Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. SOBEY'S CAPITAL INC. operating as IGA GARDEN MARKET, Respondent

LRB File No. 016-05; April 5, 2006
Vice-Chairperson, Angela Zborosky; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Rod Gillies
For the Respondent: Brian Kenny, Q.C.

Certification – Amendment – Practice and procedure – Board reviews case law under s. 5(j)(ii) of *The Trade Union Act* and concludes that provision used in very limited circumstances to determine amendment application filed outside open period - Test for amendment under s. 5(j)(ii) of *The Trade Union Act* (material change in circumstances) same as test for amendment under s. 5(k) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers Union, Local 1400 (the "Union") is designated as the bargaining agent for a unit of employees of Sobey's Capital Inc. operating as IGA Garden Market (the "Employer") which operates a retail grocery store in Moose Jaw, Saskatchewan. The Union filed an application with the Board on January 7, 2005 seeking to amend its certification Order pursuant to ss. 5(i), (j) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), by changing the geographic scope from a specified street address in Moose Jaw to the municipal boundary of Moose Jaw. The Union takes the position that such an amendment is necessary to bring the certification Order in line with certification orders the Union holds for other stores operated by Sobey's Capital Inc. ("Sobey's") in other cities in Saskatchewan and in accordance with the Board's general preference for describing the geographic scope of bargaining units in terms of a municipal boundary.

[2] The Employer filed a reply to the application taking the position that the amendment sought by the Union was inappropriate because there had been no change

in circumstances since the issuance of the certification Order and because it was incumbent upon the Union to first negotiate with respect to the proposed change with the Employer during their current negotiations for a first collective agreement.

[3] The Order sought to be amended by the Union was issued on February 9, 2004 and the Union therefore brought this application within the open period mandated by s. 5(k) of the *Act*. The bargaining unit description in the original Order reads as follows:

> *. . . all employees employed by Sobey's Capitial Inc., operating as IGA Garden Market in or in connection with its location at 769 Thatcher Drive East in Moose Jaw, Saskatchewan, except store manager, assistant store manager, grocery department manager, bakery department manager, produce department manager, deli/a-la-carte department manager, meat/fish department manager and office staff. . . .*

[4] It is noted that, in the Union's application, both the bargaining unit description and the proposed bargaining unit description contain errors in the names of the excluded positions (the stated exclusions reflect those that the Union sought on its initial application for certification) which would make it appear that the Union was also seeking amendment of the exclusions in the certification Order. However, based on the argument made by the Union at the hearing, we take the view that the only amendment the Union is seeking is to the geographic scope of the unit.

[5] The Board heard the application on May 4, 2005. At the commencement of the hearing, the parties agreed that the certification Order should be amended to reflect the change to the Employer's name since the certification Order was granted. The name changed from "Sobey's Capital Inc. operating as IGA Garden Market" to "Sobey's Capital Inc. operating as Sobey's Ready to Serve" and therefore an amended order will issue which reflects that agreed upon change.

Evidence:

[6] The facts are not in dispute between the parties. The Union filed its initial application for certification with the Board on January 16, 2004 (LRB File No. 008-04) seeking to represent a unit of employees of the Employer with certain named exclusions and with a geographic scope described as "Moose Jaw, Saskatchewan." The Employer

filed a reply proposing an alternate bargaining unit description. This bargaining unit description contained somewhat different titles for excluded positions and described the geographic scope of the bargaining unit as "in or in connection with its location at 769 Thatcher Drive East, Moose Jaw, Saskatchewan." Prior to the hearing date set for the application, the Board received a letter from legal counsel for the Union advising that the Union accepted the bargaining unit description proposed by the Employer. In light of this agreement, the Board considered the application *in camera* and issued the certification Order on February 9, 2004 with the bargaining unit described precisely as it was described in the Employer's reply.

[7] Greg Eyre, a representative of the Union, testified on its behalf. At the time of the filing of the certification application, Mr. Eyre was responsible for the co-ordination of the team that organized the employees of the Employer and was responsible for filing any applications during the organizing drive, including the certification application. He testified that he drafted the bargaining unit description contained in the application for certification and he reviewed and swore the application on behalf of the Union. He recalled that, when he received a copy of the Employer's reply to the application, he focused on the excluded positions the Employer had listed as they differed from those enumerated in the Union's proposed bargaining unit description. It appeared to him that the Moose Jaw store had a different management structure than one of the Sobey's stores in Saskatoon with which he was familiar. He set out to determine the management structure of the Moose Jaw store and, following an exchange of correspondence with the Employer, he determined that the exclusions named by the Employer were accurate. He testified that, when he indicated that the Employer's proposed bargaining unit description was acceptable, he overlooked that the Employer had described the geographic boundary of the bargaining unit in terms of the civic address of the store in Moose Jaw, rather than as simply "Moose Jaw." He stated that he missed this difference between the Union's and Employer's proposed bargaining unit descriptions through his inadvertence. Mr. Eyre noticed this error approximately two months after the certification Order was issued and he therefore waited until the open period mandated by the *Act* to bring this application.

[8] Mr. Eyre testified that the bargaining units described in the certification Orders held by the Union for the Sobey's stores in Yorkton and Prince Albert,

Saskatchewan are both described in terms of a municipal boundary, not a civic address. The certification Order for the Sobey's store in Saskatoon, an application which Mr. Eyre was responsible for preparing and filing, is described with a civic address because Sobey's operates more than one store in Saskatoon and the Union organized only that one store. In cross-examination, Mr. Eyre stated that it would have been inappropriate to do otherwise.

[9] In his examination-in-chief, Mr. Eyre stated the Union's concern that, if the geographic scope of the Union's certification Order for the Employer remains as the civic address, the Union's bargaining rights could be terminated should the Employer close the store at 769 Thatcher Drive and re-open it elsewhere in Moose Jaw. Mr. Eyre believes that, if the unit was described with Moose Jaw as the appropriate geographic scope, the Employer would not then be able to argue that the employees did not have a right to transfer to the new location and maintain their representation by the Union. He stated that this situation had occurred in the past with respect to Sobey's operations in Yorkton, Saskatchewan and in Lloydminster, Alberta.

[10] In cross-examination, Mr. Eyre acknowledged that he was not aware of any plans by the Employer to change the location of the store operating at 769 Thatcher Drive East in Moose Jaw or to close the Moose Jaw store. Mr. Eyre also acknowledged that, if the Board granted the amendment proposed by the Union and the Employer then opened a second store in Moose Jaw, the Union would take the position that the employees of that new store would be automatically included within the scope of the bargaining unit. With respect to the change in location of the Employer's store in Yorkton, Mr. Eyre admitted in cross-examination that he believed that the Employer voluntarily recognized the Union after a change in its location rather than requiring the Union to make some type of application to the Board to represent the employees there.

[11] At the time of this application to the Board the parties were engaged in negotiations for a first collective agreement. In cross-examination Mr. Eyre stated that he was not involved in those negotiations but that he believed the Union had raised the issue of the proposed change to the bargaining unit description during the negotiations.

Arguments:

[12] Mr. Gillies, counsel on behalf of the Union, argued that the evidence was clear that the Union made a mistake when it agreed to the bargaining unit description proposed by the Employer in that the Union had not intended to agree that the geographic scope should be described in terms of the civic address of the store rather than the municipal boundary. He pointed to the letter from the Union's legal counsel to the Board which indicated the Union's agreement to the bargaining unit proposed by the Employer and referred to a statement made in the letter that in the Union's "perception, the only difference is the titles attached to the management positions in question." The Union argued that, in these circumstances, the Board has the power to amend the certification Order to correct the Union's mistake pursuant to s. 5(j) of the *Act* which permits the Board to make amendments where it considers them "necessary."

[13] The Union took the position that the *Act* does not require it to establish a change in circumstances in order to obtain the amendment and relied on the Board's decision in *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 v. Canadian Linen and Uniform Service Co.*, [2004] Sask. L.R.B.R. 69, LRB File Nos. 062-02 & 090-02. The *Canadian Linen* case, *supra*, involved an application for amendment in the nature of a consolidation of bargaining units represented by different locals of the same union. The Board granted the amendment sought and, in so doing, determined that it was not necessary for the union to establish a change in circumstances. The Union pointed out the rationale of the Board in making this determination in *Canadian Linen, supra*, that is, that the mischief to be prevented by requiring the party seeking the amendment to establish a change in circumstances was the use of an amendment application as a method of appeal of the Board's original decision and that this mischief was not present in an application for amendment in the nature of consolidation. The Union argued that similar circumstances existed in this case in that the amendment application was not a disguised attempt to appeal the certification Order but was rather an attempt to cure an error made by one of the parties in circumstances where the party agreed to a bargaining unit description it had not applied for and where the matter was heard *in camera*.

[14] The Union submitted that the appropriate test for the Board to apply to correct the certification Order is the test it would have applied on the initial application for certification. In applications for certification the Board has a general policy of accepting municipal boundaries as the "most reasonable geographic description" where an employer operates at only one location in a municipality because it protects the union should the employer move its operations from one civic address to another. In support of this proposition, the Union relied on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Roca Jack's Roasting House and Coffee Company Ltd.,* [1997] Sask. L.R.B.R. 244, LRB File No. 016-97; *United Steelworkers of America, Local 5917 v. Doepker Industries Ltd.*, [2000] Sask. L.R.B.R. 290, LRB File No. 041-00; and *United Food and Commercial Workers Union, Local 1400 v. Sobey's Capital Inc., operating as Prince Albert Garden Market IGA*, [2004] Sask. L.R.B.R. 224, LRB File No. 209-04. In relation to the *Sobey's Capital Inc*., case, *supra*, where the employer had no plans to open another store in Prince Albert, the Board indicated that its policy of preferring a municipal boundary to a civic address was in place because the rights of present employees must be protected (in the event the employer changed civic locations of the current operation) ahead of the rights of hypothetical future employees, should the employer open another operation in Prince Albert.

[15] The Union argued that applying the general principles used upon initial certification to correct the error made by the Union does not result in prejudice to the parties because there has been no change in circumstances. The parties are in the same position now as they were at the time of the certification hearing and have not as yet concluded a first collective agreement.

[16] Mr. Kenny, counsel on behalf of the Employer, filed a brief that we have reviewed. Mr. Kenny argued that it has been a longstanding policy of the Board to require an applicant seeking an amendment to a certification order to demonstrate that there has been a material change in circumstances between the issuance of the certification order and the date of the application, prior to the Board considering whether an amendment should be granted. He argued that this is so even where the order resulted through the consent of the parties. The rationale for such a requirement is to prevent parties from bringing applications on an annual basis that essentially amount to appeals of the Board's original decision. In support of its argument, the Employer cited

the following cases: *Government of Saskatchewan and Saskatchewan Government Employees Union*, [1983] April Sask. Labour Rep. 67; *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*; Saskatchewan Union of Nurses v. Saskatchewan Association of Health Organizations*, [1999] Sask. L. R.B.R. 549, LRB File No. 078-97; *Canadian Union of Public Employees, Local 600 v. Battlefords Regional Care Centre*, [1989] Summer Sask. Labour Rep. 80, LRB File No. 186-88; *Retail, Wholesale and Department Store Union v. Canada Safeway Limited*, [1992] 1st Quarter Sask. Labour Rep. 47, LRB File Nos. 177-90, 178-90, 227-90 to 229-90, 036-91 & 088-91; *Canadian Union of Public Employees, Local 4532 v. FirstBus Canada Ltd.*, [2002] Sask. L.R.B.R. 261, LRB File No. 067-02.

[17] The Employer argued that the Union had failed to demonstrate a material change in circumstances concerning the Employer's structure, operations, labour relations or the duties and responsibilities and terms and conditions of employment of its employees between the date of the certification Order and the date of the amendment application, which would entitle the Union to consideration by the Board of an amendment to the certification Order. The Employer argued that the Union's application was in the nature of an appeal of the certification Order because the issue of the bargaining unit description was squarely before the Board on the application for certification even though the application proceeded *in camera*. The Employer argued that the Board does not merely "rubber stamp" uncontested certification applications which come before it but rather must exercise the discretion given to it to make a determination whether the bargaining unit description apparently agreed to between the parties is an appropriate unit.

[18] Mr. Kenny argued that s. 5(i) of the *Act* prescribes when an amendment may be undertaken, while s. 5(j) of the *Act* permits the Board to make an amendment, "where in its opinion, the amendment is necessary." This implies that there is something about the order that *needs* to be amended and that the power should not be exercised merely where the Union wishes it would have proceeded with the certification application in a different manner. The Employer suggested that the type of mistake the Board could correct because it was "necessary" would be, for example, where the incorrect address was listed in the certification order. The Employer maintained that the use of the word

"necessary" in s. 5(j) meant that the amendment must be necessary because there has been a change in circumstances.

[19] In response to the Union's argument, the Employer maintained that, if the lack of prejudice to the Employer was relevant to the inquiry, there was equally no prejudice to the Union should the amendment not be granted. The successorship provisions of the *Act* exist to protect the Union should the Employer move the operation from one civic address to another.

Statutory Provisions:

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

> *5 The board may make orders:*
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> *(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;*
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> *(j) amending an order of the board if:*
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> *(i) the employer and the trade union agree to the amendment; or*
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> *(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:

[21] In the application for amendment filed during the open period mandated by s. 5(k), the Union asked the Board to grant an order under s. 5(j) arguing that it was "necessary" to correct the Union's mistake with respect to the geographic scope of the certification Order. The proposition by the Union that the Board could utilize s. 5(j) to make an amendment to the certification Order when the application was made during the open period because the amendment was "necessary," fails to capture the proper distinction between s. 5(j) and s. 5(k), as the Board has interpreted those provisions. In order to properly dispose of the application, it is necessary for us to consider two issues: (i) the circumstances under which the Board would consider an amendment "necessary" within the meaning of s. 5(j)(ii), and; (ii) whether the Union must establish a material change in circumstances to be entitled to consideration of an amendment under s. 5(j) or s. 5(k) of the *Act*.

The circumstances under which the Board would consider an amendment "necessary" within the meaning of s. 5(j)(ii)

[22] There have been only a few decisions of the Board that have discussed or applied s. 5(j) since an amendment was made to that section in 1994. In *Canadian Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board*, [1996] Sask. L.R.B.R. 732, LRB File No. 052-96, an application came before the Board pursuant to s. 5(m) of the *Act* seeking a determination with respect to the status of two new positions. The union opposed the application on the basis that it was not filed in the open period mandated by s. 5(k) of the *Act*. In analyzing the question whether the Board had jurisdiction to make such an order outside the open period, the Board stated at 740 and 741:

> *In the Remai decision, supra, the Board found that the open periods in s. 5(k) and in other sections of the Act are not mere technical*

embroidery, but do have jurisdictional implications. In that case, the Board commented, at 138:

> *The rationale for the open periods is, in our view, to provide some predictability and order in the context of the changes which are signalled by the events to which they apply. The open period established under s. 33(4), for example, permits trade unions and employers to prepare for the stage of bargaining which will occur following the expiry date of a collective agreement. Trade unions, employers and individual employees are made aware, by the choice of other open periods, of their opportunities to seek changes in the certification Order or other Orders issued by the Board. The Board has expressed the view in the past that it is not only beyond its jurisdiction to consider applications which are not filed during the relevant open period, but that it would produce confusion and inequity to do so.*

[23] Also in the *Cuelenaere* case, *supra*, the Board went on to recognize the limited application of s. 5(j), as amended. The Board stated at 741 and 742:

> *In a decision in Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan, [1995] 3rd Quarter Sask. Labour Rep. 195, LRB File No. 139-95, the Board resisted the argument that the amendment of s. 5(j) had the effect of eliminating completely the strait-jacket imposed by the open periods in s. 5(k). The Board observed, at 199:*
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> > *We have concluded that the amendment to s. 5(j) does not have the overall effect of nullifying the requirements set out in s. 5(k). In our view, the purpose of the amendment is to expand the opportunities for the Board, on our own initiative, to determine that a situation is so anomalous or constitutes such a threat to viable collective bargaining that it requires some amplification or alteration in an earlier Order. It does not have the effect of relieving the parties to an application of the obligation to adhere to the requirements respecting open periods. The Union in this case proceeded correctly by filing the application during the relevant open period, and the effect of s. 5(j) in these circumstances is to allow the Board more flexibility in considering options where there is something anomalous about the consequences of the application of s. 5(k).*

Section 5(j) places in the hands of the Board a discretion to amend or rescind an Order in other circumstances than those where it is considered necessary to clarify or correct the Order. It permits the Board to contemplate such amendment or rescission for a range of reasons which could include substantive considerations of policy, as well as the technical issues which were the basis of such amendment or rescission before the amendment to s. 5(j). In our view, one of the implications of this is that the restrictions on considering applications which are filed outside the open period in s. 5(k) are no longer of a jurisdictional nature; the restrictions which remain are those imposed by the Board in the light of whatever factors we think relevant.

As we indicated in the University of Saskatchewan decision, supra, we do not think the amendment of s. 5(j) constituted a signal for the wholesale abandonment of the open periods set out in s. 5(k). As a general rule, the requirement that parties who wish to apply for amendment or rescission of Board Orders concerning the scope of bargaining units and the representation of employees by trade unions serves a useful purpose in terms of ensuring orderliness and predictability. The temporal benchmarks provided by the open periods should continue to guide the parties in the vast majority of cases. It is only where the application of the ordinary requirements creates a significant difficulty for the parties or an obstacle to sound collective bargaining that the Board should consider exercising our discretion under s. 5(j).

We have taken note of the argument made on behalf of the Employer that all that is necessary is a finding under s. 5(m) that the positions either are or are not out-of-scope of the bargaining unit. It is true that such a finding may clarify or resolve a number of issues which have resulted from the dispute between the Employer and the Union over the status of these positions.

On the other hand, there is equally something unresolved about a finding pursuant to s. 5(m) which is not followed by an amendment to the certification Order. As we pointed out in the case of the earlier dispute which arose between these parties, in connection with the application designated as LRB File No. 033-91, neither party can insist (in a manner which disrupts collective bargaining) on a delineation of the bargaining unit other than that contained in the certification Order. Though a finding that incumbents in particular positions are not employees within the meaning of The Trade Union Act, and must therefore be treated as being outside the scope of a bargaining unit represented by a trade union, is always of significance - and the issue of whether anyone is an "employee" is in some senses perpetually an issue - the certification Order constitutes the description of the bargaining relationship which is binding on both parties.

[24] The Board also considered the distinction made between s. 5(j) and s. 5(k) of the *Act* in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*, [1996] Sask. LRBR 27, LRB File No. 274-95 & 275-95. At 34-35 the Board stated:

> *The amended form of s. 5(j) gives the Board considerable flexibility in making decisions with respect to the amendment of previous orders. We have said that we do not interpret this amendment as obviating the application of open periods in the ordinary course of events; it should not be viewed as an invitation to make applications to the Board without regard for the open periods, which are a useful means of creating order and predictability in most situations.*
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> *On the other hand, even prior to the amendment of s. 5(j), the Board indicated, in a decision in University of Saskatchewan Faculty Association v. University of Saskatchewan [1986], April Sask. Labour Rep. 34, that there are occasions when the straight-jacket of rigid open periods does not always serve well to support the objectives of the Act.*
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> *In this case, the parties have reached a critical juncture in their collective bargaining relationship, in large part because of the continuing uncertainty and friction caused by the changes which have been taking place in relation to the Moose Jaw location. We think they are correct in pointing to a determination of the issue of the scope of the certification Order as a means by which other issues outstanding between them might be moved towards a resolution.*

[25] In *Casino Regina, supra*, the Board summarized the applicability of s. 5(j) to applications for amendment where the Board is considering the status of newly created positions and went on to distinguish the situation in the *Cuelenaere* case, *supra*. In the *Casino Regina* case, *supra*, the Board stated at 194 and 195

> *[26] In Canadian Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board, [1996] Sask. L.R.B.R. 732, LRB File No. 052-96, the Board determined that applications as to the scope of new positions that would require amendment of the certification order to exclude the position should be made during the open period specified pursuant to s. 5(k) of the Act, except in unusual circumstances.*
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> . . .
>
> *[28] The position taken by the Employer in its application for scope determination of the afs manager position would, if it prevailed, require amendment of the certification Order to*

> *regularize the bargaining unit description. In our opinion, the Employer has not demonstrated the requisite urgency that would cause us to entertain its application outside the open period pursuant to s. 5(j) of the Act. By the admission of Mr. Sawicki, the Employer had been aware of the increased business during the holiday season because of many years experience and knew of the Grey Cup celebrations at least two years in advance. Unlike the situation in John M. Cuelenaere Library, supra, where the parties had failed to resolve their difference of opinion over the scope of two key positions for over a year, leading the Board in that case to make the s. 5(m) scope determination outside the open period pursuant to s. 5(j), the Employer in the present case filled the position before attempting any negotiation with the Union and made its application within a few days of a single short meeting. Accordingly, the Employer's application in LRB File No. 252-03 is dismissed.*

[26] In the *Cuelenaere* case, the Board exercised its discretion under s. 5(j) to amend the order outside the open period because the positions in question were "key positions in the administrative structure of the library, and were also of importance in the industrial relations and personnel management relating to the employees in the bargaining unit."

[27] Sections 5(i), (j) and (k) permit the amendment of a variety of Board orders. In our view, s. 5(k) has been used to determine an amendment application filed during the open period, while s. 5(j) has been used in very limited circumstances to determine an amendment application filed outside the open period. Both ss. 5(j) and 5(k) are jurisdictional in nature in that they permit the Board to consider amendment applications filed either within (s. 5(k)) or outside (s. 5(j)) the open period. The general rule is that amendment applications are to be filed within the open period mandated by s. 5(k), unless an applicant can establish that the parties have consented to the amendment (s. 5(j)(i)) or the amendment, in the opinion of the Board, is "necessary" (s. 5(j)(ii)). In either of these latter situations, the Board may grant an amendment outside the open period. Section 5(j)(ii) does not prescribe a substantive test for an amendment that is different than s. 5(k). The qualifying word in s. 5(j)(ii) "necessary" means only that the Board has the power to determine that it is necessary to grant the amendment outside the open period rather than requiring a party to wait and file an amendment application during the open period. As such, it is not appropriate to delineate a different

test to determine a party's substantive right to an amendment for those applications under s. 5(j)(ii) than for those under s. 5(k).

Whether the Union must establish a material change in circumstances to be entitled to consideration of an amendment under s. 5(j) or 5(k) of the *Act*

[28] In our opinion, the case law, although not specifically articulated in this manner, supports the view that, generally, entitlement to the amendment of a Board order can only be established by proving that there has been a material change in circumstances which justifies the amendment. In this case, the Union urged us to amend the certification Order to reflect what the Board might have done on the initial certification application had the matter come before the Board in the first instance as a contested application, that is, to apply the general policy of describing bargaining units in terms of a municipal boundary. A review of the Board's decisions which have considered s. 5(j)(ii) illustrates that the Board does consider the law that would have applied on the initial hearing of the matter, but only after first determining that there has been a material change in circumstances, triggering the Board's ability to do so.

[29] In *Raider Industries, supra*, the Board amended a certification order pursuant to s. 5(j)(ii) of the *Act* to include a second geographical location because of a change in the circumstances under which the original certification order was granted. At the time of the hearing of the certification application the evidence indicated that the employer operated at only one location and, although it had plans to open a second geographical location, the second location was to operate as a separate entity with separate production and workforce. Following the issuance of the certification order, operations commenced at the second location but in a manner different than the employer had planned. The evidence at the hearing of the amendment application clearly indicated that the operation at the second location was integrated with the operation at the first location in terms of both production and the reallocation of the workforce from one location to the other. In its decision to grant the amendment to the certification order pursuant to s. 5(j) to include the second geographical location, the Board considered the law it would have applied on the initial certification application had it had that evidence before it, that is, to draw the geographic boundary of the bargaining unit in terms which "bear a fairly accurate relationship to the operations of an employer at the time." The Board's decision to apply these legal principles was based on there

being a change in circumstances since the issuance of the certification order. While determining that it was not appropriate to reconsider its original decision in light of the new evidence, the Board stated at 33 and 34:

> *On the other hand, though we do not think our determination on this basis is need of correction, we are of the view that* ***circumstances have altered considerably since the certification Order was granted****, and we have decided that the application for amendment of the certification Order should be granted, pursuant to s. 5(j) of The Trade Union Act.*
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> *. . .*
>
> *Based on the evidence of Mr. Brown,* ***we have concluded that there has been a significant change in the relationship between the two operations*** *in the mind of the Employer. At the time of the first hearing, it was envisioned that the Moose Jaw plant would develop as a separate entity, with distinguishable goals and essentially a new workforce. It is clear that this vision has been considerably modified, and that the Employer now views the plants at the two locations as being part of an integrated and interwoven operation. This is most dramatically illustrated, perhaps, by the decision to reallocate the existing workforce between the two plants, and to leave a minority of that workforce at Drinkwater.*
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> *In delineating bargaining units, the Board has often commented on our responsibility to ensure that the bargaining units which are created under our auspices are appropriate as vehicles for carrying out the policy objectives of The Trade Union Act. Counsel for the Employer suggested that there was nothing in the changes that have occurred which would render the continued existence of a separate unit at Drinkwater inappropriate, and we have to agree with this; if this were the only choice available, there is no question that the Board would be reluctant to deny access to collective bargaining to the remaining employees at Drinkwater.*
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> *As the Board has pointed out in the past, however, it is part of our responsibility to consider not only whether a proposed unit is an appropriate one, but whether there is a more appropriate way of defining the bargaining unit, one which will be more in keeping with the goals of the Act.*
>
> *In our view,* ***given the developments which have occurred since we issued the certification Order, the appropriate unit would now consist of employees at both locations****. The vast majority of employees in Moose Jaw were, prior to this week, among those who selected the Union as their representative for the purpose of bargaining collectively, and the concern of the*

> *Board with protecting the rights under s. 3 of a future group of employees not yet in being cannot be said to be of significant force in this situation. [emphasis added]*

[30] As stated above, the Board proceeded to issue the amended order pursuant to s. 5(j) on the basis that it was necessary to do so immediately, rather than wait for the open period, because the parties were at a "critical juncture in their collective bargaining relationship" due to the "uncertainty and friction" caused by the commencement of operations in the second location and the transfer of workforce there.

[31] In *United Steelworkers of America v. Impact Products, A Division of General Scrap and Car Shredder Ltd.*, [1996] Sask. LRBR 766, LRB File No. 180-96, the Board considered an application for certification where the geographic scope sought by the union appeared broader than the scope of the employer's existing operations. The union described the geographic scope of the bargaining unit sought in the terms "trading in Regina, in or in connection with its place or places of business located in the Province of Saskatchewan." The Board followed its general policy of restricting the geographic scope of the certification order to the employer's existing site, having before it no evidence suggesting that employees worked at locations other than Regina. In issuing the certification order containing a geographic scope limited to Regina, the Board invited the parties to apply for an amendment pursuant to s. 5(j) in the event that the Board had misunderstood the application or the evidence at the certification hearing. In our view, it is clear that the Board was suggesting to the union that, in order to be entitled to consideration of an amendment pursuant to s. 5(j) of the *Act*, it would be necessary for the union to establish a change in circumstances, that is, provide evidence which established that employees in the certified bargaining unit worked for the employer at a location outside of Regina.

[32] The decisions in the *Casino Regina* case, *supra,* and the *Cuelenaere* case, *supra*, which both involved the consideration of an amendment in the nature of adding excluded positions, also support the proposition that a material change in circumstances must first be shown in order for the Board to entertain the argument of an amendment to the certification order, whether the application is brought under s. 5(j) or s. 5(k) of the *Act*. Although the Board came to different conclusions concerning the application of s. 5(j) in the *Casino Regina* case and the *Cueleneare* case, it is implicit in

the decisions that, before the Board would consider an amendment to the certification order under s. 5(k), it looked at the question of whether there had been a material change in circumstances concerning the introduction of a new position and the determination of whether that position was properly within the scope of the bargaining unit. If there had been such a change in circumstances established, the Board would have applied the general principles to determine whether the individual was an "employee" within the meaning of the *Act* and whether the position fell in the bargaining unit described in the certification order. In *Cuelenaere*, before granting the amendment pursuant to s. 5(j), the Board implicitly determined that there had been a change in circumstances since the certification order had issued: the Board determined that the employer created two new positions and examined whether the duties of those positions brought them outside the scope of the certification order. Only after making those determinations did the Board consider whether it was "necessary" to amend the certification order pursuant to s. 5(j) of the *Act*, rather than making the parties wait for the open period mandated by s. 5(k) of the *Act*.

[33] While we are not suggesting that there will never be exceptions to the rule that one must demonstrate a change in circumstances before the Board will consider an amendment under either of s. 5(j) or 5(k), the only current exception identified in the case law concerning amendments to certification orders is in relation to amendments in the nature of consolidation of bargaining units, which was the subject of the decision in *Canadian Linen, supra.*

[34] The *Canadian Linen* case, *supra*, involved applications by two locals of the same union to amend certification orders in order to consolidate two bargaining units into one unit under a single certification order. The two certification orders involved two separate bargaining units of employees of the employer in each of its plants in Regina and Saskatoon. The bargaining unit in Saskatoon was originally certified in 1948 while the bargaining unit in Regina was certified in 1999. Each of the applications was filed in the appropriate open period for the respective bargaining unit. In determining the appropriate factors to consider on an amendment application, the Board stated at 87:

> *[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. . . .*

[35] The Board followed with a review of the authorities that had considered an application for amendment in the nature of consolidation of bargaining units in an attempt to glean the appropriate factors for the Board to consider on amendment applications of that type. The Board stated at 94 and 95:

> *[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 application 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 of the Board upon the same issue merely because one of 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.*
>
> *. . .*
>
> *[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.*

[36] The Board proceeded to note that evidence of a material change in circumstances was not required in the above referenced decisions of *O.K. Economy Stores, Canada Safeway Limited,* and *MacDonald's Consolidated Limited*, all involving consolidation of bargaining units. After reviewing similar decisions in other Canadian jurisdictions on this issue, the Board noted that, in *Canadian Union of Public Employees, Local 4532 v. First Bus Canada Ltd.*, [2002] Sask. L.R.B.R. 261, LRB File No. 067-02, the Board referred to such a requirement and stated as follows at 109 and 110:

> *[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.* [**emphasis added**]

[37] In the *Canadian Linen* case, *supra*, even though the Board found that it was not necessary for the union to show a change in circumstances before it was entitled to consideration of an order amending the certification order, the Board did comment that, if such a change was required to have been shown, it was established by reason of the fact that the union recently certified a second unit of employees in the employer's Regina location who were engaged in carrying out work identical to that performed by the employees in the bargaining unit at the Saskatoon location. Following its determination that it was not necessary for the union to establish a material change in circumstances, the Board granted the amendment consolidating the bargaining units on the basis of factors it found relevant to this type of amendment application: the Board's general preference for larger bargaining units, enhanced labour relations stability without undue operational difficulty for the employer and a sufficient coherent community of interest among those in the consolidated unit.

[38] In our view, the exception to the general rule requiring a change in circumstances described in the *Canadian Linen* case, *supra*, does not apply to the application before us. Firstly, the case before us is not an application for amendment in the nature of consolidation of bargaining units. Secondly, the rationale for the exception in *Canadian Linen*, that is, that the amendment application was not in the nature of an appeal from the Board's initial decision in relation to the certification orders, does not exist in the present application. In the present case, even though the certification application proceeded *in camera*, the question of appropriateness of the bargaining unit was necessarily before the Board for its consideration. The only evidence we have of what the Board determined in that *in camera* hearing is what appears on the face of the certification Order. It shows that the Board determined that the appropriate bargaining unit description included the street address of the Employer's operations in Moose Jaw. Therefore, in our view, the appropriate bargaining unit, including the scope of the geographic boundary, was an issue before the Board on the original application and this application by the Union to amend that geographic boundary is in the nature of an appeal of the certification Order.

[39] In further support of our conclusion, we note the similarities between the amendment application before us and those considered in the authorities referred to above. Both *Raider Industries*, *supra*, and *Impact Products*, *supra*, provide direct authority for the proposition that an amendment concerning a change in the geographic scope of a certification order first requires proof of a material change in circumstances. Furthermore, in our view, this application, which seeks an amendment to the geographic scope of the bargaining unit description in the certification Order, is much the same as an application to amend the scope of exclusions in the bargaining unit description in a certification order, where, as noted above in the *Casino Regina* and *Cuelenaere* cases, both *supra*, a material change in circumstances is required to be shown. We are not prepared to deviate from these lines of authority to establish an exception to the material change rule in the circumstances of this case.

[40] The Union raised the argument that its counsel's letter to the Board at the time of the original hearing was corroborating evidence that the Union was not in agreement with the Employer's proposed geographic scope of the bargaining unit. As

stated, the only evidence available to this panel of the Board is that Mr. Eyre says he made a mistake in agreeing to the Employer's proposed bargaining unit description that included the street address as the appropriate geographic scope of the bargaining unit. We do not have before us the evidence the original panel of the Board had when it issued the certification Order. We are therefore left with the certification Order itself which is evidence that the Board determined that the appropriate bargaining unit included the street address as the geographic scope. It is not open to this panel of the Board to second guess or overturn that panel's decision. In any event, the parties and the Board must be entitled to rely on apparent agreements of the parties without making further inquiries concerning the parties' understanding of those agreements.

Conclusion:

[41] In the case before us, the Union has not asserted that there was a material change in circumstances entitling it to a consideration of whether an amendment should be granted. In fact the Union specifically stated that there had been no change in circumstances since the issuance of the certification Order. The evidence before us indicated that the location of the Employer's operations had not changed since the certification Order was issued, and there were no planned operational changes. As such, the Union's application must fail. Should the Union be in a position to establish such a change in the future, it may bring an amendment application during the open period under s. 5(k) or, if it believes it can also establish that it is "necessary" for the Board to amend the Order outside the open period, it may attempt to bring the application under s. 5(j)(ii) of the *Act*.

[42] One final note concerns the fact that the Union brought the application under s. 5(j) of the *Act* but filed the application during the open period mandated by s. 5(k). In our view, the proper test to be applied on this type of amendment application, that is, that the Union must show a material change in circumstances, is the same whether the application is brought under s. 5(j) or s. 5(k) although, in order to grant an amendment outside the open period pursuant to s. 5(j), the Board would have to further assess whether in the circumstances it was "necessary" to do so. Because the Union filed this application within the open period, pleading ss. 5(i) and (j) was sufficient to raise the issue of whether an amendment was appropriate. Our consideration of the applicability of s. 5(j) or s. 5(k) would not have been unexpected and both parties

addressed the issue of whether a change in circumstances was required in the circumstances of this case. We note, however, that had we granted an order in the circumstances of this case, it would have been pursuant to s. 5(k) simply because the application was filed during the open period.

[43] In conclusion, we find that the Union has not established the requisite material change in circumstances entitling it to consideration of an amendment to the certification Order issued February 9, 2004 and the application so far as it concerns geographical scope is therefore dismissed. An order will issue regarding the change of the Employer's name.

DATED at Regina, Saskatchewan, this **5th** day of **April, 2006**.

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson