive about Loblaws's prospects.

21. The Board has little doubt that there are compelling arguments that Loblaws can compete with Wal-Mart in Ontario even under the old collective agreement. Despite the recent concerns that have arisen regarding stock market analysis, those arguments may even be right. However, nothing compels Local 1000A to accept the analysis of equity researchers over its own experience, knowledge and expertise of the industry. From the material before me, it is apparent that Local 1000A carefully considered its assessment of "the Wal-Mart Challenge"

22. Early on in its discussions with the unions Loblaws insisted, as a condition of entering into these discussions, that the unions would not seek to have their membership ratify the changes to the collective agreement. Among other things, Loblaws was concerned that if Local 1000A were to present any agreement to employees for ratification and they rejected the proposed agreement Loblaws's defence to any section 1(4) and/or 69 application would be seriously prejudiced. Loblaws also took the position that there could be no agreement unless all of the UFCW locals agreed to mid term amendments to their collective agreements.

23. Both Local 1000A and Loblaws asserted that in addition to the no ratification requirement Loblaws also required that Local 1000A keep the fact of the negotiations confidential. The parties asserted that requirement was instituted to protect confidential business information and strategies. However, neither party included that assertion in their pleadings.

24. The parties began to negotiate the provisions of the amendments to the agreement. The negotiations were lengthy and complex. On May 23, 2003 the discussions broke down completely. One of the reasons for the breakdown was that UFCW Locals 175 and 1977, who were also participants, took the position that any negotiated agreement would have to be subject to a ratification by its members. (There is no suggestion in the pleadings that Local 1000A also advanced this position although this was not noted at the consultation). Local 1000A suggested to Loblaws and to the other locals that in lieu of a ratification vote a representative group of employees be given the opportunity to give the locals a "mandate" to conclude a deal. Loblaws declined the proposal, broke off the talks, and told the unions that it would proceed to open the stores under a different banner.

25. On May 26th Loblaws contacted the unions and advised that it was prepared to negotiate with any local that was willing to forgo ratification in favour of obtaining a mandate from a representative group of employees Loblaws also abandoned its condition that there could be no deal unless all of the locals agreed. Local 1000A agreed to proceed on this basis. Shortly thereafter, Loblaws and Local 1000A reached an agreement in principle. The agreement represented significant movement on Loblaws in part due to Local 1000A's proposals.

26. The parties negotiated a new appendix (the "Appendix") to the collective agreement which would apply to supercentres, on new sites. At sites where a conventional Loblaws is converted into a supercentre a letter of understanding applies the part time wage schedule set out in the Appendix to employees in the department store type merchandise areas of the supercentre. Those employees do however benefit from the other provisions of the Loblaws collective agreement.

27. Many current employees will not be affected by the amendments to the collective agreement either because their store will remain in its current format or because they remain grocery employees in a store which is converted to a supercentre. Nevertheless, it is apparent that the Appendix fundamentally changes the terms and conditions of employees who will in the future be, and in some cases are, in this bargaining unit in new and converted supercentres. Such employees will largely be subject to the terms and conditions as exist in the collective agreement which applies to stores operating under the Fortinos banner. Such terms and conditions represent a change to nearly every clause of the Loblaws collective agreement for affected employees.

28. Apart from the new provisions which would apply to new supercentres and the employees who work in them, the agreement includes the following protections for existing employees:

(a) an assurance of employment to all full-time employees on the full-time payroll as of January 1, 2003. This assurance was retained if an employee transferred to a superstore;

(b) an early retirement offer to all full-time and part-time employees age 55 or over as of March 31, 2004. In addition, the offer applied to employees who retired between January 1, 2003 and June 17, 2003;

(c) employees affected by the opening of a new superstore and a related closure of a conventional store have four options in addition to bumping rights under the collective agreement including:

(i) full-time employees accepting transfer to Loblaw Real Canadian Superstores receive a payment of three weeks per year of completed service to a maximum of $75,000.00 and part-time to a maximum of $10,000.00 in addition to maintaining their bargaining unit seniority date, company service date, pension plan and personal assurance of employment where applicable;

(ii) an opportunity to sever their employment and receive four weeks per year of completed service to a maximum of $75,000.00 for full-time and $10,000.00 for part-time; and

(iii) an early retirement offer.

(iv) an opportunity to bump to another Loblaws store or to be absorbed in another Loblaws store.

(d) An agreement that Loblaws will not propose wage or benefit concessions in negotiations for the renewal of the collective agreement

(e) Loblaws also agreed to pay $450,000.00 in three instalments over three years to Local 1000A for communication and education initiatives.

29. It was understood that Local 1000A's authority to finalize the amendment agreement would be subject to a mandate from a group of employees, in Local 1000A's case, its "divisional officers". Under Local 1000A's constitution and by laws, the membership is divided into a number of divisions. Each division has its own officer who conducts meetings of the membership in the division. Divisional officers are elected, although it may be that at the time of the events giving rise to the application a few of the divisional officers were appointed. In total there are 22 Loblaws divisional officers, a significant majority of whom were elected.

30. On June 16 and 17, 2003 all of the divisional officers met at Local 1000A's offices. The divisional officers were advised of the events that had occurred. The divisional officers were told that the purpose of the meeting was to obtain a mandate for Local 1000A to conclude amendments to the collective agreement. Local 1000A advised of the legal advice it received had regarding its chances of success if it were to file an application with the Board under section 1(4) and/or 69 of the Act. Divisional officers were given an extensive presentation about, among other things, the "Wal-Mart threat" and the agreement in principle that had been reached.

31. At the end of the two-day meeting, the divisional officers voted in a secret ballot vote on whether to give a mandate to Local 1000A to conclude the agreement. They voted unanimously to give such a mandate.

32. Local 1000A continued negotiations to try to finalize the deal. At the same time they took steps to ensure that stewards, and ultimately the membership, became aware of what was going on. By this time the amendment agreement was essentially concluded. In late June, Local 1000A mailed a letter to each of its stewards. The letter advised that Local 1000A had reached an agreement in principle with Loblaws with respect to the new superstores. Stewards were invited to a meeting to take place on July 3, 4 and 7, 2003. Most stewards supported the amendments.

33. On or about June 26, 2003 Local 1000A caused to be posted in each store a notice of division meetings to take place July 13, 15, 16, and 17 where the membership could learn the details of the agreement. On July 7, 2003 Local 1000A mailed a letter to each of its members to inform them of the meeting. That letter stated:

> **To all Local 1000A Loblaw Companies Members**
>
> Greetings,
>
> By now, you have likely heard many rumours of how the employer intends to meet the imminent threat of Wal-Mart Supercentres coming to Ontario. As well, there has been much speculation about what UFCW Local 1000A is doing to protect your rights during Loblaw's restructuring. Having heard reports of many of these rumours, I can easily appreciate any feelings of anxiety you and your co-workers may be feeling.
>
> You will therefore be relieved to know that even though our industry will be significantly affected by the Wal-Mart Supercentre invasion, UFCW Canada members now working for Loblaw companies are well-protected.
>
> This does not, however, mean you will be unaffected by the company's new business strategy. Over the next several months, many workers will be affected in some way, but everyone's contract rights have been maintained. Moreover, all existing workers who are affected by the company's Real Canadian Superstore (RCSS) program, full-time *and* part-time, will have several options. Long-term wage

and benefit stability is a critically important part of what the union has negotiated for its members...for you.

On June 16-17, Local 1000A Divisional Officers from all over Ontario met at the Local's headquarters to thoroughly discuss the situation and determine how to proceed. After detailed presentations and open discussion, the divisional officer's voted to give the union leadership a mandate to finalize an agreement with the company. The vote was by secret ballot and was unanimous. While gratified by the strong vote of confidence, I still want to present the agreement to the membership and answer all questions about what happens from here.

Special membership meetings have been called for this purpose. See the back of this letter for the date, time and place of the meeting for your division. For those who cannot attend the meeting, a dedicated website *www.ufcwrealcanadian.ca)* is now being constructed. Stewards who attended recent special meetings will also have up-to-date and accurate information.

I will be at all meetings to make a complete presentation on the agreement and answer all your questions. I look forward to seeing you there.

In Solidarity,

"Kevin Corporon"
President

34. The agreement to amend the collective agreement was signed on July 11, 2003.

35. It has been the history of this union to consult the membership prior to entering into new collective agreements or significant amendments to existing agreements. That was not done in this case, except after the amendment agreement had been signed.

36. The meetings took place. The applicant complains about the amount of notice employees received of the meeting, particularly since they took place in the summer. However, he acknowledges that he attended the meeting and that he was unaware of anyone that did not attend the meeting as a result of the short notice. Therefore, there is no reason for the Board to inquire into these aspects of the complaint. By the time of the meeting the agreement had been concluded. On July 23, 2003 the applicant filed this complaint.

ISSUES

37. In its decision dated October 8, 2003, the Board identified the issues that would be dealt with at the consultation. Those issues are as follows:

1) Is the collective agreement, as amended, valid in view of the fact that it was not ratified by the membership following the agreed to amendments?

2) Did the union violate section 74 of the Act by not seeking ratification of the agreement, by not consulting directly with the membership and, as it is alleged, by concealing the fact that

negotiations were underway and that an agreement had been reached?

3) Did the union violate section 74 of the Act when it provided for a different consultation process for each of the three locals affected by the agreement?

38. At the consultation the applicant raised other issues. Included among those was whether the employer had committed an unfair labour practice (specifically a violation of section 70 of the Act) by insisting to Local 1000A that it not consult with its membership and whether Local 1000A had itself violated section 74 of the Act by acceding to Loblaws's demand. The applicant also requested that he be permitted to include as applicants other persons whom he asserts are other Loblaws employees who wish to be added to the proceeding.

39. Before turning to the issues which the Board identified I will deal with some of the other issues which the parties argued at the consultation or which the Board dealt with in a somewhat summary fashion either at the consultation or before.

Addition of Applicants

40. By two letters dated September 26, 2003, more than 2 months after the application had been filed, the applicant advised the Board that approximately 26 other alleged Loblaws employees wished to be added as applicants to these applications. The applicant did not deliver a copy of his request to the other parties until October 14, 2003, a week prior to the consultation. At no time has the applicant provided to the Board the contact information (as set out in the application form) the Board requires to make these persons parties to these applications.

41. The other parties objected to the new applicants being added. In its October 10, 2003 decision the Board deferred this issue to be dealt with at the consultation.

42. At the consultation, the Board declined the applicant's request that additional persons be added as parties. These are the full reasons for that decision.

43. Before making its decision, the Board asked the employer and Local 1000A whether they intended to make any argument regarding Mr. Blasdell's status to bring these applications. They advised the Board that they did not intend to make any such argument. Therefore, the addition of the additional applicants would have no effect on the success (or lack of success) of the application. The only purpose, from the applicant's perspective, is a demonstration that the applicant's concerns are not his alone and that several employees (at least) object to the amendments to the collective agreement and the process under which the amending agreement was reached.

44. On the other hand, to permit the persons to be added would lead to potential problems. First, the Board could not be assured that all of the persons, as they would be entitled to as applicants, had proper notice of the consultation. As a result the consultation could have been delayed or there would be a risk that a party would seek to have the matter reheard.

45. Under the circumstances the Board declined to add the persons as applicants. The Board advised the applicant that it accepts that he is not alone in having fundamental concerns about the Local 1000A's actions. On giving this ruling the applicant's agent advised the Board that the others would be filing their own application. That is their right. Of course the Board's decision in this application would in all likelihood be raised in any other such application.

Allegation that the union's conduct discriminated against women

46. In its decision dated October 8, 2003, the Board made the following ruling with respect to this issue:

> In his application the applicant also asserts that the new collective agreement discriminates against women. It relies on the assertion that female employees are disproportionately affected by union concessions in the grocery store sector. It asserts that a "large number of women" are in job classifications that will be affected by the revisions to the collective agreement.
>
> The Board does not accept, as is implicit in this argument, that the UFCW cannot agree to wage concession in bargaining with grocery stores. Accordingly, the Board declines to inquire into this aspect of the complaint. If the applicant requires more detailed reasons the Board will provide them at the applicant's request after the consultation.

47. At the consultation the applicant sought to reopen this aspect of the complaint. The Board declined the request because the applicant had not filed a request for reconsideration of the Board's decision. The applicant also did not take advantage of the Board's invitation, made in its October decision, that the Board provide more detailed reasons for its decision to decline to inquire into this aspect of the complaint.

48. Following the consultation into this mater the applicant filed a request for reconsideration of the Board October 8, 2003 decision with respect to this issue. Accordingly, the Board will determine that request in this decision.

49. Before dealing with the merits of the request for reconsideration the Board would like to comment on its procedure in applications under section 74 of the Act. That procedure is guided in part by Section 99 of the Act which states:

> 99. (1) This section applies when the Board receives a complaint,
>
> ...
>
> (c) that a trade union has failed to comply with its duties under section 74 or 75.
>
> ...
>
> (3) The Board is not required to hold a hearing to determine a complaint under this section.
>
> ...

> (5) The Board may make any interim or final order it considers appropriate after consulting with the parties.

50. The purpose of the Board's October 8, 2003 decision was, as it is permitted to do both under section 99 of the Act and its Rules, to weed out those aspects of the application which had no chance of success. While narrowing issues is always beneficial, it is a particularly important objective when, as here, the application does contain several serious issues, and where, as here, the employer's plans are imminent, and when to deal with all issues, meritorious or not, would delay the determination of the matter.

51. The applicant also challenged the decision of the Board because if failed to provide reasons for the decision. However, the decision is clearly just a bottom line decision meant to define the issues that the Board would consider at the scheduled consultation. The decision specifically invited the applicant to request full reasons. The applicant never made such request at the consultation or otherwise. Nevertheless, the Board will treat this application for reconsideration as, in part, a request for reasons.

52. The request for reconsideration also relies on the assertion that the Board failed to "put its mind to the issue of gender discrimination contrary to the Decision of the Supreme Court that an arbitrator is empowered to interpret the substantive rights of the Human Rights Code as those rights have been imported into a collective agreement". Assuming, without finding, that the Supreme Court's decision in *District of Parry Sound Social Services Administration Board v. O.P.S.E.U., Local 324 and Ontario Human Rights Commission*, 2003 SCC 42 applies to the Board, the applicant's argument on this point cannot succeed because the Board did not "fail to put its mind to the issue of gender discrimination". In fact the Board specifically addressed the issue and did not determine that it had no jurisdiction over such a complaint.

53. The applicant first raised the issue of gender discrimination in his application but only in the most superficial way with no supporting factual allegations. This allegation was contained in one paragraph. That paragraph states:

> The amendments to the collective agreement have the potential to result in systemic discrimination in employment against women workers, contrary to the Ontario Human Rights Code. By agreeing to these provisions, the Union has acted in a manner which is discriminatory.

54. The responding party responded to this allegation in paragraph 66 of schedule A to its application: " The Applicant has provided no basis for [this] absurd suggestion...". "The statement is nonsense and is in any event denied".

55. The intervener took a similar position in its pleadings.

56. The applicant filed a detailed reply to the pleadings filed by Local 1000A and the employer. In its response the applicant requested production of a substantial volume of documents. The Board notes that none of the documents requested appear to relate to the discrimination claim. (For example there was no request for pay equity or other similar records.)

57. The applicant's reply to paragraph 66 of the application is as follows.

> The Union is well aware of the body of credible academic research that supports the position that concessionary collective bargaining in the retail food industry has disproportionately impacted women workers. The concessionary provisions to which the Union agreed in its negotiations with the Employer are exactly substantially the same as provisions that are the subject of extensive analysis in *Gender, Corporate Restructuring and concession Bargaining in Ontario's Food Retail Sector, Jan Kainer, Division of Social Science, York University, 1998* and are the subject of further analysis in **Cashing In On Pay Equity?** *Supermarket Restructuring and Gender Equality, Jan Kainer, Sumach Press, 2003* and in *Women Challenging Unions, L. Briskin and P. McDermott (eds.), University of Toronto Press, 1993* and in other scholarly literature. Concessionary collective agreements negotiated by the United Food and Commercial Workers Union and by Local 1000a and the impact of those agreements on women workers are discussed at length in this literature.
>
> The premise underlying the assertion is that concessionary bargaining, which imposes lesser entitlements on a workforce that is predominantly female, or on jobs that are held predominantly by women workers, results in systemic discrimination. The Applicant asserts that, given the large numbers of women workers in job classifications (and the historical incumbency of women workers in these job classifications) that will be affected by the revisions of Local 1000a's collective agreement, support the contention that the revisions will be discriminatory in their impact on women workers. The fact that the Divisional Board has representation in a ratio disproportionate to the bargaining unit is further evidence that the actions of Union are discriminatory.

58. There are several problems with the applicant's position. Among the problems is identified by the applicant. The application states that the "amendment to the Collective Agreement have the potential to result in systemic discrimination ..." [emphasis added]. The Board is satisfied that the composition of the superstores' workforce is, at this time, purely speculative as the employees have not been hired. Moreover, the actions were taken by the union because it believed that many of its workers (most of them women presumably) would lose their jobs if it did not agree to concessions. What could be more discriminatory than a union which failed to protect jobs because the persons who held the jobs were predominantly women? Accordingly the request for reconsideration is denied.

Is the collective agreement, as amended, valid in view of the fact that it was not ratified by the membership following the agreed to amendments?

59. The applicant asserts that the amendment agreement is not valid because it was not ratified. The applicant relies on section 44 of the Act which states:

> **44.** (1) A proposed collective agreement that is entered into or memorandum of settlement that is concluded on or after the day on which this section comes into force has no effect until it is ratified as described in subsection (3).
>
> (2) Subsection (1) does not apply with respect to a collective agreement,
>
> (a) imposed by order of the Board or settled by arbitration;

> (b) that reflects an offer accepted by a vote held under section 41 or subsection 42(1);
>
> (c) that applies to employees in the construction industry; or
>
> (d) that applies to employees performing maintenance who are represented by a trade union that, according to trade union practice, pertains to the construction industry if any of the employees were referred to their employment by the trade union.
>
> (3) Subject to section 79.1, a proposed collective agreement or memorandum of settlement is ratified if a vote is taken in accordance with subsections 79 (7) to (9) and more than 50 per cent of those voting vote in favour of ratifying the agreement or memorandum.

60. The applicant argues that the amendment agreement is a "memorandum of settlement" and thus must be ratified under section 44(1). The applicant also relies on the purposes section of the Act, one of which is: "to promote employee involvement in the workplace". Finally the applicant repeatedly suggested that the union membership was a party to the collective agreement and as such was inherently entitled to ratify changes made to it.

61. Local 1000A and Loblaws focused their attention on section 58 of the Act. In their view, neither section 44 of the Act, nor any other section, requires a trade union to have mid term amendments ratified. To the contrary, section 58 of the Act permits the parties to amend "any provision" at "any time". In this regard subsections (3) and (5) of section 58 state:

> **58.** ...(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties
>
> ...
>
> (5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

62. Loblaws and Local 1000A argue that, other than amendments which purport to alter the term of a collective agreement, section 58 contains no restrictions on the right of parties to agree to amend a collective agreement. Moreover, section 79 of the Act and others make clear the time at which ratification is to occur. That time is when the term of the collective agreement comes to an end. At that time the employer has the potential right to lock out employees and the union has the potential right to strike. Absent the adverse consequences (strike/lockout) of a failure to ratify there is nothing to force employees to make a hard choice. The applicant's analysis is therefore inconsistent with the scheme of the Act.

63. The applicant responds to these arguments by arguing that section 58 applies only to "amendments" to the collective agreement; it does not apply to "additions". In this case the amendment agreement is not an agreement to amend at all. It is, he argues, the addition of an entirely new collective agreement onto Local 1000A's agreement.

64. The applicant's position has considerable attraction. Nevertheless, on balance, I am satisfied that section 44 of the Act does not require that employees ratify mid term agreements to amend a collective agreement. The following are the reasons for my conclusion.

65. Section 44 is a fairly recent addition to the Act, having been in place since 1995. Prior to 1995 trade unions were free to seek employee ratification of a collective agreement or not, as they determined was best under the circumstances. Indeed the Board held under the previous law that a trade union could sign a collective agreement that employees had rejected in a ratification vote (see *K-Mart Distribution Centre* [1981] OLRB Rep. October 1421). Prior to the amendments to the Act which introduced the current section 44, there was no doubt that mid term amendments did not require ratification any more than new collective agreements did. In *Great Atlantic and Pacific*, [1980] OLRB Rep. April 485 the Board stated:

> 43. The Board affirms the right of the parties to a collective bargaining relationship to alter or amend their collective agreement, on consent, except as to the duration of that agreement, pursuant to sections 52(3) and 52(5) [now s.58(3) and (5)] of the Act. *Frito-Lay, supra* and the cases cited therein; *United Forming Ltd.*, [1969] OLRB Rep. Jan. 1073; *Viking Pump Co. of Canada Ltd.*, 54 CLLC 17,084; *Re McCallum Transport, supra*; *G & H Steel, supra* and the cases cited therein. Amendments may concern substantive provisions, such as, seniority, as in *Re McCallum Transport, supra*. or the scope of the bragaining [sic] unit itself, as in *Frito-Lay, supra* (see also, *Toronto Star, supra*). It is almost trite to reiterate that a collective agreement is the parties' own document; the parties, subject to very few statutory proscriptions and obligations, must be free to amend that document to respond to changing circumstances.
>
> 44. The Board would add that parties should be encouraged to respond to changing circumstances through such consensual amendments. The sale of a business, in particular, may have far-reaching implications for the employees and their bargaining agent. The Board does not provide advance rulings as to the labour relations effects of commercial transactions: *Daynes Health Care, supra*. Moreover, even where the "successor rights" provisions of the statute are found to apply, where the vendor's collective agreement binds the purchaser and the Board does not exercise its authority to terminate those bargaining rights, the parties must still confront the actual impact of the sale, at the latest in bargaining for a renewal of the "vendor's" collective agreement at the appropriate time. That is, section 63 [now s.69] creates some permanence to bargaining rights regardless of changes in ownership; section 63 does not, and cannot, preserve the context in which the collective agreement existed prior to the sale. The parties' resolution of these matters should not lightly be interfered with by the Board.

66. The issue, therefore, in this case is whether section 44 of the Act changes the law, as it clearly does with respect to renewal collective agreements, to compel a ratification vote for mid term amendments.

67. Section 44 obliges a ratification vote for only two documents: a proposed collective agreement and a memorandum of settlement. The context of section 44 suggests that these are both documents that arise out of the conclusion of collective bargaining compelled by section 16 (the obligation to bargain) of the Act. I say that because section 44 is itself situated among a series of statutory provisions which define the terms of a collective agreement including sections 45 (recognition clause), 46 (no strike/ no lock out clause), 47 (union dues clause), and 48

(arbitration clause). An amendment to a collective agreement obviously need not and usually will not contain any of those provisions. In addition, section 44 itself contains two relevant exclusions to the ratification requirement 44(2)(a) and (b), each of which cannot apply to an amendment to a collective agreement. The combination of these facts suggest that an amendment agreement is a quite different from than a proposed collective agreement.

68. I reject the applicant's assertion that the amendment agreement is a "memorandum of settlement" and thus is covered by section 44 of the Act. Although "memorandum of settlement" is not defined by the Act, in my view it is a term of art with a particular labour relations meaning. A memorandum of settlement contains the terms of the settlement which will, if ratified, comprise the collective agreement. Its inclusion in the Act is necessary because of the practical reality that it often takes a substantial period of time to formally draft the collective agreement that results from the parties' negotiations. George W. Adams (in Canadian Labour Law, 2nd Ed. June 2003 at p. 12-1) put it this way:

> However, parties to collective bargaining do not normally execute a formal document until some time after the bargaining process has been completed. Rather, the agreement of the parties is usually reduced to a memorandum of settlement subject to ratification by the respective principals which is then followed by the drafting and execution of the formal document.

69. The Act therefore permits a union to conduct a ratification vote on the memorandum of settlement (i.e. the terms of the agreement) before the formal collective agreement is drafted. This assists the parties in concluding a collective agreement in the most expeditious way possible.

70. I therefore conclude that amendments to a collective agreement like the ones before me in this case are not a memorandum of settlement as that term is used within the context of section 44 and for the purposes of the Act.

71. Finally, and although it was not argued coherently, at the consultation, the applicant's best argument is that the amendments in this case were so substantial so as to cause the creation of a whole new collective agreement. For the reasons that follow I reject that analysis.

72. It is clear that prior to the amendments which brought in section 44 of the Act that mid term amendments to collective agreements were a regular part of the province's labour relations environment. In deciding that collective agreements ought to be ratified, the legislature did not see fit to grant the same treatment for amendments. Quite simply, there is nothing in section 44 of the Act which compels a ratification vote for anything but a collective agreement or a memorandum of settlement comprising the terms of a collective agreement.

73. My conclusion with respect to section 44 is strongly reinforced by section 58(5) of the Act. Section 58(5) specifically deals with mid term amendments, thereby confirming that the legislature was aware of this important labour relations reality. Section 58(5) could hardly be more broad. It states that <u>any</u> provision of a collective agreement can be amended at <u>any</u> time. Had the legislature intended to fundamentally change the law regarding mid term amendments by including a ratification requirement, it surely would have done so explicitly in section 58(5) or elsewhere. It did not do so. The interpretation advanced by the applicant would therefore require the Board to read an additional condition into section 58.

74. In addition to those reasons I also find that a conclusion that a union must cause amendments which create a whole new collective agreement to be contrary to sound labour relations. It could lead to significant uncertainty because it would be impossible for parties to know when collective agreement amendments are significant enough to attract a ratification requirement. In addition it would lead to issues in cases where several changes to a collective agreement are made over the life of the agreement, which together might arguably constitute a new collective agreement. In my view the legislature must have intended certainty with respect to this issue, the existence (or not) of a particular collective agreement being so fundamental to sound labour relations.

75. I also reject the applicant's argument that the term "revision" ought to be read narrowly so as not to include "additions" to a collective agreement or memorandums of settlement. No authority was cited for that proposition. Nor does it make any labour relations sense. The policy reason that the parties are free to negotiate mid-term amendments is to assist them to respond to changing circumstances. It would be restrictive of that policy, particular when changing circumstances are unpredictable, to prevent parties from ever amending their agreement by including additional provisions.

76. Furthermore, the suggestion that the membership are a party to a collective agreement is a misapprehension of the scheme of the Act and a trade union's role within that scheme. Section 45 of the Act makes the trade union the exclusive bargaining agent of the employees in the bargaining unit. The trade union is the party to the collective agreement, not the membership. As the Board said in *John Daniell*, [1987] OLRB Rep. July 990: "The respondent trade union is the legal bargaining agent of the employees. Its status, however, is quite different from that of an agent in a commercial context. In particular, it is not required to implement the views of a majority of employees as though they were its principals. Rather, it negotiates and enters into collective agreements as an independent contracting party." Employees have no independent right to ratify collective agreements apart from the statute.

77. While there is support for the applicant's position in the "purposes" section of the Act (s.2), the purposes of the Act are not the foundation for legal rights and obligations, although they may assist in the interpretation of provisions that provide such benefits. Moreover, the position advanced by Loblaws and Local 1000A is equally supported by purposes of the Act such as "to recognize the importance of workplace parties adapting to change" and to "promote flexibility...in the workplace". The Board has frequently commented that the purpose of the right to make mid term amendments is just that, to respond to circumstances as they arise from time to time. If employees are unhappy with mid term amendments their remedies include removing or changing the bargaining agent. In short, the purposes of the Act do not advance the applicant's position.

78. Finally, the Board is keenly aware of the practical problems that a requirement to ratify mid term amendments would create. Collective agreements are amended all the time. They are amended among other ways, through extensive negotiations as occurred here, through the settlement of grievances and through the addition of letters of understanding. If each of those amendments required a ratification vote, labour relations would be severely disrupted. Of course the applicant concedes that not every amendment needs to be ratified, but his position begs the question: where is the line to be drawn? What mid term amendments require ratification and which ones do not? In my view, those questions strongly suggest that other than amendments which alter the term of the collective agreement, (after the parties have obtained the Board's consent for early termination none) do.

79. In my view, the scheme of the Act is similar to that of many of our other democratic institutions. A trade union is elected into office and its collective agreement is ratified by the membership (or not). After that time the trade union has considerable latitude to do as it sees fit to respond to changing circumstances, or otherwise. Such latitude includes the right to agree to wholesale amendments to the collective agreement. The restriction on these rights is the obligation contained in section 74 of the Act that its conduct not be arbitrary, discriminatory or made in bad faith. The remedy for employees who are unhappy with the way that the union has exercised its rights is found in the termination provisions of the Act. That remedy can be exercised no less often than every 33 months. As the Board has often said, trade unions are not strictly speaking democratic, they are fighting organizations and the Board should be loathe to impinge on their ability to represent their members as they see fit except where the Act specifically requires the Board's intervention. There is no such requirement applicable here.

Did the union violate section 74 of the Act when it provided for a different consultation process for each of the three locals affected by the agreement?

80. The applicant alleges that the Union's representation was discriminatory and violated section 74 of the Act because, he asserts, the various locals affected by the Loblaws decision were treated differently. He asserts that other locals were given the opportunity to have employees ratify the amendments but Local 1000A employees did not have that opportunity.

81. If the allegation is true it would cast doubt on Local 1000A's story that it was given no other choice but to agree to a no ratification condition. However, it would not in itself constitute a violation of section 74 of the Act. That is because there is a fundamental flaw in this aspect of the application. Local 1000A is the only responding party to this application. Local 1000A had nothing to do with the conditions under which other Locals of the UFCW confirmed the amendments to their collective agreements. In this regard Local 1000A could not and did not treat any group of employees it represents differently than other groups of employees it represents. Nothing it did can therefore amount to discrimination as suggested by the applicant.

Did the union violate section 74 of the Act by not seeking ratification of the agreement, by not consulting directly with the membership and, as it is alleged, by concealing the fact that negotiations were underway and that an agreement had been reached?

82. The applicant alleges that the responding party delayed advising employees of the amendment agreement so that the open period would pass and employees who were dissatisfied with the agreement would not have the opportunity to terminate the union's bargaining rights.

83. The applicant's position is not supported by the facts before me.

84. There is no dispute that the negotiations between Local 1000A and Loblaws broke down in or about May 23, 2003. They renewed on May 26, 2003 and amendments to the collective agreement were agreed to in principle shortly thereafter. The divisional officers ratified the amendments on June 17, 2003. On or about June 26, 2003 the membership was advised of the deal. Therefore, only days passed from the date the deal was concluded to the date the membership was notified. On the facts, I am satisfied that Local 1000A did not delay advising employees of the deal to avoid the possibility that employees might bring an application for termination of bargaining rights.

85. Apart from the factual issues, the lack of merit in this aspect of the applicant's case can be appreciated with an understanding of how a union's bargaining rights are terminated. In order to terminate bargaining rights, 40% or more of employees in the bargaining unit must sign a petition signifying that they no longer wish to be represented by the union. One of the employees must then file an application during the "open period". The "open period" is the last three months of the collective agreement where the collective agreement is for a term of three years or less or, where the collective agreement is for more than three years, during the last three months prior to each anniversary date in this case April, May and June of 2003, 2004 and so on. Upon receipt of a timely application which appears to enjoy the support of 40% or more of the employees in the bargaining unit, the Board will conduct a representation vote.

86. It is apparent to me that it never occurred to Local 1000A that employees might at that stage be successful in terminating the union's bargaining rights. It can be difficult for employees to terminate a union's bargaining rights under the most favourable circumstances. Those difficulties are enhanced with the Loblaws bargaining unit represented by Local 1000A. It is an enormous bargaining unit covering numerous locations throughout the Province. Many of the employees are part time. It would be extremely difficult for any employee to obtain the necessary signatures particularly within a relatively short period of time.

87. The difficulty of the challenge facing any employee who wished to terminate bargaining rights cannot have escaped the leadership of Local 1000A. Indeed I am nearly certain that the prospect of termination of bargaining rights was so difficult that it would not have occurred to the Local at all let alone be a consideration in the trade union's timing of informing employees of the deal.

88. The applicant also alleges that the trade union failed to consult with the membership about the amendment agreement and thus violated section 74 of the Act. Indeed the applicant asserts that the responding negotiated a secret deal to its own benefit.

89. In a related argument, the applicant also asserts that the employer engaged in an unfair labour practice when it required Local 1000A not to consult with its membership at any time prior to an agreement in principle being entered into. It relies on, among others, section 70 of the Act. The applicant argues that by effectively acceding to the employer's illegal demand Local 1000A itself violated section 74 of the Act.

90. The applicant relies on a series of decisions in which the Board has held that trade unions have an obligation to consult with the membership during collective bargaining. In the *Employees of Manor Cleaners Ltd*, [1983] OLRB Rep. June 929 the Board commented on an application brought in circumstances where the union did not meet at all with employees prior to or during collective bargaining:

> It is difficult to conceive how the duty of fair representation can be discharged when the bargaining agent in an industrial setting fails entirely to meet with the employees prior to or any time during the bargaining process.

91. The Board found a violation of what is now section 74 and ordered the union to meet with employees to discuss the state of negotiations or, if a collective agreement had been settled, to explain and answer questions regarding the agreement.

92. Similarly in *Cuddy Food Products Ltd.* the Board stated:

> 84. We agree with the observation of the Board in *Manor Cleaners Ltd.*, [1983] OLRB Rep. June 929, at paragraph 9 that "it is difficult to conceive how the duty of fair representation can be discharged when the bargaining agent in an industrial setting fails entirely to meet with the employees prior to or at any time during the bargaining process." In *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791, the Board said that a breach of the duty under section 68 "most often comprehends conduct that is so wanton that the most modest of employee expectations to [sic] the benefits of collective bargaining have been betrayed by his trade union." That employees will be consulted by their bargaining agent before it concludes a collective agreement by which they will be bound is surely a most modest and reasonable employee expectation. In paragraph 25 of its decision in *Consolidated Fastfrate Limited*, [1984] OLRB Rep. May 691, the Board stated categorically that, in its application to the negotiation process, "a duty under section 68 must at least include a duty to consult at some point with those represented." If there can be circumstances in which that is not so, such circumstances are not present here. By failing to consult Cuddy Boulevard employees, Local 175 violated its duty to them under section 68 of the Act.
>
> ...
>
> Section 68 does not require that trade unions consult their bargaining unit employees at every step in the bargaining process nor, generally speaking, does it dictate that their consultations shall occur at any particular stage or in any particular form: *the Great Atlantic and Pacific Company, Limited*, [1983] OLRB Rep. Oct. 1654. In addition to requiring that there be some form of consultation at some stage, however, section 68 also requires that the trade union's decisions about the timing and form of its consultation not be arbitrary, discriminatory or made in bad faith. Local 175 held a ratification vote among the Trafalgar Road employees to ascertain their wishes with respect to the terms of the memorandum of June 19, 1987. It did not conduct a ratification vote among Cuddy Boulevard employees with respect to the terms of the oral agreement of June 1, 1987. Not only has it not adequately explained its total failure to consult the Cuddy Boulevard employees, it has not adequately explained why its consultations with this group should not have taken the same form as its consultations with the Trafalgar Road employees. In the circumstances of this case, Local 175's having conducted a ratification vote in one group without doing so in the other amounted to discrimination contrary to section 68.

93. After determining that the union had violated section 74, the Board in *Cuddy Foods* then discussed what remedy ought to flow from the breach. The Board expressed considerable doubt about whether it had the authority to set aside the collective agreement which had been entered into without consultation. Ultimately, the Board determined that employees would not have ratified the collective agreement had they been consulted. The Board held that the trade union ought to compensate the employees for damages suffered as a result.

94. Finally, the Board in *The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America ("OPC") and Drywall Acoustic Lathing and Insulation, Local 675("Local 675")* [1995] OLRB Rep. Aug. 1082 had a somewhat more restrictive view of the "obligation" to consult. The Board stated:

253. In achieving a settlement without a strike, some employee disappointment may be almost inevitable. A compromise often requires that something be given up in exchange for what is gained. Moreover, a union is obliged to promote the employees' INTERESTS not just cater to their expectations, as the Board observed in DIAMOND Z ASSOCIATION, [1975] OLRB Rep. Oct. 791:

> "Achieving this mutual accommodation [a settlement] requires the unfettered discretion of the representatives of the parties to explore all avenues of accommodation without the intervention of this Board in setting standards of conduct that may be characterized as an unwarranted intrusion in their private affairs. We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation, must necessarily have a "free hand" in setting strategies that will best forward employees' interests, irrespective of their expectations".

The Board has usually resisted the temptation to second guess the union's tactics, or to impose the Board's own notions of what a "fair" settlement might look like.

254. The union's task is particularly difficult when the employees have unrealistic expectations or do not fully appreciate the economic realities of the market-place or, as here, seem prepared to disregard the law. What seems "fair" to employees is not always reasonably attainable. Yet a responsible trade union will not lightly drag its members into a strike unless there is a reasonable prospect of achieving some concrete advantage. The union must weigh the utility of strike even when the alternative is an agreement that employees may find unsatisfactory.

255. Section 69 does not require trade unions to consult their members at every step of the bargaining process, nor, generally speaking, does it dictate that their consultations will occur at any particular stage or in any particular form. There must be some form of consultation at some stage, (MANOR CLEANERS LTD., [1983] OLRB Rep. May 929; CUDDY FOOD PRODUCTS LTD., [1988] Rep. Dec. 1211), but beyond that, the union is largely left to conduct bargaining in accordance with its own procedures and tactical judgement.

256. The statute does not require that there be a strike or ratification vote - although many unions conduct such referenda - and the union is not necessarily obliged to call a strike simply because the employee support one, or to reject an agreement merely because employees have done so. (See K-MART DISTRIBUTION CENTRE, [1981] OLRB Rep. Oct. 1421). A union is entitled a fairly wide latitude. The ultimate remedy for disgruntled employees is not litigation, but the rejection of the union altogether or its replacement by a rival organization. If a majority remains dissatisfied, it can oust the union at the appropriate time. The employees' ultimate remedy is at the ballot box.

95. Before commencing my analysis on this part of the Applicant's argument I note that the employer was not a responding party to this application or any other application brought in connection with this matter. However, in general, I find that absent a legitimate reason it is improper for an employer to insist that a trade union keep secret from its members the fact of negotiations that might have a substantial impact on them. Such a requirement, again absent a legitimate reason, constitutes improper interference with the trade union. This conclusion is supported by *Cuddy Foods* where the Board stated at paragraph 96,

> "The Board's jurisprudence time and again has told employers that so long as the union continues to have that authority, the employer must not question or interfere in or attempt to dictate the way the union consults with or represents those employees.

In a similar vein see *UFCW Local 401 v. Economic Development Edmonton* (Decision of Alberta Labour Relations Board dated Nov. 22, 2002).

96. That is not to say that employers can never insist that information they provide to trade unions remain confidential. Such practices are common in labour relations and they advance the goal of stable industrial relations. (See *The Great Atlantic and Pacific Company, Limited*, [1983] OLRB Rep. Oct. 1654). For example, it is not unusual for employers to give a union a confidential "heads up" about the closure of a plant. There may be good reasons for a union to agree that information provided to it remain confidential.

97. Are the reasons advanced in this case for confidentiality sufficient? Were it necessary for me to decide this issue (which, in the result, it is not) I would likely have found that they are not. The facts on this issue are somewhat muddled because the responding party and the intervener did not identify this as an issue which arose out of the application. Therefore, there are no specific facts pled on this point. Nevertheless, the Board asked the parties about this issue at the consultation. The parties advised the Board that the employer had made its confidentiality request, and the trade union agreed to it, because the employer desired to keep its business strategies secret. While not specifically pled, it appears that the employer's request and the trade union's agreement came early on in the process. I am satisfied that at least initially there may well have been merit to the employer's confidentiality request. The Board ought not to be concerned when an employer apprises a trade union of its confidential business plans at an early stage. Indeed such conduct is to be commended. However, the parties' discussions went on for several months. There was no business reason suggested that required Loblaws' please to remain confidential on May 23 but not 2 weeks later. Surely there came a time between January and May when the fact of the negotiations if not the details of the company's plans could be made known to employees.

98. Having said that, I reject the applicant's argument that a trade union is inherently in violation of section 74 if it accedes to improper or illegal demands made by an employer. In my view, such conduct is, in of itself, neither arbitrary, discriminatory or bad faith *vis a vis* the employees represented by Local 1000A. The union is free to evaluate the improper or illegal demand and decide what to do about it having regard to all of the circumstances.

99. In my view, the cases relied upon by the applicant regarding the union's "obligation" to consult with employees are also distinguishable from the facts before the Board in this case. The cases relied on by the applicant all concerned the obligation to consult when the union is negotiating a new collective agreement. Some sort of consultation is imperative under such circumstances. In order for the union not to act arbitrarily, particularly where, as in the cases relied on, there is no statutory obligation to ratify, it must review and consider the issues that the employees are concerned about in determining a new collective agreement. If it does not consult, the union is just concluding a collective agreement blindly.

100. In the case before the Board, the negotiations did not involve, and could not possibly involve, any resolution of a variety of issues which affected employees as bargaining for a new collective agreement nearly inevitably does. Instead, these negotiations were designed to remedy a particular problem which Loblaws brought to Local 1000A's attention. Loblaws advised Local

1000A, and the union rationally believed the company, that it was not prepared to discuss other alternatives. Absent any suggestion that the complainants have anything to add to the discussion (like an alternative other than the obvious one of fighting Loblaws), other than they disagree with the amendments, the members had nothing to say which could assist Local 1000A.

101. In my view, the obligation to consult only arises when employees have something meaningful to offer – as in normal collective agreement negotiations. In this case, the members' interests were entirely predictable and were taken into account. Local 1000A knew very well that many members would be against the deal and that others would be in favour. But in spite of that inevitable opposition, it determined that amending the collective agreement was the best strategy.

102. The facts in the case before me are substantially similar to those that faced the Board in *Great Atlantic and Pacific Tea Company Limited* [1986] OLRB Rep. April 485. In that case A&P purchased a warehouse operated by a rival chain, Dominion, and integrated it with its operations. Prior to the sale A&P met with the union and advised that it required amendments to the collective agreement. If the union did not agree to the amendments, A&P would either not purchase the warehouse or would purchase it and close it. Either way, 250 employees would lose their jobs. There was substantial employee objection to the amendments. In rejecting the application under section 68(now 74) of the Act the Board stated:

> 56. It is appropriate at this point to briefly comment on the assertion that the unit negotiating committee should have been involved in the "negotiations" with A & P and the result subject to ratification. To paraphrase the comment in *The T. Eaton Co., supra*, the reality of the matter was that these were not normal negotiations. In this instance, A & P was not required to bargain with the union in respect of the Dominion warehouse operations prior to a sale and, of course, A & P was under no *obligation* to purchase. A & P could simply walk away if the "deal" was not to their liking, subject to the unfair labour practice sections of the Act. The Board does not find a contravention of section 68 in the manner in which the union "negotiated", in the broad sense of that term, with A & P with respect to the proposal.

103. The real issue here is not that employees were denied the opportunity to be consulted. The issue is that the applicant and other employees dislike the deal and desire the opportunity to demonstrate that a majority of employees are also opposed. The remedy for such employees is at the ballot box, at the appropriate time, not in an application under section 74 of the Act.

104. Even if I were to have found that Local 1000A violated section 74 by not consulting with employees this is not a case where the applicant's remedial request – setting aside the agreement – would be granted. Even assuming, without finding I do have jurisdiction to set aside the amendments to the agreement as a remedy for a breach of section 74, this is not in my view an appropriate case to exercise it.

105. The breach in this case (were there one) was the failure by Local 1000A to consult with the membership. Unlike the facts in *Cuddy Foods* where the Board found, under the circumstances of that case, that the union should have held a representation vote, in this case the employees had no such right. The right to be consulted while an important right is, as the cases make abundantly clear, a limited right. Regardless of the wishes of the employees expressed in the consultation, nothing would have compelled Local 1000A to change the amendment agreement so long as it did not otherwise act arbitrarily, with discrimination or in bad faith in coming to that decision.

106. Would anything have changed had a consultation occurred? I am satisfied that it would not have. First, I accept Local 1000A's position that, despite this application, there is substantial support for their strategy among the membership. The deal is a good one under the circumstances, particularly for current employees, and that fact has likely been recognized. Even if there was considerable opposition to the amendments I think it likely that Local 1000A would not have changed its strategy. It had put considerable thought into this problem and had determined what it believed was the best course of action. It had consulted with divisional officers. Such conduct is the opposite of "arbitrary" and is consistent with s.74 of the Act.

107. Therefore, even if a breach could be established, no meaningful remedy could flow to the applicant.

108. For all of the foregoing reasons both of these applications are hereby dismissed.

109. Before leaving these issues the Board wishes to comment on the underlying reason for this application: the applicant's (and his supporters') fundamental disagreement with the union's strategy of agreeing to concessions and not fighting the employer to preserve existing wage levels. The applicant's agent asserted in the strongest terms that the union should have fought the company, and that it ought not to have succumbed to the company's "empty" threats. Of course neither the Board nor any of the participants to these proceedings can tell what the future will hold. However, one thing is clear: the trade union took the route which is most likely to protect its members' jobs. If the trade union fought the company on this issue and the applicant is wrong about its ability to compete with Wal Mart and other lower cost competitors, then thousands of the union's members' jobs would be at risk. On the other hand if the applicant is right and this was just a ploy by Loblaws to extract wage concessions to raise its profit margins the proof will be in the pudding when the company releases its profit figures. In that case, no jobs will be lost and the union will be in a position at the next round of collective agreement negotiations to reclaim the concessions made (and more). Under such circumstances, the Board sees nothing unwise or improper with the union's decision.

"Brian McLean"
for the Board