United Food and Commercial Workers Union Canada Local 864 v Lawton's Drug Store Ltd. #144, 2016 CanLII 153454 (NS LRB)

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Labour Relations Board (Nova Scotia)

Citation: United Food and Commercial Workers Union Canada Local 864 v Lawton's Drug Store Ltd. #144
Date: August 17, 2016
File No LB-0938 - Amended Order

Between

United Food and Commercial Workers Union Canada, Local 864

And

Lawton's Drug Store Ltd. #144

Before

Doug Ruck
Chair

Application: February 24, 2015

Application for Settlement of First Collective Agreement under Section 40A of the Trade Union Act

BEFORE Douglas G. Ruck, Q.C., Chair
Michael Tynes, Member
George Hall, Member

REPRESENTATIVES David C. Wallbridge, for the Applicant
G. Grant Machum, for the Respondent

CASE MANAGEMENT DATE February 27, 2015

DATES AND PLACE OF HEARING March 23 and 24, 2015 in Halifax, Nova Scotia

The Board directs the parties to resume collective bargaining with the assistance of a Conciliation Officer for a period of 30 days.

REASONS FOR DECISION

I Introduction and Background

[1] This matter has proceeded pursuant to s. 40A of the Trade Union Act (the" Act"). Section 40A provides a means for parties to a new collective bargaining relationship to have the terms of a first collective agreement settled.

Factual Background

[2] On July 3, 2014, the Board issued Order LB-0778 certifying the Applicant (the "UFCW" or the "Union") as the exclusive bargaining agent of a unit of the Respondent's ("Lawton's" or the "Employer") employees, effective June 26, 2014. On August 29, 2014, a Conciliation Officer was appointed to assist the parties to negotiate the terms of their first collective agreement. The parties had commenced bargaining in the fall of 2014, meeting without the Conciliation Officer's assistance on:

September 26 and 29;

October 14, 17, and 27; and

November 18.

[3] There is no dispute that they agreed to deal with "non-monetary" issues first, and then move on to the "monetary" issues. Over the course of their six days of unassisted bargaining, they reached agreement on many of the provisions of the collective agreement, but were unable to agree on five issues:

Wages;

Holidays and leaves;

Health and welfare;

The length of the probationary period; and

Scheduling by seniority.

[4] On January 8, 2015, they met with the Conciliation Officer to try to resolve the outstanding issues. Unfortunately, they were unsuccessful. On January 9, 2015, Lawton's forwarded a draft collective agreement, to the UFCW. The draft agreement was comprised of the terms the parties had agreed upon, plus the positions Lawton's had taken on the disputed issues at the close of the previous day's bargaining. The membership rejected the draft agreement when the UFCW held a ratification vote. On February 17, 2015, the Conciliation Officer filed a report with the Minister of Labour and Advanced Education indicating that the parties' bargaining had reached impasse.

[5] On February 24, 2015, the UFCW applied to the Board, pursuant to s. 40A of the Act, to have the terms of a first collective agreement settled for the Lawton's bargaining unit.

[6] The Board held a hearing on March 23 and 24, 2015. On March 26, 2015, the Board issued a Decision which included:

A finding that Lawton's had adopted uncompromising bargaining positions with respect to wages, and holidays and leaves, without reasonable justification; and

a direction to the parties to resume collective bargaining with the assistance of a Conciliation Officer for a period of 30 days; and

a further direction to the parties to notify the Board as to the results of their bargaining no later than April 28, 2015.

[7] The Board's Reasons for its Decision were entitled "Reasons for Decision Bottom Line". In Paragraph 2 of the Decision, the Board alerted the parties that it was issuing a "bottom- line" Decision and would issue fuller reasons at a later date.

[8] Consistent with the Board's direction, the parties resumed collective bargaining with the Conciliation Officer's assistance. They reached agreement on the terms of their first collective agreement on April 11, 2015. On April 19, 2015, the bargaining unit members ratified that agreement.

Statutory/Adjudicatory Background

[9] In December 2011 First Contract Arbitration (FCA) legislation was introduced in Nova Scotia by way of an amendment to the Trade Union Act. Bill 102, An Act to Prevent Unnecessary Labour Disruptions and Protect the Economy, received Royal Assent on December 15th. Nova Scotia was not the first province to introduce such legislation as six other provinces as well as the federal jurisdiction already had FCA legislation in place. Although the legislation varies from one province to another it generally falls into one of four models: exceptional remedy or "fault", automatic access, no-fault, and mediation intensive. Nova Scotia, similar to Manitoba, had initially adopted the automatic access approach which meant that once certain stipulated timelines had passed either party could apply for first contract arbitration.

[10] In December 2013 the FCA provisions were amended with the passage of Bill 19, An Act to Amend Chapter 475 of the Revised Statutes, 1989, the Trade Union Act. The 2013 amendments, which brought the legislation more in line with what is found in Ontario, removed the time limits placed on conciliation and eliminated automatic access to first contract arbitration. Under the previous legislation parties could apply to the Board to settle the provisions of a first collective agreement 120 days after the appointment of a conciliator. Absent a conciliation countdown clock an employer or bargaining agent may only apply to the Board if the conciliation officer notifies the Board that the parties, after making reasonable efforts, have been unable to conclude a first collective agreement. The Board must then determine whether there has been conduct by one of the parties that has led to unsuccessful bargaining and only if such conduct is found will there be first contract arbitration.

[11] Section 40A establishes a self-contained process which parties to a new collective bargaining relationship may use to settle the terms of a first collective agreement. Consistent with the Section's very specific purpose, the process it creates has unique characteristics. Two of those characteristics are particularly relevant to this matter:

The inevitability that the terms of a first collective agreement will be settled once the process is engaged; and

Tight and relatively rigid timelines.

[12] Essentially, Section 40A takes settlement of the terms of a first collective agreement out of the parties' hands. Unless the parties reach an agreement during the course of the process, Section 40A places authority to settle the agreement's terms with either an arbitrator or the Labour Board. Consistent with that inevitability characteristic, access to the Section 40A process is conditional unless the parties agree to participate in the process. This conditional access ensures that the Section 40A process does not conflict with the importance of the promotion of free collective bargaining expressed in the preamble to the Act. The access conditions are imposed by Subsection 40A(5), which establishes criteria an employer or bargaining agent must satisfy to gain access to the Section 40A process. Simply put, Subsection 40A(5) establishes a threshold to the first collective agreement settlement process. If an application satisfies the Subsection 40A(5) criteria, it proceeds beyond the threshold to the inevitable settlement of terms of the first collective agreement. If the application fails to satisfy the criteria, the Board must dismiss it and the parties are left to continue attempting to reach a collective agreement by negotiation.

[13] Lawton's opposed engagement of the s. 40A process. Therefore, the Board's first adjudicative task in this matter, and the task it faced at the conclusion of the hearing on March 24, 2015, was to determine whether the UFCW's application met the Subsection 40A(5) criteria. Specifically, Subsection 40A(5) provides:

(5) Where
(a) an application is made by an employer or bargaining agent under subsection (1);
(b) the parties do not agree to proceed by arbitration under subsection (2); and
(c) regardless of whether Section 35 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of
(i) the refusal of the employer to recognize the bargaining authority of the bargaining agent,
(ii) the uncompromising nature of any bargaining position adopted by the other party without reasonable justification,
(iii) the failure of the other party to make reasonable or expeditious efforts to conclude a collective agreement, or
(iv) any other reason the Board considers relevant,

the Board, within thirty days of receiving the application, shall either

(d) direct the settlement of the provisions of a first collective agreement by arbitration; or

(e) direct that the parties resume their efforts to conclude a first collective agreement, with the assistance of a conciliation officer, for a period of thirty days.

[14] Subsection 40A(5)(c)(iv) brought Section 40A's timeliness characteristic into play when the Board fulfilled its responsibility to determine whether the UFCW's application satisfied the threshold conditions to engage the Section 40A process. Unless the parties agreed to extend the Board's timeline pursuant to Subsection 40A(11) (which they did not), the Board had to determine the application's compliance with Section 40A(5) within 30 days of it being filed. That deadline was March 26, 2015.

[15] Throughout the course of this matter, the Board stressed its obligation to adhere to Section 40A's timelines to the parties, and also made the parties aware of their respective obligations under the statutory

timelines. This was done both in writing, and in-person at the Case Management Conference held prior to the hearing, the outset of the hearing, and the conclusion of the hearing. The Board's communication about timelines included:

February 24, 2015 Including specific dates which complied with Section 40A in the Notice of the Application and advising the parties that the dates in the Notice had been set to ensure compliance with the Section 40A timelines.
February 25, 2015 Confirming a Case Management Conference (CMC) for February 27, 2015 by letter to the parties and advising them that the CMC would place priority on the Board's March 26, 2015 deadline to determine the status of the application. The letter further advised the parties that the Board would conduct the hearing "as expeditiously as possible".
February 25, 2015 Providing the parties with a Schedule Outline/Spreadsheet highlighting all dates relevant to a Section 40A(5) application, and identifying March 26, 2015 as the date for the Board's s. 40A(5)(c) "30 Day Deadline Determination".
February 27, 2015 Reviewing and confirming the Section 40A(5) timelines with the parties at the Case Management Conference.
March 11, 2015 Advising the parties by Notice of Hearing that the hearing would commence on March 18, 2015 and continue on successive dates, as necessary. The Board also requested indexed Books of Documents, a list of Authorities on which the parties intended to rely, and pre-hearing submissions from the parties "…in order that the hearing proceeds as efficiently as possible and to ensure that the Board complies with Subsection 5 of Section 40A day(s)."
The Notice also advised the parties … "Please be advised that if a party does not provide the Board with the documents as requested, the Board may refuse to consider any documents or hear any witness tendered at the hearing. Should a party have no exhibits and/or no jurisprudence to present, please ensure such is clearly mentioned to the Board".

[16] The March 18, 2015 hearing date unfortunately was cancelled due to weather conditions which closed all government offices. The hearing took place on March 23 and 24, 2015 at the Labour Board offices in Halifax. On March 26, 2015 the Board issued its Bottom Line Decision with reasons to follow.

Procedural Background

[17] Lawton's applied for judicial review of the Board's March 26, 2015 Decision. The Motion for Directions for Lawtons' application was heard on April 22, 2015 by the Honourable Justice Wood. At that time, Lawton's applied for an injunction to restrain the Board from issuing any further reasons in support of its Decision. Wood, J. granted an interim injunction until he could conduct a more fulsome hearing into whether an injunction should be granted. That hearing was originally scheduled to take place on June 16, 2015, but was adjourned by agreement to permit the parties to ask the Board if it still intended to issue further reasons for its Decision.

[18] On October 8, 2015, the Board issued an Interim Ruling confirming that it still wished to issue full reasons for its March 26, 2015 Decision, and explaining its reasons for wanting to issue its full reasons. On January 7, 2016, Wood, J. held a hearing which inter alia dealt with the interim injunction granted on April 22, 2015. On January 13, 2016, Wood, J. issued a decision dissolving the interim injunction, and freeing the Board to issue its full reasons for its March 26, 2015 Decision.

[19] By Notice of Appeal dated January 26, 2016, Lawton's sought leave to appeal the decision of Wood, J. and, by Notice of Motion filed February 4, 2016, Lawton's also sought an order from the Appeal Court enjoining the Labour Board from issuing reasons for its March 26, 2016 decision until the appeal from Wood, J.'s January 7, 2016 decision has been determined. The Board agreed to hold off releasing its decision pending the Court's ruling on the motion to stay. On February 26, 2016 the Court of Appeal dismissed the Employer's motion enjoining the Board from issuing reasons for the March 26, 2015 Decision.

[20] This document/decision provides the full reasons underlying the Direction of the Board issued in this matter on March 26, 2015.

[21] As of the date of this document/decision, Lawton's is continuing its application to have the Board's March 26, 2015 decision judicially reviewed, and applied to have the Board's October 8, 2015 Interim Ruling judicially reviewed.

II Position of the Applicant

[22] The parties, consistent with the First Contract Arbitration provisions of the Act, presented their evidence and framed their arguments to address what both parties agreed to be the three principle questions required to be considered by the Board. Both parties relied upon the decision of the Ontario Labour Relations Board (OLRB) in U.S.WA. v. Saxum Canada Inc. 1999 Carswellont 5201; [1999] O.L.R.B. Rep 328 ('Saxum Canada') which it set out the questions as:

(i) Has process of collective bargaining been unsuccessful?

(ii) If the answer is yes to question (i), has the employer engaged in conduct which falls within any of the four subsections (a) to (d)?

(iii) If the answer is yes to question (ii), is there a causal connection between the employees conduct and the failure of the collective bargaining process?

[23] In accordance with the Board's pre-hearing directions, the Applicant filed will-say statements for Mr. Wally Cuvelier (Cuvelier), UFCW representative and Mr. Mark Dobson (Dobson), Regional Director Eastern Provinces and Chief Negotiator for the union. The Employer filed will-say statements for two individuals Shonda Ingalls (Ingalls), Vice president Human Relations and Michelle Hyson, Human Resources Manager. The Chief Negotiator for the Employer was Mr. Grant Machum who, as noted above, was representing the Employer as lead legal counsel during the proceeding before the Board.

[24] Considerable evidence and argument, oral and written, was placed before the Board for its consideration. What follows is not meant to represent all of the evidence or argument but rather serves as a summary of the evidence and argument which supports the Board's finding that it appears that the process of collective bargaining has been unsuccessful for reason(s) in accordance with Section 40A(5)(c).

Applicant

Whether the process of collective bargaining has been unsuccessful?

[25] The Applicant, in accordance with section 40A of the TUA, applied to the Board for a direction that a first collective agreement be settled between the parties upon the basis that the Employer had adopted an uncompromising bargaining position without reasonable justification and had failed to make reasonable efforts to conclude a collective agreement. Generally stated, it was the Union's contention that the Employer, without justification, was demanding terms and conditions that were inferior to those in place prior to certification and had refused to bargain certain issues in the collective agreement.

[26] The Applicant encouraged the Board to adopt an approach similar to the OLRB in making its determination as to whether the process of collective bargaining had been unsuccessful. The Applicant referred the Board to what it described as the foundational decision of the OLRB, with respect to first contract arbitration. In rendering its decision in Nepean Roof Truss Limited, [1986] OLRB Rep. July 1005 the OLRB

set out the factors to consider in determining whether "the process of collective bargaining has been unsuccessful. The OLRB, at paragraph 17, described its approach in the following terms:

17. To understand the conceptual underpinnings of the legislation, it is useful to dissect the language of section 40a(2). The Board is directed to impose settlement of a first collective agreement by arbitration where "it appears ... that the process of collective bargaining has been unsuccessful because of ...". The Board is thereby obliged to consider the following factors:

i) "The process of collective bargaining". The use of the word 'process' imports into the deliberation an examination of the interaction between the two parties.

ii) "The process ... has been unsuccessful because of...". This language makes it clear that section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the employer's refusal to recognize the union's bargaining authority, the respondent's unreasonably uncompromising bargaining proposals, the respondent's dilatory or unreasonable efforts to reach an agreement, or any other reason the Board deems relevant, then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition. In the infancy of this legislation, it has yet to be determined what other reasons the Board may consider relevant within the meaning of section 40a(2)(d), but logic and the spirit of section 40a suggest that this will involve a case-by-case analysis of whether there is a causal connection between the "reason" in question and the failure of the collective bargaining process.

iii) "irrespective of whether section 15 has been contravened". Section 15 of the Labour Relations Act imposes the duty to "bargain in good faith and make every reasonable effort to make a collective agreement". The reference to section 15 in this way can only be interpreted as making a distinction between bad faith bargaining and first contract assessments. The Board is not to be bound by whether or not the conduct complained of violates section 15. Given the Board's jurisprudence pursuant to section 15, wherein the Board has held that hard bargaining is not necessarily bargaining in bad faith (T. Eaton Company Limited [1985] OLRB Rep. March 491; Radio Shack [1985] OLRB Rep. Dec. 1789), one is left with the inescapable conclusion that the legislature has intended a different standard to apply in the determination of first contract disputes, a standard peculiar to section 40a adjudications. This does not suggest that contravention of section 15 is irrelevant. A contravention of section 15 may well be a factor to consider in assessing why the process was unsuccessful. But the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a. Hard bargaining may not violate section 15, but rigid bargaining proposals may, if they fall within subsections (a) - (d) of section 40a(2), justify the imposed settlement of a first collective agreement.

[27] In the opinion of the Applicant in order to satisfy the requirements as set out by the OLRB the parties must do more than merely go through the motions of negotiating but rather must demonstrate that they have attempted to seriously explore all of the issues and have utilized conciliation. This, according to the Applicant, does not mean a party must indefinitely explore items that would be pointless. Further discussions are only to take place where the Board determines such discussions would be fruitful.

[28] It is the position of the Applicant that the Union and Employer seriously engaged in collective bargaining as evidenced by the fact that they met on six separate occasions, exchanged written proposals, discussed them thoroughly and sought the assistance of a conciliation officer. Despite their efforts several issues remained outstanding including some of which are the subject of the union's application for first contract arbitration.

Wages

[29] With respect to wages the Union, through its witness Mark Dobson, submitted that it sought an increase in wages with the objective of improving the working conditions of the employees. Additionally, it was also

seeking an increase to maintain the status quo that saw regular annual increases for employees. The Union contended that it sought a wage scale that was reflective of current wage rates. According to the Applicant the Employer's response was to propose a wage scale in which the top pay rate was lower than the pay rate for some of the Employer's current employees. Mr. Dobson testified that as a concessionary measure the Employer had proposed that it would "red-circle" those current Employees being paid at the higher rate and henceforth the new pay scale would apply to any new employees and current employees who had not yet reached the higher pay rate thereby holding all employees to the lower level.

[30] The Applicant submitted that the Employer's wage proposal included no wage increase during the Employer's proposed one-year term. According to the Applicant this approach was contrary to the Employer's past practice of granting annual wage increases in the spring of each year. It was the Applicant's contention that there had been no wage increase since the Union applied for certification in June 2014, so the Employer's proposal, although not characterized as such by the Employer, would effectively result in a wage freeze of nearly two years.

[31] The Applicant submitted that it had attempted to move the negotiations along by reducing its overall wage proposal from a $1.00 an hour increase to a $0.50 an hour increase. The Employer rejected the offer and, according to the Union, any further movement on its behalf would have amounted to essentially negotiating with itself as the Employer consistently displayed a disinclination to discuss any form of wage increase. Mr. Dobson testified that the Employer's final offer, following conciliation, made no change to its wage proposal that had already been rejected by the Union. It was the Applicant's position that in doing so the Employer had effectively shut the door on any further negotiations.

Holidays and other leaves

[32] It was the Applicant's contention that the Employer had refused to bargain substantive language on holidays or other leaves. According to Mr. Dobson the Employer's position was that while it would agree to make its existing policies available to employees it would not agree to incorporate any of the terms of the policies in the collective agreement itself. The Employer's Final Offer included the following language on holidays and other leaves:

ARTICLE 19- HOLIDAYS

19.01 The Company will make available to employees its policy on Holidays for HRM for Full-Time and Part-Time employees.

19.02 For clarity Full-Time and Part-Time employees will receive holidays under Article 19.01 consistent with other Lawton retail store operations.

ARTICLE 20- LEAVE OF ABSENCE

20.01 The Company will make available to employees its policy on Maternity/Paternity & Parental Leave.

20.01 The Company will make available to employees its policy on Bereavement Leave. To receive a paid leave of absence under the policy Full-Time employees must notify the Company about the need for leave no later than the start of their shift on the first day of absence; they must attend the funeral or memorial service; and, if additional unpaid leave is necessary, they must request additional time off prior to the funeral leave. If the company requests, the employee must furnish satisfactory proof for the leave request.

20.03 The Company will make available to employees its policy on Jury Duty, Witness Duty or other Court Appearance Leaves.

20.04 For clarity employees will receive leave under Article 20.01, 20.02 and 20.03 consistent with other Lawton retail store operations.

The Applicant submitted that it had demonstrated a considerable degree of flexibility in bargaining these issues with the Employer and indicated that initially it had proposed twelve paid holidays along with terms for other leaves under Article 20. The twelve paid holidays sought by the union were:

17.01 The following days are considered paid holidays for Employees, at the Employee's regular hourly wage rate normal hours worked:

New Years Day Labour Day Employee's Birthday
Good Friday Thanksgiving Day Family Day
Victoria Day Remembrance Day Natal Day
Canada Day Christmas Day Boxing Day

[33] According to the Applicant it altered its position concerning the above holidays and agreed to accept the substance of the Employer's policies on holidays and other leaves provided the terms were incorporated in the collective agreement. This proposal, however, was rejected by the Employer. The Union stated that it next proposed that a referral to the policy in the Collective Agreement lock in the holidays as at a certain date so as to prevent the Employer from making any unilateral changes. The Employer also rejected this proposal.

[34] It was the Applicant's position that the Employer's proposal was unacceptable as it meant the Union, under the collective agreement, would not be able to grieve such matters as the denial of a paid holiday or a change in the holidays granted to employees. The Employer controls its policies and can therefore unilaterally change them at any time without the input of the Union. It was the Union's position that holidays constitute an important monetary item and as unionized employees do not have the protection of the Labour Standards Code for holidays they could be deprived of the right to any holidays if not listed in the collective agreement. Additionally, the Applicant submitted that it was important that members of the bargaining unit be able to refer to their collective agreement in order to know their rights within the workplace and in dealing with their Employer. The Applicant submits that the Employer's refusal to depart from its position was without justification.

[35] The Union said there was no doubt that the Employer understood its position as:

The Union made it very clear what the issues were with the Employer proposal: 1) the holidays and leave were to be listed in the Collective Agreement; and 2) the Union had to be able to enforce the holiday and leave provision. These issues were explained and discussed. Options and alternatives were explored. Bargaining was not successful.

Scheduling by Seniority

[36] It was testified that prior to the Applicant's certification, part-time employees selected their shifts by seniority. However in December 2014, during the course of bargaining, the Employer altered this practice and subsequently refused to incorporate the former practice in the collective agreement. The union pointed out that the matter of seniority was covered at Article 23.04 of the Employer's Final Offer which stated:

Seniority and an employee's Qualifications will be the governing factors in promotion, demotion, layoff, recall, access to hours of work, vacation scheduling and other working conditions as set out in other provisions of this Agreement. According to the Applicant it had initially understood this provision to mean that it would require the Employer to assign shifts on the basis of seniority to qualified employees. However, the Employer subsequently explained that it would not apply this language to allow part-time employees to select shifts by seniority. According to the union the imposition of this clause would result in inferior terms

and conditions of employment than those in place before certification.

[37] The Union stated that Seniority was a topic of considerable discussion. The differences were well defined and explained and the parties were not successful resolving this particular issue.

Probationary Period

[38] The Applicant submitted that the Employer proposed a probationary period for new hires during which an employee would have no rights under the collective agreement. The employee would have no access to the grievance procedure and could not grieve a termination of employment. The Applicant said that in an attempt to reach a resolution on this issue it had advised the Employer, during bargaining, that it would accept the Employer's terms provided if the probationary period was limited to 3 months which, it submitted, was consistent with the current probationary period used by the Employer. In the opinion of the Applicant that was a significant concession on its part, given the total exclusion of these new employees from the protections of the collective agreement.

[39] The Employer rejected the Union's proposal and countered with its own proposal consisting of a probationary period of 4 months for full-time employees and 736 hours for part-time employees. According to the Applicant the Employer's proposal would result in a situation where an employee working 24 hours per week would be without the protections of the collective agreement for more than 7 months.

[40] The Applicant argues that the Employer's contention that the Union had not revised its proposal is incorrect as originally the union had proposed a probation period of 120 hours. According to the union the matter of probation had been thoroughly canvassed by the parties and even the proposal made during conciliation by the employer exceeded the status quo.

Health and Welfare Plan

[41] With respect to the Health and Welfare Plan the Applicant submits that not only had the Employer refused to incorporate the Health and Welfare Plan in the collective agreement but also would not commit to maintaining the current level of benefits during the term of the collective agreement. The Union submits that its concern is very similar to the positon it held with respect to holidays and leaves.

Employer's Final Offer contained the following terms:

Article 16 HEALTH & WELFARE

16.01 The Company agrees to make available a benefits plan to eligible employees in accordance with the Company group insurance program, as may be revised from time to time.

16.03 For clarity employees will receive benefits under article 16.01 consistent with other Lawton retail store locations.

[42] To be eligible under the Plan, an employee must be "actively working for your employer at least 32 hours a week". Under the Employer's Final Offer, the Union could not grieve a change in eligibility requirements or a denial of benefits on the basis of ineligibility. The Union described this as an unreasonable proposal, particularly in the context of a one-year agreement, as proposed by the Employer. The Union submits that despite extensive discussion the Employer never changed its position.

Has the Respondent engaged in conduct which is uncompromising without reasonable justification?

[43] The Union describes an uncompromising bargaining position as being one from which a party has

demonstrated it will not deviate. When determining what may constitute an uncompromising bargaining position the Union stresses that the Board does not have to find that all of the Employer's bargaining positions were uncompromising but simply that one or more uncompromising bargaining positions lead to a failure to conclude a collective agreement. The language of Section 40A, submits the Union, focuses on "any" uncompromising bargaining position. Consequently, a union is not obliged to show that all of an employer's bargaining positions were uncompromising, but simply that one or more uncompromising bargaining positions lead to a failure to conclude a collective agreement. The Respondent's uncompromising bargaining position does not have to be the sole cause, but simply a cause of the failure to conclude a collective agreement: Formula Plastics Inc., [1987] OLRB Rep. May 702, para. 35.

[44] The Union further submits that in the context of negotiating a first collective agreement and, for purposes of section 40A, an uncompromising bargaining position may not differ from a hard bargaining position. However, hard bargaining that would not breach section 35 of the Act may still amount to an uncompromising position that justifies direction of first contract arbitration. The Union submits that the OLRB drew a similar conclusion in the Nepean decision where it stated at paragraph 17 "Hard bargaining may not violate section 15, but rigid bargaining proposals may, if they fall within subsections (a) - (d) of section 40a(2), justify the imposed settlement of a first collective agreement". Also in Nepean the OLRB at paragraph 17 held that the standard for an uncompromising bargaining position is different from the principles needed to show bargaining in bad faith.

[45] The Union points out that the decisions of the OLRB indicate that there are a number of factors that may be considered by the Board when determining if a party has taken an uncompromising bargaining position. In Ontario the Board has determined that the status quo is particularly important in the context of a first collective agreement. It is generally accepted that the goal of collective bargaining is to promote and bring about an improvement in working conditions as opposed to maintaining the current ones. Consequently, concessionary proposals by an employer may amount to an uncompromising bargaining position that results in first contract direction: Grant Forest Products Corporation, [1991] OLRB Rep. July 848.

[46] The OLRB also examined an employer's proposals from the perspective as to whether the objective is to demonstrate to the employees that unionization has been of little or no benefit: Grant Forest Products Corporation, [1991] OLRB Rep. July 848, para. 37; MacMillan Bloedel Building Materials Limited, 119901 OLRB Rep. January 58, para. 22.

[47] The Union submitted that of particular relevance to the matter at hand is the fact that the OLRB has, for example, found that proposals have been uncompromising where an employer proposed to increase the length of a probationary period (Grant Forest Products Corporation, supra., para. 41) or refused to discuss a wage increase (Peacock Lumber Limited, supra, para. 30).

[48] According to the Union it is not sufficient for an employer to simply hold to an unwavering bargaining position if the reason for doing so is merely a pretext. If for example an employer seeks to justify a bargaining position on the basis of financial cost, it must provide complete and accurate evidence: Grant Forest Products Corporation, supra., para. 56; Comcare (Canada) Limited, 11998] OLRB Rep. May/June 363, para. 62.

[49] The Union submits that the Board is to utilize an objective test when considering whether the Employer has reasonable justification for holding to a particular position in the context of negotiating a first collective agreement for purposes of section 40A. An objective test should take into account "the general landscape of labour relations and the specific labour relationship between the parties", as well as the prevalence of similar provisions in other collective agreements and the general recognition of the importance of such rights within the labour community and labour law jurisprudence (Formula Plastics Inc., supra, para. 26).

[50] The Union points out that the Ontario Board takes an objective approach and in doing so explicitly allows parties to access first contract arbitration without showing a breach of the duty to bargain. The Union also

notes that the Ontario case law has also held that direction to settle a first contract is not a penalty against the employer. Consequently, it is not incumbent upon a union to show egregious conduct, anti-union animus or bad faith on the part of an employer to satisfy the test under section 40a (Formula Plastics Inc., supra, para. 39).

[51] It is the Union's position that in the matter at hand the Employer has held to proposals that are uncompromising and without justification. The Employer, submits the Union, had sought concessions and proposals that were designed to demonstrate to the employees that certification is of no benefit to them. The Union submits that the Employer's chief negotiator had effectively conceded that such was the Employer's objective when, as testified by Dobson, he advised the Union that the Employer's goal was to make certification result in no additional cost to the Employer and refused to agree to any wage increase because employees at non-union stores would want a similar increase.

[52] With respect to the Employer's position concerning wages the Union submits that the evidence clearly demonstrates that throughout the course of negotiations the Employer, despite having been asked to do so, failed to provide any reasonable justification for its wage proposal and wage scale. The Union states that in presenting its position to the Board by way of its reply and argument the Employer has continued to provide the empty platitudes of: market conditions; recruitment and retention issues; wages at other non-union Lawton's stores; and wage rates at other pharmacies and retail stores. But, submits the Union, no evidence was ever provided to the Union or to the Board to support any of these claims. Without any evidence the proposal of the Employer is without reasonable justification.

[53] The Union said it had requested justification for the long time period the Employer sought in its wage scale and never received a response. The Union submits that when compared to other applicable collective agreements it is evident that the salary scale proposed by the Employer is far beyond what exists in current collective agreements that it has signed or that exist in the sector.

[54] The Union contends that the Employer's proposal reduces the maximum salary rate for employees by not holding to a wage scale range that does not reflects current rates. The Union contends that the Employer instead of accepting current rates and establishing a wage scale for 2015, took the position that the higher paid employees were "outside the normal range". However, argues the Union the "normal range" has never been provided to the Union. No reasonable justification has been provided for reducing the top salary scale and freezing wages for those employees at the top of the scale.

[55] The Union says that the Employer has admitted that employees regularly receive wage increases and some increases were given in 2014. By proposing a collective agreement that provides for no wage increase for employees in 2015 they are offering less than what employees received before certification.

[56] The Union submits that case law clearly holds that if an employer intends to rely on financial or market circumstances to support a monetary proposal the employer is required to provide complete and accurate evidence in support of its position. As stated by the OLRB in Grant Forest Products, supra, at para. 56:

We were left with a number of unanswered questions about the company's financial jus¬tification for the final offer. One of the major problems was that the financial information pre¬sented by the company was incomplete. Complete and accurate financial data is critical in this kind of case, if we are to determine whether the company's financial condition provides reasonable jus¬tification for its position. More particularly, the financial documents presented by the company both to the union in bargaining and to the Board at the hearing raised more questions than they answered. The document prepared by Mr. McLeod and given to the union on September 13th is in a somewhat unusual format. This was explained by Mr. McLeod as an attempt to make the infor¬mation on it more accessible than normal financial statements and to focus in on the company's losses. In fact, the document is rather less informative than a financial statement, and indeed is so selectively focused on the company's losses that it is not particularly persuasive. For example, Mr. McLeod

acknowledged that the dollar figures that made up the cost per ton figures did not deal with the cost of production per unit which would vary with total output, and did not deal with the production increases which were within the mill's capacity. The production figures, which played a critical role in the calculation of other figures in the document, are not included on it. Mr. Carlyle explained this deficiency by saying that these figures were made available to certain employees on a weekly basis. This suggests that these employees would have had the foresight to have kept this data for the years set out in Mr. McLeod's document, having anticipated that they would need it to analyze the figures he presented. This seems somewhat unrealistic. Other missing information included a substantial figure for insurance proceeds to cover the damage from a recent fire. In addition, the percentage columns setting out the breakdown of production costs do not add up to 100%. Although this was explained to the Board by Mr. McLeod to some extent, it contributed to the document's obscurity at the bargaining table. Indeed, it appears that even members of the company's bargaining team had some difficulty understanding it.

[57] The Union submits that by failing to provide any evidence relating to its financial situation the Employer has not provided reasonable justification for its wage proposals although such information, as held in Grant Forest Products, is “critical in this kind of case”.

[58] With respect to Holidays and Other Leaves the Union submits that the Employer has failed to provide a reasonable justification for its refusal to put the content of the holidays and leave provisions in the Collective Agreement. The Union confirms that the parties do not disagree on the content of the provisions but contends that the dispute arises from the fact that the Employer simply refuses to include them in the Collective Agreement.

[59] The Union argues that when compared to similar provisions in other collective agreements it is evident that the Employer’s proposal is not supported by the general landscape of labour relations. A factor that was clearly enunciated in Formula Plastics, supra and Yarrow Lodge, supra decisions.

[60] The Union contends that contrary to the Employer’s position there are numerous collective agreements that include holiday provisions that list the holidays and provide articles for their administration including:

Lawton’s and UFCW, Local 864 (warehouse)

Cambridge Suites and UFCW, Local 864

Numerous first contracts and current contracts in the retail pharmacy sector for Nova Scotia

Sobeys and UFCW, Local 864 (warehouse)

Sobeys retail stores

[61] The Union submits that the holiday provision is a monetary issue for the parties to a collective agreement and for bargaining unit members. The Union points out the holiday provisions under the Labour Standards Code do not apply to employees covered by a collective agreement. Consequently, if the holidays are not provided for in the collective agreement there are no enforceable holidays. The Union submits:

…If, as the Employer has proposed, holidays are only provided by company policy, the Employer can unilaterally change the holidays for employees. If employees only get what is in the Employer policy, the Union cannot grieve as the entitlements under the policy are not enforceable. The final proposal of the Employer said that bargaining unit employees would get holidays consistent with non-union employees at other stores. This proposal did not change this fundamental issue — the employer could still unilaterally change holidays for all employees.

[62] The Union further contends that the same circumstances in relation to holidays also apply to the leave

provisions except that leaves, under the Labour Standards Code, apply to employees under a collective agreement.

[63] The Union submits that, upon closer review, the Employer's reliance on the Cambridge Suites collective agreement to support its statement that referral to policies for holiday and leave were becoming "common practice" is not fully supported by the actual wording of the agreement. The Union points out that the Cambridge Suites agreement includes the following provisions without reliance on company policy:

Article 13 — Leave of Absence (which includes personal leave, union leave, compassionate care leave and emergency care leave)

Article 14— Maternity, Adoption and Parental Leave

Article 17— Holidays

Article 22— Bereavement Leave

[64] According to the Union the only reference to employer policy in the Cambridge Suites agreement is Article 26 — Court Leave and Jury Duty. That article provides a substantive right to an unpaid leave of absence and also provides that employees are entitled to pay in accordance with the Employee Handbook. The Union contends that this is distinguishable to a clause that provides no substantive right and merely refers to company policy.

[65] The Union also submits that the Employer's contention that the Lawton's Warehouse collective agreement does not include a provision for holidays is inaccurate. Article 19 of the agreement includes a list of paid holidays and provision for their administration.

[66] The Union states that the issue with the health and welfare plans was essentially the same as holidays and leaves. The Employer insisted that the collective agreement only include reference to the policy but that it could unilaterally change the policy and eligibility at will. The Union submits that in light of a one year agreement this is not reasonable and no reasonable justification was provided.

[67] As for the Employer's proposal concerning the Probationary Period the Union says that the Employer did not provide any evidence to support why the former three month probation period had to change other than stating that prior to certification the employer could dismiss at will. It was upon this basis that the Employer justified probation periods that were greater than the pre-certification three month period.

[68] The Union urges the Board to critically examine the rationale for the Employer's proposal to roll back benefits. In this case, submits the Union, the only justification is one that fails to recognize the Employer's new relationship with their employees through their bargaining agent.

[69] The Union contends that the Employer's proposal respecting scheduling by seniority is another concessionary proposal. Based upon the Employer's proposal employees will have fewer rights in relation to their schedule than they did before certification. The Union contends that this is an exceedingly important issue as it has a direct bearing on financial livelihood as well as work life balance and time with family. The Union expresses the view that the Employer did not offer a reasonable justification for its rigid position that scheduling could no longer be done by seniority. No evidence was provided to support the Employer's claim that the scheduling change is required to focus on customer service.

[70] The Union asked that the Board consider all of the above issues collectively. The Employer has maintained numerous provisions that are either concessionary or represent no change in the relationship between the Employer and its employees. For example, by insisting on the application of holiday, leave and health policies of the Employer, subject to the Employer's administration and amendment, the terms and

conditions for employees have not changed. The Ontario Board, submits the Union, has found that proposals aimed to suggest to employees that unionization has been of little or no benefit will be found to be uncompromising (Grant Forest Products, supra, para 3]; MacMillan Bloedel, supra, para. 22). The Union says that the Employer's objective is quite evident when its proposals are examined individually but when looked at in total the purpose is even more stark. The Employer has offered little or no evidence for its uncompromising positions.

Is there a causal connection between the employer's conduct and the failure of the collective bargaining process?

[71] The Union says that the issues and positions it outlined during the presentation of its case remained outstanding through conciliation and continued to remain outstanding at the time of the hearing. Given the significance of such monetary issues as wages and holidays a collective agreement would not have been finalized without a resolution to the outstanding issues.

[72] The Union reminds the Board that, as held by the OLRB, it is not necessary to find that the uncompromising positions of an employer are the sole cause of the failure of bargaining:

The employer argues that the conditions of section 40a(2flb) have not been met because bargaining broke down, at least in part, due to the fact that the union was equally uncompromising in its insistence upon a just cause clause. We do not find this a persuasive proposition. The multi-dimensional and reciprocal nature of the bargaining process means that when negotiations break down, it will frequently be as a result of adamancy on both sides. There is no requirement in section 40a(2flb) that the respondent's position be the sole cause of the failure of negotiations, a choice of syntax which recognizes the complex realities of collective bargaining. Rather, as the Board points out in general terms in Nepean Roof Truss, supra, the emphasis is on the existence of a causal connection between the uncompromising position taken by the respondent and the parties' lack of success in collective bargaining. (emphasis added by Applicant)

Formula Plastics, para. 35

[73] The Union also reiterates that a union does not have to show egregious conduct, anti-union animus or bad faith on the part of an employer to satisfy the test under section 40A.

[74] The Union refers the Board to MacMillan Bloedel Building Materials, supra, where the Ontario Board drew an obvious link between the findings that a position is uncompromising without justification and that it was a cause of unsuccessful bargaining. The Board concluded that if a position is found to be uncompromising it is not likely to change and will remain an obstacle to successful negotiations. The Board found at paragraph 23:

We have also carefully considered whether the necessary causal connection is to be found between the bargaining position of the respondent and the impasse that collective bargaining has reached. ... However as noted, in our view there is no reasonable possibility either party will abandon the principle behind their respective bargaining positions, and we remain satisfied that bargaining has been and will continue to be unsuccessful because of the nature of the company's proposal and the company's justifications for it.

[75] The Union contends that the uncompromising positions put forward by the Employer have caused a barrier to successful collective bargaining. The Union asserts that there are positions on matters that are central to a collective agreement and of significant importance to bargaining unit members. The Union submits there is no indication that those positions are likely to change.

III Position of the Employer

Whether the process of collective bargaining has been unsuccessful?

[76] In providing its answer to the first question the employer referred the Board to the decision of the Ontario Board in Saxum Canada where the OLRB, citing United Steel Workers of America v. Metro Taxi Ltd. c.o.b. Capital Taxi (Board File 3081-95-FC), considered how the Board should determine if bargaining has been unsuccessful. The OLRB emphasized that it places significant value on direct negotiations between parties which should lead to an agreement which accurately reflects their own needs. The Board stated:

69. How does one measure whether the process of collective bargaining was unsuccessful? In answering this question, we begin by assuming that the intent of the legislation is to give primacy to free collective bargaining in the recognition that an agreed to collective agreement is always preferable to an imposed one. This point was made at paragraph 16 of Nepean referred to earlier. For this reason, the threshold for lack of success must not be so low that it encourages parties to work towards a first contract direction rather than an "agreed to" settlement.
…

78. We would expect that at a minimum, an applicant should be able to show that it has attempted to seriously explore with the respondent all of the significant issues that exist between the parties. Of course, if the respondent has in fact rendered such attempts pointless, then that would be sufficient to determine that bargaining has been unsuccessful. Are further discussions possible and if so would they be helpful or fruitful? These are the types of questions that have been posed in the Board's jurisprudence. There is no specific number of bargaining sessions that parties must participate in before these questions can be answered. In some cases, many unproductive sessions may be indicative of a lack of success, but it is not necessarily so.

[77] It is the Employer's position that the present application for first contract arbitration should be dismissed as the Applicant has failed to establish a sufficient basis for the Board to find that the process of collective bargaining has been unsuccessful. The Employer submits that the Applicant has not shown that it attempted to seriously explore all of the significant issues between the parties. The Employer further submits that during the six days of bargaining and the one day with a conciliator the parties had made substantial progress and attained agreement on 126 provisions of the first contract and the Employer had presented proposals in relation to seven other provisions.

[78] It is the Employer's submission that on January 9, 2015 (following conciliation) it had provided the Union with a revised draft first contract which set out all of the provisions that had been agreed to by parties and, as mentioned, seven proposals to resolve the remaining outstanding issues. The Employer contends that the Applicant failed to respond to the proposals or the revised draft first contract even though the Employer followed up with the Union on various occasions.

[79] The Employer further submits that it was not until February 8 and 9, 2015 that the Union held meetings with the bargaining unit members to vote on the revised first contract and at no time following these meetings did the Union come back to Lawton's with any counterproposals or response to the proposals made by Lawton's on January 9, 2015.

[80] The Employer stresses that on February 17, 2015 the Conciliation Officer filed his report with the Minister of Labour and Advanced Education and that the Union had not requested any follow-up meetings with the conciliator nor had it proposed any additional dates for collective bargaining. Rather, submits the Employer, instead of seriously exploring the remaining issues the Union filed the Application for first contract arbitration with the Board on February 23, 2015 without prior notification to Lawton's.

[81] It is the Employer's position that the Application failed to show that the Union made all attempts to explore the remaining issues between the parties or, for that matter, even respond to proposals made by Lawton's. Accordingly, submits the Employer, the Application should be dismissed.

Has the Respondent engaged in conduct which is uncompromising without reasonable justification?

[82] The Employer submits that, in the alternative, if the Board should find that the process of collective bargaining was not unsuccessful it is not because of any action on the part of Lawton's but rather due to the actions of the Applicant. The Employer submits that if, in fact, the collective bargaining process was unsuccessful it was directly attributable to the backtracking of the Union at conciliation to expand the number of outstanding issues for the purpose of the first contract application and, moreover, it was the Union and not Lawton's that adopted an unreasonable and uncompromising bargaining position.

[83] The Employer referred the Board to Formula Plastics Inc., supra wherein the Ontario Board set out a detailed explanation regarding the terms 'uncompromising' and 'without reasonable justification'. The Board considered the fact that during the course of bargaining the employer insisted upon a clause which allowed for the termination of seniority upon payment of 2 weeks' pay, plus 1 week per year of service. It insisted upon this clause throughout multiple days of bargaining and a strike over a 2-year period. The Board concluded that this was "uncompromising" (paras. 22—23):

There can be little doubt on the evidence before us that the employer's position was uncompromising. The only area of flexibility indicated by the employer was in regard to the amount of pay in lieu of notice. In any event the employer maintained the same position on 8.08(b) for over two years through the course of a strike directed primarily at this clause, a bad faith bargaining complaint which had 8.08(b) as its subject and throughout the instant proceedings which were chiefly centered around this provision. Under the circumstances, the respondent's position can be fairly characterized as uncompromising.

[84] Lawton's said that going into conciliation it understood that there were five outstanding issues. But during the course of conciliation the Union tabled approximately 45 proposals it deemed to be in dispute. It was the opinion of Lawton's that the Union's actions, in this regard, were a ploy to insure the process of collective bargaining was unsuccessful so that it could bring an application before the Board.

Wages

[85] The Employer submits that at the time of conciliation the major issue related to the demands by the Union for "substantial wage increases". The original proposal by the Union was $1.00 per hour increase in each year of the first contract. However, according to the employer, and as set out in its submission the actual proposal sought much more:

The proposal sought wage rate increases for employees with three months service in the range of $1.25 per hour up to $2.17 per hour in year one of the first contract. In each additional year the wage rate would increase further. The proposals also sought to move all employees to the highest wage rate after six months (as opposed to 60 months). In year one of the first contract wage rates increases would be in the range of $2.40 per hour to $4.05 per hour in year one for employees with six months service (depending on classification). Over a three year term proposed by the Union wage rates would increase by up to 45% for employees with six month's service. In addition the Union was seeking to increase the start rate.

[86] The Employer says that at conciliation the Union altered its proposal to $0.50 per hour provided Lawton's agreed to a three year term. The Employer submits, however, that the Union had not formalized the proposal and consequently Lawton's was unable to assess the actual impact on wages. Lawton's submits that consequently it was unknown if the Union was still seeking to increase the start rate, the wage rate at three months or to have the top rate start at six months.

[87] The Employer asserts that throughout collective bargaining and conciliation the Union was unable to justify its demand for the substantial wage increase. The Employer states that it had been advised by the

conciliation officer that the Union was seeking an increase that would offset union dues. However, it was the Employer's response that the Union's position was not appropriate justification for a wage increase.

[88] The Employer disputes the Union's contention the collective bargaining was not successful because of its uncompromising position but insists that it was the Union which was uncompromising and failed to provide justification for its demands. The Employer submits that during the negotiations it provided full justification for each and every bargaining position put forward and at no time had the union bargaining team suggested that Lawton's was uncompromising or failed to provide reasonable justification. The Employer insists that it was the Union which was uncompromising and failed to provide justification for its demands. Lawton's submits that it was prepared to stay at the negotiating table and had indicated to the conciliator that it did not intend to lockout the employees.

[89] The Employer submitted that negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a "dynamic exchange." Accordingly, asserts the Employer the Labour Board must take this into account when considering the conduct of each party. It is therefore imperative that the Labour Board exercise caution when assessing the conduct of the parties given that the significant issues were being negotiated through a conciliation officer. With respect to how it had conducted itself during negotiations and conciliation the Employer submits:

It provided requested documentation and policies;

Provided various dates to meet with the Union to negotiate and conduct collective bargaining and conciliation;

Fully explained proposal and justification for positions taken at bargaining;

Highlighted throughout negotiations that the retail/pharmacy industry was changing and becoming more competitive and the need by Lawton's to remain flexible to serve its customers in the best manner possible;

Provided full explanation on all questions in relation to policies, proposed wage scale and practices of Lawton's; and

Continuously requested justification from the Union to support the wage demands being advanced by the Union. The Union, according to the employer, failed to provide any basis for the wage demands other than as stated by the union's chief negotiator: "this is what I've set out to obtain and that's what I'm going after"

[90] The Employer reiterated that in a first contract application the burden of proof rests with the Applicant and first contract arbitration is only ordered in very egregious circumstances which do not exist in the matter at hand and as such free collective bargaining should prevail in the circumstances.

[91] It was Lawton's contention that the Union's request with respect to wages was out of step with the market. Lawton's said it explained to the Union how it reviews the market on a regular basis and how it considers recruitment and retention issues. Lawton's also said it had explained that wage rates at the Scotia Square store were consistent with current wage scales at other Lawton's locations in Nova Scotia. It was further explained, according to Lawton's, that the industry is being impacted by changes in the market including increased competition.

[92] Lawton's confirmed that during a review of wages it was discovered that two employees were being paid outside the normal range and that it proposed red circling the employees in question until they reached the next threshold. Lawton's said it made it clear to the Union there would be no wage reductions as a result of collective bargaining.

[93] Lawton's states that on November 18, 2014 the parties reached agreement on the substantive portion of the preamble to wages and Lawton's had agreed to include language to the effect that wages of employees

would not drop below the minimum wage order. Lawton's said it once again requested the Union to justify its proposal based on the marketplace. According to Lawton's the Union's response was to the effect that it was what they had been requested to obtain by its membership. Lawton's highlighted again that retail is driven by minimum wages and it was not aware of a justification to increase wage rates. It was the employer's position that its wage offer was comparable with the retail sector in Halifax.

[94] Lawton's argued that based upon the Union's proposed wage scale, which was provided on November 18th the Employer determined that the proposal exceeded the $1.00 per hour "across the board" increase. Based upon the Employer's calculations it was determined that the start rate would increase in each year of the first contract. After three months the hourly rate would increase in the first classification by $1.25 per hour; in the second classification by $1.70 per hour; in the third classification by $2.17 per hour. In addition the Union was proposing an increase in the start rate for each year of the first contract. Lawton's said that this meant that all employees would reach the top wage rate in 6 months (versus 60 months). By way of example, the Employer explained that employees in the first classification currently earning $10.55 per hour would move up to $12.95 per hour; employees in the second classification currently earning $10.70 per hour would move up to $13.75 per hour; and employees in the third classification currently earning $10.80 per hour would move up to $14.95 per hour. The Employer stressed that no justification was given by the Union for the rapid movement to the top range. The percentage wage rate increase over 3 years would be in the range of 42% to 45%.

[95] Lawton's said that at the conciliation session held on January 8, 2015 it explained why the $1.00 per hour increase proposed by the Union would impact Lawton's adversely. In contrast, the Union had not provided any justification. Lawton's highlighted that it operated in an extremely competitive industry based on minimum wage rates. Further, Lawton's noted that market information established that the proposed rates by Lawton's were comparable to those of other businesses in the pharmacy and retail sectors. Lawton's also clarified that the implementation of the employer's proposed wage scales would not adversely affect any employees who may already be paid more than the proposed scale.

[96] Lawton's said that wages remained the primary focus of discussions at conciliation. Through the Conciliation Officer Lawton's was advised that the Union was willing to move to an annual increase of $0.50 per hour provided Lawton's agree to a three year term. However, according to Lawton's no further particulars were provided by the Union as to whether it was still seeking to increase the start rate, the rate at 3 months or to have the top rate commence at six months (versus 60 months). The Union failed to provide any justification other than what it had previously stated as justification for the proposed wage increase.

[97] Lawton's also disputed the Union's contention that the wage proposal was absent a wage increase during the term of the agreement and that there had been no wage increase since certification. It was Lawton's position that wage increases occur based on length of service thresholds (or hour thresholds for part time). Accordingly, wages would continue to increase during the term of the first contract. According to Lawton's seven employees have received wage increases since certification.

[98] Lawton's stated that at no time did the Union challenge any of the justifications given by Lawton's nor did the Union provide justification for its own wage proposals.

[99] It was Lawton's argument that the position held by the Union respecting wages demonstrated that it had not seriously responded to the Employer's proposal and consequently the Union could not contend that bargaining had been unsuccessful. In support of its argument the Employer relied on the ruling of the OLRB in Saxum Canada in which it stated at paragraphs 55 to 57:

Has the process of bargaining been unsuccessful in this instance? According to the pleadings the parties were able to agree on a vast number of Articles that would form part of a proposed collective agreement including but not limited to clauses on Union security, grievance procedure (for the most part), seniority, hours of work

and overtime (for the most part), paid holidays paid vacations, and benefits (for the most part). According to Mr. McKay's bargaining session notes as late as October 9, 1997 both sides indicated that good progress was being made; in fact when bargaining broke off on October 27, 1997 there were very few issues remaining on the table. By far the most contentious issue from the evidence was the issue of wages.

The evidence revealed that the Company originally sought a one year agreement. There was no question that the Company recognized that one of the aims of the Union's bargaining committee was to narrow the gap between wages. When Mr. McKay asked what it would take to maintain the status quo in a second year; Mr. Hubert drafted Article 19(2) in response to such enquiry. Mr. Hubert felt that a second year might also assist in the Union's concern in relation to the wage gap. According to the contradicted evidence the only response Mr. Hubert received to the proposal of Article 19(2) was 'That's not what we had in mind'.

Mr. Hubert is a skilled negotiator. The Board does not believe that Mr. Hubert would ultimately expect that any union would agree to language as was proposed in Article 19(2). This however was a first proposal of the employer for a second year wage scale when according to the evidence the Company anticipated financial uncertainty (as it explained at the table). The problem is that the Union never suggested changes to this proposal or suggested an alternative approach outside of its original proposal for a defined salary grid. This proposal was presented by the Company in the later stages of negotiations. Outside of saying it was not what the Union was looking for; this is no evidence of any meaningful dialogue concerning a second year. The fact that this position remained on the table after October 27, 1997 is hardly surprising given the cost of the Union's proposal on wages which was still on the table. In the Board's opinion there was no real meaningful dialogue between the parties on this issue. It seems for example that the Union might have suggested a wage reopener; compulsory arbitration or tried to negotiate a one year contract. None of these options or other suggestions were pursued by the Union after the Company had tabled its proposal on Article 19(2). It should be remembered that Mr. Hubert was initially optimistic that an agreement could be reached when Mr. McKay had asked what it would take to get a second year.

Having considered the evidence both filed and heard, the Board is of the view that it has not been shown that in this instance the process of bargaining has been unsuccessful. In the Board's opinion the parties should return to the bargaining table to attempt to reach a collective agreement. The Board would note however its concerns as previously expressed with the Company's proposal as currently drafted in Article 19(2).

[100] Lawton's reiterated that during the course of negotiations it had made numerous requests for the Union to provide justification for its position that wage increases were justified but no "market justification" was ever provided.

Holidays and other Leaves

[101] Lawton's indicated that they were in agreement with the Union as to the number of holidays and leaves full and part time employees would be entitled to receive but that the principle point of contention concerned whether they would be written into the agreement or simply referred to. Lawton's said that in response to the Union's request to include the holidays and leaves in the agreement it had explained that it was becoming common to refer to holiday and leave policies in the agreement instead of including all of the wording in a collective agreement. Lawton's said they also pointed out that as leave policies tend to change regularly to meet new legislative obligations inclusion of the extensive policies would be awkward and cumbersome in a collective agreement.

[102] Ms. Ingalls testified that on October 27, 2014 Lawton's provided the Union with policies on holidays and leaves of absence. She said that Lawton's had offered to provide the employees with the same holidays and leaves as non-unionized employees and that this would include any changes to the policies. The Union was also advised that eligibility and entitlement could be grieved. Lawton's indicated that the Union had seemed to be in agreement with this approach on November 18, however, it changed its position in relation to

policies and sought to include language that any improvement in the policies would be applicable to the bargaining unit employee whereas any decreases in benefits would not be applicable.

[103] Ingalls testified that the Employer explained to the Union that it was now common practice to simply refer to a handbook rather than setting out the policy in its entirety in the collective agreement.

[104] Lawton's referred the Board to the Cambridge Suites Agreement and also noted the Lawton's Warehouse Agreement does not include leave provisions for voting, pregnancy leave, paternity leave, parental leave or statutory holidays. The Employer contends that it is ludicrous for the Union to suggest that it would not have the ability to grieve the denial of holidays set forth in a policy referenced in the collective agreement.

[105] Lawton's submits that at conciliation on January 8, 2015 there was further discussion regarding the inclusion of holidays and leaves in the collective agreement. According to Lawton's the main issue at conciliation related to the possibility of the Company changing coverage for employees resulting in employees receiving less than non-unionized employees. Lawton's submitted that on January 9, 2015, following discussion with the conciliator proposed language on holidays and leaves according to Lawton's the Union failed to respond to the proposed language.

[106] Lawton's submits that the allegation in the Application that Lawton's refused to bargain substantive language on holidays or other leaves is false. It said the parties had reached agreement on holidays and leaves. Through the conciliation officer it was also agreed that these policies would not have to be incorporated into the collective agreement. Lawton's said it had also addressed the concern of employees getting less than non-unionized employees. The employees would be still permitted to grieve the failure to grant a holiday or provide a leave.

Scheduling

[107] Lawton's submits that, despite the Union's contention to the contrary, an agreement on scheduling had been reached by October 17, 2014 and the issue did not form part of any further collective bargaining. Lawton's says that throughout the course of bargaining it fully explained how schedules were developed and that there had been no change to the approach it had taken.

[108] Lawton's concedes that changes were made to the schedules in December 2014 but they had nothing to do with the collective agreement but rather addressed issues concerning schedules which, according to Lawton's were "reflective of individual needs versus operational requirements." Lawton's says that these changes were fully explained to employees at the time and there was also full discussion on scheduling at conciliation.

[109] Lawton's pointed out that under the Lawton's Warehouse Agreement the work schedule is based upon business needs along with the number of employees required as determined by management. There is no reference to seniority in relation to scheduling. Throughout collective bargaining the need for focus on customer service was highlighted and agreed to by all parties. Lawton's asserts that the Union's contention that the provision on scheduling would result in inferior terms and conditions of employment is an incorrect assessment of the situation.

Probationary Period

[110] Lawton's submits that on September 26, 2014 the Union had proposed a probationary period of 120 hours to which it proposed a 9 month period for full-time employees and 1000 hours for part-time employees. Lawton's said its proposal was based upon its need for a longer probationary period in the retail industry based upon past experience. Later, in response to the Union's proposal of a 3 month probationary period for

full-time employees and a 260 hour probationary period for part-time employees Lawton's countered with a period of 6 months for full-time employees and 1,000 hours for part-time employees. Lawton's says that its proposal was consistent with the Lawton's Warehouse Collective Agreement which provides for a probationary period of 920 hours. The Union provided a new proposal of 4 months for full-time employees and 408 hours for part-time employees. Lawton's explained that it was not prepared to agree to the proposal and pointed out that its position on probationary periods was consistent with or less than several other collective agreements. Lawton's reduced the probationary period to 5 months for full-time employees and 920 hours for part-time employees.

[111] Lawton's submits that through the Conciliation Officer it provided reasons for why it could not accept 3 months. As a compromise Lawton's proposed 4 months for full-time employees and 736 hours for part-time employees. The amount of hours for part-time was simply a prorated amount of time based on the probationary period for full-time employees.

[112] In support of its position that its proposal was reasonable Lawton's pointed out that the probationary period in the recent Cambridge Suites agreement (involving UFCW) is 6 months (Article 28.04) and the probationary period in the agreement for Lawton's Distribution Warehouse (also involving UFCW) is 920 hours. Both are greater than the proposal by Lawton's.

Health and Welfare

[113] In relation to the Health and Welfare proposal Lawton's submits that it was not one of the 10 "remaining issues" identified by the Union at conciliation. According to Lawton's the original proposal, put forth by the Union, on September 26, 2014 sought current health and welfare plans to continue to be available to the employees. This would mean that coverage and eligibility would be governed by the plan and could not be grieved. The proposal also provided that the benefit would be no less than those offered to other employees (Article 15.01 and 15.02). According to Lawton's the original proposal by the Union was precisely what was offered by Lawton's and accepted by the Union.

[114] Health and Welfare proposals were not discussed at negotiations until October 27, 2014. At that time Lawton's provided information regarding the various levels of benefits and indicated that it would generate sample profiles so the Union could understand the terms of its benefit plans in more detail. Lawton's advised that it was unable to write into the collective agreement specific percentages and or cost sharing ratios because these are dependent on the level of benefits chosen by the Union and employee. Lawton's explained that all Lawton's and Sobeys employees were part of the same plan and accordingly it was not possible to lock in language by including it in a collective agreement.

[115] It was testified on behalf of Lawton's that during conciliation the Union and Employer had agreed to language which would limit Lawton's responsibility in relation to health and welfare benefits including limitation on grievances (Article 16.02). Through the Conciliation Officer Lawton's says it was advised that the Union would be satisfied if the employees were given access to the policy and that language be included in the first contract providing that they would not get less than non-unionized employees. Lawton's noted the employees already had access to the policy.

[116] Lawton's proposed language to ensure that unionized employees were not treated differently than non-unionized employees (Article 16.03). The Union, according to Lawton's failed to respond to this proposal.

[117] It is the Employer's position that the allegation in the Application that Lawton's refused to set forth the term for eligibility is misleading. This issue was negotiated at conciliation and resolved (Article 16.02). Lawton's argues that the allegation that Lawton's has failed to provide satisfactory justification for refusing to maintain current level of benefits is false. Lawton's submits that it provided full justification during collective bargaining and conciliation.

[118] Lawton's points out that when compared to other agreements the wording in the draft first contract goes beyond the wording in the recent Cambridge Suites Collective Agreement involving UFCW (Article 20). As for the Lawton's Warehouse Agreement involving UFCW (Article 25.01) it simply provides that Lawton's will make available a health and welfare program to eligible employees in accordance with the Company group insurance program. That wording, submits Lawton's, is consistent with Article 16.01 of the draft first contract.

[119] As for what constitutes a reasonable justification the Employer agreed with the Union that the Board must take an objective approach in making its determination. Lawton's referred the Board to the ruling of the OLRB in Formula Plastics, supra, where it was stated in part:

…in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms a task which to some extent takes the Board into uncharted waters.

This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

…

The variety and social authority of the competing interests involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

[120] The Employer argues that the situations in which the OLRB has found that the actions of the employer constituted an uncompromising and unreasonable bargaining situation differ significantly from the bargaining that took place between Lawton's and the Union and included such occurrences as:

An offer by the employer to increase the wages of the bargaining unit so long as the union walked away from or relinquished their bargaining right (United Steel, Paper and Forestry Rubber Manufacturing, Energy Allied Industrial and Service Workers International Union v. INKAS Security Services Ltd., 2012 CanLII 827 (ON LRB) (Tab 8— Book of Authorities)).

The refusal to address the issue of security of work for outside salespersons and the elimination of meal allowances to employees who previously had this benefit (Communications, Energy and Paperworkers' Union of Canada, Local 87-M v. Ming Pao Newspapers (Canada) Ltd., 2011 CanLil 77758 (ON LRB) (Tab 9 — Book of Authorities).

Insistence upon a proposal that would see employees losing seniority after a layoff of one month was not justified by the allegation that this would be "too administratively burdensome for the company to recall seasonal employees" given the other evidence in the case and the fact that this essentially denied meaningful recall rights to seasonal employees (Root Chemical Company Inc., 1991 CanLII 6011 (ON LRB) (Tab 10— Book of Authorities).

Position of a company that it would not pay the existing level of benefits to employees that the employees had been receiving for the 15 years prior to organization (IWA-Canada, Local 2693 v. MacMillan Bloedel Building Materials Limited 1990 CanLII 5278 (ON LRB) (Tab 11—Book of Authorities).

Is there a causal connection between the employer's conduct and the failure of the collective bargaining process?

[121] Lawton's, based upon its position in response to Questions 1 and 2 submits that there is no causal connection between anything it may have done during the course of collective bargaining and conciliation and the failure, if such was found to be the case, of the collective bargaining process.

[122] Lawton's asserts that in the absence of any conduct on its part that it ran afoul of section 40A(5)(c) there can be no causal connection.

[123] Lawton's submits that the application is an attempt by the Union to have the Labour Board impose terms and conditions of employment that it could not successfully negotiate for itself through the collective bargaining process and, as such, should be dismissed.

IV Analysis and Decision

[124] The First Contract provisions of the TUA provide as follows:

Settlement of provisions of first collective agreement

40A (1) Where
(a) an employer or bargaining agent for a unit is required, by notice given under Section 33 after the coming into force of this Section, to commence collective bargaining with a view to the conclusion of a first collective agreement between the employer and the bargaining agent in respect of the unit;
(b) a conciliation officer appointed under Section 37 has notified the Board and the parties under subsection (3) of Section 38;
…
(d) the bargaining agent and the employer have not concluded a first collective agreement,

the bargaining agent or the employer may apply in writing to the Board to direct the settlement of the provisions of a first collective agreement between the parties by arbitration and, where a party so applies, the Board shall as soon as practicable serve notice on the parties of receipt of the application.

(2) Within ten days after being served with notice under subsection (1), the bargaining agent and employer may serve notice on the Board of

(a) the agreement of the bargaining agent and employer to conclude the first collective agreement by arbitration; and
(b) the name of a person who has agreed to act as arbitrator.

(3) Within sixty days after a notice is served on the Board under subsection (2), the arbitrator shall settle the provisions of the first collective agreement.

(4) The provisions of this Act respecting arbitration apply mutatis mutandis to an arbitrator acting under this Section.

(5) Where
(a) an application is made by an employer or bargaining agent under subsection (1);
(b) the parties do not agree to proceed by arbitration under subsection (2); and
(c) regardless of whether Section 35 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of

(i) the refusal of the employer to recognize the bargaining authority of the bargaining agent,
(ii) the uncompromising nature of any bargaining position adopted by the other party without reasonable justification,
(iii) the failure of the other party to make reasonable or expeditious efforts to conclude a collective agreement, or
(iv) any other reason the Board considers relevant,

the Board, within thirty days of receiving the application, shall either

(d) direct the settlement of the provisions of a first collective agreement by arbitration; or
(e) direct that the parties resume their efforts to conclude a first collective agreement, with the assistance of a conciliation officer, for a period of thirty days.

(6) Where the Board directs the parties to resume collective bargaining with the assistance of a conciliation officer under clause (e) of subsection (5) and the parties fail to conclude a first collective agreement within the period referred to therein, the conciliation officer shall notify the Board and the Board shall, within a further thirty days, direct the settlement of the provisions of a first collective agreement by arbitration.

(7) Where a direction is given under clause (d) of subsection (5) or subsection (6), the provisions of the first collective agreement between the employer and the bargaining agent must be settled by arbitration conducted in accordance with Section 40B unless, within seven days of the giving of the direction, one of the parties requests in writing that the Board settle the provisions of the first collective agreement.

(7A) Where a request is made under subsection (7), the Board shall

(a) appoint a date for and commence a hearing within twenty-one days of receiving the request; and
(b) determine all matters in dispute and release its decision within forty-five days of the commencement of the hearing.

(7B) The employees in the bargaining unit shall not strike and the employer shall not lock out the employees if

(a) a notice has been served on the Board under subsection (2) or a direction has been given under subsection (5); and
(b) the provisions of a first collective agreement have not yet been settled.

(8) Where notice is served on the Board under subsection (2) or a direction is given under subsection (5) during a strike by, or a lockout of, employees in the unit, the employees shall forthwith terminate the strike or the employer shall forthwith terminate the lockout, as the case may be, and the employer shall reinstate…

[125] As has been acknowledged by both parties to this matter the FCA provisions are not intended to stifle or replace, what at times has been described as the hallmark of labour relations, free collective bargaining. However, as evidenced by the existence of FCA legislation, there also exists the reality that on occasion, for any number of reasons, parties are unable to conclude a first collective agreement. The introduction of Section 40A provides a mechanism by which the parties, in limited circumstances, are able to access an avenue that enables them to overcome, by way of third party arbitration, what could otherwise prove to be an impenetrable obstacle. It is clear, however, that not every situation warrants the application of the FCA provisions. The

legislation has spelt out that FCA will only be initiated where, based upon the application of one party, it appears to the Board that the process of collective bargaining has been unsuccessful because:

The other party has refused to recognize the bargaining authority of the Applicant party

The other party has adopted an uncompromising bargaining position without reasonable justification

The other party has failed to make reasonable or expeditious efforts to conclude a collective agreement

Any other reason that the Labour Board deems relevant.

[126] Section 40A establishes what is essentially a two stage process to be followed by the Board. The Board must first determine whether, from the circumstances as presented, it appears, that the process of collective bargaining has been unsuccessful. If the Board finds that it does not appear that the process of collective bargaining has been unsuccessful the application will be dismissed and the parties left to their own devices. If, however, the Board answers the first question in the affirmative it must then decide whether the unsuccessful nature of the bargaining process was caused by any of the reasons set out at 40A(5)(c)(i) to (iv). The parties, in addressing the second stage of the process, focused on two questions: Had the Respondent engaged in conduct which was uncompromising without reasonable justification and secondly, was there a casual connection between the conduct and the failure of the collective bargaining process.

Does it appear, that the process of collective bargaining has been unsuccessful?

[127] It is the finding of the Board that in the matter under review it does appear that the process of collective bargaining has been unsuccessful.

[128] As was noted by the Board in United Food and Commercial Workers Union Canada, Local 864 v. Lawton's Drug Store Ltd. #144, 2015 NSLB 182, para. 66

…Viewed as a whole, Section 40A adds a self-contained process to the Trade Union Act. Once the process is engaged, the terms of a first collective agreement will inevitably be settled either by the parties' agreement, or a decision of an arbitrator or the Labour Board. Subsection 40A(5) plays a critical role in the overall Section 40A process. First and foremost, it provides criteria an employer or trade union must satisfy to gain access to the process. Simply put, Subsection 40A(5) establishes a threshold to the first collective agreement settlement process. If an application satisfies the Subsection 40A(5) criteria, it proceeds beyond the Section 40A threshold to the inevitable settlement of terms of the first collective agreement. If the application fails to satisfy the criteria, the Board must dismiss it.

[129] Section 40A is designed to bring about an expeditious resolution of a first contract application. The legislation directs the Board to provide the parties with its direction "…within thirty days of receiving the application." When determining whether at least one of the threshold conditions has been met the Board's decision, consistent with the requirement to provide an expeditious resolution, is based upon whether it "appears" that bargaining has not been successful. The use of the term "appears" in the legislation is a key component in establishing the standard used in granting direction to the parties. "Appears" must be read within the context of the words that precede it "regardless of whether Section 35 has been contravened". The Board, therefore, is not required to make the same type of fact based determination as required with a Section 35 failure to bargain application.

[130] As mentioned previously the Ontario legislation shares many similarities with the Nova Scotia FCA provisions and also makes a distinction between the Duty to Bargain and the FCA. The OLRB spoke of the distinction in Nepean, supra when the Board concluded: "…the legislature has intended a different standard to apply in the determination of first contract disputes," such that "the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a." It is interesting to note

that the Employer in Nepean had not been found in violation of section 15 in a previous hearing but the Board found in the FCA proceeding that the company had maintained an uncompromising bargaining position without reasonable justification.

[131] The OLRB set out the distinction once again in Crane Canada Inc., [1988] OLRB Rep. Jan. 13, at para. 30:

It is not a question of whether the company intended deliberately to harm the process - there is no prerequisite for an antipathetic animus in entitlement to access to section 40a directions. Nor is it a question of the company simply hard-bargaining in attempting to provide wage parity between union and non-union employees - conduct which may not be violative of section 15 may nevertheless trigger first contract arbitration under section 40a.

[132] In effect, what this means is that the Board, in making its threshold determination, need not concern itself with intent or the underlying motives of either party. It is not necessary to demonstrate that the Respondent acted in bad faith or the conduct was motivated by anti-union animus. The Respondent has contended that the employer's conduct must be found to be egregious in order to make a finding that the conduct "ran afoul" of section 40A. The Board does not find support for this contention within the wording of 40A. Egregious denotes an act or conduct which is so utterly atrocious or appalling that it is devoid of any redeeming qualities whatsoever. While such conduct, if found to exist, would in all likelihood trigger the application of Section 40A, in the opinion of the Board, the Employer's suggested standard would effectively nullify the application of Section 40A in first contract situations. The Board is of the opinion that because of the wording of section 40A a less rigorous standard comes into play when determining if the bargaining has been unsuccessful for any of the enumerated conditions.

[133] It is first of all important to appreciate that this matter did not come before the Board until such time as the conciliation officer filed his report with the Minister on February 17, 2015 in accordance with Section 38(3) of the Act. The conciliator's report, however, is not, in and of itself, evidence for the purpose of the Board's assessment, that the process of collective bargaining has been unsuccessful.

[134] In the opinion of the Board there is no one particular indicator which identifies unsuccessful collective bargaining from a situation in which it may still be possible to conclude a collective agreement. The jurisprudence from other jurisdictions, however, with legislation similar to that found in Nova Scotia has identified certain factors which may have a bearing on assessing whether the process of collective bargaining has been unsuccessful. A decision of the OLRB, which has periodically been described as the seminal case for that jurisdiction in the area of FCA, Nepean Roof Truss Limited, supra, urged the Board to review "the totality of the process" and be cautious "not to examine the complaint in a factual vacuum".

[135] Although numbers may not always provide a clear picture as to what may have transpired it is nonetheless a consideration to be taken into account as regards the number of bargaining sessions held by the parties. The information before the Board indicates that the parties met six times on their own and on one other occasion with the assistance and guidance of a conciliator. Although there is no "magic number" of meetings which the parties need to have attended in order to establish a lack of success in collective bargaining, a consideration of the number of meetings to date, the amount of progress made at those meetings, and the degree of conciliation involvement in those meetings, suggest to the Board that the bargaining process may not have been a successful one. Although the parties had managed to agree upon a number of items at the time of the application to the Board there were a number of key issues outstanding.

[136] Another factor before the Board that is indicative of a failure to succeed is the fact that no further bargaining took place after the conciliation officer filed his report. On February 9, 2015 the Union presented, what it described as the Employer's Final offer (the Employer contends that it was not a Final Offer) to the membership and the vote was unanimous that it be rejected. In the opinion of the Board from the date of

Conciliation onward the process had essentially stalled.

[137] Additionally, the focus of the parties' bargaining efforts at the point when they came before the Board concerned primarily monetary related items including wages and holidays and leaves. In examining those issues it is apparent that the parties had not moved whatsoever or very little off their respective opening positions. Having regard to the evidence presented the Board accepts that the bargaining process had ground to a halt, and that such a situation can only reflect that the process had, to date, been unsuccessful.

[138] As the Board is satisfied that the process of collective bargaining had been unsuccessful the next inquiry that the Board must answer is whether it can be said that the process of collective bargaining can be said to have been unsuccessful because of one of the four enumerated reasons reflected by section 40A(5)(c) of the Act. As noted above, it is the opinion of the Board that the answer to this question is also in the affirmative.

Does it appear that the process of collective bargaining been unsuccessful because the Employer took an Uncompromising Bargaining Position without reasonable justification?

[139] In order to satisfy the First Contract requirements it is not enough that bargaining came to an end. The next step for the Board is to determine whether the circumstances of this case establish that the employer's bargaining position qualifies as having been one of an "uncompromising nature" and is "without reasonable justification". In the opinion of the panel the circumstances in this matter establish such conclusions.

[140] In accordance with Section 40A only one threshold condition needs to be fulfilled in order for the Board to provide its direction to the parties. In this instance the Union has alleged that Lawton's has taken an uncompromising bargaining position without reasonable justification with respect to five items: wages; holidays and leaves; health and welfare; the length of the probationary period; and scheduling by seniority.

[141] Section 40A(5)(c)(ii) requires the Applicant to establish two points. First, it must be shown that the Respondent has taken a bargaining position of an uncompromising nature; and Second, this position was absent reasonable justification (as per (Nepean, supra , at para. 18). As noted by the parties, and accepted by this Board, the term reasonable requires an objective evaluation which, in accordance with the OLRB's ruling in Formula Plastics, examines both "the general landscape of labour relations and the specific labour relationship between the parties." The Board in Formula went on to distinguish this approach from a failure to bargain complaint by pointing out the reasonableness of a position represents a departure from the jurisprudence which has evolved under section 15. Now, the "intrinsic reasonableness" itself is under scrutiny, rather than the intent behind a patently unreasonable bargaining position (Formula, supra, at para. 27).

[142] With respect to the Employer's position on the Health and Welfare issue the Board finds that it did not result in the breakdown of negotiations. Both parties had made their respective positions clear and they were fully discussed. The Union has asked that the Board characterize this matter in the same manner as it portrayed the holidays and leave issue. While there are some common aspects the Board does not accept that this issue had reached the same point as leaves. One very significant distinction was the presence of a third party supplier with respect to benefits. This imposed a very real and justifiable reason why Lawton's held to its position. In the opinion of the Board this was not an issue which led to the breakdown of negotiations.

[143] As for the Employer's position concerning the probationary period the Board is satisfied that not only was the Employer's position reasonable in so far as matters had progressed but it also seemed to the Board that there remained room for further negotiations between the parties. In the opinion of the Board this was not an issue which led to the breakdown of negotiations.

[144] Concerning the matter of scheduling by seniority the Union argued that the Employer's proposed provision on scheduling would result in inferior terms and conditions of employment. The Employer argued the Union's assessment was incorrect. It was also Lawton's position that the parties had come to agreement on

this provision in October 2014. Although, based upon the information presented the Board cannot say with certainty that the parties had initially reached an agreement on this issue it does appear that subsequent actions of the employer caused the union to express some concern as to the status of the agreement. It appears to the Board that the union took the actions of the employer as resiling on the agreement. The Board, however, is not convinced that such was actually the case. It appears that there was more work to be done by the parties in order to clarify what had actually taken place and why but it would not be correct to view what had transpired as resulting in a complete breakdown in negotiations.

[145] Having considered the evidence of the parties, the written submissions and oral arguments the Board finds that the process of collective bargaining with respect to wages and holidays and leaves has been unsuccessful. With respect to wages the Board is satisfied that the position of the employer, which remained unchanged from the outset of bargaining up to and including conciliation, was an uncompromising bargaining position for which the Respondent failed to provide the Board with reasonable justification. The Board further finds that the Respondent's bargaining position, as set out below, contributed directly to the failure of the collective bargaining process. As for holidays and leaves the Board is satisfied that the position of the employer that holidays and leaves not be listed in the collective agreement was an uncompromising bargaining position for which the Respondent failed to provide the Board with reasonable justification. The Board further finds that the Respondent's bargaining position contributed directly to the failure of the collective bargaining process.

Wages

[146] Monetary issues often prove to be the most contentious matters dealt with during collective bargaining. It is for that very reason that parties often address non-monetary items at the outset of collective bargaining as a means of establishing a level of trust and acquiring a degree of momentum before moving onto those issues that are inclined to highlight significant differences in their respective bargaining positions. Such was the case in this matter. The parties, by agreement, dealt with the non-monetary items before turning their attention to those issues that held a financial component.

[147] Lawton's had taken the position throughout bargaining that it could not afford to satisfy the Union's wage demands for a variety of reasons including: market conditions, recruitment and retention issues, wages at other non-union Lawton's stores, and the wage rate provided to employees at other pharmacies and retail stores (competitors). Lawton's also asserted that the Union had never provided justification for the wage increase it was seeking on behalf of its membership other than to state that it was requesting what the membership asked for.

[148] The Board is of the opinion that certain information, during collective bargaining, is intrinsic to the employer-union relationship, such as that pertaining to wages, hours of work, conditions, and other financial benefits. If the parties are to engage in meaningful collective bargaining such information must be provided if and when requested. The Board is satisfied, as was confirmed by the evidence of Ms. Ingalls that the Union had requested information from the Employer concerning the various pay scales at the outset of bargaining but it was not forthcoming. Neither had the Employer provided the Union with any documentation to support its contention that the Union's proposal was inconsistent with the other stores or how it impacted upon the Employer's competiveness, nor was there a market analysis in support of the reference to market conditions.

[149] As noted Lawton's also points to the fact that the Union did not provide it with justification for its wage request despite being repeatedly asked to do so. The Union does not dispute this contention and confirms that its response was to advise Lawton's that it was seeking what the membership requested. As Mr. Dobson indicated this was the opening salvo by the Union with the prospect of starting an exchange of proposals.

[150] Was the Employer's position respecting wages without reasonable justification? The OLRB in Formula Plastics Inc., [1987] OLRB Rep. May 702, the made the following comments about the meaning of the word

"reasonable" in section 43(2) of the Act:

24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously, the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest…

25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into unchartered waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is made. In considering section [43(2)(b)] such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

…

28. The variety and social authority of the competing interest involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

[151] When examining reasonableness within the context of wage negotiations and the absence of financial information the OLRB in Grant Forest Products Corporation, [1991] OLRB Rep. July 848 made the following observations at paragraphs 56 and 57 which the Board finds particularly instructive in the matter at hand:

56. We were left with a number of unanswered questions about the company's financial justification for the final offer. One of the major problems was that the financial information presented by the company was incomplete. Complete and accurate financial data is critical in this kind of case, if we are to determine whether the company's financial condition provides reasonable justification for its position. More particularly, the financial documents presented by the company both to the union in bargaining and to the Board at the hearing raised more questions than they answered....

57. The Employer, at the hearing, did not provide the Board with sufficient information for it to be able to determine if the company's wage offer was reasonably justified by its losses, we needed to know the complete financial picture. The Board requires complete and accurate information as opposed to select and incomplete information.

[152] Equally instructive were the comments made by the Ontario Board in Bourque Consumer Electronics Service Inc., where the OLRB commented upon the failure of the employer to provide full economic data in that proceeding:

More important, in our view, than the survey the company did provide in negotiations, is the information it failed and refused to provide. The company declined several union requests for economic data to support the company assertions. Considering the magnitude of economic conces-sion sought, we view this failure as

unreasonable on the company's part. So long as the company refused to provide such information, the union's skepticism regarding the company's claim could hardly be expected to abate. In the circumstances of this case we find the company's refusal to be a further failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement.

Not only did the company fail to provide any data justifying its economic position during the course of negotiations, it also failed ... to provide any such information either as part of documenta¬tion filed or evidence tendered in support of its case. It was only as a result of cross-examination by the union and the union's consent to entering in evidence of a document not previously filed in accordance with Practice Note 18, that any specific economic data was brought to the attention of the union or the Board.

[153] In the opinion of the Board the Employer's persistence in holding to the no wage increase position was without reasonable justification. The evidence establishes that the Employer was insisting on maintaining its position on the basis only of an assertion that the cost of moving off that position would make it uncompetitive. It was unwilling to provide any information of substance to the Union. Has the Employer put any evidence before the Board to permit the conclusion that there is a legitimate basis for its assertion? Merely asserting such a position before the Board in the context of a proceeding under section 40A of the Act is unsatisfactory. An employer must, when faced with such an application, establish some evidentiary basis before the Board so as to support its assertion that cost is a real and legitimate factor. The Employer did not do so in this case.

[154] From the Board's perspective the approach adopted by the Employer on the wage issue effectively brought discussions to an end. If the Employer had provided information as requested it would have either substantiated its position or shown where it could not be supported. This, in turn could have provided the Union with the ability to review its opening position and if warranted vary its position by taking this information before the membership. In the absence of having anything of substance to share with the members the Union would be relying exclusively upon the Employer's word absent any verification. However, with additional information the Union would be better able to provide a response or counter proposal to the Employer's offer and thereby enable discussions to continue.

[155] It was apparent to the Board that the Employer had remained unwilling throughout the course of negotiations to provide the Union with any relevant financial information. Accordingly, by the time the matter was placed in the hands of the Conciliator the Employer's bargaining position was clear. The Employer's message to the Union was unequivocal as in essence, it was saying "it is not economically feasible to move off our position respecting wages and we are unwilling to provide you with the means of verifying that proposition".

[156] The effect of the Employer maintaining its position on the issue and the absence of any information in support of its positon put to an end the possibility that any resolution to the wage issue could be obtained through negotiation. That being said it is important to stress that the Board does not out of hand challenge or consider the Employer's position to be without merit. That does not mean, however, that the Union was under an obligation to accept the Employer's position at face value without verification. In the absence of such a demonstration it is not difficult to conclude that the parties would continue to remain at loggerheads with neither side willing to budge from their position. In the opinion of the Board no amount of bargaining would be able to resolve the wage issue.

[157] Accordingly, it is evident that the decision made by the Employer to maintain its position with respect to wages and to not provide verifiable financial information to the Union, has caused the process of collective bargaining to become unsuccessful. Any possibility that the collective bargaining process could continue undoubtedly came to a halt at that point.

[158] The Employer also implied that the Union was not assertive enough in its demands for financial

information, whereas it had repeatedly asked the Union to justify its position. The Employer's stance seemingly ignores the fact that information pertaining to an employer's financial situation invariably rests exclusively with the employer and, in the absence of the employer providing the union with relevant information the union is unable to properly assess the propriety and reasonableness of the employer's position or to formulate a counter-offer based upon accurate financial information.

[159] It is the finding of the Board that the Employer's position respecting wages was an uncompromising position taken without reasonable justification.

Holidays and Leaves

[160] The Employer took the position that including the actual wording of the holiday and leave policies in the collective agreement was outmoded and inconsistent with current collective agreements which are now inclined to simply refer to the policies. The Union for its part took the position that if the policies were not set out in their entirety within the Agreement or referenced as to a specific point in time it would remain open to the Employer to alter the policies whenever it desired to do so. The Board, it is fair to say, found this to be an intriguing issue.

[161] The Board accepts the Union's contention that the Holiday provision is a monetary issue for the parties to a collective agreement and for bargaining unit members. Although leave provisions under the Labour Standards Code apply to unionized employees holidays in the Code do not. Consequently, if the holidays are not provided for in the Agreement it may create a situation where, for the unionized employees, there are no enforceable holidays. The Employer has countered that the bargaining unit employees would get holidays consistent with non-union employees at other stores. From the Board's perspective that slight shift does not eliminate the principle concern being that the Employer without consultation or forewarning, if it so desired, could unilaterally change holidays for all employees.

[162] It appears to the Board that by presenting its proposal in this manner the Employer is attempting to eliminate the right to grieve this aspect of the Agreement which, although not framed as such by the Union, in addition to being uncompromising without reasonable justification could also be viewed as a refusal to accept the Union as the recognized bargaining agent.

[163] The Employer contended that the trend was not to include such provisions in the agreement and Ms. Ingalls testified that to do so would make the agreement cumbersome and bulky. These arguments are not persuasive and in the opinion of the Board this matter was not of such a nature that it should have resulted in such a heightened level of disagreement. In the face of clear and repeated statements by the Union in this case that it would not agree to the limitation sought by the Employer the position taken by Lawton's is found to be uncompromising and without justification.

V Disposition

[164] For the reasons set out above the Board finds that it appears that collective bargaining between the UFCW and Lawton's has been unsuccessful because of the uncompromising nature of the bargaining positions taken by the Employer without reasonable justification.

[165] The Board directs the parties to resume collective bargaining with the assistance of a Conciliation Officer for a period of 30 days.

SEVENTEENTH DAY OF AUGUST, 2016

Doug Ruck
Chair