Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1561, Applicant v. ATHABASCA HEALTH AUTHORITY INC. operating the ATHABASCA HEALTH FACILITY and URANIUM CITY MUNICIPAL HOSPITAL, Respondents and SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS and SASKATCHEWAN UNION OF NURSES, Interested Parties

LRB File No. 063-03; November 6, 2007
Chairperson, James Seibel; Members: Bruce McDonald and Clare Gitzel

For the Applicant:	Peter Barnacle
For Athabasca Health Authority Inc.:	Victoria Elliott-Erickson
For Saskatchewan Union of Nurses:	Norma Wallace
For Uranium City Municipal Hospital and Saskatchewan Association of Health Organizations:	Brian Kenny, Q.C.

Constitutional law – Jurisdiction of Board – Functional test applies to determination of jurisdiction – Board examines normal and habitual operations and activities of employer, not casual or exceptional aspects – Employer provides comprehensive health care services to aboriginal and non-aboriginal residents of region separate and distinct from normal band council functions – Province has deep and continuing active role in funding and operation of employer – Neither Indian status nor any right closely connected with Indian status at stake – Employer's business not federal business and falls under general rule that provincial legislation governs labour relations.

Successorship – Transfer of business – General principles – Board has exclusive jurisdiction to determine issue of successorship – Transition of service provision from predecessor to successor was seamless and successor acquired beating heart of enterprise of predecessor – Board finds transfer of business within meaning of s. 37 of *The Trade Union Act*.

***The Trade Union Act,* s. 37.**

REASONS FOR DECISION

Background:

[1] By a certification Order dated April 6, 1973 Canadian Union of Public Employees, Local 1561 (the "Union") was designated as the bargaining agent for a unit

comprising all employees of the Municipal Corporation of Uranium City & District operating the Uranium City Municipal Hospital ("UCMH"), except the administrator and registered and graduate nurses.

[2] Pursuant to *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03, Reg. 1, made under *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03, as amended, Saskatchewan Association of Health Organizations ("SAHO") was designated as the representative employers' organization for the purposes of collective bargaining for many health sector employers including the health districts (and now the health regions) and their affiliates, and including UCMH.

[3] At all material times, the Union was party to a collective agreement with SAHO, which covered, *inter alia*, the employees in the bargaining unit represented by the Union at UCMH with a term of April 1, 2001 to March 31, 2004 (the "collective agreement") and to a letter of understanding with UCMH dated June 26, 2002 (the "letter of understanding").

[4] Until June 2003 UCMH had been the only diagnostic and acute care health facility operating in the geographic area known as the Athabasca Basin. At the same time that UCMH was closed and decommissioned, a new health care facility, the Athabasca Health Facility (the "AH Facility"), was opened near the southeast end of Lake Athabasca on reserve lands of the Black Lake First Nation a few kilometers west of the Northern Settlement of Stony Rapids.

[5] The AH Facility was constructed and is operated by Athabasca Health Authority Inc. ("AHA Inc.") The purpose of AHA Inc. is to provide the diagnostic, acute care and certain community-based health services (e.g., addiction, community nursing, ambulance, mental health, public health, home care and long-term care services) which were formerly provided by UCMH, Saskatchewan Health Northern Services Branch (and later, after health care reorganization, the Mamawetan Churchill River and Keewatin Yatthe Health Districts[1]), and by the Black Lake and Fond du Lac First Nations and the

[1] Now, the Mamawetan Churchill River and Keewatin Yatthe Health Regions.

Prince Albert Grand Council through federal devolution from Health Canada, to all of the residents of the Athabasca Basin.

[6] Some employees of UCMH who were members of the certified bargaining unit represented by the Union and other provincial government employees affected by the closure of UCMH and the integration of health services were offered employment with AHA Inc. a few months prior to the closure of UCMH; employees who declined to accept such employment and those who were not offered employment received severance in accordance with the collective agreement.

[7] In the present application, the Union applied for a declaration pursuant to s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") that AHA Inc. is a successor employer to UCMH with respect to the certified bargaining unit. In reply, AHA Inc. took the position, firstly, that the Board had no jurisdiction to decide the issue because, *inter alia*, the AH Facility was located on reserve lands of the Black Lake First Nation and that, if any labour relations tribunal had jurisdiction, it would be the Canada Industrial Relations Board. Secondly, and in any event, AHA Inc., SAHO and UCMH all take the position that AHA Inc. is not a successor employer to UCMH within the ambit of s. 37 of the *Act*.

[8] The Board declined to determine the jurisdictional issue before hearing the evidence on the merits of the successorship issue. However, the parties did agree that AHA Inc. would first present evidence directed to the jurisdictional issue and that the Union and then AHA Inc. would present evidence directed to the issue of successorship. A great deal of testimony, documentary evidence and argument was adduced.

[9] The area of operation of AHA Inc. is customarily referred to as the Athabasca Health Authority Region, but it is not a "regional health authority" as defined by *The Regional Health Services Act*, S.S. 2002, c. R-8.2 (nor was it a "health district" pursuant to repealed provisions of *The Health Districts Act*, S.S. 1993, c. H-0.01). SAHO is not designated by regulation as the representative employers' organization for AHA Inc. but AHA Inc. holds a form of membership in SAHO for certain purposes including access to the bulk discount purchase of supplies.

[10] AHA Inc. constructed the AH Facility – a diagnostic and acute care facility – on lands of the Chicken Reserve I.R. No. 224 leased by AHA Inc. from the Black Lake First Nation near the Northern Settlement of Stony Rapids.

Evidence:

A. The Jurisdictional Issue

[11] Following is a background summary of evidence regarding the history of the development of the strategy for the modern provision of health services in the Athabasca Health Authority Region and the creation, funding and operating structure of AHA Inc. It is largely drawn from uncontroverted evidence from the great amount of documentary evidence adduced at the hearing[2] and from the testimony of Georgina MacDonald and Peter Brook who testified on behalf of AHA Inc.

[12] Ms. MacDonald was CEO of AHA Inc., a provincial non-profit corporation that constructed the AH Facility, from approximately mid-2001 until the time of hearing.

[13] Mr. Brook is a management consultant under contract to AHA Inc. He was primarily involved in the negotiations with the federal and provincial governments regarding the creation of AHA Inc. Previously he had been involved in the transfer of health services from the federal government to the Prince Albert Grand Council.

Geographic and Demographic Context

[14] The Athabasca Basin generally comprises that area of the Mamawetan Churchill River and Keewatin Yatthe Health Regions (the "northern health regions"), more or less north of the 59th parallel, from Alberta to Manitoba, to the Northwest Territories border. The area encompasses some 90,000 square kilometers. (See Map, Appendix A). While the Athabasca Basin is not a "health region" as that term is defined by *The Regional Health Services Act, supra*, the mandate to provide diagnostic and acute care services and certain other community health services to all First Nations and

[2] The major sources include the series of reports to AHA entitled "Planning and Development for Health Care Services in the Athabasca Basin –Final Report to the Athabasca Health Authority" (Bowen and Jiricka, 2001); "Provincial Conditions Regarding the Athabasca Basin Governance Structure and Health Facility" (1996); the "Framework Agreement" (1996); and the AHA Inc. Unanimous Members Agreement (1999).

non-First Nations residents of the area was devolved to AHA Inc. by the northern health regions and the Prince Albert Grand Council.

[15] Most of the residents of the Athabasca Basin are isolated by a distance of approximately 500 to 700 air kilometers from the major centres of La Ronge and Prince Albert to the south. The major population groups in the area are as follows (all figures are approximate): Black Lake First Nation (population 1100); Fond du Lac First Nation (population 900); the Northern Settlement of Stony Rapids (population 250); the Northern Settlement of Camsell Portage (population 40); and the Northern Settlement of Uranium City (population less than 100). Up to 90 percent or more of the residents of the Athabasca Basin are of aboriginal heritage.

[16] A road extends northeast from La Ronge (located approximately 250 kilometers north of Prince Albert) approximately 400 kilometers to Points North Landing, just east of Wollaston Lake. From there, access to the Athabasca Basin is solely by air, except for a winter road, open approximately three months of the year between Points North Landing and the Northern Settlement of Stony Rapids, to the northwest, adjacent to the Black Lake First Nation. The trip from La Ronge to Stony Rapids takes some 15 hours. The Northern Settlements of Uranium City and Camsell Portage are located on the north shore of Lake Athabasca further to the west while the Fond du Lac First Nation occupies lands on both the north and south shores of the eastern end of Lake Athabasca. The latter three settlements are all between approximately 100 and 250 air kilometers west of Stony Rapids. The Chicken Reserve is located on lands of the Black Lake First Nation a few kilometers west of Stony Rapids.

Historical Context

[17] UCMH was constructed in the 1950's. Prior to June 30, 2003 it was the only diagnostic and acute care health facility in the Athabasca Basin. Difficult cases were air lifted to medical facilities in La Ronge and Prince Albert and from there, if necessary, to Saskatoon. Other entities under the aegis of the Saskatchewan Health District Management Services Branch -- Northern Division, Health Canada and the Prince Albert Grand Council provided long-term care, community health, mental health, and addiction and substance abuse services to residents of the Athabasca Basin. The

closure of the Eldorado mine in 1981 resulted in a sharp decline in the population of, and services available in, Uranium City, located on the northwestern shore of Lake Athabasca; some residents moved to communities located at the eastern end of Lake Athabasca. Residents of the area knew that UCMH would probably eventually be closed with the result that the only access to acute care and diagnostic services would be by air to La Ronge or Prince Albert.

[18] In the early 1990's, consonant with the vision of aboriginal self-government, the federal Medical Services Branch of Health Canada (now known as the First Nations and Inuit Health Branch) began to negotiate with First Nations organizations in Saskatchewan regarding the transfer of responsibility for health services for First Nations peoples from federal to local control. Between approximately 1992 and 1996 the mandate to provide services relevant to this application to First Nations people and the federal funding for same through Health Canada First Nations and Inuit Health Branch was devolved to the Black Lake and Fond du Lac First Nations and the Prince Albert Grand Council, which provided addiction services and medical services through a health centre located at each First Nation – acute care and specialised diagnostic services continued to be provided to all residents of the Athabasca Basin, including First Nations people, at UCMH and, if too complex for UCMH, at the hospitals in the south.

[19] Also, in the early 1990's, a team of professionals and experts undertook a review for the purposes of planning a program to meet the health and social service needs of the residents of the Athabasca Basin. The review resulted in the 1992 report, "Health Needs Assessment of the Athabasca Basin" which proposed two options: the establishment of regional health clinics and the re-location of diagnostic and acute care services to La Ronge to the south; or, the creation of a comprehensive health and community services facility at the population centre at the southeastern end of Lake Athabasca. While the report did not include a governance model, it indicated a move towards a facility management structure in the form of a partnership between First Nations, provincial and federal governments.

[20] In 1993, the province reformed health delivery with passage of *The Health Districts Act*, *supra*, (since repealed), however, the two northernmost health districts – Mamawetan Churchill River Health District and Keewatin Yatthe Health District

– were not formed until 1997. Following the "Dorsey Report" on provincial health care reorganization, the province also restructured and rationalised health sector labour relations with the passage of *The Health Labour Relations Reorganization Act*, *supra*. In 2002, the health districts were further rationalised into a reduced number of "health regions" pursuant to *The Regional Health Services Act*, *supra*; however, the geographical integrity of the two northern health districts was maintained after the consolidation of health districts into the smaller number of larger health regions.

[21] At about the same time as the 1993 provincial health services restructuring, the Athabasca Health Facility Planning Committee was established. It was soon replaced by the Athabasca Health Authority Management Steering Committee (the "steering committee") as an advisory committee to work towards the establishment of a non-profit corporation (which eventually was established as AHA Inc.) as the "authority" to oversee the construction and operation of an integrated care facility and to deliver health services to all residents of the Athabasca Basin upon the decommissioning of UCMH. The steering committee was comprised of representatives of First Nations and other communities in the Athabasca Basin and UCMH with a view to planning and constructing a new integrated health facility.

[22] The 1994 "Functional Program Report (Croft)" presented initial plans for the new health facility intended to replace UCMH to be located on the Chicken Reserve of the Black Lake First Nation adjacent to the Northern Settlement of Stony Rapids. The steering committee (of which Ms. Macdonald was a member representing the Fond du Lac First Nation and which also included the director of UCMH) also recommended that the new facility be located on the Chicken Reserve because the majority of the resident health service users were First Nations' members in that area.

[23] Saskatchewan and Canada entered into an agreement dated March 28, 1996 to fund the construction of three health facilities (the "capital contribution agreement") detailing the federal government's contribution towards the construction of the facilities, including one in the Athabasca Basin, "in order to ensure their continued availability to First Nation members." The estimated cost of construction of each facility was stated to be between $10 and $12 million. Pursuant to the capital contribution

agreement, Canada contributed a total of $11.2 million towards the construction of all three facilities.

[24] The steering committee was charged with developing an overall framework agreement between the stakeholders governing the financial, governance and operational responsibilities of the Athabasca Basin project. The agreement dated August 13, 1996 (the "framework agreement") records the general understandings between the two First Nations, the three Northern Settlements, the Prince Albert Grand Council and the provincial and federal governments, regarding the governance structure and financing arrangements for the new integrated delivery model for acute care, long-term care, home care, community-based, ambulance, public health, mental health, and addiction and substance abuse services. The entire framework agreement is attached to these Reasons for Decision as Appendix B.

[25] The framework agreement contemplated the creation of AHA Inc. "… as the health governance body for the Athabasca Region" for the management of the construction and operation of the new health facility – the AH Facility -- and the management of the delivery of the integrated health services to all residents of the Athabasca Basin, including status and non-status Indians, whether resident of a First Nation or otherwise and all other aboriginal and non-aboriginal residents.

[26] AHA Inc. was incorporated in 1999 under *The Non-Profit Corporations Act*, *1995*, S.S. 1995, c. N-4.2, as amended. The articles of incorporation provide that the minimum number of directors is 5 and the maximum number is limited to 12. At present there are 9 directors representing the 5 members of the corporation – three representing each of the Black Lake and Fond du Lac First Nations and one representing each of the three non-First Nations Northern Settlements of Camsell Portage, Stony Rapids and Uranium City.

[27] The five members of AHA Inc. entered into a unanimous members' agreement dated January 28, 1999 (the "UM agreement"), to govern their relations within the corporation. The UM agreement is attached to these Reasons for Decision as Appendix C.

[28] With respect to corporate board resolutions, the by-laws of AHA Inc. provide that they shall be determined by a majority of the directors present, "provided that any motion or resolution will also require the support of at least two (2) of the directors representing First Nations Members and the support of at least two (2) of the directors representing Northern Community Members" (see also, UM agreement, articles 5.08 and 5.09). The UM agreement in article 5.03 provides that certain non-members including representatives of the funding agencies (i.e., the provincial and federal governments) may attend directors' meetings and have a voice but no vote.

[29] Article 3.01 of the UM agreement provides that in certain circumstances the right to deal with a membership interest in AHA Inc. may not be exercised without the consent of Saskatchewan's Minister of Health.

[30] Pursuant to article 4.14 of the UM agreement, the responsibilities of the directors of AHA Inc. include, *inter alia*, the following:

> *(a) developing policies, objectives and strategies regarding health service delivery and the health status of residents of the Athabasca Health Authority Region;*
>
> *(b) implementing the Framework Agreement, the Unanimous Members' Agreement, bylaws, agreements and contractual arrangements of the Corporation;*

[31] Pursuant to article 5.11 of the UM agreement, the directors must hold at least one meeting per year in each of the member Northern Communities and public forums in each of those communities and the First Nations.

[32] Both the provincial and federal governments provided, and continue to provide, funding for AHA Inc., as it provides services to both First Nations and non-First Nations residents of the Athabasca Basin. Certain recitals of the UM agreement describe the objects of AHA Inc. and the general structure of the funding in the following terms[3]:

[3] Article 19.09 of the UM agreement provides that the recitals form part of the UM agreement.

> *1. The Members desire to promote the health and well being of all residents of the Athabasca Health Authority Region through the delivery of comprehensive health services to all communities and all residents of that region.*
>
> *2. The Members have agreed through their ratification of and signatures to the Framework Agreement and through their record of understanding regarding the establishment of the corporation and the construction of the Athabasca Health Facility dated August 13, 1996 to jointly establish the Corporation for the purpose of governing and managing:*
>
> > *(a) the delivery of comprehensive health services to all residents of the Athabasca Health Authority Region; and*
> >
> > *(b) the construction and subsequent operation of the Athabasca Health Facility on the Chicken I.R. No. 224.*
>
> *3. The Members agree that the governance, management and operation of the Corporation will be guided by the agreements and understandings reached in the Framework Agreement dated August 13, 1996* [see reference to funding, *infra*].
>
> *4. Saskatchewan Health has agreed to provide funding to the Corporation in accordance to the Framework Agreement on behalf of all Athabasca Health Authority residents. In addition, the Black Lake First Nation and the Fond du Lac first Nation have agreed to provide any funding for health services which they receive directly from Canada or which is administered on their behalf by the Prince Albert Grand Council.*
>
> . . . .
>
> *9. Black Lake and Fond du Lac First Nations are participating in this Agreement and may make subsequent arrangements and agreements with respect to the principles and goals of the Corporation without prejudice to their existing Treaty and Aboriginal rights. Nothing in this Agreement will abrogate, derogate or create any Treaty or Aboriginal right for any individual First Nation person.*

[33] The UM agreement also reflects the intention that there should be equity as among the members with respect to the provision of services by AHA Inc. Article 2.06 provides as follows:

> *The Members agree that equity in the provision of health and health-related services will be sought, including the provision of transportation to essential services, the provision of community-based and regionally-based services and the delivery of services through a variety of delivery mechanisms including itinerant health care providers, on-site health care providers, and the coordination of visits to health care facilities.*

Articles 16.01 and 16.02 of the UM agreement describe the funding structure with respect to the origin of the money and its dedication to services as follows:

> *The Province of Saskatchewan and the Corporation shall enter into mutually acceptable service agreements that will detail the funding which Saskatchewan shall provide and the services which the Corporation will deliver.*
>
> *The Black Lake First Nation and the Fond du Lac First Nation shall enter into service agreements with the Corporation, that will detail the health services to be delivered and the funding to be contributed in support of these services. It is acknowledged that the First Nations will provide any funding for health services which they receive directly from Canada or which is administered on their behalf by the Prince Albert Grand Council.*

[34] Further with respect to funding, at page 8 of the framework agreement, it is provided that:

> *Saskatchewan will apply the contribution received from Canada towards the construction of a facility providing acute care in the Athabasca Region in accordance with the Capital Contribution Agreement between Saskatchewan and Canada.*[4]

[35] The UM agreement also provides that it shall be construed according to provincial law and requires the consent of the province (it is silent regarding consent by Canada) even though the province is not signatory to the UM agreement. Article 19.03 provides that:

> *This Agreement shall be construed and governed by the laws of the Province of Saskatchewan and executed by all parties and with the consent of Saskatchewan.*

[4] See the comments regarding the structure of the capital contribution agreement, *supra*.

[36] The UM agreement also provides that any changes to corporate articles essentially require the consent of Saskatchewan Health, as follows:

> *6.01 (a) The Articles of the Corporation may be amended with the unanimous approval of all Members of the Corporation and shall meet conditions jointly determined by Saskatchewan Health and the participating members:*

[37] The UM agreement also provides that any changes to the UM agreement require the consent of Saskatchewan's Minister of Health, as follows:

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> *19.06 . . . All parties further agree that the consent of the Minister of Health of Saskatchewan, who is not signatory to this Agreement, shall be required to make effective modifications, variation and/or amendment to this Agreement.*

[38] In June 2001 a comprehensive final report was made to AHA Inc. with respect to the options for delivery of health services in the Athabasca Basin entitled "Planning and Development for Health Care Services in the Athabasca Basin" (the "final report"). Its many recommendations included, *inter alia*, that the UCMH board be dissolved with the opening of the AH Facility as contemplated by the framework agreement (final report, part 3, paragraph 6.3.4) and identification of the need for "clarification" regarding the decommissioning of UCMH and the transfer of its capital assets, equipment, supplies and furniture to AHA Inc. (final report, part 3, paragraph 6.2.4).

[39] AHA Inc. eventually obtained an "allied membership" in SAHO allowing it to access discounts for materials and supplies afforded by group tendering.

[40] The land for the AH Facility was leased by AHA Inc. from the Black Lake First Nation for a period of 99 years. In addition, AHA Inc. continues to operate a health care centre in Uranium City and one health care station on each of the Fond du Lac and Black Lake First Nations providing nursing and addiction services, and also provides addiction and mental health services to the Hatchet Lake First Nation (which is not a member of AHA Inc.).

[41] The AH Facility partially opened on June 1, 2003 for the provision of diagnostic and out-patient services only and opened fully on July 1, 2003 to provide acute care services. UCMH, which had previously been the sole provider of diagnostic services and acute care to the residents of the Athabasca Basin, closed permanently on June 30, 2003. Prior to the closure, AHA Inc. offered employment to the employees of UCMH at the AH Facility, including a moving allowance. With the closure of UCMH, the AH Facility became, and remains, the only diagnostic and acute care health facility operating in the Athabasca Basin.

[42] The Prince Albert Grand Council, which (by earlier devolution from the federal government) previously had been providing some non-acute care health services to residents of the Black Lake and Fond du Lac First Nations including nursing, addictions, home care and mental health services, transferred the mandate for delivery of these services to AHA Inc. as of April 2003. At about the same time, the Mamawetan Churchill River Health Authority, which had similarly been providing such services to some residents in its health region, transferred two nurses, one addictions worker, one part-time community health care worker and one receptionist -- all employed by Saskatchewan Health and members of either Saskatchewan Union of Nurses (SUN) or Saskatchewan Government Employees' Union (SGEU) -- to AHA Inc. Accordingly, while acute care services for the Athabasca Basin are provided only at the AH Facility located on the Chicken Reserve, home care, community based services, emergency medical transportation, public health services, mental health services, alcohol and drug abuse services and other related health services, are delivered at other points throughout the "Athabasca Health Authority" [5] region.

[43] Minutes of a meeting of the steering committee dated May 16, 1995, refer to the ongoing development of the concepts then being considered and decided upon. One portion of the minutes regarding "Progress on Governance Model" refers to the requirement by Saskatchewan Health that service delivery would be through a single

[5] Certain relevant documents and agreements make reference to the "Athabasca Health Authority". In actual fact there is no such entity and *The Regional Health Services Act*, *supra*, does not establish an "Athabasca Health Region." This is simply a convenient reference to the mandate of AHA Inc. to provide health services to residents of the general geographical Athabasca Basin. However, AHA Inc. is designated as a "local authority" for the purposes of *The Public Health Act*, R.S.S. 1978, c. P-37, as amended.

employer, rather than several employers and an assurance that "the Province can move into the facility if standards are not met."[6]

[44] In particular the minutes of May 15, 1995 refer to the maintenance of the integrity of the then-existing bargaining units at UCMH, providing in part, as follows:

> *The committee noted that the Province will meet requirements of the Provincial Trade Union Act. That is, rights of current Uranium City Hospital employees will be protected. Collective Bargaining units will go with transferring employees.*

[45] The minutes of a meeting of the board of directors of AHA Inc. dated October 17 and 18, 2000, refer to the contemplated eventual transfer of service delivery responsibility from Mamawetan Churchill River Health District (as it then was) to AHA Inc., for the services that the Mamawetan Churchill River Health District then provided in the Athabasca Basin. Reference is made to a discussion concerning the employment contracts of the employees of the Mamawetan Churchill River Health District (who were, as noted above, members of either SUN or SGEU) who would be affected by the transfer, providing, in part, as follows:

> *It was agreed that the Chairperson would write to [Mamawetan Churchill River Health District] and Sask. Health requesting clarification on salary, benefits, and collective agreement bargaining representation;*
>
> *Without this information it will be impossible for AHA to determine the funding level required to meet its obligations under the Framework Agreement to offer employment at equivalent salary and benefit levels to affected employees.*

[46] The framework agreement (at page 7) also provides: that the provincial government would provide some rental housing in Stony Rapids for employees of AHA Inc.

[47] Mr. Brook described the historical context of the formation of the steering committee. After the shutdown of the Eldorado mine in the 1980's, Uranium City went into decline and most of its residents left. At that time, UCMH was managed by the

[6] The minutes refer to several methods through which intervention could be made, including funding agreements, land tenure agreements and specific bylaws.

Victoria Union Hospital in Prince Albert. In the 1990's, the provincial government rationalised the health care system resulting in the devolution of the delivery of health services to health districts and more local control. Service delivery responsibility for the Athabasca Basin was transferred to the Mamawetan Churchill River Health District rather than to UCMH. It did not make sense to undertake the major renovations that were required to be made to the aging UCMH to ensure long-term continuation of the delivery of diagnostic and acute care services when Uranium City was no longer the main population centre in the Athabasca Basin.

[48] The "Health Needs Assessment of the Athabasca Basin" study completed in 1992 proposed either the establishment of regional health clinics and the re-location of diagnostic and acute care services to La Ronge to the south or the creation of a comprehensive health and community services facility at the population centre at the south end of Lake Athabasca. This led to the creation of the steering committee in the summer of 1994 and the subsequent completion of the framework agreement and the federal-provincial capital contribution agreement. In Mr. Brook's opinion, the capital contribution agreement allowed for a direct capital cost contribution by the federal government because of the large First Nations user population and was the first instance of the province agreeing to invest in the construction of a hospital on reserve land – indeed, the province contributed the majority share of the money for its construction. In the time between the 1992 Needs Assessment Study and the final report in 2001, the transfer of the responsibility for the delivery of some health services in the region was negotiated between the Prince Albert Grand Council and the federal government resulting in the devolution of some authority to the Prince Albert Grand Council.

[49] Mr. Brook opined that the provisions of the framework agreement referring to "standards" recognized that the *Indian Act*, R.S.C. 1985, c. I-5, as amended, provides for the establishment of regulations regarding standards for the health and well-being of persons on reserves and the bylaw-making authority of band councils in this regard.

[50] The framework agreement (page 3) provides that AHA Inc. is designated as a "local authority" under *The Public Health Act*, R.S.S. 1978, c. P-37, as amended. The Black Lake and Fond du Lac First Nations were required to pass health bylaws

under the *Indian Act*, *supra*, adopting standards on their respective reserves which were at least equivalent to those under the *Indian Act* and the provincial legislation, *supra*, and to authorize AHA Inc. to coordinate enforcement of public health laws on reserve (but the framework agreement is silent as to enforcement off reserve).

[51] According to Mr. Brook, it was necessary to obtain recognition by the federal government of AHA Inc. as "Indian" in order to receive funding that was otherwise designated for health services for the Black Lake and Fond du Lac First Nations.

[52] Mr. Brook explained that the common reference to "Athabasca Health Authority" is not as a "health region" as defined by legislation, but as a vehicle for the practical delivery of health services to residents of the Athabasca Basin. For example, while a statute-created health district is not required to report to individual communities in the district or obtain approval of its budget by such communities but is required only to report to the provincial government, pursuant to the UM agreement, AHA Inc. must report to and obtain budgetary approval from a majority of the directors representing its five member communities. AHA Inc. must similarly obtain approval for deficit borrowing from its directors and from the provincial government but is not required to obtain federal government approval for these purposes.

[53] Mr. Brook also testified that in 2003 AHA Inc. received a ruling from the Canada Customs and Revenue Agency ("CCRA") as to its eligibility for GST exemption as a "band-empowered entity" in relation to the purchase of property and services for band-managed activities. The criteria relied upon by CCRA included, *inter alia*: the proportion of population served on-reserve; the proportion of population served that are "Status Indians" living on and off reserve; the proportion of the board of directors that are appointed by First Nations; the obligation of the board of directors to obtain First Nations approval for the annual operating budget; and, the location of the bulk of the fixed and movable assets of AHA Inc.

[54] The articles of incorporation of AHA Inc. provide for the distribution of assets on liquidation and dissolution as follows:

> *8. Persons to whom remaining property is to be distributed in the course of liquidation and dissolution of the corporation:*
>
> *In the event of the dissolution or winding up of the Corporation the assets of the Corporation shall be disposed of as follows:*
>
> *Real property:*
>
> *a) The Athabasca Health facility and the lease for the land on which the Facility is located shall be transferred to whichever health delivery organization offers membership to the Black lake First Nation.*
>
> *Personal property:*
>
> *a) If all members join the same health delivery organization, the assets shall be transferred to the new organization;*
>
> *b) If one or more Members do not join the same health delivery organization, an evaluation of assets will be taken including a determination of the source of funding of the asset; the Members and Funding Agencies will thereafter determine the method of distributing the property.*

This process is echoed in article 9 of the UM agreement.

[55] While the CCRA ruling found that AHA Inc. did not meet the criteria of "ownership," because it was not evident that in the event of dissolution or winding up the assets would be vested in the bands, it found that AHA Inc. did meet the alternative criteria of "control," mainly on the basis that the two First Nations appoint a majority of its directors and thus effectively control approval of its budget.

[56] Mr. Brook confirmed that the CCRA ruling makes no reference to consideration of the jurisdiction of labour relations or other employment issues – that is, federal or provincial -- in the application for GST exemption status.

[57] Mr. Brook testified that when the federal government delivered health services directly to the First Nations, the employees involved in same were subject to collective bargaining agreements as employees of the federal government. Following the devolution of the delivery of certain programs from the federal government to the First Nations in approximately 1993-94, the employees involved in such programs became employees of the First Nations and were not subject to any collective bargaining

agreements. At the time of hearing there were 26 employees working for AHA Inc. on the Black Lake and Fond du Lac First Nations. (The Prince Albert Grand Council continued to provide the devolved federal funding for health services to the Hatchet Lake First Nation using that First Nation's employees, with the exception of the addiction services that are provided by AHA Inc.).

[58] At present, the federal portion of the funding to AHA Inc. goes to the Black Lake and Fond du Lac First Nations, which in turn provide it to AHA Inc. AHA Inc. then returns a certain amount to the First Nations for the remuneration of band-employed employees. Mr. Brook confirmed that under the agreements in place, if the Black Lake First Nation were to withdraw as a member of AHA Inc., the AH Facility would remain on the Chicken Reserve, but with no federal funding provided thereto for members of the Black Lake First Nation. Mr. Brook confirmed that, in such event, AHA Inc. would no longer be considered a "band-empowered entity" by CCRA for GST exempt status. In any event, physical access to the AH Facility is guaranteed to the province for the time remaining on the long-term land lease notwithstanding the withdrawal of either or both of the First Nations from AHA Inc.

[59] The mandate of AHA Inc. is to provide health services to all residents of the Athabasca Basin. Mr. Brook confirmed that, during the period 1996 through 1998 before AHA Inc. was incorporated, the first $760,000 of eventual total provincial government funding of $11.6 million for the establishment of AHA Inc. and construction of the AH Facility, was transferred to the UCMH board for payment of the cost of initial design work requisitioned on behalf of the steering committee because the steering committee was not a legal entity. UCMH continued to hold a GST rebate of some $41,000 "in trust" for the yet-to-be-formed AHA Inc. The UCMH 2001 Annual Report shows that these funds were subsequently transferred to AHA Inc. Mamawetan Churchill River Health District also transferred monies held "in trust" for services delivered by AHA Inc. in that district before AHA Inc. was fully operational.

[60] The minutes of the meeting of the board of directors of AHA Inc. on May 30 and 31, 2001 refer to "transitional funding" for the corporation for 2000-01 by both the federal and provincial governments of $150,000 each and a further like sum from Saskatchewan Health for "board operations" (paragraphs 3.2, 4.3, 4.10). Further

mention is made that the lender loan approval for financing of the development of the second floor of the AH Facility required the approval of Saskatchewan Health. The minutes of the meeting of the board of directors of August 21 and 22, 2001 refer to a suggestion that the construction be funded using "surplus money" from UCMH (paragraph 4.3.1).

[61] Mr. Brook referred to the letter of understanding dated June 26, 2002, to the collective agreement between the Union and SAHO, embodying the results of local bargaining between the Union and UCMH. It included a provision that upon closure of UCMH current employees at the date of the letter of understanding would each receive a moving allowance of $4,000.

[62] In cross-examination by Mr. Barnacle, Mr. Brook testified that one Phillip Bouvier was a member and then chairman of the UCMH board from 1995 until he stepped down in March 2001. Mr. Bouvier was also a member of the steering committee until the incorporation of AHA Inc. and was then a member of the AHA Inc. board of directors from the fall of 2000 until his death in the fall of 2001. As such, he was involved throughout the decision-making process regarding the establishment of a new integrated health facility and service delivery model and the coordinated simultaneous decommissioning and closure of UCMH.

B. The Successorship Issue

[63] The parties agreed that the evidence adduced with respect to the jurisdictional issue could be applied as evidence with respect to the successorship issue under s. 37 of the *Act*.

[64] Lois Lamon, a national servicing representative for the Union with responsibility for Local 1561 testified on behalf of the Union. UCMH alone provided diagnostic and acute care services for the residents of the Athabasca Basin until June 2003. Ms. Lamon stated that employees of UCMH began raising their concerns with her as soon as it was known that a health facility would be built to replace UCMH. Ms. Lamon was involved in local bargaining regarding the letter of understanding dated June

26, 2002, *supra*, with a representative from each of UCMH and SAHO. The letter of understanding provides, in part, as follows:

> *5. Moving Allowance*
>
> *(b) Upon Termination*
>
> *(i) Upon Closure of the Hospital, current employees at the date of signing this Letter of Understanding shall receive a moving allowance of $4,000.00 expenses per household. The employee may access this allowance any time between the date of signing the letter of Understanding and the closure of the facility.*

[65] Ms. Lamon opined that the provision must be read in the context of the provisions of page 7 of the framework agreement that deal with the issue of the treatment of existing UCMH employees upon the opening of the AH Facility and the closure of UCMH:

> *Responsibility for Employees*
>
> *That Athabasca Health Authority Inc. shall offer employees of Uranium City Municipal Hospital and employees of Saskatchewan[7] who are affected by the creation of the non-profit corporation and the construction of the new facility employment at their existing salary and with their existing seniority and benefits; and*
>
> *That Saskatchewan shall provide to those employees of Uranium City Municipal Hospital and of Saskatchewan who do not accept a position with Athabasca Health Authority Inc. the applicable career development assistance programs; and*
>
> *That all parties accept that the obligations of applicable provincial and federal labour laws will be adhered to.*

[66] Ms. Lamon said that it was intended that all employees would be offered employment at the new facility upon the closure of UCMH and that the collective agreement with the Union would continue to apply, with the added benefit of a moving allowance pursuant to clause 5(b)(i) of the letter of understanding. She said the intent of the clause was that persons who chose not to take employment at the new health facility would be terminated in accordance with the provisions of the collective agreement and

[7] i.e., those employees of UCMH and the northern health regions affected by the integration and consolidation of the delivery of health services by AHA Inc. to residents of the Athabasca Basin.

also provided with a moving allowance. This was in keeping with the "Provincial Conditions Regarding the Athabasca Basin Governance Structure and Health Facility" dated April 15, 1996 (the "provincial conditions"), which set out certain conditions and principles established by the provincial government and Saskatchewan Health that were required to be embodied in and complied with by the framework agreement. The entire provincial conditions document is attached to these Reasons for Decision as Appendix D.

[67] The provincial conditions, page 5, paragraph (l), state that an "essential component" of the framework agreement must be that it contain "a commitment" to:

> *(l) ensure employees of the Uranium City Municipal Hospital and of the Province who are affected by the construction of the new facility on Chicken Reserve #224 are offered employment at the new facility without loss of salary, seniority or benefits; and that if they are not able to accept employment at the new facility, be treated in a fair and compassionate manner by the Province.*

[68] Ms. Lamon also referred to the minutes of the meeting of the steering committee dated June 13, 1996, which disclose that there was a discussion of the provincial conditions. The steering committee identified certain matters that should be addressed in the framework agreement, including, *inter alia*:

- that provincial and UCMH employees' union rights must be honoured, including retention of current salary, benefits and seniority;
- that either the federal or provincial labour relations board would make required determinations regarding collective agreements;
- that a plan should be developed for the construction and operation of housing for provincially funded staff located in Stony Rapids through Saskatchewan Housing.

[69] Ms Lamon also noted the reference in the "Interim Report to the Athabasca Health Authority" by consultants Jiricka and Bowen, dated April 10, 2000 (the "interim report"), regarding the need for AHA Inc. to ensure there were agreements with unions regarding closure of UCMH, stating at page 5, item 3: "AHA agreement with Unions re: protection of staff positions, retraining, severance, etc."

[70] Other portions of the provincial conditions that established conditions for the framework agreement, included the following:

- the requirement of security of access to the facility by all Athabasca Basin residents for the life of the facility;
- the agreement of the First Nations that the new non-profit corporation would manage both federally-funded and provincially-funded health services;
- the establishment of a mechanism for recovery of losses of provincial consumption tax revenue associated with the construction and operation of the project on reserve lands;
- an operating agreement guaranteeing compliance with provincial standards;
- at least a five-year commitment by the federal government for federal funding;
- the formalization of all parties' commitment to establish "a bilateral First Nations-Saskatchewan governance structure and to build a health facility for the Athabasca Basin";
- the clarification that all parties' funding will be provided to the governance structure which, in turn, will be responsible for planning and delivering health services to all residents;
- provisions ensuring that the Athabasca Health Authority provides services which meet minimum provincial standards, including the administration of *The Public Health Act*, *supra*, *inter alia*, by requiring that "the Athabasca Health Authority and First Nations establish protocols for enforcement of provincial legislation on reserve land."

[71] The provincial conditions also outlined "Principles that Must be Reflected in the Framework and/or Other Agreements," including, *inter alia*:

- that the "primary objective is improving the health of the residents of the Athabasca Basin," and that participation by any party does not prejudice

the rights of First Nations, the Prince Albert Grand Council, Saskatchewan or Canada services to their residents to deliver health;

- that all agreements between the province and First Nations through non-derogation clauses will recognize federal responsibility for First Nations;
- that any facilities constructed by the governing body must be used for health purposes, available and accessible for the life of the facility.

[72] The provincial conditions also required, as conditions of receiving provincial construction and/or operating funding, that capital and funding agreements provide that, *inter alia*:

- health services provided through the facility by the corporation must be available to all residents and other persons requiring services;
- authorized health and other officials have unrestricted access to the facility;
- minimum provincial standards would be met.

[73] Referring to the capital contribution agreement between Canada and Saskatchewan, *supra*, Ms. Lamon noted that the much greater majority of capital funding for the AH Facility was being provided by the province rather than by the federal government and that the intention of the capital contribution agreement, (the purpose of which appears to be to ensure a federal contribution to the project) was that, although the facility would provide services for all residents of the Athabasca Basin, the capital contribution agreement would "ensure [its] continued availability to First Nation members."

[74] By letter dated June 26, 2002, in the form of a notice of "technological change" pursuant to s. 43 of the *Act*, UCMH advised its employees of the planned closure of the hospital on or about March 31, 2003. The letter provided as follows:

> *Please accept this letter as notification, as per section 43 of The Trade Union Act, "technological change".*

> *The Uranium City Hospital is slated for closure on or about March 31, 2003.*
>
> *Given the small windows of opportunity for relocating from Uranium City, we are issuing this notice at this time to provide ample time for our employees to make arrangements to reorganize their lives.*

[75] By letter from Janet Holmgren, then-chairperson of AHA Inc., dated June 27, 2002, staff members of UCMH were advised that they could expect an offer of employment at the new facility. The letter provided, in part, as follows:

> *We understand that you have received a notice of layoff dated June 26, 2002, which indicated that Uranium City Hospital would close on or about March 31, 2003.*
>
> *Please accept this letter as an indication of the Athabasca Health Authority's continued desire to offer you employment as per the Framework Agreement.*
>
> *As we discussed at the meeting in Uranium City on April 15, 2002, the Framework Agreement states that the Athabasca Health Authority shall offer employees of the Uranium City Hospital "…employment at their existing salary and with their existing seniority and benefits…" Construction of the new Health Facility in Stony Rapids is slated for completion in November 2002. We anticipate providing you an offer of employment in the fall that would take effect when the facility is ready for operation, which may be as early as January 2003 but no later than April 1, 2003.*
>
> *We will be corresponding with you over the next few months regarding your plans to accept an offer of employment with the Athabasca Health Authority.*

[76] By letter from Ms. MacDonald, CEO of AHA Inc., dated December 16, 2002, (and a follow up memorandum dated January 13, 2003), only permanent employees of UCMH were asked to sign a release for the provision of personal information to AHA Inc. in order that they could be offered employment at the new facility. The letter provided, in part, as follows:

> *In order to offer permanent (full-time and part-time) Uranium City Municipal Hospital, (sic) whose employment will be terminated by the creation of the Athabasca Health Authority Inc. (AHA)*

> *pursuant to the 1996 Framework Agreement, AHA requires your personal information. The information we require is:*
>
> *- current pay grade classification and step*
> *- current salary*
> *- current employee group benefits and pension plan benefits*
> *- current employee and employer contributions to group benefits and pension plans*
> *- an update resume of your education, qualification and employment experience*
> *- most recent performance review*
>
> *An (sic) requesting this information I am confirming on behalf of AHA that this information will be held in strict confidence and will only be used to prepare an employment offer to you as required by the1996 Framework Agreement.*

[77] Ms. Lamon said the Union became concerned that the employees were being asked to provide resumes and release their performance reviews, because the Union deemed it unnecessary pursuant to the implementation of the framework agreement requirement to actually offer employment to the employees. She responded with a faxed memorandum to Ms. MacDonald, dated January 15, 2003, providing, in part, as follows:

> *Please be advised that CUPE is of the opinion that in accordance with the 1996 Framework Agreement, employees should transfer to AHA with the same pay classification and step, current salary and benefits that they presently receive. …As regards release of recent performance reviews or resumes, we do not believe that necessary under the terms of the agreement. We would be pleased to meet to discuss any other transitional issues which may need to be addressed. We are seeking voluntary recognition as the employees' union. Alternatively, if required, we will be seeking relief under The Trade Union Act. …*

[78] By letter to its employees dated February 19, 2003, UCMH advised them that the facility would close at the end of June 2003. The letter provided, in part, as follows:

> *The Board of Uranium City Hospital has been advised that the … closure is now slated to occur on or about June 30, 2003.*
>
> *Please accept this letter as an amendment of the June 26, 2002 notice of layoff.*

[79] AHA Inc. provided letters offering employment to permanent full-time and part-time bargaining unit employees at UCMH; no relief employees were offered employment. An example of one such letter, dated March 4, 2003, provides, in part, as follows:

> *Athabasca Health Authority Inc. (AHA) is pleased to offer you employment on the following terms:*
>
> *POSITION: You will serve in a full-time capacity as [Job Title]. The duties of the position will be as outlined in the AHA Job Description and will include such powers and duties as may be determined from time to time by AHA Board of Directors …*
>
> *TERM: This is an indefinite term position. Your start date will be June 1, 2003 or as soon thereafter as may be mutually agreed upon. The term of employment is subject to your full compliance with the underlying conditions of employment. Any contrary representations, which may have been made to you are superseded by this offer. This is the full and complete agreement between you and AHA.*
>
> *LOCATION: …*
>
> *CASH COMPENSATION: You will be paid a gross salary of not less than ___dollars per hour … and subject to the usual deductions, including but not limited to EI, Group Insurance, Pension Plan, and CPP and income tax, if applicable.*
>
> *BENEFITS: You will be entitled to the Benefits as set out in the AHA Personal Manual as well as the following medical and fringe benefits available to other AHA employees and as amended from time to time, benefits currently include the following:*
>
> - *Group insurance plan through First Nations Insurance.*
> - *Pension Plan to which you make a defined contribution from your gross earnings or the continuation of your present Pension Plan through SAHO.*
> - *Travel expenses according to AHA guidelines when traveling on behalf of AHA.*
> - *Northern Living allowance based on the applicable rates for Stony Rapids which is $5200.00 per year to be issued in equal bi-weekly instalments*
>
> *MODIFIED WORK WEEK: It is anticipated there will be a modified work week details of which will be provided to you at a later date.*
>
> *PROBATION: Your employment is subject to a six (6) month probationary period which AHA shall use for the purpose of*

evaluating your performance, ability, aptitude and qualifications. Thereafter you will have an annual employee performance evaluation. AHA reserves the right, for disciplinary or reprimand purposes, to reinstate a probationary period for periods up to six (6) months. Your employment may be terminated any time during the initial or re-instated probationary period with or without cause.

COMPANY PROPERTY: …

STRICT COMPLIANCE: You must provide your services in strict compliance with the policies, procedures, rules and regulations of AHA as set out in the Personnel Manual and/or as they may be announced or amended from time to time.

FUNDING: It is acknowledged by the parties hereto that the monies derived by AHA from which remuneration is to be paid to the Employee are monies received from federal or provincial funding agencies or organizations and payment of such money is subject to the regulations and control of such federal or provincial regulatory or granting institution. In the event that funding to AHA is terminated or substantially reduced for any cause whatsoever by such funding agency, then notice to AHA for termination of funding shall be, for the purposes of this Contract, deemed notice to the employee of termination of this Contract.

(emphasis original)

INDEMNITY: The employee agrees that in providing the services described herein to indemnify AHA and save it harmless from and against any action including inter alia any claims, suits, demands, losses, costs, expenses, actions and other proceedings, made, sustained, brought or prosecuted, in any manner based upon occasioned by attributable to or caused by (sic) the Employee's willful or negligent act, omission or delay in the course of discharging the terms of this Contract.

CONFIDENTIALITY: …

ADDITIONAL REQUIREMENTS: CPIC (satisfactory criminal record check). Declaration with respect to criminal history. Adherence to local bylaws and prohibitions. Oath of Confidentially (sic).

FURTHER CONDITIONS OF EMPLOYMENT: [to be inserted if any]

We hope that you find the forgoing terms acceptable. You may indicate your agreement with these terms and accept this offer by signing and dating the foot of this letter and returning it to the attention of the Chief Executive Officer, Georgina MacDonald at the address shown on the letterhead.

> *We look forward to your decision no later than 4:00pm CST, March 28, 2003.*
>
> *If you fail or neglect to reply by the deadline set out above, you will be deemed to have rejected the offer.*

[80] Ms. Lamon testified that the Union became concerned because the terms of these letters offering employment with AHA Inc. appeared to disclose that AHA Inc. had no intention of honouring the requirements of the framework agreement that it provide employment to the employees at UCMH with their current classification, salary and benefits, even though AHA Inc. referred to making its offer pursuant to the requirements of the framework agreement in its letters to UCMH employees dated June 27, 2002 and January 13, 2003, both *supra*.

[81] Examples of these concerns cited by Ms. Lamon included the following: the job titles and duties according to these letters are those established by AHA Inc. at the outset of the employee commencing work at AHA Inc., rather than as carried over by the employee as they existed and as agreed to as part of the existing collective agreement; the letters make no reference to retention of the benefits given to the employees pursuant to the collective agreement, including no mention of shift differential or standby pay; the requirement of a probationary period and a criminal record check for employees who were permanent employees at UCMH and, therefore, not subject to further probation or a record check is contrary to the collective agreement; the notion that a notice of loss of funding for AHA Inc. as being "deemed notice of termination" of employment to the employee is contrary to the layoff provisions and benefits of the collective agreement. Unfortunately, at the time the letters were sent to the employees they had no choice but to sign them if they wanted to continue to work.

[82] Ms. Lamon, on behalf of the Union, responded with a letter to Ms. MacDonald at AHA Inc. dated March 20, 2003 alleging that AHA Inc. was in violation of the framework agreement and requesting certain clarifications. The letter provided, in part, as follows:

> *Further to my fax of 15/01/03, it is my understanding that you are proceeding with staffing of the new Athabasca Health Care Facility without regard for the Successorship Rights of our members in*

CUPE Local #1561 as set out in Section 37 of the Trade union act. It has also been brought to our attention that not all of the employees at Uranium City Hospital have been offered employment, which is a violation of the Framework Agreement.

Additionally, while the offer letters which were received are dated March 4, 2003, it is my understanding that they were not received by employees until March 17, 2003.

It is our expectation that you will take on the existing Collective Agreement and no individual agreements are supported. Any members who may sign these individual employment contracts are signing to preserve their right to a job until we can either come to an agreement or a determination is made by the Labour Relations Board.

Additionally, the employees have a number of questions that need to be answered as follows:

1. *What are the staff benefits outlined in the Personnel Manual and do they apply to all staff?*
2. *How were wage rates determined?*
3. *Does First Nation Insurance replace Canada Life Insurance?*
4. *What is the breakdown for Employee and Employer contributions to the Pension Plan?*
5. *Are travel expenses intended to cover meetings only or does it also include nursing staff and medivacs?*
6. *What is meant by modified work week?*
7. *Why would the Employees be responsible to indemnify the Employer when in all other workplaces it is the Employer's responsibility to indemnify the Employees?*
8. *How can a clause "Further Conditions of Employment" be added without the Employees knowledge and consent at the time of signing?*
9. *Why has the Northern Allowance been reduced?*
10. *What type of housing is? (sic) And is there any subsidization of housing?*
11. *What is the intent with regards to other benefits such as vacation entitlement, sick leave entitlement, disability entitlement, etc.*
12. *What about the other benefits Employees currently have such as overtime, call-back, shift differential, and stand-by to name a few?*

If there are provisions in the Collective Agreement that need to be address, we are prepared to negotiate those with the Athabasca Health Authority. I understand you will be in Saskatoon next week and I am available to meet with you at your convenience.

[83] AHA Inc. did not reply to the letter. The Union then made the present application to the Board.

[84] By letter dated May 12, 2003, Ms. MacDonald of AHA Inc. advised Mr. Klassen, chairman of the board of UCMH, that the new AH Facility would open June 1, 2003, referred to the transfer of physicians, equipment and supplies from UCMH to AH Facility, and that nursing services for Uranium City would then be provided by AHA Inc. The letter provided, in part, as follows:

> *Further to your telephone request of this morning, this is to confirm AHA plans to begin diagnostics and physician services from the new facility on June 1, 2003. We recognize that June 1 is a Sunday, however, we anticipate the move and the establishment of these services as of that date. Two observation beds will be available and will be staffed by nurses.*
>
> *The moving of lab equipment and supplies will be planned for a date at the end of May.*
>
> *Discussions with the physicians have taken place and we are of the understanding they will be available here at Stony rapids on May 30 or June 1.*
>
> *The concern we have is to arrange nursing services for Uranium City from the hospital until such time as the clinic renovations are complete.*
>
> *We will be arranging nursing coverage for Uranium City on an interim basis until such time as final contracts can be prepared.*

[85] According to Ms. Lamon, the reference to nursing services in the last two paragraphs of the letter, was to the plan to open a nursing station in Uranium City after some renovations were done, staffed by nurses from AHA Inc.

[86] By a memorandum dated May 26, 2003, addressed to “all staff,” the manager of UCMH advised that the hospital would close at 0900 hours on June 2, 2003.

[87] According to Ms. Lamon, a list of employees of AHA Inc. as of November 1, 2003 (i.e., a few months after the closure UCMH) discloses that 15 employees were performing work within the jurisdiction of the certification Order held by the Union for UCMH (including that then being done by contracted lab services and accounting employees at AH Facility) and that there were a further 5 newly created positions that ought to be within scope of the bargaining unit because of the all employee (excepting

nurses) certification Order. There were 17 members in the bargaining unit at UCMH on the date of closure (full-time, part-time and relief employees). On November 1, 2003, 6 of those were working at AH Facility.

[88] Ms. Lamon referred to the fact that the minutes of the meeting of the steering committee for May 16, 1995 disclose that there was a discussion of the budget history of UCMH and a motion by the steering committee "that Saskatchewan Health provide a letter of reassurance to the Committee that on closure of Uranium City Hospital any outstanding portion of the $150,000 loan [by Saskatchewan Health to the hospital] will be forgiven and not repayable…" The minutes further provide that "…rights of current Uranium City Hospital employees will be protected. Collective Bargaining units will go with transferring employees."

[89] Mr. Brook testified that offers of employment were made to all full-time and part-time "permanent" employees of UCMH, but not to relief or temporary employees. This resulted in no offer being made to 6 of the 17 employees at UCMH at the time of closure.[8] Five of those to whom offers were made accepted employment.[9] Two persons formerly employed by the Mamawetan Churchill River Health District[10], where they were covered under the SGEU collective agreement also became employed by AHA Inc. With respect to seniority based entitlements for former employees of UCMH, such as vacation leave, AHA Inc. uses the their original start date at UCMH to calculate seniority.

[90] Mr. Brook confirmed that the bilateral governance structure that was created for AHA Inc. was designed to result in the recognition by the entity of both provincial and First Nations jurisdictions; for example, public health laws and regulations were to harmonize the standards under both the *Indian Act* and provincial law.

[91] In cross-examination by Mr. Barnacle, Mr. Brook confirmed that until AHA Inc. was actually incorporated its contractual interests had to be represented through another entity. For example, he said that UCMH signed the design contract for the AH

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[8] Offers were not made to relief employees: S. Abraham, A. Churchward, S. Johnson, I. Kelly, M. Thompson, and C. Zemlak. An offer was made to D. Sepp even though she was a relief employee.
[9] B. Laroque, D. Sepp, G. Thompson, I MacDonald, D.Swider
[10] S. Denechezhe, and M. MacDonald

Facility structure and when UCMH received the GST rebate referred to earlier in his testimony the province asked UCMH to transfer it to AHA Inc.

[92] Mr. Brook also confirmed that where the final report states at page 49 that, "UCMH staff carry out a similar role to the AH Facility," it is a reference to the acute care and diagnostics functions. At page 42 of the final report it states that UCMH may be a source of transitional funding for the AH Facility, and at page 50, it states that the UCMH operating budget should be transferred to the AH Facility when it opened. Certain equipment and supplies were moved from UCMH to the AH Facility when it opened and other equipment was moved to the community treatment nursing station opened in Uranium City and managed by AHA Inc.

[93] Terry Cebryk testified on behalf of AHA Inc. Mr. Cebryk was the former CEO and facility manager of UCMH. He confirmed that upon the closure of UCMH all employees were paid severance under the collective agreement with the Union. It was his understanding that it was never intended that UCMH and AHA Inc. would compete, but that the former would close upon the opening of the latter. AHA Inc. was allowed to take whatever capital assets and equipment it chose from UCMH – all were originally purchased with provincial funds.

[94] Faye Michayluk testified on behalf of AHA Inc. Ms. Michayluk has been the director of community services for AHA Inc. since early in 2003. She was formerly employed by the Prince Albert Grand Council as the coordinator of its home care program. Her department manages the community services[11] provided by AHA Inc. to residents of the Athabasca Basin through 5 facilities separate or outlying from the AH Facility, including the following:

- a separate primary health center on the Chicken Reserve, which provides primary care and treatment nursing, basic lab tests, and the community health programs;
- a primary care health centre at Fond du Lac providing similar services;

[11] Includes, *inter alia*, pre- and post-natal health, addictions, immunization, school, chronic and elderly health, adult wellness, and home care programs, and weekly physician services.

- a primary health care centre at Uranium City;
- mental health and addiction services at Hatchet Lake;
- a part-time clinic at Camsell Portage.

[95] In addition, at the outlying primary care facilities there are monthly days for lab tests, diagnostic testing, specialist physician visits, ultrasound clinics and child and family services.

[96] Ms. Michayluk confirmed her understanding that the outlying primary care health centres were formerly referred to as "nursing stations" and pre-dated the formation of AHA Inc. She also confirmed her understanding that the diagnostic and acute care services being provided at AH Facility are the same as those previously provided at UCMH.

Arguments:

A. The Jurisdictional Issue

AHA Inc.

[97] Ms. Elliot-Erickson, counsel on behalf of AHA Inc. filed a brief of argument which we have reviewed in detail. Counsel asserted that the Board lacks constitutional jurisdiction over the labour relations of AHA Inc. in the context of health services delivery on the following grounds: (1) AHA Inc. has been deemed to be a "band-empowered entity" located on reserve by CCRA; (2) "Indians" and "lands reserved for Indians" are the subject of exclusive federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1982*; and, (3) Section 81(1)(a) of the *Indian Act* allows a band council to make bylaws "to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases."

[98] Following are the statutory provisions referred to by counsel:

Constitution Acts, 1867 to 1982:

> *Powers of the Parliament:*
>
> *91 (24) Indians, and Lands reserved for the Indians.*
>
> *Exclusive Powers of Provincial Legislatures:*
>
> *92 (7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.*
>
> *92(8) Municipal Institutions in the Province.*
>
> *92(10) Local Works and Undertakings. . . .*
>
> *Indian Act, supra*:
>
> *81 (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,*
>
> > *(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;*

[99] In oral argument, counsel summarized the facts that she said indicated that the employees at the AH Facility are under federal labour law jurisdiction, including the following: the majority of the service population to which AHA Inc. provides services are First Nations persons; AHA Inc. is a "band-empowered entity" for the purposes of CCRA; the head office of AHA inc. is located on reserve lands; and federal funds were contributed to the construction of and are contributed to the operation of AHA Inc.

[100] Counsel argued as a general proposition that where, as here, there is a conflict between federal and provincial laws, federal law is paramount and the operation of the provincial law is suspended to the extent it conflicts with the federal legislation. Counsel asserted that the facts outlined above support the proposition that the labour relations of AHA Inc., specifically as concerns its employees at the AH Facility, are under federal labour law jurisdiction.

[101] Counsel referred to the following authorities in support of her arguments, asserting that those that seem to have a contrary outcome can be distinguished: *Saskatchewan Indian Gaming Authority Inc. operating as Northern Lights Casino v.*

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), [1999] Sask. L.R.B.R. 625, LRB File No. 122-99, upheld on judicial review at [2000] Sask. L.R.B.R. c-2 (Sask. Q.B.) and (2000) 203 Sask. R. 86 (Sask. C.A.), leave to appeal to S.C.C. denied [2001] S.C.C.A. No. 46 ("*Northern Lights Casino*"); *Westbank First Nation v. British Columbia (Labour Relations Board)* (1997), 39 C.L.R.B.R. (2d) 227 (B.C.S.C.), upheld on appeal, [2000] B.C.J. No. 501 (B.C.C.A.); *Four B Manufacturing Limited v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 (S.C.C.); *Whitebear Band Council v. Carpenter Provincial Council, et al*. (1982), 135 D.L.R. (3d) 128 (Sask. C.A.); *Paul Band v. R.*, [1984] 2 W.W.R. 540 (Alta. C.A.); *Sagkeeng Alcohol Rehab Centre v. Abraham*, [1994] 3 F.C. 449 (Fed. Ct. T.D.). Following, we have summarized counsel's submissions regarding these cases.

[102] In *Northern Lights Casino*, *supra*, the union applied to certify a unit of employees of Saskatchewan Indian Gaming Authority ("SIGA") working at its casino in Prince Albert. The employer argued that the labour relations jurisdiction of the casinos operated by SIGA was federal. The Board held that it had jurisdiction to entertain the certification application because the ownership of the casinos by SIGA was not pursuant to a statutory power conferred upon band councils by the *Indian Act* but rather its authority existed because of agreements between the province and the Federation of Saskatchewan Indian Nations and the provincial band councils assumed only an indirect role in the ownership and operation of SIGA. The Board found that provincial labour legislation did not abrogate or derogate from aboriginal treaty or other rights and that exclusive federal jurisdiction over labour relations was not established. Counsel argued that, for these reasons, the decision is distinguished from the present case. Unlike the bylaw-making authority conferred on band councils under the *Indian Act* with respect to the health of reserve residents, SIGA's ownership of casinos is not pursuant to a statutory power. In the present case the Black Lake and Fond du Lac First Nations have assumed a portion of direct ownership of AHA Inc. and the authority to provide health services to First Nations' people is exclusively under federal jurisdiction.

[103] In *Westbank First Nation*, *supra*, a band-owned and operated long-term care facility located on its reserve lands expanded its operations to provide intermediate care to residents of communities in the South Okanagan area whether or not they were First Nations. The facility was licensed as a continuing care operation under provincial

legislation. The British Columbia Labour Relations Board (the "BCLRB") determined that the labour relations for the facility fell within provincial jurisdiction. The employer applied to the British Columbia Supreme Court for judicial review of the decision. The Court dismissed the application, holding that the facility's function included providing care to residents who were not First Nations' residents and its operation went beyond the involvement of the band's members and council. Neither the ownership of the business, nor the employment of First Nations people, nor the carrying on of that business on reserve, nor federal funding for the business, was sufficient to affect the operational nature of the business and make it a federal business outside the jurisdiction of provincial labour law. An appeal of the decision was dismissed by the British Columbia Court of Appeal.

[104] In *Four B Manufacturing*, *supra*, a shoe manufacturing business was operated on reserve employing mostly First Nations workers. The business's shares were owned by First Nations persons and it received federal loans and subsidies. The issue was whether the labour relations jurisdiction of the business was federal or provincial. Beetz, J., speaking for the majority of the Supreme Court of Canada, outlined the guiding principles for determining the issue at 1045 as follows:

> *In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services or businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses: …*

[105] The Court found that there was nothing about the business or its operation which might allow it to be considered a "federal business"; the sewing of uppers on sport shoes was an ordinary industrial activity. Accordingly, the labour relations of the business fell under provincial jurisdiction.

[106] In *Whitebear*, *supra*, the Board granted certification for a unit of carpenters and carpenter apprentices employed on a reserve by the band council constructing houses financed by the Department of Indian Affairs. The employer band council applied for judicial review of the Board's decision. In granting the application the

Saskatchewan Court of Appeal found that the power generally to regulate the labour relations of a band council and its employees, engaged in activities contemplated by the *Indian Act*, forms an integral part of primary federal jurisdiction in relation to Indians, and lands reserved for the Indians under the *Constitution Act*, as the operations of the band council may be classified as a "federal work, undertaking or business" under the *Canada Labour Code*. Giving judgment for the Court, Cameron, J.A., stated at 139:

> *In my opinion, the particular activity in which Whitebear Band Council and its carpenters were engaged … cannot be separated from the activity of the Band Council as a whole, isolated and assigned a different character than that of which it forms part – the general function of the Band Council. …Accordingly, I am satisfied that the construction of houses on the reserve, in the circumstances, is part and parcel of the general operation as a whole of the Band Council, and cannot properly be removed from that whole and viewed a s an ordinary industrial activity in the province and falling under provincial jurisdiction; this I think is the error made by the Labour Relations Board.*

[107] In *Paul Band*, *supra*, the issue was whether employees of the band council who acted as special constables on the reserve came under provincial labour legislation. The Alberta Court of Appeal held that the employees were carrying on the normal operations of the band council under the peace, order and good government provisions of the *Indian Act* and as such constituted a federal work or undertaking. Accordingly, provincial labour legislation had no application.

[108] In *Sagkeeng Alcohol Rehab Centre*, *supra*, the employer operated an alcohol rehabilitation centre on reserve. Only a negligible portion of its clientele was non-First Nations people. In finding that the centre's employees came under federal labour jurisdiction, the Federal Court, Trial Division, observed that the rehabilitation undertaking was not an ordinary manufacturing business but provided health care at a centre governed by First Nations people and organized and operated primarily for First Nations people. Rothstein, J. stated as follows at paragraph 14:

> *The fact that the rehabilitation centre is organized and operated primarily for Indians, governed solely by Indians, that its facilities and services are intended primarily for Indians, that its staff are specially trained under the National Native Alcohol and Drug Abuse Program and receive First Nations training and that its rehabilitation program, curriculum and materials are designed for*

> *Indians, all serve to identify the inherent "Indianness" of the centre and its link to Indians.*

[109] Counsel in the present case argued that the provision of health care services by AHA Inc. is organized and operated primarily for Indians, is governed by Indians to address issues of health care in a culturally relevant manner and that its labour relations are under federal jurisdiction. Counsel also argued that the provision of health care is a normal function of band councils on reserve.

The Union

[110] Mr. Barnacle, counsel on behalf of the Union, argued that while the framework agreement provides for a form of joint venture at its best it does not establish that an individual band is the employer with respect to the delivery of services by AHA Inc., the parties to the framework agreement being two First Nations, three Northern Settlements, the Prince Albert Grand Council, Canada and Saskatchewan. The framework agreement (at page 2) envisages the creation of a provincial non-profit corporation by the First Nations communities and the Northern Settlements (referred to as "partners") to be called AHA Inc.

[111] The framework agreement expressly protects the existing aboriginal and treaty rights of the two First Nations from any prejudice arising out of the framework agreement, but neither the framework agreement nor the documents that create and govern the AHA Inc. joint venture – articles of incorporation, unanimous shareholder agreement, bylaws – affects treaty rights or the concept of "Indianness" as referred to in cases cited by counsel for AHA Inc., nor does the *Act* have any such effect. AHA Inc. is a provincial non-profit corporation that has nothing to do with the ordinary business of an Indian band council. According to the framework agreement (at page 3) the envisaged entity that became AHA Inc. is described as being a designated "local authority" by Saskatchewan for the purposes of *The Public Health Act*, *supra*.

[112] Counsel argued that AHA Inc. – not the Indian bands nor the bands in partnership with anyone else – is the employer of the workers providing the services under its mandate. The Indian bands themselves or the federal government may very well employ persons working on the reserve lands in the healthcare field for other

purposes but not in respect of the services provided by AHA Inc. Counsel maintained that these circumstances distinguish the present case from that which existed in *Whitebear*, *supra*, where the carpenters constructing the houses for the band exclusively for band members located on reserve land were employed by the band.

[113] Furthermore, counsel argued, it is irrelevant that the facility from which AHA Inc. provides certain of its services is located on reserve lands. The land may still be owned by the band but the UM agreement establishes an entity distinct from the bands and its mandate is to provide services to *all* residents of the Athabasca Basin. The two First Nations are not required to remain as members of AHA Inc. but in the event they do withdraw they are not entitled to any part of its assets and, while provincial access to the AH Facility is guaranteed in such an eventuality, the continued use of or access to the AH Facility by the bands is not (see article 11.05 of the UM agreement). The Athabasca Basin, which AHA Inc. now services in place of the UCMH, comprises a very large area including the lands of the two First Nations, but the vast bulk of the area is provincial land. Counsel asserted that it would be anomalous if the labour relations of virtually all health delivery services in such a vast area were governed federally. The fact that a significant number of AHA Inc.'s employees are aboriginal is not determinative of the jurisdiction over its labour relations, rather, the jurisdiction is determined by the nature of its actual operation, as in *Northern Lights Casino*, *supra*.

[114] Counsel argued that it is irrelevant that the federal government provides some funding for the operations of AHA Inc., because if that funding were withdrawn for whatever reason (e.g., withdrawal of the bands from AHA Inc.) AHA Inc. would continue to exist and the AH Facility would continue to serve the residents of the Athabasca Basin.

[115] Counsel asserted that article 2.06 of the UM agreement essentially provides that any resident off reserve, indeed any resident of the province, may access the services provided by AHA Inc. and no preference is given to persons living on reserve or of First Nations status. Counsel also asserted that under the AHA Inc. population-based membership formula (see article 4.03 of the UM agreement), the corporation is not a First Nations corporation but an ordinary non-profit corporation – its membership composition varies with population demographics such as if a large non-

First Nations population centre arises in the region. According to article 5.11, a minimum number of board meetings must be held in the member Northern Communities each year as well as public meetings.

[116] Counsel pointed out that both article 12.01 (Remuneration and Reimbursement for Board Expenses) and article 13.01 (Conflict of Interest) reference governing provincial legislation. The UM agreement itself is construed and governed by provincial law and requires the consent only of the province (see article 19.03). Amendments to the UM agreement require the consent of the provincial Minister of Health only; the consent of a federal official is not required (see article 19.06).

[117] With respect to the designation of AHA Inc. as a "band empowered entity" by CCRA, Counsel pointed out that such rulings are only in respect of federal taxation, and have no application outside of that context: such a ruling is of virtually no influence with respect to the issue of jurisdiction for labour relations. Counsel argued that in *Westbank First Nation*, *supra*, the Indian band had a similar type of ruling in respect of the long-term care facility located on reserve land and the British Columbia Supreme Court confirmed the jurisdiction of the British Columbia Labour Relations Board.

[118] Counsel compared the present case to the situation in *Northern Lights Casino*, *supra*, pointing out that in that case the employer, SIGA, was a non-profit corporation that owned and operated four casinos. SIGA was jointly owned by 10 tribal councils and the Federation of Saskatchewan Indian Nations, with no ownership interest held by any non-First Nations entity. SIGA's head office was located on reserve land, as was the Northern Lights Casino itself. In upholding the jurisdiction of the Board and the *Act* over the labour relations of the casino employees, counsel said, the Saskatchewan Court of Appeal did not need to hear from the respondent union or the Board.[12] According to counsel, in the original hearing of the case before the Board, SIGA had relied heavily on the Court of Appeal's decision in *Whitebear*, *supra*. However, unlike the situation in that case, the employees in the present case are not employees of the Indian bands.

[119] In *Northern Lights Casino*, *supra*, in assuming jurisdiction, the Board applied the "functional test" set out in *Four B Manufacturing Ltd*., *supra*, as applied by the Court of Appeal in *Whitebear*, *supra*. By analogy with that case, counsel argued that, while to a certain extent the two First Nations in the present case are providing health care through AHA Inc., there is a difference between their participation as members of the corporation and control of the corporation by band councils, which is not the case. The employees are not employees of the bands but employees of AHA Inc. In *Northern Lights Casino*, *supra*, Smith J. similarly applied the test enunciated by the Supreme Court of Canada in *Four B Manufacturing Ltd*. and found that it was not met, stating, at c-26, that the Supreme Court of Canada "intended to give a narrow interpretation to the concept of 'Indianness' and to favour the application of provincial labour legislation except where this would affect matters clearly governed by federal legislation or infringe upon Indian rights or status."

[120] Mr. Barnacle pointed out that in *Sagkeeng*, *supra*, the employees of the alcohol rehabilitation centre in question were employees of the band, which is not the case in the present situation. Similarly, in *Paul Band*, *supra*, pursuant to powers granted by s. 81 of the *Indian Act*, the constables were employed directly by the band with respect to policing services on the reserve only. In the present case, AHA Inc. provides services both on and off the reserve to all persons in a very large region.

[121] Counsel submitted that even if the two First Nations in the present case did own AHA Inc., that would not be determinative of the jurisdictional issue as demonstrated by *Westbank First Nation*, *supra*. There is nothing about the delivery of health care that affects Indian status, such as "registrability, membership in a band, the right to participate in the election of chiefs and band councils, reserve privileges," which were matters identified by Beetz J. in *Four B Manufacturing Ltd*., *supra,* as being part of Parliament's primary authority over Indians and the lands reserved for Indians. As a law of general application in an area of provincial constitutional paramountcy, except if the subject is a federal work or undertaking, the *Act* does not affect "Indianness" as it does not apply to First Nations' people in their treaty or status capacities. That is, there is a difference in laws applied to Indians as laws of general application and laws that affect Indian status or rights. This is in keeping with the Supreme Court's rejection of the "enclave theory" in *Cardinal v. A.G. Alberta* (1973), 40 D.L.R. 553; that is, s. 91(24) of

the Constitution does not create enclaves within a province within the boundaries of which provincial legislation of general application, which is otherwise valid, can have no application.

[122] Counsel also referred to two decisions of the Ontario Labour Relations Board: *Nipissing First Nation Fur Dressers Inc*., [1999] OLRB Rep. Nov./Dec. 1075, and, *Wikwemikong Ambulance Service No. 008*, [2002] OLRD No. 2279. In *Nipissing*, the union applied to certify the employees of an enterprise that cleaned and processed furs for the garment industry. The enterprise was located on reserve, operated by a band-owned corporation and staffed almost exclusively by band members. The band council approved all wage rates and employment terminations. Relying upon *Four B Manufacturing Ltd*., *supra*, the Ontario Board held that band ownership of an enterprise is not, in and of itself, a critical factual distinction and that the role of the band council in certain operational facets of the enterprise was not enough to make it an exception to the general rule of provincial legislative competence over labour relations.

[123] In *Wikwemikong*, *supra*, the First Nation operated a provincially-funded and provincially-regulated ambulance service serving persons both on reserve and in certain neighbouring municipalities. The service employed both band members and non-band members. The Ontario Board determined that the enterprise came under provincial labour relations jurisdiction, finding that there was no evidence as to how Indian status or any rights closely connected with Indian status were affected.

AHA Inc. in Reply

[124] Ms. Elliott-Erickson responded that both the framework agreement and the UM agreement provide that they shall not derogate from treaty rights. Although the agreements state that the services provided by AHA Inc. should be available to all residents of the Athabasca Basin, the demographic profile of the area means that the majority of persons served are aboriginal. If the First Nations withdrew from AHA Inc. it would not continue without the portion of federal funding provided through them.

[125] Counsel submitted that, alternatively, the issue was not jurisdiction over labour relations but over the health of First Nations people. The AHA Inc. board of directors falls into the shoes of the First Nations with respect to the devolved power

regarding health under the *Indian Act*. With respect to the provision of health services to band members, AHA Inc. is in the same position as the band regarding band member housing in *Whitebear*, *supra*.

[126] Counsel submitted that *Northern Lights Casino*, *supra*, may be distinguished from the present case in that gaming does not fall within the powers devolved to band councils under the *Indian Act*. Counsel agreed that, on the facts of that case, the decision of Smith J. was indeed correct.

SAHO

[127] No submission in argument was advanced on behalf of SAHO.

B. The Successorship Issue

The Union

[128] Mr. Barnacle, on behalf of the Union, submitted that, assuming that the Board has jurisdiction, the issues regarding successorship in the present case are: (1) whether there has been a disposition within the meaning of s. 37(1) of the *Act*; and, (2) whether there should be any other orders made under s. 37.

[129] Counsel argued that several of the documents in evidence disclose that the intention of the parties was that the AH Facility, as owned and operated by AHA Inc., was to replace UCMH – it was never intended that both facilities would provide acute care services once AH Facility came on line. The services provided at the AH Facility are those that were provided by UCMH. The provision of acute care services at the AH Facility essentially commenced when the same services ceased to be provided at UCMH – the "business" of UCMH was transferred to the AH Facility. Equipment and supplies were transferred from UCMH to the AH Facility to enable provision of the services. During the construction of the AH Facility, UCMH acted as the trustee of certain funds for the design of the AH Facility. Mr. Bouvier held board positions with both entities during the planning phase. All of these things were done for the purpose of *replacing* UCMH. At page 7 of the final report, reference is made as to "when the hospital relocates to Stony Rapids," and at page 25, to the "transfer of acute care

services" and staff. Pages 49 and 50 of the final report refer to the transfer of the UCMH operational budget.

[130] Counsel submitted that the evidence is clear that personnel, including physicians and nurses, and diagnostic and acute care services were transferred from UCMH to the AH Facility. Laboratory equipment, other equipment and supplies were transferred to the AH Facility as selected by AHA Inc. depending on its assessment of the usefulness of same. There is no question that the nature of the "business" is the same and that its work continues. There is no question that employees of AHA Inc. commenced performing bargaining unit work when UCMH closed. There is no significant difference between the number of employees performing such work at the AH Facility as there were at UCMH. The Union put AHA Inc. on notice before the transfer that there were concerns about successor rights and, despite a follow-up letter, received no reply.

[131] Counsel pointed out that AHA Inc. offered employment to employees of UCMH, other than relief staff, on terms and conditions dictated by AHA Inc. That is, AHA Inc. did not recognize continuity of employment or the successor rights of any of the affected employees. However, article 5.04 of the collective agreement includes relief employees within the definition of employee. In any event, counsel submitted, it is not the individual names of employees that are germane on successorship but the recognition of the rights of the bargaining unit members as a whole and the responsibilities and obligations acquired by the successor employer which is bound by the certification order and collective agreement. The fact that the employer does not recognize the continuity of employment of the employees in accordance with the terms of the collective agreement does not affect its obligation to do so.

[132] Counsel submitted that the present situation satisfied the criteria set out by the Board on successorship applications in *Cana Construction Co. Ltd. and Pan-Western Construction Ltd. and Butchner Construction Inc*. (1984), 9 CLRBR (NS) 175, LRB File Nos. 199-84, 201-84, 202-84 & 204-84, and *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd*., [1994] 3rd Quarter Sask. Labour Rep. 136, LRB File Nos. 125-94, 130-94 & 131-94.

[133] Counsel also submitted that the Board has found that it is an unfair labour practice for a successor employer to treat the employees of the predecessor employer as job applicants: *Service Employees International Union, Local 333 v. Battlefords Ambulance Care Ltd., et al*., [1996] Sask. L.R.B.R. 604, LRB File No. 202-95.

AHA Inc.

[134] Ms. Elliott-Erickson on behalf of AHA Inc. argued that AHA Inc. is not a party to the collective agreement between the Union and UCMH or the letter of understanding between them, even though the closure of UCMH was clearly anticipated. Counsel pointed out that the Union was given notice of technological change regarding the closure of UCMH and had the opportunity to negotiate the effect on the employees. Much earlier than that, the interim report and final report and the minutes of the steering committee disclose that a commitment was made that the UCMH employees would be offered employment at the same salary and with the same seniority and benefits.

[135] Counsel submitted that AHA Inc. was always viewed as a vehicle to deliver a comprehensive range of health services, some of which were formerly delivered by UCMH, the Prince Albert Grand Council and the First Nations themselves. The framework agreement set out the terms that were to be included in the UM agreement and made no reference to the *Act*, but did refer to the *Indian Act*. As a "band empowered entity" for the purposes of CCRA and income tax, AHA Inc. takes the position that it falls under the *Canada Labour Code*.

[136] Counsel argued that under s. 37 of the *Act,* whether there is continuity in the nature of the work done is key in determining whether there has been a transfer of the business – there must be some nexus in the work done by the predecessor and the successor. For example, the successorship provisions were never intended to apply to situations of sub-contracting or the dissolution of a business. Where, as here, one employer ceases to operate and another operates by offering similar and a broader range of services, successorship should not apply – there is not a sufficient nexus between the two. For example, while UCMH offered diagnostic and acute care services, it did not provide the addictions counseling that is now also offered by AHA Inc. The AH Facility was so named because it is not simply a hospital as was UCMH. The employees from UCMH constitute only a small part of the employees of AHA Inc.

[137] Counsel submitted that unlike the situation in *603195 Saskatchewan Ltd*., *supra*, there has been no acquisition of a business. In the present case there has been the transfer of only a small amount of inventory, equipment and other assets from UCMH to AHA Inc.; there was no transfer of accounts receivable and customer lists. Counsel asserted that the diagnostic and lab facilities and chronic and palliative care beds available at the AH Facility are substantially different than what was available at UCMH.

[138] Counsel submitted that, because of the question of jurisdiction and the small number of employees from UCMH, AHA Inc. decided that it could not accept the Union's position that it was a successor under the *Act*.

The Union in Reply

[139] Mr. Barnacle submitted that the list of employees at the AH Facility shows that if one were to remove the persons that perform work that has nothing to do with the work done by the employees in the Union's bargaining unit at UCMH – addictions counselors, mental health workers, community services workers, maintenance persons, nurses, administrators and managers -- there are only 22 persons performing such work, including two security personnel that would have been within the Union's bargaining unit description.

Statutory Provisions:

[140] Relevant provisions of the *Act* include s. 37 which provides as follows:

> *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).

Analysis and Decision:

A. The Jurisdictional Issue

[141] The determination of the jurisdictional issue in this case is both difficult and sensitive. We can do no better than to cite the following observation by then Vice-

Chairperson Mullin of the British Columbia Labour Relations Board in deciding a similar jurisdictional issue in *Westbank First Nation*, *supra*, at paragraph 42:

> *. . . I am aware that we are in an area that is currently sensitive and even controversial. It is clearly unfortunate in that circumstance to not have a more readily ascertainable and certain answer. As well, and lastly, I am equally aware that the determination in this matter is not within the Board's area of expertise. The Board's specialized knowledge and policy expertise as an administrative tribunal extends to labour relations matters, not the development of constitutional law, principles, or policies. Developments in that area are properly the domain of the Courts or the political or negotiating processes and their forums. As a result, the proper task of the Board in the circumstances is to attempt to make a constitutional determination in this matter as best it can in light of the existing jurisprudence, rather than on the basis of any policy considerations or any attempt at policy development in the area. That has been the conscious attempt in this decision; namely, to decide the case upon the basis of the principles and tests in the existing jurisprudence.*

In addition, the area is far from settled – it is subject to cultural and political influences – and reconciliation of the decisions is far from easy. Saskatchewan Justice declined to intervene. Indeed, counsel for the parties indicated that no matter what the decision, it would be judicially reviewed. Such positions did not make our decision easier and only served to increase the trepidation associated with it.

[142] The federal - provincial division of constitutional powers is set out in ss. 91 and 92 of the *Constitution Act*. The issue in the present case is the jurisdiction, federal or provincial, over the labour relations of AHA Inc. and specifically the AH Facility in the health services delivery employment context. Pursuant to s. 91(24) Parliament has the power to legislate with respect to "Indians, and lands reserved for the Indians." Pursuant to s. 92(7) the province has the power to legislate with respect to “the establishment, maintenance, and management of hospitals …”, and pursuant to s. 92(13) the general power to legislate with respect to “property and civil rights in the province.” The latter authority includes the mandate of *The Trade Union Act* over labour relations and employment contracts, unless the subject enterprise constitutes “a federal work or undertaking” or is an integral part of its primary competence over some other

single federal subject, in which case the labour relations jurisdiction falls under the *Canada Labour Code.*

[143] In *Northern Telecom Canada Ltd. v. Communications Workers of Canada* (1979), 79 CLLC 14,211 (S.C.C.), Dickson, J. on behalf of a unanimous Supreme Court of Canada stated the basic constitutional principles pertinent to the present case as follows at 143:

> *The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's Canadian Constitutional Law (4th ed., 1975) at p. 363:*
>
> > *In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...*
>
> *In an elaboration of the foregoing, Mr. Justice Beetz in Construction Montcalm Inc. v. Minimum Wage Commission [[1979] 1 S.C.R. 754] set out certain principles which I venture to summarize:*
>
> > *(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.*
> >
> > *(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*
> >
> > *(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.*
> >
> > *(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are*

> *removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.*
>
> *(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.*
>
> *(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.*

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd. [[1974] 1 Can. L.R.B.R. 29], provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:

> *In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.*

[144] Accordingly, exclusive provincial competence over labour relations is the general rule, as is the establishment of “hospitals” including the delivery of health care. Parliament may only assert jurisdiction over labour relations matters where such jurisdiction is “vital, essential or integral” to its primary competence over some other single federal subject – in this case, “Indians and lands reserved for the Indians” -- or as several of the governing decisions refer to it whether the matter in issue affects “Indianness.” The judgment as to which authority prevails is arrived at after an analysis of the functional and practical nature of the enterprise in question.

[145] Shortly after it decided *Northern Telecom*, *supra*, the Supreme Court of Canada decided *Four B Manufacturing Ltd*., *supra*. In that case the Supreme Court of Canada considered the constitutional authority of the Ontario Labour Relations Board to certify employees working in a shoe factory in Ontario where the factory was owned and

operated by individual members of an Indian band on reserve land. Delivering the judgment on behalf of the majority, Beetz, J. noted firstly, at 1044, that "Four B is in no way owned or controlled by the Band Council which will have no share in its profits." Beginning at 1045, he summarized the applicable law as follows:

> *In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses: . . .*
>
> *There is nothing about the business or operation of Four B which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for purposes of labour relations.* ***Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loans and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, the Labour Relations Act applies to the facts of this case, and the Board has jurisdiction.***
>
> *What is submitted on behalf of appellant is that the matter to be regulated in the case at bar is the civil rights of Indians on a reserve; that this matter falls under the exclusive legislative authority of Parliament to make laws relating to "Indians and Lands reserved for Indians" pursuant to s. 91(24) of the British North America Act, 1867"; that provincial law is inapplicable to this matter even in the absence of relevant federal law; and alternatively, that the field is occupied by the paramount provisions of the Canada Labour Code, R.S.C. 1970, c. L-1. It is argued that the functional test is inappropriate and ought to be disregarded where legislative competence is conferred not in terms relating to physical objects, things or systems, but to persons or groups of persons such as Indians or aliens.*
>
> *I cannot agree with these submissions.*
>
> ***The functional test is a particular method of applying a more general rule, namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal***

jurisdiction over some other federal object: the Stevedoring case.

Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered in order to deal with appellant's submissions is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and lands reserved for Indians. The second question is whether Parliament has occupied the field by the provisions of the Canada Labour Code.

In my opinion, both questions must be answered in the negative.

I think that it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either, the operation of which the band has expressly refused to assume and from which it has elected to withdraw its name.

But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of chiefs and band councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians. *Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy.*

The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competency to the exclusion of provincial laws of general application. In Union Colliery Co. of

> *B.C. v. Bryden, [1899] A.C. 580, the British Columbia Coal Mine Regulations Act, 1890 provided that "no boy under the age of twelve years, and no woman and girl of any age shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground". The provision was amended by the insertion of the words "and no Chinaman" after the words "and no woman and girl of any age". The amendment was held to be ultra vires the Province as relating to naturalization and aliens. But it was never suggested that the general prohibition to employ boys under the age of 12 years and women and girls of any age in any mine was not applicable to naturalized persons and aliens including persons of Chinese extraction.*
>
> ***A similar reasoning must prevail with respect to the application of provincial laws to Indians, as long as such laws do not single out Indians nor purport to regulate them qua Indians, and as long also as they are not superceded by valid federal law. In this connection, it must be noted that whereas the Indian Act, R.S.C. 1970, c.I-6, regulates certain Indian civil rights such as the right to make a will and the distribution of property on intestacy, it does not provide for the regulation of the labour relations of Indians with one another or with non-Indians. Nor does the Canada Labour Code so provide, as we shall see later. These labour relations accordingly remain subject to laws of general application in force in the Province as is contemplated by s. 88 of the Indian Act.***
>
> [**emphasis added**]

[146] The later well-known decision of the Saskatchewan Court of Appeal in *Whitebear*, *supra*, stands to be compared to *Four B Manufacturing Ltd.* In the decision of the Court delivered by Cameron, J.A., it was held that the activities of the band council in constructing housing for its members on the reserve were so directly involved with matters of Indian status rights and privileges that the labour relations with the band council should be characterized as forming an integral part of the primary federal jurisdiction over Indians and Indian lands. Cameron, J.A. stated at 133 as follows:

> *As municipal councils are "creatures" of the legislatures of the provinces, so Indian band councils are the "creatures" of the Parliament of Canada. Parliament, in exercising the exclusive jurisdiction conferred upon it by s. 91(24) of the B.N.A. Act to legislate in relation to "Indians, and Lands reserved for the Indians", enacted the Indian Act, R.S.C. 1970, c. I-6, which provides - among its extensive provisions for Indian status, civil rights, assistance, and so on, and the use and management of*

> *Indian reserves - for the election of a chief and 12 councilors by and from among the members of an Indian band resident on an Indian reserve. These elected officials constitute Indian band councils, who in general terms are intended by Parliament to provide some measure - even if rather rudimentary - of local government in relation to live on Indian reserves and to act as something of an intermediary between the band and the Minister of Indian Affairs.*
>
> *More specifically, s. 81 of the Act clothes Indian band councils with such powers and duties in relation to an Indian reserve and its inhabitants are usually associated with a rural municipality and its council: a band council may enact by-laws for the regulation of traffic, the construction and maintenance of public works, zoning, the control of public games and amusements and of hawkers and peddlers, the regulation of the construction, repair and use of buildings, and so on. Hence a band council exercises - by way of delegation from Parliament - these and other municipal and governmental powers in relation to the reserve whose inhabitants have elected it.*

[147] In *Whitebear, supra,* in applying the functional test in *Four B Manufacturing Ltd*., *supra*, Cameron, J.A. stated, at 138, as follows:

> *As I have observed, the primary function of an Indian band council is to provide a measure of self-government by Indians on Indian reserves. In enacting by-laws pursuant to their power to do so, and in performing generally their local government function, an Indian band council is doing that which Parliament is exclusively empowered to do pursuant to s. 92(24) of the British North America Act but which Parliament, through the Indian Act, has delegated band councils to do. In this sense, the function of an Indian band council is very much federal. So too, in my opinion, are their associated functions - acting at once as the representative body of the inhabitants of the reserve and the agent of the minister with regard to federal programs for reserves and their residents - and participating in certain of the decisions of the minister in relation to the reserve. Given this, the provisions of the Indian Act to which I have referred and the origin and nature, purpose and function of an Indian band council, I am satisfied that the power generally to regulate the labour relations of a band council and its employees, engaged in those activities contemplated by the Indian Act, forms an integral part of primary federal jurisdiction in relation to "Indians, and Lands reserved for the Indians" pursuant to s. 91(24) of the British North American Act.*

[148] In *Northern Lights Casino*, *supra*, at 654, the Board observed that in applying the functional test in *Whitebear*, *supra*:

> *[91] Mr. Justice Cameron focused his attention on the "normal and habitual activities" (Const. Montcalm Inc., supra, 769) of the business of the band council, not the particular activity of construction and renovation of housing which was subject to the application for certification.*

[149] The Board also observed, at 655, that the Alberta Court of Appeal took a similar approach in *Paul Band*, *supra*, -- i.e., it focused its functional analysis on the overall operation of the employer -- in determining that the labour relations of special constables employed by the band council enforcing provincial laws on reserve lands was governed federally. In *Paul Band* the Court stated as follows, at 546:

> *In enforcing provincial laws on the reserve, the band council was carrying out one of a number of powers entrusted to it by s. 81 of the Indian Act, namely, the regulation of traffic, and the observance of law and order. This was an integral part of the normal operation assigned to the band council by s. 81 of the Indian Act.*
>
> ***In determining that the Alberta Labour Act applied to the employment of a special constable by the Paul Band, the trial judge found that the band council, in employing the special constables, was engaged in a provincial undertaking because it had them appointed special constables under provincial law to enforce provincial laws on the reserve in pursuance of the provincial constitutional function in the administration of justice. In purporting to apply the functional test spoken of by Beetz J. the trial judge considered only the activity of the employees, in isolation from the principal normal activities of the employer, the band council. That was his key error.***
>
> ***This is not the functional test referred to in the authorities cited. It would result in incongruity, with some employees of a business or concern governed by provincial labour law, and others of the same business or concern by federal labour law, depending on the actual work being done from time to time. In the present case, it is shown in evidence that the appellant band council employs office staff, health workers, social workers, alcohol counselors, arena caretakers and others.***
>
> *In determining the nature of the operation of the band council, the trial judge was required to look "at the normal or habitual activities" of the council "as a going concern": [per Beetz in Montcalm] and at*

> *the legislative authority over that operation [per Pigeon J. in City of Yellowknife v. Canada, [(1977), 2 S.C.R. 729]].*
>
> [**emphasis added**]

[150] In *Northern Lights Casino*, *supra*, the Board also considered the decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, where Lamer C.J. commented on the application of provincial law of general application to First Nations people in the following terms at 1119:

> *The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.*
>
> *In other words, notwithstanding s. 91(24), provincial laws of general application apply proprio vigore to Indians and Indian lands. Thus, this Court has held that provincial labour relations legislation (Four B) and motor vehicle laws (R. v. Francis, [1988] 1 S.C.R. 1025, 51 D.L.R. (4th) 418), which purport to apply to all persons in the province, also apply to Indians living on reserves.*
>
> *Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matter touching on "Indianness" or the "core of Indianness" (Dick, [[1985] 2 S.C.R. 309] at pp. 326 and 315; also see Four B, supra, at p. 1047 and Francis, supra, at pp. 1028-29). The core of Indianness at the heart of s. 91(24) has been defined both in negative and positive terms. Negatively, it has been held to not include labour relations (Four B) and the driving of motor vehicles (Francis). The only positive formulation of Indianness was offered in Dick. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply proprio vigore to the members of an Indian band to hunt and because those activities were "at the centre of what they do and who they are" (supra, at p. 320). But in Van der Peet, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.*

[151] With respect to these comments, we agree with the observation of the Board in *Northern Lights Casino*, *supra*, at 657 that:

> *[96] We do not understand Lamer C.J. in his reference to Four B Manufacturing Ltd., supra, as overruling Francis, supra, or Whitebear, supra. The remarks were made in a general context and we assume that they are to be understood as affirming the propositions dealt with in Four B Manufacturing Ltd. as they applied to the facts of that particular case.*

[152] In *Northern Lights Casino*, *supra*, the Board reviewed and summarized a good number of additional decisions, including several cited by counsel in the present case, that bear upon the issue, and which we have reviewed. Following are the Board's observations regarding these cases at 658 through 661:

> *(1) Syndicat des travailleurs de l'enseignement de Louis-Hemon v. Conseil des Montagnais du Lac St.-Jean (1982), 50 di 190, where the Canada Labour Relations Board held that teachers at schools on an Indian reserve fell within the constitutional jurisdiction of the Canada Labour Code;*
>
> *(2) Ontario Public Service Employees' Union v. Ontario Metis and Non-status Indian Association et al., [1980] 3 Can. L.R.B.R. 328 where the Ontario Labour Relations Board held that provincial labour legislation applied to the Association because: (a) the legislation was of general application and did not attempt to regulate Indians as Indians; and, (b) the work in question was not a federal undertaking or business to which federal labour law would apply;*
>
> *(3) Manitoba Teachers' Society et al. v. Chief and/or Council of the Fort Alexander Indian Band et al, [1984] 1 F.C. 1109 (F.C.T.D.), where the Federal Court affirmed the application of the Canada Labour Code to teachers and school boards on Indian reserves;*
>
> *(4) Celtic Shipyards (1988) Ltd. v. The Marine Workers' and Boilermakers' Industrial Union, Local 1 and the Musqueam Indian Band, [1994] BCLRB No. B131/94, where the British Columbia Labour Relations Board held that a ship building business owed through the vehicle of a corporation by the Musqueam Indian Band was not subject to federal labour laws;*
>
> *(5) Kostyshyn (Johnson) v. West Region Tribal Council, [1994] 1 C.N.L.R. 94 (Fed. Ct. Tr. Div.) where the Federal Court enforced the order of an adjudicator appointed to hear and determine an unjust dismissal application brought by a former employee under*

the Canada Labour Code. The Court held that a Tribal Council was neither an Indian or an Indian Band, citing Re Stony Plain Indian Reserve No. 135, [1982] 1 W.W.R. 302 (Alta. C.A.) and Kinookimaw Beach Assn. V. R., [1979] 6 W.W.R. 84 (Sask. C.A.), leave to appeal to the S.C.C. ref'd 1 Sask. R. 179n, and, as a result, ss. 89 and 90 of the Indian Act did not prevent the garnishment of the Tribal Council's funds. However, the Court did not discuss how the Tribal Council, if it is not an Indian or Indian band, came to have its labour relations regulated by the Canada Labour Code;

(6) Sagkeeg Alcohol Rehab Centre Inc. v. Abraham, [1995] 1 C.N.L.R. 184 (Fed. Ct. Tr. Div.), where the Federal Court held that an alcohol rehabilitation centre located on the Fort Alexander Indian Reserve which received funding from the federal government and provided services primarily, but not exclusively to band members, was a matter falling within federal jurisdiction. The Court analyzed the function of the Centre as "a form of health care service designed and operated to meet the needs of its Indian beneficiaries";

(7) Nisga'a Valley Health Board v. B.C. Government Services, [1995] BCLRB No. B289/95. This case dealt with the labour relations of a health board, operated by a non-profit corporation with each Nisga'a Village Band Councils having a representative on the Board and with one representative of the Nisga'a Tribal Council. The health board operated in accordance with a transfer agreement entered into between the Indian bands in question and the Federal Department of Health and Welfare. Some provincial funds were also available to the health board. The vast majority of the people served by the health board were Indian residents of the Nass Valley. The British Columbia Labour Relations Board held that the health board fell within federal labour jurisdiction because "its purpose is the provision of health services on reserves" and "this purpose clearly falls within the functions and normal activities of Indian Band administration under Section 81(1)(a) of the Indian Act (at 18). The Board noted that the federal government retained general responsibility for health care for Indian residents of the Ness Valley, and the health board had stepped into the shoes of the band councils and federal government in providing health services to its Indian members;

(8) Canadian Union of Public Employees v. Native Child and Family Services of Toronto, [1995] O.L.R.B.D. No. 4298, the Ontario Labour Relations Board held that Native Child and Family Services did not function in the federal sphere of "Indian, or Lands reserved for the Indians" and were subject to provincial regulation with respect to their labour relations. At para. 35, the Board commented as follows:

> *In our view there is little support in the jurisprudence for*

> *the notion that Indian content, without some connection to the exercise of federal legislative power, makes an organization necessarily incidental to the federal power, attracting federal jurisdiction over labour relations. In all the cases to which we were referred, save Sagkeeng Alcohol Rehab Centre Inc., cited above, to which we will return, the finding of federal jurisdiction was in a factual context that included a fairly direct connection with the exercise of federal power in relation to Indians, for example, the operation of a Band or reserve defined by the federal government pursuant to the Indian Act, (see Francis v. Canada Labour Relations Board, [1981] 1 F.C. 225 (C.A.)(St. Regis), rev'd on other grounds [1982] S.C.R. 12, or the operation of a school pursuant to provisions of the Indian Act (Qu'appelle Indian Residential School Council, [1988] 2 F.C. 226]). Sagkeeng Alcohol Rehab Centre Inc., cited above, is an exception to this to the extent that the only federal presence appears to be funding and training. However, the Court made a link to Indian status because of the admission criteria, and to this extent, perhaps it is not to be considered an exception. As well it was located on a reserve, and there is mention of Indian health projects on reserves in the Indian Act, sections 18(2), 73(1)(g) and 81(1)(a). To the extent that it is an exception, however, the requirement of a connection to the exercise of federal legislative power is a concept which is in our view supported by higher authority as indicated in the decisions of the Supreme Court in Four B, supra, Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R. 751] and Pioneer Management [80 CLLC 14,018];*

(9) Skeetchestn Indian Band, where the British Columbia Labour Relations Board held that labour relations in regard to the operation of a band store by the Skeetchestn Band on its reserve fell under federal jurisdiction applying the functional test to the overall operation of the Band Council;

(10) Westbank First Nation v. British Columbia Labour Relations Board, [1997] B.C.J. No. 2410 (BCSC), where Tysoe J. upheld the decision of the British Columbia Labour Relations Board to certify a bargaining unit of employees employed at a long-term care facility operated on the Westbank First Nation for Indian and non-Indian persons. The home was owned by a corporation, which in turn was owned and controlled by the Band council. In this instance, the learned Justice at [para 53 - QL] applied the functional test to the business of the long term care facility, as opposed to the business of the Indian band and concluded at para. 55 as follows:

> *Although the ultimate goal may be to benefit members of the Westbank First Nation and other First Nations groups, the actual function of the Home is to provide intermediate care to a much wider group, the majority of which are not First Nations people. There is a distinction to be made between the "means" and the "end". While it may be argued that the "end" only relates to First Nations people, the "means" to accomplish the "end" is much broader and relates to a majority of non-First Nations patients. In the Four B case, (supra), the purpose of the business was to benefit the Band as a whole to improve their economic position but the means to accomplish this purpose was held not to constitute a federal business. It is the "means", not the "end", which is the relevant consideration under the functional test of the nature of the business.*

[153] In *Northern Lights Casino*, *supra*, the Board then defined its duty to apply the functional test in *Four B Manufacturing Ltd*., *supra*, in the following terms, at 661 and 662:

> *[98] In summary, then, we conclude that The Trade Union Act, being a provincial law of general application, will apply to First Nations' enterprises unless, in the words of Four B Manufacturing Ltd., supra, at 1047, "Indian status is at stake or rights so closely connected with Indian status that they should be regarded as necessary incidents of status such as the right to participate in the election of chiefs and band councils, reserve privileges, etc." In our view, this is another way of describing "the core of Indianness", which under Delgamuukw, supra, must also include those rights protected under s. 35(1) of the Constitution Act, 1982. In Francis, supra, in the Federal Court, the core of Indian status included the work of the Indian Band Council, including the provision of education, administration of lands and estates, welfare, public works, old age homes, water, sanitation, garbage collection, etc. Whitebear, supra, and Paul Band, supra, came to similar conclusions that work undertaken by a Band Council and its employees, engaged in activities contemplated under the Indian Act were functions that were central to Indian status.*
>
> *[99] Qu'appelle, supra, and Manitoba Teachers' Society, supra, reached a similar conclusion with respect to the provision of education to First Nations' children. The provision of health care services on reserve land for the primary benefit of First Nation's members has also fallen within the core of Indian status in Sagkeeng, supra, Nisga'a Valley Health Board, supra, but not in Westbank where the service was operated for the broader community as a commercial enterprise. A Band-owned store*

> *qualified as part of the core of Indian status in Skeetchestn, supra, while a ship building and repair company did not in Celtic Shipyards, supra.*
>
> *[100] In our view, the functional test set out in Four B Manufacturing Ltd., supra, as applied by the Court of Appeal in Whitebear, supra, requires the Board to examine the operations and normal activities of the FSIN and SIGA to determine if the labour relations of SIGA are governed by The Trade Union Act. The FSIN established the agreements which led to the creation of SIGA; it established a legislative framework for the operation of First Nations' casinos; it controls the operations of SIGA through the Board of Directors; and, it controls the distribution of casino profits among First Nations.*

[154] We are in agreement with these observations. Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule. The essential test to be applied in the determination of jurisdiction in the present matter is clear: the "functional test"; namely, the nature of the operation in terms of its normal or habitual activities. The jurisprudence reviewed above requires that, in applying the functional test to the present case, we must examine the nature of the normal and habitual operations and activities of AHA Inc., particularly in respect of the AH Facility, and not the casual or exceptional aspects.

[155] As background, AHA Inc. is a provincially-incorporated non-profit corporation, the membership of which is made up of the Black Lake and Fond du Lac First Nations and the Northern Settlements of Uranium City, Stony Rapids and Camsell Portage and the representatives of such members act as the directors of the corporation. The AH Facility is owned by AHA Inc., not by the Black Lake First Nation on whose land it is located. The province retains a right of access to the AH Facility should the Black Lake First Nation withdraw from membership in AHA Inc. Ostensibly, the province provided the majority of the funds for the construction of the AH Facility – some 7 or 8 million dollars to the federal government's 3 to 4 million. Thereafter, the province provided and continues to provide operating funds, while the First Nations members of AHA Inc. contribute whatever monies are received by them from the federal government or the Prince Albert Grand Council for health services (UM agreement article 16). A member of AHA Inc. may not transfer its interest in the corporation without the consent of the province (UM agreement article 3.01). Amendment of the UM agreement must meet conditions agreed to by the province (UM agreement article 19.06).

[156] The stated mandate, purpose and function of AHA Inc. is to provide comprehensive health services to all persons residing in the vast Athabasca Basin, both First Nations and non-First Nations, that were previously delivered by diverse funders and service providers, including UCMH. Within that framework, the particular purpose and function of the AH Facility is to provide the medical diagnostic and acute care services which, it should be noted, was the function and purpose of UCMH until the AH Facility commenced operation.[13] In our view, there is no doubt that the AH Facility was intended to replace and did in fact replace, the provision of exactly similar diagnostic and acute care services as were delivered by UCMH. Uranium City was at one time the largest population centre in the Athabasca Basin and UCMH was the primary provider of medical diagnostic and acute care services to the region's population, including all First Nations and non-First Nations residents.

[157] This mandate and purpose was envisioned in several of the documents reviewed in the first part of these Reasons for Decision. For example, as early as 1996 the recitals to the framework agreement stated, in part, as follows:

> *Whereas all parties hereto acknowledge:*
>
> *The benefits of co-ordinating and integrating all health services delivered in the Athabasca Region; and*
>
> *That a governance structure is required which is capable of providing efficiently and effectively health services to* ***all residents of the Athabasca Region and which is accountable to the residents of the Athabasca Region****; and*
>
> *The importance of establishing* ***a health facility*** *in the Athabasca Region operated by a governance structure* ***which represents the best interests of the communities which the facility is to serve****.*
>
> [**emphasis added**]

[158] The final report of June 2001 echoed these objectives. The second paragraph of the Executive Summary states as follows:

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[13] In a letter to the Union dated May 28, 1998, regarding the restructuring of staffing patterns at the hospital, UCMH stated that, "Sask. Health, the Board of Governors and management believe this is a feasible plan

> *The Athabasca [Basin] faces challenges related to its distance from larger health centers, different languages, cultures, and isolation between communities. Long-term commitment by the [Athabasca Health] Authority is needed* ***to achieve equal access to services for all residents of the Basin****.*
>
> [**emphasis added**]

[159] Under the heading, "Challenges," at page 2 of the Executive Summary, the authors of the final report state as follows:

> *AHA's primary task is the creation of a new organization* ***that integrates the health care needs of First and non-First Nations people into one equally accessible service****.*
>
> [**emphasis added**]

[160] Under the same heading, the authors of the final report made the following observations regarding the practical difficulties associated with the integration of services delivered by diverse funders and providers and with respect to the perception of the identity of the "employer" stating as follows:

> *Differences in funding and benefits for First Nation and non-First Nation programming will challenge AHA as it strives to offer equality of and access to health services to everyone.* ***The Province of Saskatchewan has a responsibility to provide health services, including care provided in hospitals, health insurance, home care, public health, long term care, care for the mentally ill, health promotion, and disease prevention to all residents regardless of their status.***
>
> ***The federal government has a treaty-based responsibility for community health services for First nation people over and above those provided by the Province.*** *There are funding programs that exist which have elaborate eligibility criteria and administrative components attached to them (i.e. Non-insured Health Service Benefits).*
>
> *. . . .*
>
> *The issue of "Who is the employer?" has been a predominant concern of present and potential employees. AHA Inc. was encouraged early on to start creating a 'corporate' image by*

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that will ensure continued access to health care & hospital services **for the residents of the Athabasca Basin**." [**emphasis added**]

> *choosing a Logo, distributing a Newsletter, and increasing communication with its communities.* ***It is important for potential staff to know that they will be employed by AHA and managed by its CEO, not by a particular person, Band, or community****.*
>
> [**emphasis added**]

[161] Under the heading, "Community," in the Executive Summary, the final report recognized the role in the operation and direction of AHA Inc. of the diverse communities in the entire Athabasca Basin, stating in part as follows:

> *It is important to promote inclusion of community members in the development of programs and services to address health care needs. The Authority must be aware of community activities and opportunities that will improve health determinants.*

[162] Under the heading, "Evaluation," the final report stated in part as follows:

> ***Success is dependent on the transfer of all funds and positions that have been utilized in the direct and indirect provision of services to the residents of the Athabasca Basin.***
>
> [**emphasis added**]

[163] This vision was embodied as a sort of "mission statement" in the recitals to the UM agreement of AHA Inc. as follows:

> *1. The Members desire to promote the health and well being of* ***all residents of the Athabasca Health Authority Region*** *through the delivery of comprehensive health services to* ***all communities and all residents of that region****.*
>
> *2. The Members have agreed through their ratification of and signatures to the Framework Agreement and through their record of understanding regarding the establishment of the corporation and the construction of the Athabasca Health Facility dated August 13, 1996 to jointly establish the Corporation for the purpose of governing and managing:*
>
> > *(a) the delivery of comprehensive health services to* ***all residents of the Athabasca Health Authority Region****; and*

> *(b) the construction and subsequent operation of the Athabasca Health Facility on the Chicken I.R. No. 224.*

[**emphasis added**]

[164] The requirement that AHA Inc. provide health services equitably to all residents of the Athabasca Basin is set out in articles 2.06 and 4.14(a) of the UM agreement:

> *2.06 The Members agree that **equity in the provision of health and health-related services will be sought**, including the provision of transportation to essential services, the provision of community-based and regionally-based services, and the delivery of services through a variety of delivery mechanisms including itinerant health care providers, on-site health-care providers, and the coordination of visits to health care facilities.*
>
> *4.14 The Directors responsibilities shall include:*
>
> > *(a) developing policies and objectives and strategies regarding health service delivery and the health status of **residents of the Athabasca Health Authority Region**;*

[**emphasis added**]

[165] These statements of object and purpose in the several years leading up to the commencement of operation of AHA Inc. and the AH Facility were subsequently put into a practice that constitutes their normal and habitual activities. Services are provided to all residents of the Athabasca Basin. Services are provided equitably to all residents with no policy or practice of priority for members of the First Nations.

[166] The accountability of AHA Inc. to the Athabasca Basin as a whole is reflected in the requirement that the corporation hold at least one regular board meeting and one public forum in each member Northern Community or First Nation each year (UM agreement, article 5.11).

[167] While the band councils of the First Nations' members of AHA Inc. may have made bylaws in accordance with s. 81(1) of the *Indian Act* "to provide for the health of residents on the reserve" and certain ancillary health services after devolvement from the federal government to the Prince Albert Grand Council, historically, they did not

provide the medical diagnostic and acute care services to their residents that were provided at UCMH and now at the AH Facility. The fact that the locus of the provision of these services is now on the Chicken Reserve on land leased from the Black Lake First Nation instead of at UCMH in Uranium City is of little relevance to the issue of the labour relations jurisdiction over the employees of AHA Inc. at the AH Facility (See, *Four B Manufacturing*, *supra*). Should the Black Lake First Nation withdraw from membership in AHA Inc., the province retains a right of unrestricted access to the AH Facility for the balance of the 99 year lease period so long as the facility is used for the delivery of health care services.

[168] The staff of AHA Inc., including those who work at the AH Facility, are not employed by any First Nation, they are employed by AHA Inc. The policies and operation of AHA Inc. are not governed by the band councils of its First Nations members but by the representatives of all of its members who are the directors of the corporation. Its day-to-day operations are directed by its own officers and administrators.

[169] It appears to the Board that the functions performed by AHA Inc. and particularly the AH Facility – i.e., the equitable provision of health services to all residents of the Athabasca Basin -- are either separate and distinct from normal band council functions or historically have not been undertaken by the band councils in the present case. The band councils (either directly or through the Prince Albert Grand Council) have never delivered comprehensive health care services, and particularly diagnostic and acute care medical services, to non-First Nations residents of the Athabasca Basin; and therefore they had certainly never consulted with non-First Nations residents or other communities in the Athabasca Basin as to the nature, mode of delivery and protocols of such services. Even if in the past they have provided some services to their own band members that are presently being provided by AHA Inc., it was a relatively much smaller range and scope of services. Furthermore, even with respect to those limited services, they have now, through the Prince Albert Grand Council, devolved responsibility for their provision and the authority to determine the nature and range of such services, the mode of delivery and the protocols for review and change, to a provincial corporation mandated to provide equal access to comprehensive medical services to all residents of the vast Athabasca Basin.

[170] As noted by the Board in *Northern Lights Casino*, *supra*, at 662, in *Francis*, *Whitebear*, *Paul Band* and *Skeetchestn*, all *supra*, the employees in question were employees of the band councils who were engaged to provided the subject services to members on the reserves and in *Qu'appelle*, *Manitoba Teachers' Society*, *Sagkeeng*, and *Nisga'a Valley Health Board*, all *supra*, the provision of education and health services, which are services that have devolved from the federal government to First Nations, were continued under the federal legislative powers. However, we find the situation in the present case to be much more consonant with the situation in *Westbank First Nation*, *supra*, than in those cases.

[171] There are many similarities between the situation in the present case and those which pertained in *Westbank First Nation* and *Sagkeeng*, both *supra*, that do not exist in relation to any of the other cases cited by the parties. While the facts of these two cases are briefly outlined, *supra*, it serves to examine them in more detail, particularly since the decisions arrive at different conclusions.

[172] In *Westbank First Nation*, *supra*, the First Nation established a long-term care facility on its lands in 1983. The facility was originally owned directly by Westbank First Nation and in 1989 ownership was transferred to the West Bank First Nation Development Co. Ltd. and the facility expanded its operations to provide intermediate care to residents of communities in the South Okanagan area whether or not they were First Nations. The shares in the company were held by the chief and councillors of Westbank First Nation. In 1995, the British Columbia Government Employees' Union and the British Columbia Nurses' Union applied to the British Columbia Labour Relations Board to be certified to represent two units of employees at the care facility. The B.C. Board ruled that the facility came under provincial jurisdiction and that B.C. Board had jurisdiction to entertain the applications for certification. An application for reconsideration was dismissed by the B.C. Board. The jurisdictional issue came before the British Columbia Supreme Court in the context of a subsequent decertification application by the employer that was dismissed by the B.C. Board.

[173] In the decision dismissing the employer's application for judicial review Tysoe J. referred, at 232 and 233, to certain salient facts from the Board's decision on jurisdiction, which we have summarised as follows:

- The Administrator of the facility reported to the Westbank First Nation Administrator, Portfolio Head, who in turn reported to the Westbank First Nation.

- The facility was designed to address the needs of the Westbank Indian Band by providing health services in a culturally appropriate way

- The facility attempted to provide those services which are needed by native people and often not otherwise available, such as, a drug and alcohol counselling program for people over 65, which was funded by the Band.

- The facility also provided an avenue for native people who needed to do community service, as well as opportunities for summer work and school experience.

- The facility attempted to create employment for Band members among the staff and has done so to the following extent that 33% of the service staff, 53% of the institutional care staff, and 60% of the support staff were Band members.

- A goal of the facility was to create employment opportunity for Band members and First Nations people.

- The number of residents at the facility fluctuated. At the time of the application the total was 49, of whom one was a registered member of the Westbank Indian Band, 10 were First Nations people, and three were private paying patients (i.e., not entitled to provincial health care funding). There were 35 non-native British Columbia residents in the facility for whom the facility received payment from the province for services rendered.

- The facility had always satisfied the requests of Band members for palliative care.

- The facility provided service to Band residents, but also to the non-native residents of the reserve and to the residents in the Kelowna area in general.

[174] In its decision, the B.C. Board indicated that prior to certification the facility had operated according to federal standards and under the purview of the Canada Labour Code:

> *14. Although covered by the provincial Workers' Compensation scheme, Pine Acres Home is not covered by provincial zoning laws or building standards. It is subject to federal health and safety standards. As well, all labour relations to date have been through Labour Canada under the Canada Labour Code, Adjudicator Chertkow's decision being a leading example. Other than the development of a means to obtain security through incorporation, the functional control of Pine Acres Home remains with the Band. Thus, the Employer has operated Pine Acres Home with the view that it falls under the Canada Labour Code.*

[175] On judicial review, additional facts that were considered by the learned chambers judge are set out in the judgment at 233 through 235, which we have summarized as follows:

- At no time since the facility opened had the number of full-time native employees been less than 46% of the total number of employees.

- The proportion of patients of the facility who are First Nations people varied over the years. In March 1984 it was 56% (9 of 15); in March 1988 it was 74% (14 of 19); in March 1995 it was 21% (11 of 51); and in December 1995 it was 32% (19 of 59). The employer maintained that the policy of the facility was to give priority to Westbank Band members first, other natives second and non-natives third.

- The Band obtained authority from the Department of Indian Affairs and Northern Development to administer its own low rental intermediate care program pursuant to a Band resolution when the facility was first constructed.

- The facility was constructed by the Band in 1983 under the direction of the Band Council.

- The facility operated on unallocated and unencumbered Band land which was managed by the Band.

- The Band arranged financing for the construction of the facility.

- The Band Council selected and employed the facility administrator.

- An information package and letters sent out in 1987 showed that the facility focused primarily on seeking native patients.

- The facility has an Indian motif and displays Indian art work.

- The Band Council undertook the major tasks in expanding the facility in 1988,1989 and 1993.

- The expansion of the facility was partially financed by a contribution agreement with the federal government, which provided for a non-repayable contribution of $400,500 and a repayable contribution of $200,000. Conditions of the contribution agreement included (i) obtaining the support of the Department of Indian Affairs and Northern Development and the B.C. Ministry of Health for the expansion, (ii) obtaining service provider designation from the B.C. Ministry of Health, and (iii) initiating a plan to train and employ native women.

- The Band Council continued to deal with funding and servicing for the facility.

- In the Band's financial statements, the facility was shown as a non-corporate entity owned and controlled by the Band and any revenue over expenditures were allocated to the Band, not the Company.

- The facility became a bona fide public institution under the Excise Tax Act in 1984.

- The facility was shown as being operated by the Band for Revenue Canada purposes and, as such, was not subject to taxation.

[176] Indeed, on the basis of the facts, both the B.C. Board and the learned chambers judge (at 235) accepted that that the facility was controlled and operated by the Band Council.

[177] In the judgment, the Court distinguished the decisions in *Whitebear* and *Sagkeeng*, both *supra*, which had held that the labour relations jurisdiction in those cases was federal. With respect to the latter decision, the rationale of the decision of the Federal Court in that case that we say distinguishes the decision from the present case is as follows, at 460-61:

> *The evidence before me indicates that the features of the applicant distinguish it from the facts in Four B, supra. We are not here concerned with an ordinary manufacturing business carried on on an Indian reserve. Rather, the rehabilitation centre in question is engaged in the provision of a form of health care service designed and operated to meet the needs of its Indian beneficiaries.*

> *The fact that the rehabilitation centre is organized and operated primarily for Indians, governed solely by Indians, that its facilities and services are intended primarily for Indians, that its staff are specially trained under the [National Native Alcohol and Drug Abuse Program] and receive First Nations training, and that its rehabilitation program, curriculum and materials are designed for Indians, all serve to identify the inherent "Indianness" of the centre and link it to Indians.*
>
> *The inference that I draw is that, for admission purposes, Indians are given priority over others. The applicant's focus is primarily on Indians and its facilities are available first and foremost to Indians. The question of eligibility for admission therefore, is integrally bound up with Indian status.*

[178] On judicial review of *Westbank First Nation*, *supra*, the learned chambers judge observed as follows with respect to both *Sagkeeng* and *Whitebear*, both *supra*, at 242 and 243:

> *In Whitebear, Paul Band and Sagkeeng, the Courts found that the operations in question were inextricably linked to "Indians and Lands reserved for the Indians" with the result that they were federal operations.*
>
> *In Whitebear, the construction of houses on the reserve was conducted exclusively by and for members of the band. The Court found that this activity could not be separated from the operations of the band council as a whole. In Paul Band, the function of the constables was to regulate traffic and to observe law and order on the reserve. The Court held that this was part of the operations of the band council. Finally, in Sagkeeng, the rehabilitation centre was truly designed for Indians. Its function was specifically to assist Indians to overcome their addiction to alcohol and only a negligible portion of the residents of the centre were non-Indians.*

[179] In concluding that the B.C. Board was correct in its decision that the province had jurisdiction over the labour relations of the long-term care facility, Tysoe, J. stated as follows, at 243 through 245:

> *In Four B, the Supreme Court of Canada directed that the fundamental issue is whether the business, having regard to the functional test of the nature of the operations, can be characterized as a federal business. In considering the nature of the operations, one must look to the normal or habitual activities, not its exceptional or casual aspects. Taking this into account, it is*

my opinion that the business of Pine Acres Home cannot properly be characterized as a federal business and, accordingly, its labour relations are governed by the provincial legislation.

The normal activity of Pine Acres Home at the time of the Jurisdictional Decision was to provide intermediate care to residents of the South Okanagan community. *While the Home's stated policy has been to give priority to First Nations patients, the percentage of such patients in the Home was only in the range of 21 to 32% in 1995 and there is no evidence that it has been necessary to invoke the policy, at least since the expansion of the Home. In order to make the provision of intermediate care to First Nations people economically viable, the Council of the Westbank First Nation made the decision to expand the Home and make it more available to non-native residents of the South Okanagan community.* ***Unlike the situations in Whitebear, Paul Band and Sagkeeng, the running of the Home goes beyond the governance of band members by the Band Council. The involvement of non-First Nations patients is more than an incidental part of the business.***

Although the ultimate goal may be to benefit members of the Westbank irst Nation and other First Nations groups, the actual function of the Home is to provide intermediate care to a much wider group, the majority of which are not First Nations people. There is a distinction to be made between the "means" and the "end". While it may be argued that the "end" only relates to First Nations people, the "means" to accomplish the "end" is much broader and relates to a majority of non-First Nations patients. ***In the Four B case, the purpose of the business was to benefit the Band as a whole to improve their economic position but the means to accomplish this purpose was held not to constitute a federal business. It is the "means", not the "end", which is the relevant consideration under the functional test of the nature of the business.***

. . .

As Beetz J. stated in Four B, ***neither the ownership of the business, nor the employment by that business of First Nations people, nor the carrying on of that business on a reserve, nor federal funding for the business, taken separately or together, have any effect on the operational nature of that business. As in Four B, neither Indian status nor any right closely connected with Indian status of the nature discussed by Beetz J. is at stake in the case at bar.*** *The power to regulate the labour relations of Pine Acres Home does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for Indians.*

> *Based on the functional test of the nature of its operations, the business of Pine Acres Home is not a federal business. The present situation falls under the general rule that provincial legislation governs labour relations, as the exception for federal jurisdiction has not been established.*
>
> [**emphasis added**]

[180] In *Westbank First Nation*, the British Columbia Court of Appeal dismissed the appeal by the employer at [2000] B.C.J. No. 501 (B.C.C.A.).

[181] As in *Four B Manufacturing Ltd*. and *Westbank First Nation*, both *supra*, neither the partial ownership of AHA Inc. by First Nations nor the employment by it of some First Nations people nor the carrying on of its business on a reserve nor the federal contribution to funding for the business, taken separately or together, has any effect on the operational nature of AHA Inc. To this we might add nor is there any effect on the operational nature of AHA Inc. by its classification as a "band empowered entity" for tax purposes (the business in *Westbank First Nation* was similarly exempt under the tax laws at that time) nor the fact that the AH Facility has both an English and a Dene name and an aboriginal-inspired logo.

[182] In our opinion, in the present situation, there are not even as many or as cogent indicia to support an argument that AHA Inc. is a federal business. The nature and habitual activity of AHA Inc. is to deliver comprehensive health care services to all residents, both First Nations and non-First Nations, in the Athabasca Basin. The policy direction, administration, development of care protocols and day-to day operation of AHA Inc. is even more distanced from the band councils of the Black Lake and Fond du Lac First Nations than was the operation of the long-term care facility from the band council in *Westbank First Nation*, *supra*. The province has a deep and continuing active role in the funding and operation of AHA Inc. as a vehicle for the delivery of health services to all the residents of the area, which is within provincial jurisdiction. Analyzed functionally, the undertaking in question is the delivery of culturally responsive health services -- this does not make it a federal undertaking. Even if an obligation by the federal government to provide the services in question to the relevant First Nations is assumed, it is not reasonable to assert that all federal treaty obligations must be met exclusively within enterprises comprised solely of employees governed by federal labour

laws. Historically, the diagnostic and acute care needs of the First Nations residents in the Athabasca Basin were met by UCMH. In the present case, the Indian aspects of health care, although of great significance and importance, are supplemental to the primary mandate of providing equal health services to all.

[183] With respect to the function and operation of AHA Inc. and the AH Facility neither Indian status nor any right closely connected with Indian status of the nature discussed by Beetz J. is at stake. The power to regulate the labour relations of AHA Inc. and the AH Facility does not form an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians. The business is not a federal business and it falls under the general rule that provincial legislation governs labour relations.

B. The Successorship Issue

[184] The Union alleges that AHA Inc. is a successor to UCMH within the meaning of s. 37 of the *Act*. The Employer denies that that is the case. The Board has exclusive jurisdiction to determine the issue: *Service Employees International Union, Local 336 v. Eastend Wolf Willow Health Centre*, [1993] 1st Quarter Sask. Labour Rep. 52 (Sask. C.A.).

[185] The statutory elements for the application of s. 37 were outlined by the Board in *Cana Construction Inc.*, *supra*, as follows:

> (1) a predecessor employer who is certified by an order of the Board or who is party to a collective agreement;
>
> (2) a sale, lease, transfer or other disposition of the predecessor employer's business or part of its business to the alleged successor employer; and
>
> (3) a refusal by the alleged successor employer to recognize either the certification order or the collective agreement.

[186] The purpose of s. 37 of the Act was succinctly stated by the Board in *603195 Saskatchewan Ltd.*, *supra*, as follows at 139 :

> *Section 37 of The Trade Union Act provides for a transfer of collective bargaining obligations when a business or part of a business changes hands. It represents an effort on the part of the legislature to safeguard the protection which employees have achieved through the exercise of their rights under the Act, when the enterprise in which they are employed is passed on as a result of negotiations or transactions in which they have no opportunity to participate. The protection provided by Section 37, however, does not apply to all cases where an employer disposes of his business, and the determination as to whether the means by which a business has changed hands brings the new entity under the obligations which flow from Section 37 is often a matter of some complexity.*

[187] The difficulty in arriving at a decision has been recognized by all labour relations tribunals. In many of its decisions the Board has referred with approval to the following well-known statement on the issue by the Ontario Labour Relations Board in *Canadian Union of Public Employees v. Metropolitan Parking Ltd*., [1980] Ontario L.R.B.R. 1193, at 1205:

> *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a going concern, something which is carried on. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a business from an idle collection of assets...*
>
> *This distinction is easily stated, but the problem is, and has always been, to draw the line between a transfer of a business, or a part of a business and the transfer of incidental assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue shall be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in the business, or has set up a new business which resembles the old one in many respects.*

[188] It is not necessary that we find there was a transfer or acquisition of a business in the strict legal sense that pertains in other areas of law outside labour

relations (e.g., conveyancing, insurance, contracts, etc.) in order to find that AHA Inc. is the successor employer to UCMH. In *Eastend Wolf Willow Health Centre*, *supra,* the Saskatchewan Court of Appeal described the Board's jurisdiction in this regard as follows at 53 through 56:

> *The Labour Relations Board concluded, after reviewing the state of integration and the degree of operation of the Centre, that its jurisdiction was engaged and, further, that it was appropriate to make the order sought. The Board said, inter alia:*
>
> > *Under Section 37 of The Trade Union Act, it is the transfer of something which is recognizable as the same 'business' or at least 'part of a business' that serves to impose on the successor the obligation to assume the collective bargaining relationship to which the predecessor was a party.*
> >
> > *. . .*
> >
> > *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.*
>
> *When the matter was raised in Queen's Bench Chambers on an application to quash, many issues, including the use of the transcript and the current state of the law in the Supreme Court on the standard of review of decisions of a board of this type were raised. The chamber judge did indeed, after concluding it was appropriate for him to do so, conduct an analysis of the evidence, addressing what he thought to be the pivotal question, that is, was there any evidence upon which the Board could conclude that the Centre was a successor employer. He said:*
>
> > *However, the Board goes on to say that 'the employer (i.e. the Centre) characterizes itself as a successor employer for employees of both of the previously existing facilities'. In my view, this statement is not supported by the evidence. The evidence of Mr. Grant does not indicate that he considers that the Centre is presently the employer of the employees previously employed by the Lodge and the Hospital, although it is fair to say that he envisages this will be the case when the appropriate agreements have been made, the necessary legislation passed, the additional construction completed and all of the employees then being housed in the new buildings.*

> *But my above review of the evidence makes it clear that none of these steps had occurred at the time of the hearing.*

Taking this view, he then quashed the order for vote as premature.

. . .

. . . Facts, of course, do not exist in a vacuum. The Labour Relations Board and the chamber judge both focused on facts they found to be significant. More fundamentally, however, each had in mind an interpretation of s. 37. An analysis of the facts is impossible without deciding what the superstructure, that is, the meaning of s. 37, is.

The Board, in our view, took a less rigorous and legalistic view of the meaning of successor in s. 37 than that ultimately taken by the chamber judge. The Board, in its decision, was not prepared to limit itself to indicia of transfer of title or assets of a nature which might be more pertinent in the context of, for example, financing arrangements, insurance contracts or other such matters. It determined that for the purposes of labour relations less rigorous characteristics than formal legal transfer were adequate to engage s. 37. It concluded it ought, as it put it, to attempt to "discern the beating heart of an enterprise" *and relied on factors such as the fact that the Centre had been incorporated with a board of directors, which board was composed of the directors of the two founding institutions. It also noted that funding had been approved, a new building had been built and the first phase of construction was complete. Employees had been selected in the name of the Centre and had begun work. Further administration was being carried out in the name of the Centre and residents had moved into the new building. It saw this as adequate to find the new entity to be successor employer.*

The chamber judge turned his attention to these facts, and concluded as noted above that they were not in his view adequate to engage s. 37.

However, it is clear that his analysis and rejection of the evidence before the Board was based on a more strict and rigorous definition of what constitutes a successor employer under s. 37.

We are of the view that the fundamental question which he failed to answer was whether the Board's interpretation of s. 37 was patently unreasonable. To emphasize facts of lesser traditional legal significance in the Board's judgment and those of more concrete significance in parallel areas for example, property law, begs the real question.

The authorities, including Corn Growers, supra, make it clear that ***it is within the purview of the Board to interpret s. 37*** *and on an application to quash, the first question to be asked by the reviewing court is whether the interpretation is patently unreasonable. To jump immediately to an analysis in the facts premised on a different*

> *interpretation does not serve.*
>
> ***In the circumstances we have looked at the interpretation of the Board of s. 37 and cannot in the circumstances find it to be patently unreasonable. It does not, as noted, apply to other areas of the law, such as financing, conveyance of property or insurance, where a more precise and predictable delineation of the moment of transfer may be appropriate. The Board is interpreting s. 37 for the purposes of labour law alone. This is its function. We cannot say that the lesser test set by it is patently unreasonable in context.***
>
> *We are of the view that this is the first issue which should have been addressed by the chamber judge.* ***The review of the evidence, given this answer, should have been conducted on the definition put forward by the Board, not on the more restrictive definition of the chamber judge.***
>
> *In summary we are of the view that the Board's findings of fact were unimpeachable, that its construction of s. 37 was not patently unreasonable, and that its conclusion ought not therefore to have been interfered with.*
>
> [**emphasis added**]

[189] This was stated in another fashion by the Ontario Labour Relations Board in *Hotel Employees Restaurant Employees Union v. Accomodex Franchise Management Ltd*., [1993] O.L.R.B. Rep. April 281, at 291 and 295:

> *However, when interpreting section 64, the board has not adopted this mechanical, literalist approach, nor has it automatically embraced common or commercial law concepts. The Board has recognized that it is dealing with a statutory code of rights and obligations which have few common or commercial law antecedents. Indeed, when one examines the subject matter of the statute, it becomes readily apparent that it involves concepts for which there is no common-law foundation, and for which a dictionary will not provide much assistance.*
>
> *. . .*
>
> *As a result of section 64,* ***bargaining rights are not coextensive with commercial ownership or the continuing identity of the owner, nor does it matter who the new owner comes to have possession of the instruments necessary to carry on all or part of the functions of the predecessor. Bargaining rights continue with a continuation of the business undertaking or a part of it.*** *The cases explore just what those instruments or elements of the business are, and what can be said to be the essence of the undertaking - land, equipment, location, employee*

> *skills, licences, patents, etc.* ***They consider, from a labour relations perspective, whether a sufficiently-coherent grouping of those things has been transferred so as to warrant a continuation of bargaining rights.***
>
> [**emphasis added**]

[190] This Board expanded on these concepts in *603195 Saskatchewan Ltd*., *supra*, where it stated as follows at 141 and 142:

> *In these cases, labour relations boards, including this one, have stated that in determining whether a successorship has occurred which will impose bargaining obligations on the successor employer, a tribunal should be less concerned with the legal form assumed by a transaction than with the essential features of the business entity which comes into existence in comparison with that which has been disposed of, and whether those features in the new business somehow draw their character from the old business. In the Versa Services decision, supra, this Board made the following comment:*
>
> > *.... It may be obscured by a dizzying variety of technical legal or commercial forms, it may display puzzling or conflicting features, it may have quite a different character than the entity which was previously in existence, but a successor may still be identified because of the transmission of some imponderable and organic essential quality from the previous employer. This transmission is not tied to specific work, individual employees, or, naturally, the employment relationship which was already in existence.*

[191] Prior to 2003, UCMH was the provider of diagnostic and acute care medical services to the population of the Athabasca Basin. Difficult cases beyond the means of UCMH were airlifted south to La Ronge, Prince Albert or Saskatoon. Due to the closure of mines in the area in the early 1980's, the population of and general services available in Uranium City slowly dwindled. After a time it was no longer a logical locus for the provision of medical services to the Athabasca Basin and it made no sense to modernize and upgrade UCMH. As described earlier in these Reasons for Decision, in-depth studies concluded that the more centralized area of the Black Lake First Nation and the Northern Settlement of Stony Rapids, together the now largest population concentration in the Athabasca Basin, was the appropriate place to locate a new modern diagnostic and acute care facility, the AH Facility, and the head office of a comprehensive health services delivery entity, AHA Inc.

[192] Planning and construction took several years. As evidenced by the minutes of the meeting of the steering committee of May 15, 1995 and the framework agreement of 1996, it was envisioned that UCMH would be decommissioned when the new health facility was ready and that the employees of UCMH including doctors, nurses, and support staff (including members of the Union), would be transferred to the AH Facility. The minutes provided in part that:

> *. . .rights of current Uranium City Hospital employees will be protected. Collective Bargaining units will go with transferring employees.*

[193] The framework agreement provides, at page 7, that:

> *That Athabasca Health Authority Inc. shall offer employees of Uranium City Municipal Hospital and employees of Saskatchewan who are affected by the creation of the non-profit corporation and the construction of the new facility employment at their existing salary and with their existing seniority and benefits.*

[194] The responsibilities of the directors of AHA Inc. include the implementation of the framework agreement (article 4.14 of the UM agreement).

[195] Arguably, bargaining rights acquired by employees through the exercise of rights in accordance with s. 3 of the *Act* constitute a benefit to employees – and certainly, the responsibilities and obligations of an employer under a duly negotiated collective agreement constitute benefits that enure to the benefit of the employees in the bargaining unit. The maintenance of the integrity of the existing bargaining units at the UCMH likewise are of a benefit to the employees affected by the closure of UCMH and the opening of the AH Facility.

[196] Before the incorporation of AHA Inc., from 1996 to 1998, UCMH was used as a vehicle for the flow-through of funding for the design of the AH Facility and the offices of AHA Inc., and held GST rebate funds in trust for AHA Inc. for when it would eventually be incorporated.

[197] The AH Facility partially opened on June 1, 2003 for the provision of diagnostic and out-patient services only at the same time that activities at UCMH were being wound down. The AH Facility opened fully on July 1, 2003, to provide acute care services. UCMH had been closed permanently the day before on June 30, 2003. Had UCMH simply been closed and no facility like the AH Facility simultaneously opened, the Athabasca Basin would have been without regional diagnostic and acute care medical services. However, the opening of the AH Facility ensured that exactly the same services as those provided at UCMH continued to be provided.

[198] At or before the opening of the AH Facility UCMH doctors, nursing staff, and other employees and some equipment and supplies were moved to the AH Facility. Other equipment was moved to the community treatment nursing station that opened in Uranium City managed by AHA Inc.

[199] AHA Inc. had offered to consider the Union's full-time and part-time permanent employee members (but not relief employee members) at UCMH for employment at the AH Facility requiring that the employees make application for employment – employment that would be on new terms and conditions without application of or reference to the existing collective agreement. In our opinion, AHA Inc. had no right to do this. A successor employer cannot treat the employees of the predecessor as job applicants. This was confirmed by the Board in *Battlefords Ambulance Care Ltd*., *supra*, at 612 and 613, where it cited with approval the decisions of the Ontario Labour Relations Board in *Emrick Plastics Inc.* and *Daynes Health Care Limited,* both *infra:*

> *In Emrick Plastics Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 195, [1982] 3 C.L.R.B.R. 163, the Ontario Labour Relations Board considered an argument similar to the one put forward by WPD and, applying a purposive interpretation of the Ontario counterpart to our s. 37, concluded as follows at 171:*
>
> > *Nowhere in the Kelly Douglas decision [[1974] 1 C.L.R.B.R. 77] did the B.C. Board suggest that a successor employer was free to select its employment complement free from the provisions of the governing collective agreement. On the contrary, that Board*

in M.M. Pruden, [[1976] 1 C.L.R.B.R. 138; quashed 69 D.L.R. (3d) 713 (B.C.S.C.)] stated, at page 143:

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

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

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

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

> *Where the sale of a business occurred, the Balmoral employees [predecessor's employees] did not revert to the status of "laid off employees" or employees who had been*

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

[200] The Board also described the operative effect of s. 37, at 617:

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

[201] On the basis of all the evidence we find that the transition of service provision from UCMH to AHA Inc. was seamless and that AHA Inc. acquired all or part of the business of UCMH – the "beating heart of the enterprise" so to speak. Accordingly, we find that, effective June 30, 2003, AHA Inc. became the successor employer to UCMH and under s. 37 of the *Act* is bound by all orders of the Board and the pertinent collective agreement as bound UCMH. AHA Inc. shall forthwith comply with all applicable obligations and responsibilities as a result thereof.

[202] We recognize that it has been some considerable time since we heard this application and we note from some of the jurisprudence in the area that this is not necessarily unusual. Undoubtedly there will be matters relating to the implementation of this decision that will require negotiation between the parties or perhaps even further application(s) to the Board. In the context of the amount of time that has elapsed since this application was heard, we have considered the recent decision of Zarzeczny J. in *Tora Regina (Tower) Limited v. United Food and Commercial Workers, Local 1400 and Saskatchewan Labour Relations Board* 2007 SKQB 385. The *Tora Regina (Tower) Limited* decision related to an application for certification requiring evidence of support. We do not believe that the *Tora Regina (Tower) Limited* decision is applicable to a case of successorship such as we have decided herein, as it is a recognition of something that occurs at the time of the successorship which is not changed or affected by our declaration. The parties were aware that the position of the Union was that there was or would be successorship in the circumstances at the time that it did in fact occur, and chose to govern themselves accordingly. It was open to the Employer to acknowledge at any time the fact of what had already occurred in law. The Union has requested a

declaration and an order to that effect shall issue. Of course, it is open to either party to apply for such orders and directions as may be deemed necessary to effectively resolve issues stemming from the successorship.

DATED at Regina, Saskatchewan, this **6th** day of **November, 2007.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson