THE SASKATCHEWAN EMPLOYMENT ACT

PROVINCE OF SASKATCHEWAN

IN THE MATTER OF AN ARBITRATION PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT RESPECTING CERTAIN GRIEVANCES NUMBERED 2020-PSAC-05 AND 2021-PSAC-01

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA and its Local 40005 (collectively "PSAC")

UNION/GRIEVOR

– and –

SASKATCHEWAN GAMING CORPORATION ("Casino")

EMPLOYER

AWARD

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before

John Comrie, KC, FCIArb **Arbitrator**

Heard on June 9, 2022 at the Four Points Sheraton, Regina, Saskatchewan S4R 8R2

For the Union: **Morgan Rowe**
Ravenlaw LLP
Ottawa, Ontario

For the Employer: **Daniel P. Kwochka**
McKercher LLP
Regina, Saskatchewan

INTRODUCTION

[1] The arbitration out of which this award ("Award") arises concerns two disputes ("Grievance 1" or "Grievance 2" individually or "Grievances" collectively) between Local 40005 of the Public Service Alliance of Canada (collectively the "Union" or "PSAC")) and Saskatchewan Gaming Corporation ("Employer" or the "Casino").

[2] Grievance 1 was filed on April 6, 2020 as #2020-PSAC-05 under a Collective Bargaining Agreement executed on February 4, 2014 with expiry December 31, 2016 ("CBA 1") and Grievance 2 was filed on January 11, 2021 as #2021-PSAC-01 under a Collective Bargaining Agreement executed on July 13, 2020 with expiry December 31, 2021 (CBA 2). CBA 1 and CBA 2 are collectively referred to hereunder as "Collective Agreements".

[3] The Grievances used identical language to state that the Union "…grieves that the Employer violated Article 40 (*in Grievance 1 and Article 42 in Grievance 2*) and all other applicable articles by improper layoff". Each Grievance also asked: "The Employer …be made to respect the collective agreement…(*and*)…members be paid in lieu of notice as defined in Article 40 (*in Grievance 1 and Article 42 in Grievance 2*) and all other applicable articles. And to be made whole."

[4] By letter June 20, 2020 Arbitrator Comrie was appointed by Minister Don Morgan, Minister of Labour Relations and Workplace Safety to arbitrate Grievance 1 and Grievance 2 was subsequently added to the appointment. The parties were unable to hold the hearing until June 9, 2022.

[5] At the outset of this arbitration, the parties agreed that these matters were properly before me acting as a Board with a single arbitrator and that the Board had jurisdiction to deal with the Grievances, and all issues arising in respect thereof. The parties have also waived compliance with section 6-50(1) of The Saskatchewan Employment Act until January 27, 2023, subject to further extension with the agreement of the parties.

[6] Due to the complexity of the chronology of events and the various issues in this dispute, the Award is segmented into several parts. The following index is provided to facilitate ease of review:

than the requirements of the SEA, after the adoption of *The Employment Standards (Public Emergencies) Amendment Regulations, 2020,* (the "Emergency Regs")? (paras 148-163)

VI. **Issue No 3**: **Did the Employer breach its consultation obligations under the Collective Agreements and if so, what are the consequences, if any?** (paras 164-171)

VII. **Issue No 4**: **Does current Canadian jurisprudence on statutory on the principles of interpretation support the above conclusions?** (paras 172-196)

VIII. **Decision and Order** (paras197-198)

I. FACTUAL FRAMEWORK OF THE DISPUTE

1. Factual Background

[7] Saskatchewan Gaming Authority is a provincial Crown corporation which operates casinos in Regina and Moose Jaw with the trade names "Casino Regina" and "Casino Moose Jaw".

[8] PSAC is a union as defined by *The Saskatchewan Employment Act,* SS 2013, c S-15.1 (SEA) and is the certified bargaining agent for the employees at both locations who work in table games, guest services, bank, slots, security and maintenance departments.

[9] The dispute in both Grievances concerns the interpretation of certain sections of the SEA as it existed prior to March 6, 2020 together with certain amendments of the SEA and emergency regulations issued thereunder all adopted in response to the COVID-19 pandemic and the application of those provisions to the layoff and recall provisions in the Collective Agreements, all in the context of the emergency actions taken by the Government to limit the spread of COVID-19 in the Province starting in early March 2020 and continuing through January 2021.

[10] In somewhat simplified terms, the factual chronology shows that due to governmental emergency orders requiring the closure of Casino Regina and Casino Moose Jaw during the COVID-19 pandemic, the Employer underwent two major layoffs: Layoff No. 1 of 229 Employees on April 3, 2020 preceded by a Notice of Layoff No. 1 issued by the Employer's CEO on March 27 and Layoff No. 2 of 143 Employees on December 28, 2020 preceded by a Notice of Layoff No. 2 issued by the Employer's CEO on December 18, 2020. All the Employees included in these two layoffs are referred to as the "Laidoff Employees" in the remainder of this Award.

[11] The notice periods provided by Notice of Layoff No. 1 (approximately 6 days) and Notice of Layoff No. 2 (approximately 10 or 12 days – depending on when notice was received) were not designed to comply with and in fact, did not comply for the most part with the applicable notice requirementss for layoff periods provided under CBA 1 and CBA 2, which are identical to each other

and importantly, substantively identical to the applicable requirements set out in section **2-60** of the SEA.

[12] The essence of the dispute is whether the Laidoff Employees – to quote the exact language from section **2-61**(1)(b) – were entitled to the "entitlements provided for in the collective agreements" (ie in CBA 1 and CBA 2) in respect of pay in lieu of notice (and perhaps including other "entitlements" respecting layoffs) all as provided under the SEA, notwithstanding certain amendments made to the SEA during the declared "public health emergency".

[13] Among other things, one of those amendments provided that "during a public emergency period … employers and employees are exempt from the provisions of, and employees are not entitled to the protections provided by, sections…**2-61** of the Act respecting layoffs". (*emphasis added – ed*) This phrase and its component parts are so important to the balance of this Award that they are given precise definitions in Part II below to expedite the explanation of their meaning.

[14] The Employer argues that it was exempt from any obligations to provide notice of layoff by by virtue of the first part of the above phrase.

[15] The Union argues that the negotiated terms of its applicable collective agreements stand alone from that phrase and are not affected by it such that those negotiated commitments remain enforceable. In its analysis, the Union actually simply ignores the second part of the above phrase (the underlined words above). Although it does not actually come out directly and say this, its position by implication is that these underlined words do not suspend the operation of the negotiated terms for notice-in-lieu found in CBA 1 and 2.

[16] In what follows, the original relevant SEA provisions are set forth, followed by a summary of the more important legislative and executory emergency actions, followed by the relevant layoff and recall provisions of the Collective Agreements and then by the actions of the Employer in response to such emergency actions.

2. A summary of the Government of Saskatchewan legislative and executive responses to COVID-19 – March to December 2020

[17] The starting point must be an understanding of the original wording of the SEA from Part II of the statute with respect to layoffs. This wording existed prior to the pandemic and continues in force today. It starts in section **2-60** by a simple listing of the minimum notice requirements and then provides further interpretation under section **2-61.** The two sections read as follows:

Layoff and Termination

Notice required

2-60(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than

the period set out in the following Table:

Table

Employee's Period of Employment	**Minimum Period of Written Notice**
more than 13 consecutive weeks but one year or less	one week
more than one year but three years or less	two weeks
more than three years but five years or less	four weeks
more than five years but 10 years or less	six weeks
more than 10 years	eight weeks

(2) In subsection (1), **"period of employment"** means any period of employment that is not interrupted by more than 14 consecutive days.

(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption in employment.

(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).

Payments in case of layoffs or terminations

2-61(1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:

(a) if the employer is not bound by a collective agreement that applies to the employee, the greater of:

(i) the sum earned by the employee during that period of notice; and

(ii) a sum equivalent to the employee's normal wages for that period; or

(b) if the employer is bound by a collective agreement that applies to the employee, the entitlements provided for in the collective agreement.

(2) For the purposes of subsection (1), if the wages of an employee, not including overtime pay, vary from week to week, the employee's normal wages for one week are deemed to be the equivalent of the employee's average weekly wage, not including overtime pay, for the 13 weeks the employee worked preceding:

(a) the date on which the notice of layoff or termination was given; or

(b) if no notice of the layoff or termination was given:

(i) the date on which the employee was laid off or terminated; or

(ii) a date determined in the prescribed manner.

(3) If an employer lays off or terminates the employment of an employee at a remote site, the employer shall provide transportation without cost for the employee to the nearest point where regularly scheduled transportation services are available.

(*note emphasis added to section 2-61(1) (b) above – ed*)

[18] What is important to note about the above provisions at the outset is that section **2-61**(1) describes two different scenarios. The first [subsection (a)] is where an Employee is not covered by a collective agreement. The second [subsection (b)] is where the Employer is bound by a collective agreement that applies to the employee in question. In that second case, the Employer must pay to the employee – NOT what is required by the statute – BUT what is required by the collective agreement applicable to the employee is question. In this case that means what is required by either CBA 1 or 2.

[19] The next critical event in this chronology is the discovery by the Government on March 12, 2020 of its first presumptive case of COVID-19 in Saskatchewan.

[20] Five days later, on March 17, 2020 *The Saskatchewan Employment (Public Health Emergencies) Amendment Act, 2020* (the "SEA Emergencies Act") was assented to and made retroactive to March 6, 2020. That statute *inter alia* created the concept of a "public health emergency" and added a new section **2-59.1** to the SEA which in sub-sections (1) through (6) provided that Saskatchewan's chief medical health officer ("SK CMHO") could issue a public health order ("PHO") which under the stated conditions would establish a public health emergency in Saskatchewan. (In what follows it should be noted that the term "SEA" defined in para 8 above, includes all amendments made to the SEA by virtue of this SEA Emergencies Act.)

[21] In addition to the powers described in the preceding paragraph permitting the SK CMHO to create a public health emergency, the new section **2-59.1** aslo included an additional important sub-section (7) which was a "notwithstanding" clause, which is important to the Employer's interpretation of these provisions. That clause is set out in para 66 below in Part II "Submissions of the Employer".

[22] The SK CMHO then issued the first such PHO on that same date creating a "public health emergency". It is common ground that at all times material to this dispute subsequent to March 17, 2020 that such a "public health emergency" did exist in Saskatchewan as a result of the issuance of a PHO. A Subsequent PHO was issued on March 19, 2020 which *inter alia* ordered the closure of all recreational and entertainment facilities in Saskatchewan, including casinos.

[23] Two further sets of amendments were promulgated respectively on March 19, 2020 and May 14, 2020 to be cited as *The Employment Standards (Public Emergencies) Amendment Regulations, 2020,* (collectively referred to as the "Emergency Regs") which were very similar except that the second set (the "Emergency Regs2") eliminated a time limitation that existed in the first set (the "Emergency Regs1"). The material portions of the Emergency Regs1 are almost identical to the Emergency Regs2. The latter read as follows:

> **Definition for Part**
>
> **44.2** In this Part, "public emergency period" means the period during which an order of the chief medical health officer issued pursuant to subsection 2-59.1(2) of the Act, or an emergency declaration ordered pursuant to the Emergency Planning Act, is in force.
>
> **Certain Provisions do not apply during public emergency period**
>
> **44.3**(1) During a public emergency period, employers and employees are exempt from the provisions of, and employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs.
>
> (2) After the date on which the public emergency period is no longer in force, an employer continues to be exempt from the provisions of section 2-60 and 2-61 of the Act respecting layoffs for a further period of two weeks.
>
> (3) After the expiry of the two-week period mentioned in subsection (2):
>
> (a) the employer must schedule any laid off employees to work with the employer;
> (b) if any employees have not been scheduled to work with the employer, the employees:
> i) are deemed to be terminated; and
> ii) are entitled to pay instead of notice in accordance with sections 2-60 and 2-61 of the Act to be calculated from the original date on which the employer laid off the employee; and
> (c) if any employees have been scheduled to return to work with the employer but do not return to work, the employees are deemed to have resigned.

[24] It was agreed between the parties that at all material times in this dispute, a "public emergency period" existed as defined by section **44-2** above.

[25] On March 20, 2020 the Government also issued a Minister's Order declaring a provincial state of emergency under *The Emergency Planning Act* which *inter alia* provided that "…all persons are required to comply with any orders" of the Minister of Health, the Chief Medical Health Officer, the Saskatchewan Public Safety Agency and "The Royal Canadian Mounted Police and all police services are authorized to take any reasonable action, including the power of arrest, to enforce this order, any

other order pursuant to section 18 of *The Emergency Planning Act*, or any order pursuant to *The Public Health Act, 1994*".

[26] On April 23, the Government announced a graduated five-phase re-opening plan called "Re-Open Saskatchewan" which was then slowly implemented over the summer and fall months such that by December 1, 2020 approximately 141 Laidoff Employees had been recalled.

[27] Unfortunately, during this same fall period a resurgence of the virus had hit the Province again and the Government began introducing new public health restrictions. On November 25, 2020 the Government announced it would be limiting the Employer (among others) to 30 patrons at one time.

[28] By December 14, 2020 the SK CMHO issued a new PHO which caused the Employer to conclude it could not operate under the new restrictions and announcements to that effect were made during December with a final memo from the Employer CEO on December 18, 2020 announcing the Casino would suspend its operations and temporarily close effective December 19, 2020 with most Employees being laid off on December 28, 2020.

3. Collective Agreement provisions on layoff and recall

[29] The provisions in respect of layoff and recall in the Collective Agreements are set out in Article 40 of CBA 1 and Article 42 of CBA 2. The terms of those provisions for all material purposes are substantively identical.

[30] The layoff and recall provisions of CBA 1 are as follows:

> **ARTICLE 40 – LAYOFF AND RECALL**
>
> 40.01 Employees may be laid off due to lack of work.
>
> 40.02 The Joint Union Management Representative Workforce Committee (JUMRWC) will be assembled prior to any lay off proceedings to determine what impact, if any, these proceeding will have on the units' representative workforce. When the (JUMRWC) determines that the proceedings will impact the units' representative workforce in a negative manner, the JUMRWC members agree to consult with their principals to discuss alternate workforce adjustment plans to ensure a representative workforce is maintained.
>
> 40.03 Employees who are laid off may exercise their seniority to retain employment by bumping junior employees providing they have the necessary knowledge, skills and ability to do the job being bumped into and providing Article 40.02 has not been enacted. Employees will have a time period of two (2) days to decide whether they want to exercise this right.

40.04 Employees so displaced may exercise their seniority to retain employment by bumping junior employees providing they have the necessary knowledge, skills and ability to do the job being bumped into and providing Article 40.02 has not been enacted. Employees will have a time period of two (2) days to decide whether they want to exercise this right.

40.05 Where an employee has been in continuous service of the employer for at least three (3) consecutive months, the employer shall not layoff the employee without giving the employee at least the following notice or pay in lieu thereof:

a) one weeks' written notice when his/her period of employment is more than three months but less than one year;

b) two week's written notice where her/his period of employment is one year or more but less than three years;

c) four weeks' written notice where his/her period of employment is three years or more but less than five;

d) six weeks' written notice where his/her period of employment is five year or more but less than ten years;

e) eight weeks' written notice where her/his period is ten years plus.

40.06 (a) When recalling employees, the same shall be done on the basis of seniority within an employee's classification.

(b) If the employer recalls all available employees within the classification and still has vacancies, the employer shall recall laid off employees from other classifications if they possess the necessary knowledge, skills and ability to do the job.

40.07 When the employer recalls an employee who has been laid off, the employer shall attempt to notify the employee by phone. If contact cannot be made by telephone, the employer shall notify the employee by registered letter addressed to that employee's last known address. Employees recalled shall report to the Casino and submit availability information, as required. It is the employee's responsibility to keep telephone and address information current. Failure to respond to a recall within seven (7) calendar days will constitute an end to the employer-employee relationship and the employee will be removed from the recall list.

[31] In addition to the above provisions with respect to layoffs, CBA 1 also provides separately for the process for severance when an employee is laid off and elects to retire or resign, including the payment of severance pay based on years of continuous service. CBA 2 has similar provisions.

4. The Employer response to governmental legislative and executory actions

[32] Contrary to sections 40.02 and 42.02 of the Collective Agreements there was no effort in March 2020 or December 2020 to convene the "Joint Union Management Representative Workforce Committee" (the "JUMRW Committee") to assess the impact of the proposed layoffs, to consider whether the layoffs would have an impact on the diversity and representation in the active workforce, and to discuss alternative workforce adjustment plans to ensure a representative workforce was maintained, despite the layoffs.

[33] In fact at the time of the Notice of Layoff No. 1, the JUMRW Committee did not exist as neither party had taken action to constitute the body. Eventually, in October 2020 it was brought into existence, although it was apparently never consulted.

[34] The evidence was that the Union was not consulted about either Layoff No. 1 or Layoff No. 2 prior to the Employer's decision to effect the layoffs and only learned of the layoffs when the Employer provided the Union with a copy of the memos circulated to employees advising of same.

[35] Notwithstanding the Employer's failure to consult with the Union, its CEO did make a substantive effort to communicate directly with Employees about relevant information as and when it became available to her.

[36] Employer CEO Susan Flett initially sent out memos on March 16, 2020 updating Employees on what she knew about the Casino's plans to respond to the COVID-19 emergency and to suspend operations temporarily at the end of the day on March 17. She sent a further memo on March 19 advising that full time Employees would continue to be paid for a period of two weeks and that further information regarding compensation would be shared as soon as it was available.

[37] The subsequent communication from CEO Flett displays significant effort to empathize with Employees and to provide useful information at a time of a completely unexpected crisis in most if not all Employees' lives. The memo is worth setting out in full:

SaskGaming

To: All SaskGaming Employees **Date:** March 27, 2020

From: Susan Flett
President and CEO

Re: **Temporary Employee Layoffs at Casinos Regina and Moose Jaw**

It is with a heavy heart that effective April 3, 2020, permanent employees of Casinos Regina and Moose Jaw who are not required due to the temporary closure of our properties will be temporarily laid off. Layoff notices are in the mail and will be delivered early next week. Employees who have not been temporarily laid off at this time have already been notified.

I wish I could have relayed this information to you face-to-face. However, the COVID-19 pandemic, as well as the temporary closures of Casinos Regina and Moose Jaw have made for an unprecedented situation.

I want to remind you that these layoffs are only temporary – that means if you have been laid off, you will have job security and the ability to return to your home position once we are back up and running. You will also be able to access government programs during this temporary layoff period, including Employment Insurance (EI) benefits and funds for employees made available through the Government of Canada's COVID-19 aid package.

Without a doubt, this is a sad and uncertain time for everyone. That is why I want to ensure you have all the information you need to easily navigate next steps, and to understand what kinds of supports are available to you.

First and foremost, Records of Employment will be electronically submitted to Service Canada following the completion of the next pay period. That means you do not need to call Human Resources to request one.

I encourage you to apply for EI benefits as soon as possible. To do so, visit Canada.ca and select "Employment Insurance and Leave," then click on the type of benefit that best suits your situation. Follow the instructions to start your online application to claim EI benefits. At the end of the online application process, you will be presented with a confirmation page. It contains a lot of useful information. Please take some time to read it, as well as the EI leaflet attached to this memo.

This week, the Government of Canada announced a new Canada Emergency offers employees temporarily laid off due to COVID-19 access to $2,000 a month for four months in emergency support. However, the online portal to apply for the CERB will not be up and running until the start of April. I encourage you to check Canada.ca for more details.

If you have a mortgage on your home, the Government of Canada has established a Mortgage Deferral Program with Canada Mortgage and Housing Corporation, Canadian banks and lenders. Contact your bank or mortgage professional to learn what options are available to you.

If you rent your home, the Government of Canada is currently exploring assistance for renters. I encourage you to stay tuned to forthcoming announcements from the federal government on what options might be available to you. Meanwhile, the Government of Saskatchewan has temporarily suspended rental eviction hearings as a result of the COVID-19 emergency.

If you have a Government of Saskatchewan-issued student loan, a six-month student loan repayment freeze has been put in place. This will provide you with immediate student loan relief.

If you are feeling overwhelmed and needing someone to confidentially speak to, the Employee Family Assistance Program is available 24 hours a day by calling 1- 800-387-4765. You can also find information online about a variety of topics at workhealthlife.com.

For the most up-to-date information on COVID-19, including self-isolation and personal protection measures, please visit saskatchewan.ca/covid19. If you are presenting symptoms of COVID-19 or have health concerns, please call 811.

I ask only one thing of you during this temporary shutdown – please focus on being healthy and taking care of your families. While this situation is not ideal, the COVID-19 outbreak is serious and your wellbeing is critically important. Stay safe and stay inside.

As always, I commit to providing you information as soon as possible. When I receive confirmation of the casinos reopening, you will be the first to know.

Until then, thank you.

Susan Flett

[38] On March 27 a total of 229 members of the Union received letters informing them of their temporary layoff effective April 3. A total of 29 Union members remained working for the Employer on April 4, made up mostly of maintenance and security people to maintain facilities.

[39] In response, on April 6, 2020 the Union filed Grievance 1.

[40] From approximately mid-April to the end of July 2020, the Union and the Employer held weekly union-management meetings to discuss matters related to the impact of COVID-19 on the workplace.

[41] On April 23, 2020, the SK Government announced a graduated five phase re-opening plan called 'Re-Open Saskatchewan'. On the same date, Ms. Flett distributed a Memo to all SaskGaming employees advising of the re-opening plan which contemplated casinos being permitted to re-open at phase 4 although the implementation date was undetermined.

[42] On June 19, 2020, Blaine Pilatzke, SaskGaming's VP of Corporate Services, distributed a letter to all SaskGaming employees advising that employees would continue to be laid off during the period of the 'Public Emergency Period'.

[43] On June 30, 2020, Ms. Flett distributed a Memo to all SaskGaming employees advising that the SK Government had announced phase 4 of the Re-Open Saskatchewan plan would begin on July 9, 2020 at which time the Casino could re-open and that details of the re-opening would be forthcoming.

[44] On July 3, 2020, Ms. Flett distributed a further Memo to all SaskGaming employees advising that the Casino would be re-opening on July 9, 2020 although with limited hours and that employees would be recalled in phases to coincide with the re-opening of particular services.

[45] On July 5, 2020, some of the laid off employees were recalled as set out in a sample letter from Mr. Pilatzke.

[46] On September 25, 2020, Ms. Flett distributed a further Memo to all SaskGaming employees advising that the Casino would be re-opening live table games on October 8, 2020 utilizing guidelines approved by the Chief Medical Health Officer.

[47] As a result of a resurgence of COVID-19 cases, the SK Government began introducing new public health restrictions between October and December 2020. On November 25, 2020, the SK Government announced it would be limiting the Casino to 30 patrons at one time. On the same date, Ms. Flett distributed a Memo to all employees advising management would be assessing the impact of the new measures.

[48] As a result of the gradual re-opening to coincide with services, laid off employees were recalled over time and by December 1, 2020, approximately 141 PSAC bargaining unit members had been recalled.

[49] On December 14, 2020, the Chief Medical Health Officer issued a Public Health Order imposing restrictions which SaskGaming management determined required that casinos close again effective December 19, 2020.

[50] On the same date, Ms. Flett issued a Memo to all SaskGaming employees advising that SaskGaming would once again be suspending operations and temporarily closing effective December 19, 2020.

[51] On December 15, 2020, Mr. Pilatzke advised PSAC that the SaskGaming Executive Committee was continuing to deliberate, was consulting with shareholders, and would provide further updates when able.

[52] On December 16, 2020, Mr. Pilatzke advised PSAC that SaskGaming had determined that the temporary closure of Casino Regina would result in lay-offs. He advised that the lay-offs would be effective on December 28, 2020 and that wages for affected employees would continue to be paid until December 27, 2020. Mr. Pilatzke identified that a meeting would be scheduled with PSAC for December 19, 2020 and that SaskGaming would address any questions that PSAC had regarding the lay-offs at that time.

[53] The Parties ultimately met on December 17, 2020 to discuss the Casino's closure. At this time, SaskGaming confirmed its decision to lay-off members of PSAC's bargaining unit.

[54] On December 18, 2020, Ms. Flett issued a Memo to all SaskGaming employees advising that SaskGaming would once again be suspending operations and temporarily closing effective December 19, 2020.

[55] On December 18, 2020, Mr. Pilatzke wrote SaskGaming employees officially advising that each employees whose work was not required would be laid off effective December 28, 2020.

[56] A total of 143 PSAC members received letters informing each of their temporary layoff although their group benefit coverage was again continued.

[57] On January 11, 2021, PSAC filed Grievance 2.

5. Summary timeline of significant events

[58] Sections 1 to 4 of Part I above are taken in large part directly from the Agreed Statement of Facts ("ASF") submitted as the factual predicate for the hearing of this dispute. That evidence was then supplemented with *viva voce* evidence from both the Union and the Employer at the hearing. The following chart of significant events summarizes the above sequence of events relevant to this dispute. It is based primarily on the ASF but supplemented with other factual information provided at the hearing,

SUMMARY TIMELINE OF IMPORTANT EVENTS

Date	**Event** *(note: Grievances and Notice of Layoffs No. 1 and No. 2 and effective date bolded below)*
March 12, 2020	First presumptive case of COVID-19 in Saskatchewan
March 16	Employer CEO memo – advises of closure end of business on March 17
March 17	Saskatchewan Employment Act (Public Health Emergencies) Amendment Act ("SEA Emergencies Act") – creates new concept of "public health emergency"
March 17	SK Chief Medical Health Officer (CMHO) – issues Public Health Order (PHO) – imposes certain restriction on public gatherings
March 18	SK Government declares a state of emergency under the The Emergency Planning Act
March 19	CMHO – issues new PHO which among other things ordered the closure of all entertainment facilities in SK, including casinos
March 19	Regulations proclaimed under the SEA Emergencies Act – "Emergency Regs" which provide that during an emergency "…employers are exempt from the provisions of, and employees are not entitled to the protections provided by section 2-60 and 2-61" of the Saskatchewan Employment Act (SEA) in respect of layoffs
March 27	**Notice of Layoff No. 1** - Employer CEO memo – layoffs for most employees to be effective April 3 together with significant information about various government programs available for support of employees. [The memo also confirmed that the Employer would be voluntarily continuing group benefit coverage during the closure.????]
March 27	229 members of the Union receive lay-off notices
April 3	**Layoff No. 1:** 229 members are laid off leaving 29 members who continued to work
April 6	**Union files Grievance 1**
May 14	New amending regulations proclaimed under the SEA Emergencies Act –"Emergency Regs2" which repeal certain limitations that were included in the original regulations so that the removal of the protections of sections 2-60 and 2-61 of the SEA will continue for 2 weeks after the public emergency period expires, at which time all laid-off employees must either be scheduled to work or are deemed terminated and are entitled to pay instead of notice in accordance with those sections.

April-July	Weekly meetings take place between Union and Employer
July 9	Limited number of employees are recalled
Sept 25	Employer CEO memo advising of further limited recalls of employees
Nov 26	Due to a resurgence of COVID-19 cases, SK CMHO issued new PHO limiting public facilities including casinos to 30 patrons at one time due
Dec 1	By this date due to gradual reopening plans of the Employer 141 Union members had been recalled
Dec 14	SK CMHO issues new PHO imposing restrictions that the Employer determined required it to close its operations once again effective Dec 19, 2021 and Employer CEO issues memo advising all operations would be suspended and temporarily closed effective December 19, 2020
Dec 17	Union and Employer meet to discuss impending closure
Dec 18	**Notice of Layoff No. 2:** Employer CEO memo confirms closure Dec 18 and lay-offs would be effective Dec 28 and 143 Union members received letters to that effect, but again confirming group benefit converage would continue throughout the lay-off
Dec 28	**Layoff No. 2**: 143 Union members laid off
Jan1,2021	**Union files Grievance 2**
June 20	Employer reopens casinos with restrictions on capacity
August	Employer completes recall of all laid-off employees

II. SUBMISSIONS OF THE EMPLOYER

[59] The Employer's argument is relatively straightforward, relying on a common sense reading and interpretation of the relevant provisions of the SEA.

[60] The Employer starts with a description of the long-standing requirements of Sections **2-60** and **2-61** of the Act set out at para 17 above in respect of the minimum periods of notice of layoff and how to calculate them in certain circumstances.

[61] It then summarizes the creation of the new section **59.1** to the SEA, with particular reference to sub-section (7) thereof which is a "notwithstanding" clause that reads as follows:

> **2-59.1**
> …
>
> (7) Notwithstanding any other provision of this Part or the regulations or any other Act or law, the Lieutenant Governor in Council may make orders for the purposes of this section, to continue through all or any part of the period mentioned in subsection (5):
>
> (a) suspending the application of any provision of this Part or the regulations that deals with matters regulated by this section;

(b) amending, suspending or varying the application of any provision of this Part or the regulations to employees and employers to whom this section applies;

(c) setting out requirements for the purposes of subsection (6);

(d) respecting any additional matter or thing that the Lieutenant Governor in Council considers necessary to facilitate the purpose of this section, the protection of employees or the prevention or reduction of disease.

[62] The Employer then summarizes some of the provisions of Emergency Regs1 and quotes in particular, the two sections which it says defeat the Union's argument. Those sections are **44.1** and **44.2** which read as follows:

Definition for Part

44.1 In this Part, "**public emergency period**" means the period during which an order of the chief medical health officer issued pursuant to subsection 2-59.1(2) of the Act, or an emergency declaration ordered pursuant to *The Emergency Planning Act*, is in force.

Certain Provisions do not apply during public emergency period

44.2 During a public emergency period:

(a) subject to clause (c), employers are exempt from the provisions of, and employees are not entitled to the protections provided by sections 2-60 and 2-61 of the Act respecting layoffs;

[63] A similar set of the above provisions exists in Emergency Regs2, with one minor exception, which is shown here:

"44.3(1) During a public emergency period, employers **and employees** are exempt from the provisions of, and employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs."

[64] Note the bolded words in the above quoted subsection. Those words do not exist in Emergency Regs1. However, it is argued below that makes no difference to the Employer's argument. For both sets of Emergency Regs it should also be noted that an order of the SK CMHO declaring the public health emergency was in effect.

[65] The most important words in both sets of the Emergency Regs are three operative phrases which are defined below as "Operative Phrase 1" for Emergency Regs1; "Operative Phrase 1A" for the similar phrase in Emergency Regs2 and "Operative Phrase 2" for the second part of the section in both sets of Emergency Regs. Each Operative Phrase 1, 1A and 2 are preceded by the introductory words "During a public emergency period…". The combination of Operative Phrase 1, 1A and 2 are

collectively referred to in the remainder of this Award as the "Operative Language". After being stripped of irrelevant language each of these Phrases reads as follows:

> "During a public emergency period:
>
> > "employers are exempt from the provisions of…sections 2-60 and 2-61 of the Act respecting layoffs" ("Operative Phrase 1") (taken from section 44.2 of Emergency Regs1);
> >
> > "employers and employees are exempt from the provisions of…sections 2-60 and 2-61 of the Act respecting layoffs" ("Operative Phrase 1A") (taken from section 44.3 of Emergency Regs2) (*emphasis added – ed*); and
> >
> > "employees are not entitled to the protections provided by sections 2-60 and 2-61 of the Act respecting layoffs" ("Operative Phrase 2") (taken from section 44.2 of Emergency Regs1 and section 44.3 of Emergency Regs2)
> >
> > [The term "Operative Language" in the remainder of this Award refers collectively to Operative Phrases 1, 1A and 2.]

[66] The Employer then begins its summary of the Union's argument by quoting section **2-7** which deals with another long-standing concept in the SEA that allows one to compare terms in the SEA itself against the negotiated terms of any collective agreement. If the comparison on a few itemized issues shows the negotiated document to be "more favourable" then those provisions will prevail over anything in the SEA. The language of the section reads as follows:

> **More favourable conditions prevail**
> **2-7**(1) In this section, **"more favourable"** means more favourable than provided by this Part, any regulations made pursuant to this Part or any authorization issued pursuant to this Part.
>
> (2) Nothing in this Part, in a regulation made pursuant to this Part or in any authorization issued pursuant to this Part affects any provision in any other Act, regulation, agreement, collective agreement or contract of services or any custom insofar as that Act, regulation, agreement, collective agreement, contract of services or custom gives any employee:
>
> (a) more favourable rates of pay or conditions of work;
>
> (b) more favourable hours of work;
>
> (c) more favourable total wages; or
>
> (d) more favourable periods of notice of layoff or termination.

[67] The Employer then describes the Union's argument as a kind of "combination" of the above section **2-7** with the provisions of section **2-61**(1)(b) set out at para 17 above, although how those sections combine to make a coherent argument is never made clear by the Employer.

[68] The Employer then just proceeds to make its own interpretation of the relevant legislation. The first step in that analysis is to note the provisions of the notwithstanding clause in subsections (a) and (b) [of section **2-59.1**(7)] which provide that the Lieutenant Governor-in-Council could make orders:

> "(a) suspending the application of any provision of this Part or the regulations that deals with matters regulated by this section;" and
>
> "(b) amending, suspending or varying the application of any provision of this Part or the regulations to employees and employers to whom this section applies"

[69] The Employer then submits that the "exact purpose of section 44.2" of the Emergency Regs1 was – in the words of the above sub-sections – to "suspend the application of any provision of this Part or the regulations that deals with matters regulated by this section". The same argument could be made using subsection (b). The same arguments also apply in respect of section 44.3 of Emergency Regs2.

[70] What section 44.2 of Emergency Regs1 did was "remove(d) an employee's right to receive notice or pay in lieu of notice as a result of a layoff triggered by COVID-19 measures irrespective of union membership". Any problems that might undermine the Employer's argument such as the more favourable clause are in its view presumably removed by the "notwithstanding" language in the above subsections which override any other provisions of the SEA.

[71] Finally, the Employer notes the definitions of "employee", "employer" and "layoff" from Part II of the SEA which are worth repeating here:

> (f) **"employee"** includes:
>
> (i) a person receiving or entitled to wages;
>
> (ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee;
>
> (i) a person being trained by an employer for the employer's business;
>
> (ii) a person on an employment leave from employment with an employer; and
>
> (iii) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv):
>
> but does not include a person engaged in a prescribed activity;

(g) **"employer"** means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:

(i) has control or direction of one or more employees; or

(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;

(l) **"layoff"** means the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days;

2-3(1) This Part applies to all employees and employees in Saskatchewan other than:

(a) subject to subsections (2) and (3) and to the regulations made pursuant to this Part, those employees whose primary duties consist of actively engaging in farming, ranching or market gardening activities; and

(b) those employees or employers, or categories of employees or employers, excluded in the regulations made pursuant to this Part from all or portions of this Part.

[72] The Employer then concludes its argument by pointing out that the above definitions make in clear that the SEA, as amended and all the Emergency Regs apply to the Employer and all of its employees (ie the Union members) in Saskatchewan who make up the Laidoff Employees.

[73] The Employer also points out that the language used in Operative Phrase 2 are words which clearly capture what the Employer calls the "severance provisions of a Collective Agreement" (para 28) and "…this provision was suspended during the public emergency period as a result of the amendment of the SEA.

[74] The final statement of the Employer's submission now however refers to Operative Phrase 1 and 1A when it submits that during a public emergency period "employers" (as defined above) were exempted from the requirement to provide notice of a layoff or make payment in lieu of such notice and this exemption applied equally to unionized and non-unionized employers and employees"notwithstanding" any other provision in Part II of the SEA.

[75] The Employer does not recognize any difference between Operative Language 1 and 1A which might affect the conclusion in the above sentence, at least as might apply to Layoff Notice No. 1 which was issued before Operative Language 2 came into effect in May, 2020.

III. SUBMISSIONS OF THE UNION

1. The foundational premise of the Union's submission.

[76] The Union made three main submissions in support of its position. Before outlining its first and its main submission, the Union developed a thorough analysis of what it obviously considered to be an important founding principle of its position – namely, that the right to lay off arises from the collective agreement, and from nowhere else.

[77] The Union suggests this principle is "well-established" and puts forth several authorities to buttress the proof of this proposition, including one long-standing well recognized precedent: *British Columbia Hydro Power Authority v IBEW, Local 258* [1983] BCCA 92 at paras 81-83 (*"BC Hydro"*) Quoting *BC Hydro*: "There is no residual right in management to lay-off employees. It is a right founded in contract."

[78] In case the reader should think the existence of a management rights clause in a collective agreement might provide a way around that conclusion, the Union also quotes additional authorities to substantiate the conclusion that such clauses "simply retain those existing management rights which have not been abridged or modified by the collective agreement … a management rights clause cannot be used to grant the employer a power – such as the right of lay-off – which it did not already possess at common law." (Union Summary of Argument, para 9).

[79] Accordingly, the right to lay-off employees is a negotiated right and can therefore, only be found in a collective agreement that has been negotiated between the parties. Although the Board is fully in agreement with the Union's analysis to this point, it is worth pointing out that the right to lay-off employees is not the only thing that did not exist at common law – neither did unions nor enforceable collective agreements – they all depend on the SEA as is outlined further in Parts IV and V below. Unions did not just drop out of the sky, but owe their complete existence, their capacity to contract and their legal power and authority to the SEA itself, as well as certain processes thereunder.

[80] The result of the Union's analysis to this point is that a correct understanding of the Employer's layoffs in this case, must start from "the recognition that the Employer only had the right to lay-off employees in 2020 by virtue of the specific process and terms for lay-off negotiated by the parties" in CBA 1 and 2.

[81] The Employer was given this right in CBA 1 by virtue of Article 40.01 which states "Employees may be laid off due to lack of work." CBA 2 uses identical language at Article 42.01. With this foundation - with which the Board agrees - the Union puts forward the following three arguments in support of its position.

2. The first argument: The amendments to the SEA do not displace the Employer's collective agreement obligations in respect of pay in lieu of notice, because those obligations are independent and stand alone from the SEA.

[82] Although the Employer was relying on its negotiated right to layoff employees under Articles 40.01 and 42.01 (under CBA 1 and CBA 2 respectively), it did not comply with the requirements for

layoffs established under Article 40.05 in respect of CBA 1 and under 42.05 in respect of CBA 2. Those requirements demanded either a specific notice period for each Employee or pay in lieu thereof.

[83] The Employer argues it was exempted from these obligations by virtue of the Emergency Regs. However, the Union does not accept this interpretation and purports to demonstrate that conclusion by quoting all of the provisions from both sets of the Emergency Regs, although the relevant provisions are identical in both sets.

[84] What makes the Union's argument confusing is that both it and the Employer rely on an analysis of Operative Phrase 1A which reads as follows:

> "During a public emergency period … employers and employees are exempt from the provisions of … sections 2-60 and 2-61 of the Act respecting layoffs."

[85] The Union focuses on the above Operative Phrase 1A and then uses that wording to conclude (at paras 14 and 15) "In neither case (*ie in neither set of emergency regs- ed*) … did the *Emergency Regulations* override, displace, or otherwise modify the lay-off procedures and protections under the Collective Agreement…nothing in either *Emergency Regulatiion* purports to override negotiated contractual or collective agreement terms governing lay-offs."

[86] Since Operative Phrases 1 and 1A only "exempt" employers and employees from the obligations in sections 2-60 and 2-61 and since the Emergency Regs don't refer to the obligations in CBA 1 or 2, then it follows according to the Union that those obligations must still stand and be enforceable. Thus, according to the Union, the Employer must make the payments in lieu of notice agreed to in the Collective Agreements.

[87] The brief reads as though the Union thinks (although does not ever really say this) that the Emergency Regs would have had to expressly refer to the provisions in each and every Collective Agreement by name in the Province to be effective. However, that would obviously have been impractical and was not necessary to be effective. Why that is the case is set out in Part IV below.

3. <u>The second argument</u>: The provisions of CBA 1 and 2 are "more favourable" as that term is defined in section 2-7 of the SEA and must therefore be adhered to.

[88] Section **2-7** of the SEA provides language that includes a definition of "more favourable" the effect of which is that if any contract language is negotiated into a collective agreement that is more favourable in respect of "rates of pay, conditions of work including hours of work, total wages or more favourable periods of notice of layoff or termination", the more favourable provisions in the applicable collective agreement will prevail. (The exact language of section 2-7 is set out at para 66 above.) This general observation is confirmed by reference to various authorities who have interpreted this provision.

[89] Again, the Board does not disagree with this statement of general principle. However, the Union's application of this principle to the facts in this case is more problematic.

[90] To begin with, the provisions for notice of layoff as required by the SEA are effectively identical to the provisions in both CBA 1 and 2. The only differences are minor points such as making the notice periods effective after 3 months in CBA 1 and after 13 weeks in the SEA. The common sense method to interpret the meaning of section **2-7** in this case is simply to hold up the provisions in CBA 1 and CBA 2 (set out in articles 40.05 and 42.05 respectively) and compare them to the requirements for notice in section **2-60.**

[91] What you find in that comparison is that there is no material difference between the negotiated contract language and the statutory requirements. That would normally be the end of that argument.

[92] However, the Union continues that one should only make the comparison after giving effect to the Emergency Regs which - using the Union's interpretation of Operative Phrase 1 or 1A – means that CBA 1 and 2 are "more favourable" at that point. However, query again whether that interpretation is correct. If not, the argument fails.

[93] The Union's argument goes like this: "In this case, the *Emergency Regulations* do away with any form of protections with respect to lay-offs during the relevant periods, including the protections with respect to the notice periods for lay-off or pay in lieu of notice." This conclusion is arguable if one only reads Operative Phrase 1 or 1A and at the same time, one ignores Operative Phrase 2 as the Union does.

[94] As explained in more depth in Part V, Operative Phrase 2 actually suspends the operation of whatever provisions respecting layoffs have been negotiated in any applicable collective agreement – which obviously includes CBA 1 and 2.

[95] The Union argument therefore fails because of the wording in Operative Phrase 2 (which suspends all entitlements respecting layoffs in CBA 1 and 2): After giving effect to the provisions of the Emergency Regs there is no difference between the effective provisions of CBA 1 or 2 and the SEA during a "public emergency period".

[96] Finally, the Union develops an argument that one should not just consider the requirements for notice of layoff, but one must look at the "precise compass" of "benefits under consideration – that is look at the bundle or package of benefits on the relevant topic to determine whether, collectively, they are more favourable than what is provided by the SEA or its regulations". This conclusion is reached by reference to a Saskatchewan arbitral award from Arbitrator Ish, which in the Board's opinion does not justify this conclusion. That analysis is set forth in Part V below.

4. <u>The third argument</u>: The Union suggests that the Employer's failure to consult with the Union in the manner required by Articles 40.02 and 42.02 of the respective Collective Agreements was a breach.

[97] The Employer suggested in its brief that the Union never really considered this a serious argument. There is some logic to that observation simply because the written brief of the Union never draws any conclusions from the alleged failure to comply with Articles 40.02 and 42.02.

[98] The Union describes the provisions in the Collective Agreements that require the assembling of JUMRW Committee "to assess the impact of the proposed lay-offs, consider whether the lay-offs would have an impact on the diversity and representation in the active workforce, and discuss alternative workforce adjustment plans to ensure a representative workforce is maintained despite lay-offs".

[99] The Union also states "these steps did not happen", but then never draws any conclusions from that allegation. The Union does set out the important principle that obligations to consult have been judicially determined to be "substantive rights" and a "necessary precondition to engaging in lay-offs".

[100] However, what follows from that conclusion is never made clear. Were the layoffs invalid because of the failure to consult or did the failure only constitute a "breach" of some kind? What we are left with is the Union's statement that these provisions "must be taken very seriously", but nothing more.

IV. ISSUE NO 1: Do the Collective Agreements create employee rights under Articles 40 and 42 that are independent and stand alone from the SEA?

1. The constitutional and administrative law underpinnings of PSAC in Saskatchewan?

[101] Obviously the whole history of Canadian labour law is beyond the scope of this Award. However, one important point about that history needs to be remembered – namely, at common law unions were illegal and had no status. The introduction of Prime Minister MacDonald's Trade Union Act in 1872 legalized unions in Canada and prevented their members from being charged with conspiracy.

[102] From that point – through the federal wartime legislation that eventually morphed into provincial labour laws across the country – to the famous 2015 Saskatchewan Federation of Labour successful challenge at the Supreme Court of Canada to the government's limits of essential workers' right to strike, unions have depended on legislation and now the Charter for their powers, their authority and their very existence.

[103] The SEA, like most other provincial labour laws, is effectively a complete code on a wide range of labour and employment matters in Saskatchewan. Of perhaps most importance to unravelling the issues in this dispute is section **6-3** which reads as follows:

> "Capacity of unions
> **6-**3 For the purposes of this Act, every union is deemed to be a person" (*emphasis added-ed)*

[104] Section **6-3** is the fundamental starting point to understand how and why PSAC is present in this proceeding and what its role is. This section of the SEA is what gives PSAC the fundamental capacity and the legal power in Saskatchewan to pursue its goals, without which the Union would be unable to function.

[105] Other parts of the SEA then provide for the recognition of PSAC as a "union" as defined in section **6-1** (1) (p), establish the process by which it became the certified bargaining agent for the Employer (**6-13**) and allow for "collective bargaining" (**6-38**) with a valid and binding "collective agreement" produced at the end of that process (**6-41**)

[106] The point is the fundamental "operating system" by which PSAC carries on its business in Saskatchewan is overseen by and under the provisions of the SEA, subject to the qualification at the beginning of section **6-3**: - namely, the stipulation that a union is "deemed to be a person" is subject to the overriding qualification that that provision only applies "for the purposes of this Act". The Union has no more general powers of a "person" than might otherwise be the case had that qualification not been inserted.

[107] In this respect, PSAC or any union subject to the jurisdiction of the SEA is not unlike other legal entities whose existence and operational functions are governed by some statutory instrument, such as municipal corporations, business corporations, co-operatives and the like. They too have limitations and qualifications on their status which must be understood any time one is investigating the power or capacity of these bodies.

2. The nature of "temporary lay-off" rights and their dependence on the SEA.

[108] Historically at common law, unions not only had no legal status as described in the previous section, but as well employers had no unilateral right to simply lay off employees, whether temporarily or permanently, without being subject to a possible claim for unjust or constructive dismissal, and a demand for damages in lieu of a lack of notice. Since the arrival of COVID-19, this history has come to be reviewed at some length in many recent cases. [See for example *Taylor v. Hanley Hospitality Inc., 2021 ONSC 3135 ("Taylor")*].

[109] The manner in which the current regime of temporary layoffs in collective agreements came to exist is completely dependent on statutory regimes like the SEA. The SEA gives Saskatchewan unions first of all the capacity to negotiate on behalf of employees and then, the statute imposes requirements on employers to provide minimum notice periods.

[110] Employers at common law have been required for many years now to observe an obligation to provide minimum notice periods on employee dismissals – either by expressly negotiating a term to this effect in employment contracts or by implication through the settlement of claims for unjust or constructive dismissal in employment contracts for non-unionized employees.

[111] The requirement to negotiate this term in the world of unionized employees has led to the development of a number of unique concepts which again were really unknown at common law. Industries with larger workforces were often subject to the whim of economic or seasonal cycles, resulting in a temporary lack of work for many employees. Industry and unions over the years responded to this challenge through the negotiation of the concept of a "temporary lay-off" where there was no intention to permanently terminate an employee. This is a unique concept, unknown in historical employment law.

[112] This in turn, along with the concepts of seniority and bumping led to the typical form of modern collective agreements that allow for a permanent workforce that may shrink at various times when "layoffs" are announced, but where "recalls" result in the employees returning back to the Employer.

[113] In a typical situation, the union job would be considered a better job than what had been obtained by an affected employee during the layoff. When the recall was announced an employee who had been living on employment insurance or a lower wage non-union job would gladly return to the unionized workforce. Over time if the employee remained with the employer, he or she would obtain enough seniority that when future lay-offs were announced, they would be insulated from the problem by being able to "bump" other employees with lesser seniority and so on.

[114] As this process evolved over the years, governments recognized the need to insure the existence of some minimum notice requirements for an employer to "lay-off" an employee, whether unionized or not. These provisions were typically less than what a non-unionized employee could force an employer to pay him or her by way of damages in lieu of notice, depending of course on many other factors such as length of service.

[115] Unions also typically negotiated provisions that recognized first of all the right of an employer to "lay-off" an employee for lack of work. At the same time Employers were required to comply with a set of notice requirements. These notice requirements would be incorporated directly into the respective collective agreement in a form often identical to the legislation. That is the case in this proceeding where the notice provisions in CBA 1 and 2 are substantively identical to the notice requirements of section **2-60** of the SEA. In some cases, employers will negotiate notice terms for their laid off employees which exceed the minimum statutory requirements. In such cases, the statute is seen as a floor.

[116] Articles 40 and 42 of CBA 1 and 2 are examples of a regime designed to mimic the statutory requirements. These articles provide a system that allows for the Employer to lay-off employees due to a lack of work. The provisions require compliance with a whole set of obligations (ie "entitlements" in the language of the SEA) designed to regulate the process in a normal world – ie pre or post pandemic. (The provisions of Article 40 are quoted in their entirety at para 26 above.) The minimum notice requirements in both Articles 40 and 42 are substantively identical to the statutory provisions set out in sections **2-60** and **2-61** of the SEA which are set out verbatim at para 17 above.

[117] The Union's written Summary of Argument acknowledged (at para 4) that the layoff provisions in CBA 1 and 2 are "substantively identical". For the first grievance, the relevant provisions are set out in Article 40 of CBA 1 (quoted above at para 26). It describes the whole lay-off process, including the notice provisions in section 40.05. Note that section 40.05 is not only substantively identical to section 42.05 in CBA 2, but both those sections are also substantially identical to the notice requirements in section **2-60** of the SEA quoted above.

[118] The important point about the whole regime of temporary layoffs, seniority and bumping provisions as contained in modern collective agreements, and as contained in CBA 1 and 2 is that they are a direct result of the empowerment of PSAC (and others) by and under the provisions of the governing legislation, in this case the SEA.

[119] Without the fundamental provisions of the SEA, such as section **6-3** which gives the Union the legal capacity of a "person" under Saskatchewan law (and thus the power to negotiate and sign contracts - but only for "the purposes of the Act"), and without the statutory process for certification, collective bargaining, collective agreements and ratification, there would be no CBA 1 or 2 and no PSAC. As stated above, the Union's capacity as a deemed person exists "for the purposes of this Act" and as such, its work on behalf of employees must necessarily be undertaken and executed subject to that qualification.

[120] What does that mean for this dispute? It means that any issue about the rights of employees under a collective agreement cannot be understood in isolation from the SEA; and, it certainly is not the case that obligations in any collective agreement made in Saskatchewan are somehow independent of the SEA.

[121] There are no obligations under any collective agreement in Saskatchewan which can exist independently from the SEA. If at any given time a union is challenged to prove the enforceability of any rights and obligations in a Saskatchewan collective agreement, it can only establish that validity and enforceability by proving compliance with and good standing under the various provisions of the SEA which gave the Union the power to negotiate those rights and obligations.

[122] If it happens that at the time a challenge is made, the government has seen fit to suspend temporarily or modify permanently some or all ofthe rights and obligations that had previously been created by exercising the power given to a union under the SEA, then there is no limit to what the government can do in this regard, subject to overriding constitutional and Charter limitations which are not applicable in this case. The only question is whether the words in question actually do the job. In this case those words are perfectly clear and obviously "do the job" as outlined in the next section.

[123] This is a simple tautology that flows from the founding principle that the SEA creates in the Union the power of a "person" to negotiate a collective agreement "for the purposes of the Act". If the government subsequently determines that it wants via that same Act to suspend or modify collective agreement rights created using that power, then there is no limit to what the government can do in this regard inside the SEA, subject always to overriding laws such as the Charter or international federal treaty obligations which are not relevant here. Within its jurisdiction, and subject

to such things as the Charter, the legislature is a sovereign authority with all the power it needs to take such actions.

[124] The SEA gives PSAC and others the capacity and the power to enter into the processes that resulted in CBA 1 and 2. Accordingly, when it comes to understanding and interpreting the provisions of Emergency Regs2 – regulations issued under the authority of the SEA – one must remember this overall constitutional and administrative law context.

3. What then does it mean when the Emergency Regs say "…employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs"?

[125] The basic question posed in this dispute is just this: What are these "protections provided by sections **2-60** and **2-61**" of the SEA? If the answer to that question is either the protections of Article 40 or 42 in CBA 1 or 2 respectively, then that is effectively the end of this dispute. Is that the answer to this basic question?

[126] Fortunately, the Act is quite clear. Section **2-61** (1)(b) says: "If the employer is bound by a collective agreement that applies to the employee" (which is clearly the case here) then the protections provided by section **2-61** (1)(b) are "the entitlements provided for in the collective agreement". What are these "entitlements"? The entitlements provided in the collective agreement (ie CBA 1 or 2) are those found in Articles 40 and 42 respectively. And, most importantly, the Emergency Regs just stated "employees are not entitled" to these entitlements.

[127] When the provisions are put beside each other and stripped of irrelevant language while maintaining only the language applicable to situations where there is a collective agreement, then the clarity and obviousness of this answer is made manifest:

> **2-61** of the SEA says: "If an employer lays off … an employee, the employer shall pay to the employee, with respect to the period of notice required pursuant to section **2-60** …the entitlements provided for in the collective agreement"
>
> - and then -
>
> **44.3**(1) of the Emergency Regs says: "During a public emergency period…employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs."

[128] What more needs to be said? The Union argues that somehow the above language is really directed only at the statutory notice requirements and that commitments in a collective agreement are separate and independent somehow from the statute. But that is not the case as was shown in the previous section. The above wording is explicit – what is being suspended is "the entitlements provided for in the collective agreement".

[129] This language clearly covers whatever "protections" are contained in the CBA 1 or 2 – and it should be noted that language is not limited to just the minimum notice requirements, but to any

"protections…respecting layoffs". As will be seen below, this language also suspends the protections of any other "protections" in CBA 1 or 2 which the Union wants to argue makes those documents "more favourable" than the statute. (see paras 148-163 in Part V below)

[130] The SEA gave PSAC the capacity and power to negotiate collective agreements on behalf of the employees of the Employer. The Union did just that and the negotiation process resulted in various provisions – namely, Articles 40 and 42 on minimum notice as well as others such as Articles 41 and 43 on severance, in each case in CBA 1 and 2 respectively. Because the SEA creates the capacity of the Union to act as a "person" and negotiate collective agreements, the government that created that power, clearly has the authority to limit the results of those negotiations as it did in the Emergency Regs.

[131] There was no need to modify or amend the language that had been negotiated in the applicable collective agreements. The Union brief argues (at para 15) that nothing in the Emergency Regs "purports to override negotiated contractual or collective agreement terms governing lay-offs" and then incorrectly asserts that the said Emergency Regs "only exempted employers from the application of sections 2-60 and 2-61 of the SEA itself". In both cases, the Union analysis is confused.

[132] In the first place, the heading of section **44.3**(1) of the Emergency Regs2 makes clear there is no intent to "override negotiated contractual or collective agreement terms". The title reads: **"Certain provisions do not apply during public emergency period"**. And, the section itself makes it clear that the purpose of the Emergency Regs is to suspend the operation of contractual terms, not to override them. Operative Phrase 2 reads "and employees are not entitled to the protections provided by…section 2-61".

[133] So it may be that very clear and direct language is necessary to amend or modify the words in a collective agreement, but that is not what is at issue here. (If it was, a different analysis would be required and that is beyond this Award.) But the kind of directness and clarity that the Union says is necessary to amend or modify sections of a contract is not necessary here (assuming for the moment that is even true). What is intended is only that certain "protections' in collective agreements across the Province are being suspended and the language of either section **44.2** or **44.3** in that regard is perfectly clear and direct.

[134] Clearly there is no intent to amend, modify or override anything – the existing contractual provisions in the Collective Agreements remain in place, but throughout the public emergency period which the Emergency Regs were designed to address, they are merely suspended.

[135] There is therefore no intent to make any permanent change or amendment or override of the negotiated provisions of the applicable collective agreements. Rather, the intent was, as one would expect from an "emergency regulation", to do something that was not intended to last a long time, but rather was expected only to address an emergency situation, caused by the exigencies around COVID-19. In fact, that is what happened. Fifteen months later on August 5, 2021, sections **44.2** to **44.4** inclusive were repealed by SR 81/2021.

[136] In the second place, the Union also incorrectly asserts that the Emergency Regs "only exempted employers" from the application of sections **2-60** and **2-61**. In fact as the language of the Emergency Regs makes perfectly clear, the provisions do indeed exempt employer and employees as the Union states, but the section proceeds to add the critical words in Operative Phrase 2 "…and employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs." This is the language of suspension of employee rights under collective agreements and is not limited to an exemption for employers as the Union argued.

[137] That is because of the practical effect of Operative Phrase 2 - which the Union ignores in its argument – namely the words "employees are not entitled to the protections provided by … section **2-61** … respecting layoffs". One must read those words together with the actual language in section **2-61**, which does actually directly refer to CBA 1 and 2 when it refers to the "entitlements provided in the collective agreement". The words "collective agreement" in this phrase are referring to the "collective agreement that applies to the employee" which in this case is referring obviously to CBA 1 and 2.

[138] Accordingly, the Emergency Regs actually do exactly what the Union says is required, namely they suspend all employees rights to rely on the protections in CBA 1 and 2 – the entitlements actually negotiated in the applicable collective agreements- just like the Union says is necessary. This is the exact opposite conclusion to what the Union argues is the case. The Union says (at para 18):

> "Given the lack of any language to suggest that the *Emergency Regulations* were intended to override contractual and collective agreement terms, the Employer was therefore obligated to respect the requirements of Articles 40 and 42 and could not rely on *Emergency Regulations* which only affected SEA provisions to evade its binding Collective Agreement obligations."

[139] This quote discloses the heart of the problems with the Union's argument. As indicated above, Operative Phrase 2 actually speaks to and about obligations found in the collective agreements applicable to any employee – and is not limited to "SEA provisions". In this case that is CBA 1 and 2 and that fact directly contradicts the above quote from the Union brief.

[140] The Union concludes this first argument with reference to a number of authorities relating to the requirement for clear legislative language in circumstances where one must interpret the meaning of statutory provisions, particularly relative to the emergency COVID-19 enactments all in the context of collective agreements and labour law more generally.

[141] The cases quoted by the Union to demonstrate this requirement refer to examples that bear no similarity to the interpretation required of the SEA and the Emergency Regs. They hold for example that legislation that referred to "grievances" does not include reference to "arbitrations". This somewhat obvious conclusion is understandable because the two nouns refer to different concepts and is not helpful in this dispute.

[142] It thus appears that the Government of Saskatchewan has clearly suspended the operation of all "entitlements…respecting layoffs" in Articles 40 and 42 of CBA 1 and 2 respectively, by providing

in the Emergency Regs that employees (such as PSAC members) are not entitled to the protections in their collective agreements as otherwise provided in section **2-61** of the SEA. That begs the question does the government have the power to do that?

4. Did the Government have the power to suspend the operation of the "entitlements provided for in the collective agreement?

[143] In principle, a provincial government acting within its constitutional jurisdiction, subject to constitutional Charter rights and the provisions of certain international agreements, has the power to unilaterally alter, modify, amend, cancel or suspend contracts by statutory enactment to the extent and as it considers necessary or advisable, such as in the Emergency Regs. That is especially true where the power being exercised to create the contract in the first place came from the government.

[144] To buttress the implicit power of the legislature to act in the manner it did and to insure the enforceability of *inter alia* section 44.3 of the Emergency Regs, the new section 59.1 in the SEA which was adopted on March 17, 2020 included the following "notwithstanding" clause:

> **PART II**
> **Employment Standards**
>
> …
>
> "**Public Health Emergency Leave**
>
> **2-59.1** (1) In this section, '**chief medical health officer'** means the person designated as chief medical health officer pursuant to *The Public Health Act, 1994*.
>
> …
>
> (7) Notwithstanding any other provision of this Part or the regulations or any other Act or law, the Lieutenant Governor in Council may make orders for the purposes of this section, to continue through all or any part of the period mentioned in subsection (5):
>
> (a) suspending the application of any provision of this Part or the regulations that deals with matters regulated by this section;
>
> (b) amending, suspending or varying the application of any provision of this Part or the regulations to employees and employers to whom this section applies;
>
> (c) setting out requirements for the purposes of subsection (6);
>
> (d) respecting any additional matter or thing that the Lieutenant Governor in Council considers necessary to facilitate the purpose of this section, the protection of employees or the prevention or reduction of disease.
>
> *(emphasis added throughout – ed)*

[145] The provisions in sub-section (7) (a) and (b) above make it clear, the government has the power to "suspend" or "amend, suspend or vary" the application of any provision of this Part …to employees…to whom this section applies". This obviously includes the power to suspend the provisions of section **2-61** referred to above. It should also be noted this subection (7) is a "notwithstanding" clause which means that all other things being equal, its provisions override all otherwise relevant provisions of the SEA, including for example the "more favourable" provisions of section **2-7** of the SEA discussed under Issue No. 2 below.

[146] This was not an issue raised by either party, but it is included here for completeness of analysis. There are arguments one might attempt to suggest the Emergency Regs were unconstitutional for some reason, such as overriding protected Charter rights without the necessary legal steps to make that possible.

[147] However, no such arguments were made. That being the case, and with no apparent constitutional limitations affecting the Government, the long standing principle of Canadian constitutional law regarding legislative supremacy must apply. The adoption of the Emergency Regs was a lawful and valid exercise of legislative power and authority and sections 44.2 and 44.3 of the Emergency Regs are fully enforceable in accordance with their very clear and transparent terms.

V. ISSUE NO. 2: Do the provisions of CBA 1 and 2 respecting layoffs continue in force after the adoption of the Emergency Regs because they are "more favourable" than the requirements of the SEA after the adoption of the Emergency Regs?

1. Section 2-7 of the SEA provides that any "more favourable" provisions in a collective agreement prevail over less favourable provisions in the SEA.

[148] The Union's written Summary of Argument suggests the following provisions of the SEA must be applied to the set of facts in this dispute:

> **2-7** (1) In this section, **"more favourable"** means more favourable than provided by this Part, any regulations made pursuant to this Part or any authorization issued pursuant to this Part.
>
> (2) Nothing in this Part, in any regulation made pursuant to this Part or in any authorization issued pursuant to this Part affects any provision in any other Act, regulation, agreement, collective agreement or contract of services or any custom insofar as that Act, regulation, agreement, collective agreement, contract of service or custom gives any employee:
>
> (a) more favourable rates of pay or conditions of work;
> (b) more favourable hours of work;
> (c) more favourable total wages; or
> (d) more favourable periods of notice of layoff or termination.

[149] The clear intent of this provision is that in respect of any of the items specified in section **2-7** (2), particularly in respect of item (d), if a collective agreement such as CBA 1 or 2 provides for "more favourable" provisions than what is prescribed by this Part II (*dealing with employment standards*), then the provisions of the collective agreement – such as CBA 1 or 2 - must prevail.

[150] It should be noted that these four items consist of specific factors that each have characteristics which are primarily either financial or conditions of work: a) rates of pay or conditions of work, b) hours of work, c) total wages or d) minimum notice of layoff. (These factors are referred to as the "Four More Favourable Factors" in the remainder of this Award.)

[151] Section **2-**7 was put in place because from time to time unions and employers were negotiating provisions on one or more of the Four More Favourable Factors that gave the respective employees "more favourable" terms on one or more of these factors. The government did not want employers to backslide on their commitments by somehow being able to invoke the lesser minimum standards on these items in the SEA.

[152] However, in this case the provisions of Articles 40 and 42 are identical to the provisions in the SEA on required notice periods for layoffs or terminations, thus the Union's argument fails. Nonetheless, the Union is determined to make these provisions support its case, notwithstanding the fact that the provisions on minimum notice and pay in lieu of notice in CBA 1 and 2 are identical to those in the SEA. It proceeds to argue that because the Emergency Regs actually eliminate the protections for minimum notice requirements in sections **2-60** and **2-61**, the natural effect of that fact is the perverse outcome that Articles 40 and 42 become "more favourable" – the exact opposite of what the Government clearly intended.

[153] The logic of this argument is difficult to discern as the Union ignores the fact that Operative Phrase 2 actually suspends the operation of entitlements in CBA 1 and 2 respecting layoffs. After giving effect to the Emergency Regs, the SEA provisions are the same as CBA 1 and 2 – the provisions on notice and pay in lieu in both instruments has been suspended and are therefore identical to each other.

[154] Regardless, the Union says that after the Emergency Regs have been adopted, the protections in sections **2-60** and **2-61** have been eviscerated leaving the provisions of CBA 1 and 2 as "more favourable". Thus in the Union's argument, Article 40 and 42 must prevail because they are clearly more favourable than the eviscerated provisions of the SEA after the adoption of the Emergency Regs.

[155] The Governor-in-council adopted the Emergency Regs to address a specific situation (ie COVID-19 exigencies) including express provisions to eliminate the layoff notice provisions in collective agreements the protections. Yet, the Union argues that the action of doing that effectively made the provisions of CBA 1 and 2 "more favourable" and so they must prevail. However, because the Emergency Regs actually suspend the protections of CBA 1 and 2 on layoffs, this argument fails.

[156] The final argument the Union presents along these lines is to suggest that when deciding whether the provisions of CBA 1 or 2 are "more favourable" and should thus be preserved (and rendered enforceable by this Award), one must take account of a whole host of procedures that exist in CBA1 and 2 that are not in the SEA – either before or after the adoption of the Emergency Regs. The provisions that thus, in the Union's opinion, make CBA 1 more favourable are those sections in Articles 40 and 9 for example that consist of the following (similar articles are found in CBA 2):

a) the obligation on the Employer to consult with the Union (40.02);
b) preservation of seniority for a year after layoff [(9.05 (b)];
c) seniority based on bumping rights (40.03 and 40.04);
d) the right to recall by seniority (40.06); and
e) severance pay should an employee choose to retire or resign after layoff (41.01)

[157] This argument belies the fact that none of the above provisions - which the Union says make CBA 1 more favourable - are listed in section **2-7**(2) as one of the Four More Favourable Factors that should be considered when assessing whether a particular collective agreement is in fact more favourable.

[158] However, the Union persists by referencing a decision of Arbitrator Ish that it says is good authority for the notion that one should focus on a package of benefits on a relevant topic (such as the five listed above) without ever explaining how any one of the provisions quoted from CBA 1 or 2 might improve any of the Four More Favourable Factors listed items from **2-7** (2) and thus make them "more favourable".

[159] The logic referred in the decision of Arbitrator Ish is developed from a complete analysis of a jurisprudential debate about whether a limited or a broad view should be taken when analyzing the factors in a collective agreement that must be considered in assessing the applicability of this "more favourable" standard from section **2-7.** (see *Regina (City) v Regina Civic Middle Management Assn. (Vacation Pay Grievance)*, [2017] SLAA 16 at para 28, 31-36).

[160] Arbitrator Ish concludes that a balanced approach – not too isolated and not too broad – should be applied to the facts in his case. The factors he considered to fall into this middle ground in his case which was a dispute about vacation pay, included a series of provisions in the applicable collective agreement that all related to provisions about overtime and vacation pay – the direct subject of the debate in his case.

[161] The "precise compass" used by Arbitrator Ish did not extend to the kind of wide range of provisions the Union suggests in this case should be used to make the "more favourable" analysis. The Four More Favourable Factors are all directly involved with "rate of pay, hours of work, total wages or periods of notice". None of these justify a much broader inclusion of the concepts proposed by the Union which include obligations to consult, seniority provisions or severance pay on resignations. The approach suggested by the Union is too broad and cannot be used to maintain the enforceability of section 40.05 or 42.05 of CBA 1 and 2 respectively.

[162] Another way of looking at this "more favourable" issue which gets one to the same conclusion is to consider the meaning of the words in section **44.3** of the Emergency Regs: "the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs." It is these protections "respecting layoffs" that are suspended by that section.

[163] Whatever that means, those words undoubtedly refer to "entitlements in the collective agreement" which would include every provision that fell within the ambit of the "precise compass" used by Arbitrator Ish. That being the case, after implementation of the Emergency Regs, those protections have been suspended and CBA 1 and 2 cannot therefore be considered "more favourable" after adoption of the Emergency Regs.

VI. ISSUE NO. 3: Did the Employer breach its consultation obligations under the Collective Agreements and if so, what are the consequences, if any?

1. What were the Employer's consultation obligations?

[164] The identical obligations to consult with the JUMRW Committee are contained in Articles 40.02 and 42.02 of CBA 1 and 2 respectively. For ease of reference, the former are repeated here as follows:

> "40.02 The Joint Union Management Representative Workforce Committee (JUMRWC) will be assembled prior to any lay off proceedings to determine what impact, if any, these proceeding will have on the units' representative workforce. When the (JUMRWC) determines that the proceedings will impact the units' representative workforce in a negative manner, the JUMRWC members agree to consult with their principals to discuss alternate workforce adjustment plans to ensure a representative workforce is maintained.

[165] It is not clear what the logic of this argument is relative to the issue of what notice of layoff the Union employees were entitled at the time of Layoff No. 1 and Layoff No. 2. The Employer states that "the Union conceded it was not placing much reliance upon the argument" although it acknowledges the Union argument that the Employer was in breach of the Collective Agreements because it failed to consult with the JUMRW Committee.

[166] The Union itself does not draw any clear conclusions from its submission on this issue relative to the main issues in this dispute. The Union just concludes that compliance with this kind of consultation obligation should serve as a "balance to the Employer's right to make the ultimate decision on whether to proceed with layoffs' and therefore "must be taken very seriously". (para 27)

[167] Further the Employer brief confirms the evidence at the hearing which was that the "uncontradicted evidence was that no such Committee had ever been formed and that neither party had submitted names for such a Committee until October 2020 at which time, in the midst of increasing pandemic related restrictions, the Union submitted three prospective names to management.

[168] The facts as presented at the hearing were that - considering the state of concern about the spread of disease and in the context of enforceable orders from the government to actually shut down facilities as was the case here - there was significant communication with the Employees from the Employer's CEO, Ms. Flett both prior and subsequent to Layoffs No. 1 and 2. This is not the same as "consultation" as required by the JUMRW Committee, but it was a good faith effort to at least inform the employees about what was happening in an extraordinary set of once-in-a-lifetime circumstances.

[169] As well, there was no suggestion at the hearing that any of the layoffs were carried out in a non-representative manner. This was almost necessarily so because the government orders caused the complete shut-down of Casino Regina and Casino Moose Jaw with the result that except for a very small skeleton staff necessary to preserve the facilities, all employees were laid off.

[170] According, there is no real issue under this heading as to whether any lack of compliance with Articles 40.02 and 42.02 somehow invalidated the layoffs and entitled the Laidoff Employees to collect payments in lieu of notice under CBA 1 or 2. Even if there was some lack of compliance, there was no material impact on the workforce that would justify pay in lieu of notice. Moreover, the JUMRW Committee is "advisory" only and had it met and given its advice, there was no obligation on the Employer to follow such advice. There is also no suggestion that the outcome on the layoffs from a government mandated forced shutdown would be different in any way.

[171] This is not to say that that these consultation obligations should somehow be ignored or in the future should be considered as anything but serious obligations that both parties should endeavour to meet and satisfy. An important social obligation of the Casinos has been to preserve a representative workforce and nothing in this Award should be taken to undermine that commitment. However the issue of consultation with an advisory committee in the circumstances of COVID-19 restrictions where whole facilities were shut down cannot be relevant to the issues in this dispute.

VII. ISSUE NO. 4: Does current Canadian jurisprudence on the principles of statutory interpretation support the above conclusions?

1. The need for care and attention to the modern principles of statutory interpretation under Canadian law.

[172] At the hearing of this matter, a union witness and counsel for both the Employer and the Union spoke about the how COVID-19 related events impacted all the material issues in this case. Employer counsel argued that in making interpretations of the various statutory instruments in this case, one needed to consider what the evidence was about the atmosphere in the Province at the time decisions were being made about whether layoffs were necessary.

[173] Counsel for the Union quite properly pointed out that the whole subject of statutory interpretation was not as simple as many often believed and that in particular, it had to be undertaken with great care and attention.
[174] The Board agrees with the observations of both counsel and has asked itself whether the interpretations of Saskatchewan legislative actions described in Parts IV, V and VI above are consistent with the proper principles of statutory interpretation.

[175] The analysis and interpretation provided iin Parts IV, V and VI in this case is based primarily on an elucidation of the common sense meaning of the words involved. It happens from time to time that a particular set of legislative acts will take place where the language in question is not obscure and in an atmosphere that is so well known, that the interpretation of applicable statutory instruments in this atmosphere need not rely on any further outside information about the broad purposes of the legislation.

[176] Such is the case here for the reasons set out in Parts IV, V and VI. Saskatchewan was in the midst of a worldwide pandemic, the broad outlines of which inundated the news every day and the government and the Chief Medical Officer of the Province determined we were in a public health emergency, lives were at risk and he determined public facilities such as the Casinos had to be shut down completely to stop the spread of the disease.

[177] In this case the meaning and purpose of the applicable legislative acts such as the Emergency Regs is not obscure in any sense and the plain meaning of the intent of the legislature can be gleaned from the common sense meaning of the words themselves. In the opinion of the Board, that is the case in this dispute and for that reason, the interpretation given to the various statutory instruments considered above is accurate and reliable without further analysis.

[178] Notwithstanding this general conclusion, it is worth considering some of the small amount of evidence which the Board reviewed and gives some context to the broader legislative intent behind the SEA Emergencies Act and the Emergency Regs in particular.

[179] In the words of the Supreme Court of Canada, good statutory interpretation should always include "textual, contextual and purposive analysis of the statute or [the] provision in question". (see *Re Rizzo and Rizzo Shoes Ltd.,* 1998 1S.C.R.27). To understand this, one must first understand a few basic principles of modern statutory interpretation as gleaned from the jurisprudence.

[180] As with the subject of labour history in Canada, the history of this subject too is way beyond the scope of this Award. Whole books, academic papers, doctoral theses and a few seminal cases from the Supreme Court of Canada are devoted to the subject. (See for example E.A. Driedger *Construction of Statutes* (2nd ed. 1983), Ruth Sullivan "Statutory Interpretation in a New Nutshell", 2003 *Canadian Bar Review,* volume 82 at 51, and particularly *Alberta Union of Provincial Employees v Lethbridge Community College,* [2004] 1 S.C.R. 727, particularly the case law reviewed by the Court at p 744 and following entitled "The Modern Approach to Statutory Interpretation") (the "Lethbridge College" case).

[181] The upshot of the direction given by these authorities as summarized by the Supreme Court in the Lethbridge College case is that a proper interpretation must first carefully consider the words in an Act (quoting Driedger at p. 87) "in their entire context and in their grammatical and ordinary sense". That part of the process was completed and is set out above in Parts IV, V and VI.

[182] When that task is complete, one must secondly according to the Supreme Court, then combine that interpretation harmoniously with the "scheme of the Act, the object of the Act and the intention of Parliament".

[183] The parties did not see fit to provide much evidence about the broad purposes of the amendments to the SEA or the purpose of the Emergency Regs, presumably because the background and general purpose of the legislation was well known to everyone. However, the Agreed Statement of Facts (defined earlier as the "ASF") contained significant material that provides some background as to the purposes of the legislative and executive actions taken by the Government of Saskatchewan in response to the pandemic.

[184] To accomplish this goal, one must summarize what can be discerned from the one witness in the case, from the various background documents put into evidence via the ASF and the interpretative arguments made by counsel for the parties in oral argument about the intention of the legislature, particularly in respect of the words that make up the term defined above as the "Operative Language".

2. A Summary of the evidence about context and background facts relevant to determining the purpose of the SEA Emergencies Act and the Emergency Regs, particularly Operative Phrase 2

[185] A critical initial fact relative to these events is that on March 12, 2020 the Government identified its first presumptive case of COVID-19 in Saskatchewan.

[186] The sequence of events laid out in the ASF also displays something of the urgency, bordering on near panic at times, in the actions of the Legislature, the Executive Council and the SK CMHO as they all dealt with the pandemic. Some of the more important points that stand out are the following:

a) Five days after the discovery of the first case of COVID-19, the Government adopted radical new amendments to SEA via the adoption of the SEA Emergencies Act, which among other things referred to earlier in this Award, changed the law around how and when any employee in the Province who received wages could be absent from work, all in an attempt to limit the spread of COVID-19. If the absence was caused by a public health emergency, a number of new provisions were created including by way of example:

    i. the obligation on employees to give an employer 4 weeks notice of an absence from work was removed completely (SEA Emergencies Act , s **5**);

ii. the obligation to provide a doctor's certificate to prove inability to work was similarly removed (s. **4(1)**); and

iii. employers could order employees to work from home and isolate themselves under certain circumstances (s. **7**)

b) The SEA Emergencies Act was backdated and made retroactive to March 6, 2020 – a feature of modern legislation that is rarely used;

c) The Executive Council declared a state of emergency on March 18, 220 that gave the Government extraordinary powers, including for example the power:

i. "to conscript persons needed to meet an emergency";

ii. "to control or prohibit travel to or from any area of Saskatchewan";

iii. "to fix prices for food, clothing… and essential supplies and the use of any property, services, resources, or equipment within any part of Sasktachewan"; and

iv. the RCMP were given power to take any reasonable action, including the power of arrest, to enforce this order…".

d) On March 19, 2020 Emergency Regs1 was adopted among other things (as described above) to adopt the Operative Language which both exempted employers from the statutory notice obligations and suspended the ability of employees to rely on the negotiated provisions of their collective agreements across the Province. Emergency Regs2 followed 8 weeks later to repeal Emergency Regs1 and replace it with further amendments that were made effective on May 14, 2020.

[187] The ASF also contains a series of memos from Ms. Susan Flett, the President and CEO of the Employer to the Employees during this time period which are also instructive about the factual background to the purposes of the legislation being interpreted in this Award, particularly the Operative Language. A summary of some of the important background points from her memos is as follows:

a) In her March 16th memo (Tab 4, ASF) she advised that casinos depend on a number of high touch surfaces such as slot machines, cards and chips with the result there was no practical way to operate Casino Regina or Moose Jaw and comply with the new safety standards. She further acknowledged the impact on everyone and advised that SaskGaming would "endeavour to minimize any financial hardship" to allow employees to focus on their health.

b) By the time of the March 19th memo (Tab 9, ASF), Ms. Flett had further information from SaskGaming and advised the Employer would continue paying all full-time unionized and non-unionized employees for two weeks. Similar arrangements for part-time employees was also made based on their average earning over the past three months.

c) Finally, in her March 29th memo (Tab 10, ASF), both provincial and federal governments were getting policies organized to respond more effectively to the pandemic and Ms. Flett outlined a series of additional steps designed to limit the impact of the shutdowns on employees which included:

    i. "You will have job security and the ability to return to your home position once we are back up and running"

    ii. Steps had been taken to expedite the availability of Employment Insurance for all employees;

    iii. A new Government of Canada COVID-19 aid package had been developed and would be available shortly named the "Canada Emergency Response Benefit" ("CERB") which would provide benefits of $2000 per month in emergency support;

    iv. A new Mortgage Deferral Program from Canada Mortgage and Housing Authority to assist with house payments and indications that the Province would be providing some kind of assistance for renters;

    v. Government of Saskatchewan student loans were given a six month freeze to assist students with debt repayments; and

    vi. The Employer's Employee Assistance Plan would be available to assist people with all manner of counselling to assist in cooping with the impact of the pandemic on employees and their families.

    vii. From April through December, a series of further memos from Ms. Flett and emails from Blaine Pilatzke, VP of Corporate Services for the Employer dealt mostly with updates on the reopening plans and the safety measures to be implemented. However, Mr. Pilatzke's emails detail the plans the Employer put in place to maintain the group benefit package for employees during this time period – all the way to through March 2021 for employees who had been laid off in March 2020 and not recalled.

[188] Ms. Michelle Lang ("Lang"), the President of the Local 40005 of PSAC, was the first and only witness at the hearing. Facts she testified to that are relevant to understanding the purpose of the Operative Language in particular are as follows:

a) She testified that not all Union employees were laid off as the Employer found it necessary to maintain the employment of slot techs, maintenance and security personnel.

b) She was questioned about whether she received the CERB allowance and Employment Insurance ("EI") which she said she did. On redirect from Union counsel she explained that those amounts were less than her entitlement to pay-in-lieu of notice had the Employer honoured the Union's claim for these benefits.

[189] Putting all of the above information together one can identify the following factors and the outlines of a general plan the government adopted in response to the pandemic. Those factors and the plan are helpful in understanding the broad purposes of the various legislative and executive actions taken to respond to the pandemic, particularly in respect of the Operative Language in March and April, 2020:

a) The Province was in a state of emergency due to fears from the pandemic and the government assumed extraordinary powers to deal with it;

b) The main objective of all government action was to maintain public health and to do that by "stopping the spread" of the disease by such things as closing down all recreational and entertainment facilities, including casinos such as those operated by the Employer;

c) The shutdown ordered across the Province affected employees based in situations where the government felt disease spread needed to be controlled and no mention is made anywhere of treating unionized and non-unionized employees differently. The most important issue was to "stop the spread";

d) It follows as a logical deduction that businesses like casinos - which were completely shut down - were deprived of any ordinary income or revenue;

e) At the same time, at least in the case of the Employer, ongoing costs were incurred for tech slots, maintenance and security, which would be typical for any shut down business;

f) New amendments were made to the SEA that were designed to expedite the shutdown of facilities and to allow people to work from home were possible. This included provisions in the SEA that eliminated certain obligations on employees to give notice to their employers about their absences and similarly, employers and employees were exempted from compliance with the notice of layoff provisions

in sections **2-60** and **2-61** of the SEA regardless whether such notice requirements were in a collective agreement of not. Most importantly the rights of Union members to rely on the negotiated provisions of their collective agreements on notice of layoff were suspended from March 19, 2020 until August 5, 2021;

g) The Employer continued to pay both unionized and non-unionized laid off employees for two weeks after it shut down as well as continued their group benefits through all of 2020 and continued to provide access to its EAP plan to assist all employees to cope with pandemic related issues;

h) Significant government programs were initiated for all employees whether unionized or not, to assist with housing costs, to pay the CERB at $2000 per month for 4 months and to expedite access to Employment Insurance programs for further financial assistance during layoffs. The dollar amounts of this combined support was not, in the opinion of the Union Local President, equal to what its members would have been paid by way of pay in lieu of notice of layoff under CBA 1 or 2;

[190] In summary, to stop the disease spread and preserve the public health of the citizens of Saskatchewan, the government took significant steps to shut down businesses, to implement programs that made it easier for all employees to stay home and made it easier for employers to initiate layoffs of employees where necessary to stop disease spread. As businesses were being shutdown and eliminating their revenue and employees were being laid off across the economy, it was necessary to dampen the financial hit of such forced shutdowns by eliminating the requirement to give notice or pay in lieu of notice. At the same time, obligations on employees to give notice to employers about their absences were also eliminated.

[191] There were no provisions in any of these measures that suggest the government intended that union members would somehow be given special treatment different from all other wage earners in the Province and collect what would amount to a windfall benefit if they were allowed to collect pay in lieu of notice of layoff at the same time as collecting the CERB and Employment Insurance benefits and other significant measures taken to limit the financial impact of the layoffs on all employees.

[192] At a time where employers were being forced to shut down, incur ongoing costs with no revenue, the government also suspended the protections negotiated in collective agreements in respect of required notice of layoff or pay in lieu to dampen the impact on business from the forced closures. All of these steps are completely consistent with one purpose, namely the purpose of stopping COVID-19 disease spread by enacting provisions across the board that applied to all businesses where there was a risk of COVID spread and applied equally to all employees at the same time as provisions were being implemented to support all employees equally with financial and other measures.

[193] Accordingly, when it comes to interpreting the Operative Language, is there anything in the above factors that would support the Union's argument in this case? As a whole the above factors provide a significant degree of information about the Government's purpose in taking the executive

and legislative actions that are described and interpreted in Parts IV, V and VI above, particularly the Operatiave Language.

[194] The Government must necessarily have intended one of the following options:

a) **Option 1: TheEmployer Argument** - The Government intended to suspend all Saskatchewan union members' rights to notice of layoffs (or pay in lieu) under their collective agreements when it said that employees were not entitled to the protections in section **2-61** (which section refers to the "entitlements provided for in the collective agreement"), all with the intent in a state of emergency:

   i. to minimize the financial impact on businesses that were being shut down;

   ii. to insure all wage earners in the Province could be treated equally in across the board steps to deal with the pandemic; and

   iii. to allow the design of impact reduction steps (such as the CERB) by both the Federal and Provincial authorities that would apply equally across the board to all employees; or

b) **Option 2: The Union Argument** – Notwithstanding the express provisions in section **2-61** and the description of the various steps taken to protect all wage earners equally, the Government intended to allow union members to additionally collect whatever monies they were entitled to under their collective agreement so that they could collect those monies in addition to the financial support given to all wage earners.

[195] In these circumstances, Option 1 seems the obvious explanation for the Government's "purpose" in enacting the Operative Language - to temporarily suspend all union members' rights in Saskatchewan to receive notice of layoff or pay in lieu as described in their collective agreements, until the danger from the pandemic had passed.

[196] When this intention and purpose of the Government is made clear and combined with the interpretative analysis of the actual language in the SEA Emergencies Act and the Emergency Regs, particularly the Operative Language as described above in Parts IV, V and VI, there can be no doubt that the Employer's interpretation of these actions is what was intended and what was their proper purpose as required by the principles of statutory interpretation in Canada.

VIII. DECISION AND AWARD

[197] For all of the reasons set forth in Parts IV, V, VI and VII, Grievances 1 and 2 are denied and an order to that effect is hereby made.

[198] The Parties asked that this Board remain seized of this matter in case at some point it may be necessary to deal with any further matters from this dispute. For that reason, the Board will remain seized of this matter unless and until this Award becomes final and is not subject to further appeal.

John Comrie KC, FCIArb, Arbitrator