Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4799, Applicant v. BOARD OF EDUCATION OF HORIZON SCHOOL DIVISION No. 205 Respondent, and DEER PARK EMPLOYEES' ASSOCIATION, Interested Party

LRB File No. 053-06; October 2, 2007
Chairperson, James Seibel; Members: Joan White and Duane Siemens

For the Applicant:	Peter Barnacle
For the Respondent:	James McLellan
For the Interested Party:	No one appearing

Bargaining unit – Appropriate bargaining unit – Fragmentation – Board has exclusive jurisdiction to determine matter of consolidation of bargaining units – In circumstances of case, single bargaining unit comprising employees in existing bargaining units constitutes appropriate unit for collective bargaining – Consolidation reduces fragmentation, allows employees to bargain together to single coherent collective agreement and goes some way to improve labour relations stability and promote industrial peace.

Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Statutory statement of Board's authority in s. 37 of *The Trade Union Act* does not alter fundamental object and purpose of *The Trade Union Act* – Object and purpose of *The Trade Union Act* that employees have right to join and be represented in collective bargaining by trade union of their choice – Board declines to sweep significant number of employees into existing units or consolidated unit without evidence of their wishes.

***The Trade Union Act*, ss. 2(a) and 37.**

REASONS FOR DECISION

Background:

[1] Effective January 1, 2006 the provincial government made a general restructuring of boards of education and their school divisions. The restructuring was compulsory for the public school system and voluntary for the separate school system. The amalgamation of 68 of 81 school divisions into 15 larger school divisions, resulted in the present 28 public and separate school divisions in the province.

[2] The Board of Education of Horizon School Division No. 205 (the "Employer" or the "Horizon School Division") was created by the amalgamation of six (6) smaller school divisions: Wakaw School Division No. 48; Sask Central School Division No. 121; Lanigan School Division No. 40; Humboldt School Division No. 104; Humboldt Rural School Division No. 47; and, Lakeview School Division No. 142, (the "legacy school divisions" or "pre-amalgamation school divisions").

[3] Canadian Union of Public Employees, Locals 832-3, 3084, 3542, 4178, 4288 and 4699 (the "CUPE locals"), are certified as the collective bargaining agents for certain non-teacher (support staff) units of employees of five (5) of the legacy school divisions as follows:

- CUPE Locals 832-3 and 4178 – Wakaw School Division No. 48;
- CUPE Local 3084 – Sask Central School Division No. 121;
- CUPE Local 3542 – Lanigan School Division No. 40;
- CUPE Local 4288 – Humboldt School Division No. 104; and,
- CUPE Local 4699 – Lakeview School Division No. 142.

There is no certified bargaining unit of employees in Humboldt Rural School Division No. 47.

[4] Canadian Union of Public Employees, Local 4799 (the "Union") was created as a result of the merger and transfer of obligations of the CUPE locals, pursuant to s. 39 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[5] All employees covered by the collective agreements between the CUPE locals and the boards of education of the legacy school divisions are members of the Union. There are no "grandfathered" non-members or exclusions for other reasons. The Union's members constitute approximately 70 per cent and, hence, a significant majority of all the Employer's support staff employees.

[6] A small independent trade union, the Deer Park Employees' Association, is presently certified to represent a certain small number of bus driver support staff

employees of the Employer in Ituna, Saskatchewan and, at the hearing, the Union submitted that it excluded those nine (9) employees from its application. The Deer Park Employees' Association was given notice of the application but did not file a reply or attend the hearing.

[7] In the instant application, the Union has applied for the following relief:

(a) pursuant to s. 39 of the *Act*, a declaration recognizing the Union as the bargaining agent for the six bargaining units previously represented by the CUPE locals;

(b) pursuant to ss. 37(1) and 37(2)(a) of the *Act* a declaration that the Employer is the successor employer of the employees in the seven legacy school divisions including the employees represented by the CUPE locals; and,

(c) pursuant to s. 37(2) of the *Act*, orders that:

(i) all non-teacher support staff employees of the Employer (that is, those that are presently covered by the existing certification Orders and those that are not) constitute a single all employee unit;

(ii) the all employee unit is appropriate for collective bargaining;

(iii) the Union represents a majority of the employees in such unit, and;

(iv) making amendments to the certification Orders and collective agreements and providing directions as necessary.

[8] The description of the proposed bargaining unit is as follows:

> *All employees employed by the Horizon School Division No. 205 of Saskatchewan within the boundaries of the School Division, except Director of Education, Secretary Treasurer,*

> *Superintendents of Curriculum and Instruction, Superintendents of Student Services, Superintendents of Human Resources, Superintendents of Business Operations, Superintendents of Finance, Superintendents of Facilities and Transportation, Superintendents of Payroll, Teachers employed and functioning as such, and employees represented by the Deer Park Employees' Association.*

The parties agreed to defer any issues with respect to exclusions pending the Board's decision with respect to the main issues, above.

[9] In its reply to the application, the Employer admitted that, in accordance with s. 37 of the *Act*, it is the successor employer of the employees in, and is bound by the certification Orders and collective bargaining agreements covering, the bargaining units in the legacy school divisions. The Employer did not object to the Union's application pursuant to s. 39 of the *Act*. However, it took the position that the successorship application is not appropriate for pulling previously unrepresented employees into the existing bargaining units or the proposed single amalgamated unit. Further, and in any event, the Employer took the position that an "all-employee unit" is not an appropriate unit for the purposes of collective bargaining. Furthermore, the Employer stated that it has voluntarily recognized the Humboldt Public School Support Services Staff Association and the Humboldt Rural Support Services Staff Association[1] as the representatives of certain support staff employees presently not represented by a certified trade union.

[10] Extensive evidence and argument was presented over three days of hearing.

Evidence:

[11] At the hearing the parties informed the Board that they were in agreement regarding certain numbers of employees. They filed a list of 509 names, being the total number of support staff in the Horizon School Division, not including the nine (9) bus driver support staff who are members of the Deer Park Employees Association, as follows:

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[1] These "Associations" are not "trade unions" under *The Trade Union Act*.

Employee members of the CUPE locals		354
Presently non-unionized employees who would become members of the proposed unit if the application is granted		155
	Total	509

[12] There are also 12 persons stated to be managerial or confidential exclusions from the proposed enlarged bargaining unit.[2]

[13] As a result of union security provisions and the effluxion of time all of the 354 employees in the bargaining units represented by the Union in the legacy school divisions are members of the Union, being approximately 70% of the total number of employees. The Union seeks a single bargaining unit comprising the employees it presently represents in the units in the legacy school divisions and also the 155 presently unrepresented employees. The Union did not file evidence of majority support for the application among the employees in the latter group.

[14] Kim Aschenbrenner testified on behalf of the Union. Greg Deren, Marian Wolfe and Marc Danylchuck were called to testify on behalf of the Employer.

Kim Aschenbrenner

[15] Kim Aschenbrenner is a national staff representative of the Union in the Saskatoon region. The former CUPE locals involved in this application represent various support staff (i.e., non-teaching) classifications, such as caretakers, bus drivers, educational (teacher) assistants, counselors, librarians and library assistants, and clerical staff. He summarized the composition of the bargaining units represented by the former CUPE locals and the dates of the original certification Orders, as follows:

> *CUPE Local 832-3: Wakaw School Division No. 48, caretakers – July 26, 1962;*
> *CUPE Local 4178: Wakaw School Division No. 48, all other support staff, except bus drivers[3] and central office clerical staff – April 24, 1998;*

[2] Counsel on behalf of the Union advised that the Union did not necessarily agree that all 12 persons should be excluded and suggested that, if necessary, the Board should reserve decision on the point.
[3] Bus driving in the former school division is contracted out.

CUPE Local 3084: Sask Central School Division No. 121, all support staff, except bus drivers – May 16, 1986, amended February 8, 2006;

CUPE Local 3542 -- Lanigan School Division No. 40, all support staff, except central office clerical staff – May 23, 1991;

CUPE Local 4288 -- Humboldt School Division No. 104, except elementary school – May 31, 1999, amended May 24, 2001;

CUPE Local 4699 -- Lakeview School Division No. 142, all support staff, except bus drivers – December 20, 2004.[4]

[16] Copies of the present certification Orders held by the CUPE locals fully describing the bargaining units are attached to these Reasons for Decision as Schedule "A".

[17] Each of the collective agreements between the CUPE locals and employers contains a standard "union security" clause.

[18] Two of the legacy school divisions are in the Humboldt area: Humboldt School Division No. 104 and Humboldt Rural School Division No. 47. The bargaining unit for the former Humboldt School Division No. 104 comprises support staff at the town's high school but not the elementary school. Presently, the Union does not represent any support staff employees in the former Humboldt Rural School Division No. 47.

[19] In the former Wakaw School Division No. 48, the bus driving is contracted out and the drivers are not employees of the school division. Central office clerical staff are not represented.

[20] In the former Sask Central School Division No. 121 and Lakeview School Division No. 142, the bus drivers (15 employees and 6 contractors) are not represented.

[21] In the former Lanigan School Division No. 40, central office clerical staff are not represented.

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[4] The Lakeview School Division was itself created by an earlier amalgamation of three school divisions represented by the Union -- Shamrock, Wadena and Ituna School Divisions.

Greg Deren

[22] Greg Deren is the director of employee relations for the Saskatchewan School Boards Association (the "SSBA"). His department advises and represents individual public school boards with respect to human resources matters including collective bargaining, at their request.

[23] Mr. Deren offered his opinion of the intention of school division restructuring in general. Larger school divisions, which ensure a minimum of 5000 students, provide a certain quality of education not afforded smaller divisions by evening out the local tax base. At one time there were hundreds of school divisions in the province. He described the amalgamations creating several larger school divisions, which we will not set out here.

[24] Mr. Deren pointed out that the Union had conducted organizing drives and made applications for certification during 2005 even though it was aware that those school divisions would be amalgamated as at January 1, 2006 and wondered aloud as to why it had not done so in the legacy school divisions in the present case.

[25] Mr. Deren described "central office staff" as including positions such as reception, accounting and clerical. He stated that in most school divisions only a small portion — and in some cases, even none – of the central office staff is unionized. He described the rationale for not including central office staff in the bargaining unit from the SSBA's point of view: it is awkward when there is a small central office staff in a school division with respect to confidentiality issues, because some people must be excluded from certain discussions; it is not conducive to the desire for "a happy cohesive work unit," because the union membership of some staff is "potentially divisive." However, in cross-examination, he admitted there is no evidence that being in a union results in "disloyalty."

[26] In cross-examination Mr. Deren confirmed that the central office staff in Wadena, which was in the former Lakeview School Division No. 142 and is now part of the Horizon School Division, is unionized. Mr. Deren confirmed that the Union has made other applications to the Board similar to the present one with respect to seven

amalgamated rural school divisions resulting from the January 1, 2006 restructuring. For example, he confirmed that a joint amendment application by the Union and the Board of Education of the Saskatchewan Rivers School Division No. 119 made since the restructuring had resulted in an all-support-staff bargaining unit represented by the Union by an Order dated July 11, 2006 in LRB File No. 107-06. When asked whether the all-support-staff bargaining unit in that school division had proved "unworkable," Mr. Deren admitted that he was not aware that that was the case and that that particular board of education "obviously agreed" that it was workable.

[27] Further, in cross-examination, Mr. Deren agreed with counsel for the Union that in the past when the Union had obtained certifications for central office staff in what were then much smaller school divisions there were relatively few staff -- some smaller school divisions had only a single secretary and clerk. He confirmed that the largest public school divisions (with more than 10,000 students) have central office staff that are organized in unions.

[28] The terms and conditions of employment in each school division and within school divisions, including the Horizon School Division, vary as a result of the restructuring. Mr. Deren confirmed that in the Saskatchewan Rivers School Division the move by the union and school board to bargaining on behalf of an agreed upon all-employee unit had solved those differences in that school division.

Marion Wolfe

[29] Marion Wolfe has been the superintendent of human resources for the Employer since January 1, 2006. Prior to January 1, 2006 she was employed by the former Sask Central School Division No. 121 as superintendent of school operations.

[30] Ms. Wolfe testified that the central office for the Horizon School Division will be located in Lanigan and two service centres, one for payroll and one for bus driving services, will be located in Humboldt and Wadena, respectively. Otherwise, she said that the amalgamation had resulted in little change at the school level, with few employees moving from one legacy school division to another. There has been no inter-

mingling of employees that she was aware of. However, two employees did move from a legacy school division central office to the Humboldt service centre.

[31] Ms. Wolfe described the staff profiles of the legacy school divisions just prior to amalgamation into the Horizon School Division, as follows:

A. Sask Central School Division No. 121– CUPE Local 3084:

- Bus drivers -- 15 union employee drivers, 6 non union contractors.
- All central office staff – union.
- All caretakers and educational assistants -- 49 union, (3 non-union employees of a First Nation).
- Counselors – 2 union, 1 non-union.
- All school clerical staff – 14 union.

B. Lakeview School Division No. 142– CUPE Local 4699:

- Private contractors' bus drivers – 22 non-union.
- Bus drivers represented by Deer Park Employees' Association – 9.
- Bus fleet supervisor/foreman – 1 union.
- All caretakers and educational assistants – union.
- All library assistants, school clerical staff and counselors – union.
- Central office staff -- 2 union, 1 non-union.

C. Humboldt Rural School Division No. 47:

- All employees are non-union, including 3 central office staff; they are members of the "Humboldt Rural Support Services Staff Association" which is not a "trade union" under the *Act*, but which was voluntarily recognized by the legacy school division and now by the Employer, with whom the Association has an agreement.
- All bus drivers are employed by an independent contractor.

D. Humboldt (Town) School Division No. 104– CUPE 4288:

- All high school support staff – union.

- All support staff of the single elementary school – non-union.
- Central Office Staff – 1 non-union.
- All non-union employees are members of the "Humboldt Public School Support Services Staff Association" which is not a "trade union" under the *Act*, but which the Employer says was voluntarily recognized by the legacy school division and now by the Employer, with whom the Association has an agreement.

E. Lanigan School Division No. 40– CUPE Local 3542:

- All school support staff – union.
- All central office staff – non-union.
- All bus drivers – non-union.

F. Wakaw School Division No. 48– CUPE Locals 832-3 and 4178:

- All caretakers – union (CUPE Local 832-3).
- All school clerical staff – union (CUPE Local 4178).
- Central office staff – non-union.
- There are no employee bus drivers.

[32] In cross-examination, Ms. Wolfe admitted that "from a strictly administrative point of view," it would probably be easier to administer a single collective agreement for all support staff rather than the several that exist presently, at least with respect to pay and benefits, but it would depend on the content of the agreement.

[33] Ms. Wolfe admitted that the members of the voluntarily recognized Humboldt Rural Support Staff Association do not have access to a grievance and arbitration procedure for alleged violations of the Association's agreement with the Employer.

Marc Danylchuk

[34] Marc Danylchuk has been the director of education for the Employer since before the restructuring in anticipation of the amalgamation. He has been

employed in the field of education for more than 29 years. Essentially, he is the Employer's CEO with duties established by statute.

[35] The members of the Board of Education of the Horizon School Division are elected, one from each of 14 sub-divisions. The school division is geographically extensive – approximately 250-300 kms from end to end. There are approximately 7000 students and 2000 staff.

[36] At a teachers' convention in November 2005, representatives of the Union suggested that the parties should apply for a joint amendment to the certification Orders, but there has been no discussion of this since to the time of hearing. Mr. Danylchuk stated that the Employer would agree to a joint amendment consolidating the existing certification Orders, but would not agree to include presently non-union staff.

[37] The school division amalgamation resulted in the combining of six separate central office cultures – some former directors of education became superintendents and some staff was hired from outside the amalgamated school division. Mr. Danylchuk offered the opinion that the presence of some unionized staff in the central office is divisive and creates confidentiality problems when discussing school closure issues – he said there was a conflict in loyalty between union and non-union central office staff.

Statutory Provisions:

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

> *2 In this Act:*
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> *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
>
> *. . .*
>
> *5 The board may make orders:*

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

(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;

. . .

6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

. . .

18. The board has, for any matter before it, the power:

. . .

(v) to order, at any time before the proceedings has been finally disposed of by the board, that:

(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likelt to arise in the proceeding, whether or not such a vote is provided for elsewhere; and

(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;

. . .

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).

Arguments:

The Union

[39] Mr. Barnacle, counsel on behalf of the Union, filed a written brief, which we have reviewed and appreciate.

[40] Mr. Barnacle submitted that there appeared to be no issue that the Horizon School Division is the successor employer to the legacy school divisions pursuant to s. 37(1) of the *Act*. He also submitted that there is no issue that the Union is the successor to the separate CUPE locals representing the bargaining units in the legacy school divisions pursuant to s. 39 of the *Act*. Where the issue arises, however, is with respect to the application by the Union under s. 37(2) of the *Act* to amalgamate the existing bargaining units into a single unit and to add all of the support staff employees that are not presently covered by the existing certification Orders.

[41] Counsel submitted that s. 37(2)(a) of the *Act* is not in issue because the Employer admits that it is the successor employer of all of the unionized employees affected by the application. The Union requests orders, pursuant to ss. 37(2)(b) and (c) that, subject to the exclusion of teachers, confidential and managerial exclusions pursuant to s. 2(f) of the *Act* and the employees that are members of the Deer Park Employees' Association, a unit of all support staff employees of the Employer (that is, those that are presently covered by the existing certification Orders and those that are not) is an "appropriate unit" pursuant to s. 2(a) of the *Act*, and that the Union represents a majority of those employees.

[42] Addressing the issue of bringing the presently unrepresented support staff employees into a proposed unit of all support staff, Mr. Barnacle explained that the present application is not made pursuant to s. 5 of the *Act* (i.e., certification pursuant to ss. 5(a), (b), and (c), or amendment pursuant to s. (5)(j),(i), or (k)), but rather, s. 37. Counsel pressed the point that, therefore, the Board's cases regarding "accretion" to a bargaining unit pursuant to applications made under the former provisions, are of limited value. He suggested that the listing by the legislature in s. 37(2)(b)(i) of the *Act* of the various types of units that might be appropriate requires the Board to determine the issues of appropriateness of the bargaining unit, the bargaining agent for that unit and to

amend the certification order(s) and/or scope clause(s) of the collective agreement(s), and provide directions as necessary.

[43] In anticipation of argument by counsel on behalf of the Employer, Mr. Barnacle addressed the decision of the Alberta Labour Relations Board in *Canadian Union of Public Employees, Local 3203 v. Horizon School District No. 67, et al*., [1995] Alta. L.R.B.R. 439. In that case three smaller school units were merged into one larger district. One of the units was unionized and two were not organized. The union represented 72 per cent of the employees in the expanded employee group. The union applied to amend the bargaining certificate to sweep the previously unrepresented employees into a district-wide unit without a vote; however the employer and the unrepresented employees requested that there be a vote. The Alberta Board dismissed the application, holding that while a district-wide unit might be appropriate in a certification application, the aim of successorship is to preserve existing bargaining rights and existing units would not be altered unless intermingling made the existing bargaining structure unworkable. There was no evidence of significant intermingling. The Alberta Board issued a new bargaining certificate geographically restricted to the area occupied by the former unionized school units.

[44] Mr. Barnacle argued that the Alberta legislation applicable to school districts in the *Horizon* case, *supra*, differed significantly from s. 37(2) of the *Act.*[5] Counsel said that the latter requires the Board to consider which kind of unit is appropriate in a successorship situation. That is, it is incumbent upon the Board to consider a unit appropriate for the new organization. However, in *Horizon*, the Alberta Board examined cases that involved bargaining units represented by different bargaining agents and applied a policy that required intermingling as a determinative factor in determining whether to create a single bargaining unit – employees would vote on which of the two bargaining agents would represent them. In *Horizon*, a majority percentage of the employees in the unrepresented group intervened in the hearing to advise the Board that they did not want to belong to the union. The Alberta Board did not order a vote to see whether the unrepresented employees wanted to be represented by the union.

[5] See, Alberta *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 46. Counsel pointed out that Section 46 (now s. 48 of the *Code*), applied to amalgamations of "governing bodies" including school districts, hospitals and other public institutions, while s. 44 (now s. 46), which applies to ordinary successorship situations, is more similar to, but less detailed than, s. 37(2) of *The Trade Union Act*.

However, counsel pointed out that the Alberta Board did state that in different circumstances a single unit might be appropriate.

[45] Mr. Barnacle argued that under s. 37(2)(b) of the *Act* the Board is to determine the appropriate unit and then determine support – the provision makes no reference to intermingling. Counsel argued that in the present case the new Employer is rationalizing its operations by creating a new central office, satellite offices and service centres. If *all* support staff employees are not included in an amalgamated bargaining unit obviously it will result in fragmentation of the work force. The fragmentation will not be geographically isolated, but will be endemic to nearly all work units, the two service centres and the central office, and will be magnified by cross-over and intermingling of employees of the legacy school divisions within the amalgamated school division as time passes. In addition, it would be possible for the Employer to "play off" one group of unionized employees against another group of non-unionized employees doing the same job. The appropriate bargaining unit should reflect the framework of the Employer's organization conforming to the Board's general policy preference for larger bargaining units recognizing the employees' community of interest. Mr. Barnacle submitted that a new larger unit that does not include the presently unrepresented support staff employees is not an appropriate unit: it would be fragmented and, over time, employees would cross over from one work unit to another within the school district. If the Union applied to the Board for such a unit on an initial certification, the Employer would almost certainly argue that it was not an appropriate unit and the Board would almost certainly find that it was not an appropriate unit.

[46] A large portion of Mr. Barnacle's argument was directed to describing the nature of accretion cases decided under s. 5 of the *Act* where an application is made to amend an existing certification order to include an additional group of employees. In such cases, proof of majority support among the group of add-on employees is required.

[47] Counsel initially addressed two of the historically important cases respecting the issue: *University of Saskatchewan v. Canadian Union of Public Employees, Local 1975, et al.*, [1978] 2 S.C.R. 834 (S.C.C.); (1977), 22 N.R. 314 (Sask. C.A.), and *Prince Albert Co-operative Association Limited v. Retail, Wholesale and*

Department Store Union, Local 496, (1982) Sask. R. 314, 141 D.L.R. (3d) 524 (Sask. C.A.), affirming [1982] May Sask. Labour Rep. 55, LRB File No. 535-81.

[48] In *University of Saskatchewan*, *supra*, the Board, relying on its powers under ss. 5(i) and (k) of the *Act* consolidated seven certified bargaining units into a single unit and deleted an exclusion of another group of employees, which had the effect of including a large number of employees in the new unit who had not been included in the seven former units. Mr. Barnacle pointed out that, in allowing an appeal by the University of the decision of the Saskatchewan Court of Appeal dismissing an application for judicial review of the Board's decision, the Supreme Court of Canada adopted the dissenting reasons of Bayda, J.A. (as he then was). While Bayda, J.A. held that the Board had the jurisdiction to effect a simple consolidation of the bargaining units, it did not have the jurisdiction to "sweep in" the previously unrepresented employees to the new consolidated unit without ascertaining the wishes of the employees as to whether they wanted to be represented by the union representing that unit. Bayda, J.A. held that the extant certification orders did not constitute evidence that the union had the support of any portion of the employees in each of those bargaining units (and, therefore, did not constitute evidence of support of a majority of employees in the consolidated unit), the implication being that the union had to demonstrate that it had such a level of support as well as the support of a majority of the previously unrepresented employees in the add-on group in order to succeed in bring the latter employees in to a new consolidated and enlarged bargaining unit.

[49] Counsel pointed out that a few years later, in *Prince Albert Co-operative Association*, *supra*, in reasons written by Bayda, C.J.S., on behalf of the Court, his Lordship resiled somewhat from the position espoused in *University of Saskatchewan*, *supra*, that an extant certification order was not evidence of support for the union of a majority of employees in the certified bargaining unit.

[50] In *Prince Albert Co-operative Association, supra*, the Board made a certification order in 1953. In 1981 the Union applied for an amended certification order under s. 5(k) of the *Act* for an enlarged bargaining unit. There were approximately 120 employees in the original unit at the employer's place of business in Prince Albert. The union sought to add 38 employees employed in towns outside of Prince Albert at places

of business that the employer had acquired since the original order. The union filed direct evidence of majority support among the employees in the add-on group, but relied upon the existing order as proof of support of the majority of employees in the original unit. The employer objected that this was not evidence of majority support for the enlarged unit. The Board allowed the application. The employer applied for judicial review. In its judgment, written by Bayda, C.J.S., the Saskatchewan Court of Appeal affirmed the Board's decision and iterated that an existing certification order is at least *prima facie* proof of the wishes of a bare majority of the employees to be represented by the union, i.e., 50 per cent plus one – that is, it is not necessary for the union to "re-prove" that it has majority support among that group of employees for the purposes of an application to amend the order to add previously unrepresented employees to the bargaining unit.

[51] Counsel argued that both of these decisions involved the Board's jurisdiction in applications for amendment under s. 5 of the *Act*. He asserted that the Board's powers under s. 37 are freestanding and unaffected by the limitations under s. 5 described in those decisions. But, he submitted, in any event, the cases at least establish that the Board has the discretion to accept "whatever evidence of [employee] wishes "it deems appropriate."

[52] However, Mr. Barnacle argued that neither *University of Saskatchewan* nor *Prince Albert Co-operative Association*, both *supra*, resolved the issue as to whether employee wishes must be determined on the basis of evidence of majority support among the employees in the add-on group (the "accretion"), the new proposed enlarged unit, or a "double majority" of both. In *Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd*., [1993] 2nd Quarter Sask. Labour Rep. 213, LRB File No. 001-92, the union applied to amend a certification order under s. 5 of the *Act* to expand the geographic scope of the order which would have the effect of sweeping in four groups of employees at locations not included in the bargaining unit described in the existing order. Counsel pointed out that the Board observed as follows:

> *Bayda C.J.S. found that a majority of the employees in the accretion supported the union's application, but did not stop there, which he would be expected to do if he felt that a majority in the accretion was determinative. Instead he continued with a*

> *discussion of how the union could prove majority employee support in the overall unit, which appears to be the constituency he had in mind.*

[53] Mr. Barnacle argued that the Board's power under s. 37(2)(c) of the *Act* to determine what trade union, if any, represents a majority of employees is limited to the "unit determined to be appropriate pursuant to clause (b)"; that is, he said, the Board is specifically directed to consider only evidence of support in the enlarged unit and not the accretion. Counsel submitted that in the present case the Board ought to accept the fact of complete union membership in the legacy school division bargaining units – i.e. 354 -- as evidence of support for the Union of that number of employees in the present application. Counsel argued that this evidence constitutes evidence of the support of a majority of employees in the proposed enlarged bargaining unit required under s. 37(2)(c) of the *Act*.

[54] Nonetheless Mr. Barnacle conceded that in *Sunnyland*, *supra*, the Board held that, where a union wishes to expand its bargaining unit by adding groups of employees who are not covered by the existing certification order, it must show majority support among the employees in the accretion and in many cases since the Board has adopted this approach in considering s. 5 accretion-related amendment applications. He argued, however, that the Board's powers under s. 37(2)(c) of the *Act* are fundamentally different than its powers on such amendment applications. Under s. 37(2)(c), he said, the Board's mandate to determine what trade union, if any, represents a majority of employees is specifically limited to the "unit determined to be appropriate pursuant to clause (b)"; that is, the Board is specifically directed to consider only evidence of support in the enlarged unit found to be appropriate and not the accretion. Whether the union has majority support from the group of employees being added is irrelevant so long as it has an overall majority in the proposed enlarged unit.

[55] Counsel noted that the courts have been quick to reproach the Board when it exercises powers that are not specifically provided under the *Act*. For example, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Kindersley and District Co-operative Ltd*. (1998), 167 D.L.R. (4th) 410 (Sask. C.A.), the Saskatchewan Court of Appeal dismissed the union's appeal from a decision on judicial review that quashed the Board's decision that it could attach conditions to the

amendment of a certification order that had the effect of substituting the existing scope clause of the collective agreement or order that the existing collective agreement applied to the new employees added to the bargaining unit by the amended certification order. That is, the Court found that the Board had no specific power to make the orders that it did and the powers purported to be applied could not be implied from the application of the s. 42 general powers provision of the *Act*. Counsel argued that, therefore, the converse must be true: the Board is within its jurisdiction to exercise specific statutory powers to make orders that affect a collective agreement's scope clause under s. 37(2)(e) of the *Act* and that, in fact, the Board can order that the collective agreement does apply to the enlarged bargaining unit under s. 37(2)(f).

[56] Mr. Barnacle then addressed several decisions of the Board regarding successorship made pursuant to s. 37. Referring to the Board's decision in *Board of Education of the Saskatchewan Rivers School Division No. 119 v. Canadian Union of Public Employees, Local 4195*, [1998] Sask. L.R.B.R. 478, LRB File Nos. 303-97 & 364-97, counsel pointed out the Board's expressed general preference for larger and ideally single all-employee bargaining units in furthering the goals of maintaining industrial peace and avoiding undue fragmentation.

[57] Mr. Barnacle submitted that the only decision of the Board that is directly on point, *Canadian Union of Public Employees, Local 4188 v. Board of Education of Crystal Lakes School Division, No. 120*, [1999] Sask. L.R.B.R. 715, LRB File No. 206-99, supports the Union's position. In that case, two smaller school divisions were amalgamated to form the larger Crystal Lakes School Division. In one of the pre-amalgamation bargaining units the union held an all-employee certification order; in the other, substitute caretakers and bus drivers had been excluded from the bargaining unit by agreement of the parties at the time of original certification. The employer and union jointly applied to the Board on a reference under s. 24 of the *Act* for a determination as to whether the group of substitute employees excluded from one of the pre-amalgamation bargaining units should be included in the new larger amalgamated bargaining unit. While the parties agreed that a bargaining unit comprising all of the employees would be an appropriate unit, the employer argued that the Board should conduct a vote among the previously unrepresented substitute employees to see if they wanted to be represented by the union in the proposed larger bargaining unit. In

[58] In much of the balance of his argument Mr. Barnacle summarized the treatment of the issue by the labour relations boards in some other Canadian jurisdictions – Canada, British Columbia and Ontario. We do not intend to set out his analysis and arguments regarding those cases in detail, but point out that counsel asserted that the Canada Board's position is that there is no point in ordering a vote in circumstances like the present case because the Union represents a clear and significant majority of all of the employees in the proposed unit. Counsel submitted that the Canada Board distinguishes between an "expansion of union bargaining rights," which labour relations boards do not usually allow without proof of support among the add-on group, and an "expansion of an existing bargaining unit" where the union is merely increasing the number of employees in the existing classifications represented in the bargaining unit. Counsel put this point of view into juxtaposition by pointing out that it has been this Board's policy for decades that, on initial certification applications, where the union provides evidence of at least a bare majority, the Board does not order a vote. He submitted that there is no logical basis for requiring the Union in this case to re-sign the existing members of the pre-amalgamation bargaining units (which would be a large majority -- approximately 70 per cent -- of all support staff employees employed by the Employer) when the evidence discloses that all 354 employees are members of the Union. In the present case, the Union is not seeking to change the bargaining unit structure, but only to add employees within the existing structure.

[59] In support of his arguments, counsel referred to the following additional cases: *Canadian Overseas Telecommunications Union v. Teleglobe Canada, et al*., [1979] 3 Can. L.R.B.R. 86 (CLRB); *Telecommunications Workers Union v. Telus*

Corporation, et al., [2004] CIRB No. 278; *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Central Park Lodges Ltd., et al.*, [2002] OLRB Rep. July/August 592; *Ontario Public Service Employees Union v. Regional Municipality of York*, [2000] OLRB Rep. March/April 371; *Service Employees International Union, Local 333 v. Metis Addictions Council of Saskatchewan*, [1993] 3rd Quarter Sask. Labour Rep. 49, LRB File No. 002-93; *City of Saskatoon v. Canadian Union of Public Employees, Local 59, et al*., [1998] Sask. L.R.B.R. 321, LRB File No. 232-97; *St. Thomas More College Faculty Association v. St. Thomas More College*, [2003] Sask. L.R.B.R. 426, LRB File No. 105-02.

The Employer

[60] Mr. McLellan, counsel on behalf of the Employer, filed a brief of argument that we appreciate and have reviewed.

[61] Counsel argued that in the present case the Union is focused on s. 37(2) instead of s. 37(1); the purpose of the latter provision is the preservation of existing bargaining rights, not to expand the scope of representation, while the provisions of the former provision must be read in the context of the latter provision. Counsel referred to *Telus Communications*, *supra* as support for this proposition. The enumeration of the Board's powers in s. 37(2) must be read in the context of the mischief that s. 37(1) seeks to avoid, i.e., the erosion of bargaining rights on successorship. He submitted that the Union is asking the Board to choose the *most* appropriate unit, not *an* appropriate unit, which would be the existing unit.

[62] Counsel pointed out that none of the employees in the Humboldt and Humboldt Rural legacy school divisions are members of the Union. The employees in these particular legacy school divisions may comprise appropriate units if a union was to organize them, but there is no evidence that the existing bargaining units are inappropriate.

[63] Mr. McLellan argued that *Horizon*, *supra,* was instructive in the present case and that there are no material differences between s. 37(2) of the *Act* and the provision of the Alberta legislation under consideration in that case. He submitted that in

the present case there is no evidence of any intermingling of employees, erosion of bargaining rights or that fragmentation in the present case will have the negative consequences referred to by counsel for the Union, and there already has been some fragmentation with the organization by another union of school bus drivers in the former Deer Park School Division.

[64] Counsel submitted that the Board considered the issue of intermingling in *Saskatchewan Health-Care Association (representing Wolf Willow Lodge) v. Service Employees' Union, Local 3336 and Canadian Union of Public Employees, Local 2297*, [1992] 3rd Quarter Sask. Labour Rep. 93, LRB File Nos. 091-92, 099-92 & 155-92 (hereinafter referred to as "*Wolf Willow Lodge*") and *Saskatoon Union of Nurses v. Prince Albert District Health Board*, [1996] Sask. Labour Rep. 368, LRB File 304-95, and that those decisions are instructive in the present case.

[65] For the purposes of argument, Mr. McLellan submitted that, assuming that s. 37(2) permits an add-on to the existing bargaining unit without evidence of majority support in the add-on group as found by the Board in *Crystal Lakes*, *supra*, it begs the question of the remedial focus of s. 37(1). That is, if there were a unionized group working alongside an unorganized group in the same school it would be a problem that the Board should resolve in the absence of majority support in the add-on group, but there is no evidence of any such difficulty in any school after amalgamation. The thrust of this part of counsel's argument was that the decision in *Crystal Lakes* is an anomaly – *Sunnyland Poultry* and *Pioneer Co-op*, both *supra*, required evidence of majority support in the add-on group, as did every other accretion decision of this Board that counsel said he reviewed. In the present case, he said, the Board should not exercise any discretion under s. 37(2) – there are no actual problems to solve as a result of the successorship, only the illusory ones raised by the Union.

<u>The Union in Reply</u>

[66] In reply to argument on behalf of the Employer, Mr. Barnacle submitted that the Employer has confused the operation of ss. 37(1) and 37(2) of the *Act*. According to counsel, s. 37(1) simply provides that existing orders and obligations apply after the transfer of a business. The legislature could have left it at that and left the resolution of any arising problems to recourse to the amendment of the certification

order mechanism in s. 5 of the *Act*. Rather, counsel suggested, while s. 37(1) provides for the preservation of existing bargaining rights on successorship, s. 37(2) looks to the future and what is appropriate moving ahead after the transfer of a business – it comprises a complete code for dealing with the new employer and its structure after the acquisition. The two sections work in tandem; for example, s. 37(1) does not address issues of "community of interest" that can arise on successorship, while s. 37(2) can be used to do so.

[67] With respect to the Board decisions regarding intermingling referred to by counsel for the Employer, Mr. Barnacle submitted that they all deal with situations in the health sector and are really examples of the application of the "community of interest" principle. If the Board considers community of interest on s. 5 applications, as it did in *St. Thomas More College*, *supra*, it may, and should, appropriately do so under s. 37(2) on successorship. In the present case, the Union has complete membership among the employees in the bargaining units it presently represents in the pre-amalgamation legacy school divisions, equivalent to approximately 70 per cent membership of all support staff employees in the amalgamated school division.

[68] Mr. Barnacle submitted that counsel for the Employer did not deal adequately with the Board's decision in *Crystal Lakes*, *supra*, trying to explain it away as an anomaly, but ignoring its finding that it was not necessary to look at employee support in the add-on group.

[69] Mr. Barnacle said that, in the present case, the Union has not asked for the "most appropriate" unit, but rather that the Board consider that the unit proposed is appropriate in the Employer's post-amalgamation structure.

Analysis and Decision:

[70] There are two applications before us in the present case. One is the Union's application pursuant to s. 39 of the *Act* to recognize the transfer of rights and obligations from the CUPE locals representing the bargaining units in the pre-amalgamation legacy school divisions to the Union. The other is the Union's application pursuant to s. 37 of the *Act* to deal with the successorship of the Horizon School Division following the statutory amalgamation of six legacy school divisions as at January 1,

2006. The Union requested to amend the latter application to exclude the employees represented by the Deer Park Employees' Association in its description of the proposed bargaining unit and that request is granted.

Transfer of Bargaining Rights – Section 39

[71] There is no real contention between the parties regarding the application pursuant to s. 39. Amalgamation or merger of the CUPE locals is not the same as consolidation of the bargaining units, which matter will be considered later in these Reasons for Decision in the context of successorship. Notwithstanding the fact that, pursuant to s. 39(b) of the *Act*, no order of the Board is required to effect such an amalgamation – the Board's records are "deemed to be amended" to reflect the change – an Order will issue recognizing the transfer of bargaining rights from, and the amalgamation of, the CUPE locals to the Union. Pursuant to s. 39(b) of the *Act* all extant orders, agreements and proceedings in effect between the CUPE locals in the legacy school divisions shall inure to the benefit of the Union and shall apply to all persons affected thereby.

Successorship – Section 37

[72] With respect to the application pursuant to s. 37 and the matter of successorship, the Employer admits that it is the successor employer to the boards of education of the six pre-amalgamation legacy school divisions and that pursuant to s. 37(1) of the *Act* it is bound by the existing certification Orders and collective bargaining agreements between those former school divisions and the respective CUPE locals. Accordingly, there is no issue with respect to s. 37(2)(a). This Board having recognized above the merger and amalgamation of the separate CUPE locals and the transfer of bargaining rights in and to the Union, there is no issue that the Employer is bound by the fact that the extant orders, agreements and proceedings of the Board inure to the benefit of the Union.

[73] However, there is a considerable difference between the parties with respect to the Union's application to be declared as the bargaining agent for a bargaining unit comprising all of the Employer's support staff employees including those that were not organized in the legacy school divisions and included in the existing certification Orders.

[74] Firstly, we must determine, pursuant to s. 37(2)(b), whether the support staff employees constitute one or more units appropriate for collective bargaining, which initially may involve the consolidation of the existing several bargaining units into a single unit.

[75] It is long-established policy that the Board generally prefers larger more-inclusive bargaining units to smaller less-inclusive units. In *Board of Education of the Saskatchewan Rivers School Division No. 119 v. Canadian Union of Public Employees, Local 4195*, [1998] Sask. L.R.B.R. 478, LRB File Nos. 303-97 & 364-97 four school divisions were amalgamated. Three of the school divisions had non-teaching staff in bargaining units represented by seven different locals of the same union, while the non-teaching staff of the fourth school division were not unionized. The new larger school division admitted that it was the successor employer and applied pursuant to s. 37 to create a single bargaining unit. The Union did not oppose the application generally, but sought to include positions in the new consolidated unit that had been excluded in the original separate certification orders.[6] The Union also applied to represent the previously unrepresented employees in the fourth legacy school division and filed evidence of majority support from the employees in that group. The Board granted the Union's certification application for the fourth school division and then consolidated all of the bargaining units. The Board stated as follows at 487:

> *The Board's policy has been to prefer large "all employee" bargaining units. The history of the certification Orders and collective agreements affecting the employees with this new Employer demonstrates the need for a more rational approach to collective bargaining in the school divisions.*

[76] The Board described its primary concern with respect to bargaining unit amalgamation in successorship cases as the maintenance of the bargaining rights of employees, stating at 488 as follows:

> *When amalgamating bargaining units under the successorship provisions contained in s. 37 of the Act, the Board is primarily concerned with maintaining the bargaining rights of employees. In*

[6] The excluded classifications that the union sought to include were positions whose incumbents were working for the school divisions but which were not funded by the employer.

> *Saskatchewan Government Employees' Union v. Headway Ski Corporation, [1987] Aug. Sask. Labour Rep. 48, LRB File No. 396-86, the Board outlined the factors to consider when merging bargaining units in the following terms, at 57:*
>
> > *In deciding whether a bargaining unit can be appropriately maintained after the transfer of part of a business, the Board on the one hand will wish to honour existing bargaining rights and on the other will wish to maintain its preference for larger and ideally single all employer units. Where there is a conflict between these two goals, the interest of maintaining industrial peace should prevail and undue fragmentation should be avoided.*

[77] In *Saskatchewan Rivers*, *supra*, the Board determined that the order of amalgamation of the bargaining units should continue to exclude the employees in question, and that any problems that arose as a result should be solved by the parties through negotiation. The Board stated as follows at 488:

> *In the present case, the parties have agreed that an amalgamation of the bargaining units can take place. There is no labour relations conflict between the existing bargaining rights and the creation of an "all employee" bargaining structure. The only question that arises is whether the Board should continue to exclude positions which are not funded by the Employer. Currently, none of the Union locals represent such positions. Although the exclusion of such positions from the bargaining structure may create some fragmentation in the bargaining unit structure, overall the exclusion affects a very small portion of the bargaining unit.*
>
> *The Board is of the view that the amalgamating Order which will be issued under s. 37 of the Act, should continue to exclude positions which are not funded by the Employer. The parties have achieved a great deal through restructuring the various bargaining units into one new bargaining unit. However, there are, no doubt, many wrinkles that will need to be ironed out over the course of negotiating the next collective agreement. The Board is of the view that the question of the inclusion or exclusion of the persons in dispute in this application should be subject to a round of negotiations in order to permit the parties to consider fully the consequences of including or excluding the positions in question. In some instances, the parties may conclude that the persons in question are not "employees" of the Employer. For other positions, if they are "employees" of the Employer, the parties should discuss the concrete issues that require resolution before*

> *determining whether or not to include the positions in the Agreement. If the negotiations are not fruitful, either party may apply to the Board for an amendment to the certification Order to have the matter finally determined in the relevant open period.*

[78] The Board has the exclusive jurisdiction to determine the matter of the consolidation of bargaining units: See, *University of Saskatchewan*, *supra*, and the excerpt therefrom, per Bayda, J.A., *infra*. In the present case, we are of the opinion that a single larger bargaining unit comprising employees in the existing bargaining units in the extant certification Orders of the Board regarding the legacy school divisions (copies of which are attached to these Reasons for Decision), with the exception of the employees represented by the Deer Park Employees' Association constitutes an appropriate unit for the purposes of collective bargaining. Consolidation of the bargaining units will reduce fragmentation to a certain degree and allow the employees in the bargaining unit to bargain together with a view to obtaining a single coherent collective agreement. This will almost certainly also go some way to improve labour relations stability and promote industrial peace – in any event, such aims will not be harmed.

[79] An Order consolidating the separate bargaining units into one unit represented by the Union will issue, with the exception of the bargaining unit represented by the Deer Park Employees' Association. As in *Saskatchewan Rivers*, *supra*, we are confident in the ability of the parties to resolve any resulting issues and problems through good faith negotiation. In particular, in order to ensure that the consolidated unit accurately reflects the current scope of all of the existing units combined, the parties will be asked to attempt to come to an agreement as to the appropriate wording for the scope clause in the consolidated order. In the event that the parties are not able to resolve the issues that may arise, including those related to rationalizing the extant collective agreements, we shall remain seized under s. 37 of the *Act* to deal with the same.

[80] The issue remains as to whether the presently unrepresented support staff employees in the legacy school divisions ought to be added to and included in the now consolidated bargaining unit represented by the Union.

[81] The starting point for an analysis of this issue is to review the decisions in *University of Saskatchewan, Prince Albert Co-operative Association*, and *Sunnyland Poultry*, all *supra*. Before undertaking this review, we wish to make it clear that we understand that in the present case the Union has not applied for an amendment to the certification Order(s) under s. 5 of the *Act* to include the group of previously unrepresented support staff employees, has not filed evidence of majority support among such employees and relies solely on s. 37 of the *Act*.

[82] Firstly, *University of Saskatchewan* established several key principles:

(a) that the Board has the exclusive jurisdiction to determine the matter of consolidation of bargaining units;

(b) that with respect to an application to amend a certification order under s. 5 of the *Act* beyond simple consolidation of bargaining units, the Board must deal with the amendment application as if it was under ss. 5(a), (b) and (c), and consider those matters that are relevant to applications under those provisions;

(c) that with respect to the s. 5(a) determination as to whether a unit is appropriate for the purposes of collective bargaining, the Board is not required to ascertain the employees' wishes;

(d) that with respect to the s. 5(b) determination as to what trade union, if any, represents a majority of the employees in the appropriate unit, the Board must allow the employees to choose the union they wish to represent them; and,

(e) that the Board may use whatever evidence of employee wishes that it deems appropriate, which determination is not subject to judicial review.

[83] In *University of Saskatchewan*, *supra*, Bayda, J.A. (as he then was) stated as follows at 325 and 326:

If the scope of the new certification order containing the amendment is only to consolidate into one bargaining unit the previously established seven bargaining units then the order is clearly within the jurisdiction of the Board. . . .
. . . .

If, however, the scope of the order containing the amendment extends beyond the consolidation of bargaining units (or some like amendment) and embraces matters which properly fall under section 5(a) (b) and (c) of the Act, then the Board has no jurisdiction to make that order on an application under Section 5(a) or 5(k) of the Act, unless the Board deals with the application as if it were one under Section 5(a) (b) and (c) and considers those matters which are relative to applications under Section 5(a) (b) and (c).

The first step then is to establish the scope of the order. In my respectful view, it falls into the second of the two categories referred to above. Two factors assume importance in this regard. First, in terms of numbers the bargaining unit is enlarged by some 15 per cent, a not insignificant increase. Second, practically all of the employees so added had for some time previous to the application been served and were at the time being served, from the standpoint of collective bargaining, by an existing association. (The importance of this factor is not diminished by the fact that this association was not certified as bargaining agent for the administrative personnel). Thus, in my view, clause (a) of the new certification order purports to create a new appropriate bargaining unit; clause (b) purports to determine the Union which represents a majority of employees in that new bargaining unit; and clause (c) to direct the employer to bargain collectively with that Union. These are all matters which properly fall under Section 5(a) (b) and (c) of the Act. Indeed, the order itself specifies it was made under this Section.

The question remains whether the Board dealt with the application as if it were one under Section 5(a) (b) and (c) of the Act and considered matters relative thereto. If it did, then as noted above, jurisdiction is preserved. If not, jurisdiction is exceeded. . . . ***It is, I think, now settled that to enable the Board to make an Order under s. 5(a) of the Act, the Board is not required to ascertain the employees' wishes respecting the composition and determination of an appropriate unit . . . . That, however, is not true of an order under Section 5(b) of the Act. The import of the provisions of Section s 3 and 5(b) of the Act, is such that where a new bargaining unit is established the employees in that unit have the right to choose the union they wish to represent them and the wishes of the majority of the employees in that unit shall prevail. These provisions impose a concomitant obligation upon the Board to ascertain those wishes before it can exercise its right to determine***

> ***what union, if any, represents the majority in that unit. The Board may use whatever evidence of those wishes it deems appropriate evidence it must have. The commission by the Board of an error of law or fact respecting that evidence cannot form the basis of an order to quash.***
>
> *(**emphasis added**)*

[84] Bayda, J.A. went on to hold that the existing certification orders were not evidence that any number of the employees in the bargaining unit supported the incumbent union as their bargaining agent and held that the union would have to establish that it had the support of a majority of all of the employees in the enlarged unit that it proposed. Clearly, this opinion was at odds with his dictum that the Board could use whatever evidence of employee wishes (i.e., support) it deemed appropriate and, in *Prince Albert Co-operative Association*, *supra*, he resiled from this latter position regarding evidence of majority support in the existing bargaining unit. On behalf of the Court of Appeal, he stated as follows at 527 and 528:

> *. . . I find, on reflection, that the Board was entitled to adopt… the following approach. Proof of the subsistence of the first certification order constituted proof of two basic facts: first, that … at the time of the making of the first order, the Union represented a majority of the employees in the bargaining unit as it was then constituted; second, that at no time were steps taken successfully, by the employees in the unit, as it was constituted before its enlargement, still wished the Union to represent them. …Thus, the Board had before it circumstantial evidence of the choice of the majority of the 120 employees in the bargaining unit before its enlargement. While the evidence was not direct, or the best available, it need not have those qualities. As was noted in the University of Saskatchewan case, "The Board may use whatever evidence of those wishes it deems appropriate …". That evidence of the choice of the majority of the 120 employees, coupled with the direct evidence the Board had of the choice of the 38 additional employees, permitted the Board to make a determination under Section 5, clause (b) of the Act. it follows that my observation in the University of Saskatchewan case went too far.*

[85] In *Prince Albert Co-operative Association*, *supra*, the Court of Appeal considered the existence of the certification order, without more, to be evidence only of the support of a bare majority of the employees in the existing bargaining unit. Both the Board and the Court of Appeal considered it necessary that the applicant union provide

evidence acceptable to the Board of the wishes of the employees in the add-on group before the amendment to the scope of the bargaining unit to include that group would be granted.

[86] In *Saskatchewan Government Employees Union v. Wascana Rehabilitation Centre*, [1993] 1st Quarter Sask. Labour Rep. 167, LRB File No. 236-92, the Board identified the three general ways in which employees may be added to an existing bargaining unit, stating as follows at 169 and 170:

> *There are three general ways in which employees may be added to the group of employees represented by a particular trade union for the purpose of bargaining collectively. Though there may in some cases be difficulty in deciding on the facts which of these is appropriate, it is possible to describe in a general way the circumstances in which they apply.*
>
> *The first method of adding employees to an existing unit is through the union security clause in a collective agreement. Once a trade union has been certified to represent the employees in a bargaining unit which is defined, the resulting collective agreement typically requires that employees who are added to the workforce in the unit must obtain membership in the union as a condition of employment. Though the majority of bargaining units are defined in terms of one workplace, there are bargaining units which have a wider geographical scope, covering a municipal area or even the province as a whole; in these cases, if the employer, for example, opens a new outlet into which the kinds of employees described in the certification order are hired, those employees will be added to the existing bargaining unit.*
>
> *The second method by which employees are added to an existing unit is through bargaining between a trade union and an employer concerning the scope of the bargaining unit. In these cases, which often involve questions of whether newly created positions will be excluded from the unit, the parties may agree that the description of the unit should be amended, and apply to the Board to have this amendment recorded in the certification order. Section 5(j) contemplates such an application where the employer and the trade union agree to the proposed amendment.*
>
> *The third way by which a trade union may ask to have employees added to the bargaining unit is by bringing an application to have the description of the bargaining unit altered to reflect the inclusion of these employees. The circumstances under which this may be done, and the criteria which the Board will use in determining whether to allow such an amendment, have not been fully*

> *articulated, but it is possible to discern from previous Board and judicial statements on this issue some principles which should be applied in a case such as this.*
>
> *It is not always easy to make the factual distinctions which reveal the category into which any given situation should fall. In this case, however, it is clear that the addition of these employees to the bargaining unit would require the unit to be redefined, given that they have been explicitly excluded in a succession of Board decisions and collective agreements. It is first necessary to determine, therefore, whether the application is properly before the Board.*

[87] After reviewing the decisions in *University of Saskatchewan* and *Prince Albert Cooperative Association*, both *supra*, the Board concluded that the "third way" of adding employees to an existing bargaining unit requires evidence of support among the employees sought to be added, stating as follows at 173:

> ***In our opinion, this approach, which allows the Union to rely on a valid and subsisting certification order as proof that it enjoys majority support in an existing unit, but requires that the wishes of a new group of employees be canvassed before the unit can be reshaped to include them, seems to provide an appropriate balance between the secure and stable status for a trade union, and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are determined, whether that be through representation by some organization other than a union, or by some other means.***
>
> *In this case, the Union made no claim that the majority of the Physical Therapists supported the application for amendment, and therefore would have been unable, even if the application had been brought in the proper form, to satisfy the principles which this Board has adopted for the determination of this issue.*
>
> *This is not, as we see it, inconsistent with the position the Board has taken when groups of employees have applied to have themselves removed from an existing bargaining unit. In those cases, other considerations come into play, including the preference of the Board for more comprehensive bargaining units, and the history which exists of representation by the present union.* ***In the case of applications to amend the description of the bargaining unit to include new groups of employees, the jurisprudence indicates that, as on a certification application, the Board must take into account the wishes of employees as well as the appropriateness of the unit applied for.***
>
> *(**emphasis added**)*

[88] However, an issue persisted as to which constituency Bayda, J.A. had in mind when considering the issue of majority support for the expansion of the unit – that is, a majority of employees in the accretion alone or in the overall expanded proposed unit or in the old unit *and* the accretion. This issue was raised in *Sunnyland Poultry*, *supra*. In that case, the union sought to amend the certification order to add four groups of employees by enlarging the geographic scope of the existing certification order. This was the first time that a union sought to add a group of employees without providing evidence of majority support among the employees in the accretion. While the employer argued that the union had to show that it had the support of a majority of employees in the accretion, the union argued that it need only show that it had the support of a majority of employees overall in the expanded proposed bargaining unit whether or not it included support of the majority of employees in the accretion. The Board observed as follows at 220:

> *Nevertheless, how the learned judge would view the precise issue raised by this application remains unclear. It remains unclear because* ***Bayda C.J.S. did not, in either decision, directly consider the validity of a majority in the overall unit that did not include a majority of the employees in the accretion.*** *That fact situation was not raised in either case. In University of Saskatchewan, the union did not present evidence of a majority in either of the competing constituencies, the overall unit or the accretion. Conversely, In Prince Albert Co-operative Association Limited the union established a majority in both of the possible constituencies. Nor did either case require the Learned Judge to consider the accretion alone as an alternative constituency. In University of Saskatchewan, the employer appears to have raised the necessity of proof of majority support in the accretion, but the judgment does not directly reply to that issue, perhaps because it was unnecessary. The learned Judge was disposing of the application favourably to the employer on other grounds.* ***Consequently, when examined carefully, the Judge's remarks on the proper constituency within which majority support is to be calculated can be read as less than determinative.***
>
> (***emphasis added***)

[89] In all cases of this nature after *Prince Albert Co-operative Association*, *supra*, and prior to *Sunnyland*, *supra*, it appears that unions had chosen to rely upon a combination of their certification orders as evidence of majority support in the existing units and direct evidence of majority support among the employees in the add-on

groups. In *Sunnyland* the Board observed, at 220, that "This, as far as the Board is aware, is the first occasion where a union has not presented evidence of majority support from the employees in the accretion, and it is therefore the first time that the Board has been requested to make a ruling."

[90] In *Sunnyland*, the Board examined the policy then currently applied by the British Columbia Labour Relations Board in applications to amend a certification order to add a group of employees and noted that the British Columbia Board required specific evidence of majority support in the accretion. The Board also concluded that the then current practice of the Canada Labour Relations Board was similar. And, the Board also examined the then current policy of the Ontario Labour Relations Board, which actually required that the union apply for a second certification order of the add-on group and then apply to consolidate the two units. The Board concluded as follows at 224:

> *In those jurisdictions which have directly considered the issue, the uniform conclusion is that where a union applies to the Board to amend its bargaining unit by bringing in a group of employees who fall outside of the unit defined in the certification order, the Union must establish that the amended unit is appropriate for collective bargaining and that a majority of the employees being added to the bargaining unit support the application. Most Boards either do not require any indication of support from the employees in the existing bargaining unit or, by accepting the existing certification order as proof, render this a pro forma question.*
>
> *Although some of the specifics of collective bargaining legislation differ from province to province the fundamental structure and purpose of these statutes are the same.* ***In all jurisdictions the fundamental scheme of the Act is that employees decide on a majority basis if they will bargain collectively and if so, through which union. This purpose is important to keep in mind because where ambiguity exists, or a choice between competing interpretations must be made, that interpretation which is most in accord with the purposes and objects of the Act should be selected.***
>
> (***emphasis added***)

[91] The situation facing the Union and the Employer in the present situation has much in common with early restructuring in health care some 15 years ago with the enactment of *The Health Districts Act*, S.S.1993, c. H-0.01 (since repealed) that brought separate health care institutions under the aegis of district health boards, prior to the

1997 report of the Health Labour Relations Reorganization Commission entitled *Reorganization of Saskatchewan's Health Labour Relations* (the "Dorsey Commission Report") which led to the rationalization of labour relations in that sector pursuant to regulations under *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03. The effect of the earlier reform was that while the employer side of labour relations was consolidated into one entity, there was no corresponding consolidation of unions' bargaining rights. Conflicts arose between unions representing similar groups of employees in the consolidated health districts or unionized employees performing the same job were working alongside those who were not unionized. It is instructive to review some of the cases that arose as a result of that earlier restructuring in the health care sector and the approach taken by the Board.

[92] In *Saskatchewan Union of Nurses v. Saskatoon City Hospital*, [1995] 2nd Quarter Sask. Labour Rep. 196, LRB File No. 050-93, the existing certification order was tied to the particular facility but as a result of health care restructuring the employees all became employees of the Saskatoon District Health Board. The union applied to amend the bargaining unit description to include all nurse employees in the health district so that the employer could not get around the facilities based scope of the existing orders by hiring people into positions not connected with any particular facility. Before outlining the reasons for decision in the case, the Board made the following general observation about its role in the reorganization of health care at 198 and 199:

> *The reorganization of health services in Saskatchewan has presented many challenges to trade unions and employers in the health care sector. Among these challenges has been that of redefining the boundaries of collective bargaining relationships to reflect accurately the administrative structures which have now been instituted.*
>
> *Throughout the process of restructuring and redefinition which has been taking place, this Board has been at pains to state our view that* ***our role is to consider and comment on the incremental changes as they take place, not to preside over the implementation of some entirely new configuration of bargaining.***
>
> *. . . .*
>
> ***The basic principle adopted by the Board - that changes in the configuration of collective bargaining in the health care***

> ***system should be made as modifications of the existing network of bargaining relationships and obligations - can be stated fairly simply, but this does not mean that it is always easy to see where the process of change may lead in specific factual situations, which can present issues of great complexity****. Though we have been impressed with the degree to which the parties have been able to identify and manage a multitude of puzzling issues, by collective bargaining and by multi-party discussions of questions which have implications beyond a particular relationship, it is not surprising that a number of riddles remain.* ***These can be particularly complicated in a context where this Board must consider not just the rights and obligations of one trade union and an employer, but the possible claims of other trade unions and the position of groups of employees who are not currently represented by a trade union.***
>
> *(****emphasis added****)*

[93] The Board concluded that the application should not be granted because it was speculative as to what might occur in the future regarding the hiring of nurses in the health district. The Board opined that any such changes must take into account the considerations that had historically been examined. This included the requirements for the demonstration of support, although the Board was less than clear about how that requirement would be viewed. The Board stated as follows at 201 and 202:

> *It may be, on the other hand, that it is possible for a trade union to agree with the Employer to extend the scope of a current Order through collective bargaining; or it may be that it is necessary for one trade union or another to organize the employees into a new bargaining unit. It is in our view necessary, however, to wait until the situation is more than completely speculative before determining how to assess the competing claims of trade unions, or to decide what a particular trade union must demonstrate in the way of support among a group of employees not within the scope of an existing certification Order.*
>
> ***In this sense, the approach we have taken in the reformed health care system does not differ from the approach we have always taken to considering the scope of bargaining units. The primary goal of this approach has been to ensure that trade unions may retain and rely upon the bargaining rights they obtained when the pattern of health care administration was different. This does not mean that trade unions can extend those bargaining rights without satisfying the criteria which have historically applied.***
>
> ***(emphasis added)***

[94] In *Wolf Willow Lodge*, *supra*, the successor employer took over the operation of two health care facilities -- a long-term care home organized by SEIU and an acute care hospital organized by CUPE – to be operated in a single facility constructed in two phases. The employer, which agreed that it was the successor employer of both facilities, applied to the Board for an order directing a vote to determine which union should represent the employees. One of the employer's alternate grounds for application was the suggestion that the proviso in s. 37(1) of the *Act* -- "unless the Board otherwise orders" -- contemplates that a successor employer may raise the possibility of a scenario other than the one outlined in the rest of the provision. At the time of the application, the first phase of construction of the long-term care and common facilities areas, such as laundry and dietary, had been completed but the second phase of construction, which would include acute care, had not yet commenced. Accordingly, it was not known to what degree the services formerly provided at the hospital would change in the new facility or what the eventual range of services provided would be. In directing the requested vote, as opposed to leaving two bargaining units in the amalgamated facility, the Board considered the issue of intermingling and referred with approval to the test adopted by the British Columbia Labour Relations Board. The Board stated as follows at 97 and 99:

> *There have been numerous cases, in this jurisdiction and elsewhere, dealing with the issue of successorship. In this case, the employer does not resist the allegation that it is the successor employer with respect to the employees represented by the applicant; rather,* ***the question is whether the employer is correct in concluding*** *that it is also the successor employer to employees represented by the Canadian Union of Public Employees, and* ***that the employees included in the two bargaining units will be so entangled that collective bargaining will not be viable unless there is only one bargaining representative for both of these units****.*
>
> *. . . .*
>
> *Where one institution or enterprise takes over or merges with another, the question of how to deal with the representational interests of employees who have become "intermingled' may arise. There are, of course, cases where putting two sets of employees under one roof does not mean that the two bargaining units cannot be continued independent of one another; there are also cases where a successor acquires a business which remains geographically separate, and may be treated as an independent*

> *unit (see, for example, Daynes Health Care Ltd., [1985] OLRB Rep. March p. 387).* ***The test suggested by the British Columbia Labour Relations Board in The Glenshield House, BCLRB No. 45/84, was "whether the day-to-day operation of the transferor's previous business will be altered to complement the successor's operation in such a way as to necessitate a change in the composition of the bargaining unit."*** *Though this sentence is clearly speaking to a situation which differs slightly from this one,* ***the process of combining the Wolf Willow Lodge with Eastend Union Hospital can, in our view, be said to necessitate a change in the composition of the existing bargaining units****.*
>
> *When the two institutions become part of the Eastend Wolf Willow Health Centre, the two groups of employees which have existed will become, in effect, one group. The job classifications which exist under the current collective agreements overlap and duplicate each other; the two unions have traditionally provided representation to units of employees carrying out similar jobs - this is certainly true in the Saskatchewan health-care sector.* ***It is unrealistic to suppose that the employer could continue to treat the two units separately****.*
>
> ***(emphasis added)***

[95] The Board observed that the situation in *Wolf Willow Lodge* was somewhat unique in that no intermingling had yet taken place, but there was little doubt that it would occur eventually, this despite the fact that there was uncertainty about what the form of the completed facility would be like. The Board referred to decisions in other jurisdictions which had considered such a situation and determined it appropriate to factor such future near-certainty into the decision to hold a “run-off” vote” which would result in a single enlarged bargaining unit represented by one of the unions. The Board observed as follows at 100 and 101:

> *In any situation in which the intermingling of employee groups is an issue, there are likely to be some items of unfinished business. These questions, by their nature, arise in circumstances of transition and change, in which it is difficult to predict what the enterprise will look like in a completed form. In the Fairhaven case itself, neither constituent institution had moved into the new facility. In a decision of the British Columbia Labour Relations Board in Canada Envelope Company and Barber-Ellis and Pulp, Paper and Woodworkers of Canada, 86 CLLC 16,041,* ***that Board made a finding that the employee groups were sufficiently intermingled to justify a representation vote, although construction of the new plant in which they would be housed was not complete****.*

> ***In both of these situations, the Board acknowledged that the future shape of the enterprise in question would justify a representation vote, even though there were a number of aspects of these cases which were still contingent.*** *It might be argued that it would be a mistake to reach a conclusion that intermingling will occur of a kind which would justify a vote so early that the outcome of the changes is as mysterious as it apparently is here. In our view, however, it would also be a mistake to grant one union successor rights simply because what is going to happen to the lodge aspect of the operation is much clearer than what is to be the fate of the service provided by the hospital; this would in effect be an unjustified windfall for them, based on the happy chance that the institution which largely resembled Wolf Willow Lodge gained access to the new facility first, while external circumstances delayed the completion of the second phase of the project, and rendered it somewhat unclear what its nature would be.*
>
> *The Board is satisfied that, whatever the outcome of the current consultation and approval process, the Eastend Wolf Willow Health Centre will provide services which go beyond those provided in a long-term care facility, and which will comprehend services which continue or resemble those provided up to now at Eastend Union Hospital. We are also satisfied that the Health Centre is correct to regard itself as successor employer to both of the institutions which previously served Eastend.*
>
> ***(emphasis added)***

[96] Both the union and the employer requested that the Board order a representational vote. The Board found that a single combined bargaining unit was appropriate (without determining whether a majority of the employees in each existing unit favoured such a configuration) and ordered that there be a vote to determine which union would represent the employees. The Board then addressed the issues of the two different collective agreements and seniority in the new post-vote structure. It directed, pursuant to s. 37 of course, that seniority be "dovetailed" and collective bargaining ensue to solve problems of the application of a collective agreement to the enlarged unit. The Board stated as follows at 102 and 103:

> *As we have determined that the appropriate bargaining unit for the Eastend Wolf Willow Health Centre is one which takes in both the bargaining unit represented by the Service Employees' Union and that represented by the Canadian Union of Public Employees, it is our view that the seniority lists for these employees should be combined, and the employer required to engage in whatever*

> *consultation is required according to the collective agreements now in existence.*
>
> *To echo the observations of this Board in Headway Ski Corporation (supra), at p. 15, neither collective agreement is likely to be a "perfect fit" for the current situation; nor is the collective agreement which will apply once a single bargaining agent is selected be entirely satisfactory for the combined unit. Nonetheless,* ***the Board will****, as the Board in Headway Ski Corporation did,* ***"assume that free collective bargaining will ultimately result in revisions that reflect the realities of the new situation."*** *Meanwhile, our advice to the employer would be to maintain the status quo to the extent possible until a vote has determined which of the unions is to be the bargaining agent, and to engage in bargaining concerning any further changes, as required under the Act.*
>
> ***(emphasis added)***

[97] In *Prince Albert District Health Board*, *supra*, the Board considered a somewhat similar situation, but it was not decided under s. 37 of the *Act*. The district health board operated two facilities in Birch Hills, an acute care hospital and a special care home. The nurses at the hospital were represented by the Saskatchewan Union of Nurses ("SUN"). The nurses at the special care home were not unionized. The hospital ceased operating as an acute care facility and become a "health centre" offering a clinic service. As a result, some of the nurses at the hospital were laid off; while others continued staffing the health centre operating out of the former hospital. The special care home building was subsequently expanded so as to be able to include the functions of the health centre in a single "health facility." When the expanded health facility opened, the health centre in the former hospital was closed and its nursing staff was laid off. The new health facility then hired two nurses into two new purportedly non-union positions to perform the same duties that had been performed at the former health centre – the nurses that were hired to fill the two positions were formerly nurses at the now-closed unionized health centre. On a joint reference to the Board under s. 24 of the *Act* (there was no separate successorship application pursuant to s. 37), SUN argued that the part of the combined health facility that offered the services formerly provided by the health centre should be regarded as a separate entity viable for continued collective bargaining on the basis of the certification order granted to the union for the former hospital, with appropriate amendments made pursuant to s. 5(j) of the *Act*. The employer took the position that if it was not a successor, it was a situation where two groups of employees were intermingled because of the combination of two facilities, and

it would not be appropriate to recognize the health centre section of the facility as a separate and appropriate bargaining unit.

[98] In *Prince Albert District Health Board*, *supra*, the Board observed that it historically took a pragmatic and functional approach to the impact on bargaining structures caused by health care reforms, where single-facility certification had been the norm. The Board stated as follows at 373 and 374:

> *The changes which have taken place in the organization of health services since 1992 have had a significant impact on the collective bargaining structures, relationships and obligations in that sector. It is not necessary to review here the range of issues which have arisen for determination by this Board, or those which have been dealt with by the parties themselves. The approach which the Board has taken can generally be described as a pragmatic or functional one; we have tried to accommodate the changes by building on the bargaining relationships which existed prior to the reforms, which were largely based on individual facilities or services. In Health Sciences Association of Saskatchewan v. Saskatoon City Hospital and Service Employees' International Union, LRB File No. 266-93, we made this comment, which captures the temper of this approach:*
>
> > ***It is true that the process of consolidation, merger or transfer of departments or services within the Health District poses a number of complicated and serious questions. Among these issues are the significance of seniority accrued in one bargaining unit when an employee or group of employees are moved to another unit, the access of employees to vacancies or promotion opportunities, bumping rights and appropriate supervisory structures. In our view, however, the key to resolving these questions lies, not in a redefinition of bargaining units - a process which could not provide comprehensive answers to these matters in any case - but in the acknowledgement of existing obligations and the application of the provisions of existing or modified collective agreements.*** *Where individual collective agreements do not provide adequate answers, it is possible that some process of discussion may be necessary to resolve questions which cut across collective agreements or whose solution may affect more than one group of employees. In evidence before the Board, there was reference to such mechanisms as the "merger and transfer agreements" concluded between the Regina District Health Board and a group of trade unions representing groups of employees in that district. The*

> *conclusion of such agreements is consistent, in our view, with the pragmatic approach traditionally followed by the parties to collective bargaining in the health care sector, and is also consistent with the approach taken by this Board to the recognition of bargaining rights in this field.*

In trying to determine how established bargaining relationships may require modification or redefinition to meet the new conditions, we have indicated that the old descriptions of bargaining units or the extent of bargaining rights may have limited meaning in new circumstances*. In Service Employees' International Union v. Southwest District Health Board, LRB File No. 158-94, the Board made this point as follows:*

> *We see this as an issue of that kind. As we have indicated, the predominant basis for the delineation of bargaining units continues to be individual facilities, though it may be anticipated that there will ultimately be applications to consolidate or merge existing bargaining units which may produce a new configuration of bargaining units. While the existing single-facility bargaining units continue to be the basis on which collective bargaining takes place, this does not mean that there has been no shift in the nature of the bargaining relationship which is based on bargaining units so defined, or that there has not been a change in the relationship between existing bargaining units. For example, though the Union described as "all-employee" units the units defined in the certification Orders it has obtained, some going back thirty years, the term "all-employee unit" is of limited use in describing the relationships which must be fostered now that one employer has replaced fifteen separate employers. Though there may be some positions which manifestly belong within a particular bargaining unit, it will be less clear in other cases where a particular position belongs, and how it should be allocated. This may be especially true of positions of the kind we are considering here, where the duties performed by incumbents are not related exclusively to one facility, but cover a number of different facilities. Though there have apparently been isolated cases in the past where employees held more than one position within the district, this is somewhat different from the circumstance where the responsibilities associated with one position relate to more than one facility.*

(***emphasis added***)

[99] The Board did not find it necessary to determine whether the union would have been foreclosed from making an application based on s. 37 regarding successorship, had it in fact done so. Instead, the Board essentially treated the situation as if two separate entities that were already "owned" by the district health board were simply merged and proceeded to address the issue of whether the employer was compelled to recognize the union as the representative of a bargaining unit comprised only of the two nurses from the former health centre by focusing on the appropriateness of that proposed bargaining unit. The Board stated as follows at 375:

> *Answering this question requires us to focus on the appropriateness of the bargaining unit which the Union proposes as the basis for collective bargaining with the Employer.* ***Although this Board has often recognized the continuation of the bargaining rights of groups of employees who have in the past elected to be represented by a trade union, it must be said that these bargaining rights are not of an absolute kind. In order to maintain the right to represent employees, a trade union must continue to represent a majority of employees in a bargaining unit which is appropriate, that is, a bargaining unit which the Board has determined to constitute a viable basis for a collective bargaining relationship.***
>
> *The representative of the Union referred us to the decision of the Board in Saskatchewan Government Employees Union v. Headway Ski Corporation, LRB File No. 396-86. In that decision, the Board found that a successor employer was obliged to recognize the bargaining rights of a group of employees previously employed by a government department. The Board made this comment:*
>
> > *Applying those principles to the facts of this case, the Board finds no evidence that employees covered by the S.G.E.U. collective agreement were mixed or intermingled with the pre-existing work force of Headway Management Ltd., which for many years operated the ski school and rental shop independently from the ski lift and snow-making and grooming operations performed by S.G.E.U. members. The latter operations have now been transferred in their entirety to Headway Ski Corporation, but they continue to be carried on separately from the Headway Management Ltd. enterprises. There are no employees of Headway Ski Corporation other than those doing work that was previously done by S.G.E.U. members, employed by the Government of Saskatchewan.*

> *It is clear from this statement that the Board concluded that it was possible to continue to treat the former government employees as a separate group for the purpose of bargaining collectively.*
>
> (***emphasis added***)

[100] In *Prince Albert District Health Board* the Board commented on the need to consider the rationality of the collective bargaining relationship if two bargaining units were accommodated in the same facility. The Board stated as follows at 376 and 377:

> *This comment was made in connection with the issue of whether two bargaining units could be accommodated within one facility. It alludes to a point which is of significance in this situation as well, which is that the Board has a general interest in ensuring that bargaining units are delineated in terms which will form a rational basis for a sound collective bargaining relationship. We must be persuaded that the terms and conditions of employment of the employees in the unit which is proposed are sufficiently distinctive that they can be the basis of negotiation with the employer.*
>
> *We have concluded that this cannot be said in the circumstances which we have considered here. The evidence does not show that the health centre can any longer be considered a separate facility. Though the fact that the two facilities have been placed under one roof is not determinative, it is one of the signs that what were once two separate entities will in future be operated as a co-ordinated whole. The rotating schedule is not simply an arbitrary whim of the Employer, but an indication that the functions which are to be performed by the staff within the combined facility, including the nurses, will become less distinct. Though there have been various phases in this evolution, it is clear that ultimately there will be no intelligible way of distinguishing the jobs of the "health centre" nurses from those of the "nursing home" nurses.*

[101] In the final result, the Board refused to treat the two nurses that had formerly worked in the health centre as an appropriate bargaining unit and ordered a representation vote among all of the nurses in the health facility, which was an appropriate unit, stating as follows at 377:

> *From the point of view of the positions in the Birch Hills Health Facility, however, we have determined that an appropriate bargaining unit would be a unit composed of all nurses in that facility. The Union can only retain, or obtain, bargaining rights for that unit if they can establish that they enjoy the support of the majority of employees in the unit. To this end, we will order that a*

> *vote be conducted among all of the nurses employed at the Birch Hills Health Facility.*

[102] In *Prince Albert District Health Board*, the Board referred to a decision concerning a somewhat similar situation in *Saskatchewan Union of Nurses v. Twin Rivers District Health Board*, [1994] 3rd Quarter Sask. Labour Rep. 132, LRB File No. 109-94. In *Twin Rivers District Health Board*, pursuant to provincial health reforms, two previously administratively separate entities in the health district – the Cutknife Union Hospital and the Cutknife and District Special Care Home – were merged into the Cutknife Health Complex. The nurses in the hospital were unionized, but the nurses in the special care home were not. The health district assumed control of the formerly separate institutions and began integrating the services they provided. A decision was made to provide nursing services in the entire facility on a twenty-four hour basis. This necessitated the deployment of nurses from the two previous facilities more or less interchangeably in order to have sufficient nurses to provide around the clock care. The parties both agreed that this situation presented labour relations difficulties and applied to the Board jointly on a reference under s. 24 of the *Act* to determine whether the union should represent all of the nurses. The Board agreed with the parties that it was not sensible to maintain a less than all-inclusive bargaining unit, observing as follows at 133 and 134:

> *The reforms in the health care system which are currently taking place in Saskatchewan have numerous implications for the labour relations of trade unions and employers in this sector. In this case, the parties have reasonably concluded that the replacement of two institutions by a new entity raises certain questions about how to apply or modify the certification Orders held by groups of employees in the institutions which have ceased to exist in their previous form.*
>
> ***The parties are in agreement that the work of the nurses in the Cut Knife Health Complex can no longer be sensibly divided between a unionized bargaining unit and a non-union group of nurses. There is no longer any basis on which an appropriate bargaining unit less inclusive than the group of nurses as a whole can be defined. We are in agreement with this conclusion. Though the Board has on many occasions granted certification for bargaining units which are smaller than the most inclusive units, there must be some comprehensible criteria by which such a unit might be delineated, and such criteria cannot be articulated in this case****.***
>
> ***(emphasis added)***

[103] The situation in *Twin Rivers District Health Board, supra*, obviously involved an intermingling of the two groups of nurses, one unionized and the other non-unionized. The Board ordered a vote to determine whether the group *as a whole* would be represented by the union or become non-unionized. The Board stated as follows at 134 and 135:

> *In our decision in Eastend Wolf Willow Health Centre v. Service Employees' International Union (1992) 3rd Quarter, Sask. Labour Rep. p. 93, the Board dealt with the concept of "intermingling." This term refers to a combination of groups of employees in a new entity which replaces the previous enterprises or institutions in which the employees have been employed. The concept is not specifically addressed in The Trade Union Act, as it has been in some jurisdictions.*
>
> *Nonetheless, the Board held in that case, as well as in the case of Fairhaven Long-term Care Centre, LRB File No. 212-86, Reasons for Decision dated October 22, 1986, that the notion of intermingling has some application to the kind of situation which occurred in those two cases.*
>
> ***In both of those cases, the Board held that the employees of the new entity should be given an opportunity to make the decision with respect to representation by a trade union. The riddles posed by the configuration in the new institution could be solved neither by allowing one of the trade unions which represented a unit of employees in one of the merged entities to lay claim to all of the employees on the basis of its certification order, nor by trying to maintain two separate groups of employees within the new structure.***
> *. . . .*
>
> *It is our view that this is an appropriate way of determining the representation question in these circumstances, and we will therefore direct that a vote be taken among all of the nurses in the Cut Knife Health Complex to determine whether they wish to be represented by the Saskatchewan Union of Nurses for the purpose of bargaining collectively.*
>
> *(**emphasis added**)*

[104] In *Prince Albert District Health Board, supra*, the Board explained its "general interest in ensuring that bargaining units are delineated in terms which will form a rational basis for a sound collective bargaining relationship," and said that to maintain two

separate units of employees, the Board "must be persuaded that the terms and conditions of employment of the employees in the unit which is proposed are sufficiently distinctive that they can be the basis of negotiation with the employer." In recognizing that the centralization of service delivery would ultimately mean that there would be no way to distinguish one group of nurses from another, the Board concluded that a vote should be conducted to determine whether the union would represent the entire group of affected employees, stating as follows at 377:

> *We have concluded that this cannot be said in the circumstances which we have considered here. The evidence does not show that the health centre can any longer be considered a separate facility.* ***Though the fact that the two facilities have been placed under one roof is not determinative, it is one of the signs that what were once two separate entities will in future be operated as a co-ordinated whole****. The rotating schedule is not simply an arbitrary whim of the Employer, but an indication that* ***the functions which are to be performed by the staff within the combined facility, including the nurses, will become less distinct. Though there have been various phases in this evolution, it is clear that ultimately there will be no intelligible way of distinguishing the jobs of the "health centre" nurses from those of the "nursing home" nurses.***
> . . . .
>
> ***From the point of view of the positions in the Birch Hills Health Facility, however, we have determined that an appropriate bargaining unit would be a unit composed of all nurses in that facility. The Union can only retain, or obtain, bargaining rights for that unit if they can establish that they enjoy the support of the majority of employees in the unit. To this end, we will order that a vote be conducted among all of the nurses employed at the Birch Hills Health Facility.***
>
> *(****emphasis added****)*

[105] In our opinion, the cases regarding labour relations difficulties that arose from the earlier reorganization of health care did not result in the Board establishing any standard definition for the treatment of those situations. However, there are certain themes that run through several of the cases, including the fact that, as a general principle, it is not the role of the Board to preside over the implementation of a new configuration of bargaining (in health care, there was pressure from some quarters to implement sectoral bargaining). Another principle was the refusal to depart from the consideration of criteria that had been historically applied when it was sought to include

previously unrepresented employees in existing bargaining units. Such "historical criteria" include the requirement that the wishes of such employees be canvassed before the unit is reshaped.

[106] In the present case, we understand the position of the Union that, given that it has complete membership of those employees in the existing bargaining units in certain of the legacy school divisions because of union security provisions in the various collective agreements and the effluxion of time, the Board should accept such membership as evidence of support of the Union of that number of employees – some 351 – for the purposes of this application and not just of a bare majority of the employees it presently represents. We also accept that the reasons of Bayda, J.A. in *University of Saskatchewan*, *supra*, and *Prince Albert Co-operative Association*, *supra*, cannot be plumbed for any conclusion as to whether he would have accepted such an argument, as it was not put to the Court.

[107] The overarching object and purpose of the *Act* is expressed in s. 3, that is, that employees have the right to join and be represented in collective bargaining by the trade union of their choice. All provisions of the *Act* must needs be interpreted with consideration of that fundamental object and purpose in mind. We view the overall import of the opinions of Bayda, J.A. expressed in *University of Saskatchewan* and *Prince Albert Cooperative Association*, both *supra*, as endorsed by the Supreme Court of Canada and confirmed by the Board in *Sunnyland, supra*, and numerous cases since, that requiring evidence of the wishes of employees sought to be added to an existing bargaining unit strikes "an appropriate balance between the secure and stable status for a trade union and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are determined." We do not view the statutory statement of the Board's authority in s. 37 to alter the fundamental object and purpose of the *Act*. It may be that there are exceptions to this position, for example, if the number of employees sought to be added were in an existing classification represented by the union and their numbers were very small in relation to an overwhelming number of employees represented by the union there may be no logical reason to require evidence of their wishes. But that is not the situation before us, where nearly one-third of the support staff employees are not represented by the Union.

[108] We recognize that in *Crystal Lakes*, *supra*, a case specifically involving school division consolidation, the panel of the Board that heard the case determined that, although evidence of the wishes of the majority of the add-on group of previously unrepresented substitute employees was filed, they could have been added to the consolidated bargaining unit without such evidence of their wishes. But the decision is short – some three pages -- and the Board did not disclose that it heard argument with respect to, or reviewed or analysed in any detail, the existing jurisprudence in coming to its conclusion. It may be that in including the employees the Board was swayed by the consideration that the number of substitute employees was small in comparison to an overwhelming number of unionized employees but it is impossible to say that that was so with any certainty because the reasons for decision are cursory. To the extent that the decision does not clarify or explain the basis on which it was determined, it remains an anomaly.

[109] In the present case, where it is sought to add a significant number of employees to existing bargaining units or a consolidated unit, we are of the opinion that in the absence of evidence of their wishes, it is not appropriate to sweep them in. This is in accordance with the Board's long-standing historical position and what we consider to be the interpretation of s. 37 (2) in light of s. 3 of the *Act* and the overarching principle of employee choice. Had the legislature, in consolidating the many school divisions as at January 1, 2006, seen fit to establish a "Dorsey-style" solution to the bargaining unit configurations and labour relations complexities resulting therefrom it could easily have done so. But it did not and so we have determined to essentially follow the same path taken by the Board when health care was reorganized prior to the Dorsey Report and to allow the parties to sort out the problems themselves through the collective bargaining process with such guidance as they may seek from the Board from time to time.

[110] Accordingly, we decline to sweep the presently unrepresented employees into the existing bargaining units or a consolidated unit on the basis of the evidence presently before us.

[111] In our opinion, it is a certainty that, if intermingling of union and non-union employees doing the same jobs has not yet occurred, it will in the very near future and

with increasing frequency. Conflict is inevitable when such employees work side by side with different terms and conditions of work including access to grievance and arbitration procedures and will increase when problems of transfer, mobility, lay-offs, job posting, seniority and the application of multiple collective agreements, etc., occur more and more frequently. We can only assume that the parties have considered this and that they have so far chosen to deal with these issues through collective bargaining. A bargaining unit of all support staff employees would be more stable than the present configuration from an industrial relations and administration viewpoint and could be achieved in several ways: (1) the Union could file evidence of majority support among the group of presently unrepresented employees; (2) the Union could file direct evidence of support of the employees in the existing bargaining units that establishes the majority support of the total number of support staff employees both within and outside of the bargaining units; (3) by representation vote of the group of previously unrepresented employees sought to be added that demonstrates their majority support; or (4) by a representation vote of all of the support staff employees that demonstrates their majority support. Of course, however, if process (4) was followed and the vote did not demonstrate majority support among all employees, the bargaining unit would cease to exist.

[112] However, neither of the parties has sought to have a representation vote of any constituency in either the application or reply. But, of course, the parties had no way of knowing how the Board, in the final analysis, would view this complex situation. Accordingly, we think it fit to reserve our discretion as to whether to order a representation vote until we have heard from the parties as to whether they are in agreement to a vote at all and, if so, as to whether it should be among the presently unrepresented employees only or among all of the employees.

[113] In any event, we have determined that it is appropriate to consolidate the existing bargaining units in the interests of streamlining collective bargaining, reducing fragmentation and promoting the stability of industrial relations between the parties as far as possible without sweeping in employees in the absence of evidence of their wishes. Such a consolidated unit is an appropriate unit if not the most appropriate unit.

Conclusion:

[114] An Order will issue to the following effect:

(1) Transferring the bargaining and representational rights of CUPE locals 832-3, 3084, 3542, 4178, 4288, and 4699, to the Union (Local 4799);

(2) Declaring that the Board of Education of Horizon School Division No. 205 is the successor employer to each of Wakaw School Division No. 48; Sask Central School Division No. 121; Lanigan School Division No. 40; Humboldt School Division No. 104; Humboldt Rural School Division No. 47; and Lakeview School Division No. 142;

(3) Adjourning this proceeding *sine die* pending:

(a) the advice and representations of the parties regarding a representation vote;

(b) the advice and representations of the parties regarding the scope clause in the consolidated certification order; and

(c) further hearing, if necessary, as to other issues that the parties may wish to address regarding s. 37 as, for example, *inter alia*, the term and application of the several existing collective bargaining agreements.

DATED at Regina, Saskatchewan, this **2nd** day of **October, 2007**.

LABOUR RELATIONS BOARD

James Seibel, Chairperson

SCHEDULE "A"

CUPE Local 832-3: Wakaw School Division No. 48, caretakers – July 26, 1962;

CUPE Local 4178: Wakaw School Division No. 48, all other support staff, except bus drivers and central office clerical staff – April 24, 1998;

CUPE Local 3084: Sask Central School Division No. 121, all support staff, except bus drivers – May 16, 1986, amended February 8, 2006;

CUPE Local 3542 -- Lanigan School Division No. 40, all support staff, except central office clerical staff – May 23, 1991;

CUPE Local 4288 -- Humboldt School Division No. 104, except elementary school – May 31, 1999, amended May 24, 2001;

CUPE Local 4699 -- Lakeview School Division No. 142, all support staff, except bus drivers – December 20, 2004.