Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, RETAIL WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 568 and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 558, Applicants v. CANADIAN LINEN AND UNIFORM SERVICE CO., Respondent

LRB File Nos. 062-02 and 090-02; May 5, 2004
Chairperson, James Seibel; Members: Brenda Cuthbert and Duane Siemens

For the Applicants: Larry Kowalchuk
For the Respondent: Larry LeBlanc, Q.C., and Jean Torrens

Certification – Amendment – Practice and procedure – Application for amendment in nature of consolidation different than more common application to amend exclusions or inclusions in bargaining unit description – Application for consolidation cannot be construed as unwarranted or disguised attempt to appeal existing multiple certification orders – Therefore, not generally necessary for applicant for consolidation amendment to establish material change in circumstances before application can be considered by Board.

Certification – Amendment – Evidence – Where existing individual units and proposed consolidated unit all represented by same union, not necessary for union to demonstrate support of employees affected.

Certification – Amendment – Practice and procedure – Where proposed consolidated unit is appropriate unit, satisfies preference for larger bargaining units and will likely result in enhanced labour relations stability without causing undue operational difficulty for employer, Board grants application for consolidation of two bargaining units.

***The Trade Union Act*, ss. 2(a), 3, 5(a), 5(i), 5(j) and 5(k).**

REASONS FOR DECISION

Background:

[1] Canadian Linen and Uniform Service Co. (formerly Canadian Linen Supply Co. Ltd.) (the "Employer") is engaged in the linen and uniform supply and cleaning business with branch plants in several Canadian provinces, including Saskatoon and Regina, Saskatchewan. Saskatchewan Joint Board, Retail, Wholesale and Department

Store Union and its Local 558 represent employees as the designated bargaining agent pursuant to separate certification Orders for each of the Regina and Saskatoon branch plants, respectively. The present applications by the certified bargaining agent are for amendment of both the Regina and Saskatoon certification Orders by amalgamation or consolidation of both bargaining units under a single certification order designating Saskatchewan Joint Board, Retail, Wholesale and Department Store Union as the bargaining agent, pursuant to ss. 5 (i), (j) and (k) of *The Trade Union Act*, R.S.S. 1978, c. T-17, (the "*Act*").

[2] Pursuant to an Order of the Board dated January 26, 1994 (the "Saskatoon certification Order")[1], Retail, Wholesale and Department Store Union, Local 558 was designated as the certified bargaining agent for a unit of employees of Canadian Linen Supply Co. Ltd in Saskatoon (the "Saskatoon bargaining unit"). The Employer's Saskatoon operation was originally certified by the Union in 1948, and has remained continuously so since that time through the successions and name changes of the Employer. The description of the Saskatoon bargaining unit is as follows:

> *all employees . . . except the Branch Manager, Service Manager, Sales Manager, Service Supervisor, Office Manager, Production Superintendent, one (1) Assistant Production Superintendent, Chief Engineer, two (2) Route Supervisors, two (2) Linen Sales Persons and one (1) Customer Retention Manager*

[3] The collective agreement currently in place for the Saskatoon bargaining unit is for the term January 1, 2002 to December 31, 2004 (the "Saskatoon collective agreement"). The scope clause in the Saskatoon collective agreement differs somewhat from the scope of the Saskatoon certification Order as follows:

> *all employees . . . except the Branch Manager, Service Manager, Sales Manager, two (2) Service Unit Managers, Office Manager, Assistant Office Manager, Production Superintendent, Management Trainee, Chief Engineer, two (2) Route Supervisors, Linen Sales Persons and C.I.P. Account Co-ordinator*

[1] LRB File No. 249-93.

[4] Pursuant to an Order of the Board dated May 7, 1999 (the "Regina certification Order")[2], Saskatchewan Joint Board, Retail, Wholesale and Department Store Union was designated as the certified bargaining agent for a unit of employees of the Employer in Regina (the "Regina bargaining unit") described as follows:

> *all employees . . . except the general manager, office manager, assistant office manager, production manager, assistant production manager, chief engineer, sales manager, commission salespersons, customer service manager, customer service unit manager, customer service supervisors and customer service representatives/drivers*

[5] The collective agreement currently in place for the Regina bargaining unit expired December 31, 2002 (the "Regina collective agreement"). Retail, Wholesale and Department Store Union, Local 568, in Regina negotiated the agreement with the Employer. The scope clause in the Regina collective agreement is identical to the scope of the Regina certification Order.

[6] The employees covered by the Union's Regina certification Order were once included in a bargaining unit certified by Service Employees International Union, Local 299 ("SEIU"), pursuant to a certification Order made by the Board on November 8, 1988.[3] That certification Order was rescinded by an Order of the Board dated November 8, 1989.[4] SEIU also represented, and continues to represent, a bargaining unit comprising "customer service representatives/drivers" at the Employer's Regina branch plant pursuant to a certification Order made by the Board on December 16, 1980.[5] As noted above, the customer service representatives/drivers are excluded from the scope of the Union's Regina certification Order. The customer service representatives at the Employer's Saskatoon branch plant are included in the Saskatoon bargaining unit represented by the Union's Local 558.

[7] Following the presentation of the case on behalf of the Union, Ms. Torrens, of counsel on behalf of the Respondent, brought a motion for non-suit. The Board heard

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[2] LRB File No. 048-99.
[3] LRB File No. 227-88.
[4] LRB File No. 170-89.
[5] LRB File No. 349-80.

the arguments of the parties and reserved decision on the motion. The case on behalf of the Employer was then presented to and heard by the Board.

Evidence:

[8] Gary Burkart is a staff representative based in the Union's Saskatoon office. He has negotiated or assisted in the negotiation of every collective agreement with the Employer on behalf of the Union's Local 558 since 1980.

[9] Mr. Burkart testified that it had been his experience, since becoming involved in negotiations with the Employer in 1980, that any agreement made with the Employer's negotiation representatives was subject to ratification by senior management in the Employer's Canadian head office in Vancouver. However, he admitted that such a condition is not an uncommon requirement in collective bargaining. Referring to the current Saskatoon collective agreement, Mr. Burkart pointed out that the signatories on behalf of the Employer included, Dave Jess, general manager of the Employer's Saskatoon plant; Neil Nairouz, a vice-president of the Employer based in the Employer's Vancouver head office; and, Gary Johanson, a consultant with LMR Consultants Ltd. of Fort Saskatchewan, Alberta, under contract to the Employer. Mr. Burkhart also noted that the previous collective agreement for the Saskatoon bargaining unit was also signed by Mr. Johanson, as well as Mr. Nairouz's predecessor, Erwin Dyck and Mr. Jess's predecessor, Chris Froio. Mr. Burkart testified that Mr. Nairouz was the lead negotiator on behalf of the Employer for the current agreement (although he did not attend the initial meeting), while Mr. Dyck was the lead negotiator for the previous agreement. Mr. Johanson assisted in the negotiations for both agreements, while the general manager at the time, either Mr. Jess or Mr. Froio, made only infrequent comments during both sets of negotiations.

[10] The Employer apparently has standard operating policies as referred to in certain correspondence to the Union and a corporate "Statement of Business Ethics" both applicable to its operations across Canada. The Union became aware of the latter document after raising an issue about certain actions taken by the general manager of the Saskatoon plant. Mr. Nairouz, as the general manager's superior, advised Mr. Burkart to contact him directly in Vancouver regarding such concerns from then on. As a

contractor to federal government, with an obligation to adhere to the Federal Contractors Program administered by Human Resources Development Canada, the Employer developed a uniform employment equity policy applicable to and posted at each of its plants in Canada, which has been in place since 1999. Mr. Burkart testified that to effect any changes to such policies and documents requires negotiation with the principals at the Employer's Vancouver head office, but he agreed that it is not uncommon for national and international corporations to have company-wide policies.

[11] Kelly Miner has been a staff representative for the Union for about 11 years and has been responsible for the Regina bargaining unit since certification in 1999, including negotiations for the present first collective agreement which expired on December 31, 2002. She was the principal negotiator on behalf of the Union with respect to the Regina collective agreement. She pointed out that the signatories to the Regina collective agreement on behalf of the Employer include Garry Smith, general manager of the Regina branch, and Mr. Dyck, then district manager. Mr. Dyck, assisted by Mr. Johanson, appeared to Ms. Miner to be the lead negotiator on behalf of the Employer, although Mr. Johanson was initially introduced to her as the lead negotiator. Mr. Smith had very little to say during negotiations. The collective agreement was subject to ratification by the Employer's head office management.

[12] Ms. Miner testified that negotiations for the Regina collective agreement were tough. The Employer refused to meet and the Union filed an unfair labour practice application. The local general manager, Mr. Smith, had no authority to conclude an agreement or even to agree to dates for negotiations. The Union took a strike vote and obtained a strike mandate. The Employer countered with a notice of lock-out. The Union instituted work-to-rule and a ban on overtime in April 2000. Mr. Dyck attended in Regina to negotiate an end to the job action, which included an agreement to dates for conciliation in May and June, 2000 agreed to by Mr. Dyck. However, a crisis arose when some of the dates were put in jeopardy because of a scheduling conflict on the part of Mr. Johanson. Mr. Dyck intervened to resolve the difficulty.

[13] According to Ms. Miner, the Union's proposals for the Regina collective agreement were modeled on the Saskatoon collective agreement with the exception that, in Regina, the Union does not represent the customer service

representatives/drivers who are represented by SEIU. Until 1998, SEIU also represented the plant and engineering employees in a separate bargaining unit. In 1999, the Union obtained certification of the Regina bargaining unit, which includes those employees as well as the employees in the office, excepting the sales persons. Also, the Saskatoon certification Order excludes “management trainee” from the bargaining unit, while the Regina certification Order makes no mention of the position as an exclusion. However, it was not made clear as to whether there is any such position at the Regina branch.

[14] According to Ms. Miner, general meetings were held of the members of each of the Regina and Saskatoon bargaining units, at which a majority of the members of each bargaining unit agreed to a motion to amalgamate the bargaining units into a single unit and re-signed support cards in favour of representation by the Union.

[15] In cross-examination, Ms. Miner agreed that there are differences in the structures of the job classifications between the Regina and Saskatoon plants and there are some different issues and priorities in the negotiations on behalf of the two groups of employees. However, she maintained that the latter matter was at least partly attributable to the fact that the negotiations in Regina were for a first agreement, while the Saskatoon negotiations were in the context of a mature bargaining relationship.

[16] Garry Smith has been the general manager of the Employer’s Regina plant since 1996 and has been with the Employer since 1994. The Employer has four Canadian districts: Montreal, including the branches in the area east of the Ontario/Quebec border; Toronto, including the branches in Ontario; Calgary, including the branches in Alberta and Manitoba; and, Vancouver, including the British Columbia and Saskatchewan branches. Mr. Smith reports to Neil Nairouz, the district manager based out of Vancouver, as does the general manager of the Saskatoon plant, Mr. Jess. Mr. Nairouz reports to Mr. Landry, vice-president of Canadian operations in Oakville, Ontario, who in turn reports to the North American head office in Minnetonka, Minnesota.

[17] According to Mr. Smith, the revenue of the Regina plant is some 10 per cent greater than the Saskatoon plant, but the two plants have approximately the same number of personnel. The two plants are managed separately and maintain separate

financial statements and profit-loss accountings, submitted to the corporate head office in Minnetonka, Minnesota. There are standard operating procedures that apply to all branches; neither the Regina nor Saskatoon plant has unique policies. He has access to the financial results for any North American branch of the company, but the only formal sharing of such information between the Regina and Saskatoon plants is with respect to pricing in the Saskatchewan market. He and Mr. Jess speak infrequently about operational needs. Each branch develops its own reports regarding, budget, sales and marketing strategic planning, and capital requirements, which are submitted to senior management but not between the branches. There is no interchange or transfer of employees between the two branches.

[18] There is some communication between the Regina and Saskatoon branches as concerns issues regarding common customers. The national sales manager out of Ontario negotiates nation-wide or regional contracts with customers with national or regional operations, and provides the information to the affected branches. Otherwise, each branch operates within a defined trading area. In the case of Saskatchewan, Davidson is the north-south dividing line for the Saskatoon and Regina branch trading areas.

[19] The Regina plant, built in 1971, is on a single level; the Saskatoon plant, built in the 1950's, is three stories. There are five departments in the Regina plant: production (employees engaged in cleaning, repairs, custom fitting, identification labeling, represented by the Union); engineering (in-scope power engineer, janitor and vehicle mechanic, represented by the Union); office (in-scope clerks, represented by the Union); service (the customer service representatives who make pickups and deliveries, represented by SEIU); and, sales (out-of-scope commission sales representatives).

[20] According to Mr. Smith, Mr. Johanson was the lead negotiator on behalf of the Employer for the Regina negotiations. He said he hired Mr. Johanson as a consultant with the agreement of Mr. Landry and Mr. Dyck. He confirmed that the owners of the company had the final authority to make an agreement.

[21] There are certain differences between the Regina and Saskatoon collective agreements, some of the perhaps more apparent or notable of which include the following:

- the time limits for the first and second steps of the grievance process are different;

- there is a minor difference of one hour in the start time of the daily 12-hour production shift at each branch, and the Saskatoon branch has an additional daily 8-hour shift specifically for mat processing that does not exist at the Regina branch. The Regina branch schedules daily maintenance services of 18.5 hours, while Saskatoon schedules such services for 15 hours daily;

- under the Regina agreement, all overtime hours are paid at 1.5 times regular rate, whereas under the Saskatoon agreement, essentially, the first two hours are paid at 1.5 times for the first two hours and additional hours as well as all Sunday hours are paid at 2 times regular rate. The Regina agreement provides for the entitlement to bank a certain number of overtime hours to be taken as paid time off in lieu;

- the Saskatoon agreement contains a form of pay equity clause while the Regina agreement does not;

- while vacation entitlements are the same under both agreements, the dates for submission of requests for vacation time are different;

- with respect to seniority, under the Saskatoon agreement, an employee absent from work due to accident or illness may continue to accumulate seniority for up to 6 months, whereas the Regina agreement provides for accumulation for up to 12 months;

- under the Saskatoon agreement, “temporary employees” are entitled to participate in the benefit plans, whereas “relief employees” under the Regina agreement may not;

- the filling of vacancies and new positions under the Regina agreement is pursuant to a so-called “hybrid” clause[6], whereas such are filled under the Saskatoon agreement pursuant to a “minimum competence” clause[7];

- entitlement to leave of absence is somewhat broader under the Saskatoon agreement. Under the Regina agreement, full-time employees are entitled to a single paid day annually for the maintenance of personal health. The Saskatoon agreement provides for wage top-up for jury duty, while the Regina agreement does not;

- under the Regina agreement, disability indemnity is available for up to 13 weeks, while under the Saskatoon agreement the period is 16 weeks. Employees accumulate sick leave credits at the rate of 2/3 days per month under the Saskatoon agreement, and at 1 day per month under the Regina agreement, to a maximum of 8 days under both agreements;

- the employer contribution rate to the Union’s dental benefits plan is lower under the Regina agreement; the employee superannuation contribution rate is slightly lower under the Regina agreement.

[22] Mr. Smith expressed the opinion that the Regina agreement provided a competitive advantage for the Employer compared to the Saskatoon agreement in that the labour costs under the latter agreement are somewhat greater.

Arguments:

(a) Application for Non-suit

[6] Art. 16.3(a): “…based on the qualifications, abilities, and seniority of applicants who are qualified for the position. …”
[7] Art. 18.3(a): “…on the basis of seniority when merit and ability are sufficient…”.

[23] After the close of the case for the Union, Ms. Torrens, of counsel on behalf of the Employer, made a motion for non-suit without election, as is the practice before the Board. The Board heard the arguments of the parties, summarized as follows, and reserved decision on the motion.

[24] Ms. Torrens argued that it was incumbent upon the Union to prove that the proposed amalgamated unit was a unit appropriate for the purposes of collective bargaining, which, counsel asserted, required the demonstration of a material change in circumstances since the granting of the certification Order or last collective agreement, and to establish that there is majority support for the amendment application. In support of the argument, counsel referred to the following decisions of the Board: *Canadian Union of Public Employees, Local 4532 v. FirstBus Canada Ltd*., [2002] Sask. L.R.B.R. 261, LRB File No. 067-02; *Saskatchewan Union of Nurses v. Saskatchewan Association of Health Organizations and Prince Albert District Health Board*, [1999] Sask. L.R.B.R. 549, LRB File No. 078-97; *Federated Co-operatives Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 504*, [1978] July Sask. Labour Rep. 45, LRB File No. 502-77 ("*Federated Co-operatives (1978)*"); *Battlefords Regional Care Centre v. Canadian Union of Public Employees, Local 600*, [1989] Summer Sask. Labour Rep. 80, LRB File No. 186-88.

[25] Counsel for the Employer further asserted that a party seeking such an amendment must demonstrate a "compelling reason" why the Board should grant the application, citing in support of the argument the Board's decision in *Saskatoon Civic Middle Management Association v. City of Saskatoon and Amalgamated Transit Union, Local 615*, [2000] Sask. L.R.B.R. 390, LRB File Nos. 235-98 & 255-98.

[26] Ms. Torrens further asserted that the evidence filed in support of the application makes no reference to a consolidated bargaining unit and that no evidence of a material change in the Employer's business or bargaining structures was adduced.

[27] Mr. Kowalchuk, counsel for the Union, argued that the support card evidence filed in support demonstrated that the application was endorsed by the individual employees at each location at meetings specifically called for the purpose of considering the consolidation issue and after a vote on the question. Drawing an

analogy to the situation where a union seeks to “add on” to an existing bargaining unit, counsel noted that only evidence of majority support of the members of the add-on group is required. In the present case, majority support of the employees in each bargaining unit was filed.

[28] With respect to the second aspect of the argument made on behalf of the Employer, counsel for the Union referred to the Board’s decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Young Co-operative Association Limited, et al.*, [2001] Sask. L.R.B.R. 676, LRB File No. 060-98, in asserting that it is not necessary for an applicant for an amendment to show a material change as described above by counsel for the Employer, so long as an applicant moves with reasonable haste to amend a certification order to accurately reflect where fundamental control over collective bargaining resides. In any event, counsel argued that the *prima facie* evidence of material change in the Employer’s bargaining structure in the present case is that there are now two bargaining units under the same fundamental control as far as the Employer’s industrial relations is concerned. The application for amendment was brought at an early opportunity after the initial certification of the Regina bargaining unit and the settlement of a first collective agreement there. The similarity of method of bargaining and the structure of the Employer’s negotiating team with respect to the two units was not known to the Union until there had been negotiations for the Regina collective agreement.

[29] Mr. Kowalchuk submitted that the necessity to demonstrate a “compelling reason” for the amendment sought is not a non-suit issue, but that, in any event, the compelling reason for the application is to ensure the enabling of the employees’ right to be represented by the bargaining agent of their choice – that is the Union’s Joint Board – to ensure that bargaining can take place at the Employer’s head office level at a single table with the actual people with the authority to make an agreement for the Employer.

[30] In rebuttal, counsel for the Employer submitted that, at the time the Regina bargaining unit was certified in 1999, the Union could have sought a bargaining unit that included both Saskatchewan locations and there has been no material change since that time; the form and method of bargaining by the Employer has not changed. Counsel also sought to distinguish *Young Co-operative Association Limited*, *supra*, on

the basis that the issue in that case was one of the identity of the "true employer" with which to bargain and was not an application for amendment of the same nature as in the present case.

(b) The Amendment Application

[31] Mr. Kowalchuk, on behalf of the Union, began argument by pointing out that the certification Orders in the present case each require the Employer – the same employer – to do the same thing: bargain collectively with the Union's local (in the case of Saskatoon) or the Union's Joint Board (in the case of Regina) with respect to its employees in its two Saskatchewan locations. The purpose of the amendment application is to ensure orderly bargaining for the locations at a single table with the persons with the authority to bargain and to make a binding agreement. The local general manager for each location does not have the authority to do so and the Union, on behalf of the employees at each location, is already bargaining with the same people, but at two separate tables.

[32] Furthermore, counsel argued, the present amendment application is, in fact, the embodiment of the desire of the employees to exercise the right, pursuant to s. 3 of the *Act*, to be represented in bargaining by the union they "select" – in the present case, as a single bargaining unit by the Union's Joint Board rather than the Union's local. Counsel asserted that the Board should respect the wishes of the employees in this regard unless the proposed bargaining unit is not an appropriate unit.

[33] Counsel pointed out that in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Federated Co-operatives Limited*, [1999] Sask. L.R.B.R. 521, LRB File Nos. 044-98 to 061-98 ("*Federated Co-operatives (1999)*"), the Board determined that it had jurisdiction under ss. 5(k) and 2(g)(iii) of the *Act* to consider an application that several certification orders for bargaining units at individually incorporated retail co-operatives should be amalgamated for the purposes of bargaining collectively with Federated Co-operatives Limited as the "true employer" for such purposes. Ultimately, the parties to the matter agreed to proceed with one of the applications on behalf of a single co-operative as a representative case and to hold the others in abeyance pending the outcome. In the resulting decision in *Young Co-operative Association Limited*, *supra*, the Board determined, at 686, that in the

circumstances of the case, “patterned bargaining” on the employer’s side did not indicate that Federated Co-operatives Limited had “fundamental control” over labour relations at Young Co-operative Association Limited, even if its industrial relations specialists played “an influential role.” The Board noted that the settlement of grievances and collective bargaining disputes remained in the hands of the local board of directors and the general manager of Young Co-operative Association Limited, and that Young Co-operative Association Limited opted to provide various benefit plans negotiated by Federated Co-operatives Limited and made available to individual retail co-ops.

[34] Mr. Kowalchuk argued that, while the general principles in the two cases are instructive, the key difference from the present case is that Federated Co-operatives Limited did not have the “final say” over the content of the individual retail co-operative’s collective agreement. This ought to be contrasted with the present case where the Employer’s Vancouver executives must ratify the collective agreement negotiated with respect to both the Saskatoon and Regina branches. The purpose of the present application is to facilitate effective collective bargaining by ensuring that the employees’ bargaining representative sits across the table from those who make the final decisions, particularly as concerns benefits as those cannot be negotiated locally.

[35] Ms. Torrens, on behalf of the Employer, filed a written argument that we have reviewed. Counsel argued that, notwithstanding that any collective agreement required ratification by the Employer’s executives, the table officers have the mandate to make a tentative agreement. This bargaining structure is not uncommon for national corporations, nor is the use of common corporate policies and procedures. Counsel asserted that the evidence established that the chief spokesperson for the Employer at both bargaining tables was Mr. Johanson, who took instructions from the branch manager. The two branches had different priorities in bargaining, not least because the Saskatoon bargaining relationship is a mature one spanning several decades, and because of the differing composition of the bargaining units. Counsel pointed out that the two branches maintain separate financial results, profit and loss reports, and strategic plans, do not share revenues, central purchasing or training and there is no transfer of employees between them.

[36] Ms. Torrens asserted there were two key issues to be considered by the Board: whether there had been a material change in circumstances since the last collective agreement was negotiated; and, whether a merged bargaining unit is a more appropriate unit than the existing two unit structure for the purposes of collective bargaining.

[37] As authority for the proposition that the Applicants must demonstrate that there has been a material change in circumstances, counsel cited the following decisions of the Board: *Government of Saskatchewan v. Saskatchewan Government Employees' Union*, [1983] April Sask. Labour Rep. 67, LRB File No. 435-82; *Saskatchewan Association of Health Organizations*, *supra*; *Federated Co-operatives (1978)*, *supra*; *Battlefords Regional Care Centre*, *supra*; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canada Safeway Limited*, [1992] 1st Quarter Sask. Labour Rep. 47, LRB File Nos. 180-90, 181-90, 216-90, 217-90, 226-90 and 034-91; *FirstBus Canada Ltd*., *supra*.

[38] Ms. Torrens asserted that there has been no material change in circumstances as concerns the Employer's structure, operations, labour relations, or the duties, responsibilities and terms and conditions of employment of the affected employees since the date of the last collective agreements.

[39] With respect to the second proposition, counsel referred to the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd*., [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92, regarding some of the factors that go into striking the balance between the s. 3 right to organize and bargain collectively and the appropriateness of the bargaining unit for such purpose – sufficiency of the community of interest among the employees concerned, fragmentation of the total complement of employees, a history of successful bargaining, disadvantage to other groups of employees as a result of the bargaining unit description.

[40] Counsel asserted that other factors may bear on the issue of bargaining unit appropriateness in the case of amalgamation applications as enumerated by the Board in *Canada Safeway Limited*, *supra*: (1) whether the proposed unit will be viable for

the purposes of collective bargaining; (2) whether the employees in the proposed unit share a sufficient community of interest to warrant consolidation, noting that bargaining history may serve to either corroborate or refute a community of interest; (3) recognition of organizational difficulties in particular industries; (4) the promotion of industrial stability; (5) the wishes or agreement of the parties; (6) the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations. Among these factors, (2) and (4) are of the greatest import.

[41] Referring to the decisions of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. MacDonald's Consolidated Limited*, [1989] Winter Sask. Labour Rep. 76, LRB File No. 089-89, *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd*., LRB File No. 086-80, *FirstBus Canada*, *supra*, and *Canadian Union of Public Employees, Local 287 v. City of North Battleford and North Battleford Firefighters' Association, Local 1756*, [2001] Sask. L.R.B.R. 943, LRB File No. 054-01, counsel posited that, in cases of bargaining unit merger, it must be demonstrated that the merged unit is *more* appropriate than the existing multiple unit structure.

[42] Ms. Torrens argued that the existing single branch bargaining units are in fact more appropriate than the proposed amalgamated unit. Counsel noted certain operational differences between the branches and the demonstrated history of successful collective bargaining at each location.

[43] Counsel also argued that the support card evidence filed in the present case is not sufficient to show employee support for a merged bargaining unit represented by the Union's Joint Board – some of the cards refer to an application for membership in, and authorization to bargain collectively by, the Union's Joint Board, while others refer to the Union's Local 558.

[44] In rebuttal, Mr. Kowalchuk argued that neither *Canada Safeway*, *supra*, nor *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores (A Division of Westfair Foods Ltd.)*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89, both of which cases involved consolidation of bargaining units for several geographically separated grocery stores, make any reference to a requirement

to demonstrate a material change in circumstances before an application to amend by consolidation will be considered. The necessity to demonstrate material change arose in the cases to amend the scope of certification orders to include or exclude positions, because the Board will not "sit in appeal" of its decisions on the shape or design of the bargaining unit in an initial certification. In any event, counsel argued that the discovery by the Union, after it had obtained certification for the Regina bargaining unit, that the people at the bargaining table representing the Employer did not have the authority to make a collective agreement, was analogous to a material change after certification.

[45] With respect to the sufficiency of the support card evidence, Mr. Kowalchuk argued that the reference in some of the cards to the Union's Local 558 is not a material issue and that the Board may accept the evidence of Ms. Miner as to the question posed to the membership regarding amalgamation and representation by the Union's Joint Board and as to the results of the vote on the issue. In any event, as this is not a "raid" or successorship situation, there was no question for the employees as to the identity of the bargaining agent in the event of consolidation.

[46] Counsel asserted that the real issue is whether the proposed bargaining unit is more appropriate for long-term industrial relations stability.

Statutory Provisions:

[47] Relevant provisions of the *Act* include the following:

> *2 In this Act:*
>
> *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
>
> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *. . .*

5 The board may make orders:

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

. . .

(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

. . .

(j) amending an order of the board if:

(i) the employer and the trade union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or

(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;

notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

Analysis and Decision:

(a) The Application for Non-suit

[48] Counsel on behalf of the Employer made a motion for non-suit at the conclusion of the case for the Union. The Board reserved its decision and evidence was called on behalf of the Employer. The motion for non-suit was predicated upon two assertions: that the Union had not adduced evidence of a "material change in circumstances" such as to induce the Board to embark upon an examination of the existing bargaining structures with a view to determining whether the proposed change was appropriate and that the Union had not adduced evidence of majority support for the application.

[49] The principles applied by the Board to an application for non-suit were enunciated in *Saskatchewan Government and General Employees' Union v. Mitchell's Gourmet Foods Inc. et al.*, [1999] Sask. L.R.B.R. 577, LRB File Nos. 115-98 & 151-98, as follows, at 583:

> *In the present situation, the test applied is whether, accepting the applicant's evidence at face value, a prima facie case has been established in law or that the evidence is so unsatisfactory or unbelievable that the burden of proof has not been satisfied. The motion for non-suit cannot succeed if there is some evidence upon which the Board could return a finding that successorship and a transfer of bargaining obligations has occurred. The weight of the evidence is not in issue.*

[50] Because of the view that we take of the present application as outlined in the detailed Reasons for Decision that follow, the application for non-suit is dismissed.

(b) The Applications for Amendment

[51] The present applications for amendment are in the nature of a consolidation of two bargaining units composed of employees of the same employer represented by the same union. In accordance with the Board's jurisprudence, the applications for amendment were filed in the respective "open period" for each bargaining unit: See, *Saskatchewan Joint Board, Retail, Wholesale and Department*

Store Union v. Remai Investment Co. Ltd., [1993] 4th Quarter Sask. Labour Rep. 136, LRB File Nos. 167-93 & 168-93.

[52] The present applications differ from an application to consolidate bargaining units represented by two or more different unions where the bargaining rights of one or more of the unions would be affected or eliminated by consolidation. It also differs from the more common types of amendment applications seeking to add or delete individual positions from the scope of an existing certification order, or to add a group of unrepresented employees to, or carve out a group of employees from, an existing bargaining unit.

[53] However, all applications for amendment must be considered within the context of the overarching purpose of the *Act*. Section 3 of the *Act*, *supra*, describes the legislative object and purpose of the *Act*, that being to facilitate the exercise of the right of employees in an appropriate unit to bargain collectively through the trade union of their choosing. The Board described its approach to interpretation of the *Act* in light of this explicit legislative purpose in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, at 718, as follows:

> *When faced with an interpretive issue under the Act, the Board starts with the overall purpose of the Act which is to grant rights to employees to bargain collectively through unions of their own choosing. The Act is not "neutral" in the sense of not preferring unionized or non-union workplaces. It is explicit in preferring the development of collective bargaining relationships between employees acting through trade unions of their own choosing and employers. The Act reinforces the preference of this relationship through its various provisions which prohibit certain conduct that would otherwise destroy or weaken the collective bargaining relationship. As a result, the remainder of the Act must be interpreted in the light of the act's central purpose.*

[54] Section 2(a) of the *Act* defines "appropriate unit" as "a unit of employees appropriate for the purposes of bargaining collectively." Pursuant to s. 5(a) of the *Act*, *supra*, the appropriateness of a proposed bargaining unit is always a matter for the discretion of the Board: *Canadian Union of Public Employees, Local 1015 v. City of Lloydminster,* [1985] Jan. Sask. Labour Rep. 33, LRB File No. 011-84.

[55] In applications for certification of an initial unit of employees, the Board may certify *an* appropriate unit rather than the *most* appropriate unit: See, for example, *Construction and General Workers Union, Local 180 v. Saskatchewan Writers Guild*, [1998] Sask. L.R.B.R. 107, LRB File No. 361-97. Similarly, applications for amendment of the bargaining unit structure must be determined subject to the condition that any resulting bargaining unit configuration will be appropriate for the purposes of collective bargaining. With respect to amendment, the issue of the appropriateness of the unit is again within the discretion of the Board. The longstanding position of the Board is that the principle of *res judicata* does not apply to findings of the appropriateness of a unit: *Saskatchewan Association of Medical Laboratory Technologists v. Regina General Hospital and Regina Hospital Employees' Union, Local 176 (C.U.P.E.) and Service Employees' International Union*, [1978] July Sask. Labour Rep. 49, LRB File Nos. 617-77 & 618-77.

[56] The Board described the fundamental object and purpose of the determination of the appropriateness of a unit in *Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan*, [1995] 3rd Quarter Sask. Labour Rep. 195, LRB File No.139-95, at 201, as follows:

> *As the Board has observed on numerous occasions, the determination of the boundaries of the units of employees which are to be the basis of a collective bargaining relationship is an important task, and a number of factors may be taken into account in deciding whether any proposed bargaining unit is appropriate. In G. Wayne Hanna v. Government of Saskatchewan and Saskatchewan Government Employees' Union, LRB File No. 338-84, the Board made the following comment:*
>
> > *It is well settled that a labour relations board is not obligated to approve whatever unit is put forward by employees as appropriate for collective bargaining purposes, any more than it must accept the unit favoured by the trade union claiming to represent them, or the unit chosen by their employer. While the Board will consider the reasons why any particular unit is preferred, its paramount concern must be the creation of bargaining units that in its opinion will facilitate the establishment, development, and continuity of viable, healthy and harmonious bargaining. (See, Trade of Locomotive Engineers and Canadian Pacific Limited,*

> *Vancouver, B.C. et al. (1976) 1 CLRBR 361; and Insurance Corp. of B.C. and C.U.P.E., Local 1965 et al (1974) 1 Can LRBR 403).*

[57] Cognizant of this concern, the Board has long expressed a general preference for broader, more-inclusive bargaining units. See, *O.K. Economy Stores, supra*. As explained by the Board in *United Food and Commercial Workers. Local 1400 v. Peak Manufacturing Inc*., [1996] Sask. L.R.B.R. 234, LRB File No. 011-96, at 239:

> *The Board has routinely said that, while our preference is for bargaining units which are as comprehensive as possible, and which would ideally include all of the employees of an employer, we are prepared to contemplate the creation of bargaining units which are not as inclusive provided that we are satisfied that they represent a coherent and viable basis for sound collective bargaining.*

[58] The *Act* does not prescribe, proscribe or restrict the factors or criteria that the Board may consider and apply to determine whether a proposed bargaining unit is appropriate or whether an application for amendment should be considered and then granted or dismissed. While the factors and criteria considered on an application for initial certification are similar to those considered on an application for amendment, the significance accorded to, and the emphasis placed upon, any individual factor or criterion differs from the significance and emphasis placed thereon in an application for initial certification according to the type of amendment application under consideration. For example, in initial certification, the issue of "community of interest" is often emphasized, particularly where a trade union applies to represent a bargaining unit which is smaller than a unit consisting of all employees, owing to the fact that, if the Board is to certify a less-inclusive bargaining unit, in contrast to its general preference for broader more-inclusive units, there must be some basis for doing so. On the other hand, the community of interest factor may lose more than a little of its significance when considering subsequent changes to the collective bargaining structure. As stated by the Board in *University of Saskatchewan*, *supra*, at 201:

> *…the Board must have some basis for determining that the smaller unit will be cohesive enough that sensible collective bargaining can be carried on; the similarity of the interests of those included in the smaller unit thus looms larger as a factor in this context than in a situation where the more heterogeneous all-employee unit is proposed.*

> *This does not mean, however, that "community of interest" continues to be the primary factor in subsequent decisions about the delineation of bargaining units. As one or more bargaining units of the employees of one employer become established, and as a trade union becomes experienced and successful at representing the interests of employees, the range of interests included in any bargaining unit may become broader, and the emphasis on community of interest less pronounced.*

[59] Therefore, one of the differences in an application for consolidation from an initial application for certification is the emphasis that the Board may place on "community of interest" in determining the appropriateness of the proposed bargaining unit.

[60] Applications for amendment in the nature of consolidation have arisen quite infrequently and the Board does not have a large body of jurisprudence regarding the issue. As pointed out earlier in these Reasons, the *Act* does not prescribe the factors or any criteria that the Board must necessarily consider in determining either whether to hear an application for amendment in the nature of consolidation or whether to grant such an application. It is useful to the present inquiry to review in detail the relatively few decisions of the Board regarding the issue.

[61] In *O. K. Economy Stores*, *supra*, the Union held five separate certification orders, obtained between 1974 and 1982, for certain of the employer's stores in Saskatchewan. Although there were also five separate collective agreements, they were identical in all material respects. The employees in each bargaining unit had similar skills, duties and responsibilities. Interchange of employees between bargaining units was rarely, if ever, initiated by the employer below the management level. Seniority was not transferable between bargaining units, however, the employer's policy was to accommodate employees who moved from one centre to the other if possible. There had been some movement of bargaining unit employees from one unit to another, but it was not common. For the most part, management authority over the five units was centralized, including the employer's labour relations. Each store was managed by a manager with limited authority. There was no functional interdependence between the five stores and corporate philosophy required each store to be financially viable. The employer argued that a consolidated unit would be inappropriate because a conflict of

interest might develop between some of the units, although the employer could not cite any examples of a past conflict of interest between any of the five bargaining units. The employer did testify, however, that due to greater market pressure on it at two of the five locations, it had been required, during the then present round of bargaining, to propose lower wage scales (roll-backs) at those locations while offering increases at the other three locations. If the units were consolidated, the employer argued, there was a risk that the employees at the three units who were being offered an increase would accept the offer, even though it entailed a roll-back for employees at the other locations. To avoid this conflict of interest, the employer urged the Board to follow the Ontario practice of restricting multi-store units in the retail food industry to the municipality, that is, to leave the units as they were.

[62] Rather than make the decision based upon a policy enunciated in several then current cases out of Ontario that bargaining units in the industry should be restricted to a municipal boundary, the Board in *O.K. Economy Stores* stated, at 65, that,

> *…the better approach whether on a certification or consolidation application was to simply determine if the proposed unit is appropriate on a case by case basis.*
>
> (Emphasis added.)

[63] The Board referred, at 66, to the rationale for the Board's general preference for larger and fewer bargaining units, as follows:

> *…because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability by reducing the incidence of work stoppages at any place of work*

[64] But, the Board also recognized that larger size alone did not necessarily make one bargaining unit more appropriate than another and referred to several of the factors that must be considered in any given case, stating as follows, at 66:

> *This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large*

> *or small, the Board must examine a number of factors assigning weight to each as circumstances require. There is no single test that can be applied. Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*

[65] However, the Board also recognized the different considerations that pertain to a consolidation application versus an application for initial certification, stating, at 66:

> *The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry. As a result, on initial certification applications a bargaining unit containing only one store may be found appropriate. That finding does not rule out the existence of other appropriate units and, accordingly, <u>on a consolidation application, a larger unit may be found appropriate. There is no inconsistency between the initial determination of a single store unit with a municipal geographic boundary and a subsequent determination that a larger unit is appropriate</u>.*
> (<u>Emphasis</u> <u>added</u>.)

[66] In *O. K. Economy Stores*, the employer had argued that the bargaining interests of employees in each of the units were not similar and were in conflict. However, the Board observed that such concerns must be weighed against the advantages of a larger unit, stating, at 66, that,

> *This potential conflict cannot be ignored but its likelihood must be evaluated and against it must be weighed the general advantages of larger units and those factors which tend to establish a community of interest between the employees. Furthermore, the Board must be sure that the employer is not simply trying to control the appropriate unit issue from the bargaining table as it is always possible for employers to create or construct a scenario that will produce a conflict of interest in large multi-classification or multi-location units.*

[67] The Board stated, at 66-67, that in such circumstances, that is, where it is alleged that there is a potential conflict of interest between the units sought to be

consolidated, bargaining history is one of the most important factors to consider, and the Board cannot assume that the union will neglect its duty to bargain fairly on behalf of all employees in the consolidated bargaining unit, or that the employees will not act in the best interests of all employees in the bargaining unit:

> *When evaluating the likelihood of a conflict on a consolidation application, the Board must have regard to the bargaining history of the units which, in this case, have bargained together for many years and worked under identical collective bargaining agreements without any conflict. The Board must also have regard to the role of the bargaining agent and cannot presume that it will fail in its duty to ensure that any collective agreement which it negotiates is fair to all members of the unit. Nor can the Board assume that the employees will act in the manner the employer predicts. Finally, if a serious conflict of interest ever becomes a reality, reluctant as the Board is to fragment an existing bargaining unit, the Board does have jurisdiction to do so.*

[68] The Board found nothing wrong with the union's apparent motivation for the application for consolidation in *O.K. Economy Stores*, that being to balance the employer's power in bargaining by attempting to consolidate its own power as far as possible. The Board stated, at 67:

> *In Saskatchewan, like elsewhere, the retail food industry has evolved to the point that it is dominated by several large employers whose labour relations are highly centralized. The respondent is one of those employers. It is therefore not surprising that unions and employees whom they represent attempt to balance the employer's bargaining power, first by bargaining together and, eventually, by consolidating their bargaining units to the extent possible.*

[69] In allowing the application for consolidation, the Board iterated that the fundamental consideration in the determination of appropriateness of a bargaining unit is whether it is viable and able to meaningfully bargain collectively. The Board concluded, at 67, as follows:

> *The reasons advanced by the employer for abandoning the Board's normal preference for a larger, and in this case, more viable bargaining unit are not persuasive when compared to the likely advantages. <u>The essence of appropriateness in the context of labour relations is that the unit be able to carry on meaningful collective bargaining with the employer</u>. <u>A unit of the size</u>*

> *proposed would be capable of performing that function without significantly impairing the employer's operation. To deny the application would neither promote efficient collective bargaining or long-term industrial stability; it would merely perpetuate the fragmentation of what could be a larger, more stable and more viable bargaining structure.*
>
> (Emphasis added.)

[70] Some eighteen months after the decision in *O.K. Economy Stores*, *supra*, the Board had the opportunity to consider once again the issue of bargaining unit consolidation in *Canada Safeway Limited*, *supra*. An application was made to consolidate the six bargaining units of store employees certified by the union between 1948 and 1966 into a single province-wide bargaining unit. The evidence disclosed that the pattern of bargaining was that the respective union locals would negotiate a collective bargaining agreement for the Saskatoon and Regina units (referred to as "city units"), and then negotiate a separate agreement for the bargaining units in North Battleford, Prince Albert, Swift Current and Yorkton (referred to as "rural units"). Generally, the rural unit agreement adopted the provisions of the city unit agreement with some modifications. However, in 1988, the employer took a position in bargaining that would have resulted in material differences between the two contracts. This led to a lengthy and acrimonious strike and lockout. Settlement of the dispute resulted in agreements with the rural units containing modifications to the salary ranges paid to certain of those employees, which made them less than those paid to similar employees in the city units. The dispute concerning the difference in wages centered around the employer's requirement that each store be financially viable in its own right, and the fact that it was facing difficulty in competing with the rural co-operative grocery stores that generally paid their employees lower wages than did Safeway to its employees in the city units. The employees in each of the bargaining units had similar skills, duties and responsibilities. With the odd exception, there was no interchange of employees between units; if such occurred, it was never initiated by the employer. Although seniority was not transferable, the employer's policy was to accommodate employees who moved from one centre to another if it could. There was no interdependence between the stores. A manager and first assistant manager managed each store. For the most part, the employer's management authority over all the units, including labour relations, was centralized in its Winnipeg division office.

[71] At the time of the hearing of the application by the Board, the parties were once again in negotiations in which the employer was taking a position that would result in significant differences between the two collective agreements. The union acknowledged that the primary purpose of its consolidation application was to restrict the employer from bargaining different terms and conditions of employment as between the two agreements. The employer argued that the Board ought not to disturb the existing certification orders to assist either of the parties in their collective bargaining strategies. The Board concluded that the crux of the issue to be determined was the appropriateness of the unit applied for, stating, at 49, as follows:

> *In our view, these considerations raised by the parties, although important to them, are not conclusive to the Board's determination. Such issues change with the vagaries of circumstance and the passage of time; the determination of the present issue must be based on more enduring factors. Of paramount importance is the necessity to determine whether or not the unit applied for is appropriate under the circumstances.*
>
> (Emphasis added.)

[72] In deciding upon the criteria used to determine consolidation applications, the Board in *Canada Safeway Limited* approved of the position enunciated in *O. K. Economy Stores*, *supra*, that on a consolidation application a larger multi-location bargaining unit may be found to be appropriate notwithstanding the prior determination on the initial certification that a single location unit was appropriate. And, while the Board approved of the significance of the criteria enunciated in *O. K. Economy*, *supra* (at p. 66 of the Reasons for Decision in that case), it observed that the relative weight assigned the various factors "must be adapted to accommodate the fact that the application is not for a new certification order, but rather a consolidation of existing unit certifications." The Board declared, at 53 of *Canada Safeway Limited*, that two considerations ought to receive particular emphasis on consolidation applications: (1) whether the employees in the proposed unit share a sufficient community of interest to warrant consolidation; and, (2) whether the consolidated unit will promote industrial stability. The Board stated as follows:

> *Where there are existing collective bargaining relationships, the board must begin with the premise that the existing bargaining unit is appropriate. Although the board generally prefers larger*

> *integrated units, a substantial history of collective bargaining in a particular form will be a salient indicator of the community of interest recognized by the parties. The bargaining history must be reviewed to determine whether there are historical facts or incidents which would indicate a community of interest in the proposed bargaining unit. The focus is therefore not on whether the certified units are somehow inappropriate, but rather on whether the historical bargaining practices of the parties indicates a community of interest in a larger unit which is appropriate given the considerations referred to above.*

[73] Although the Board in *Canada Safeway Limited* dismissed the application, it did so on the basis that there was not a sufficient community of interest between the employees in the units sought to be consolidated. Recognizing that it was the first time that the Board had occasion to refine and expand a policy on consolidation applications that began with *O. K. Economy*, the Board stated as follows, at 54:

> *The Board's ruling should not be construed as a finding that the single unit proposed is inappropriate. Rather, it is a reflection that the onus is on the applicant to prove that the proposed single unit would be appropriate for collective bargaining; and, on this occasion, for the reasons given, it has failed. We are cognizant that this is the first occasion on which the Board has had an opportunity to define and expand a policy on consolidation applications which began with its decision in OK Economy. It may well be that the parties, after a review of the Board's decision, will be in a position, on a subsequent application, to convince the Board of the existence of an appropriate unit(s) other than those found in the present award.*

[74] In *Canada Safeway Limited*, the Board referred to its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. MacDonalds Consolidated Limited*, [1989] Winter Sask. Labour Rep. 76, LRB File No. 089-89, decided a few months before *O. K. Economy Stores*, *supra*. In *MacDonalds Consolidated Limited*, the employer had argued that the question of the appropriateness of the five existing single-location bargaining units was *res judicata* by virtue of the Board's previous certification orders. However, the Board declared that the real issue was "whether one consolidated unit would be more appropriate than the five individual units." In granting the application, the Board noted that "[c]onsolidation would … be in keeping with the Board's policy of favouring larger bargaining units." While it is apparent on its face that the decision was predicated upon the finding that a review of the history of collective

bargaining between the parties established that the proposed consolidated unit was more appropriate for such purposes, it is not clear how much weight the Board placed upon the fact that all five locations were already subject to identical collective agreements negotiated at one table.

[75] It is interesting to note that in none of *O.K. Economy Stores, Canada Safeway Limited,* nor *MacDonald's Consolidated Limited*, all *supra,* all decisions regarding consolidation, does the Board refer to the necessity that the applicant demonstrate that there has been a material change in circumstances before the application can succeed. The issue of demonstrating a material change on amendment applications gained currency with the Board's decision in *Federated Co-operatives Limited v. Retail Wholesale and Department Store Union, Local 504*, [1978] July Sask. Labour Rep. 45, LRB File No. 502-77 ("*Federated Co-operatives Limited (1978)*"). In that case the employer made application during the open period to exclude certain classifications of employees from the existing certification order issued following a lengthy hearing for amendment not too long before in 1975. Then Chairperson Sherstobitoff (as he then was) described the practical concern of the Board that underscores the requirement that such an application for amendment be premised upon a material change in circumstances, as follows, at 46-47:

> *A concern of the Board is to prevent applications for amendment year after year as a method of appeal from a previous decision o f the Board upon the same issue merely because one if the parties is dissatisfied with the previous decision of the Board. In this case, the panel of the Board which heard the application resulting in the Order of October 8th, 1975 and the panel which heard the present application are very substantially different, in large part because of the turnover in membership of the Board between the dates of the two applications. It can be inferred that some persons might make applications for amendment in the hope that a new panel will view the matter in a different light. The Board wishes to make it clear that it will not sit in appeal on previous decisions of the Board and it therefore determines that in this application, as in all applications for amendment, the applicant must show a material change in circumstances before an amendment will be granted.*

[76] The fundamental basis for the Board's determination is explained earlier in the Reasons for Decision, and has not been referred to in subsequent references to the decision in the Board's jurisprudence. The respondent union to the application for

amendment had argued that the issues that the employer was asking the Board to consider were identical to the issues which had been considered and decided by the Board in the 1975 decision, and that the principle of *res judicata* should apply and the application be dismissed. The Board expressed reluctance to apply the principle in cases of application for amendment, one of the elements of which is that the order under consideration is a final order, given that the *Act* provides for a statutory right to apply for amendment annually during the open period, stating, at 46, as follows:

> *Clearly, any party interested in a certification Order has the right to apply for an amendment during the time limited by Section 5(k)(i). In such circumstances the Board is reluctant to apply the principle of re judicata to an application made under that Section since it would appear to be contrary to the intention of the legislature which granted to the parties the right to apply for such amendments.*

[77] In referring to another element of *res judicata* – that the same question is to be determined – the Board stated, at 46, as follows:

> *Another requirement before res judicata can apply is that the previous decision constituted a determination of the same question as that sought to be determined in the present application. It is here that a problem may arise when it is alleged that there has been a change in circumstances between the date of the first decision and the date of the second application. When it is alleged that there has been a change in circumstances, the only manner in which the Board can properly determine the issue is by hearing the evidence. The exact nature of the change in circumstances which will be sufficient to warrant taking the matter outside of the principle of res judicata or to warrant an amendment is a factual matter to be decided upon the evidence in each individual case.*

[78] The result of the decision in *Federated Co-operatives Limited (1978)* is that the principle of *res judicata* is not applied by the Board to applications for amendment under ss. 5(i), (j), and (k). The real basis for the requirement that an applicant demonstrate a material change in circumstances is, as stated above, to ensure that an application for amendment does not result in the Board sitting, in effect, in appeal of its previous order, a power that is not within the Board's jurisdiction: See, *Carpenters Provincial Council of Saskatchewan v. K.A.C.R. (A Joint Venture)*, [1985] Jan. Sask. Labour Rep. 41, LRB File No. 342-84.

[79] Despite the Board's reference in *Federated Co-operatives Limited (1978)* to the need to show a material change in circumstances "in all applications for amendment," such reference must be considered in the context of the application then before the Board and the mischief that the policy was intended to prevent, that being, as stated above, to prevent amendment applications from being used as a method of appeal in circumstances where the principle of *res judicata* cannot be applied to preclude the application or as the basis to dismiss it.

[80] We reviewed the Board's jurisprudence regarding amendment in the nature of consolidation since the decision in *Federated Co-operatives Limited (1978)* (with the exception of *FirstBus Canada Ltd.*, *supra,* which is addressed later in these Reasons) above, and the concept that evidence of material change was required is not mentioned in any of *O.K. Economy* Stores, *Canada Safeway Limited,* or *MacDonald's* C*onsolidated Limited*, all *supra*, and does not otherwise appear to have been a consideration in any of those cases.

[81] The decisions in *O.K. Economy Stores*, *supra*, and *Canada Safeway Limited*, *supra*, provide a basic framework for the analysis of an application for amendment in the nature of consolidation of bargaining units, but it is also instructive to review the approach taken by other jurisdictions in determining similar applications.

[82] In British Columbia, where, like Saskatchewan, the legislation does not set a threshold for review of bargaining unit structures nor define any criteria that must be applied when considering amendment in the nature of consolidation, the British Columbia Labour Relations Board has adopted a three-part test for consolidation applications, as enunciated in *Island Medical Laboratories Ltd*. (1993), 19 C.L.R.B.R. (2d) 161, at 190-91, under which it examines: (1) whether at least one of the existing bargaining unit structures is no longer appropriate; (2) whether the consolidated unit applied for is appropriate, including having regard to community of interest; and, (3) whether there is a valid labour relations purpose for the amendment, which incorporates a consideration of the notion of potential or actual industrial stability in the context of a given case. That is, an applicant is required to demonstrate that the old units are no longer appropriate and that there is actual or potential industrial instability if they are

retained and not changed. The British Columbia Board reiterated the test in *Kamloops News*, BCLRB No. B12/95, as follows:

> *In considering a consolidation application in these circumstances, the Board must consider the appropriateness of the entire collective bargaining structure. If a valid labour relations purpose exists, the Board may exercise its discretion to consolidate the bargaining unit structure. In the multiple bargaining unit structure of this case, labour relations purpose turns . . . on industrial stability.*

[83] In *Service Corp. International (Canada) Ltd*., [1998] BCLRBD No. 39, the British Columbia Board observed that the potential for industrial instability among multiple bargaining units will most often arise from significant changes in an employer's operations.

[84] In Saskatchewan, *O.K. Economy Stores*, *supra*, and *Canada Safeway Limited*, *supra*, demonstrate a less restrictive approach than in British Columbia, in that the central issue in those cases was whether the consolidated unit applied for would be appropriate, not whether one of the existing units is inappropriate.

[85] While the Alberta *Labour Relations Code*, R.S.A. 2000, s. 12, specifically provides for the making of applications for consolidation, like Saskatchewan and British Columbia, the legislation does not expressly mandate any threshold or criteria to be considered. Alberta has essentially adopted the British Columbia model.

[86] The Alberta Labour Relations Board reviewed the principles applicable to applications for consolidation in that jurisdiction in its recent decision in *General Teamsters, Local Union No. 362 v. Burnco Rock Products Ltd.*, [2002] Alta. L.R.B.R. 74, an application to consolidate four separate bargaining units of concrete mixer drivers at the employer's plants in Calgary and certain surrounding towns. The Calgary bargaining unit included more than 50 drivers, while the other plant units included between 5 and 7 drivers. The employer contended that its operations had not changed significantly since the individual plant units were certified 10 years earlier and that there was no indication of instability resulting in strained relationships or labour relations difficulties.

[87] In granting the application, the Alberta Board recognized the difference between a consolidation application where the applicant union holds the bargaining rights for all of the units in question and that where the bargaining rights for one or more other unions would be extinguished, observing, at paragraphs 53 through 55:

> *…this is not a situation where one of the parties is seeking or asking to reduce boundary disputes between bargaining agents. As indicated above, in most such reconsiderations one or more bargaining agents will be divested of some or all of its bargaining rights. Because of the possibility of this divestiture, from a policy perspective, the Board approaches such applications cautiously. Only when real or perceived uncertainty in bargaining unit boundaries has proven sufficiently damaging to bargaining relationships or so wasteful of resources that the need for clarity and labour peace outweighs the utility of maintaining the status quo will the Board engage in such a review. Indeed, this cautious approach makes good labour relations policy sense when the result can be the loss of long held bargaining rights against the wishes of the membership of a bargaining agent.*
>
> *But that is not to say such a policy should be applied to every situation involving multiple units with multiple bargaining agents. Different considerations come into play when the same bargaining agent represents multiple units of the same employer. Such a situation was not contemplated by the Board in Finning and, in our opinion, constitutes another type of reconsideration.*
>
> *In situations where one bargaining agent is the certified agent for multiple units, it is unlikely that the problems contemplated by the board in Finning will arise. For instance, there is far less likelihood of duplicative bargaining, inter-union competition in bargaining, or boundary disputes, barriers to employee mobility outside of seniority lists and increased exposure to industrial disputes, evidence of potential industrial unrest or instability is unlikely or diminished.*
>
> (Emphasis added.)

[88] In *Burnco Rock Products*, *supra*, therefore, the Alberta Board recognized that applications for consolidation are not all the same, but that there is a spectrum, along which each individual case will fall, that will determine the stringency of the threshold that that Board will apply and the considerations it will take into account. Endorsing the test enunciated by the British Columbia Board in *Island Medical Laboratories*, *supra*, the Alberta Board stated, at paragraph 51, as follows:

> *…the Board's response to an application to reconsider an existing bargaining structure will vary with a number of factors including: the nature of the existing bargaining structure; whether bargaining rights would be lost as a result of variation; whether the application contemplates a consolidation, clarification or fragmentation of the bargaining structure; and employee wishes.*

[89] The Alberta Board took the position that a lack of evidence of industrial instability as a result of the existing bargaining unit structure would not necessarily preclude consideration of an application for amendment, but that the type of amendment sought could affect the emphasis that the Board would place on certain factors in considering the application, in light of that Board's general policy preference for larger, broader bargaining units. The Alberta Board placed less weight on the third factor in *Island Medical*, *supra*, that is, the need to show potential or actual industrial instability. The Alberta Board stated, at paragraph 56:

> *We do not believe, however, that the lack of industrial instability or diminution of such evidence should necessarily negate such a reconsideration application. Rather, the Board should consider the three factors set out in Island Medical, taking into account that some of these factors may deserve less emphasis in this case than in cases involving multiple units with multiple bargaining agents. . . . We also must be mindful that in workplaces where collective bargaining is well established, from an overarching policy perspective, we prefer the stability of one or a few larger bargaining units to the fragmentation or disorder of many smaller units.*

[90] The Ontario Labour Relations Board considered several applications to consolidate bargaining units made pursuant to s.7 of the *Labour Relations Act*, R.S.O. 1990, c. L-2 (the provision was repealed by the *Labour Relations Act*, S.O. 1995, c. 1, in November, 1995). Section 7 expressly provided for application by an employer or a trade union to combine bargaining units if the employees in each bargaining unit were represented by the same union. While subsection 7(3) allowed the Ontario Board to "take into account such factors as it consider[ed] appropriate," however, it also made it mandatory for the Ontario Board to consider the extent to which combining bargaining units would facilitate viable and stable collective bargaining, reduce fragmentation of bargaining units, or cause serious labour relations problems.

[91] While in Saskatchewan the Board may take into account any factors deemed relevant to the issue, but need not necessarily take into account any particular factor or factors, the cases from Ontario decided under this particular statutory mandate are instructive in that, while the Ontario Board was required to consider certain factors, it was also allowed to consider any other factors it considered appropriate. The legislation under which the Ontario cases were decided ensured that a certain number of limited factors had to be considered. That is, the criteria in s. 7(3) are inclusive rather than exhaustive, so it is useful to review the jurisprudence that was developed thereunder.

[92] In *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523, the Ontario Board considered an application to combine the employer's office bargaining unit comprising mainly clerical, administrative, customer service and caretaking staff, and outside bargaining unit which included electricians, equipment operators, mechanics, labourers, meter readers and foresters. In determining to combine the units, the Ontario Board concluded that it would, to some extent, facilitate viable and stable bargaining and reduce fragmentation without causing serious labour relations problems.

[93] Commenting on the factors it was required to consider under s. 7 of the Ontario *Labour Relations Act*, *supra*, the Ontario Board observed as follows, at paragraph 9:

> *In Board of Governors of Ryerson Polytechnical Institute, [1984] OLRB Rep. Feb. 371, the Board noted that in striving to create a viable structure for collective bargaining, a broadly based bargaining unit offers several advantages over a fragmented structure, and went on to elaborate on the undesirable effects of fragmentation, including the increased risk of work stoppages:*
>
> > *15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See Usarco Limited, [1967] OLRB Rep. Sept. 526; K Mart Canada Limited, [1981] OLRB Rep. Sept. 1250; and Insurance Corporation of British Columbia, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.*

> *17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enchance [sic] the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitable [sic] spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.*

[94] It is recognized that both *Mississauga Hydro-Electric* and the *Ryerson Polytechnical* case cited therein were instances of "integrated enterprises" rather than cases regarding geographically separate bargaining units, as is the situation in the present case. However, in the former decision, the Ontario Board considered that the principles would nonetheless pertain in such cases as well, but that the geographic separation of groups of employees might deter or militate against the organization of larger units.

[95] In *Mississauga Hydro-Electric*, *supra*, at paragraph 14, the Ontario Board referred to the usefulness of these principles in the context of an application to consolidate geographically separate bargaining units in a case decided a short time before, and also referred to the differences in what is significant to determining a consolidation application from an application for initial certification, as follows:

> *Much of this discussion is useful in the context of section 7 as well. Indeed, in Olympia & York Developments Limited, April 8, 1993 (unreported) the Board reiterated some of these views in the context of an uncontested combination application:*

> *This bargaining unit description consolidates the above-mentioned employee groupings into a single unit for collective bargaining purposes. It avoids fragmenting a group of building service workers into two legally distinct units, each of which would encompass only a handful of employees. And, of course, if there were two separate units, that could mean: separate bargaining, separate collective agreements, separate seniority regimes, a strike of one or other of these employee groupings at different times, and potentially two trades unions, should one or other of these employee groups choose to displace the Transit Union (as has happened before in this organization). This is not a recipe for stable or effective collective bargaining, nor (as noted) did the employer appear at the hearing to substantiate any concerns it might have about the proposed consolidated bargaining structure.*
>
> *At the same time, it is also evident that the Board's approach to combining bargaining units must be somewhat different than the method the Board uses to structure those units at the point of certification … there are obvious differences in the kinds of factors relevant even to viability. For example, the Board may not have the same concern that larger bargaining units might impede the right of employees to organize themselves in a combination application, when access to collective bargaining is not an issue. This brings the problems associated with fragmentation and its impact on viable and stable collective bargaining into sharper focus. Indeed, in the absence of this concern, the Board's views on the undesirable impact of fragmentation may suggest a more marked preference for larger-units.*
>
> (Emphasis added.)

[96] The Ontario Board noted the absence from the Ontario legislation of the mention of community of interest as a mandatory factor to be considered on a consolidation application, and described the change in the Ontario Board's emphasis regarding community of interest given the changes that had occurred in the modern workplace in recent years. The Ontario Board observed as follows, at paragraph 15:

> *Notable by its absence in section 7(3) as well is any mention of community of interest, another factor the Board has considered in determining the original contours of bargaining units. In Ryerson, supra, the Board defined this phrase in terms of the extent to which employees share bargaining objectives. Criteria for*

assessing community of interest were set out by the Board in Usarco Limited, [1967] OLRB Rep. Sept. 526 as follows:

1) nature of work performed;
2) conditions of employment;
3) skills of employees;
4) administration;
5) geographic circumstances;
6) functional coherence and interdependence.

It is fair to say that in recent years, the Board has recognized that community of interest is a matter of degree, rather than a fixed dividing line between those employees who share a community of interest and those who do not. In addition, less emphasis has been given to the community of interest indicia standing alone, as the Board has preferred the more integrated and relative approach to bargaining unit determination expressed in The Hospital for Sick Children, [1985] OLRB Rep. Feb. 266:

We might make an additional but related observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

. . . .

17. The fact that community of interest is not an explicit criterion in section 7(3) appears to reflect, to some degree, both an increasing recognition in the Board's jurisprudence that considerable diversity can be accommodated within one bargaining unit, and the Board's willingness to question what may be obsolete assumptions with respect to shared bargaining interests. It is also true that in a combination case where there are one or more bargaining units which have existed for some time, it may be more difficult to determine whether there are any inherent conflicts in bargaining interests and objectives. This is because the Board's initial structuring of the bargaining unit or units at certification may have had an impact which obscures any intrinsic compatibility or conflict. As the Board noted in Ryerson, supra, inclusive bargaining units tend to erode differentials between employees. Similarly, separate bargaining units may encourage a divergence of interests and working conditions. In other words, an attempt to measure any natural community of

> *interest in a combination application may be distorted by the Board's original determination.*
>
> (Emphasis added.)

[97] That is, in *Mississauga Hydro-Electric*, *supra*, the Ontario Board observed that it was important to reconsider or "rethink" the content and significance of the concept of "community of interest," particularly in consolidation applications, in light of the changes in the organization of the modern workplace.

[98] In that case, the employer had argued that it was incumbent upon the applicant union to establish that there were serious problems with the existing configuration. In rejecting this proposition, the Ontario Board found that, in the case of consolidation of bargaining units generally, it was necessary to consider the change in social and economic conditions that had historically shaped its policies with respect to initial certification. The Ontario Board stated at paragraphs 19 and 20, as follows:

> *The employer in this case urged the Board to adopt an approach to section 7 in which bargaining units would not be combined unless the applicant could point to serious labour relations problems in the existing bargaining framework. Implicit in this proposition is the idea that since the Board will have initially determined that one or more of the units was appropriate, there should be some significant threshold for an applicant to overcome in terms of subsequent combination. Although at first glance this approach is not without some advantages, further examination reveals a number of flaws.*
>
> *At the outset, it is important to note that the Board has acknowledged the elasticity of the concept of the appropriate bargaining unit. Rather than seeking to ascertain the one perfect bargaining unit in each situation, it has recognized that there may be more than one equally appropriate bargaining unit in a particular case. …If there can be more than one appropriate unit, the Board's determination at the certification stage may not carry as much weight in a subsequent combination application.*

[99] Rejecting the proposition that an applicant for consolidation ought to be required to meet a threshold of essentially demonstrating some significant change in circumstances or industrial instability, the Ontario Board pointed out, in paragraphs 21

and 22, that initial certification structures may have resulted from the initial emphasis on access to bargaining:

> *In addition, certifications for existing units have taken place over a span of almost fifty years. A number of them were based on assumptions, for example with respect to the part-time employees, which have come under increasing scrutiny in the wake of changing social and economic conditions. Moreover, as we noted above, some bargaining units may have been shaped to a very significant degree by factors more relevant to certification than combination, such as the concern that larger bargaining units may impede organization. It is also true that bargaining unit determinations in certification applications take place in a context in which the issues are often framed by the parties with reference to the impact it will have on the chances of certification. The parameters established by the parties in this regard may affect the ultimate decisions. Similarly, many bargaining unit determinations are also based on agreement by the parties, and the Board has often been content to found its decisions in this area on such agreements, even to the point of accepting units it would not normally establish itself….*
>
> *As a result, the current bargaining unit landscape represents a veritable hodgepodge of rational and sound structures, outdated assumptions, specific organizing patterns, historical anomalies, individual agreements by parties, and Board determinations in a context where the parameters of litigation may have been distorted by strategic concerns. To this extent, it may be difficult to marshal the status quo in aid of an approach to combination orders which requires the applicant to meet a significant threshold.*
>
> (Emphasis added).

[100] Quite significantly, the Ontario Board found that a shift in the union's bargaining power that might flow from consolidating bargaining units, given that the agreement for the employer's outside workers was significantly better than that for the office workers from the employees' point of view, was not evidence of "serious labour relations harm" such as to militate against the granting of the application. The Ontario Board stated, at paragraph 29, as follows:

> *We cannot leave this more general discussion of section 7(3) without commenting on the issue of bargaining power. There is no doubt that the contours of a bargaining unit have a significant impact in this regard, as the Board noted in Kidd Creek Mines,*

> *supra*. *And just as the parties' positions in certification bargaining unit disputes are often influenced by tactical issues relating to increasing or decreasing the chances of certification, it would not surprise us if combination applications are brought and resisted against a backdrop of strategic considerations relating to bargaining power. We do not rule out the relevance of some of these issues, particularly as they may relate to organizational difficulties in a sector. For example, a bargaining unit may be so small and weak that it cannot negotiate in any meaningful way, and the economic sanctions contemplated by the Act remain a theoretical option only. In that case, a larger unit might well facilitate viability. At the same time, we think that considering bargaining power as a factor in isolation is somewhat unlikely to be a fruitful line of inquiry in this context.*
>
> (Emphasis added.)

[101] A few months later, in *Hudson's Bay Company*, [1993] OLRB Rep. Oct. 1042, the Ontario Board considered an application to consolidate seven department store bargaining units in southern Ontario. Initially, negotiating committees had been set up for store-by-store negotiations. After this process proved frustrating for both sides, the parties agreed to one set of negotiations for all stores, which resulted in one memorandum of agreement that was then turned into a separate collective agreement for each bargaining unit. Negotiations subcommittees addressed the issues of commissions and classifications, which were issues specific to certain stores. The individual stores varied in size, range of merchandise and services offered, and business hours, geared to the area, clientele and market niche. There were also differences in wage rates, based on factors such as local labour markets, and in the relative numbers of supervisors and full-time and part-time staff, but the staff at each location performed the same basic functions. Six of the stores were in one general managerial or administrative region, eastern Ontario, while the seventh was in another, Quebec. The employer's central human resources department conducted contract negotiations, although regional managers were included on the bargaining committees. Grievances were generally handled at the store level for the first and second stages, and then at the regional level.

[102] In the present case, much of the evidence adduced on behalf of the Employer was directed to attempting to define and contrast the differences in operation and local conditions between the Saskatoon and Regina plants. The argument was

made that consolidated bargaining was inconsistent with the autonomy of the local branch managers and that the differences between the operations could not be reconciled in a common collective agreement.

[103] In *Hudson's Bay Company*, *supra*, the argument was advanced on behalf of the employer that local conditions required that there be flexibility in negotiations that would be abrogated by consolidation. Rejecting the assertion as a significant impediment to consolidation, the Ontario Board observed that this was as much a concern for the union as for the employer, stating, at paragraphs 43-44, as follows:

> *In any event, it was apparent from the evidence before us that local autonomy and market flexibility were not inconsistent with a combined structure. In their centralized bargaining to date, the parties have from time to time agreed upon specific provisions for particular stores, classifications or individuals in one set of negotiations leading to one memorandum of agreement. We accept that there is a need to maintain a balance between the convenience and strength of standardization and the need to be responsive to local conditions. However, as the evidence in this case demonstrates, there are a number of ways to do this, including letters of understanding and collective agreement provisions addressing particular problems. There are also other options in terms of bargaining arrangements with respect to the mix of local and central issues …*
>
> *The evidence indicates that the tension between central and local issues is an important matter for the union as well, which must be responsive to its local members if it is to remain viable. The parties' mutual interest in being alert to this issue means that combining these units does not leave the company particularly vulnerable in this regard.*

[104] In the present case counsel for the Employer argued that the Board ought not to consolidate the bargaining units as it would give the Union a "leg-up" in negotiations, but counsel did not explain what that supposed advantage would be.

[105] As noted earlier in these Reasons, in *Mississauga Hydro-Electric*, *supra*, the Ontario Board considered the issue of the parties' strategies to shift bargaining power as likely not "a fruitful line of inquiry". In *Hudson's Bay Company*, *supra*, the employer also argued that consolidation would result in a shift of bargaining power in favour of the union. The Ontario Board held that such a consideration was not the kind

of “serious labour relations harm” contemplated by the Ontario legislation, stating at paragraph 47, as follows:

> *It was apparent from the company’s evidence that the option to return to store by store negotiations was a bargaining chip for the company that it was reluctant to lose. We accept that combining the units may result in some type of shift in bargaining power in this regard. However, this does not appear to be the kind of serious labour relations problem contemplated by section 7(3) which would persuade us to dismiss this application.*

[106] About a year after the decision in *Hudson’s Bay Company*, the Ontario Board considered two applications to consolidate bargaining units at movie theatres, in *Cineplex Odeon Corporation*, [1994] OLRB Rep. July 824, and *Famous Players Inc*. [1994] O.L.R.D. No. 4396. In both cases, the employers operated theatres across North America and within the province.

[107] In *Cineplex Odeon*, *supra*, the union sought to consolidate seven bargaining units in six cities in southern Ontario, ranging in size from eight to thirty employees each. All of the units were initially organized over a two-month period earlier in the year. None of the units yet had a collective agreement. Applying *Mississauga Hydro-Electric*, *supra*, the Ontario Board found, at paragraph 5, that consolidation would minimize fragmentation, which is “a key element in facilitating viable and stable collective bargaining.”

[108] In *Cineplex Odeon*, *supra*, the employer opposed the application on the basis that the union ought to have advised both the company and the employees at the time it filed for certification that it would subsequently be requesting to consolidate the bargaining units. However observing that the Ontario *Labour Relations Act*, *supra*, was designed to facilitate organizing, the Ontario Board noted that the union had not resiled from any agreement or representation it had made with regard to consolidation and there was no prejudice or detriment to the employer. Recognizing that the approach to consolidation of bargaining units has considerations in common with the factors examined in initial certifications, but also some significant differences, the Ontario Board noted that access to bargaining – a primary consideration in initial certification applications – may not be an issue in combination applications, which in turn may lead to

the exercise of a general preference for larger and broader bargaining units. At paragraph 11, the Ontario Board observed as follows:

> *When the Board's predilection for minimizing fragmentation is freed from considerations about self-determination and access to bargaining, the effect in the context of a combination application may be a stronger preference for larger units than in certification applications.*
>
> (Emphasis added.)

[109] The employer in *Cineplex Odeon*, *supra*, also argued that differences in the financial viability of the theatres might result in the wishes of the employees at one or more of the larger theatres forcing the taking of a strike upon reluctant employees at a smaller theatre. Rejecting the argument, the Ontario Board stated, at paragraph 16, as follows:

> *It must be acknowledged, however, that this is a very speculative concern, assuming as it does financial data which was not in evidence, a failure to reach a collective agreement, a vote in which regional differences were both relevant and ignored, a union insensitive to these interests and a number of other contingencies which we have no particular reason to presume.*

[110] In *Famous Players Inc*., *supra*, the union sought to combine two all-employee bargaining units at theatres in Toronto and Ottawa, the former with ten employees and the latter with thirty-five. There were differences in the hours of operation and no interchange of employees between the two theatres. The two theatres were in different managerial and administrative regions – eastern Ontario and Quebec. The employer had different bargaining committees for the negotiations for each bargaining unit, with the exception of one person in common on both. The employer took the position that no fragmentation existed with the current bargaining structure, and that, in any event, fragmentation would not be reduced by consolidation because of the geographic and organizational separation of the two operations; that is, consolidation would not result in an "appropriate 'whole'." The employer also asserted that consolidation would not enhance viable and stable collective bargaining but, rather, would impede bargaining and result in serious labour relations problems. The Ontario Board rejected this submission stating that the employer's argument confused the notion of unit appropriateness in cases of initial certification with that which is significant in

cases of consolidation. Referring to *Hudson's Bay Company*, *supra*, and *Cineplex Odeon*, *supra*, it was noted that, in the absence of any serious labour relations harm, geography was not considered determinative.

[111] In *Famous Players*, *supra*, the employer also argued that the usual goals of reducing fragmentation – administrative efficiency and convenience in bargaining, lateral mobility for employees, a common framework of employment conditions, and industrial stability – were not factors in that case because there was no reason that successful bargaining could not take place at two tables, there was no interchange of employees between the two units, the issues facing the employees were different in the two administrative regions in which the units were situated, and the concern for industrial stability was mitigated by the fact that the two units were represented by the same union. The Ontario Board found that the evidence did not support this position. Referring both to a concern with regard to the consistency in the terms and conditions of employment of individuals performing the same work, and the spectre of "competitive bargaining" between units, the Ontario Board found that the similarity of the functions performed by the employees and in their working conditions belied the employer's contention that consolidation would not tend to enhance viable and stable bargaining, and observed that any resulting problems could be resolved in bargaining. At paragraph 38 the Ontario Board stated as follows:

> *…the employer conceded in reply argument that it had led no evidence to establish serious labour relations problems, asserting only that the geographic and administrative disparateness which formed the foundation of its argument on fragmentation would obviously lead to serious labour relations problems in the case of combination. On the facts as set out above, we are satisfied that any problems associated with regional conditions, the managerial structure, and the minor differences between conditions at the two locations could easily be dealt with in bargaining.*

[112] As noted earlier in these Reasons, while the Board in *O.K. Economy Stores*, *supra*, *Canada Safeway Limited*, *supra*, and *MacDonald's Consolidated Limited*, *supra*, did not refer to or apply any requirement that the applicant for consolidation demonstrate "a material change in circumstances" in *FirstBus Canada Ltd.*, *supra*, the Board did refer to such a requirement. The application under consideration in that case was filed as a "raid." At issue were two units of employees, the members of each of

which were employed by FirstBus. However, the employees in each local were employed in respect of two separate contracts for services that FirstBus had with two different customers: the Battlefords School Division No. 118 and the Battlefords Trade and Education Centre. Employees of each bargaining unit had applied for rescission of the respective certification Orders and the Board had ordered that votes be conducted in both units. A third local of the same union applied under the raid provision in s. 6(2) of the *Act* to replace the existing locals in an expanded bargaining unit of all of the FirstBus employees in the city. The Board treated the application as an application to amend the bargaining unit under ss. 5(i), (j) and (k) of the *Act*, rather than as a raid, because the unions involved were not in competition or adverse in interest. At the hearing of the application, counsel for the union did not lead any evidence with respect to the appropriateness of the proposed bargaining unit. The Board dismissed the application, on a motion for non-suit, stating, at 267, that the applicant,

> *…failed to establish that a material change had occurred that justified a review of bargaining structures and it failed to establish that the proposed bargaining unit was an appropriate bargaining unit.*

[113] In our opinion, to the extent that the decision in *FirstBus Canada Ltd.*, purports to change the Board's policy or approach to consolidation applications outlined in *O.K. Economy Stores*, *supra*, and *Canada Safeway Limited*, *supra*, over ten years ago, it is an anomaly. An application for amendment in the nature of consolidation of bargaining units is quite different from the more common amendment application for a change to the bargaining unit description regarding the positions excluded from, or classifications included within, the scope of an existing certification order. The former type of amendment application is not liable to being used for the mischief that the so-called "material change rule" is meant to prevent: an application for consolidation cannot be construed as an unwarranted or disguised attempt to appeal the existing multiple certification orders in respect of the bargaining units sought to be consolidated.

[114] We are of the opinion that it is generally not necessary for an applicant for amendment in the nature of consolidation to establish that there has been a material change in circumstances before the application can be considered. In our opinion, the decision in *FirstBus Canada Ltd*. merely demonstrates that indeed not all amendment

applications for consolidation are the same, and it is necessary to determine on a case-by-case basis whether evidence of a material change may be required. This is consonant with the position of the Board in *O. K. Economy Stores*, *supra*, as concerns the appropriateness of the unit. On some applications for consolidation there may be evidence that the existing orders are no longer appropriate for the purposes of collective bargaining because of a change in circumstances and the Board is asked to consider whether some other configuration is appropriate. But the fact that there has been no material change generally ought not to preclude the Board from considering whether consolidation will result in the creation of a single appropriate unit that will likely enhance the stability of the parties' labour relations.

[115] However, if it were necessary that the applicants in the present case demonstrate a material change in circumstances, then we consider the fact that the Union has fairly recently, and since the certification of the Saskatoon bargaining unit many years ago, certified a second bargaining unit of the Employer's employees in the province who are engaged in the carrying out of identical work in Regina, to be a material change in circumstances for the purposes of this kind of amendment application.

[116] The argument was advanced on behalf of the Employer that the two existing bargaining units are appropriate, and that the Union had the opportunity to attempt to certify a single large unit including the employees in both locations when it organized the Regina location, but that it had instead chosen to organize that location separately and autonomously. In our opinion, the fact that the Union waited to make the consolidation application until after a first collective agreement had been secured for the Regina unit and the employees had had the opportunity to experience working life under the agreement is not a basis upon which to dismiss the application. Indeed, it seems prudent to have allowed the employees to acquire such experience before they could make a decision that consolidation might result in improved labour relations, strength in bargaining and industrial stability. Unlike the position taken by the British Columbia Board as outlined above, the Board's jurisprudence has not required an applicant for consolidation to demonstrate that one of the existing bargaining unit structures is no longer appropriate.

[117] In the present case, the Employer argued that it was necessary for the Union to provide evidence of support by the employees in each bargaining unit sought to be consolidated. The Union argued that it has demonstrated such support on the basis of the support cards filed and the evidence that a favourable vote was held among the employees in each unit.

[118] While on initial certification, evidence of majority support of the employees must be filed with the application, there are differences surrounding such a requirement as concerns the various types of amendment applications. For example, when seeking to amend a certification order to add a group of unrepresented employees to an existing bargaining unit, the applicant trade union must file evidence of majority support among the employees in the add-on group: See, for example, *Canadian Union of Public Employees, Local 2269 v. Saskatoon Public Library Board*, [1989] Spring Sask. Labour Rep. 82, LRB File No. 257-88. By contrast, in cases of amendment to include new classifications to the scope of an existing certification order, the union does not have to establish the support of the individual employees in the classifications if they reasonably can be regarded as falling within the description of the bargaining unit. The reasons for these differences are, at least in part, so that the objectives of s. 3 of the *Act* are not undermined or manipulated by subsequent additions to the work force or reorganizations within the unit: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc*., [1996] Sask. L.R.B.R. 27, LRB File Nos. 274-95 & 275-95, at 30-31.

[119] The importance of demonstrating support of the employees is abrogated where they are not choosing a bargaining agent for the first time nor choosing a new bargaining agent. Neither *O.K. Economy Stores*, *supra*, nor *Canada Safeway Limited*, *supra*, both cases involving application for consolidation of units represented by the same union, refer to such a requirement. We agree with those decisions and do not consider the requirement necessary in the present circumstances where the existing individual units and the proposed consolidated unit are all represented by the same union. However, if it were necessary to provide evidence of majority support with respect to a consolidation of bargaining units represented by the same union, we would find that the support card evidence filed is sufficient for such purpose, especially in light of the associated vote held of the members of each bargaining unit.

[120] We must now determine whether or not to grant the application for consolidation after considering the relevant factors.

[121] In our opinion, the circumstances in the present case are quite similar to *O.K. Economy Stores*, *supra*. In that case, each of the five units was geographically separated; the employees in each unit had similar skills, duties and responsibilities; interchange or movement of employees between units was rare; seniority was not transferable; management authority was centralized with a manager at each store; there was no functional interdependence between stores; each store was required to be financially viable.

[122] In the present case, in our opinion, the proposed consolidated bargaining unit is an appropriate unit. Firstly, it satisfies a general preference for larger bargaining units.

[123] Secondly, with respect to community of interest, we note that both Alberta and Ontario have stated that such factor is not as significant on consolidation applications as it is on applications for initial certification. The employees at the Regina and Saskatoon plant carry out the same functions and have similar working conditions, even if the classifications at each plant do not have the same names or the duties of the incumbents may differ in minor respects. The fact that the Regina employees work in a single-storey plant, while the Saskatoon plant is three-storey, is not significant. The overarching consideration on an application for consolidation is whether it will likely result in enhanced labour relations stability, without causing undue operational difficulty for the employer.

[124] As almost all of the decisions referred to in the overview of jurisprudence earlier in these Reasons demonstrate, geographic separation by itself is not important, unless it otherwise makes consolidation untenable. Indeed, in *Cineplex Odeon*, *supra*, and *Famous Players*, *supra*, the units were in different administrative and management regions of the company. In the present case, while the plants have different local management, they operate according to centralized administrative and financial policies

and procedures and they do not compete with each other, essentially as was the situation in *O.K. Economy Stores*, *supra*.

[125] While the Employer in the present case argued that the Union was seeking to derive some advantage in bargaining by reason of the consolidation, it was not clear what this purported advantage would be or to what degree. In any event, in *Canada Safeway supra*, the Board found that how consolidation affects bargaining strategies is not relevant. The Ontario line of cases held to the same view.

[126] In our opinion, in the present case, to the extent that community of interest as a discrete consideration enters into the matter, the employees in the Saskatoon and Regina plants share a sufficiently coherent community of interest that that they can bargain together on a viable basis without causing serious organizational or labour relations harm to the Employer. Any difference in interest is not serious enough that it will derogate from the anticipated enhanced stability afforded by a single large bargaining unit structure. We are satisfied on the evidence that the Employer's authority in bargaining with each of the existing units lies with its Vancouver managers and Mr. Johansen and in that respect is already centralized. Any problems associated with local management structure and with differences in classification and minor differences in working conditions between the two plants can be dealt with in bargaining.

[127] Accordingly, orders will issue granting the application for consolidation of the two bargaining units and leaving it to the parties to negotiate a collective agreement appropriate for the new unit. The Board will remain seized to deal with any problems of implementation or any further remedial relief deemed appropriate and necessary.

DATED at Regina, Saskatchewan, this **5th** day of **May, 2004**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson