Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCALS 2268 and 3730, Applicant v. ST. PAUL'S ROMAN CATHOLIC SEPARATE SCHOOL DIVISION NO. 20, Respondent and CERTAIN FORMER EMPLOYEES OF HUMBOLDT ROMAN CATHOLIC SCHOOL DIVISION NO. 15, Interested Parties

LRB File No. 066-06; September 23, 2008
Chairperson, James Seibel; Members: Clare Gitzel and Gerry Caudle

For the Applicant: Peter Barnacle
For the Respondent: Rick Elson
For Interested Parties: John Will

> **Bargaining Unit – Transfer of Obligations – Following statutory amalgamation of school divisions, Board recognized the transfer of bargaining rights from two separate locals to two new separate locals**
>
> **Unfair Labour Practice – Duty to Bargain in Good Faith – Following statutory amalgamation of school divisions, Union brings application against Employer alleging breach of 11(1)(c) for failure to bargain collectively with respect to group of previously unrepresented employees - Board not prepared to "sweep in" previously unorganized employees without evidence of overall support – Unfair Labour Practice dismissed**
>
> ***The Trade Union Act*, ss. 37 and 39**

REASONS FOR DECISION

Background and Agreed Facts:

[1] Effective January 1, 2006 the provincial government made a general restructuring of Boards of Education and their school divisions. The restructuring was compulsory for the public school system and voluntary for the separate school system. The amalgamation of 68 of 81 school divisions into 15 larger school divisions resulted in the present 28 public and separate school divisions in the Province. The present application arises from that restructuring in which six smaller former separate school divisions (the "legacy school divisions") were subsumed by St. Paul's Roman Catholic Separate School Division No. 20 (the "Employer" or "St. Paul's School Division") as a result of Ministerial Orders disestablishing the legacy school divisions and vesting their assets and contractual rights and responsibilities in St. Paul's School Division.

[2] The Canadian Union of Public Employees, Locals 2268 and 3730 (the "Union") represents two bargaining units of certain former employees of certain of the legacy school divisions. The Union filed the present application in which it is alleged that St. Paul's School Division failed to bargain collectively with respect to employees of one of the legacy school divisions, the Humboldt Roman Catholic School Division No. 15 ("Humboldt School Division"), -- in respect of the former employees of which the Union does not hold a specific bargaining certificate --, and thereby committed unfair labour practices in violation of ss. 11(1)(a), (b), (c), (d) and (e) of *The Trade Union Act*, R.S.S. 1978, c.-T-17 (the "*Act*"). At the commencement of argument at the hearing, Mr. Barnacle, counsel on behalf of the Union, advised that the Union would not proceed with the application in respect of sub-sections (a) and (e).

[3] In its reply to the application, St. Paul's School Division says that because there has been no integration of the operations of the legacy school divisions with that of St. Paul's School Division and no intermingling of employees, it would be inappropriate to include employees of the former Humboldt School Division in bargaining units represented by the Union without evidence of support of a majority of those employees; that is, the employees ought not to be "swept into" the bargaining units represented by the Union without proof of support.

[4] A group of certain former support staff employees of the legacy Humboldt School Division, at St. Augustine and St. Dominic Schools, appeared at the hearing as interested parties. They took the position that they did not want to be included in one of the CUPE bargaining units without a vote. Mr. Will, counsel on their behalf, was allowed to make representations at the hearing.

[5] Following is a summary of the agreed statement of facts filed jointly by the parties to this application.

[6] Prior to January 1, 2006, there were seven separate school divisions within a 115 kilometre radius of Saskatoon: St. Paul's School Division, St. Alphonse Roman Catholic School Division No. 2 ("St. Alphonse School Division"), Humboldt School Division, St. Gabriel's Roman Catholic School Division No.23 ("St. Gabriel's School Division"); South Corman Park Roman Catholic School Division No.213 ("South

Corman Park School Division”), Aberdeen Roman Catholic School Division No. 214 (“Aberdeen School Division”) and Clavet Roman Catholic School Division No. 215 (“Clavet School Division”).

[7] The South Corman Park School Division, Aberdeen School Division and Clavet School Division were not operational and had no employees at the time of amalgamation with St. Paul’s School Division.

[8] By certification Order dated August 29, 1958 the Board certified the School Caretakers and Maintenance Association No. 34 C.L.C. (the “Maintenance Association No. 34”) as the bargaining agent for a unit of employees of St. Paul’s School Division comprising caretakers and office staff, except the superintendent of schools. In November 1978, the clerical office staff in the unit withdrew therefrom and became members of CUPE, Local 2268. In October 1982, the remaining members of the original bargaining unit transferred to CUPE Local 2268. Thereafter and until 1994, the Employer, St. Paul’s School Division bargained collectively with CUPE 2268 in respect of the employees, without any amendment of the original certification Order.

[9] In 1994, CUPE Local 3730 was formed for the purpose of representing the employees then included in the bargaining unit represented by CUPE Local 2268. The Employer and the Union applied jointly to the Board for amendments or new orders reflecting these changes. The Board issued two Orders:

(1) An Order designating CUPE Local 3730 as the bargaining agent for a unit comprising all service employees employed by St. Paul’s School Division, except for casual employees and summer students; and,

(2) An Order amending the original Order issued to Maintenance Association No. 34 in 1958 designating CUPE Local 2268 as the bargaining agent for a unit comprising all employees of St. Paul’s School Division, except teachers, specific administrative officers of the school board, secretaries to the administrative officers, cafeteria managers, payroll assistants, programmer analysts, casual employees, and members of CUPE Local 3730.

[10] Both CUPE Locals and the Employer have bargained collective agreements expiring December 31, 2007.

[11] On February 26, 1988, the Board certified CUPE Local 3325 as the bargaining agent for a unit of employees of St. Gabriel's School Division comprising all employees, except teachers, the director of education and the secretary/treasurer. Those parties bargained collectively and concluded their last collective agreement expiring December 31, 2005.

[12] On July 18, 2005, the Board certified CUPE Local 4734 as the bargaining agent for a unit of employees of St. Alphonse School Division comprising all employees, except the director and teachers. Those parties did not conclude a first collective agreement before the school division restructuring.

[13] On December 15, 2005, the Minister of Learning issued an Order ("Ministerial Order No. 1") providing for the following, effective January 1, 2006:

(1) The disestablishment of St. Alphonse School Division, Humboldt School Division, St. Gabriel's School Division, South Corman Park School Division and Clavet School Division;

(2) The alteration of the boundaries of St. Paul's School Division to include the geographic areas formerly covered by these legacy school divisions;

(3) The establishment of three subdivisions within St. Paul's School Division as follows:

(a) Subdivision 1: the geographic area formerly covered by St. Alphonse School Division, South Corman Park School Division, and Clavet School Division;

(b) Subdivision 2: the geographic area formerly covered by Humboldt School Division; and,

(c) Subdivision 3: the geographic area formerly covered by St. Gabriel's School Division.

(4) The vesting of the assets, liabilities and contractual obligations of the legacy school divisions in St. Paul's School Division.

[14] On December 19, 2005 the Minister of Learning issued an order ("Ministerial Order No. 2") providing for the following, effective January 1, 2006:

(1) The disestablishment of Aberdeen School Division;

(2) The alteration of the boundaries of St. Paul's School Division to include the geographic area formerly covered by Aberdeen School Division; and,

(3) The vesting of the assets, liabilities and contractual obligations of Aberdeen School Division in St. Paul's School Division.

[15] After Ministerial Order Nos. 1 and 2 were issued, the Employer engaged in collective bargaining with CUPE Local 3255 with respect to the former employees of St. Gabriel's School Division expiring December 31, 2007, which stipulated that the collective agreement applied to all employees of St. Paul's School Division at Biggar, and specifically excluded the members of CUPE Locals 2268, 3730, and 4734, and the employees at Humboldt School Division. Likewise, the Employer engaged in collective bargaining with CUPE Local 4734 with respect to the former employees of St. Alphonse School Division expiring December 31, 2007 which stipulated that the collective agreement applied to all employees of St. Paul's School Division at Viscount, and specifically excluded the members of CUPE Locals 2268, 3730, and 3255, and the employees at Humboldt School Division.

Preliminary Submissions:

[16] Counsel for the parties made preliminary submissions to the Board to clarify their positions. They also filed a joint Exhibit book.

<u>The Union</u>

[17] Peter Barnacle, counsel on behalf of the Union, stated that the application was neither one regarding successorship under s. 37 of the *Act*, nor an application to amend the certification Orders pursuant to s. 5, but an application alleging unfair labour practices by the Employer.

[18] Counsel also advised that evidence would be adduced to establish that CUPE Locals 3325 and 4734, which represented bargaining units of employees of St. Gabriel's School Division and St. Alphonse School Division respectively, had merged with CUPE Locals 2268 and 3730. Those employees are now members of one of CUPE Locals 2268 or 3730, depending upon whether they are service employees or clerical employees. Accordingly, the Union was seeking an Order pursuant to s. 39 of the *Act* recognizing the merger and transfer of bargaining rights.

[19] Counsel submitted that the Union's overall position is that the employees of the legacy school divisions are now employees of St. Paul's School Division and that the existing certification Orders for bargaining units of employees of St. Paul's School Division now cover those employees as members of the bargaining units described in the Orders. Counsel asserted that the situation is no different than when an employer hires new employees and they are required to join the union under union security provisions. The Union is simply seeking to enforce existing bargaining rights. The Employer has refused to bargain collectively regarding the former non-unionized employees of the legacy school divisions, thereby committing unfair labour practices.

[20] However, Mr. Barnacle said that the Union would waive mandatory union security for existing employees brought into the bargaining units by the school division restructuring – *i.e.,* they would not be required to join the Union as a condition of maintaining employment –, but only seeks to have the union security provisions enforced regarding new hires since January 1, 2006. This includes the payment of union dues since that date.

[21] Counsel submitted that the onus is on the Employer to apply to the Board if it wants certain classifications excluded from the scope of the existing certification.

The Employer

[22] Mr. Elson, counsel on behalf of the Employer, submitted that the situation is less analogous to the transfer of a business under s. 37 of the *Act* than to the consolidation of health services by the provincial government in 1992, because it is not an acquisition in the usual commercial sense, but a statutory consolidation. Under Ministerial Orders Nos. 1 and 2, St. Paul's School Division was vested with the assets, liabilities and contractual obligations of the legacy school divisions including certification Orders and collective agreements.

[23] Counsel submitted that the Employer's position was that, if the Union seeks to represent all non-union support staff employees of the legacy school division employers, it ought to have brought an application to consolidate the existing bargaining units along with evidence of the majority support of the employees to be added to the bargaining unit.

[24] At the close of the Employer's case, Mr. Elson advised that it was conceded that, if the Employer was wrong about the effect of Ministerial Orders 1 and 2, then it was an unfair labour practice for the Employer to negotiate directly with certain former employees of Humboldt School Division.

The Interested Parties

[25] Mr. Will, counsel on behalf of the Interested Parties, submitted that his clients were in agreement with the position of the Employer.

Evidence:

[26] Bill Robb has been a national servicing representative with the Union since 1994. He testified that, at the time of the school division restructuring on January 1, 2006 the bargaining units at St. Gabriel's School Division and St. Alphonse School Division represented by CUPE Locals 3325 and 4734, respectively, included

approximately eight employees in total. The merger with and transfer of bargaining rights of those locals to CUPE Locals 2268 and 3730 was completed on April 12, 2006. Meetings of the members of all four locals involved were held to approve the transfer of members of CUPE Locals 3325 and 4734 and their reception by CUPE Locals 2268 and 3730.

[27] Mr. Robb testified that on March 22, 2006 he became aware that the Employer had negotiated directly with former employees of Humboldt School Division, when he received a call from one of the interested parties who advised him that the employees did not want to meet with the Union. The next day he met with Al Boutin, the Employer's Superintendent of Human Resources, and learned that the Employer had agreed with those employees to bring their wages and benefit plans up to the level of those that the Employer provided for its employees in the collective agreements with the Union.

[28] By letter dated March 28, 2006 the Union advised the Employer of its position that the former non-unionized support staff employees of the Humboldt School Division were now covered by the existing St. Paul's School Division certification Orders, which included all service and clerical employees. The Union sought to negotiate letters of understanding "to integrate the new members into the collective agreements", and requested that dues deduction commence May 1, 2006.

[29] In its response to the Union by letter dated April 12, 2006, the Employer said it was not prepared to negotiate with respect to the former Humboldt School Division employees, because

> *. . . while the Minister's Order vests certain legal obligations, relative to the disestablished School Divisions, with St. Paul's, it says nothing about any obligations, presently vested with St. Paul's, which are to be* imposed *on the employees of any of the former Divisions, without their consent.*

[30] It was this response that prompted the Union to file the present application.

[31] Donald Lloyd has been the Employer's Superintendent of Administrative Services since 1995. He described the process of the school division amalgamation and the advantages for the smaller School Divisions. At the time of hearing, there had been no intermingling of former support staff employees of the legacy school divisions with those in Saskatoon. Some St. Paul's School Division employees had occasionally gone out to schools in the legacy school divisions to attend to computer systems and to provide mechanical consulting services.

[32] Mr. Lloyd testified that there were approximately eight former employees of the St. Alphonse School Division, of which four were in the bargaining unit represented by CUPE Local 4734 now employed by St. Paul's School Division. The former Director of Education worked out of Saskatoon. The St. Alphonse School Division was K-8, so students attended the public system for high school education as did those at the K-9 St. Gabriel School Division.

[33] Mr. Lloyd testified that there were approximately 69 former employees of the Humboldt School Division now employed by St. Paul's School Division, ten of which had been in the administrative office. Approximately 22 of the employees were engaged in caretaking and clerical activities. They were not unionized. The administrative office of the Humboldt Separate School Division were in the same offices as those of the public system Humboldt Rural School Division No. 47 – the office staff assumed positions with the public school division after amalgamation. No clerical or service staff were released or transferred as a result of amalgamation. With respect to secondary education in the separate and public divisions, all students attend the Humboldt High School. Approximately 74 per cent of the secondary students in Humboldt are in the separate school system. The Director of Education of the separate Humboldt School Division was the director of education of the High School, and the secretary treasurer of the High School was the secretary-treasurer of the public school division. St. Paul's School Division has a tuition agreement for secondary students of the public system in Humboldt with another public system school division created after amalgamation that included the public system in Humboldt, Horizon School Division No. 205.

[34] Mr. Lloyd stated that the amalgamation therefore brought about 34 additional employees into the employ of St. Paul's School Division, for a total of

approximately 600 employees. He acknowledged that the former non-unionized employees of the Humboldt School Division were brought up to the wage and benefits levels of the St. Paul's School Division unionized employees.

[35] Mr. Boutin testified that he met with seven of the 25 former service employees of Humboldt School Division, at the request of one of them, on December 21, 2005 to "bargain" compensation for the group for the following year (*i.e.,* post-amalgamation). He acknowledged that it was not "collective bargaining" as that term is used in the *Act* and did not result in a collective agreement, but rather, the terms that were agreed to were embodied in a statement of policy regarding the employees. He said that the Employer agreed to provide the employees with the same benefits and wages as the unionized employees because "they should be compensated in a fair reasonable and consistent manner." He also acknowledged that many items were not discussed that are in the collective agreements with the unionized employees including, seniority, posting of vacancies, discipline and dismissal, professional development leave, compassionate leave, conditions of probation for new employees. Mr. Boutin acknowledged that, even if the employees had not agreed, the Employer would have implemented the policy anyway. The negotiations were concluded before the merger on January 1, 2006.

[36] Mr. Boutin testified that he knew from Mr. Robb that the Union's position was that the former employees of Humboldt School Division were, after amalgamation, part of the St. Paul's bargaining units represented by the Union.

Arguments:

<u>The Union</u>

[37] Mr. Barnacle, counsel on behalf of the Union, summarized the facts of the merger of the Union locals as outlined above, and submitted that the merger occurred by operation of law pursuant to s. 39 of the *Act*. Counsel submitted that the net effect was that CUPE Locals 2268 and 3730 represented all of the employees covered by the four certification Orders, which are all-employee certifications. The sole issue is the status of the approximately 25 former employees of the legacy Humboldt School Division.

[38] Mr. Barnacle submitted that the present situation was not one of successorship pursuant to s. 37 of the *Act* because, *vis a vis* the Union, the Employer was the same after the disestablishment/vesting. That is, the Employer *i.e.,* St. Paul's School Division, remained the same as it was merely vested with the employment of 25 additional employees -- successorship only applies where one employer transfers the whole or part of a business to another, whereas the present situation is one of disestablishment and vesting by Ministerial Order. Counsel contrasted the present situation with the following hypothetical scenario: if St. Paul's School Division constructed a new school and staffed it with the 25 former employees of the Humboldt School Division, the new employees would be covered by the St. Paul's certification Orders, would be included in the certified bargaining units and would be obliged to join the Union pursuant to the union security provisions of the existing collective agreements. Counsel submitted that the true view of the present situation is that St. Paul's School Division has acquired 25 new employees that formerly worked for the Humboldt School Division, which employees now staff and operate the school or school buildings and equipment vested in St. Paul's School Division by Ministerial Order.

[39] Mr. Barnacle submitted that the Union is merely seeking to have the existing St. Paul's "all-employee" certification Orders applied without amendment. The Ministerial Orders do not exclude, restrict or abrogate the operation or application of the *Act* or the existing certification Orders. Counsel asserted that, whereas the Employer's position is that the Ministerial Orders would have to specifically state that the employees of the legacy school divisions are included in the St. Paul's School Division bargaining units before they would be included as a result of the disestablishment/vesting, the Union's position is that the Ministerial Orders would have to specifically exclude the operation of the *Act* in order that the bargaining certificates would not apply to the new employees. The Ministerial Orders speak of the "disestablishment" of the former school divisions, the "vesting" of assets, liabilities and contractual obligations in St. Paul's School Division, and the alteration of its geographic boundaries, but do not provide for the abrogation of the application of any statute or existing certification Order.

[40] Mr. Barnacle submitted that the Employer's negotiations with seven of the employees of the former Humboldt School Division was prejudicial to the Union – the Employer agreed to provide them with much better wages and benefits than they were

presently receiving and which took the Union years of collective bargaining to obtain for the employees of St. Paul's School Division – and constituted an unfair labour practice in violation of s. 11(1)(c) of the *Act*. The fact that the Employer's witnesses testified that this was done because it was important to have consistency among employees across the school division belies its assertion that there is no sufficient community of interest among the former Humboldt School Division employees and the St. Paul's School Division employees.

[41] In support of his arguments, counsel referred to the following decisions: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1993] 4th Quarter Sask. Labour Rep. 216, LRB File Nos. 256-93 to 260-93; *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95; *International Brotherhood of Electrical Workers, Local 529 v. Bill's Electric City Ltd.*, [1996] Sask. L.R.B.R. 399, LRB File No. 061-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. McGavin Foods Limited*, [1997] Sask. L.R.B.R. 210, LRB File No. 173-96; *United Food and Commercial Workers International Union, Local 226-2 v. Western Canadian Beef Packers Inc.*, [1998] Sask. L.R.B.R. 743, LRB File No. 026-98; *Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations*, [2002] Sask. L.R.B.R. 624, LRB File No. 057-02.

[42] In conclusion, Mr. Barnacle advised that the Union was prepared to waive the application of the union security clause that would require the 25 employees in question to join the Union, but that they be subject to the collective agreement and required to pay union dues.

The Employer

[43] Mr. Elson, counsel on behalf of the Employer, filed a memorandum of argument that we have reviewed. Counsel argued that the Board must look at ss. 40 through 60, and particularly s. 42(1), of *The Education Act, 1995*, S.S., which provides that a Ministerial Order establishing a school division designate its boundaries. Accordingly, limitation of geographic operation of certification orders applying to school divisions would be redundant. When such certification Orders were issued, it was not

anticipated that the school divisions would grow in such a way as to envelope other then existing School Divisions.

[44] Counsel submitted that the Ministerial Orders in the present case vested St. Paul's School Division with all of the contractual obligations of the former School Divisions, including individual contracts of employment with the non-union support employees of Humboldt School Division, and did not change the character of those contracts.

The Interested Parties

[45] Mr. Will, counsel on behalf of the interested parties, argued that the employees he represents were forced to accept St. Paul's School Division as their Employer and had no choice in the matter. While conceding that new employees are required to join the union, as in the case where a school is constructed, he said it would be unfair to require the Humboldt School Division support staff to do so.

Analysis and Decision:

[46] There are two applications before us in the present case. One is the Union's application pursuant to s. 39 of the *Act* to recognize the transfer of rights and obligations from the Union locals representing the bargaining units in the legacy school divisions to Union Locals 2268 and 3730. The other is the Union's application for an order finding the Employer guilty of an unfair labour practice and ordering it to comply with the existing certification Orders, and ancillary relief.

Transfer of Bargaining Rights – Section 39

[47] Notwithstanding the fact that pursuant to s. 39(b) of the *Act*, no order of the Board is required to effect the amalgamation or merger of the Union locals, – the Board's records are "deemed to be amended" to reflect the change – we are of the opinion that the transfer of bargaining rights to a single Union local by the separate Union locals in the legacy school divisions is not inappropriate for the purposes of collective bargaining. An Order will issue recognizing the transfer of bargaining rights from, and the amalgamation of, the separate locals to Locals 2268 and 3730. Pursuant to s. 39(b) of the *Act* all extant orders, agreements and proceedings in effect between

the Union locals in the legacy school divisions shall inure to the benefit of Locals 2268 and 3730 and shall apply to all persons affected thereby.

Unfair Labour Practice – s. 11(1)(c)

[48] Both the Union and the Employer have submitted that the present case is not one of successorship pursuant to s.37 of the *Act*, but rather, a statutory disestablishing of certain school divisions and the vesting of their assets, liabilities and contractual obligations in another existing school division. There is no issue between the parties that the Employer is bound by the extant orders, agreements and proceedings of the Board applicable to the legacy school divisions and St. Paul's School Division.

[49] However, there is a difference between the parties with respect to the Union's application that we find that the St. Paul's School Division certification Orders apply to all non-teacher support staff employees of the Employer, including those that were not organized in the legacy school divisions and included in existing certification Orders. The Union says they are "new" employees in the same way that employees hired to staff a newly constructed school would be subject to the union security provisions of the collective agreements. The Employer and interested parties say that they are not, and ought to have the right to make the decision whether to join the Union.

[50] It is long-established policy that the Board generally prefers larger more-inclusive bargaining units to smaller less-inclusive units. In *Saskatchewan Rivers School Division No. 119 v. Canadian Union of Public Employees Local 4195,* [1988] Sask. L.R.B.R. 478, LRB File Nos. 303-97 & 364-97, four school divisions were amalgamated. Three of the school divisions had non-teaching staff in bargaining units represented by seven different locals of the same union, while the non-teaching staff of the fourth school division was not unionized. The new larger Saskatchewan Rivers School Division admitted that it was the successor employer and applied, pursuant to s. 37, to create a single bargaining unit of all organized non-teaching staff by consolidating the existing units. The Union did not oppose the application generally, but sought to include positions in the new consolidated unit that had been excluded in the original separate certification orders. The Union also applied to represent the previously

unrepresented employees in the fourth legacy school division and filed evidence of majority support of the employees in that group. The Board granted the Union's certification application for the certification of the employees of the fourth school division and then consolidated all of the bargaining units. The Board stated as follows at 487:

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

[51] In *University of Saskatchewan v. Canadian Union of Public Employees, Local 1975, et al.*, [1978] 2 S.C.R. 834 (S.C.C.); (1977), 22 N.R. 314 (Sask. C.A.), it was determined that the Board had exclusive jurisdiction, not reviewable on judicial review, to consolidate existing bargaining units, but that the Board must consider any application to represent employees beyond those included by a mere consolidation, as an application for certification pursuant to ss. 5(a), (b) and (c) of the *Act*. Mr. Justice Bayda (as he then was) stated as follows:

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

[52] *University of Saskatchewan* also held that for the purposes of determining whether the unit applied for is appropriate for collective bargaining, the Board is not bound to consider the employees' wishes. Mr. Justice Bayda stated as follows:

> *It is, I think, now settled that to enable the Board to make an Order under s. 5(a) of the Act, the Board is not required to ascertain the*

> *employees' wishes respecting the composition and determination of an appropriate unit . . . . That, however, is not true of an order under Section 5(b) of the* Act*. The import of the provisions of Section s 3 and 5(b) of the* Act*, is such that where a new bargaining unit is established the employees in that unit have the right to choose the union they wish to represent them and the wishes of the majority of the employees in that unit shall prevail. These provisions impose a concomitant obligation upon the Board to ascertain those wishes before it can exercise its right to determine what union, if any, represents the majority in that unit. The Board may use whatever evidence of those wishes it deems appropriate evidence it must have. The commission by the Board of an error of law or fact respecting that evidence cannot form the basis of an order to quash.*

[53] In *Canadian Union of Public Employees, Local 4799 v. Board of Education of Horizon School Division No. 205*, [2007] Sask. L.R.B.R. ---, LRB File No. 053-06 (not yet reported), which was heard after the present case, but which has already been decided, the Board extensively reviewed many of the cases that arose out of the earlier reorganization of health care. We do not propose to do so again here, and the Board continues to subscribe to our comments in that case with respect to those decisions. The conclusions drawn by the Board in *Horizon* after that review included the following:

> *In our opinion, the cases regarding labour relations difficulties that arose from the earlier reorganization of health care did not result in the Board establishing any standard definition for the treatment of those situations. However, there are certain themes that run through several of the cases, including the fact that as a general principle, it is not the role of the Board to preside over the implementation of a new configuration of bargaining (in health care, there was pressure from some quarters to implement sectoral bargaining). Another principle was the refusal to depart from the consideration of criteria that have been historically applied when it was sought to include previously unrepresented employees in existing bargaining units. Such "historical criteria" include the requirement that the wishes of such employees be canvassed before the unit is reshaped.*

[54] What this means is that the Board may determine whether a particular bargaining unit is appropriate for the purposes of collective bargaining without regard to the wishes of the employees, but before such a unit may be certified, the Board's policy is to canvass the employees.

[55] In *Horizon School Division*, *supra*, the Board found that a single larger consolidated bargaining unit comprising employees in the existing bargaining units in the extant certification Orders of the Board regarding the legacy school divisions constituted an appropriate unit for the purposes of collective bargaining. As held in *University of Saskatchewan, supra*, the Board's exclusive jurisdiction to consolidate bargaining units is not reviewable.

[56] However, in the present case, the Union does not seek consolidation of existing bargaining units or amendment of the existing unit descriptions, but, rather, seeks a declaration that the existing St. Paul's School Division bargaining certificates cover the employees of the former Humboldt School Division.

[57] If all employees were included in the existing units it would: reduce fragmentation (another union could potentially seek to represent presently unrepresented employees); allow the employees in the bargaining unit to bargain together with a view to obtaining a single coherent collective agreement; serve to lessen administrative and bargaining complexity for both the Union and the Employer; and, significantly enhance labour relations stability and promote industrial peace, by abrogating the risk of multiple disruptions in service. It is almost certain that, had the Union applied for such a bargaining unit in the first instance, the Board would have found it to be appropriate. The non-union employees, as we understand it, are all in classifications currently represented by the Union in the extant certified bargaining units.

[58] While inter-mingling of the employees in the legacy school divisions has been minimal, it is a near certainty that it will occur, and at an increasing rate. A single bargaining unit would greatly reduce employee conflict with respect to new postings, vacancies and transfers, and would abrogate the situation where union and non-union staff performing the same job would be working side-by-side with different terms and conditions of work and protection through the grievance and arbitration process. With respect to the last point, the Board stated as follows in *Horizon School Division*, *supra*:

> *In our opinion, it is a certainty that, if intermingling of union and non-union employees doing the same jobs has not yet occurred, it will in the very near future and with increasing frequency. Conflict*

> *is inevitable when such employees work side by side, with different terms and conditions of work including access to grievance and arbitration procedures, and will increase when problems of transfer, mobility, lay offs, job posting, seniority, and application of multiple collective agreements, etc., occur more and more frequently.*

[59] However, as in *Horizon School Division*, *supra*, we are not prepared to simply "sweep in" the presently unorganized support staff.

[60] In our opinion, whether or not the present situation is a "successorship" pursuant to s. 37, it is such by any other name for all intents and practical purposes, and we propose to treat it as such. In other words, if the Union seeks to represent the former Humboldt School Division employees added to the Employer's employee complement as a result of school division reorganization, it must show that it has the support of a majority of the employees.

[61] In *Prince Albert Co-operative Association Limited v. Retail, Wholesale and Department Store Union, Local 496*, (1982) Sask. R. 314, 141 D.L.R. (3d) 524 (Sask. C.A.), affirming [1982] May Sask. Labour Rep. 55, LRB File No. 535-81, the Board had made the original certification Order in 1953. In 1981 the union applied for an amended certification order under s. 5(k) of the *Act* for an enlarged bargaining unit. There were approximately 120 employees in the original unit at the Employer's place of business in Prince Albert. The union sought to add 38 employees employed in towns outside Prince Albert at places of business that the employer had acquired since the original certification Order. The union filed direct evidence of majority support among the employees in the add-on group, but relied upon the existing certification order as proof of support of the majority of employees in the original unit. The Employer objected that this was not evidence of majority support for the enlarged unit. The Board allowed the application. The Employer applied for judicial review. In its judgment, written by Bayda, C.J.S., the Saskatchewan Court of Appeal affirmed the Board's decision and iterated that an existing certification Order is at least *prima facie* proof of the wishes of a bare majority of the employees to be represented by the union, *i.e.,* 50 percent plus one – that is, it is not necessary for the union to "re-prove" that it has majority support among that group of employees for the purposes of an application to amend the order to add previously unrepresented employees to the bargaining unit. If it chooses, the union may

rely upon its bargaining certificate, and need demonstrate only that it has majority support in the add-on group.

[62] But neither *University of Saskatchewan, supra,* nor *Prince Albert Co-operative, supra,* resolved the issue as to whether employee wishes must be determined on the basis of evidence of majority support among the employees in the add-on group (the "accretion") only, or of all the employees in the new proposed enlarged unit.

[63] Shortly after those decisions, the Board addressed the issue when the matter was raised again in *Sunnyland Poultry Products Ltd.*, *supra*. In that case, the union applied to amend the certification Order under s. 5 of the *Act* to expand the geographic scope of the Order which would have the effect of sweeping in four groups of employees at locations not included in the bargaining unit described in the existing Order. The Board observed as follows:

> *Bayda C.J.S. found that a majority of the employees in the accretion supported the union's application, but did not stop there, which he would be expected to do if he felt that a majority in the accretion was determinative. Instead he continued with a discussion of* ***how the union could prove majority employee support in the overall unit, which appears to be the constituency he had in mind.***
>
> *(Emphasis added.)*

[64] As we interpret the above three decisions, the Union must prove that it has support in the "overall unit" (in this case, the proposed all-employee units that we have found to be appropriate). This is further supported by the fact that, arguably, pursuant to s. 37 (2)(c) of the *Act*, in the case of successorship, the Board's mandate to determine what trade union, if any, represents a majority of employees is limited to the "unit determined to be appropriate pursuant to clause (b)"; that is, that the Board is specifically directed to consider only evidence of support in the enlarged unit found to be appropriate and not in the accretion alone; and whether the union has majority support from the group of employees being added is irrelevant so long as it has an overall majority in the proposed enlarged unit.

[65] Proof of the support of a majority of employees in the "overall unit" (or the two units in the case of St. Paul's School Division) may be established in any of several ways, as pointed out in *Horizon School Division*, *supra*:

(1) the Union could have relied on its existing bargaining certificates as evidence of the support of a bare majority of the employees in those units, and filed support card evidence of majority support among the group of presently-unrepresented employees;

(2) the Union could have filed support card evidence of the employees in the existing bargaining units of a number sufficient to establish the majority support of the total number of support staff employees both within and outside of the bargaining units (*i.e.,* in the enlarged proposed unit(s));

(3) the Union could have relied upon its existing bargaining certificates as evidence of majority support of the employees in those units, and asked for a representation vote of the group of previously unrepresented employees sought to be added, that represents their majority support; or,

(4) the Union could request that a representation vote be held among all of the support staff employees, both presently represented and unrepresented, in the proposed enlarged unit(s), that demonstrates their majority support.

[66] However, the Union has not applied to represent the former Humboldt School Division employees through any of these mechanisms. But, it is certainly open to it to do so, and to choose the mechanism it desires.

[67] Given our findings above, we find that the Employer has not committed an unfair labour practice as alleged.

Conclusion

[68] Orders will issue to the following effect:

(1) transferring the bargaining and representational rights of Canadian Union of Public Employees, Locals 3325 and 4734 to Canadian Union of Public Employees, Locals 2268 and 3730; and,

(2) dismissing the Unfair Labour Practice application.

DATED at Saskatoon, Saskatchewan, this **23rd** day of **September**, **2008.**

LABOUR RELATIONS BOARD

____
James Seibel,
Chairperson