IN THE MATTER OF:

AN ARBITRATION

BETWEEN:

City of Winnipeg,

("the City" or "the Employer")

- and –

WAPSO, Local 162

("the Union")

DECISION

Policy Griev. 90/17/LRA – Schedule J

Sole Arbitrator: Kristin L. Gibson

Appearances:

JOHN JACOBS.....Legal Counsel for City of Winnipeg

JOHN DAWSON.....Senior Labour Relations Officer for City of Winnipeg

FRED THIESSEN.....Legal Counsel for WAPSO

DEE GILLIS.....Executive Director of WAPSO

ALYSSA HUNG.....Labour Relations Officer for WAPSO

INTRODUCTORY COMMENTS AND PRELIMINARY ISSUES

This interesting grievance was submitted for arbitration under the expedited arbitration provisions of the *Labour Relations Act* ("the Act") by the Union in June of 2017, and was adjourned and later removed from the expedited process when it became apparent that more than one day would be needed for the hearing. Ultimately I heard five days of evidence, with argument taking place on September 18, 2017. At the time the grievance was filed, and the first few days of evidence heard the parties were awaiting the delivery of an award from an interest arbitration board, having been unable to negotiate a successor collective agreement to the one which they had been operating under, which has an expressed expiry date of October 17, 2015. Pursuant to Article 18 of the collective agreement (Exhibit 1) the interest arbitration board was required to issue their award on or before July 23, 2017.

The grievance, initially filed by WAPSO on March 16, 2017 alleges that the City has breached both the terms of the collective agreement and sections 16 and 80 of the Act in the timing and method of invoking a Schedule to that collective agreement (Schedule J) in the circumstances existing between approximately the middle of February and the end of June of 2017. Schedule J contains language contemplating WAPSO members performing struck work of other civic bargaining units and provides both a process for engaging members in doing such work as well as modified terms and conditions of employment that will come into effect in the event that work is performed. The modifications to working conditions are expressly provided "... in recognition of the stressful working conditions which normally arise during a strike".

The grievance was amended by WAPSO prior to the arbitration to include reference to section 17 of the Act. Although Mr. Jacobs on behalf of the City did not oppose the amendment, he took the position throughout the hearing and in argument that I did not have jurisdiction as an arbitrator to conclude that an unfair labour practice had occurred contrary to either sections 16 or 17 of the Act.

The fact that WAPSO members had been without a successor collective agreement since October of 2015, and were embroiled in an interest arbitration process in the spring of 2017 had a bearing, in the submission of the union, on how their members perceived the actions of the City in invoking the provisions of Schedule J. The other timing issue, which is clearly relevant and involves some of the disputed matters between the parties, was the status of the City's collective bargaining with CUPE Local 500 ("CUPE") at various material points in time. This is due to the fact that CUPE was the other civic union which was bargaining with the City at the material times.

The Union's position was more fully articulated by Mr. Thiessen in his opening remarks. WAPSO's threshold argument is that Schedule J is not enforceable by the Employer because its provisions are collectively in violation of section 17 of the Act as intimidation and coercion and\or a promise or inducement not to perform struck work of other civic unions. WAPSO also strongly suggests that the actions of the City both as to the timing and content of communication to its members relating to job status in the event of a labour disruption violated section 16 of the Act. Section 16 is a reverse onus provision which prohibits retaliation – including 'altering the status' of employment - when employees refuse to perform struck work. Mr. Thiessen suggested that an arbitrator has the jurisdiction, in appropriate circumstances, to make a finding that an unfair labour practice had occurred and to order a remedy in accordance with that

finding. As an alternative to the position that Schedule J was unlawful and therefore unenforceable, WAPSO alleged that the City had violated the terms of Schedule J procedurally in a number of respects including the timing and scope of its initiation, the conflation of two distinct work scenarios ('redeployment' and 'reassignment') and the apparent compulsion of employees to respond.

As noted above Mr. Jacobs on behalf of the City took the view that I did not have jurisdiction to find that an unfair labour practice had occurred, and that while some mistakes may have been made in the activation of Schedule J when viewed in hindsight, those mistakes do not rise to the level of a violation of the Schedule nor do they provide evidence of bad faith on the part of the City.

The interest arbitration award was delivered in July of 2017 and it removed Schedule J from the parties' collective agreement. Although to my understanding Mr. Thiessen made the same arguments of illegality in relation to Schedule J that he advanced at the instant hearing, it was removed on the basis that the principle of replication of free collective bargaining meant that WAPSO would not have agreed to its continued inclusion.

Given that Schedule J will not be in effect going forward both parties addressed the issue of mootness in their submissions. Essentially there is agreement that a number of the issues surrounding the roll out of Schedule J are not moot and that a decision dealing with those issues would be helpful in the parties' ongoing relationship. There is the possibility, as identified by Mr. Jacobs, that the City might seek an *ad hoc* agreement with WAPSO, or proceed unilaterally with a canvass of WAPSO employees in the event of a future labour disruption by another civic union.

EVIDENCE

Ms. Dee Gillis, who is the Executive Director of WAPSO, gave evidence of the history of Schedule J as well as about the circumstances over the months between February and June of 2017 that were relevant to the grievance. Ms. Gillis has been associated with WAPSO for more than fifteen years, first as the international representative for IFPTE and then as interim Executive Director prior to her recent confirmation in that position. Ms. Gillis spoke generally about the history of WAPSO and provided an excerpt from the website, which describes its evolution from a loose association of professional and supervisory employees into its present form as a more traditional bargaining agent which is voluntarily recognized by the City and which has been signatory to a series of collective agreements beginning in 1974.

Ms. Gillis also provided a series of documents from 1988 which followed the introduction of Schedule J into the parties' agreement in 1988 – 1990 (Exhibits 9 – 11). It appears that what was a unilateral City policy in 1988 was inserted into the collective agreement without material alteration and in the wake of a conditional layoff notice referencing the possibility of a strike by CUPE Local 1550 in April of 1988. Ms. Gillies testified that to her knowledge Schedule J had essentially remained unchanged up to the parties' current agreement. She was not challenged on any of this evidence.

On February 13, 2017 Mr. Dawson, a Senior Labour Relations Officer with the City, sent Ms. Gillis an email attaching a letter requesting a meeting "regarding the City's decision to proceed with the canvass of employees for voluntary reassignment in the event of a CUPE work disruption". The letter stated that the meeting would include discussion of the "Voluntary Reassignment" form

contemplated by Schedule J. Ms. Gillies was out of the country on vacation during the month of February, and accordingly Mr. Dawson received an out of office response to his email. He then emailed Ms. Hung asking her to respond to the February 13th letter. On the following day, February 14th, Mr. Dawson sent a follow up email to Ms. Hung advising in part:

> Today we will be commencing the canvass of staff for the purpose of reassignment. We are still available to consult on these forms and schedule J as per my request yesterday at a time that is convenient for both parties. Should the consultation result in any adjustment(s) to the process that we are proceeding with today then we will make the necessary changes at that time.

Later in the day on February 14th Mr. Dawson revised the information about commencing the canvass, advising Ms. Hung that the forms were not being handed out at that time but rather "there are preliminary discussions occurring at the department level."

A meeting was scheduled for February 15, 2017, which Ms. Hung attended along with Mr. Dawson and Ms. Moist from Human Resources. Ms. Hung's evidence was that the meeting centred on the content of the forms (both the voluntary reassignment form and the medical restriction form) that had been used on the prior occasion that Schedule J was activated, which was in 2011. Mr. Dawson testified, and an email string (Exhibit 27) confirmed, that Ms. Hung was provided with copies of the 2011 forms on February 14th. Ms. Hung identified a number of concerns with the 2011 forms (Exhibit 28) which she understood – based on the forms themselves – was only asking for an election about reassignment and did not address redeployment as an option. Mr. Dawson testified that there was also some discussion of the possibility of lay off of WAPSO members, and that there was disagreement between himself and Ms. Hung as

to the circumstances under which that might occur in the context of a labour disruption.

The evidence was not in dispute that the final forms created and rolled out to WAPSO employees were substantively different from the 2011 forms discussed with Ms. Hung on February 15th, and that the 2017 forms were not approved by WAPSO or shared with them prior to being rolled out. In Mr. Kirby's evidence he suggested that the 2017 forms had been approved by WAPSO, but his understanding in that regard was mistaken. It was also not in dispute that WAPSO was not further consulted with about the Schedule J roll out or advised of the updated anticipated timing of that roll out to its members.

An email from Ms. Roberta Marsh, Senior Manager Human Resources Services at the City, dated February 27, 2017 went out to all WAPSO members advising them of the existence of "My Reassignment" forms within the human resources self-serve software and stating in part: "Forms are to be completed by 4:30 p.m. on Wednesday March 1, 2017." The forms, which consisted of the election page and the medical information page if necessary were hyperlinked to the email. The election form was entitled "Voluntary Reassignment\Redeployment Form" and the election WAPSO employees were asked to make was:

> Are you prepared to accept reassignment\redeployment if required?

There was only the ability to say yes or no to the above question in its entirety. This language is in contrast to the question asked on the 2011 version of the form, which although it bore the same title asked only:

> Are you prepared to accept reassignment if required?

Although WAPSO did not get a copy of the updated form from the City before it was rolled out to their membership they were provided with copies from a number of their members. Ms. Gillies testified that employees were required to make the election about reassignment and redeployment in order to be able to submit the form. A significant concern from the Union's perspective is that the terms reassignment and redeployment are used interchangeably in the form and there is no ability for the employee to elect to do one and not the other. This, as pointed out above, distinguishes the form from the 2011 version where employees were only asked to elect whether they were prepared to be reassigned.

Shortly after she returned from vacation on March 6, 2017 Ms. Gillies began to receive expressions of concern from her members about the forms and the direction that all employees had to make an election about reassignment and redeployment. Ms. Gillies sent an email to Robert Kirby, the City's Manager of Labour Relations on March 13, 2017 (Exhibit 13) setting out WAPSO's position that it was premature to ask their members to make an election on volunteering for reassignment as there had been no 'triggering event' as required by Schedule J. This position was also communicated by WAPSO to its members on several occasions, the latest of which was March 13, 2017. Mr. Kirby responded the following day (Exhibit 14) disputing this position and requesting WAPSO to rescind its position to its members that they were not required to make an election at that point.

While WAPSO has not changed its view of the operation of Schedule J, when it became clear that the parties fundamentally disagreed on the timing and circumstances of the City's ability to invoke the need to make an election, WAPSO members were advised to comply with the direction to fill out and submit the form and that the matter would be dealt with as a grievance. Both

Ms. Gillies and Ms. Hung testified to their view that their members could be facing discipline for failing to complete the form as directed. A WAPSO member testified that he received a personal visit from a member of the City's Human Resources department about the fact that he had not to that point filled out the form. He took this visit as a threat that he would be disciplined if he continued to fail to do so. I also heard evidence from that individual and another WAPSO bargaining unit member that their Director had told them that if they did not elect reassignment\redeployment as set out on the form they would be laid off. Neither individual was challenged on their evidence. A third WAPSO member testified and confirmed that he received a voicemail message from Human Resources telling him he was required to fill out the form and make an election, after he had held out initially on submitting the form.

Ms. Gillies clarified in her testimony that WAPSO was not particularly concerned about the City's request for a skills inventory, which was done in conjunction with the required election. The Union understands why the skills inventory would be useful for advance planning and agrees that an employer can request such an inventory or update of its employees in the normal course.

WAPSO is concerned, in addition to its view that the direction to make an election about reassignment was premature, that its members could not rescind their election once made, and further about what safeguards had been put in place to ensure confidentiality of an individual's election. There was no dispute in the evidence that WAPSO members were not able to electronically change their response from 'yes' to 'no' and vice versa on the forms contained in Peoplesoft. A letter dated February 28, 2017 from Mr. Michael Jack, the City's Chief Corporate Services Officer, to Mr. Michael Robinson, WAPSO President stated clearly that a WAPSO member would not be able to withdraw from their acceptance of reassignment\redeployment unless they were invoking

paragraph 6 of Schedule J, which allowed a member to report a health and safety concern about their placement.

Mr. Kirby confirmed in his testimony that there was a concern about people changing their election during the training aspect of Schedule J, but deferred to Human Resources on the process of the roll out. There was evidence from Ms. Marsh that WAPSO executive had been advised at the end of March that the City was keeping a list of those employees who had indicated that they wanted to change their election at the departmental level. There was no evidence that WAPSO members had been similarly advised by the City.

An email string between a WAPSO member and Ms. Chamberlain of the employer's Human Resources department dated March 13, 2017 (Exhibit 17) reflected the City's position at that point in time that a person could not change their election once submitted. This is consistent with the message in Mr. Jack's correspondence. Ms. Chamberlain's response to the member was:

> Changes can only be made to the form when you would like to add/delete a particular skill or certificate/licence. Otherwise submissions are considered final.

Ms. Gillies testified that she had been made aware of other situations where members had also been told that they could not change their elections once made, which she understood had continued until at least June 6, 2017. An email string between a bargaining unit member and the City's human resources department dated June 6, 2017, confirmed that this position was still being taken. However, later that same day another Labour Relations Officer with the City advised WAPSO that in fact their members could change their election.

It seems clear that the message being sent to WAPSO members until at least June 6, 2017 from the individuals in Human Resources that they were directed to contact was that they could not change the election that they had made on the reassignment\redeployment form, particularly if that change was from a "yes" to a "no". I do not accept that there is any requirement on WAPSO leadership to advise their members about the apparent process of keeping a list of persons wanting to change their election. There was no indication in the City's evidence that this information was provided to WAPSO membership. I did not hear from either Ms. Moist or Ms. Chamberlain, who were the individuals identified on the various emails rolling out Schedule J as those who should be contacted in the case of questions.

There was a Labour Management meeting between WAPSO and the City on March 22, 2017 where WAPSO asked which departments would be closed in the event of a CUPE labour disruption and were apparently not provided with an answer. Ms. Gillies testified that WAPSO members were reporting that they were being told that their departments would be closed and they would be laid off if they did not elect reassignment. I was told that not all of the positions in the bargaining unit supervise CUPE employees, and very few members have no duties other than the supervision of CUPE employees. This evidence was not challenged on cross examination.

Ms. Gillies provided copies of emails to employees in the Water and Waste and Planning, Property and Development departments dating from the first week in April which advised which services within each were deemed to be essential and thus would be continuing in the event of a labour disruption. None of this information was provided directly to WAPSO by the City.

Ms. Marsh testified that after the original canvassing email went out to WAPSO membership late in the day on February 27, 2017 there were a significant number of individuals who had not responded. Accordingly, a second email was sent out on March 10, 2017 as a reminder. This email (Exhibit 19) contained an additional note, added due to what was perceived as confusion respecting who was required to fill out the forms:

> Completion of these forms is required even if your work is deemed an essential service. Those performing essential services may perform work that would have been performed by our fellow employees who belong to the CUPE bargaining unit.

A third and final email was sent out on March 21, 2017 to WAPSO members which contained direction to all employees that it was "... imperative that you complete this form immediately and before March 23, 2017 at 4:00 p.m.". This email also contained a statement that if an individual's WAPSO position was not continuing in the event of a labour disruption and the person did not accept reassignment or redeployment they would be laid off.

It should be noted as well that the message contained in these two emails about changes to the form is consistent with the message contained in the email from Ms. Chamberlain to a member about the ability to change only the skills inventory or health information.

The only other City bargaining unit that was in a strike or lockout position in February of 2017 was CUPE. Ms. Gillies testified about her understanding of the status of negotiations between CUPE and the City at the relevant time periods. In addition Mr. Gordon Delbridge, the president of CUPE Local 500 gave evidence. Mr. Delbridge provided a letter, dated May 30, 2017 to Ms. Gillies setting out a timeline of steps taken in bargaining between CUPE and the City to that date. It is apparent from this timeline, as well as the evidence from Mr.

Delbridge that the first meeting, at which bargaining proposals were to be exchanged, took place on February 6, 2017. At this initial meeting the City apparently advised CUPE that it would not pay the CUPE bargaining committee for the meetings, which came as a surprise to CUPE given past practice in this regard, and resulted in some difficulty in scheduling meeting dates subsequently. This position on payment of the committee was later modified by the City.

The initial meeting was quite short by all accounts, and the proposals tabled by the City sought a number of concessions from CUPE. CUPE and the City met again on February 8, 2017, which meeting was again fairly brief and essentially not very productive. The City unilaterally applied for conciliation on February 8, 2017and a conciliator was appointed by the Province the following day. The City also filed an unfair labour practice against CUPE alleging a failure to bargain in good faith on February 27, 2017 which was the same day that the email respecting Schedule J went to WAPSO members.

Mr. Kirby characterised the bargaining as unproductive until after the conciliator got involved and testified that both he and his team were of the view that CUPE was refusing to continue bargaining after the initial meeting dates by cancelling scheduled dates and declining to meet face to face with the City's bargaining team. He further articulated his opinion - which again was that of his team – that as of the time when Schedule J was activated in February of 2017 there was a realistic threat of a strike or lockout. As a result the City's Service Continuity Operations Committee ("SCOC") – which I understand is tasked with planning for the event of a labour disruption affecting City Services – moved into more intensive meetings, which were occurring once or twice weekly from mid-February until the tentative contract reached with CUPE was ratified by both

sides. Ms. Marsh, who was also on the City's bargaining team, echoed these views in her testimony.

Mr. Kirby also testified about the number of employees needed to maintain what the City considered as essential services during a CUPE strike or lockout, and as well about the time needed to implement planning for such a labour disruption. He said that between five and six hundred employees from WAPSO and exempt ranks would be needed. While he did not discuss in detail the amount of time required for each of the essential services, Mr. Kirby testified that six to eight weeks' lead time was needed for the treatment of drinking and waste water to be covered. There was no dispute from WAPSO's witnesses to the general proposition that significant time would be needed to plan for and mobilize personnel to cover the list of essential services contained in Schedule J. It was however Mr. Thiessen's submission that this was not WAPSO's problem, that is Schedule J does not go that far and there is no stand alone obligation on WAPSO to assist the City in its' planning for the continuation of essential services in the event of a strike by CUPE.

One of the threshold issues is whether the City can unilaterally decide that a threat of a strike or a lockout exists and use that decision point as the trigger to invoke the procedures contained in the Schedule. In his evidence Mr. Kirby stated that in the City's view it was their right to make that determination, particularly as of the two parties signatory to Schedule J only the City would likely have the necessary knowledge of the bargaining landscape to do so. It was also clear from his evidence that although the right to 'trigger' Schedule J is unilateral in the City's view, the conclusion that a strike or lockout was imminent had to be objectively reasonable.

DECISION

The first issue to be determined is whether I have jurisdiction as a labour arbitrator appointed under the Act to enforce sections 16 and\or 17 of the Act by determining that unfair labour practice(s) have occurred. As indicated in his opening remarks, Mr. Thiessen takes the position that I do, however in final argument he pointed out that as section 16 is expressly incorporated into Schedule J (including the reference to a violation being an unfair labour practice) I could make such a finding pursuant to the collective agreement. Mr. Thiessen also argued, respecting both sections 16 and 17 of the Act, that I would have the jurisdiction under section 80 of the Act – which codifies the duty to act reasonably, fairly and in good faith – to find a violation even in the absence of the ability to declare that an unfair labour practice had occurred.

Mr. Jacobs argued that I have no jurisdiction to find that an unfair labour practice has occurred, and that even if I did have the jurisdiction I ought not to exercise it. He further submitted that because the language of section 16 of the Act is contained in the preamble to Schedule J and not the body of the schedule it is not a substantive provision of the Schedule and accordingly cannot support a remedy. In any event, he took the position that neither section 16 nor 17 was engaged as a result of the facts in this case as no adverse action occurred in relation to WAPSO employees. Put another way, neither section has prospective application. He also strongly submitted that the totality of the evidence showed that the City had acted reasonably and in good faith and that section 80 was not violated.

Mr. Thiessen urged me to apply the Supreme Court's dicta in and *Parry Sound v. O.P.S.E.U., Local 324*[1] to allow for a determination that jurisdiction exists for an

[1] 2003 SCC 42; 2003 CarswellOnt 3500

arbitrator to enforce rights under the Act. While this is an intriguing question, I think I can deal with the issues raised in this grievance by reference to the terms of Schedule J itself and do not need to decide if I have jurisdiction to determine that an unfair labour practice has occurred. In this regard, I do not agree with Mr. Jacobs that section 16 of the Act is present in Schedule J only as context, as the final recital specifically incorporates the preamble by reference into the substantive aspects of the Schedule.

The questions surrounding the roll out of Schedule J can be identified as:

1) Whether the trigger contained in Schedule J of a 'threat' of a work stoppage or lock out can be determined by the City unilaterally;

2) Whether the trigger contained in Schedule J was prematurely determined to exist;

3) What is the extent of the requirement under Schedule J and\or section 80 of the Act for consultation with WAPSO in the roll out of Schedule J;

4) Was there meaningful consultation with WAPSO on those aspects of Schedule J where the obligation to consult exists;

5) Was the conflation of redeployment and reassignment on the form permissible under Schedule J or otherwise;

6) Was the direction to respond to the question of redeployment at all given the wording of Schedule J permissible;

7) Was widespread as opposed to focussed dissemination of the reassignment form permissible under Schedule J;

8) Was the pressure brought to bear on WAPSO members who did not make the election within the deadlines in the form of visits or calls from Human Resources/their managers directing them to submit the form a violation of Schedule J and\or section 80 of the Act;

9) Was the apparent inability of employees to change their election once made until very late in the process if at all a violation of Schedule J and\or section 80 of the Act.

As pointed out by both parties, due to the fact that Schedule J is such an unusual group of provisions to be contained in a collective agreement, there was little or no jurisprudence that was on point.

Whether the trigger contained in Schedule J of a 'threat' of a work stoppage or lock out can be determined by the City unilaterally.

Mr. Kirby's position on this threshold issue for the deployment of Schedule J is that of the two parties signatory to the Schedule only the City is able to realistically make a determination on whether a threat of a strike or lockout exists with another bargaining agent. He also stated, however, that this determination must be objectively reasonable. Schedule J does not contain any language dealing directly with this issue. As pointed out by Mr. Thiessen in his submissions, the preamble to Schedule J contains a recital which reads:

> ... the parties recognize the mutual benefit of advance planning in order to prepare for the continuation of essential services in the event of a strike by another civic union, and to inform and prepare employees in advance for their role in and the impact upon them of a strike by another civic union.

The union's submission suggested that this recital – which is also incorporated by reference into the body of the Schedule – should inform and even expand the consultative role for WAPSO contemplated by the Schedule. While I agree that this aspect of the preamble reinforces the explicit consultation aspects in the Schedule, I do not agree that it goes so far as to include WAPSO in the determination of when the processes set out in the Schedule are triggered. The right to ask employees to perform the work of their struck co-workers is at its core

a management right, which is no doubt the reason that the Act provides significant protection for employees who are asked to make such a choice. As a management right, unless the collective agreement takes away or fetters that right, it can be exercised without the consent of or consultation with the union as long as that is done reasonably and in accordance with section 80 of the Act.

Against this legal backdrop, I agree with Mr. Kirby's characterization of how Schedule J should be triggered. WAPSO is not directly involved in the City's bargaining experience with another bargaining unit and will of necessity be getting its information second hand – either through the media or contact with individuals involved in that bargaining. It does not make sense to me in this context that the parties would have agreed that WAPSO have the ability under Schedule J to take part in a determination that a threat exists from another bargaining agent. To the extent that the basic circumstance being addressed in Schedule J is a management right, in my opinion there would need to be much more specific language allowing WAPSO to weigh in on the existence of a threat.

Whether the trigger contained in Schedule J was prematurely determined to exist.

The more difficult question in my view is whether the City's determination in February of 2017 that a realistic threat of a strike by CUPE existed was objectively reasonable. It is clear from the evidence that the time frame in which this decision was made was mid to late February of 2017, at which point only two bargaining sessions with CUPE had taken place. Both were non-productive by all accounts, and were followed by the cancellation of additional scheduled

meeting dates by the CUPE bargaining team and difficulty in rescheduling those dates. After the second short meeting the City almost immediately unilaterally applied for conciliation – a conciliator was appointed on February 9, 2017 and began working with the parties. The City felt strongly enough about CUPE's perceived refusal to engage in bargaining that they filed an unfair labour practice alleging a failure to bargain in good faith at the end of February.

Contrary to what was suggested by Mr. Thiessen in his argument, I do think that the fact the City was faced with providing essential services to a City the size of Winnipeg is relevant to the amount of lead time City administration can take into account when deciding if there is a threat of a strike. It would be irresponsible for the City to leave such a determination to the last minute and then be faced either with not being able to provide required core services or having to accede to improvident demands at the bargaining table because a strike could not be allowed to occur. Much was made in evidence and in argument of the use by the City of the phrase "... in the unlikely event of a labour disruption" when introducing the topic of a strike or lockout in communications with its employees and outside parties, such as the media. With due respect to Mr. Thiessen this is clearly rhetoric for the audience and does not influence my view of whether a strike was or was not imminent.

Similarly, the suggestion in argument that because the level of threat ebbed and flowed throughout the spring and early summer along with the progress at the CUPE bargaining table that ought to have either interrupted or stopped the roll out of Schedule J is not realistic given the size and complexity of the undertaking the City was required to deal with in the circumstances. Once a reasonable determination has been made that a threat of a labour disruption exists, that determination does not need to be revisited in my view, at least not in the circumstances which existed in this matter. I do not think that the

mechanics of Schedule J require or contemplate withdrawal once it is invoked even if things temporarily improve.

I had more difficulty dismissing WAPSO's submission that the City brought the threat on itself by the manner in which it approached bargaining with CUPE. Looking at the situation in hindsight it seems to me that the City's actions in taking an aggressive concession based opening position in bargaining, coupled with the refusal to pay the CUPE bargaining committee for meeting contributed to the existence of the threat and perhaps even escalated the situation to the point of where a threat was objectively in existence. It is however important to note that both Mr. Delbridge and the City's witnesses characterised the bargaining as hard but not unfair.

I think that in order for me to make a finding that the determination of the existence of a threat – and the coincident roll out of Schedule J – was not *bona fide* because it was self-inflicted I would have to find that the City's approach to bargaining with CUPE was in bad faith. CUPE did not take that position in the evidence given by its' President and further I did not get that impression from the evidence of Mr. Kirby. I did get the overall impression that – rightly or wrongly – Mr. Kirby and his team were surprised by the reception of their bargaining strategy by CUPE and that a level of panic set in institutionally about the ability of the City to provide essential services if a strike ensued. I think that this set the stage for the problems that occurred with the activation of Schedule J.

Accordingly, it is my view that the decision by the City to trigger Schedule J in February of 2017 was reasonable and not in violation of Schedule J, given the circumstances at the time.

What is the extent of the requirement under Schedule J and\or section 80 of the Act for consultation with WAPSO in the roll out of Schedule J?

As mentioned above, the right to ask employees to perform struck work is a management right, the exercise of which is governed by the parameters of Schedule J and the protections contained in the Act. That being the case, I do not think that there is an implied or overarching right of consultation even taking into account the recital above. Mr. Thiessen submitted that the scope provisions of the collective agreement, along with article 9 ("Changes in Working Conditions or Provisions") and article 12, which creates a joint Management Relations Committee provided a broader right of consultation in the deployment of Schedule J. Except to the extent that the Management Relations Committee is expressly referenced, as discussed below in relation to paragraph 6 of the Schedule, I do not agree. Mr. Jacobs submitted that article 9 deals in a general fashion with more permanent changes to existing positions as well as the addition or deletion of positions and that the specific language in Schedule J ought to prevail. I agree with this point – article 9 does not apply to or modify Schedule J in my opinion.

However, Schedule J does contain explicit consultation requirements in paragraphs 4 and 6. There is no disagreement between the parties that the law provides that consultation must be meaningful, although the consultation obligation does not mean that agreement must occur. The salient portions of paragraph 4, which is entitled "Canvass for Volunteers for Reassignment" are reproduced for ease of reference:

> Where, in the City's determination, the employee's duties and responsibilities do not continue, WAPSO agrees that the City shall ask these employees if they object or not to performing the work of striking employees. Where any employee is prepared to accept suitable alternate duties performing essential services as determined and assigned by the City which may involve the work of striking employees, such employee shall be so reassigned. For

> planning purposes in this regard, the City, in consultation/discussion with WAPSO, will develop a "Volunteer Reassignment Form" which will request information relative to skills and experience.
>
> In addition, where health/medical information is required to ensure that reassignments/redeployments are appropriate and do not endanger individual health and safety, the City, in consultation/discussion with WAPSO will develop a separate form for this purpose. This form will be kept separate from the "Volunteer Reassignment Form" and will be sent directly by the employee to Occupational Safety and Health (OSH) where the information contained thereon will be kept confidential.

It is obvious, and indeed not in dispute, that the City must consult with WAPSO in the development of the "Volunteer Reassignment Form" which is the form that asks employees "... whether they object or not to performing the work of striking employees." It is also not in dispute that the City and WAPSO are obliged to consult on the health and medical information form.

Paragraph 6 of Schedule J is less obvious in terms of the obligation to involve WAPSO in any consultation that occurs respecting redeployment and\or reassignment of individual employees. Paragraph 6 reads in its entirety:

> The City will endeavour to redeploy and/or reassign employees to areas of work which do not exceed their expertise or capabilities. Such redeployment/reassignment will be communicated to individual employees with as much advance notice as possible.
>
> The City agrees to consult with employees so far as possible and practical regarding the position to which they will be redeployed and/or reassigned.
>
> In the event an employee believes that the reassigned work places him or her "at risk" with respect to health and safety, he or she may puruse the matter to the Occupational Safety and Health Division for review and determination.

> Any concerns related to this Item #6 may be referred to the Management Relations Committee.

There is clearly an obligation to consult with the employee in question which is limited by the practicalities of the situation. I heard no evidence on this point but it seems to me that if an employee wanted to involve WAPSO in that individual consultation they would have that right. That is not to say that employees have the right to union representation in all matters between themselves and their employer, but where the topic is agreeing to do struck work common sense suggests that WAPSO's involvement is reasonable. In addition, paragraph 6 provides that "Any concerns related to this item #6 may be referred to the Management Relations Committee." This is a joint Committee constituted under article 12 of the collective agreement as referenced above, and composed of equal numbers of management and WAPSO representatives. The fact that concerns relating to redeployment or reassignment are to be dealt with by the Management Relations Committee, in concert with the recital that references the mutual benefit of advance planning leads me to conclude that WAPSO does have the right to involvement and consultation along with the employee affected in individual cases.

Was there meaningful consultation with WAPSO on those aspects of Schedule J where the obligation to consult exists?

As determined above, the rights of consultation created by schedule J are limited to those under paragraphs 4 and 6. There was no argument advanced by WAPSO that a violation of paragraph 6 occurred so I will deal only with the rights under paragraph 4. WAPSO took the position that the lack of advance notice of the meeting to review the forms and the perfunctory nature of that meeting, along with the undisputed fact that the Voluntary Reassignment Form was materially changed after the meeting and without further consultation constituted both a violation of Schedule J and of section 80 of the Act. WAPSO

further took the position in relation to its' submissions that there is a more robust consulting role in the deployment of the Schedule that the failure to involve WAPSO at all after the February 15th meeting was both a violation of the letter and spirit of the Schedule as well as of section 80 of the Act. I will comment on the aspect of this submission alleging a violation of section 80 in the overall manner of deployment of Schedule J.

The evidence respecting the notice of consultation was not in dispute and included the fact that the initial emails from Mr. Dawson suggested essentially no consultation, that is the forms were being deployed immediately with or without WAPSO's review. I appreciate that this approach was softened by the time that the meeting took place, but there is no question in my mind that the original plan – of deployment within 24 hours of the original letter and without even a response from WAPSO having been received – does not meet the definition of meaningful consultation.

What actually took place was that the 2011 forms were shared with Ms. Hung the day before the meeting, along with the advice later that day that the forms would not be deployed immediately. The City, both through evidence and in argument took the position that the forms used in the 2017 activation of Schedule J were more or less 'dusted off' from the previous time they had been used in 2011 and thus little consultation was realistically necessary. I think that had the 2011 Voluntary Reassignment form not been substantively changed *after* Ms. Hung reviewed the forms with Mr. Dawson and Ms. Moist on February 15, 2017 this would have been a valid approach. Although the lead time given to Ms. Hung was quite brief, and the urgency conveyed in the February 14th email from Mr. Dawson may have caused Ms. Hung to abbreviate her review, she did not ask for more time to consider the documents. There was no indication in her evidence that she was not able to air her concerns – which

were primarily about the medical form – at the February 15th meeting. I would not want the parties to take away from this award a general proposition that one or two days' notice would be sufficient to comply with the obligation to consult – however in these circumstances, if the Voluntary Reassignment Form had not changed after the meeting, I would have been satisfied that the consultation on the forms was in compliance with Schedule J.

However, the evidence is not in dispute that WAPSO was not provided with advance – or as it turned out any – understanding of the changes the City ultimately made to the previously utilized Voluntary Reassignment Form. Joint review of the 2011 forms was a reasonable starting point as discussed above, but there is no question that material changes were made to the form after that review which were not discussed at the February 15th meeting. The most significant of these was the conflating of reassignment and redeployment as a requirement to elect. Given the legal and practical difference between reassignment and redeployment as those terms are defined in Schedule J - one triggering the protections of section 16 of the Act and the other not – the failure to consult with WAPSO on this change constitutes a violation of the language of Schedule J.

I am not prepared to find that the failure to consult on the updated forms was in bad faith or in violation of section 80. I think the City's dealing with the forms was less thoughtful than it might otherwise have been due to the perceived urgency of the situation. This was unfortunate as in retrospect, had the change to an omnibus election for reassignment and redeployment been aired with WAPSO it is likely this aspect of concern would have been dealt with before the process was rolled out to employees. The conflation of these two significantly different concepts in my opinion drove a number of the other challenges that emerged in the activation of Schedule J.

Was the conflation of redeployment and reassignment on the form permissible under Schedule J or otherwise?

It will be fairly evident from the answer to the above question that I do not think that the two terms can be validly conflated when an employee is being asked about their willingness to perform the work of striking co-workers in a different bargaining unit. While it is perfectly permissible for an employer to ask the question as long as they are not in violation of the Act in how that is done, it is not permissible in my opinion to be unclear about whether and to what extent an employee's agreement is committing them to perform struck work.

It is apparent from the language of Schedule J that the canvassing of WAPSO members which may occur in the event of a strike (as defined in the schedule) is agreed to be for the purposes of "reassignment". The clearest statement of this is in the first sentence of paragraph 4, which states in part: "... the City shall ask these employees if they object or not to performing the work of striking employees." The fact that an employee may end up doing partly struck work and partly redeployed work is specifically recognized further on in paragraph six and makes sense in the context of what may realistically occur in the delivery of essential services during a strike. This does not mean that it is acceptable to conflate the question in the first place however. Doing so obscures the critical question of whether the employee consents to perform struck work at all and more importantly may invalidate that consent if given in answer to the combined question.

It is therefore my view that the terms should not have been conflated in the 2017 election form and that the only election contemplated by Schedule J is whether an employee will agree to volunteer for reassignment. The fact that the terms

were combined created reasonable confusion in the minds of WAPSO members as to what they were volunteering for, and also resulted in the results of the canvass being less reliable on the pure issue of reassignment. Neither of these facts assisted in a smooth roll out of Schedule J.

Was the direction to respond to the question of redeployment at all given the wording of Schedule J permissible?

While the term "redeployment" is defined in Schedule J, and has a place in what may occur as part of a Schedule J implementation it is also very clearly a different concept from reassignment and does not involve Section 16 of the Act. As such, it is arguable whether an employee is even required to volunteer for redeployment or whether the City could simply direct that individual to perform the alternative duties as long as it was safe for the person to do so and they were qualified or trained for the duties. This being the case I think that it would be permissible, although perhaps not necessary, for employees to be asked whether they were prepared to be redeployed as that term was defined in Schedule J.

Ms. Marsh took the position in her testimony that there realistically would be no opportunity for pure redeployment, that is in all cases where an employee was performing different duties from their home position there could or would necessarily be some aspect of struck work involved. I think that this position was taken primarily in defence of the conflation of the terms in the Voluntary Reassignment Form however if it is accurate there would be no need for employees to be canvassed for redeployment at all.

Was widespread as opposed to focussed dissemination of the reassignment form permissible under Schedule J?

WAPSO has argued that the City could not require any employee to respond to the canvass for volunteers until such time as a determination had been made as to which employees would continue to work in their positions during a strike and which employees would not. The canvass should then have been restricted to those persons whose duties had been determined would not continue, and not been disseminated to all WAPSO members as it appears occurred. Paragraph 4 of Schedule J begins with the phrase:

> Where, in the City's determination, the employee's duties and responsibilities do not continue, WAPSO agrees that the City shall ask these employees whether they object or not...

The language used in this sentence certainly supports Mr. Thiessen's point that the activation of Schedule J requires the City to focus on which departments and which employees in the WAPSO unit would be affected in the event of a strike, and to tailor its' canvass accordingly.

The evidence from Mr. Kirby was that the SCOC was considering the issue of which departments and which activities within departments would continue in the event of a strike or lockout, which is both common sense and consistent with the approach set out in Schedule J. There was also evidence from both Ms. Hung and Ms. Gillies that the City advised during the March 22, 2017 Labour Management meeting that it had determined which departments would be operating in the event of a labour dispute, although that was after the first two emails to employees about the Schedule J election and coincident with the third. It is worth noting as well that Schedule J contains a list of some of the departments which would continue to operate in the event of a strike or lockout. It seems obvious that WAPSO members employed in departments felt to be essential would be most likely continuing in their roles. It further seems likely that at the time the original email went to WAPSO members implementing

Schedule J the City would have had an understanding of which departments would be operating and which would not, although perhaps not a detailed plan of all affected duties and roles.

Given the timing and complexity of the undertaking I do not think that the City can be found to be in violation of Schedule J if it canvasses more broadly rather than less that is, it errs on the side of asking people whose positions might later be determined to be necessary, but I do think that sending the email to all WAPSO members when it is obvious that some of them would be continuing in their roles sent the wrong message and is not in accordance with either the language or the spirit of Schedule J. As with the post consultation amendments to the Voluntary Reassignment Form it is likely that the overly broad approach to dissemination of the request was the product of haste and lack of experience with the Schedule J process as opposed to bad faith but the impact on the WAPSO bargaining unit was detrimental.

Was the pressure brought to bear on WAPSO members who did not make the election within the deadlines in the form of visits or calls from Human Resources/their managers directing them to submit the form a violation of Schedule J and\or section 80 of the Act?

Was the apparent inability of employees to change their election once made until very late in the process if at all a violation of Schedule J and\or section 80 of the Act?

In his submissions Mr. Thiessen submitted that four points established clearly by the evidence constituted violations of sections 16, 17 and\or 80 of the Act. These four points were the threat of discipline for not electing (which included the threat of layoff), the lack of real choice given the conflation of the options on the Voluntary Reassignment Form, the *de facto* inability of employees to change their minds once the form was submitted, and the promise of reward for taking struck work which was created by the working condition improvements

contemplated in the body of Schedule J for those who worked during a strike. I have already addressed the issue of conflation of the choice, but will deal with the other three points.

While the fact that the working conditions contained in Schedule J are in many ways superior to those in the balance of the collective agreement is undeniable, those conditions were negotiated by WAPSO historically and as such do not meet the requirements of section 17 of the Act, if I were inclined to the view that I had the jurisdiction to enforce section 17. It is also self-evident that section 80 is not triggered by the mere existence of negotiated language.

WAPSO conceded, and I agree that it is permissible for the City to advise people that if there is no work for them as a result of a strike or layoff in another civic bargaining unit they will be laid off where a 'well reasoned determination of which employees would not be needed' had occurred. Schedule J expressly contemplates the likelihood that some layoffs will occur in paragraphs 3 and 8. I agree as well with the general view of the City through its witnesses that warning WAPSO members of the possibility of lay off if they had not elected to be reassigned and where their regular positions would not be required in the event of a CUPE strike was reasonable and responsible. The difficulty arose in the manner of dissemination of that warning combined with the heavy handed way in which Schedule J was deployed.

I have dealt above with the problem created by seeking to have all WAPSO members, even those who would clearly be needed to do their own jobs in the providing of essential services, make the election on the Voluntary Reassignment Form. The consequence of proceeding in this fashion was that the mentioning of layoffs, particularly when done repeatedly, took on a more threatening aspect. That aspect became even more concerning when

coupled with the follow up addressed to those who had not responded to the original emails seeking their election on the Form. The unchallenged and uncontradicted evidence from WAPSO was that its members felt pressured by personal approaches directing them to make the election and became concerned that a failure to do so might subject them to discipline. Visits and voicemail messages from Human Resources directing individuals to make their election, along with language such as "... it is imperative" that this be done in the final email rises to the level of threat in my view.

While there is no suggestion that individuals were specifically told they had to agree to reassignment\redeployment, WAPSO argued that this pressure, in concert with references about layoffs created that impression. I agree that was the result, whether or not it was the intention of the City to telegraph or pressure a particular response by the manner of implementation of the election portion of Schedule J. The evidence given by the City's witnesses that a large majority of WAPSO members chose 'yes' on the election form is therefore not surprising, and given the lack of clarity in the election along with the implicit direction to the desired response should have been more concerning to the employer.

I have already determined that the evidence supports WAPSO's contention that employees were not able to change their election once made or at least were being advised that they could not by the City. This inability persisted until very late in the process and combined with the facts that the question being asked was unclear on the topic of reassignment and that a 'yes' answer to the election was being telegraphed by the employer is very concerning.

Section 16, which is incorporated by reference into Schedule J, operates with the language of the balance of Schedule J to protect the right of employees to refuse struck work of their co-workers represented by another civic union. In

Grundy v. British Columbia Telephone Co.[2] the Canada Labour Relations Board, in discussing the issue of employees performing struck work set out the purpose of a section similar to our section 16 at paragraph 48:

> As a general conclusion, section 184(3) recognizes the intensity of feelings among employees to adhere to privately held or union advocated principles of not doing the work of others on strike. The employee's motivation is irrelevant. It may be a matter of principle, or merely a matter of avoiding conflict with fellow employees, or feeling that the performance of some struck work is beyond current knowledge or skills, or for some demeaning, or ...merely not wanting to become involved. It could be any of a number of other reasons. The Code allows the employer to seek to operate and perform the work of employees on strike. At the same time it allows other employees to choose whether they will be instruments through which the employer seeks to attain its bargaining goals.

There was no disagreement between the parties during the hearing that the right to refuse necessarily includes the right to rescind an initial agreement to perform struck work. This right can be exercised at any time, and while not explicit in Schedule J ought to have been recognized by the City at a much earlier point in the process. I did not hear evidence about why the process was designed not to allow reconsideration of an employee's election, however it is possible that a too literal reading of paragraph 6 led to that result.

In summary on this point, it is my determination that the City was in violation of Schedule J through the manner in which it was rolled out. Further, the combined effect of those violations created a reasonably perceived level of threat on the part of WAPSO members, particularly those who were reluctant to submit the Voluntary Reassignment Form and therefore delayed in doing so. This constituted a violation of the duty to act reasonably in the administration of the collective agreement contrary to section 80 of the Act.

---

[2] 1981 CarswellNat 732; [1982] 1 Can. L.R.B.R.326

WAPSO took the position throughout the hearing that the City ought to have involved WAPSO in the Schedule J process as that process unfolded, and further that the responses given to WAPSO leadership were dismissive and conveyed a disdain for any contributions WAPSO might have made. It can't be forgotten that during this time the City and WAPSO were in the latter stages of their own labour dispute which involved a dispute over the existence of Schedule J, albeit one that had gone to interest arbitration. While that reality provides an explanation for the adversarial nature of the relationship between WAPSO and the City during this period it also adds to the level of uncertainty and concern that existed in WAPSO members.

The most difficult question is that of remedy. While I have found that the City was in violation of both Schedule J and section 80 of the Act I am not prepared to conclude that what took place was in bad faith. The City was in a very difficult stretch of its relationship with both CUPE and WAPSO and no doubt much concern existed over the delivery of essential services in the event of a CUPE strike. While more consultation with WAPSO (even beyond that required in Schedule J) would likely have eased the roll out of Schedule J it is understandable given the adversarial nature of the situation at the time why that did not occur.

I am therefore allowing the grievance in part and making a declaration that the City was in violation of Schedule J in the following respects:

1) Failure to consult with WAPSO on the changes to the 2011 Voluntary Reassignment Form made after the February 15, 2017 meeting between the parties:
2) Conflating of the terms reassignment and redeployment in the election contained in the Voluntary Reassignment Form;

3) Failing to focus the request to make the election for reassignment to those employees who were likely not to be continuing in their home positions.

Further, I am declaring that the City was in violation of both Schedule J and of the duty to act reasonably in the administration of a collective agreement under section 80 of the Act in the manner in which employees who did not respond to the initial request to submit the Voluntary Reassignment Forms were approached, including the repeated mentioning of the prospect of lay off and the language of the follow up communications. Finally, the City was in violation of both Schedule J and of the duty to act reasonably created by section 80 of the Act in not allowing, facilitating and\or communicating the right of employees in the WAPSO bargaining unit to change their minds once the form was submitted.

In the circumstances, I am not ordering damages as requested by WAPSO.

Dated at Winnipeg, this 20th day of October, 2017

KRISTIN L. GIBSON, SOLE ARBITRATOR