Labour Relations Board
Saskatchewan

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant, v. SMILEY'S BUFFET AND CATERING, Respondent, ERICAL CLEANING SERVICE, Respondent, and LUTHERAN SUNSET HOME OF SASKATOON, Interested Party

LRB File Nos: 007-08 & 008-08; November 25, 2008
Vice-Chairperson, Steven Schiefner; Members: Clare Gitzel and Bruce McDonald

For S.E.I.U., Local 333:	Mr. Keir J.M. Vallance
For Smiley's Buffet and Catering:	Mr. Jon Danyliw
Erical Cleaning:	Mr. Calvin Nickel
For Lutheran Sunset Homes:	Mr. Larry Seiferling, Q.C. and Ms. Megan Shields

Successorship – Transfer of business – Predecessor entered into contractual relations with alleged successors to provide food services and maintenance and cleaning services - Board not satisfied that Union held sufficient collective bargaining jurisdiction over workplace to sustain application pursuant to s. 37 or s. 37.1 of *The Trade Union Act*.

Successorship – Transfer of business – Alleged successors entered into contractual relationships with predecessor for the provision of food services and maintenance and cleaning services – Board concludes that arrangements merely contractual and did not involve the disposition of a business or part thereof within the meaning of s. 37 of *The Trade Union Act*.

Successorship – Deemed successorship – Board not satisfied that seniors apartment "public institution" within meaning of section 37.1 of *The Trade Union Act*.

***The Trade Union Act*, ss. 37 and 37.1.**

REASONS FOR DECISION

Background:

[1] Steven Schiefner, Vice-Chairperson: On January 15, 2008, the Service Employees International Union, Local 333 (the "Union") filed an application with the Board against 619217 Saskatchewan Ltd, carrying on business in Saskatoon under the name Smiley's Buffet and Catering, ("Smiley's"), seeking a declaration that there had been a sale or transfer of a business (catering and food services) within the meaning of either Sections 37 or 37.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended

(the “Act”), and alleging a violation of s. 36(2) of the *Act* by Smiley’s. This application bears the LRB File No. 007-08.

[2] On January 15, 2008, the Union also filed a similar application with the Board against Erical Cleaning Services (“Erical") seeking a declaration that there had been a sale or transfer of a business (janitorial and cleaning services) within the meaning of either ss. 37 or 37.1 of the *Act* and also alleging a violations of s. 36(2) of the *Act* by Erical. This application bears the LRB File No. 008-08.

[3] At the request of and with consent of the parties, the two (2) applications where heard and argued concurrently before the Board on October 20 and 21, 2008 in Saskatoon (herein collectively referred to as the “hearing”). Lutheran Sunset Home of Saskatoon, operating as LutherCare Communities (“LutherCare”), was granted intervenor status and participated fully throughout the hearing.

Facts and Evidence:

[4] For the most part, the facts necessary to determine the applications are not in dispute. Lutheran Sunset Home of Saskatoon is incorporated by private act of the Legislature and operates under the business name of LutherCare Communities. LutherCare owns and/or operates several housing and care facilities in Saskatoon, as well as in Outlook, Regina and Estevan. These facilities are primarily designed for seniors and range from independent living apartments, to senior centers, to group homes, to special care homes; the difference in facilities being the degree and type of care desired or required by the tenants. Many of LutherCare’s facilities offer a broad range of programs and services for their tenants, including wellness and activity programs, social interaction, spiritual care and meal services. The tenants living in independent living apartments (as the name would imply) need the least (often no) care. Whereas, facilities, such as special care homes, provide comprehensive services to tenants who require 24 hour acute care as Level 3 and 4 care patients within the provincial medical system. Some facilities operated by LutherCare accommodate the special needs of tenants suffering from dementia and other cognitive impairments. Simply put, LutherCare provides a broad spectrum of housing services, ranging from independent living accommodations (apartments) to comprehensive personal care facilities tailored to the needs of their tenants (acute care).

[5] Some of LutherCare's facilities are approved or accredited under the Provincial health care system and receive funding from the Saskatoon Health Region with the balance privately funded through rental rates and other payments by the residents of such facilities. Health care funding received by LutherCare is predicated on the type of care required by the tenants and quantum of such funding is a factor of the number of tenants requiring such care within an accredited facility.

[6] Some of LutherCare's facilities are physically integrated; being located on adjacent properties and sharing common utility services and connecting walkways. There is also a functional integration in some facilities in that tenants can move or transfer from one facility (providing one level of care) to another facility (providing another level of care) as the individual needs of tenants change. Similarly, physical integration of facilities permits better contact between couples where one spouse may require greater personal care, while their partner continues to have the capacity for independent living.

[7] The significance of this background is that the work place that is the subject matter of the within applications is contained in such an integrated facility. Luther Special Care Home (the "Home") is an accredited special care facility receiving health care funding from the Saskatoon Health Region and providing 24 hour acute care to tenants. Luther Tower (the "Tower") is an independent living apartment privately funded through rental and other fees paid by tenants. The two (2) facilities are located adjacent to each other in Saskatoon, have some level of physically and functionally integration, and are both operated by LutherCare.

[8] The Union currently holds a collective bargaining certificate in relation to certain facilities operated by LutherCare but has held others in the past. The first certification Order appears to be an Order of this Board dated June 25, 1985, which certified "*.. all employees of Lutheran Sunset Home of Saskatoon operating under the names and style of Lutheran Sunset Home and Luther Tower except [exceptions lists] ..*" (the "1985 certification Order"). The most recent Order of this Board is dated October 28, 2002 and certified "*all health care providers employed by … Lutheran Sunset Homes of Saskatoon …"*. This most recent certification Order was issued as a result of the

reorganization in the health care sector, pursuant to *The Health Labour Relations Reorganization Act*, S.S. 1996, c. H-0.03, following the so-called "Dorsey Report".

[9] The Saskatchewan Association of Health Organizations ("SAHO") is the representative employers' organization that bargains collectively on behalf of employers in the health care sector. Since the health care sector reorganization, LutherCare has been an affiliate of SAHO and a party to the provincial collective agreement bargained by SAHO with the Union. SAHO's most recent collective agreement is for the term April 1, 2005 to March 31, 2008 (the "SAHO Collective Agreement").

[10] Not all of LutherCare's operations are subject to representative bargaining through SAHO and, as a consequence, not all of the facilities operated by LutherCare's are subject to the SAHO Collective Agreement. The aspects of LutherCare's operations that are not subject to SAHO bargaining are either the subject of stand-alone collective agreements or are not subject to any collective bargaining arrangements (*i.e.* are not unionized).

[11] It was the common ground of the parties that the Home was certified to the Union and that the Union had the right to and did in fact bargain collectively for employees in this facility. It was also common ground that many of the employees at the Home were deployed or assigned to work in other facilities operated by LutherCare, including the Tower. There was, however, a dispute between the parties as to whether or not the Tower itself was the subject of the recent (or any) certification Order.

[12] The Home and Tower have been in operation since 1978. Although operated within one (1) larger corporate structure, LutherCare treats the two (2) facilities as discrete operations, separately budgeting for each facility's revenues and expenditures and separately accounting for such things as utility billing and maintenance charges. For example, in the nomenclature of LutherCare, the Tower "contracted" the Home to provide certain services to the Tower including food services, housekeeping and maintenance on a fee-for-service basis. LutherCare's practice of separate accounting and budgeting for each of its facilities, appears to have been extended to all of the facilities that LutherCare now operates in Saskatoon and throughout the Province.

[13] For many years, staff from the Home were utilized to provide food services, housekeeping and maintenance and, following the 1985 certification Order of this Board, these employees were members of the Union. The volume of services required by the Tower was such that a number of the employees of the Home worked predominately or exclusively in the Tower. Staff from the Home provided food services to both the Tower and the Home and housekeeping and maintenance services to various facilities operating by LutherCare. The result being that LutherCare employed more people at (or through) the Home than were required to operate the Home; the additional people being required to satisfy the needs of other facilities operated under the corporate umbrella of LutherCare.

[14] As indicated, LutherCare receives health care funding for certain aspects of its operations. For example, LutherCare receives health funding for the Home (associated with the type of care required by the tenants in that facility); but it did not and does not receive funding for the Tower; nor with respect to any of the additional staff or employees of the Home who provided services to the Tower pursuant to LutherCare's internal contractual arrangements. LutherCare operates a number of facilities in Saskatoon and throughout the Province that do not receive health care funding, including the Palisades Intermediate Care Home (514 – 23rd Street) in Saskatoon, the Luther Intermediate Care Home (1230 Temperance Street) in Saskatoon, the Luther Riverside Terrace Personal Care Home (915 Saskatchewan Crescent) in Saskatoon, Villa Royale (Edmonton Avenue) in Saskatoon, Luther Place (Outlook), Broadway Terrace (Regina) and Trinity Tower (Estevan).

[15] Following health care reorganization in the Province, a Joint Job Evaluation was initiated to coordinate or rationalize (reduce) the approximately 1,200 job classifications that emerged following the move to larger heath regions and sector-based collective bargaining for health care providers in the Province. The result for LutherCare was that a number of the positions working at the Home received pay increases, including the employees providing services to the Tower. In response to increasing labour costs, LutherCare began exploring the potential of abandoning its internal contractual arrangements between the Home and the Tower (with unionize workers of the Home providing services to the Tower on a fee-for-services basis). At the direction of its Board of Directors, in 2007, LutherCare's management began exploring the

potential of acquiring both food services and maintenance and housekeeping services from private contractors. LutherCare received and ultimately accepted proposals from Smiley's to provide catering and food services and from Erical to provide maintenance and cleaning services.

[16] Recognizing that this would result in a reduction of the staff complement at the Home, LutherCare opened discussions with the Union. However, before the parties achieved a negotiated resolution, LutherCare commenced a staged lay-off of affected employees at the Home. In response, the Union filed grievances under the collective agreement and an application with this Board alleging the commission of an unfair labour practice by LutherCare. Prior to a hearing on the merits of their application, the Union sought an interim Order from the Board pursuant to section 5.3 of the *Act* to have the Employer cease its activities and to reinstate the affected employees. The Union's interim application was dismissed by the Board on June 27, 2007 with reasons set forth in *Service Employees International Union, Local 333 v. Lutheran Sunset Home of Saskatoon*, [2007] Sask. L.R.B.R. 268, LRB File No. 045-07.

[17] On July 3, 2007, LutherCare and the Union executed a Letter of Understanding regarding the termination of the services provide by the Home to the Tower. The Letter of Understanding defined a protocol to be applied by LutherCare in the layoff of affected employees. In response, the Union agreed to withdraw all grievances under the collective agreement, as well as their outstanding application before this Board. There appears to be no dispute between the parties as to compliance with the Letter of Understanding.

[18] The genesis of the current dispute between the parties is whether or not the Tower continues to be subject to the SAHO Collective Agreement and/or whether or not the Union enjoys any residual bargaining rights with respect to this work place following the contracting out of catering and food services to Smiley's and of maintenance and cleaning services to Erical pursuant to either ss. 37 or 37.1 of the *Act*.

The Union's Position:

[19] The Union's position was that it holds a valid certification Order with Luthercare and that this Order encompassed the work being performed at the Tower

both with respect to catering and food services provided to residents therein and cleaning and maintenance thereof. The Union took the position that s. 37 of the *Act* was applicable to the provision of these services because the arrangements entered into by LutherCare with both Smiley's and Erical were analogous to the sale of a "business" within the meaning of that section. In support of this position, the Union relied upon the decisions of this Board in *S.G.E.U. v. Headway Ski Corporation*, [1997] Aug. Sask. Labour Rep. 48, LRB File No. 396-86, *S.G.E.U. v. Golf Kenosee Inc*, [1987] Sept. Sask. Labour Rep. 34, LRB File No. 180-06, and *C.U.P.E., Local 1975-01 v. Versa Services Ltd. et al.*, [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92.

[20] In the alternative, the Union took the position that the facilities operated by LutherCare, including the Tower, were "public institutions" within the meaning of s. 37.1 of the *Act* and, as a consequence, the sale of a business was deemed to have occurred within the meaning of s. 37 when employees of the LutherCare ceased providing food services and cleaning and maintenance services to the Tower and substantially similar services were subsequently provided to the building by another employer. In support of this position, the Union relied upon the decision of this Board in *R.W.D.S.U, Local 568 v. Johner's Homestyle Catering*, [2007] Sask. LR.B.R. 213, LRB File No. 006-06 to 011-06.

[21] As a consequence, the Union sought an Order of this Board that, with respect to the provision of meals to the residents of Luther Tower, Smiley's is bound by the Board's certification Order dated October 28, 2002. Similarly, the Union also sought an Order of this Board that, with respect to the provision of janitorial and maintenance services at or in connection with to the Tower, Erical is bound by the same certification Order.

[22] The Union further argued that, as they had provided both Smiley's and Erical with union security demands that had not been honoured, both employers were in violation of s. 36(2) of the *Act*.

[23] In support of their applications, the Union called Ms. Ann Jenkins, an employee and representative of the Union since 2003. Ms. Jenkins testified that her portfolio of responsibility included Luther Special Care Home. The Union also called Ms.

Malory Newman, who worked for LutherCare as a waitress at the Tower from 2004 until April, 2007. The Union also called Mr. Doug Helstrom, who worked for LutherCare from January, 1986 to July, 2007, most recently as a senior maintenance engineer. Both Ms. Jenkins and Mr. Helstrom testified as to the nature of the work performed by the staff in the Tower prior to April of 2007, when the staff from the Home stopped providing these services.

[24] In support of their position that the Tower was certified, the Union pointed to the certification Order of this Board dated June 25, 1985, which certified "*. . . all employees of Lutheran Sunset Home of Saskatoon operating under the names and style of Lutheran Sunset Home* ***and Luther Tower****" (emphasis added)*. The Union took the position that the inclusion of the words "*and Luther Tower*" in the Order as evidence that the certification was intended to apply to the Tower, as well as the Home.

[25] The Union also pointed to their collective agreement with SAHO covering the period April 1, 2001 to March 31, 2004 which included a specific reference on page 36 to positions, namely: "*Housekeeping Aid*", "*Maintenance 1*" and "*Waitress/Waiter*", for Lutheran Sunset Home. Ms. Jenkins testified that, during this period, these positions had worked exclusively or primarily in the Tower. The Union argued that this was evidence that the Union had bargained for, and continue to bargain for, workers in the Tower performing food services, cleaning and maintenance services.

[26] It was an admitted fact that the staff of Smiley's perform essentially the same functions as the former employers of the Home providing food services to the Tower and it was apparent that the staff of Erical perform essentially the same functions as the former employees of the Home providing housekeeping and maintenance to the Tower.

[27] Adopting the words of this Board in *Headway Ski Corporation*, *supra*, the position of the Union was that they were merely trying to preserve, rather than to expand, their existing bargaining rights.

LutherCare's Position:

[28] LutherCare took the position that the Tower itself is not (and has not been) subject to the Union's certification Order. In the alternative, LutherCare took the position that, even if the Tower had been certified pursuant to the 1985 certification Order, that certification Order had been either superceded by subsequent certification Orders, including the most recent (which did not include reference to the Tower), or the Union had abandoned its interest in the Tower. In advancing this position, LutherCare relied on the decision of this Board in *Morin v. Aim Electric Ltd. and International Brotherhood of Electrical Workers, Local 529,* [1985] Feb. Sask. Labour Rep. 27, LRB File No. 331-84, a case in which the Board considered the principles of abandonment of collective bargaining rights.

[29] In addition, LutherCare took the position that the arrangements for the provision of catering and food services with Smiley's and the provision of maintenance and cleaning from Erical did not amount to the "sale of a business" (or part thereof) within the meaning of s. 37 of the *Act*. In support of their position, LutherCare argued that they continued to still be in the business of providing food services to tenants of the Tower, as well as the maintenance and housekeeping of this facility. LutherCare took the position that merely the mode of providing these services has changed; from internal contractual arrangements with staff from the Home providing the services; to external contractual arrangements with private contractors providing these services. In so arguing, LutherCare relied on the decisions of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Crescent Heights Janitorial Service,* [1985] Oct. Sask. Labour Rep., LRB File Nos. 079-85, 080-85 & 083-85 to 086-85 and *S.G.E.U. v. Chatterson Building Cleaning Ltd*, [1986] Dec. Sask. Labour Rep. 42, L.R.B. File Nos. 193-86, 194-86, 195-86 & 196-86.

[30] With respect to s. 37.1 of the *Act*, LutherCare took the position that none of its facilities were owned or operated by the Provincial or a municipal government and that the Tower was not a hospital, university or other public institution within the meaning of s. 37.1. As a consequence, LutherCare argued that none of its arrangements with private contractors, in particular, those arrangements with Smiley's and Erical, attracted the deeming affect of s. 37.1.

[31] Simply put, LutherCare took the position that there had been no transfer of collective bargaining obligations to either Smiley's or Erical regarding the Tower and that the Union's application should be dismissed.

[32] In support of their position, Luther Care called Ms. Vivian Hauck, the Chief Executive Officer of LutherCare, a position she had held since January of 2008. Ms. Hauck has been an employee of LutherCare since 1985; originally as a staff nurse and more recently as the Vice President of Health Services, a position that oversaw the operations of the Home and the Tower during the period of the health care reorganization, the Joint Job Evaluation, and the change in the mode of delivery of food services and maintenance and cleaning services.

Smiley's Position:

[33] Smiley's echoed the position of LutherCare regarding the Union's application. Simply put, Smiley's took the position that there had been no sale of a business within the meaning of s. 37 and no transfer of collective bargaining obligations to it within the meaning of s. 37.1. As a consequence, Smiley's asked that the Union's application be dismissed. In advancing their position, Smiley's relied on the decision of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Marriott Canadian Management Services Limited.,* [1988] Fall Sask. Labour Rep. 69, LRB File No. 029-88.

[34] Mr. Philip Nelson was called to testify on behalf of Smiley's. Mr. Nelson, the majority owner of the company operating as Smiley's Buffet and Catering, testified as to Smiley's history in the catering and food services industry in Saskatoon, as well as the company's involvement with LutherCare and the provision of food services to the Tower.

Erical's Position:

[35] Erical also took the position that there had been no sale of a business within the meaning of s. 37 and no transfer of collective bargaining obligations to it within the meaning of s. 37.1. Erical also asked that the Union's application be dismissed.

[36] Mr. Calving Nickel, a partner and owner of Erical Cleaning Services, testified as to his company's involvement with LutherCare and the provision of maintenance and cleaning services to the Tower.

Relevant Statutory Provisions:

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

> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*
>
> *(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:*
>
> > *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
> >
> > *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
> >
> > > *(i) an employee unit;*
> > > *(ii) a craft unit;*
> > > *(iii) a plant unit;*
> > > *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> > > *(v) some other unit;*
> >
> > *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*

> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*

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

Analysis and Decision:

[38] For the reasons set forth herein, the Union's applications must be dismissed.

The Collective Bargaining Status of the Tower:

[39] Firstly, the Board is not satisfied that the Union holds collective bargaining rights with respect to the Tower that could bind or be transferred to either Smiley's or Erical or form the basis of a successorship application within the meaning of either ss. 37 or 37.1 of the *Act*.

[40] In so finding, the Board acknowledges that the 1985 certification Order of this Board, which included a reference to the Tower, when coupled with the evidence of Ms. Hauck that at the time of this Order, the Home and the Tower were the only two (2) facilities operated by LutherCare, may well have been indicative of an intention on the part of the Union and the LutherCare to establish an "all employee" bargaining unit covering both facilities. The Board acknowledges that this evidence does support the Union's position.

[41] On the other hand, the conduct of the Union and LutherCare subsequent to this Order would tend to indicate another intention of the parties or, possibly the evolution of a new intention following health care reorganization in the Province. In this regard, the Board notes that the most recent certification Order of this Board makes no reference to the Tower. In fact, the Order makes no reference to any particular facility operated by LutherCare. Such an Order would be consistent with the types of certification Orders issued by this Board following health care reorganization and the move to sector-based collective bargaining in health care following the Dorsey Report. The most recent certification Order of this Board certified the Union to "all health service providers employed" by LutherCare. While this Order does not, itself, answer the question of whether or not the Tower was or continued to be certified, it is indicative of the general change in collective bargaining jurisdiction that occurred at this time affecting many trade unions, including the Service Employees International Union, Local 333.

[42] In this regard, the Board notes the evidence of both Ms. Jenkins and Ms. Hauck that LutherCare operated a number of facilities, some of which are subject to the SAHO Collective Agreement (such as the Home), some of which were subject to stand alone collective agreements, and some of which were not subject to any collective agreements (*i.e.* are not unionized). Ms. Hauck took the position (a position

acknowledged by Ms. Jenkins in cross examination) that the Tower was not a facility bargained for by SAHO through their representative bargaining regime. Furthermore, the SAHO Collective Agreement included specific reference to the Home but not the Tower. While the SAHO Collective Agreement may well have applied to the employees of the Home working at the Tower (as did previous collective agreements), the Board is not satisfied that the SAHO Collective Agreement applies to the Tower, itself. In this regard, the Board notes that LutherCare operates a number of facilities, many of which are not subject to the SAHO Collective Agreement.

[43] Both Ms. Jenkins and Ms. Hauck acknowledge that the Union had not negotiated a stand alone collective agreement with respect to the Tower. Both witnesses acknowledged that there were employees working in the Tower for whom the Union did not purport to represent, including a manager, a nurse, a social worker, tenant services worker, an accounting clerk, a pastor and clerical staff. The Union argued that these employees were excluded from the Union's jurisdiction by both the 1985 certification Order and the most recent Order of this Board. In other words, the Union did not need a stand alone collective agreement for the Tower because all of the employees of LutherCare, who were working at the Tower and who were within the Union's jurisdiction, were covered by the SAHO Collective Agreement. While this may have been true, it would seem apparent to the Board that the employees working at the Tower were not included within the jurisdiction of the SAHO Collective Agreement because they worked <u>at the Tower</u>; they were included within that Agreement because they worked <u>out of the Home</u>, which was a SAHO affiliate as an accredited health care facility.

[44] In the Board's opinion, any collective bargaining jurisdiction that the Union may have held with respect to the Tower through the SAHO Collective Agreement was extinguished with the Letter of Understanding between LutherCare and the Union, dated July 3, 2007. With this agreement, LutherCare and the Union resolved all policy and individual grievances and all outstanding allegations pursuant to the *Act* arising out of the termination of the serviced provided by the Home to the Tower. The evidence of both Ms. Jenkins and Ms. Hauck was that both parties had complied with their obligations under this Agreement. The Board finds that any collective bargaining jurisdiction which the Union may have held with respect to food services and

maintenance and cleaning services performed at the Tower arising out of the SAHO Collective Agreement came to an end on July 3, 2007.

[45] Furthermore, the Board concludes that the collective bargaining jurisdiction that the Union may have held with respect to the Tower pursuant to the 1985 certification Order was removed by subsequent Orders of this Board. The Board notes that there is no mention of the Tower in the most recent certification Order of the Board, there was no stand alone agreement for the Tower, and the Union did not purport to represent the other employees working at the Tower not engaged in catering and food services or maintenance and cleaning services.

[46] In conclusion, the Board finds that, with respect to the provision of food services and maintenance and cleaning services at the Tower, there was no collective bargaining obligations to transfer to either Smiley's or Erical or that could form the basis of a successsorship application within the meaning of either s. 37 or 37.1 of the *Act*.

Contracting Out vs. Sale of a Business:

[47] Even if the Union holds collective bargaining jurisdiction that could be said to cover the food services and maintenance and cleaning services performed at the Tower, the Board is not satisfied that the LutherCare's arrangements with either Smiley's or Erical were analogous or consistent with the sale of a business within the meaning of s. 37 of the *Act*. In this regard, the Board considered the testimony of Ms. Newman, Mr. Helstrom, Ms. Hauck, Mr. Nelson and Mr. Nickel, reviewed in some detail LutherCare's agreements with both Smiley's and Erical, and ruminated on the helpful cases propounded by the parties.

[48] In what is often regarded as the leading case on the issue of successorship, *Canadian Union of Public Employees v. Metropolitan Parking Inc.,* [1980] 1 C.L.R.B.R. 197 (Ont.), at 203, the Ontario Labour Relations Board outlined the following rationale for the legislative provisions concerning the transfer of obligations:

> *The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interests of employees will be*

> *at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both....*

[49] The circumstances under which the obligations of successorship may be found include not only the sale of a business in a technical sense, but also extend to situations where the business (or part thereof) is "leased, transferred or otherwise disposed of." In the *Metropolitan Parking* case, *supra*, the Ontario Board made the following observation on this point:

> *Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. Likewise, the meaning given to the terms "business" or "disposition" in other statutes is of limited assistance in determining their meaning in The Labour Relations Act.*

[50] To establish that an employer is a successor in the sense envisioned by s. 37 of the *Act*, the Board must find that a “business” (or part thereof) has passed from one employer to another; something which a variety of cases have proven to be no easy task. Again, on this issue, the Ontario Board, the *Metropolitan Parking* case, *supra*, provided the following seminal observations:

> *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....*

[51] Many labour boards across Canada have struggled with the distinction between the transfer of a business (*i.e.* a successorship situation) and a mere “contracting out” of services. Unlike a successorship situation, mere contractual relationship do not include the passing of a recognizable and distinct business (or part thereof) from one employer to the next. Typically, such situations arise when an

employer decides that certain services or functions, which are currently being performed by staff, could be more efficiently or economically done by an outside contractor. While subcontracting arrangements always involve the transfer of work, the transfer of work does not necessarily amount to the transfer of all or a part of a business within the meaning of s. 37 of the *Act*.

[52] For example, a finding of a mere contractual relationship occurred in *The Charming Hostess Inc. v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers*, [1982] 2 C.L.R.B.R. 409 (Ont.). In that case, Molson's Brewery Ltd. entered into a contract with an outside firm to provide a variety of services in its hospitality rooms. The Ontario Labour Relations Board concluded that this contract did not involve a disposition of a distinct business entity, or any loss of control over the general operation of the brewery or the hospitality service connected with it. The Board observed, at 421:

> *In our view, Molson's has not disposed of the Anchor Room or the John Molson Room or even the "hospitality part" of its business (whatever that may mean). Rather, Molson's is operating its business in a different way, making use of the services of subcontractors to fulfill needs which it could not meet within its own organization or with its own employee complement....*

[53] This Board has found a mere contractual relationship in a number of cases, including *Chatterson Building Cleaning , supra, and Crescent Heights Janitorial Service*, *supra*,

[54] On the other hand, this Board has found a successorship situation in a number of other cases, including *Headway Ski Corporation*, *supra, Golf Kenosee*, *supra*, and *Versa Services , supra*.

[55] For the purposes of the present applications, the following comments of this Board in *Versa Services*, *supra,* may be instructive:

> In a contracting out relationship, the contractor is typically a self-contained entity, not in the sense that it has acquired any "business" from the employer, but in the sense that it undertakes to provide labour to perform defined services. It may also provide equipment, management expertise or other things which are connected to the

> provision of the services. In the eyes of labour relations boards, the extent to which an employer is entitled to have work which was once performed by employees done by the employees of an outside contractor is a matter which is generally subject to whatever controls may be placed on it through collective bargaining, and does not arise as an issue for regulation under legislation.
>
> As we have suggested earlier, to establish that an employer is a successor in the sense envisaged by Section 37, it must be established that something of a coherent and dynamic nature, something which may enjoy a separate existence as a "business," was passed on from the original employer to the successor. To quote the Board in the Headway Ski case, we must look to whether there is "a discernible continuity in the business or part of the business formerly carried on by the predecessor and now being carried on by the successor.

[56] As indicated at the outset, for the most part, the facts forming the basis of the within applications were not in dispute between the parties. What was in dispute was the proper “characterization” of those facts from a labour relations perspective.

[57] Ms. Hauck testified that, in 2007, in response to increasing labour costs at the Home, LutherCare began exploring options for reducing operating costs at the Tower, which costs, absent mitigation, must be passed on to tenants through rent increases. At the direction of its Board of Directors, in 2007 LutherCare’s management began exploring the potential of acquiring both food services and maintenance and housekeeping services from private contractors. LutherCare received and ultimately accepted proposals from Smiley’s to provide catering and food services and from Erical to provide maintenance and cleaning services. It was an admitted fact that the staff of Smiley’s perform essentially the same functions as the former employers of the Home providing food services to the Tower and it was apparent that the staff of Erical perform essentially the same functions as the former employees of the Home providing housekeeping and maintenance to the Tower.

The Provision of Catering and Food Services to the Tower by Smiley’s

[58] On April 26, 2007, LutherCare executed an Agreement for Service with Smiley’s, wherein LutherCare engaged the services of Smiley’s to provide meals of a nutritious nature to tenants of the Tower (the “Food Services Agreement”). The Food Services Agreement specified that the hours of service, requiring meals to be provided during specified periods of time on a daily basis every day of the year. In exchange,

Smiley's was paid compensation from LutherCare on the following basis: "*$10.50 for every dining room meal as would be covered by the Luther Tower meal program or 90% of all cash value sales, or other compensation mutually agreed upon …"*. Pursuant to the Food Services Agreement, Smiley's compensation is paid by LutherCare on a monthly basis.

[59] With respect to the provision of catering and food services to the Tower, Mr. Nelson testified that his company had some 25 years of catering and food services experience in Saskatoon prior to taking the Tower contract, operating multiple restaurants in Saskatoon. Mr. Nelson testified that, when his company was asked to submit a proposal to LutherCare, it subsequently met with LutherCare's management to discuss his company's proposal, as well as the menu or food selections to be provided to tenants of the Tower. Mr. Nelson testified that, in taking over food services at the Tower, his company acquired no management expertise, no staff and no equipment, nor any assets from LutherCare. Under the terms of their arrangements, Smiley's prepares a selection of foods at its kitchen facilities, delivers the prepared food to the Tower, dishes the prepared food onto on individual plates, and then services the food to Tower tenants in accordance with their selections from the food menu for that meal. Much as it was done when staff from the Home provided food services, Smiley's staff serve the food to tenants in a common area in the Tower, with certain aspects of meal preparation (*i.e.* warming, steaming, dishing, etc.) taking place using equipment belonging to Luthercare, such as a steamers, warming units, preparation tables and a dishwasher. Under the terms of their arrangements, LutherCare is responsible for cleaning the common area and maintaining all equipment used by Smiley's in the common area.

[60] Mr. Nelson testified that the food services provided to Tower tenants consisted of two (2) components, firstly; the LutherCare's meal program, which consisted of a specified number of meals supplied by LutherCare to tenants; and secondly; additional meals acquired by Tower tenants over and above the meal program. Mr. Nelson testified that tenants typically utilized their meal program rights to purchase dinner meals (which were generally of greater value), with any additional meals generally acquired by tenants associated with snacks or lunches. Mr. Nelson testified, if tenants acquired additional meals, a charge was recorded and billed to the tenant's room through LutherCare. Irrespective of the meal provided, Mr. Nelson

testified that Smiley's was paid on a per meal basis by LutherCare in accordance with the Food Services Agreement.

[61] In the Board's opinion, LutherCare's arrangements with Smiley's are more consistent with a contractual relationship than the transfer of a business within the meaning of s. 37 of the *Act*. Unlike the situation in *Headway Ski Corporation*, *supra,* or *Golf Kenosee*, *supra, or Versa Services*, *supra,* Smiley's transactional relationship continues to remain with LutherCare. Smiley's may deliver the food to the tenants of the Tower but, in so doing, Smiley's customer continues to be LutherCare. Smiley's potential for financial success, and the risk of failure, rests predominately in the quality of the bargain it has struck with LutherCare pursuant to the Food Services Agreement. Under these arrangements, the "business" of providing food services to tenants, including such essential factors as the type and quality of food, the price to be charged, and the hours of operation, continue to rest with LutherCare and has not passed to Smiley's. LutherCare remains in control of the provision of food services to the Tower. In the words of this Board in *Versa Services*, supra, nothing of a coherent and dynamic nature has passed from LutherCare to Smiley's, other than the contractual obligation to provide the labour necessary to perform the defined services.

The Provision of Cleaning and Maintenance Services to the Tower by Erical

[62] With respect to the provision of cleaning and maintenance services to the Tower, Mr. Nickel testified that his company had some 20 years of experience providing cleaning and maintenance services to other buildings in Saskatoon prior to taking the Tower contract. Mr. Nickel testified that his company employed approximately 100 employees, five (5) of which worked predominately or exclusively at the Tower pursuant to his company's contract with LutherCare. Mr. Nickel testified that, in taking over the maintenance and cleaning services at the Tower, his company received no management expertise, no staff, and no equipment, nor any other assets, from LutherCare. Mr. Nickel testified that his staff are responsible for cleaning the Tower, grounds keeping, snow removal and building maintenance. Mr. Nickel testified that his company was an independent company, that it supplied all of its own labour and equipment in the performance of its services to the Tower.

[63] On April 26, 2007, LutherCare executed an Agreement for Service with Erical, wherein LutherCare engaged the services of Erical to provide comprehensive cleaning services to Tower, together with maintenance services, mechanical services and grounds keeping (the "Maintenance Contract"). The Maintenance Contract sets forth, with some degree of specificity, the scope of work required to be performed by Smiley's, together with the compensation to be received in exchange. The compensation is described as a flat fee for service payable on a monthly basis.

[64] In the Board's opinion, LutherCare's arrangements with Erical are wholly consistent with a contractual relationship and the Board saw no evidence of the transfer of a business within the meaning of s. 37 of the *Act*. In this regard, the Board notes the type of work being performed, the nature of the contractual arrangements, and the circumstances of the alleged successor and predecessor are very similar to those found in *Crescent Heights*, sup*ra,* and *Chatterson Building Cleaning*, *supra*. Under the terms of the Maintenance Agreement, the "business" of providing maintenance and cleaning services to the tenants of the Tower continue to rest with LutherCare and has not passed to Erical. In the words of this Board in *Versa Services*, *supra*, nothing of a coherent and dynamic nature has passed from LutherCare to Erical, other than the contractual obligation to provide the labour necessary to perform the defined services.

Deemed Successorship:

[65] In the alternative, the Union asked the Board to consider whether or not s. 37.1 of the *Act* had application to LutherCare's contractual relationships with Smiley's and Erical such that a deemed successorship could be found to have arisen.

[66] Section 37.1 was added to the *Act* in 1994. The rationale for doing so was canvassed by this Board in *United Food and Commercial Workers Union, Local 1400 v. The Corps of Commissionaires, North Saskatchewan Division,* [2002] Sask. L.R.B.R. 188, LRB File No. 276-00. The Board stated at paras. 32 and 33:

> *The seminal decision of the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] OLRB Rep. December 1193, held that a change of a service subcontractor at a particular site would not constitute a "sale of a business" for purposes of successorship even if the same work was performed at the same site by many of the same employees, there being no transfer of anything from the predecessor to the alleged successor.*
>
> *However, s. 37.1 of the Act changes this approach with respect to certain services under certain circumstances. It supersedes the Metropolitan Parking analysis and deems there to be a successorship even though there is no direct or indirect transaction or dealings between the deemed predecessor and the deemed successor. There is a sale because the statute deems that there is. Section 37.1(1) defines the services to which s. 37.1 applies. Section 37.1(2) stipulates the three prerequisites that must be established before "a sale of a business is deemed to have occurred" for the purposes of s. 37. Standing on its own, s. 37.1 provides no protection for unions that have organized employees in the contract service sector; the protection is obtained by the legislation deeming that a sale of a business has occurred to which s. 37 applies. Bargaining rights with respect to the listed services, including security services, become attached to particular buildings and sites owned by the provincial or a municipal government, or public institutions such as hospitals and universities. The Board has no discretion to exempt the services or any site or building described in s. 37.1 from the deeming provision.*

[67] Both ss. 37 and 37.1 of the *Act* are policy-laden provisions, intended by the legislature to achieve remedial objectives. As such, they must be interpreted so as to ensure the attainment of those objectives. The remedial objective of s. 37 was to preserve collective bargaining rights and obligations following the disposition of a business (or part thereof); rights not otherwise protected or preserved by the common law. The challenge for this Board in applying this provision (as has been the case for other labour boards applying similar provisions in other jurisdictions) has been to determine whether or not the disposition of a business (or part thereof) has occurred. The remedial objective of s. 37.1 was to preserve collective bargaining rights and obligations in circumstances that would not otherwise have been found to be a sale or transfer of a business within the meaning of s. 37. In other words, the remedial effect of s. 37.1 is to extend the application of s. 37 by creating a relationship between certain specified physical locations and the bargaining rights held by union members working at those locations.

[68] In the case at bar, none of LutherCare's facilities are owned or operated by the Provincial or a municipal government. It was common ground that the Tower was

not a university. The issue in dispute (and the question for this Board to resolve) is whether or not the Tower is a “hospital” or a “public institution” within the meaning of s. 37.1. The Union took the position that the words “other public institution” should be broadly interpreted and that the Tower should be include within the meaning of s. 37.1, being analogous to a hospital because LutherCare received government funding and provided services of a health care nature within its umbrella of facilities.

[69] In interpreting s. 37.1, the Board is mindful of the express and specific language used by the legislature in this section. It is not a provision of general application. Rather, the deeming effect of s. 37.1 is confined to specific types of services (*i.e.* foods services, janitorial or cleaning services and security services) provided to either specific employers (*i.e.* the owners or managers of buildings owned by the Government of Saskatchewan or a municipal government) or specific facilities (*i.e.* hospitals, universities or other public institutions). In this context, the Board adopts the general principle that, when specific word (*i.e.* “hospital” and “university”) are followed by general words (*i.e.* “other public institutions”), the general words must be interpreted in a manner analogous to the former (“*ejusdem generis*” to use the latin phrase). By so doing, the Board is best able to ensure the attainment of the desired remedial objectives of the legislature.

[70] While LutherCare may receive government health funding through the Saskatoon Health District, no such funding is received by LutherCare for the Tower nor was there any evidence that the operation of the Tower directly or indirectly benefited from the funding that was received by LutherCare. Similarly, there was no evidence that any health care services (*i.e.* Level 3 and 4 care or otherwise) were provided at the Tower. LutherCare operates a number of facilities throughout the province, most of which are not accredited health care facility, nor do they receive health care funding, nor do they provide any form of acute care to tenants therein. LutherCare argued that receipt of government funding is not indicative of something being a public institution and that the Board must be cautious not to find all of LutherCare’s facilities to be “public institutions” on the basis that some facilities within LutherCare’s larger corporate structure performed public functions; a position with which the Board concurs.

[71] It was not clear to the Board that any facility operated by LutherCare, including the Home (which was accredited, which did receive health care funding, and which did provide acute care services), fell within the category of facilities that the authors of the 1994 amendment to the *Act* intended would be subject to the deeming effect of s. 37.1 (*i.e.* facilities similar in nature to hospitals or universities or facilities owned by the Government of Saskatchewan or a municipality). However, the Board had no difficulty concluding that the Tower, which for all intents and purposes is a privately-funded, apartment complex catering to seniors, is neither a "hospital" nor "public institution" within the meaning of s. 37.1.

Unfair Labour Practice:

[72] For the reasons set forth above, the Board has concluded that no collective bargaining obligations have transferred to either Smiley's (with respect to food services provided to residents of the Tower) or to Erical (with respect to maintanence and cleaning of the Tower) pursuant to either ss. 37 or 37.1 of the *Act*. As a consequence, the Board finds that there is no evidence that either Smiley's or Erical violated s. 36(2) of the *Act*. However, even if it had found otherwise, the Board notes the evidence that union security requests had been served on the Respondents was equivocal. The evidence of Ms. Jenkins was that she "thought" notices had been sent to both Smiley's and Erical. However, Mr. Nelson testified that he had had no contact from the Union prior to the within application and was not cross-examined on this point. Although Mr. Nickel testified that he had received a letter from the Union about two (2) months after taking over the Tower contract, the evidence that Erical had, in fact, received a union security request was less than clear.

Conclusion:

[73] For the above captioned reasons, the Union's applications are hereby dismissed. Firstly, the Board is not satisfied that the Union holds collective bargaining rights with respect to the Tower that could bind or be transferred to either Smiley's or Erical or form the basis of a successorship application within the meaning of either ss. 37 or 37.1 of the *Act*. Even if the Union held collective bargaining jurisdiction that could be said to cover the food services and maintenance and cleaning services performed at the Tower, the Board is not satisfied that the LutherCare's arrangements with either Smiley's or Erical were analogous or consistent with the sale of a business. Also, the

Board was not satisfied that the Tower is a “public institution” within the meaning of s. 37.1. Finally, the Board found no evidence that either Smiley’s or Erical had violated s. 36(2) of the *Act*.

DATED at Regina, Saskatchewan, this **25th** day of **November, 2008.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson