Labour Relations Board
Saskatchewan

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 568, Applicant v. JOHNER'S HOMESTYLE CATERING, Respondent

LRB File Nos. 006-06, 007-06, 008-06, 009-06, 010-06 & 011-06; June 5, 2007
Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and John McCormick

For the Applicant: Larry Kowalchuk
For the Respondent: Christine Hansen-Chad and Ray Johner

Successorship – Deemed successorship – Section 37.1 of *The Trade Union Act* – Section 37.1 of *The Trade Union Act* intended to ensure continuation of union representation when cafeteria contractor working in public institution changes – Successor employer steps into shoes of predecessor employer and assumes all obligations under collective agreement, including rights of employees to remain employed – Successor employer required to reinstate employees and make decisions thereafter in accordance with collective agreement.

Duty to bargain in good faith – Refusal to bargain – Successor employer's failure to recall predecessor employer's employees put union in position of having to prove existence of employees' statutory rights under s. 37 of *The Trade Union Act* – Board finds successor employer violated ss. 11(1)(c) and 11(1)(e) of *The Trade Union Act* and orders successor employer to reinstate employees and pay them for monetary loss arising from unfair labour practices.

Successorship – Collective agreement – Scope clause of collective agreement must be amended to reflect reality of business structure of successor employer – Board cannot require successor employer to change structure of business operations to accord with scope clause in collective agreement – Successor employer must comply with lay-off and just cause provisions of collective agreement – Board amends scope clause to refer to partners of successor employer rather than to principal of predecessor employer.

Remedy – Monetary loss – Calculation – Successor employer paid monetary loss to affected employees – Union took issue with method of payment, particularly with deductions made and with timing of certain payments – Board not proper forum to determine whether successor employer made payments in improper fashion, however, successor employer should have discussed issues with union before taking unilateral action of making payments in manner successor employer chose – Board finds failure to bargain in good faith and reserves jurisdiction to deal with issues of liability/monetary loss arising from finding.

***The Trade Union Act*, ss. 2(b), 5(d), 5(g), 11(1)(c), 11(1)(e), 37 and 37.1.**

REASONS FOR DECISION

Background:

[1] On January 27, 2006, Retail Wholesale and Department Store Union (the "Union") filed several applications with the Board against Johner's Homestyle Catering ("Johner's"), including an unfair labour practice application, applications for reinstatement of and monetary loss for Shannon O'Fee and Florence Koch and an application for reinstatement of Barb Symonds. The unfair labour practice application alleges that Johner's violated ss. 11(1)(c) and (e), 37, 37.1 and 37.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*") and arises out of a successful bid made by Johner's on a tender by Saskatchewan Power Corporation ("SaskPower") to operate a cafeteria on SaskPower's premises in Regina, Saskatchewan. The Union holds a certification order dated April 10, 1975 that designates it as the exclusive bargaining representative for all employees employed by John Tappin Catering Ltd. ("Tappin" or the "predecessor employer"), the company that operated the cafeteria prior to Johner's. The applications filed by the Union result from the Union's assertions that Johner's is the successor employer to Tappin[1] and that Johner's has failed to honour its obligations as a successor employer under the *Act* and under the collective bargaining agreement between the Union and Tappin.

[2] In its unfair labour practice application, the Union specifically alleges that, after opening the cafeteria at SaskPower on January 9, 2006, Johner's failed to honour the certification order and the collective bargaining agreement after initially agreeing to do so. The Union alleges that, while Johner's initially recalled two employees, Ms. O'Fee and Ms. Koch, they were provided with only part-time shifts (they had been full-time employees under the collective bargaining agreement with Tappin) and, on January 24, 2006, Johner's canceled the recall of Ms. O'Fee and Ms. Koch. In addition, the Union alleges that Johner's breached the collective agreement by allowing out-of-scope personnel to do in-scope work. The applications for reinstatement of and monetary loss

[1] Although no direct evidence was led on this point, it is the Board's understanding that John Tappin Catering Ltd. is the same or a related entity to Alakava Food Service Ltd ("Alakava"). At the time of the closure of the cafeteria in August 2005, the most recent certification order listed John Tappin Catering Ltd. as the Employer, while the parties' most recent collective agreement named Alakava as the Employer. Our references to Tappin in these Reasons for Decision also include Alakava.

for Ms. Koch and Ms. O'Fee and the application for reinstatement of Ms. Symonds arise out of the failure of Johner's to employ those individuals from the date Johner's took over the operations of the cafeteria.

[3] Johner's filed replies to each of the Union's applications, indicating that it initially agreed to honour the collective bargaining agreement and agreed to bring the employees back to work for available shifts once new classifications and job descriptions were in place, a condition to which the Union had agreed. However, once Johner's had recalled employees for shifts that were available to suit its business needs, the Union refused to discuss job classifications and descriptions. Johner's said that it had a new concept for operating the cafeteria and therefore new classifications and job descriptions would be required before the employees could return to work. In addition, Johner's stated that its five partners operated the company and the company only needed one part-time employee per day in order to operate the cafeteria. In these circumstances, the part-time employees required new job descriptions and classifications. Johner's further indicated that it was a partnership, not a corporation, and that it did not take over or buy any part of Tappin. Johner's took the position that its partners are entitled to work at the cafeteria performing work that was previously done by in-scope employees.

[4] These applications were initially heard by the Board on May 29, 2006. At the outset of that hearing, the Board asked the Union whether part of the relief it was requesting was a declaration that Johner's was the successor to Alakava/Tappin. The Union indicated that it was seeking that declaration. On June 14, 2006, the Board issued an Order, with reasons to follow, which essentially indicated that Johner's was a successor employer to Tappin and Alakava and was bound by both the certification order dated April 10, 1975 with regard to Tappin and the collective agreement between the Union and Alakava. The Board also ordered that the certification order and the collective agreement be amended to reflect their application to the new bargaining unit. The Board also determined that Johner's had committed unfair labour practices in violation of ss. 11(1)(c) and (e) of the *Act* and ordered that Ms. O'Fee, Ms. Koch and Ms. Symonds be reinstated and paid monetary loss. Lastly, the Board appointed a Board agent to facilitate discussions between the parties relating to the reinstatement and monetary loss orders and the amendment to the bargaining unit description and the

collective bargaining agreement and to then report back to the Board. The Order read as follows:

> ***THE LABOUR RELATIONS BOARD**, pursuant to Sections 5(a), 5(b), 5(c), 5(d), 5(e), 5(f), 5(g), 11(1)(c), 11(1)(e), 37 and 37.1 of The Trade Union Act, **HEREBY:***
>
> (a) ***ORDERS** that there is deemed to have been the sale of a business for the purposes of s. 37.1 of The Trade Union Act from John Tappin Catering Ltd. and Alakava Food Services Ltd. to the Respondent, Johner's Catering, with respect to the provision of cafeteria services to Saskatchewan Power Corporation and, from and after the date on which the Respondent first provided such cafeteria services, the Respondent is bound by the certification Order dated April 10, 1975 with respect to John Tappin Catering Ltd. and by the collective agreement between Alakava Food Services Ltd. and the Applicant, which collective agreement shall be the agreement in force for all employees in the bargaining unit described in paragraph (b) of this Order;*
>
> (b) ***ORDERS** that all employees of the Respondent, except the President, Vice-President and Secretary, providing services with respect to Saskatchewan Power Corporation at 2025 Victoria Avenue, in Regina, Saskatchewan, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> (c) ***ORDERS** that the Applicant, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set out in paragraph (b) of this Order;*
>
> (d) ***ORDERS** the Respondent, the employer, to bargain collectively with the trade union set forth in paragraph (c) of this Order, with respect to the appropriate unit of employees set out in paragraph (b) of this Order;*
>
> (e) ***ORDERS** the amendment of the collective agreement described in paragraph (a) of this Order to reflect its application to the bargaining unit described in paragraph (b) of this Order;*
>
> (f) ***FINDS** that the Respondent has committed an unfair labour practice in violation of s. 11(1)(c) of The Trade Union Act by failing or refusing to bargain collectively with the Applicant;*

(g) ***FINDS*** *that the Respondent has committed an unfair labour practice in violation of s. 11(1)(e) of The Trade Union Act by discriminating in regard to hiring, tenure of employment and terms and conditions of employment with a view to discouraging membership or activity in, and the selection of, a labour organization;*

(h) ***ORDERS*** *the Respondent to cease and refrain from committing the unfair labour practices described in paragraphs (f) and (g) of this Order;*

(i) ***ORDERS****, notwithstanding the order made in paragraph (e) of this Order, the Respondent to reinstate each of Shannon O'Fee, Florence Koch and Barb Symonds to their employment with the Respondent within ten (10) days of the date of this Order under the same terms and conditions of employment as existed on August 26, 2005, and without any loss of seniority;*

(j) ***ORDERS*** *the Respondent to pay to Shannon O'Fee and Florence Koch the monetary loss suffered by each of them (after deduction of monies earned through mitigation) from the date on which the Respondent first provided the cafeteria services described in paragraph (a) of this Order to the date of the reinstatement of Shannon O'Fee and Florence Koch;*

(k) ***APPOINTS*** *Kelly Miner, Investigating Officer, as Board Agent for the purpose of:*

(i) *Facilitating discussion between the Applicant and the Respondent relating to the reinstatement of Shannon O'Fee, Florence Koch and Barb Symonds, and relating to the calculation and determination of monetary loss suffered by Shannon O'Fee and Florence Koch as a result of the Respondent's unfair labour practices;*

(ii) *Facilitating discussion between the Applicant and the Respondent relating to an amendment to the bargaining unit description under s. 37(2)(e) of The Trade Union Act;*

(iii) *Facilitating discussion between the Applicant and the Respondent relating to the application of the collective bargaining agreement described in paragraph (a) of this Order;*

(iv) Examining any records of the Respondent, the Applicant, Shannon O'Fee and Florence Koch relating to the amount of monetary loss suffered by Shannon O'Fee and Florence Koch as a result of the Respondent's unfair labour practices;

(v) Interviewing any employee or partner of the Respondent in relation to the amount of monetary loss suffered by Shannon O'Fee and Florence Koch as a result of the Respondent's unfair labour practices;

(vi) Reporting to the Board within 60 days of the date of this Order, or within such further time period as the Board Agent may request and Vice-Chairperson Zborosky may allow, on:

(1) whether the Applicant and the Respondent have reached agreement on the issues addressed by this Order; and

(2) whether the Board should issue further orders or hold further hearings on any point relating to the provision of information by the Respondent or the amendment to the bargaining unit description under s. 37(2)(e) of The Trade Union Act or the giving of directions as to the application of the collective bargaining agreement under s. 37(2)(f) of The Trade Union Act or the terms of reinstatement of Shannon O'Fee, Florence Koch and Barb Symonds, or the calculation and determination of monetary loss owing to Shannon O'Fee and Florence Koch at the time of this Order or at the time of the Board Agent's report.

(l) ***RESERVES*** *jurisdiction to deal with any issues arising from the implementation of this Order or from the Board Agent's report ordered herein.*

[5] On September 8, 2006, the Board agent submitted a report to the Board. The report indicated that the parties had reached an agreement with regard to the reinstatement of Ms. O'Fee, Ms. Koch and Ms. Symonds and the monetary loss payable to Ms. O'Fee and Ms. Koch. The quantification of those payments was set out in detail

in the report. The report indicated that the parties agreed that payments were to be made by September 30, 2006. The Board agent also indicated that the parties agreed that the bargaining unit description should be amended pursuant to s. 37(2)(e) of the *Act*, to read as follows:

> *All employees employed by Johner's Homestyle Catering operating as Johner's Catering in or in connection with its places of business at SaskPower in the City of Regina except the partners of Johner's Catering, are an appropriate unit of employees for the purpose of bargaining collectively.*

[6] The Board agent recommended that the Board rescind the certification order with respect to Tappin and grant a new certification order with respect to Johner's, containing the amended bargaining unit description. Lastly, the Board agent indicated that the parties had reached an agreement with respect to necessary amendments to the collective agreement with the exception of the union security clause found in article 5 of the collective agreement. Article 5 of the collective agreement reads as follows:

> *ARTICLE 5 – UNION SECURITY*
>
> *Every employee who is now or hereafter becomes a member of the Union shall maintain his membership in the Union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty (30) days after the commencement of his employment, apply for and maintain membership in the Union as a condition of his employment.*
>
> *Persons whose jobs are not in the bargaining unit shall not perform any bargaining unit work except in the case of an emergency or by mutual agreement by the parties.* ***John Tappin shall be considered exempt from this clause.***
>
> ***[emphasis added]***

[7] The Board agent recommended that the Board hold a further hearing to determine if and how article 5 should be amended.

[8] A hearing before the Board was scheduled for October 24, 2006. At the hearing, counsel for the Union indicated that the Union wished the Board to address the following issues:

1. Which people should be in-scope and the extent of protection of bargaining unit work;

2. The lay-off of union members when bargaining unit work remains to be performed;

3. The reduction of hours to part time for Ms. O'Fee and Ms. Koch, while others perform their work;

4. Improper payment of monetary loss to Ms. O' Fee and Ms. Koch;

5. Improper payment of vacation pay;

6. Failure to assign Ms. O'Fee and Ms. Koch their previous duties;

7. Requiring employees to take a lunch break, not allowing employees to take breaks in the restaurant, and providing employees only the "lunch special";

8. Employees only having security clearance for the restaurant floor;

9. Employees not having a change room and secure place for their belongings;

10. Employees receiving improperly completed records of employment by including monetary loss and vacation pay in a regular pay period;

11. Employees previous working conditions did not require Fridays off; and

12. General treatment and attitude.

[9] The Union indicated that, since the issuance of the Board's Order, Johner's had laid off the Union's members while Mr. Johner and three others were doing bargaining unit work. The Union argued that these issues properly arose out of the issuance of the Board's Order.

[10] Counsel for Johner's argued that the issues raised by the Union did not all arise out of the Board's Order and that, in any event, many of the issues are matters for arbitration, not the Board. Counsel for Johner's also indicated that she was only recently informed of these issues and was not prepared to deal with them at the hearing. Counsel for Johner's indicated that the only issue for the Board to address was that of scope and the amendment to article 5 of the collective agreement. Counsel for Johner's indicated that Johner's had properly paid the monetary loss agreed to on time and in

compliance with the *Income Tax Act* and that, if any problems with the payments remained, the matters should be returned to the Board agent.

[11] In response to the arguments made by Johner's, the Union argued that it wished to present evidence that the payments of monetary loss were not properly made as the withholding tax should not have been at a rate of 40%. The Union argued that these issues arose out of the Board's finding of violations of ss. 11(1)(c) and (e) and the order to cease and desist and that, at best, the Board has dual jurisdiction with an arbitrator to deal with these matters. The Union argued that the Board should not defer where a party is seeking enforcement of a Board order or an order of contempt. The Union indicated its intention to file further unfair labour practices, if necessary, to deal with the issue of the recent lay-off.

[12] Following the above oral submissions of counsel for both parties, the Board issued a preliminary ruling, indicating that the Board would address the following issues because they arose directly from the Board's Order of June 14, 2006 and because they could result in the disposition of the remainder of the Union's issues or at least assist in the determination of those issues:

1. The union security clause in article 5 of the collective bargaining agreement, specifically, whether it should be amended to reflect its application to the agreed-upon bargaining unit description; and

2. The payment of monetary loss to Ms. O'Fee and Ms. Koch, specifically as it relates to the deductions Johner's made to those payments and the treatment of vacation pay.

[13] The Board also advised the parties that, following its conclusions in relation to issue number one above, the Board would indicate which of the remainder of the Union's issues would require further hearing and determination by the Board, including whether the Board has jurisdiction to hear the same or whether it lacks jurisdiction because the issue does not fall within the jurisdiction reserved in the Board's Order of June 14, 2006 or because the issue should be deferred to grievance arbitration under the collective agreement.

[14] These Reasons for Decision will include analysis of the Board's reasons for issuing the Order dated June 14, 2006 as well as analysis and conclusions with respect to the issue arising out of the Board agent's report and those identified above that arise out of the implementation of the agreements between the parties concerning the monetary loss of Ms. O'Fee and Ms. Koch.

Facts and Evidence:

[15] As previously stated, the Union has held a certification order covering all employees employed in the cafeteria on the premises of SaskPower at its head office in Regina, Saskatchewan since April 10, 1975. The Union indicated that the cafeteria operated under contract between SaskPower and Tappin from the date of certification until August 26, 2005, at which time the cafeteria closed due to the bankruptcy of Alakava. The cafeteria was closed for approximately 4 months while SaskPower performed renovations to the area and put out a tender for operation of the cafeteria. Johner's was the successful bidder and commenced operation of the cafeteria on January 9, 2006.

[16] As indicated in the background portion of these Reasons for Decision, the Board heard several issues related to this application on two sets of hearing dates. Given the Board's issuance of the Order dated June 14, 2006 and the nature of the issues dealt with at each set of hearing dates, it is helpful to outline the evidence received by the Board at each set of hearing dates. As there was a significant amount of evidence led by the parties on both hearing dates, we intend to set out only that evidence that is relevant to our conclusions.

May 29, 2006 Hearing

[17] At the outset of the initial hearing on May 29, 2006, following a discussion by the Board with the parties, Ray Johner, on behalf of Johner's, indicated his acceptance of the proposition that Johner's operation of the cafeteria fell within the successorship provisions of the *Act*, specifically, s. 37.1, and there was therefore a "deemed sale" giving rise to the obligations under s. 37 of the *Act*. Section 37.1 reads as follows:

> *37.1(1) In this section, "services" means cafeteria or food services, janitorial or cleaning services or security services that are provided to:*
>
> > *(a) the owner or manager of a building owned by the Government of Saskatchewan or a municipal government; or*
> >
> > *(b) a hospital, university or other public institution.*
>
> *(2) For the purposes of section 37, a sale of a business is deemed to have occurred if:*
>
> > *(a) employees perform services at a building or site and the building or site is their principal place of work;*
> >
> > *(b) the employer of employees mentioned in clause (a) ceases, in whole or in part, to provide the services at the building or site; and*
> >
> > *(c) substantially similar services are subsequently provided at the building or site under the direction of another employer.*
>
> *(3) For the purposes of section 37, the employer mentioned in clause (2)(c) is deemed to be the person acquiring the business or part of the business.*

[18] Therefore, the fact that Johner's is a successor employer is not in dispute. The primary dispute between the parties involves the legal obligations that flow from the successorship.

[19] Ms. O'Fee and Ms. Koch testified on behalf of the Union. Ms. O'Fee worked at the cafeteria for the predecessor employer since September 2001 on a full-time basis, seven hours per day, five days per week. She was classified as a cafeteria assistant, although she filled in as a cashier or cook when needed. Ms. Koch was employed at the cafeteria since 1979 and was classified as a cafeteria assistant with the predecessor employer, working full-time, Monday to Friday, 7:45 a.m. to 3:45 p.m. Ms. O'Fee also testified that Ms. Symonds worked for the predecessor employer on a part-time basis when the cafeteria was busy. Ms. O'Fee testified that there was no job description either within or outside the collective agreement and that she was simply required to help out where needed. There was a significant amount of evidence led at

the hearing through Ms. O'Fee and Ms. Koch concerning the exact nature of their duties as cafeteria assistants for the predecessor employer. Essentially, the duties were far ranging and included prep work, set up, taking orders, serving, cleaning up, delivering coffee, some short order cooking or baking, as well as performing the cashier's work in place of Mr. Tappin, the principal of the predecessor employer. Ms. O'Fee described the cafeteria operation of the predecessor employer as "self-serve" with "cafeteria style food" and with a soup and salad bar and hot food prepared ahead of time. The predecessor employer also performed a catering service within and outside SaskPower.

[20] Ms. O'Fee and Ms. Koch testified that, on August 26, 2005, they were informed that the predecessor employer no longer employed them and they left without receiving their paycheques or holiday pay or any severance pay or notice. They are both still owed these outstanding payments. Ms. O'Fee was told by a SaskPower employee that it would be some time before the cafeteria reopened but that, when a new tender was awarded, nothing would change in terms of her hours of work and pay.

[21] Brian Haughey, a representative of the Union, also testified. He stated that he spoke with Mr. Johner in December 2005 and they set up a meeting for January 3, 2006 to discuss the re-opening of the cafeteria. Mr. Haughey testified that Mr. Johner stated that the company would honour the collective agreement and certification order. At the January 3, 2006 meeting, Mr. Johner indicated that he would be calling the Union's members later that week or over the weekend to talk about returning to work. It appears that Ms. O'Fee and Ms. Koch also met with Mr. Johner and that nothing was said at the meeting that would indicate to them that their hours of work or pay would change. Mr. Haughey testified that, while he and Mr. Johner discussed some issues concerning the collective agreement, Mr. Johner placed no conditions on calling the employees back to work. Mr. Haughey did acknowledge in cross-examination that the issue of job classifications and descriptions came up in his discussions with Mr. Johner and that he told Mr. Johner changes should be workable but also stated he would have to discuss them with the employees. Mr. Haughey testified that the Union and predecessor employer had not had job descriptions and that it was not common to place job descriptions in a collective agreement.

[22] On January 13, 2006, Mr. Haughey received a letter from Mr. Johner. In this letter, Mr. Johner indicated that Johner's wished to recall two employees; one for a four-hour shift Monday, Wednesday and Friday and another for a four-hour shift Tuesday and Thursday. The Union indicated to Johner's that Ms. Koch would take the first shift and Ms. O'Fee the second but that it accepted these positions without prejudice to its right to assert before the Board that both employees were entitled to full-time hours. Mr. Haughey stated that he knew that, at this time, Mr. Johner had his spouse, Bonnie Johner, as well as his children working in the cafeteria.

[23] Mr. Haughey stated that, around the time he received Mr. Johner's letter of January 13, 2006, they had had a discussion concerning Mr. Johner's wish to have new job descriptions in place because Johner's was changing the nature of the cafeteria operations. Mr. Haughey stated that he indicated to Mr. Johner that new job descriptions could not be developed if the employees were not actually working - one had to observe what they were doing in order to determine whether their duties had changed and, if so, how they had changed. Mr. Haughey testified that there was nothing in the letter of January 13, 2006 that placed the condition of developing new job descriptions before the employees could return to work nor was this his understanding from conversations he had with Mr. Johner.

[24] A short time after receiving the January 13, 2006 notice of recall, Ms. O'Fee and Ms. Koch learned that Mr. Johner had canceled the recall notices. This was a serious disappointment to Ms. O'Fee who quit her alternate employment, having expected to return to full-time work at the cafeteria. As of the date of the hearing (May 29, 2006), neither Ms. O'Fee nor Ms. Koch had been offered any work with Johner's.

[25] Mr. Johner also gave evidence at the hearing. While Johner's acknowledged that it was the successor to the predecessor employer, Mr. Johner indicated that the current collective agreement no longer "fit" his business operation and he therefore required changes to the collective agreement. Although Mr. Johner was aware when Johner's was awarded the tender that the cafeteria was a unionized workplace, he had indicated to the Union at that time that certain changes were required to the collective agreement, including new classifications and job descriptions, before the former employees of Alakava/Tappin could return to work. He believed that Mr.

Haughey did not have a problem with that. Subsequently, however, he understood the Union's position to be that the employees should be reinstated and then the Union would negotiate changes. Mr. Johner therefore issued recall notices to the two employees on the understanding that the Union would immediately enter discussions with him concerning new job classifications and descriptions. Mr. Johner testified that the shifts offered in his January 13, 2006 letter to the Union were the only shifts Johner's could afford to pay. Mr. Johner stated that, after he sent the January 13, 2006 letter recalling the two employees, the Union would not honour its agreement to develop new job descriptions before the employees returned to work. He therefore canceled the recall. He stated that any attempts to resolve this issue with the Union have led to threats and bitter feelings and he therefore found it in the parties' best interests to have the matter determined by the Board. In cross-examination, Mr. Johner reiterated that Johner's would not hire back any of the employees until proper classifications and job descriptions were developed.

[26] Mr. Johner testified that Johner's is a partnership consisting of himself, Bonnie Johner (his spouse), his daughters, Kristy and Aleesha Johner, as well as Ken Dyck. The partnership owns a restaurant/bakery in Balgonie and also operates the cafeteria at the police station in Regina. All of the partners have been working at the SaskPower cafeteria, some on a part-time basis. When asked if those individuals were "employees" or "management," Mr. Johner replied that they were "owners." Mr. Johner stated that the partners do not receive wages but rather receive a portion of the profits of the operations.

[27] Mr. Johner testified that changes have been made to the operation of the cafeteria and that he expects further changes to be made to the services offered. The primary change in operation is moving from the buffet style of the predecessor employer to a full menu with counter service.

[28] A significant amount of evidence was led concerning the work required for the new style of operations. Given our conclusions in this matter, it is not necessary to recite that evidence in detail. While the style of operations has changed, it is clear that a substantially similar service is being provided to SaskPower and that the job duties required to deliver that service are sufficiently similar to those required by the

predecessor employer, except perhaps for the need for superior cooking abilities. These jobs are currently being performed by the partners of Johner's.

October 24, 2006 and November 7, 2006 Hearing

[29] Ms. Koch testified on behalf of the Union at the second set of hearing dates as well. She testified that, on October 18, 2006, a few months following her reinstatement through the June 2006 agreement of the parties, she, Ms. O'Fee and Ms. Symonds (who returned to work on a part-time basis), were laid off from their employment with Johner's. Mr. Johner stated that he gave proper notice of lay-off to both employees pursuant to the collective agreement. It appears that the lay-off may have been because Johner's was undertaking further renovations. Ms. Koch also stated that, while she was working at Johner's, the five partners of Johner's were also working there performing such duties as operating the till, cooking, preparing and serving food, and delivering coffee.

[30] Upon her reinstatement, Ms. Koch's job duties initially included only cleaning and dishwashing, although later she began to prepare the salad bar. Mr. Johner testified that, after Ms. Koch's and Ms. O'Fee's reinstatements and before their lay-offs, Ms. Koch worked 8 a.m. to 4 p.m. and Ms. O'Fee worked 8 a.m. to 3 p.m. In Mr. Haughey's view, the only difference between Johner's operations and those of Tappin was that, with Johner's, a person was required to serve the food from the back kitchen to the customer. Mr. Johner also testified about changes in the cafeteria operations. He believes that, when the most recent renovations are complete, he will require one full-time and one part-time qualified cook and implied that none of the Union's members were qualified for this work.

[31] There was further evidence led at this hearing concerning the composition of the Johner's partnership. Although Johner's does not have a partnership agreement, it is registered as a partnership with the Saskatchewan Corporations Branch and acts as a partnership in the operation of the business. A copy of the company's profile with the Saskatchewan Corporations Branch which was entered into evidence indicated that, on August 1996, Johner's Homestyle Catering became registered as the business name for the partnership. The partnership currently consists of Ray Johner, Bonnie Johner, Kristy Johner, Aleesha Johner and Ken Dyck. Mr. Johner testified that

the partnership has been in operation for approximately 18 years and has been similarly structured for many years. The profile indicates that an alteration was made January 25, 2006 and Mr. Johner explained that the alteration was filed to add Aleesha as a partner, after she had expressed an interest in being part of the business. Aleesha Johner is 22 years old. Mr. Johner indicated that Ken Dyck and Kristy Johner were added as partners approximately 3 years ago. He denied that the partnership was created for the purposes of running the cafeteria at SaskPower.

[32] Mr. Johner testified that the partners all receive a share of the profits. While some of the partners receive a pay cheque, only income tax deductions are made at their request. No deductions are made for employment insurance or workers' compensation as they are not considered "employees." Mr. Johner testified that some or all of the partners meet on a daily basis to discuss any issues that have arisen concerning the operation of the cafeteria. He stated that the partners make their decisions together.

[33] Mr. Johner testified as to the roles and responsibilities of each partner in the operation of the cafeteria at SaskPower. Mr. Johner has the role of the executive chef and Mr. Dyck is the full-time sous chef. Bonnie Johner looks after certain administrative matters such as accounting/payroll as well as banquets. Both Bonnie Johner and Aleesha Johner help out in the cafeteria as needed, although Aleesha Johner primarily works at the cafeteria at the police station. Kristy Johner is the public relations person at the SaskPower cafeteria and she designs the menus and looks after cashing out. Mr. Johner testified that, while all of the partners perform work that was previously done by bargaining unit employees, they also perform work that was not previously done by bargaining unit employees.

[34] There was evidence led at the hearing concerning the extent of managerial authority exercised by the five partners of Johner's as well as Ms. Koch's perception of who had such authority. For reasons that follow, this evidence is not relevant to the determination of this application.

[35] While the certification order concerning the predecessor employer excluded the President, Vice-President and Secretary/Treasurer, only Mr. Tappin was

permitted by the collective agreement, under article 5, to do work typically performed by the bargaining unit. Mr. Tappin usually worked as the cashier but he also made sandwiches and did short order cooking. Ms. Koch testified that occasionally Angela Tappin, Mr. Tappin's daughter and the Secretary/Treasurer of the corporation, performed bargaining unit work similar to that of a cafeteria assistant, although Ms. Tappin was just "filling in" and not “taking away work” from the bargaining unit employees. Although Ms. Tappin was initially treated as in-scope, she was later determined to be out-of-scope because she was the Secretary/Treasurer of the corporation. Mr. Haughey testified that the provisions contained in article 5 which permitted Mr. Tappin to perform work usually performed by bargaining unit employees was a recent addition to the collective agreement.

[36] Mr. Johner acknowledged in cross-examination that, prior to awarding the tender to Johner’s, SaskPower made him aware that there was a union and a collective agreement in place but that there was no discussion that Johner’s was operating as a partnership nor was there any discussion about how the operation would be staffed.

[37] In Mr. Johner’s view, article 5 of the collective agreement should be amended to exclude the application of that clause not just to him but to all of the partners because they are all equal in the business. Mr. Johner felt it was only fair that the partners get to work at their own business and said that Johner’s simply did not require any additional employees at the time of the hearing (October 24, 2006 and November 7, 2006).

[38] Mr. Haughey stated that the Union was not seeking to have the partners of Johner’s included within the scope of the bargaining unit, but rather was taking the position that all of the work in the cafeteria should be done by the Union’s members and that the only partner who should be working there and performing bargaining unit work was Mr. Johner. Mr. Haughey stated that the partners could not be placed in-scope because they had a business to protect.

[39] The evidence led at the hearing indicated that Ms. Koch and Ms. O'Fee were dissatisfied with the manner in which the monetary loss payments were made to them. Specifically, the employees and the Union complained that Johner’s used an

improper rate for withholding tax at source (Johner's used the rate applicable to the usual payment of wages rather than that typically applied to a severance payment or retiring allowance) and, for Ms. O'Fee, Johner's failed to deduct the employment insurance overpayment required to be paid before it calculated the amount of the withholding tax, thereby causing that sum to be subject to double taxation. Mr. Haughey made inquiries of Revenue Canada concerning the appropriate manner of payment and also had the Union's bookkeeper examine the deductions in order to explain the problems to Mr. Johner and Bonnie Johner. When Mr. Haughey discussed this issue with them, he received no response. Mr. Haughey acknowledged that he had had no prior discussions with Mr. Johner and Bonnie Johner concerning how the money would be paid to the employees.

[40] Bonnie Johner testified on behalf of Johner's. Ms. Johner is a partner of Johner's and, while she spends the majority of her time working at the police station, she also works occasionally at the cafeteria at SaskPower. Also, for the last five to six years, Ms. Johner has been responsible for payroll and bookkeeping of the partnership, although she has had no formal training in the area. Ms. Johner testified that she calculated and paid the monetary loss owing to Ms. O'Fee and Ms. Koch as a result of the agreement entered into between the parties. In one paycheque, she included the employee's regular pay for hours worked, retroactive pay pursuant to the settlement agreement and holiday pay owing also pursuant to the settlement agreement and, in so doing, she used the monetary amounts contained in the Board agent's report, as given verbally to her by Mr. Johner. As she had not previously calculated such a retroactive payment and a repayment of employment insurance benefits, in addition to using Revenue Canada's payroll diskette, she made inquiries of a number of people at Revenue Canada and at Human Resources Development Canada concerning the method/structure of the payment. Ms. Johner stated that she was advised to include the amount of the employment insurance repayment in Ms. O'Fee's gross income before calculating the withholding tax. Ms. Johner also stated that the individual with Revenue Canada arrived at the same numbers as she had. Ms. Johner further stated that no one at Revenue Canada advised her of an alternate way to calculate/pay the monetary loss and employment insurance repayment.

[41] Ms. Koch also testified concerning the vacation leave payment she received from Johner's pursuant to the settlement agreement the parties had reached with the assistance of the Board agent. The claim for earned vacation pay arose from the reinstatement and monetary loss orders made by the Board. According to the Board agent's report, the parties agreed that vacation leave would not be paid out to Ms. Koch and Ms. O'Fee as part of their retroactive payment but rather would be paid out when they actually took vacation leave. Ms. Koch testified that her vacation leave was paid out with her other retroactive wage payment on September 30, 2006, contrary to her wishes. She had wanted to wait to receive the payment when she took a vacation leave the following year. In cross-examination, Ms. Koch acknowledged that Mr. Johner had asked her whether she wished to take vacation leave or a lay-off and she chose the vacation leave first but later changed her mind.

[42] Mr. Johner testified that his understanding of the agreement reached concerning the retroactive vacation leave payment was that vacation leave would be taken by the employees that year, prior to September 30, 2006 and that, if it was not, the vacation leave should be paid out. He stated that he based this conclusion on the provisions in the collective agreement dealing with vacation leave where it states that it should be taken between May 1 and September 30, unless otherwise agreed to by the employer and the employees. Mr. Johner stated that the matter had not come up for discussion with the Board agent nor with the Union but that he had discussed the matter with the employees. He had circulated a holiday sign up sheet and the employees indicated they did not want to take vacation leave that year. Mr. Johner acknowledged in cross-examination that he told the employees they either had to take vacation leave or be laid off.

[43] Ms. Johner testified that she included vacation pay with the employees' paycheques because they had declined to take vacation leave during May to September, as provided for in the collective agreement and because the collective agreement does not allow for the carryover of unused vacation leave. Ms. Johner stated that she made the payments based on her understanding that the agreement reached between the parties meant that, if the employees did not take their vacation leave that year, the money should be paid out to them, although she acknowledged in cross-examination that she had never seen a copy of the Board agent's report. In cross-

examination, Ms. Johner also admitted that one of the employees stated that she would take her vacation the following January, but Ms. Johner felt that that was not convenient for Johner's (although she did not consult Mr. Johner on the matter).

Arguments:

May 29, 2006 Hearing

[44] The Union took the position that Johner's was a successor employer pursuant to s. 37.1 of the *Act*.

[45] The Union argued that Johner's was in violation of ss. 11(1)(e) and (m) of the *Act* by failing to call the Union's members back to work upon commencement of the cafeteria operations and by utilizing other individuals, albeit partners, as employees. The Union requested that the employees be reinstated and paid their monetary loss. The Union also stated that Johner's was in violation of s. 11(1)(c) by failing to bargaining collectively with the Union and failing to comply with the collective agreement. The Union suggested that Johner's was not prepared to honour the certification order or comply with the collective agreement and that the condition placed on the employees' return to work, that is, the development of new job descriptions, was without merit. The Union argued that in an "all employee" unit with a collective agreement that permitted only Mr. Tappin to perform work of the bargaining unit, it was not open to Johner's to use its partners to perform work the employees previously performed and that there was work available to be done by the former employees. Section 37.1 protects the employment stability of the former employees.

[46] In response, Mr. Johner advised the Board that, if the Board determined that it was appropriate for the employees to return to work not knowing their job duties, they could come back to work right away.

[47] At the conclusion of arguments, the Board posed the question of whether the parties might benefit from the appointment of a Board agent to assist in some way in the resolution of their differences. Neither party objected.

October 24, 2006 and November 7, 2006 Hearing

[48] The Union submitted that, while the parties had reached an agreement on the scope of the bargaining unit, there remained a dispute concerning the scope of the exclusion in article 5 of the collective agreement which deals with which out-of-scope personnel could perform the work of the bargaining unit. The Union took the position that the clause should remain in the collective agreement and that the Board should amend it pursuant to s. 37(2)(f) to allow only Mr. Johner to do the work of bargaining unit employees. Counsel pointed out that, when Mr. Tappin operated the cafeteria, only Mr. Tappin was allowed to do bargaining unit work, even though the certification order contained three excluded positions. The Union therefore argued that allowing only one out-of-scope person to perform bargaining unit work where there were a greater number of excluded positions in the certification order was appropriate.

[49] The Union also argued that Johner's was only a "paper partnership," set up for taxation purposes, because the parties do not make decisions together. The Union argued that the partnership as a whole is not truly managing the operation, only Mr. Johner is responsible. The Union argued that, given Bonnie Johner's and Aleesha Johner's limited involvement with the SaskPower operation, they should not be permitted to perform any work of the bargaining unit.

[50] With regard to the vacation leave payments owing under the settlement agreement, the Union argued that the parties agreed this would not be paid out until the employees took their vacation leave. The Union argued that the failure of Mr. Johner to communicate the entire nature of the agreement to Ms. Johner was improper and evidenced a lack of respect for the *Act*. The Union also took the position that the calculation of the monetary loss payment was inaccurate in four respects:

(i) The employment insurance repayment was not to be included in the gross income such that withholding tax was deducted from it (the sum was taxed twice);

(ii) The money owing for past wages should have been treated as a lump sum, separate from the employees' regular pay, with a corresponding lower rate of withholding tax;

(iii) The employees' vacation pay should not have been paid out at the time that it was; and

(iv) Because the vacation pay was treated as part of the employees' regular pay, the rate of withholding tax was excessive

[51] The Union suggested that these errors in calculation and payment were problematic because the additional withholding tax should not have been deducted and gave rise to a loss of use of that money by the employees. Also, because the payments for past wages and vacation leave were treated as regular earnings, the employees encountered problems qualifying for employment insurance following their recent lay-offs.

[52] The Union argued that Ms. Johner's lack of training and expertise with regard to making the monetary loss payment is no excuse - Johner's was still in violation of the Board's Order and the agreement of the parties. The Union argued that Mr. Johner should have given the settlement agreement to Ms. Johner and advised her to take the matter to their accountant. The Union submitted that, should the Board find that Johner's violated the Board's Order or the parties' agreement concerning monetary loss, the matter should be left for resolution between the parties in the first instance, as more evidence of the amount of the loss may be required. The Union also wished to seek aggravated and punitive damages, not only interest for loss of use of the money. As such, the Union urged the Board to remain seized of the matter in case the parties could not resolve it on their own.

[53] Johner's argued that the Board should determine the appropriate exclusions in article 5 of the collective agreement based on the structure of operations of Johner's, being different than the structure of Tappin. Counsel for Johner's pointed out that Angela Tappin, as the Secretary/Treasurer of the corporation, did some bargaining unit work even though she was not specifically excluded under the terms of article 5. Johner's took the position that all the partners should be excluded in article 5 based on their roles and their ownership in the partnership and because all five of them are the "employer." Johner's also argued that all the partners have the authority to fire and discipline and to make decisions impacting employees' terms and conditions of work. In addition, Johner's argued that the five individuals are truly partners, making decisions together, sharing in the profits rather than receiving a salary and that the partnership is registered as such with Corporations Branch. In other words, Johner's meets the

definition of partnership in *The Partnership Act* in that the partners are carrying on business, in common, with a view of profit. Johner's argued it matters not to the determination of whether Johner's is a true partnership that some of the partners perform a greater role at SaskPower than others (although they all have some role there), particularly given that the partnership has multiple operations.

[54] Johner's also argued that the change in the nature of the cafeteria operations requires a different skill set for its employees and the Union's members are not qualified for the work. According to the collective agreement, it is not up to Johner's to provide necessary training. Johner's also stated it cannot afford to pay the salaries of full-time employees.

[55] With regard to the monetary loss, Johner's argued that the parties did not agree to a method of calculation or payment and therefore the payments were not in violation of the agreement. The Employer argued that Bonnie Johner calculated these payments based on sound advice, even though that method may have differed from the Union's interpretation of the proper method of calculation. Johner's suggested that, if the Board finds the payments were calculated improperly, Johner's could attempt to remedy that, perhaps by holding back further income tax remittances from Revenue Canada.

[56] With regard to the vacation leave payments, there was no evidence of a mutual agreement between the parties to take vacation leave outside the time period provided for in the collective agreement and therefore the payment was reasonably made at the end of September. If the Board finds that the payment was made in error, Johner's suggested that the employees return the money to it to be used when they take vacation.

[57] In response to Johner's' arguments, the Union submitted that the evidence established that only Mr. Johner has managerial authority at the SaskPower cafeteria. The Union also stated that, if the current employees are not qualified to perform the cooking required in the cafeteria, Johner should hire a cook and put that employee in the bargaining unit.

Relevant Statutory Provisions:

[58] The relevant provisions of the *Act* include:

> *2 In this Act:*
>
> *(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*
>
> *. . .*
>
> *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;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*

(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;

(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;

(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

. . .

(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;

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

. . .

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any

kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;

. . .

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

(a) determining whether the disposition or proposed disposition relates to a business or part of it;

(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:

(i) an employee unit;
(ii) a craft unit;

(iii) a plant unit;
(iv) a subdivision of an employee unit, craft unit or plant unit; or
(v) some other unit;

(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);

(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);

(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;

(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

37.1(1) In this section, "services" means cafeteria or food services, janitorial or cleaning services or security services that are provided to:

(a) the owner or manager of a building owned by the Government of Saskatchewan or a municipal government; or

(c) a hospital, university or other public institution.

(2) For the purposes of section 37, a sale of a business is deemed to have occurred if:

(a) employees perform services at a building or site and the building or site is their principal place of work;

(b) the employer of employees mentioned in clause (a) ceases, in whole or in part, to provide the services at the building or site; and

(c) substantially similar services are subsequently provided at the building or site under the direction of another employer.

> *(3) For the purposes of section 37, the employer mentioned in clause (2)(c) is deemed to be the person acquiring the business or part of the business.*

Analysis and Decision:

[59] Given that the Board's determinations made after each hearing were based on the facts disclosed and issues raised by the parties at each hearing, the Board will deal with the issues raised by the applications in the same manner as it did when outlining the evidence. We shall first deal with our reasons for issuing the Order of June 14, 2006 following the hearing of May 29, 2006. We will then follow with our analysis and conclusions concerning the additional issues raised at the October 24, 2006 and November 7, 2006 hearing dates.

May 29, 2006 Hearing

[60] Johner's agreed that it was the successor employer to Tappin by operation of s. 37.1 of the *Act*. In our view, that was an appropriate position to take. Clearly, the present situation meets the criteria of a "deemed sale" within the meaning of s. 37.1 such that the successorship provisions of s. 37 apply to Johner's. Johner's took over an operation that provided cafeteria or food services to the owner or manager of a building owned by the Government of Saskatchewan and: (i) employees performed those services at that building and it was their principal place of work; (ii) the predecessor employer (Tappin) ceased to provide those services at that building; and (iii) a substantially similar service was provided at that building by another employer (Johner's).

[61] We find that the circumstances meet the requirements of a deemed sale in s. 37.1 and that Johner's is a successor employer within the meaning of s. 37. As such, the Union is entitled to a declaration of same, as well as amendments to the certification order and the collective agreement to reflect changes to the employer's name and bargaining unit description.

[62] Given the admission by Johner's and the Board's finding of a successorship, it becomes necessary for the Board to determine the nature of the obligations that follow from the successorship.

[63] The Board has considered the effect of s. 37.1 on only one occasion. In *United Food and Commercial Workers Union, Local 1400 v. The Corps of Commissionaires, North Saskatchewan Division,* [2002] Sask. L.R.B.R. 188, LRB File No. 276-00, the Board considered a situation where an employer agreed it was a successor to an employer who provided security services to the City of Saskatoon. Although the primary issue in that case was the nature of an appropriate bargaining unit given the intermingling of employees of the predecessor employer with other employees of the successor employer, the Board's comments are helpful to understanding the policies underlying a successorship of this type. The Board stated at 197 through 200:

> *[30] The present application is the first time that the Board has considered some of the issues involved in the application of s. 37.1 of the Act, which was added with the 1994 amendments to the Act. The Board has made passing reference to the provision in two previous decisions. In Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd., [1996] Sask. L.R.B.R. 523, LRB File No. 083-96, the Board stated, in obiter, at 531, that s. 37.1* ***". . . is intended to ensure the continuation of union representation when cafeteria or food service contractors or janitorial or cleaning service contractors working in public institutions change."*** *In Argus Guard, supra, the Board found that s. 37.1 has no application in determining an appropriate bargaining unit in initial certification applications regarding security services.*
>
> *[31] Section 37 of the Act provides that when a business, or part thereof, is sold, leased, transferred or otherwise disposed of, the transferee acquires the business subject to the collective bargaining rights of the transferor; the union retains bargaining rights for the employees in that part of the business and the new owner is required to recognize those rights.* ***The obligation upon the transferee arises upon the transfer occurring whether or not the union has applied to the Board for a declaration that the transferee is a successor.*** *The effect of s. 37 is to abrogate the effect of a change in ownership so that the bargaining rights are not restricted to a single employer, but rather become attached to the business.* ***Catching transactions that are not a "sale" in the ordinary sense, the collective bargaining obligations run with the business regardless of who the owner is.***
>
> *[32] The seminal decision of the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] OLRB Rep. December*

> *1193, held that a change of a service subcontractor at a particular site would not constitute a "sale of a business" for purposes of successorship even if the same work was performed at the same site by many of the same employees, there being no transfer of anything from the predecessor to the alleged successor.*
>
> *[33] However, s. 37.1 of the Act changes this approach with respect to certain services under certain circumstances. It supersedes the Metropolitan Parking analysis and deems there to be a successorship even though there is no direct or indirect transaction or dealings between the deemed predecessor and the deemed successor.* ***There is a sale because the statute deems that there is. Section 37.1(1) defines the services to which s. 37.1 applies. Section 37.1(2) stipulates the three prerequisites that must be established before "a sale of a business is deemed to have occurred" for the purposes of s. 37. Standing on its own, s. 37.1 provides no protection for unions that have organized employees in the contract service sector; the protection is obtained by the legislation deeming that a sale of a business has occurred to which s. 37 applies. Bargaining rights with respect to the listed services, including security services, become attached to particular buildings and sites owned by the provincial or a municipal government, or public institutions such as hospitals and universities. The Board has no discretion to exempt the services or any site or building described in s. 37.1 from the deeming provision.***
> . . .
> *[36] It was admitted that the Corps is the successor to Inner-Tec with respect to the security services provided with respect to the City's asset management division. How are ss. 37.1 and 37 of the Act to be interpreted and applied in the present circumstances?*
>
> *[37]* ***Initially, it is important to recognize that the concept of successorship in s. 37 originates in policy and is not amenable to the application of ordinary commercial law principles. And, because of the equally policy-laden nature of deemed successorship in s. 37.1, it may not be appropriate to apply the principles of ordinary successorship to such cases.***
> . . .
>
> [**emphasis added**]

[64] In *Corps of Commissionaires*, after referring to the findings of the Ontario Labour Relations Board in the case of *Ensign Security Services v. United Steelworkers of America, et al.*, [1994] OLRB Rep. October 1310, at 1320, specifically that the effect of the successorship provisions in the Ontario legislation "is to protect the stability of

bargaining rights even where the contract for certain work changes hands," the Board concluded, at 202:

> *[44] There is no doubt that s. 37.1 of the Act has a similar effect. And, pursuant to s. 10 of The Interpretation Act, 1995, S.S. 1995, c. I-11.2, with the whole of the Act,* ***it is required that it "shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects."***
>
> *[45] Counsel on behalf of the Corps argued that the Corps should not be bound by the Inner-Tec certification Order and contended that the issue of the structure of an appropriate bargaining unit in the present case is part of that determination.* ***The existing certification Order determined that the Union represented the Inner-Tec employees working with respect to the City's asset management division security services contract. It is also clear that from the date of the deemed sale the Corps was bound by the certification Order and the collective agreement between Inner-Tec and the Union with respect to the employees affected by the deemed sale. There are no compelling considerations that lead us to order otherwise. . . .***
>
> [**emphasis added**]

[65] In applying ss. 37.1 and 37 to the facts before us, it is clear that Johner's, as a successor, is bound by the certification order and collective agreement covering the employees of Tappin. It is also clear that this arose at the time of the deemed sale, that is, when Johner's commenced operations of the cafeteria at SaskPower, without the Union first obtaining an order from the Board. Given these obligations, the question the Board must answer in the circumstances of this case is whether Johner's was required to recall the former employees of Tappin, without the pre-condition of developing job descriptions and whether Johner's failure to do so was in violation of the duty to bargain collectively as required by s. 11(1)(c) of the *Act*.

[66] While the *Corps of Commissionaires* case, *supra*, suggests that the ordinary law of successorship might not always apply in the case of this special form of successorship, the Board's comments in *Service Employees International Union, Local 333, v. Battlefords Ambulance Care Ltd., Dutchak Holdings Limited operating as WPD Ambulance Care, Bruce Chubb and Walter P. Dutchak,* [1996] Sask. L.R.B.R. 604, LRB

File No. 202-95, are instructive on the issue before us. In the *Battlefords Ambulance* case, the employer, WPD Ambulance Care ("WPD") admitted that it was a successor employer to Battlefords Ambulance Care ("BAC") and was bound by the certification order and collective agreement, but argued that it was appropriate to treat the predecessor employer's employees as new job applicants because, in its view, the collective agreement did not apply to those employees prior to their selection for continued employment with BAC. The Board rejected this argument, stating, at 612 through 617:

> *This case raises squarely the issue of whether employees of a predecessor employer retain their employment status with the successor employer. In addition, it raises the question of whether a refusal by a successor employer to continue the employment of the predecessor's employees can result in an unfair labour practice under s. 11(1)(c). An additional issue arises as to whether such conduct also constitutes a breach of the collective agreement that should be resolved through the grievance and arbitration provisions in the collective agreement, as opposed to being heard and dealt with by this Board.*
>
> *In the present case, WPD acknowledges that the Union's certification order and collective agreement apply to it as a result of the successorship provisions contained in s. 37 of the Act. However, it also takes the position that the employees of B.A.C. who were not selected for employment by WPD have no status as employees under the collective agreement in question. This position was boldly asserted in the reply to the grievance documents as follows:*
>
> > *As a preliminary matter, the employer says that the grievor is not and has never been an employee of the Company and therefore has no right to file a grievance, no right to reinstatement or recall.*
>
> *In Emrick Plastics Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, [1982] 3 C.L.R.B.R. 163, the Ontario Labour Relations Board considered an argument similar to the one put forward by WPD and, applying a purposive interpretation of the Ontario counterpart to our s. 37, concluded as follows at 171:*
>
> > *Nowhere in the Kelly Douglas decision [[1974] 1 C.L.R.B.R. 77] did the B.C. Board suggest that a successor employer was free to select its employment complement free from the provisions of the governing collective agreement. On the contrary, that Board in M.M. Pruden,[[1976] 1 C.L.R.B.R. 138; quashed 69 D.L.R. (3d) 713*

(B.C.S.C.)] stated, at page 143:

> *. . .On the other hand,* ***it is implicit in s. 53****, and in the reasoning of Chairman Weiler in Kelly Douglas,* ***that any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause". A successor employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees".***

. . .

The interpretation given to its successorship legislation by the British Columbia Labour Relations Board makes eminent good sense to this Board as well. Collective bargaining legislation is designed primarily for the benefit of employees, not trade unions. Can it really be said that the Legislature in enacting section 63 of our own Act intended that the rights of the bargaining agent selected by the employees would "run with the business" (cf., for example, Marvel Jewellry, [1975] OLRB Rep. Sept. 733), that the collective agreement bargained for and ratified by those employees would run with the business, but that the very employees who had made these choices would not? The Board would need unmistakable language in its statute to come to that conclusion. . .

We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a collective agreement over a sale transaction without hiatus, and that ***the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective***

> ***agreement during their tenure with the predecessor employer.***

The Ontario Labour Relations Board reaffirmed its decision in Emrick Plastics Inc., supra, in Daynes Health Care Limited, Earl Daynes and Service Employees International Union, Local 183 and Group of Employees, (1984), 8 C.L.R.B.R.(N.S.) 1 where it stated at 23:

> *38. Where the sale of a business occurred, the Balmoral employees [predecessor's employees] did not revert to the status of "laid off employees" or employees who had been properly terminated. They were actively employed by Balmoral until its business had been completely transferred to Daynes, and, upon the acquisition of Balmoral's business, they became employees of Daynes with full seniority rights and a claim to any work opportunities then available. Their status as employees in the bargaining unit did not change, and Daynes had no more right to change it than its predecessor had. . . . **The Balmoral employees could not be discharged without just cause, and if Daynes suddenly found itself with too many employees for the available work, it was required to reduce its work force in accordance with the lay-off provisions in the collective agreement, taking into account the seniority rights of all of its employees.***

. . .

*However, to the extent that the B.C.G.E.U. decision suggests, if in fact it does, that employees of the predecessor has no contractual rights arising on the transfer of the business or part of it to a successor employer, we would respectfully disagree with the judgment and prefer instead the reasoning of the Ontario Labour Relations Board in Emrick Plastics Inc., supra, and Daynes Health Care Limited, supra. **Clearly, as recognized by the Ontario Board, the successorship provisions would provide a hollow remedy for unionized employees if the provisions are interpreted to effect a transfer of the Union's bargaining rights and the collective agreement to the successor employer, without requiring the successor employer to continue the employment of the people who actually performed the work.***

. . .

In our opinion, the difference is not insignificant. In the case of the unilateral implementation of new rules under a management rights provision, the Employer recognizes the employment status

of the predecessor's employees, albeit subjecting them to new rules that might result in their discharge. Such discharge is governed by the terms of the collective agreement itself. In the present case, ***WPD did not acknowledge step 1 of the process - that is, it did not recognize the continued employment status of the predecessor's employees. Instead it took the position that the collective agreement does not apply to the former employees of B.A.C. until and unless they are offered work by W.P.D. This approach fundamentally misconstrued the collective bargaining obligations imposed on the successor employer by s.37 of the Act which is meant to place the successor in the shoes of the predecessor by binding it to the certification Order and the collective agreement as though the former had been made against it and the latter signed by it.***

. . .

Applying the cases quoted above to the present case, the Board finds that WPD failed to bargain in good faith when it treated employees of B.A.C. as job applicants; when it subjected them to pre-employment screening tests to determine if they were suitable to be hired; when it refused to continue to employ 6 of the 13 former B.A.C. employees; and when it refused to acknowledge that the collective agreement applied to all former employees of B.A.C. This failure to bargain in good faith is not cured by WPD's willingness to accept the Union as the exclusive representative of the employees which it selected for continued employment, nor its willingness to discuss the issue with the Union or its willingness to participate in the grievance and arbitration procedures. The position taken by WPD places the Union in the position of having to prove the existence of its collective bargaining rights with the successor employer, as opposed to having such rights automatically recognized by the successor employer as is required by s. 37 of the Act. As stated in the Emrick Plastics Inc. case, supra, the Act should not be interpreted "so as to give successor employers a licence to weed out 'undesirable employees'." ***A successor employer must accept that it becomes a party to the collective agreement of its predecessor, without modification. This requires the successor employer to continue to employ its predecessor's employees unless their employment is terminated by the successor employer in accordance with the provisions of the collective agreement. The successor employer fails in its duty to bargain collectively if it maintains the position that it has a free hand to select the employees who will work in its newly acquired business without reference to the rights of the employees of the predecessor employer under the terms of the collective agreement.***

[**emphasis added**]

[67] The reasoning in *Battlefords Ambulance*, *supra*, makes it clear that, immediately upon the occurrence of the successorship, the successor employer steps into the shoes of the predecessor employer and assumes all obligations under the collective agreement, which include the rights of employees to remain employed, without any pre-conditions. Applying this reasoning to the case before us, it follows that Johner's was required by the certification order and terms of the collective agreement to employ the predecessor employer's employees without setting an arbitrary pre-condition that new job descriptions first be in place before the employees could return to work. If Johner's expected that it would require the employees to perform work duties dissimilar to that which they performed for the predecessor employer, that was an issue for it to address following their reinstatement and in accordance with the collective agreement. Similarly, if Johner's expected that it would not require the services of any of the employees, it could only make that decision following their reinstatement and in accordance with the terms of the collective agreement.

[68] Johner's failure to immediately recall the predecessor employer's employees upon the commencement of its operations has put the Union in the position of having to prove the existence of the employees' continuing collective bargaining rights to which they are entitled by virtue of s. 37 of the *Act* and, as such, Johner's is in violation of the duty to bargain in good faith found in s. 11(1)(c) of the *Act*. In addition, the failure to continue to employ the predecessor employer's employees amounts to a violation of s. 11(1)(e) of the *Act*. The appropriate remedies that follow from such findings, aside from declarations of the violations, are orders reinstating the predecessor employer's employees and directing payment of their monetary loss. It is for these reasons that the Board ordered the reinstatement of Ms. Koch, Ms. O'Fee and Ms. Symonds and the payment of monetary loss for Ms. Koch and Ms. O'Fee (no monetary loss application was filed relating to Ms. Symonds) from the date of the initial loss, that is, Johner's commencement of operations on or about January 9, 2006.

[69] As previously stated, following the arguments of the parties at the first hearing, the Board suggested, and neither party objected to, the appointment of a Board agent to assist the parties in resolving their outstanding issues. Based on the information and evidence presented at the first hearing, it became obvious that Johner's,

as a new employer inheriting obligations under the *Act*, had a significant lack of understanding with regard to its successorship obligations and that an acrimonious relationship had developed between the Union and Johner's. These factors, combined with the fact that insufficient evidence was led by the parties to address all of the issues resulting from a finding of a successorship, led the Board to conclude that the assistance of a Board agent would be of great benefit to the parties and to the Board. The Board therefore appointed a Board agent to assist the parties in resolving their differences concerning necessary amendments to the certification order and the scope and application of the collective agreement (as referred to in ss. 37(2)(e) and (f)), as well as the implementation of the reinstatement order and calculation of the payment of monetary loss to the affected employees. While the parties were successful to some degree with this process, it became necessary for the Board to hold a further hearing to address their outstanding issues. That hearing was held on October 24 and November 7, 2006.

October 24, 2006 and November 7, 2006 Hearing

[70] As previously stated, with the assistance of the Board agent, the parties agreed on the amount of monetary loss owing to Ms. Koch and Ms. O'Fee and to a new bargaining unit description for the purposes of amending the certification order, as well as changing references in the collective agreement to the name of the new employer, Johner's. As such, an order will issue rescinding the certification order naming Tappin as the employer while a new certification order will issue with the agreed upon bargaining unit description naming Johner's as the employer.

[71] The primary issues before the Board at the October 24, 2006 and November 7, 2006 hearing were: (i) whether and how the union security clause in article 5 of the collective agreement should be amended to reflect its application to the parties/new bargaining unit; (ii) the issues arising out of the payment of monetary loss to Ms. Koch and Ms. O'Fee, including the issues of the amount of withholding tax deducted, the inclusion of the employment insurance repayment in gross income before deduction of withholding tax and the payout of vacation leave pay.

(i) Whether and how the union security clause in article 5 of the collective agreement should be amended to reflect its application to the parties/new bargaining unit.

[72] It is clear that the current wording of article 5 of the collective agreement, which requires that work typically performed by bargaining unit employees must be performed only by bargaining unit employees but that John Tappin is excluded from the application of the article, no longer applies to the circumstances the parties find themselves in upon the occurrence of the successorship. The article therefore must be changed to reflect its application to the successor employer. Such an amendment is permitted by ss. 37(2)(e) and (f) of the *Act*. While this issue has arisen infrequently before the Board, we note that in *Estevan Coal Corporation, a subsidiary of Luscar Coal Income Fund and Prairie Coal Ltd., and subsidiary of Manalta Coal Income Trust v. United Mine Workers of America, Local 7606 and United Steelworkers of America, Local 9279,* [1998] Sask. L.R.B.R. 709, LRB File No. 186-98, the Board issued an order that, in effect, amended the application of the collective agreement with regard to employees' seniority. That case involved a successorship that arose as a result of the amalgamation of two separate companies, whose employees were each represented by a different union, and where the two sets of employees were to become intermingled. While the Board ordered a vote by all affected employees concerning which union would represent the amalgamated bargaining unit, the Board also issued an order dovetailing the seniority of employees in the amalgamated bargaining unit (relative to the seniority each employee earned under their prior collective agreement) which had the effect of requiring the employer (and eventually, the successful union) to recognize that new order of seniority. The Board apparently determined that such an amendment to the collective agreement was necessary considering the finding of a successorship and the structure of the new bargaining unit. Similarly, in the case before us, it is necessary for the Board to consider an amendment to article 5 to reflect the structure of Johner's operations.

[73] The Union argued that article 5 should be amended to exclude only Ray Johner of Johner's from the application of that clause. Johner's argued that all of the partners of Johner's should be excluded. In other words, the Union argued that only one of the partners should be permitted to perform work that was typically performed by

bargaining unit members while Johner's argued that all five partners should be able to perform such work.

[74] In order to determine this issue, it is necessary to understand the structure of the predecessor employer's business and the operation of its business prior to its closure. It is apparent that the predecessor employer was a corporation which, by its very nature, is composed of shareholders who own the business and directors who manage the business of the corporation. While there was little evidence led at the hearing concerning how the business operated at the cafeteria, we do know that Tappin operated the cafeteria for many years and that John Tappin, president of the predecessor employer, performed the work of bargaining unit employees by operating the till and performing some of the cooking. It was also stated that Angela Tappin, Mr. Tappin's daughter and secretary/treasurer of the corporation, occasionally worked at the cafeteria performing some work typically performed by bargaining unit members and that, although she was initially treated as an in-scope employee and member of the Union, she was eventually treated as out-of-scope on the basis of her position as a director of the corporation.

[75] It was in the context described above that the Union and predecessor employer negotiated the disputed provision in article 5. We have no evidence before us concerning the background or details of the negotiations of this provision except that it was a recent amendment to the collective agreement.

[76] The successor employer, Johner's, has a very different business structure from that of Tappin. We find, on the facts, that Johner's is indeed a partnership. Mr. Johner testified that the five named individuals are partners of Johner's and it is clear from the evidence presented that the partners are carrying on the operation of the business (which is composed of at least the two cafeterias), in common, with a view of profit. In addition, Johner's registered its business name with the Saskatchewan Corporations Branch registry a number of years ago and has listed in the registry the five individuals who were named as partners at the hearing. It is not necessary that Johner's have a partnership agreement as the provisions of *The Partnership Act* apply in the absence of a written agreement between the parties. The specific job duties that any of the partners perform at the cafeteria are not relevant to our determination that this is a

partnership. It is not essential that they perform managerial functions in the cafeteria in order to be considered partners of Johner's. It was suggested by the Union that Johner's is a "paper partnership" set up for the purposes of acquiring the cafeteria operations and avoiding obligations under the *Act* and the certification order. We find no evidence of this. All of the current partners of Johner's, with the exception of Aleesha Johner, were recorded as partners on the Corporations Branch registry long before Johner's bid on the SaskPower tender and, in fact, were operating the cafeteria at the police station (as well as the Balgonie operation at some point in time) for a number of years. The recent addition of Aleesha Johner as a partner does not change our view, particularly given the fact that Aleesha Johner primarily works at the police station operation.

[77] In our view, article 5 must be amended to reflect the reality of the business structure of the successor employer just as it had reflected the structure of the predecessor employer, Tappin. For the most part (with the exception of Angela Tappin as discussed below), Mr. Tappin was the only director performing day-to-day work in the cafeteria. Johner's, as a partnership, has structured its operations in a manner where the partners' contributions to the partnership are in the form of working at the two cafeterias. As such, in order to reflect the reality of Johner's operations, article 5 must be amended to exclude its application to all of the partners of Johner's.

[78] This conclusion is also supported by the bargaining unit description agreed to by the parties, that is, that the bargaining unit includes all employees employed by Johner's except the partners of Johner's. We wish to make it clear that the partners are excluded from the application of article 5 on the basis of their ownership status and not their employment status or the work they perform. In other words, they are not excluded on the basis that they all actually perform duties of a managerial character at the SaskPower cafeteria, although some of the partners obviously do perform such duties and, by virtue of the five individuals being owners of the business, they are all generally responsible for managing the partnership's operations. As it would give rise to a conflict of interest for owners to be members of the bargaining unit, the partners must remain out of the scope of the bargaining unit.

[79] The Union argued that one cannot automatically exclude the application of article 5 to all five partners simply because the certification order excludes all partners. It pointed to the situation with Tappin, where the certification order excluded three positions yet only one of those was excluded in article 5. While we do not find such an analysis applicable given the essential differences between a corporation and a partnership in terms of ownership/responsibility for management, it is also not a determinative factor on the facts of this case. Under the Tappin operation, while only John Tappin was excluded from the operation of article 5, it is clear that Angela Tappin occasionally performed work of bargaining unit employees (and was ultimately treated as out-of-scope), yet her name was not inserted into article 5 to permit her to perform this work. Ms. Koch testified that this was permitted by the Union because Ms. Tappin was not taking work away from the bargaining unit, however, in our view, this illustrates the Union's acceptance of the practicalities of the Tappin operation, as the Union arguably could have required the employer to hire an employee and place the employee in the bargaining unit.

[80] Furthermore, article 5 cannot be read in a literal way in the sense that, because only one person was excluded from its application as concerns the predecessor employer, only one individual may be excluded as concerns the successor employer. We simply cannot require a successor employer to change the structure of its business operations, which were in place prior to the successorship, upon becoming bound by a collective agreement through the operation of s. 37 of the *Act*. In addition, it would be impossible to select one individual from the partnership to exclude under article 5 of the collective agreement when all partners participate and work at the cafeteria. Although Mr. Johner appears to perform a significant amount of work at the cafeteria, it would be arbitrary to choose him as the excluded individual to the exclusion of the other partners.

[81] Support for the Board's conclusion may be found in the *Corps of Commissionaires* and *Battlefords Ambulance*, cases, *supra*. In *Corps of Commissionaires, supra,* in concluding that the successor employer was bound by the certification order and collective agreement of the predecessor employer with respect to a group of its employees working for the City of Saskatoon, the Board determined that the discontinuance of those employees' employment could only be for legitimate

business reasons and in accordance with the collective agreement. The Board stated at 208 through 210:

> *[62] Counsel for the Corps asserted that the 1984 decision of the British Columbia Labour Relations Board in Bell Farms Ltd., supra, is authority for the proposition that a successor employer need not hire the predecessor's employees. However, after careful review of the case we do not come to the same conclusion.* ***The British Columbia Board determined that not all existing jobs must be continued after the transfer of a business, but that any terminations or layoffs must be done in accordance with the applicable collective agreement.*** *In arriving at its decision in Bell Farms, the British Columbia Board approved of and applied the following principles articulated by another panel of that Board in M.M. Pruden and B.C. Assessment Authority, [1976] 2 Can. LRBR 138, at 143:*
>
> > *The thrust of s. 53 is to preserve collective bargaining and collective agreements for the group, and the Board has power to revise units, certifications, and collective agreements for that purpose … . In addition, the Board now has power under the Labour Code to preserve the seniority rights of employees where it where it is of the opinion that it would be in furtherance of the objectives of the Code (ss. 53(3)(d) and 27).* ***But it is not a policy of the Code that all existing jobs be continued after a succession. For example, if an employer chooses to integrate separate operations to achieve greater efficiency and economy, there is nothing in the Code which prohibits it from terminating or laying off employees as a result … .***
> >
> > *On the other hand,* ***it is implicit in s. 53 … that any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause". A successor employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees".***
>
> *. . .*
>
> *[66] Furthermore,* ***while the Corps could decline to employ the Inner-Tec employees, it could only do so for legitimate business reasons and any lay-off would have to be in***

> ***accordance with the collective agreement.*** *Obviously, this was not done because the Corps refused to acknowledge the Union or apply the collective agreement. Why the Corps has conducted itself as it has is unclear. It was admitted at the hearing that there was a successorship. The wording of s. 37 of the Act makes it clear that the legislature intended that the collective agreement be binding on the successor employer until the Board declares otherwise. Moreover, in acting as it did, the Corps refused to bargain collectively with the Union in violation of s. 11(1)(c) of the Act and is guilty of an unfair labour practice.*
>
> [**emphasis added**]

[82] In the *Bell Farms* case referred to in the preceding quote, the British Columbia Labour Relations Board rejected the Union's request for a declaration that the successor employer be required to employ a certain number of employees of the predecessor employer stating that the number of employees required by the successor "is a matter of management" of the business provided the work "is carried out in accordance with the collective agreement."

[83] Similarly, in the *Battlefords Ambulance* case, *supra*, the Board found the successor employer guilty of an unfair labour practice and remained seized for the purposes of considering whether to order the submission of a rectification plan if the parties could not resolve the matter. In so doing, the Board acknowledged that a successor employer's business operation might be different than the predecessor's and that there is no obligation on the successor to operate the business in the same manner and with the same complement of employees as the predecessor, subject to the successor's compliance with the lay-off and just cause provisions of the collective agreement. At 615 the Board stated:

> ***Our analysis does not require the successor employer to continue the business in the same manner that it was performed in the past. Not all of the former jobs may survive the transfer of a business, in which case the successor employer may be required to lay staff off in accordance with the provisions contained in the collective agreement.*** *The new employer steps into the shoes of the predecessor in terms of exercising the rights granted to it under the collective agreement****. In many cases, this will permit the employer to decide how many employees it requires to conduct its business.***

(ii) The issues arising out of the payment of monetary loss.

[84] One of the complaints of the Union with respect to Johner's payment of Ms. Koch's and Ms. O'Fee's monetary loss was that excessive withholding tax was deducted from the payments because the payments were treated as regular wages rather than as lump sum or severance payments and because the employment insurance repayment for Ms. O'Fee was added on to her gross income before withholding tax was calculated and deducted. The Union also complained that the inclusion of the past wage claim and the employment insurance repayment in the employees' regular wages had a negative effect on the employees' ability to qualify for unemployment insurance benefits. Lastly, the Union complained that the employees were improperly paid their vacation leave payments before they took their actual vacation leave, contrary to the agreement reached with Johner's on this issue.

[85] With respect to the issue of the proper rate of withholding tax, the parties had not discussed or agreed upon the characterization or the structure of the payments, except that Johner's would make the employment insurance repayment (the amount of which was determined with the assistance of the Board agent) and that the payments would be made before September 30, 2006. The question put before us was whether Johner's actual or the Union's proposed structure/characterization of the payments was correct. This is not a question that the Board can answer as it is a complicated one and would involve the Board interpreting the *Income Tax Act* and possibly the *Employment Insurance Act*. Not only do we not have the expertise to do so, the evidence that was led at the hearing was inadequate to assist in that determination. Both parties led hearsay evidence concerning the appropriate characterization and method of calculation of the payment, in particular, the proper amount of withholding tax and whether the employment insurance repayment should have been included or deducted from gross income before withholding tax was calculated. For the most part, this hearsay evidence was based on Revenue Canada's advice to each of the parties. Based on that evidence, we can only conclude that it appears that there may be multiple ways in which to properly structure the payment, one method more immediately favorable to the employees than the other. We cannot say, however, on the evidence presented, that

one was correct and one was incorrect. Therefore, we must defer that part of our decision to Revenue Canada and Human Resources Development Canada.

[86] Even though we are unable to make a decision on the appropriate characterization and structure of the payments for the past wage loss, the inclusion of the employment insurance repayment and the proper treatment of withholding tax, in our view, the fact that the parties had not reached an agreement or discussed the issue, does not dispose of the matter. It is our view that, given the obligation to bargain in good faith required by s. 11(1)(c) and the June 14, 2006 Order of the Board concerning payment for monetary loss, Johner's should have discussed the characterization/structure of payment with the Union before taking the unilateral action of making the payments in the manner it chose. We therefore find that Johner's is in violation of s. 11(1)(c) of the *Act* for failing to discuss the characterization/structure of payment with the Union as well as the inclusion of the employment insurance repayment in the gross income of Ms. O'Fee. The consequences flowing from this violation of the *Act* remain to be considered.

[87] With regard to the payments for past wage loss, if the Union can prove that its proposed structure is acceptable to Revenue Canada, the employees may be entitled to monetary loss. However, the only loss that follows is the loss of use of those funds because, presumably, upon the filing and assessment of the employees' income tax returns for the 2006 taxation year, the amount of actual tax owing on the payments will be determined. The loss to the employees in these circumstances would result from the fact that excessive withholding tax was deducted from those payments at source, not necessarily that too much tax was paid (although if it was, Revenue Canada would provide the employees with a refund). Therefore, the appropriate period of time to consider the loss of use of excessive withholding tax deducted (if proven) is from the date payment was made to the employees to the date the tax return was assessed by Revenue Canada. The Board is not in a position to make this determination based on the evidence presented at the hearing.

[88] In order for the Union to establish liability on the part of Johner's in this regard, it must obtain a ruling from Revenue Canada indicating that its proposed characterization/structure of payment of monetary loss (and the corresponding rate of

withholding tax) would have been acceptable to Revenue Canada. In order to establish monetary loss resulting from this action by Johner's, the Union must also provide the Board with proof of that loss. That may be established through an examination of the tax returns filed by the employees for the 2006 taxation year compared to an adjusted tax return based on the Union's proposed method of calculation. Alternatively, proof of the amount of the excessive tax deducted at source might be offered through a ruling obtained from Revenue Canada.

[89] Similarly, the propriety of including the employment insurance repayment in gross income before withholding tax was calculated, cannot be determined by the Board on the basis of the evidence presented to the Board. In our view, this issue must be sorted out with Revenue Canada (with respect to the issue of the excessive withholding tax deducted) and Employment Insurance (with respect to the issue of its inclusion in income for the purposes of calculating the qualifying period for benefits subsequent to the recent lay-off). Again, it appears that the only monetary loss which flows from such a breach of the *Act* and the Board's Order is the loss of the use of the excessive withholding tax from the date the payment was made to the employees until the time such matter was corrected. If the Union can establish such liability, as noted above, and can provide proof of the amount of money which the employees lost the use of, the parties may return to the Board for appropriate orders, if they are not able to first resolve the matters on their own.

[90] With respect to the Union's complaint concerning the payment of vacation leave pay, while it appears to be a reasonable business decision on the part of Johner's to pay out such vacation leave in the circumstances, the matter should have been raised with the employees and the Union before Johner's made those payments. The parties had agreed that past earned vacation leave would not be paid until the employees actually took their vacation leave. However, the agreement between the parties was vague in the sense that there was no indication of the year in which the employees would be required to take their vacation leave. The obligation on Johner's to discuss this matter with the employees and the Union arises from both the obligation to bargain under s. 11(1)(c) of the *Act* as well as the parties' collective agreement. The collective agreement requires that holidays be taken between May and September unless agreed otherwise and, while there is no provision for carryover of unused vacation leave, it is at

least arguable that vacation leave earned in 2006 can only be taken in 2007. Also, because of the possibility in article 14 that the parties could agree to a vacation leave other than between May and September, Johner's should have discussed the matter with the Union or at least given fair warning of its intention to pay the employees in order that the employees could plan accordingly. For these reasons, we find that Johner's payment of the vacation leave pay to the employees contributes to our determination that Johner's committed an unfair labour practice within the meaning of s. 11(1)(c).

[91] The more difficult question to answer becomes the extent of the loss as a result of the apparently premature vacation leave payment. In making orders for monetary loss, the Board is typically governed by the principle of placing the injured party in the position he or she would have been in had the *Act* not been violated. Following that principle in these circumstances would require the employees to return the vacation leave payment to Johner's and Johner's to pay vacation leave when the employees actually took such vacation leave. However, to require the employees to return the payment at this time might be near impossible and certainly impractical. It also lacks practicality given our conclusions concerning the effect of a successorship and Johner's mode of operation of their business. In addition, an issue that was not raised by the parties but factors into the circumstances of this case, is the possible requirement on Johner's to pay any vacation leave pay owing at the time of an employee's lay-off from employment. If Johner's was required to pay and record the vacation leave payment on the employees' records of employment at the time of their lay-offs, there was no loss suffered by the employees. However, if Johner's was not required to make such a payment on lay-off and the payment of vacation leave affected the eligibility of the employees for further employment insurance benefits, the employees will have suffered a loss as a result of their failure to qualify for such benefits. In these circumstances, if the Union can prove that the *Employment Insurance Act,* S.C. 1996, c. 23 and Regulations do not require payment of the outstanding vacation leave owing upon lay-off, the Union may return the matter to the Board to attempt to establish liability on the part of Johner's and to attempt to prove specific monetary loss suffered by the employees resulting from the improper vacation leave payment. (Liability, of course, would also be dependent on the employees' ability to establish that they otherwise would have qualified for such benefits.) There is otherwise no quantifiable loss suffered by the employees by reason of having received their vacation leave pay at the time they did.

[92] Although we have determined that Johner's is in violation of s. 11(1)(c) of the *Act*, we do not find any anti-union animus on the part of Johner's with respect to the manner in which it made payment of the monetary loss and of the vacation leave in the circumstances of this case. As such, there is no entitlement to any aggravated or punitive damages. Any further monetary loss suffered by the employees that may be determined in the manner set out above, is restricted to the loss of use of funds or, in other words, payment of interest on the excessive withholding tax deducted for the period of loss, as well as any monetary loss resulting from the delay, if any, in receiving further employment insurance benefits subsequent to the lay-offs, which occurred as a result of the improper calculation/payment of the monetary loss owing pursuant to the Board's June 14, 2006 Order and the agreement reached by the parties with the assistance of the Board agent.

[93] The Board will therefore retain jurisdiction over the issues of Johner's liability for any further monetary loss and the quantum of that loss, as set out above. We will, however, leave the issues to be resolved by the parties in the first instance.

[94] As stated at the outset of these Reasons for Decision, the Board ruled as a preliminary matter at the hearing of October 24, 2006 and November 7, 2006 that it would defer consideration of a number of other issues raised by the Union. The Board has answered items 4, 5, and 10^2 of the Union's list as set out earlier in these Reasons for Decision. In our view, there are no further matters for the Board to consider as all other items either do not arise out of the Union's initial application or the Board's Order of June 14, 2006, or they are matters which should be dealt with through the grievance procedure in the collective agreement. We shall deal with the specific reasons for declining to exercise jurisdiction over each of those complaints.

[95] Given our findings concerning Johner's obligations as a successor employer as well as the manner in which the Board has ordered the amendment to article 5 of the collective agreement, it is unnecessary for the Board to address the following issues:

1. Which people should be in-scope and extent of protection of bargaining unit work;

2. The lay-off of union members when bargaining unit work remains to be performed;

[96] The Board also finds it unnecessary to address the following issue, however, to the extent that this represents a complaint concerning the propriety of the recent lay-offs under the terms of the amended collective agreement, grievance arbitration is the appropriate forum:

3. The reduction of hours to part time for Ms. O'Fee and Ms. Koch, while others perform their work;

[97] The Board will not hold a further hearing into the matters listed below because they are not differences under the *Act* and/or do not arise out of the Union's application or the Board's Order of June 14, 2006. These differences are of a nature that they could only arise under the parties' collective agreement and are therefore more appropriately dealt with through the grievance arbitration procedure as required by s. 25(1) of the *Act*. In the alternative, to the extent that any of these claims might also arise under the *Act*, we defer to an arbitrator under the collective agreement. The following matters are therefore deferred to the grievance arbitration procedure under the collective agreement, as amended by order of the Board:

6. Failure to assign Ms. O'Fee and Ms. Koch their previous duties;

7. Requiring employees to take a lunch break, not allowing employees to take breaks in the restaurant, and providing employees only the "lunch special";

8. Employees only having security clearance for the restaurant floor;

9. Employees not having a change room and secure place for their belongings;

. . .

---

[2] To the extent this complaint has not been answered by the Board, it is a matter for grievance arbitration.

11. Employees previous working conditions did not require Fridays off; and

12. General treatment and attitude.

Summary:

[98] The Board will therefore make the following orders:

(i) An order pursuant to ss. 5(i) and (j) of the *Act* rescinding the certification order made on April 10, 1975 under ss. 5(a), (b) and (c) of the *Act* naming Tappin as the employer;

(ii) An order rescinding clauses (b), (c) and (d) of the Board's Order of June 14, 2006;

(iii) An order for certification pursuant to ss. 5(a), (b) and (c) and ss. 37(2)(b), (c) and (e) of the *Act* naming Johner's Homestyle Catering as the employer and containing the following bargaining unit description:

> *All employees employed by Johner's Homestyle Catering operating as Johner's Catering in or in connection with its places of business at SaskPower in the City of Regina except the partners of Johner's Catering, are an appropriate unit of employees for the purpose of bargaining collectively.*

(iv) An order pursuant to ss. 5(d) and (e) of the *Act* finding that Johner's committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* and clauses (h) and (j) of the Board's Order of June 14, 2006 and an order to cease and refrain from committing this unfair labour practice;

(v) An order pursuant to ss. 37(2)(e) and (f) of the *Act* and clauses (e), (k)(iii) and (l) of the Board's Order dated June 14, 2006, amending the collective agreement to apply to Johner's including changing all references to the employer to Johner's Homestyle Catering and amending article 5 of the collective agreement as follows:

ARTICLE 5 – UNION SECURITY

Every employee who is now or hereafter becomes a member of the Union shall maintain his membership in the Union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty (30) days after the commencement of his employment, apply for and maintain membership in the Union as a condition of his employment.

Persons whose jobs are not in the bargaining unit shall not perform any bargaining unit work except in the case of an emergency or by mutual agreement by the parties. The partners of Johner's Homestyle Catering shall be considered exempt from this clause.

(vi) An order reserving jurisdiction to deal with any issues of liability or monetary loss that arise from the Board's finding of the violation of s. 11(1)(c) herein.

DATED at Regina, Saskatchewan, this **5th** day of **June, 2007.**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson