The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4836, Applicant v. LUTHERAN SUNSET HOME OF SASKATOON, c.o.b. as LUTHERCARE COMMUNITIES, REGINA LUTHERAN CARE SOCIETY INC., and BROADWAY TERRACE INC., Respondents

LRB File No. 043-09; October 9, 2009
Chairperson, Steven Schiefner; Members: Bruce McDonald and Marshall Hamilton

For the Applicant:	Mr. J. E. (Jay) Seibel
For the Respondents, Regina Lutheran Care Society Inc. and Broadway Terrace Inc.	Ms. Meghan McCreary
For the Respondents, Lutheran Sunset Home of Saskatoon and LutherCare Communities	Mr. Philip Gallet

Employer – Designation of principal or contractor – Board identifies and applies criteria for determining, as between principal and contractor, who is true employer of employees – Principal owns supportive housing facility and contractor provides management and operational services to that facility - Board determines that it would be inappropriate to designate the principal as the employer.

Employer – Related employers – Board identifies and applies criteria for determining whether two respondents are related employers pursuant to s. 37.3 of the *Trade Union Act*.

Successorship – Transfer of business – Board determines that termination of contractual relationship between principal and contractor does not involve the transfer of a business within the meaning of s. 37 of the *Trade Union Act*.

Technological Change – Definition – Board finds that lay-off of employees resulting from the loss of a management contract not technological change within meaning of s. 43 of the *Trade Union Act*.

***The Trade Union Act*, Sections 2(g), 5(j), 37, 37.3 and 43(2).**

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: These proceedings involve a supportive housing project located in Regina, Saskatchewan, commonly known as the Broadway Terrace, and various corporate entities involved in the operation and management of that facility. The Saskatchewan Labour Relations Board (the "Board) was called upon to examine the

relations and interrelationships between these various corporate entities and to determine, from a labour relations perspective, the proper characterization of these relationships in the application of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*"). Although not essential to the Board's disposition herein, certain background information is helpful in understanding these proceedings.

[2] Regina Lutheran Care Society ("RLCS") was a non-profit corporation operating in the City of Regina involved in the provision of a spectrum of housing services, ranging from independent living accommodations (*i.e.* apartments) to more comprehensive personal care facilities. The difference in these facilities being the degree and type of care desired or required by the tenants thereof.

[3] Broadway Terrace was constructed by the Regina Lutheran Care Society in 2003 and completed in 2004. Concomitant with the construction of their new facility, RLCS incorporated Broadway Terrace Inc., which is a wholly-owned subsidiary of RLCS. Regina Lutheran Care Society and Broadway Terrace Inc. are related corporations, sharing the same directors, and, for purposes of Broadway Terrace, sharing a common goal. Broadway Terrace Inc. owns the land upon which Broadway Terrace is located and RLCS owns Broadway Terrace Inc. For purpose of these proceedings, these two (2) related corporations are hereinafter collectively referred to as the "Owners".

[4] Prior to the completion of Broadway Terrace, believing that they did not have an appropriate mix of management skills at that time to operate their new facility, the Owners approached Lutheran Sunset Home of Saskatoon and ultimately entered into an agreement with Lutheran Sunset Home of Saskatoon to manage and operate their new facility. Lutheran Sunset Home of Saskatoon is incorporated by private act of the Legislature and operates under the business name of "LutherCare Communities". Lutheran Sunset Home of Saskatoon, carrying on business as LutherCare Communities, owns and/or operates several housing and care facilities in Saskatoon, as well as in Outlook, in Estevan, and (until recently) in Regina. For purposes of these proceedings, we refer to Lutheran Sunset Home of Saskatoon as "LCC".

[5] The agreement between the Owners and LCC to manage and operate the Broadway Terrace was for an initial five (5) year period commencing on May 1, 2004 and continuing thereafter until such time as either party gave notice to terminate.

[6] In 2007, the Canadian Union of Public Employees, Local 4836 (the "Union") organized the employees of LCC working at the Broadway Terrace and, by Order of the Board dated April 5, 2007, the Union was certified as the bargaining agent for a unit comprising the employees of LCC working at Broadway Terrace, subject to a list of named exclusions. Following certification, the Union and the LCC entered into a collective agreement covering the employees working at Broadway Terrace, which agreement was effective April 15, 2008 and expires on April 14, 2011. The employees covered by the collective agreement provided housekeeping, food services, and a variety of other services to the tenants of Broadway Terrance, together with maintenance and clerical services concomitant with the operation of the facility.

[7] In June of 2008, the Owners resolved to terminate their operating agreement with LCC and soon thereafter gave verbal notice to LCC of their intention to terminate the operating agreement. On January 2, 2009, the Owners gave formal notice to LCC of its intention to terminate their agreement effective May 1, 2009. On March 25, 2009, LCC wrote to the Union to advise them of the fact that their contract to operate and manage Broadway Terrace was expiring and would not be renewed. In that letter, Mr. Mitzel advised the Union that:

> *…As a result of the loss of the contract, LutherCare Communities will be issuing layoff notices to 40 employees of whom 28 hold full or part time status and 12 who are casual and are employed on an as needed basis. The effective date of their termination is April 30, 2008.*

[8] LCC issued layoff notice to all employees in the Union effective April 30, 2008. At the time of layoff, there were approximately forty (40) employees within the bargaining unit.

[9] Concomitant with LCC's planned layoff of their employees, the Owners advertised for, interviewed and hired thirty-six (36) individuals to work at Broadway Terrace, performing essentially the same work as was performed by LCC's employee prior to termination of their contract. Approximately twenty-eight (28) members of the bargaining unit were hired by the Owners.

[10] On April 24, 2009, the Union filed an application pursuant to s. 5.3 of the *Act* seeking an interim order of the Board preventing LCC from laying off the employees of Broadway Terrace. In addition, the Union filed an application alleging an unfair labour practice against

both LCC and the Owners. In its unfair labour practice application, the Union cited ss. 37.3 and 37(1) of the *Act* alleging that a transfer of business had occurred under s. 37(1) or that LCC and/or the Owners were related employers within the meaning of s. 37.3 of the *Act*. In addition, the Union alleged that a technological change had been implemented in contravention of s. 43(2) of the *Act*.

[11] The Union's interim application was heard by a panel of the Board on April 30, 2009 and was dismissed for the reasons set forth in the Decision of the Board dated May 6, 2009. See: *Canadian Union of Public Employees, Local 4836 v. LutherCare Communities (Lutheran Sunset Home of Saskatoon),* 2009 CanLII 22876 (SK L.R.B.)

[12] The Union's unfair labour practice application was heard by the Board on August 26, 27 and September 4, 2009. At the outset of the hearing on August 26, 2009, the Union sought leave to amend its application as follows:

(a) to allege and seek a declaration from the Board that Broadway Terrace Inc., Regina Lutheran Care Society Inc., and/or Broadway Terrace Joint Venture was the true employer of the employees within the meaning of s. 2(g) of the *Trade Union Act*;

(b) to seek an Order of the Board amending the Union's certification Order, pursuant to s. 5(i) and/or (j) of the *Act* to reflect the identity of the true employer; and

(c) to allege and seek a finding of the Board that Broadway Terrace Inc., Regina Lutheran Care Society Inc., and/or Broadway Terrace Joint Venture have committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* for failing to bargain collectively with the Union.

[13] The Board reserved decision on the Union's application to amend its unfair labour practice application. On August 27, 2009, at the conclusion of evidence, the Board granted the Union's application to amend its unfair labour practice application in the manner sought, relying upon the authority granted pursuant to s. 19 of the *Act* in doing so.

The Union's Evidence:

[14] The Union called Mr. Will Bauer, who was a national representative for the Canadian Union of Public Employees ("CUPE National"). Mr. Bauer testified that on March 25, 2009 he met with LCC's Mr. Mitzel, the Vice-President of Human Resources & Community Services, and was advised of LCC's plans to layoff of its employees working at Broadway Terrace effective April 30, 2009. Mr. Bauer stated that he checked the records of the Union and this meeting was the first notice the Union had of LCC's plans to layoff their employees working at Broadway Terrace.

[15] Mr. Bauer further provided that, at the time of his meeting with Mr. Mitzel, the executive of the Union was inactive and that ultimately CUPE National took administrative control of the Union. Mr. Bauer testified that, at the time of his meeting with Mr. Mitzel, the Union had five (5) outstanding grievances with LCC, four (4) of which related to members of the Union's executive and/or their earlier termination by LCC. Mr. Bauer testified that only one (1) active member of the Union's executive was hired by the Owners.

[16] Mr. Bauer also testified that during his March 25, 2009 meeting with Mr. Mitzel he was not provided with notice, and there was no discussion of "technological change" within the meaning of s. 43 of the *Act*. In cross-examination by counsel for LCC, Mr. Bauer admitted that he did not raise this issue with Mr. Mitzel during their meeting either.

[17] Mr. Bauer testified that, after his meeting with Mr. Mitzel, he phoned Ms. Jill Beatty, the Owner's Chief Executive Officer, and asked the Owner to delay their meeting with the employees (and, presumably, to delay the issuance of layoff notices to members).

[18] Mr. Bauer provided that the employees in the unit were given their layoff notices later that day (*i.e.* on March 25, 2009) at a meeting organized by Mr. Mitzel. Mr. Bauer provided further that he spoke with members of the bargaining unit and asked them to take notes during their meeting with Mr. Mitzel.

[19] Mr. Bauer testified that he had difficulty communicating with members of the bargaining unit and that he believed, based on at least one (1) statement made to him by the

spouse of a member, that the membership were reluctant to speak with the Union until they knew whether or not they had new jobs with the Owners.

[20] Finally, Mr. Bauer testified that on April 14, 2009 he attended another meeting with Mr. Mitzel to discuss the Union's outstanding grievances with LCC, at which time, Mr. Mitzel advised the Union that LCC was prepared to continue working with the Union toward the resolution of these matters.

[21] In cross-examination by counsel for the Owners, Mr. Bauer admitted that no representatives of the Owners attended either the Union's meeting with Mr. Mitzel or the meeting organized by Mr. Mitzel to provide layoff notices to members of the Unit. However, Mr. Bauer observed that Ms. Beatty was in the building on March 25, 2009 and that she spoke with some of the affected employees after their meeting with Mr. Mitzel.

[22] In cross-examination by counsel for LCC, Mr. Bauer confirmed that following his initial meeting with Mr. Mitzel on March 25, 2009, LCC continued to negotiate with the Union with respect to the outstanding grievances. Furthermore, Mr. Bauer admitted that the Union had not filed any unfair labour practice applications related to the earlier dismissal of the members of the Union's executive that were the subject matter of the outstanding grievances.

[23] In cross-examination by counsel for LCC, Mr. Bauer admitted that on March 25, 2009 he knew that at least one (1) active member of the Union's executive was going to be in attendance during the meeting organized by Mr. Mitzel to provide layoff notices; that he asked this member to take notes at the meeting; and that he had not asked LCC if he could attend the meeting.

[24] The Union did not call any members of the bargaining unit or any members of the Union's executive (active or otherwise).

The Owners' Evidence:

[25] Mr. Fred Hill testified on behalf of the Owners. Mr. Hill was the Chairman of the Board of Directors for both Regina Lutheran Care Society Inc and Broadway Terrace Inc. Mr. Hill joined the Board in February of 2005; became Vice-Chairperson in June of 2005; and became Chairperson in January of 2006.

[26] Mr. Hill described the history of Regina Lutheran Care Society Inc. and indicated that the Owners operate three (3) facilities in Regina:

> The Regina Lutheran Home, located at 1925 5th Avenue: This facility was the first constructed by the Society and was described as a nursing home providing Level 3 & 4 Care for residents of that facility.
>
> Milton Heights, located at the corner of Winnipeg Street and Broadway Avenue: This facility was described as a ten (10) story apartment complex catering to low and middle income seniors and vulnerable adults.
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> Broadway Terrace, located at 1150 Broadway Avenue: This facility was described an intermediate care facility. Tenants acquire ownership in suites in this facility through life-leases and are able to purchase additional tenant services, such as food, linen, and housekeeping services, on a monthly fee for services basis.

[27] Although Mr. Hill testified that each of its facilities was managed through separate non-profit corporations, all three (3) boards of directors were comprised of the same members as sat on the Board of Directors for the RLCS, which was the holding company for all three (3) operations.

[28] Mr. Hill stated that Broadway Terrace was comprised of one hundred and twenty-three (123) life-lease units, together with fifteen (15) personal care beds; the latter facilitating more intensive care for tenants (when and as necessary. Mr. Hill testified that, although the Society originally planned to operate the facility with their existing staff, prior to the completion of construction, the Board of Directors of the RLCS concluded that their existing staff (and, in particular, their CEO at that time) did not have the necessary capacity or experience to operate their new facility. As a consequence, RLCS contacted LCC and sought a proposal from them on the operation of Broadway Terrace.

[29] Mr. Hill provided that on September 23, 2003, LCC provided a proposal to the RLCS's Board of Directors to manage and operate Broadway Terrace. This proposal involved LCC supplying the human resources necessary to manage all aspects of day-to-day operations at Broadway Terrace and delivering all tenant services to residents thereof. LCC's proposal was described in a letter dated September 23, 2003 to the RLCS's Board of Directors and included the following general description of the relationship between the parties being proposed by LCC:

> *This "Proposal" is premised on the undertaking of a long-term commitment by both parties to provide care and housing to seniors in the community. Ownership of the plant and equipment remains solely with RLCS, while LCC will manage the facility similar to a joint venture, committed to be there for the constituency, providing a safe, secure and supportive environment at all times. LCC philosophy of care is a holistic approach, which includes but is not limited to spiritual care, food services, gerontological social work, wellness services, hotel services and tenant services.*

[30] At some time prior to the commencement of operations of Broadway Terrace, the Owners resolved to utilize LCC's services to manage and operate their new facility and negotiations between the parties culminated in a document entitled Broadway Terrace Joint Operating Agreement. This agreement, although not executed until May 10, 2005, was for an initial five (5) year period commencing on May 1, 2004 and continuing thereafter until such time as either party gave notice to terminate (hereinafter referred to as the Joint Operating Agreement.

[31] The following Articles (or portions thereof) of the Joint Operating Agreement are, in the opinion of the Board, relevant to the matters in issue between the parties (and/or were referred to by the parties during the proceedings):

> *3.* ***OBJECTIVES AND RELATIONSHIP OF PARTIES***
>
> *3.1* ***Establishment of Joint Operation****. The parties agree that the Owner shall contribute, among other things, the Owner's Services[1] and the Caregiver[2] shall contribute its expertise in providing Personal Care Services such that the Owner and the Caregiver shall jointly establish the Joint Operation[3] as a single provider of Senior's Services to Residents of the Facility.*
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> *3.4* ***Joint Operation Property.*** *The Owner shall continue to be the sole legal and beneficial owner of the Facility and the Equipment. Each of the Owner and the Caregiver shall have access to and the use of the Facility and the Equipment for the purposes of the Joint Operation. The Caregiver hereby grants to the Joint Operation a non-exclusive licence to use the Marks in connection with the Joint Operation in accordance with the terms of section 12 herein.*
>
> *3.5* ***No Partnership Created.*** *The parties acknowledge and agree that this Agreement is not intended to create, nor shall it be construed as creating any partnership or agency relationship. Nothing contained in this Agreement shall or shall be deemed to constitute the parties as partners or as agent of the other nor any other relationship whereby either could be held liable for any act or omission of the other party. The Joint Operation will not be carried on with a view to profit*

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1 The term "**Owner's Services**" was a defined term meaning the facility and all equipment located therein.

2 The term "**Caregiver**" was a defined term meaning LCC.

3 The term "**Joint Operation**" was a defined term meaning the joint operation of Broadway Terrace by the Owner and LCC as a single provider of services to the residents of that facility.

6. ***CONTRIBUTIONS AND OBLIGATIONS OF THE PARTIES WITH RESPECT TO THE JOINT OPERATION***

6.1 ***Contributions of the Owner.*** *Notwithstanding the generality of paragraph 3.1, the Owner shall make the following contributions to the Joint Operation:*

(a) The Owner shall at its own expense construct the Facility, in a good and husband like manner and within a reasonable time, in accordance with the proposed plan outline attached hereto as Schedule C. It is estimated that the Facility will be completed and ready for occupancy on or about the first day of May, 2004;

(b) Subject to the terms of this Agreement, the Owner shall at is own expense at all times maintain the Facility in a good state of repair such that the Facility may operate as a first class seniors' residence and personal care home;

(c) The Owner shall at its own expense provide all Equipment and adequate space for the Joint Operation, including kitchen space, within the Facility and pay for the expense of all utilities that are required for the Joint Operation. The Owner agrees to maintain all Equipment and to replace it when it is worn out;

(d) The Owner shall place or cause to be placed and keep in force the following insurance in respect of the Joint Operation, including the Facility and Equipment, with a reputable insurance company or companies:

(i) All risk insurance policy covering the Facility and Equipment for its full insurable value including replacement cost, stated amount, earthquake and flood coverages;

(ii) Boiler insurance coverage;

(iii) Comprehensive third-party liability insurance coverage in an amount not less than $5,000,000.00 on an occurrence basis, that names both the Owner and the Caregiver as insureds. Such insurance shall provide protection against any claims for personal injury or death or property damage or loss in the event that either the Owner or the Caregiver shall be held liable as a result of their respective obligations as Owner and Caregiver of the Joint Operation; and

(iv) Business interruption insurance and/or rental insurance coverage sufficient for a period of 12 months.

The Owner agrees that copies of certificates of each insurance policy shall be delivered to the Caregiver. All cancellation clauses in the above-mentioned policies are to provide for not less than thirty (30) days prior notice to the Caregiver of cancellation and/or material alteration of the policies;

(e) The Owner shall obtain all licences that may be required for the Joint Operation to operate as a seniors' residential and personal care home; and

(f) The Owner shall be liable to pay and shall pay all expenses of the Joint Operation.

6.2 ***Contributions of Caregiver.*** *Subject to the terms of this Agreement, including the Approved Budget (as defined herein), the Caregiver shall provide the following services to the Joint Operation:*

. . .

6.3 ***Personnel.*** *The Caregiver shall investigate, hire, train, promote, supervise and discharge (as necessary) all full-time and part-time on-site personnel necessary for the operation of the Joint Operation (collectively, the "Personnel"). With respect to Personnel:*

(a) All Personnel shall be employees of the Joint Operation;

(b) The Caregiver shall develop and supervise the implementation of personnel policies and procedures reasonably necessary for the Joint Operation to comply with all applicable employment, anti-discrimination, wrongful discharge, occupational safety and health and other similar laws and regulations affecting employment of Personnel (and where applicable, union contracts); and

(c) The Caregiver shall counsel, evaluate and train all of the employees of the Facility as necessary for the day to day operation of the Facility. The Caregiver shall have the right to discharge employees where necessary and appropriate.

6.6 ***Budgets.***

(a) At least forty-five (45) days prior to the commencement of each Fiscal Year during the term of this Agreement, the Caregiver shall prepare and submit to the Owner, for the Owner's approval, a proposed accrual basis operating budget (the "Budget") for the ensuing Fiscal Year setting forth in reasonable detail, on a monthly basis, the Caregiver's estimates of (i) operating revenue, (ii) operating expenses, including estimated costs for repairs and maintenance work recommended by the Caregiver, and (iii) capital expenditures recommended by the Caregiver. Such Budget shall be an "Approved Budget" when approved by Owner pursuant to this Section 6.6. The Owner shall approve the Budget in writing to the Caregiver within thirty (30) days after receipt, including any amendments that the Owner, in its discretion deems necessary. If the Owner does not approve, or amend and approve, the Budget within such thirty (30) day period then the Owner shall be deemed to have approved of the Budget; and

(b) If at any time circumstances indicate that the Approved Budget does not materially reflect the projected needs of the Residents pursuant to the Personal Care Agreements, the Caregiver shall notify the Owner of the same and shall submit to the Owner a proposed revised Budget. The Owner shall approve the Revised Budget in writing to the Caregiver within thirty (30) days after receipt, including any amendments that the Owner, in its discretion deems necessary. If the Owner does not approve, or amend and approve, the revised Budget within such thirty (30) day period then the Owner shall be deemed to have approved of the Budget. The Owner agrees to act in good faith by submitting reasonable and achievable amendments and will not unreasonably withhold

approvals of budgets submitted by the Caregiver. If the budget approval is withheld and in the sole discretion of the Caregiver, the failure to approve the revised Budget will compromise the normal services provided by the Caregiver, the Caregiver shall have the right to terminate this Agreement and is entitled to remedies under paragraph 8.4.

6.7 ***Contracts and Purchasing****.*

(a) An Approved Budget shall constitute authorization for the Caregiver to expend funds to operate and manage the Facility pursuant to such Approved Budget, and the Caregiver may do so without further approval, provided, however, that the Caregiver shall not make any expenditure in excess of ten (10%) percent over the amount budgeted for such time in the Approved Budget without Owner's approval. The Caregiver shall use its best efforts to adhere to the Approved Budget;

6.8 ***Maintenance and Disbursement of Funds****.*

(a) The Owner shall establish a suitable operating bank account (the "Operating Account") at the Bank in the name of the Owner with the Caregiver and the Owner being the only parties authorized to draw from the Operating Account. The Caregiver shall deposit all funds collected from the operation of the Joint Operation in the Operating Account, it being understood that all funds so deposited shall be held in trust for the benefit of the Owner. Such funds shall include (i) all amounts of rents, fees, assessments and other charges received as set forth in Section 6.2(b)(i) hereof, (ii) all other monies furnished by the Owner or received by the Caregiver for and on behalf of the Owner, (iii) all proceeds from sales of goods and services, refunds, reimbursements and (iv) proceeds, if any, from business interruption or rent loss insurance;

(b) The Caregiver shall not co-mingle any funds in the Operating Account with other funds collected and deposited by the Caregiver which are not related to this Agreement.

(c) To the extent funds are available in the Operating Account, the Caregiver shall disburse such funds to pay all expenses authorized in the Approved Budget or otherwise under the terms of this Agreement, including, but not limited to, the following (but only to the extent such expenses constitute Authorized Expenses):

(i) All Taxes which the Caregiver shall pay before the same becomes delinquent unless payment thereof is contested by the Owner, and the owner has, by notice hereunder, advised the Caregiver not less than ten (10) days prior to the date on which such taxes, assessments or charges are payable of such contest had directed the Caregiver not make such contested payment;

(ii) All required payments of debt service on mortgages or other indebtedness encumbering the Facility. Such payments may include interest expenses, principal reductions and/or amounts payable for tax and insurance escrows if required by the mortgagees;

(iii) The salaries, wages, other compensation including, without limitation, withholding taxes, unemployment insurance premiums, workers' compensation premiums, pension fund contributions and other fringe benefits and related expenses of the Personnel;

(iv) The costs and expenses of utilities, services and concessions of the Joint Operation;

(v) the cost of all purchases of materials and supplies incurred in the day-to-day operation of the Joint Operation;

(vi) The costs and expenses for repairs, maintenance and alterations to the Facility;

(vii) The costs of any auditing or other accounting services, legal services, and other professional services utilized by the Facility or in accordance with the provisions hereof;

(viii) The cost of insurance maintained pursuant to this Agreement;

(ix) The Caregiver's Revenue Share (as defined herein) and reimbursements due under this Agreement, and all other payments due the Caregiver under the terms of this Agreement;

(x) The cost of leasing activities undertaken; and

(xi) All other Authorized Expenses incurred by the Caregiver in the operation and management of the Joint Operation;

7. MANAGEMENT OF THE JOINT OPERATION

7.2 ***Management Advisory Committee.*** *The Owner and the Caregiver agree to form a Management Advisory Committee. The purpose of the Management Advisory Committee is to give advice and recommendations to the Caregiver with respect to the day-to-day management of the Joint Operation. The Management Advisory Committee terms of reference shall be as set out in the attached as Schedule G.*

8. TERM OF AGREEMENT AND TERMINATION

8.1 ***Term of Agreement.*** *Subject to section 8.2, the term (the "Term") of this Agreement shall be for a period of five (5) years, from the Effective Date unless otherwise terminated earlier in accordance with the provisions of section 6.6, section 8.3, section 14.2, or section 15.2 hereof.*

8.2 ***Termination for Convenience.*** *Upon expiry of the Term, this Agreement shall continue in full force and effect; provided, however, that at any time thereafter, either party may terminate this Agreement on at least one hundred and twenty (120) days' notice to the other party.*

9. FINANCIAL MATTERS

9.1 ***Caregiver's Share of Revenues.*** *The parties acknowledge and agree that the Caregiver shall be entitled to a share (the "Caregiver's Revenue Share") of the*

revenues received from the operation of the Joint Operation in accordance with the following:

(a) $45 per Unit per month during the term of this Agreement;

(b) plus an additional amount of $40 per occupied Unit per month during the Term of this Agreement.

The parties further acknowledge and agree that the Caregiver shall be entitled to transfer the Caregiver's Revenue Share from the Operating Account to itself prior to the payment of any of the expenses of the Joint Operation.

10. ***ACCOUNTING***

10.1 ***Books and Records.*** *An accounting system in respect of the Joint Operation, including proper books of account and all reconciliation of the Account, shall be established and maintained by the Caregiver. Entry shall be made in the books of account of all such matters, terms, transactions and things that are usually written and entered into books of account with respect to an operation of a similar nature. Such books of account shall be maintained at the Facility. The Owner shall have a free access at all times to inspect, examine and copy such books and records. The Caregiver will establish appropriate internal controls to protect the assets of the Owner and the Joint Operation.*

[32] Mr. Hill testified that in many respects, the parties had not followed the terms of the joint Operating Agreement in the day to day administration of the facility. For example, Mr. Hill provided that the facility was not operated as a "joint operation" or, at least, not a joint operation with respect to the workforce. Mr. Hill testified that, contrary to Article 6.3(a) of that agreement, the employees working at Broadway Terrace were not employees of a "joint operation"; they were exclusively the employees of LCC and the Owners had no involvement with their hiring, the terms or conditions of their employment, or with their remuneration, training or orientation. Mr. Hill stated that the Owners' primary involvement in the operation of Broadway Terrace was the provision of the facility and the equipment located therein.

[33] Mr. Hill testified that the Owners' involvement in day-to-day operations at Broadway Terrace was essentially limited to three (3) areas:

1. The Owners' right to make final determinations with respect to each year's "***operating budget***"; budgets presented by LCC to the Owners each year and for which final approval rested with the Owners.
2. The "***joint operating account***" that was established by the Owner and into which all revenues for the facility were deposited and out of which all expenses were charged.

3. Participation by representatives of the Owners in a "***management committee***", which provided advice and recommendations to LCC in the day to day operation of the facility.

[34] Mr. Hill testified that LCC annually prepared an estimated budget for the operations of Broadway Terrace and that the Owners reviewed the budget presented by LCC and exercised the right of final approval. In exercising their right of final approval, Mr. Hill provided that, if a budget line was too high (or conversely too low), the Owners could send the budget back to LCC for change. In some cases, Mr. Hill indicated that the annual budget was presented by LCC with various increments of desired increases for certain budget lines, such as salaries, with an indication of the additional services that would be received or provided concomitant with each increment of increase. Mr. Hill testified that the Owners were not involved in the composition or details of any particular budget line, including salaries. Mr. Hill indicated that the Owners only approved the total amount for each budget line and then used the final tabulation of LCC's operating budget to determine the annual service fees to be charged to residents.

[35] Mr. Hill further testified that the Owners periodically and regularly reviewed LCC's performance under the operating agreement by reviewing their expenditures relative to the budgets that had been approved.

[36] Mr. Hill provided that LCC was paid a management fee based on the number of beds located within the facility, with an incentive for the number of beds that were occupied. In exchange for their management fee, LCC provide all services necessary to make the facility run, ranging from operating the kitchen and providing food services, to providing laundry and housekeeping services, to social programming for tenant, to shoveling the snow on the sidewalk. In doing so, LCC was also responsible for paying all bills and costs associated with operation of the facility, including the salaries of staff, and did so (at least initially) directly out of the operating account established by the Owners. Later in the operation of the facility (2005), LCC began utilizing their own bank accounts to pay expenses, including salaries, and merely reimbursed itself for such costs by making a draw on the Owner's operating account. Mr. Hill testified that this change in the practice of paying expenses occurred sometime after October of 2005.

[37] Mr. Hill testified that, while the Owners and LCC shared common goals; namely, the provision of safe and affordable housing, coupled with a broad range of tenant services provided in a spiritual setting, they shared no common managers and they had no common ownership. In Mr. Hill's opinion, they were two (2) separate organizations, with the Owners contracting with LCC to provide services that, at the time they began opened Broadway Terrace, the Owners did not believe they possessed.

[38] Mr. Hill testified that, in the fall of 2005, the Owners released their previous Executive Director and began a search for a person with the necessary managerial skills and experience to allow the Owners to operate Broadway Terrace. Mr. Hill further testified that the current Executive Director (now referred as to Chief Executive Officer) of RLCS, Ms. Jill Beatty, was hired by the Owners in June of 2006 and that her hiring laid the foundation for the Owners' subsequent decision to cancel their contract with LCC and take over operations at Broadway Terrace.

[39] In cross-examination by counsel for the Union, Mr. Hill confirmed that, under the Joint Operating Agreement with LCC, the Owners were responsible for the payment of all costs associated with operation of Broadway Terrace, including all costs associated with salaries and benefits provided to the employees working at the facility. Mr. Hill also confirmed that, if operating cost of the facility increased, these costs were passed on to tenants through increased tenant fees. However, Mr. Hill denied that there was a direct link between increased costs and the need for the Owners to pass these costs on to tenants in the form of tenant fees. Mr. Hill indicated that cost increases were not passed on to tenants if savings could be realized elsewhere in the operations. In cross-examination, Mr. Hill admitted that, if LCC negotiated salary increases that were too high, the Owners could have declined to approve the budget as presented by LCC. However, Mr. Hill denied doing so.

[40] In cross-examination, Mr. Hill confirmed that the Owners were informed by LCC's housing manager, who regularly attended meetings of the Board of Directors, that the Union had applied to represent the employees working at Broadway Terrace. Mr. Hill also confirmed that the Owners periodically received updates from the housing manager (an employee of LCC) on the Union's certification drive during meetings of the Owners Board of Directors. In cross-examination, Mr. Hill denied that representatives of the Owners were involved in or present during collective bargaining with the Union. However, Mr. Hill admitted that the Owners received

regular reports regarding collective bargaining from LCC's housing manager during meetings of the Owners' Board of Directors. Mr. Hill denied that the Owners provided any parameters to LCC in their negotiations with the Union or another other form of a collective bargaining mandate.

[41] In cross-examination, Mr. Hill admitted that the Owners reimbursed all of LCC's expenses associated with collective bargaining. Mr. Hill stated that, at first, the Owners did not believe they should be responsible for such costs but later concluded that the Owners were obligated to reimburse LCC for the costs of collective bargaining. The Owners came to this conclusion based on the language of their agreement with LCC believing that, under the terms of their operating agreement with LCC, the Owners were obligated to reimburse LCC for all expenses they incurred in the operation of Broadway Terrace, including the cost of collective bargaining.

[42] In cross-examination with respect to the operating account, Mr. Hill admitted that both the Owners and LCC had independent signing authority over this account, with both having authority to deposit and withdraw funds from the account. Furthermore, Mr. Hill also confirmed that after LCC established its owner bank account, LCC continued to have authority to withdraw funds from the joint account and continued to do so; the difference being that, before the change, all cheques were drawn on the joint account; and, after the change, LCC merely reimbursed itself for the costs it incurred from the joint account.

[43] In cross-examination, Mr. Hill admitted that, although the Owners had always wanted to operate Broadway Terrace with its own staff, it was not until May of 2008 (one month after being advised that the Union had received a certification Order), that the Board of Directors began formal transition planning to examine the risks and benefits of terminating its contract with LCC and operating Broadway Terrace with its own employees.

[44] Finally, in cross-examination, Mr. Hill testified that during construction of Broadway Terrace, there were cost overruns and the Owner could not get the necessary additional financing from their traditional lender. As a consequence, the Owners approached LCC and received sufficient funding to complete Broadway Terrace by way of a loan agreement. Mr. Hill admitted that, at the time the Owners negotiated the operating agreement with LCC, the Owners' loan with LCC was not complete. In other words, at the time the Owners negotiated the

operating agreement, LCC was one (1) of the Owners' creditors. Furthermore, Mr. Hill admitted that, because of this relationship, a provision was included in the operating agreement that the Owners could not sell or transfer controlling interested in Broadway Terrace without LCC's consent. In redirect, Mr. Hill testified that the Owners' loan to LCC carried an interest rate of prime plus five percent (5%).

[45] Ms. Jill Beatty testified that she was the Owner's Chief Executive Officer, having been hired by the Owners in June of 2006 (although not starting until August of 2006). Ms. Beatty testified that she was the only employee of RLCS and was responsible for oversight of the three (3) facilities owned by RLCS. Ms. Beatty confirmed Mr. Hill's description of the supportive housing services offered by RLCS in Regina, Saskatchewan.

[46] Ms. Beatty testified that all three (3) facilities collectively employed approximately two hundred (200) people; with the least number of employees (2 – 4) working at Milton Heights; with the greatest number of employees working at the Regina Lutheran Home (150-160); and with approximately forty (40) employees working at Broadway Terrace (4 of which were considered to be management).

[47] Ms. Beatty confirmed Mr. Hill's testimony that the Owners had no direct involvement with employees when Broadway Terrace was operated by LCC. In addition, Ms. Beatty testified that the Owners had no payroll records for the employees, nor time sheets, nor any control over scheduling of employees (prior to May 1, 2009). In cross-examination, Ms. Beatty denied that the Owners had access to LCC's personnel files prior to May 1, 2009 but admitted that in January of 2009 she had began working out of the Housing Manager's Office in Broadway Terrace, while this person was on maternity leave, and that there may have been files left in that office by its previous occupant.

[48] Ms. Beatty confirmed that the Owners' agreement with LCC provide that LCC received a management fee based on the number of occupied beds at Broadway Terrace, plus reimbursement for all and every expense incurred in the operation of that facility. Ms. Beatty testified that the Owners' originally disputed LCC request for reimbursement of the costs of collective bargaining with the Union but ultimately concluded that they were obligated to do so by their agreement with LCC. In cross-examination, Ms. Beatty testified that there were "*ups &*

downs" in their relationship with LCC, including disputes over other cost items for Broadway Terrace.

[49] Ms. Beatty confirmed Mr. Hill's description of the "joint account" utilized for Broadway Terrace and testified that the Owners' decision to create a joint account and to provide LCC with signing authority was based on operational convenience and upon what she described as "*well-considered trust*". Ms. Beatty explained that, if LCC "*ran amuck*" with the Owners' funds, they would lose the operating contract for Broadway Terrace and probably would not get any contracts from anyone else either.

[50] Ms. Beatty testified that the Owners' decision to cancel LCC's operating contract for Broadway Terrace could be traced back to her hiring. Ms. Beatty testified that she was specifically hired to assume the responsibility for the operation of Broadway Terrace, together with the other facilities operated by the Owners in Regina.

[51] Ms. Beatty testified that the Owners initiated informal communications with LCC in 2008 so that they would have advance notice of the Owners' intention to terminate their operating agreement at the expiration of its initial term. Ms. Beatty indicated that LCC wanted and was hoping to keep the contract for Broadway Terrace. After being advised that the Owners had already made up their mind, LCC began drawing up plans for their departure and for the orderly transition to operations at Broadway Terrace to the Owners. Ms. Beatty indicated that the parties wanted a smooth transition with no interruption in services to the tenants.

[52] Ms. Beatty testified that the Owners advertised broadly to hire staff to work at the facility and received approximately 400 applications from interested individuals, from which eighty (80) interviews were conducted. Ms. Beatty testified that the Owners hired thirty-nine (39) employees, including three (3) managers, to operate the facility commencing on May 1, 2009. Ms. Beatty testified that they interviewed all of the employees that they hired and that references were checked and Criminal Records reports were obtained on all employees that were offered employment. Ms. Beatty testified that the Owners conducted orientation sessions with all employees (in July-August of 2009) on matters ranging from the mission and values of the Owners, to the procedures for holiday scheduling, to how to complete timesheets. Finally, Ms. Beatty testified that twenty-eight (28) former employees of LCC working at the facility were rehired by the Owners. In cross-examination, Ms. Beatty testified that all employees were

placed on probation for six (6) months after being hired by the Owners and explained that the delay in conducting orientation sessions (*i.e.* two (2) months) was because they did not have a Human Resources Department at that time.

[53] In cross-examination, Ms. Beatty confirmed that she was in the building (Broadway Terrace) on March 25, 2009 when the employees were given their layoff notices by LCC. Ms. Beatty confirmed that she was approached by at least one (1) employee, a cook, whom Ms. Beatty encouraged to apply to the Owners for a job, telling her that she was a good cook.

LutherCare Communities' Evidence:

[54] Mr. Larry Mitzel was called to testify for LCC. Mr. Mitzel was the Vice-President of Human Resources and Community Services. Mr. Mitzel provided an overview of LCC's activities, which included the provision of supportive housing in various communities in the province either in facilities they owned or in facilities owned by others. Mr. Mitzel also described the history of LCC and its organizational structure. Mr. Mitzel testified that LCC and the Owners did not share any common membership on their respective boards of directors nor any common management.

[55] With respect to Broadway Terrace, Mr. Mitzel's testimony confirmed Mr. Hill's and Ms. Beatty's description of the relationship between the Owners and LCC. Mr. Mitzel denied any direct involvement by the Owners in the day-to-day operations of Broadway Terrace. For example, Mr. Mitzel denied any involvement by the Owners in staffing levels at Broadway Terrace. Mr. Mitzel testified that, while it still had the contract for Broadway Terrace, LCC paid all employees working in the building; that all pay stubs issued to employees were in the name of LCC; that LCC made all arrangement for benefits for employees; and that all discipline and grievance matters involving employees at Broadway Terrace was performed by management of LCC; all without direction from the Owners.

[56] Mr. Mitzel testified that LCC was receiving approximately $140,000 per year from the Owners for the management of Broadway Terrace and that the loss of this contract was significant for LCC.

[57] Mr. Mitzel further testified that LCC retained a human resource consultant to assist them in collective bargaining with the Union and that, although the Owners ultimately reimbursed LCC for this expense, LCC received no direction from the Owners with respect to collective bargaining.

[58] Mr. Mitzel stated that he prepared all letters for terminated employees; that he sent the requisite notices to the Minister of Labour; and that he conducted the meetings with affected employees. Mr. Mitzel clarified that there were four (4) meetings held; two (2) meetings on March 25 and two (2) on March 26, 2009 to accommodate employees' shifts. Mr. Mitzel confirmed that no representatives of the Owners were present during any of these meetings.

[59] In cross-examination, Mr. Mitzel admitted that, although the Owners gave advance notice to LCC of their intention to terminate the operating contract for Broadway Terrace in 2008, LCC did not give advance notice to either the employees or the Union of the fact that they lost the contract for Broadway Terrace. When asked by counsel for the Union why LCC did not give more notice to its employees, Mr. Mitzel answer that LCC was afraid that the employees would "*jump ship and not wait around*".

[60] In cross-examination, Mr. Mitzel testified that LCC was involved in collective bargaining with the Union from 2007 until April 15, 2008 (when the collective agreement was signed) and that he believed that LCC, through their negotiator, had advised the Union that it had an operating agreement with the Owners of Broadway Terrace respecting the management of that facility. However, Mr. Mitzel admitted that LCC did not advise the Union, during these negotiations, of the potential that LCC could lose the contract with the Owners.

Rebuttal Witness Called by the Union:

[61] In response to the testimony of Mr. Mitzel that he believed that LCC had advised the Union of the existence of its operating agreement with the Owners, the Union was granted leave to call a rebuttal witness. The Union called Ms. Patricia Brockman.

[62] Ms. Brockman testified that she was a National Representative for CUPE National and, as such, she assisted the Union in their application to the Board in obtaining their Certification Order and was present for some of the collective bargaining sessions that occurred between the Union and LCC. Ms. Brockman testified that LCC did not advise the Union, during

any collective bargaining sessions that she was at, that LCC had an operating agreement with the Owners. Ms. Brockman testified that the Union was not aware nor were they advised that the Owners were responsible for reimbursing LCC for all costs at Broadway Terrace. In addition, Ms. Brockman testified that LCC did not advise the Union (or the Board) of the nature of its relationship with the Owner during the processing of the Union's certification application. Ms. Brockman testified that, at the time of certification, the Union was under the belief that LCC was the "true employer" of the employees working at Broadway Terrace.

[63] In cross-examination by counsel for LCC, Ms. Brockman testified that the Union conducted its own investigations as to LCC's corporate status. Ms. Brockman admitted that the Union saw some documents that indicated a relationship between the Owners and LCC but could not remember what those documents were. Ms. Brockman admitted that she did not know whether or not LCC had told the Union about its relationship with the Owners during collective bargaining (because she was not present at all meetings) but as far as she understood the Union did not know that the Owners owned Broadway Terrace nor the nature of the relationship between LCC and the Owners respecting the management and operation of the facility.

The Argument of the Parties:

[64] The Union's argument was multi-faceted, as was the nature of its application and the relief being sought from the Board.

[65] Firstly, the Union alleged that LCC and the Owners had failed to disclose the true nature of their relations during proceedings related to the Union's application for certification. The Union argued that, if it had known the true nature of the relationship between the parties (which the Union alleged was a joint venture), the Union would have sought a certification Order from the Board naming either the joint venture as the true employer or adding the Owners as named employers to the Union's Certification Order. The Union argued that the responsibility for the Union's lack of adequate information rested solely with the Owners and LCC. On this basis, the Union argued for and sought an Order of the Board pursuant to s. 5(j) of the *Act* amending the Union's certification Order to name the Broadway Terrace Joint Venture and/or the Owners as the "true" employers of the bargaining unit within the meaning of s. 2(g)(iii).

[66] Secondly (and potentially in the alternative), the Union argued for and sought a determination from the Board that the Owners and LCC were related employers within the

meaning of s. 37.3 of the *Act*. The Union alleged that the Owners and LCC had formed a joint venture for purposes of the management and operation of Broadway Terrance and, on the basis of this joint venture, the Owners and LCC were under "common control or direction". To which end, the Union sought an Order of the Board pursuant to s.37.3 that the Owners and LCC should be deemed to be one (1) employer for purposes of collective bargaining with the Union.

[67] Thirdly (and in the alternative), the Union argued for and sought a determination from the Board that a transfer or disposition of a business (or part thereof) had occurred between LCC and the Owners within the meaning of s. 37(1) of the *Act* on May 1, 2009 when the Owners assumed responsibility for the day-to-day operations and management of the Broadway Terrace, responsibilities previously held by LCC. On this basis, the Union sought an Order of the Board pursuant to s. 37(2) amending the Union's certification Order to reflect the transfer of that business.

[68] Fourthly, concomitant with any of the above captioned findings of the Board, the Union sought a determination from the Board that either the Broadway Terrace Joint Venture or Regina Lutheran Care Society and Broadway Terrace Inc., as the case may be, had committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* for failing to bargain collectively with the Union.

[69] Finally (and the final alternative), the Union argued that the layoff of employees by LCC was a technological changed implemented by LCC contrary to s. 43(2) of the *Act*.

[70] Simply put, the Owners and LCC disputed each of the Union's allegations and asked that the Union's application be dismissed. Both the Owners and LCC filed written submissions for which the Board is thankful.

Statutory Authority:

[71] The word "employer" is defined in s. 2(g) of the *Act* as follows:

2 In this Act:

(g) "employer" means:

(i) an employer who employs three or more employees;

> *(ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;*
>
> *(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;*
>
> *and includes Her Majesty in the right of the Province of Saskatchewan.*

[72] The Board has the authority to amend a certification Order pursuant to s. 5(j) of the *Act* which provides as follows:

> *5 The board may make orders:*
>
> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*

[73] Section 37.3 of the *Act* defines the Board's authority with respect to "related employers". This section provides as follows:

> *37.3(1) On the application of an employer affected or a trade union affected, the board may declare more than one corporation , partnership, individual or association to be one employer for the purposes of this Act if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.*
> *(2) Subsection (1) applies only to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.*

[74] Section 43 of the *Act* defines the term "technological change", defines an employer's responsibilities associated with the implementation thereof, and defines the Board's authority in the event a violation of the provision is determined by the Board. This section provides as follows:

> *43(1) In this section "**technological change**" means:*
>
> *(a) the introduction by an employer into the employer's work, undertaking or business of equipment or material of a different nature or*

kind than previously utilized by the employer in the operation of the work, undertaking or business;

(b) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material; or

(c) the removal or relocation outside of the appropriate unit by an employer of any part of the employer's work, undertaking or business.

(1.1) Nothing in this section limits the application of clause 2(f) and sections 37, 37.1, 37.2 and 37.3 or the scope of the obligations imposed by those provisions.

(2) An employer whose employees are represented by a trade union and who proposes to effect a technological change that is likely to affect the terms, conditions or tenure of employment of a significant number of such employees shall give notice of the technological change to the trade union and to the minister at least ninety days prior to the date on which the technological change is to be effected.

(3) The notice mentioned in subsection (2) shall be in writing and shall state:

(a) the nature of the technological change;

(b) the date upon which the employer proposes to effect the technological change;

(c) the number and type of employees likely to be affected by the technological change;

(d) the effect that the technological change is likely to have on the terms and conditions or tenure of employment of the employees affected; and

(e) such other information as the minister may by regulation require.

(4) The minister may by regulation specify the number of employees or the method of determining the number of employees that shall be deemed to be "significant" for the purpose of subsection (2).

(5) Where a trade union alleges that an employer has failed to comply with subsection (2), and the allegation is made not later than thirty days after the trade union knew, or in the opinion of the board ought to have known, of the failure of the employer to comply with that subsection, the board may, after affording an opportunity to the parties to be heard, by order:

(a) direct the employer not to proceed with the technological change for such period not exceeding ninety days as the board considers appropriate;

(b) require the reinstatement of any employee displaced by the employer as a result of the technological change; and

(c) where an employee is reinstated pursuant to clause (b), require the employer to reimburse the employee for any loss of pay suffered by the employee as a result of his displacement.

(6) Where a trade union makes an allegation pursuant to subsection (5), the board may, after consultation with the employer and the trade union, make such interim orders under subsection (5) as the board considers appropriate.

(7) An order of the board made under clause (a) of subsection (5) is deemed to be a notice of technological change given pursuant to subsection (2).

(8) Where a trade union receives notice of a technological change given, or deemed to have been given, by an employer pursuant to subsection (2), the trade union may, within thirty days from the date on which the trade union received the notice, serve notice on the employer in writing to commence collective bargaining for the purpose of developing a workplace adjustment plan.

(8.1) On receipt of a notice pursuant to subsection (8), the employer and the trade union shall meet for the purpose of bargaining collectively with respect to a workplace adjustment plan.

(8.2) A workplace adjustment plan may include provisions with respect to any of the following:

> *(a) consideration of alternatives to the proposed technological change, including amendment of provisions in the collective bargaining agreement;*
>
> *(b) human resource planning and employee counselling and retraining;*
>
> *(c) notice of termination;*
>
> *(d) severance pay;*
>
> *(e) entitlement to pension and other benefits, including early retirement benefits;*
>
> *(f) a bipartite process for overseeing the implementation of the workplace adjustment plan.*

(8.3) Not later than 45 days after receipt by the trade union of a notice pursuant to subsection (2), the employer or the trade union may request the minister to appoint a conciliator to assist the parties in bargaining collectively with respect to a workplace adjustment plan.

(10) Where a trade union has served notice to commence collective bargaining under subsection (8), the employer shall not effect the technological change in respect of which the notice has been served unless:

> *(a) a workplace adjustment plan has been developed as a result of bargaining collectively; or*
>
> *(b) the minister has been served with a notice in writing informing the minister that the parties have bargained collectively and have failed to develop a workplace adjustment plant.*

(11) This section does not apply where a collective bargaining agreement contains provisions that specify procedures by which any matter with respect to the

> *terms and conditions or tenure of employment that are likely to be affected by a technological change may be negotiated and settled during the term of the agreement.*
>
> *(12) On application by an employer, the board may make an order relieving the employer from complying with this section if the board is satisfied that the technological change must be implemented promptly to prevent permanent damage to the employer's operations.*

Analysis and Decision:

[75] As indicated at the outset, the case involves the relationships between various corporate entities and the proper characterization of these relationships, from a labour relations perspective in the application of the *Act*. The Board will address each aspect of the Union's allegations in turn.

Who was the "True" Employer of Members of the Bargaining Unit and Should the Certification Order Be Amended?

[76] The Union alleged that LCC and the Owners had failed to disclose the true nature of their relations during proceedings related to the Union's application for certification and asked the Board to amend the Union's Certification Order to add Regina Lutheran Care Society Inc. and Broadway Terrace Inc. and/or Broadway Terrace Joint Venture (*i.e.* a joint venture involving the Owners and LCC) as the named employers. To do so, the Union asked the Board to find that one or more of these parties was the "true" employer within the meaning of s. 2(g)(iii) of the *Act*.

[77] The Union argued that the Owners and LCC had entered into a joint venture for purposes of operating and managing Broadway Terrace and their intention to form this joint venture could be seen as early as April of 2004, when the Owners and LCC jointly registered the business name of "Broadway Terrace". In their supporting documentation to register this business name, both parties declared an intention to form a "joint venture". The Union argued that this document was evidence of the Owners' and LCC's intention; their "true" intention (the Union asserted) with respect to the nature of their relationship.

[78] The Union argued that the parties' joint venture came to fruition and culminated in the Joint Operating Agreement that was signed by the parties respecting the operation and management of Broadway Terrace. Simply put, the Union took the position that the Owners and LCC formed a joint venture for the purposes of combining their respective property, capital,

knowledge, skills and experience to pursue a common enterprise; namely, the management and operation of Broadway Terrace. The Union argued that each party needed the other's contributions to make this enterprise possible and that evidence of the intermingling of their corporate affairs can be found in various terms of the operating agreement between the parties.

[79] The Union asserted that the Owners and LCC failed to disclose the nature of their relationship to the Union and that they arranged their affairs in such a fashion that evidence of their joint venture was not apparent to the Union. To which end, counsel for the Union asserted that LCC's representations to the Union (or lack thereof) with respect to their relationship with the Owners was a fraud and, if the Board is not willing to make a determination that the Owners are the "true" employer, the facts of these proceedings would become an instruction manual for employers seeking to avoiding Certification Orders in the future.

[80] In reply, the Owners deny that they were the employers (true or otherwise) of the employees at Broadway Terrace prior to May 1, 2009 and took the position that LCC was, at all times material to this application, the true employer of the employees in the bargaining unit.

[81] Counsel for the Owners noted that there was no evidence that the Owners played any roll in hiring employees, assigning work, assessing the quality of work performed, or firing or disciplining employees. The Owners did not determine the number of employees at the work place nor provided any direction in collective bargaining or labour relations in the work place. To which end, the Owner argued that there was no evidence that the Employer exercised anything that could be described as "fundamental control" over the employees in the bargaining unit (prior to May 1, 2009). In taking this position, the Owners relied upon this Board's decisions in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation* [1996] Sask. L.R.B.R. 523, LRB File No. 083-96; *Amalgamated Transit Union, Local 588 v. City of Regina*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Young Co-operative Association* [2001] Sask. L.R.B.R. 676, LRB File No. 060-89.

[82] LCC adopted much of the argument advance by the Owners and also took the position that it was, at all relevant times, the employer; the true employer of the employees in the bargaining unit. Counsel for LCC argued that, to the extent there was a "joint venture", it was in relations to the provision of services to tenants and their mutual desire to provide comprehensive

services in a seamless and coordinated fashion. Counsel took the position that there was no compelling evidence of a joint venture from a labour relations perspective.

[83] Counsel for LCC admitted that Article 6.3(a) of LCC's operating agreement for Broadway Terrace included a reference that all personnel (working at the facility) would be employees of the "joint venture". However, counsel argued that the evidence indicated that the parties did not comply with this provision and that all employees of the bargaining unit were "employed" (in every sense of the word) by LCC. To which end, counsel for LCC relied on the decision of the Board in *Amalgamated Transit Union v. City of Regina, supra*, as standing for the proposition that, when the Board is examination the nature of an employment relationship, substance (*i.e.* what the parties actually did) is more important than form (*i.e.* the wording contained in the contract documents).

[84] Counsel for LCC denied the Union's allegation that LCC had failed to make any relevant or necessary disclosures to the Union and objected to the Union's assertion that the LCC had participated in a fraud or otherwise attempted to deceive the Union as to the nature of its relationship with the Owners respecting the operation of Broadway Terrace. Counsel for LCC observed that it was common knowledge that LCC was not the owner of Broadway Terrace and the nature of the relationship between the parties was easily discoverable by the Union with normal due diligence.

[85] Having considered the evidence presented during these proceedings and the argument presented by counsel for the parties on this aspect of the Union's application, the Board is not satisfied that either Regina Lutheran Care Society Inc. or Broadway Terrace Inc., nor a joint venture involving the Owners and LCC, are the true employers of the employees in the bargaining unit. Furthermore, the Board is not satisfied that this is an appropriate circumstance for the Board to exercise its discretion pursuant to either s. 2(g)(iii) or s. 5(j) of the *Act* to alter the Union's existing Certification Order.

[86] Firstly, the Board is not satisfied that a joint venture had been formed by the Owners and LCC of a nature that could be found to be an employer within the meaning of the *Act*. While there was evidence of an association between the Owners and LCC to combine their respective property and capital (in the case of the Owners) and skill and knowledge (in the case of LCC) to carry out a common enterprise; namely, the operation and management of Broadway

Terrace, the nature of that associate, from a labour relations perspective, was that of principal and independent contractor. While their relationship may satisfy the definition of a joint venture for other purposes (such as income tax, investment regulation, or registration of business names and corporate entities), the evidence establishes that, from a labour relations perspective, the parties entered into an agreement and conducted themselves as principal and contractor. They were not carrying on a common business with a view to a shared profit; they were carrying on separate and independent businesses. Of particular significance to the Board in coming to this conclusion was the unilateral right of the Owners to terminate the relationship between the parties at the conclusion of the initial contract period without remedy or recourse by LCC. Such right of unilateral termination would be inconsistent with an intention to form a joint venture.

[87] Secondly, even if the Board had been satisfied that a joint venture had been formed between the parties, the Board was not satisfied that s. 2(g)(iii) of the *Act* would have any application to that fact situation. This provision authorizes the Board to make determinations as to which corporate entity, **as between** principal and a contactor, is the true employer. The Board is not satisfied that this provision would assist the Union in its application if the Board were to find that a joint venture had been formed (*i.e.* in circumstances involving the absence of a principal and independent contractor).

[88] With respect to the application of s. 2(g)(iii), this Board has previously been called upon to make determinations as to whether the principal or the contractor is the "true" employer within the meaning of the *Act* (*i.e.* for purposes of collective bargaining). In doing so, the Board has focused its examination on which party exercises "fundamental control" over labour relations at the work place. In other words, who has effective control over the essential aspects of the employment relations? The Board has previously adopted several (non-exclusive) criteria to assist in this determination, which criteria include an examination of the following aspects of the relationship between the parties:

1 *The party exercising direction and control over the employees performing the work;*
2 *The party bearing the burden of remuneration;*
3. *The party imposing discipline;*
4. *The party hiring the employees;*
5. *The party with the authority to dismiss the employees;*
6. *The party who is perceived to be the employer by the employees; and*

7. The existence of an intention to create the relationship of employer and employee.

[89] In the Board's opinion, the Owners did not exercise fundamental control over labour relations at the work place nor did they have effective control over the essential aspects of the employment relations. The evidence indicates that the Owners did not exercise direction or control over any of the employees in the bargaining unit; nor were the Owners involved in their hiring or discipline. There was no evidence that the Owners had the authority to dismiss any of the employees in the bargaining unit. Simply put, there was no evidence that the Owners exercised meaningful control over any aspect of labour relations at the work place.

[90] While the Union argued that the Owners' control over the budget approval process gave the Owners an invisible hand at the bargaining table, there was no evidence that the Owners exercised any such control during the course of collective bargaining. There was no evidence that LCC did not have the requisite authority to bargain with respect to any issues that arose at the bargaining table, including wages, benefits and terms of employment for members of the bargaining unit. There was also no evidence that the Owners were perceived by the employees as their employer nor any evidence of an intention on the part of the Owners to create an employment relationship with the employees working at Broadway Terrace prior to termination of the Owner's operating agreement with LCC.

[91] The Union most forcefully argued that the Owners, unbeknownst to the Union and as a consequent of the terms and conditions of the Joint Operating Agreement, bore the *de facto* burden of remuneration. In support for this position, the Union pointed to Owners' responsibility to pay all "costs" associated with the operation of Broadway Terrace pursuant to the operating agreement and the fact that the Owners reimbursed LCC for all wages and benefits paid to employees, together with all costs associated with collective bargaining. The Union argued that, in making its determination as to which corporate entity is the "true" employer, the Board should place an enhanced emphasis on the "burden of remuneration" criteria to ensure that the party who ultimately pays the bill is at the table during collective bargaining. The Union took the position that, because the Owners bore the ultimate burden of paying all expenses at Broadway Terrace, they should have been at the bargaining table with the Union.

[92] In the Board's opinion, the Union's argument with respect to defining which party bore the burden of remuneration and the significance that this singular criterion should play in the determination of which corporate entity is the true employer can not prevail. Firstly, this Board stated in *Amalgamated Transit Union v. City of Regina, supra*, that every contracting situation (where money is paid for services performed) involves a "wage flow" from the principal to the contractor. The Board went on to caution that "*one must be mindful not to interpret the "burden of remuneration" concept so loosely that it loses real meaning*."

[93] In the Board's opinion, notwithstanding the Owners' obligation to reimburse LCC for all salary, wage and other costs associated with remunerations of employees, the party bearing the "burden of remuneration" remained LCC. The employment relationship was between the employees and LCC and the party responsible for remuneration, pursuant to that relationship, was LCC. Furthermore, in the Board's opinion, the burden of remuneration is but one (1) criterion of many which must be examined by the Board in a determination made pursuant to s. 2(g)(iii) of the *Act*. In the Board's opinion, where one (1) party bears the burden of remuneration but the other exercises day-to-day control over the employment relationship and labour relations in the work place (as in the present case), it is the latter party who should be considered the "true" employer; not the former.

[94] Finally, a determination made pursuant to s. 2(g)(iii) involves the exercise of discretion on the part of the Board and thus must be based on a sound labour relations footing. To retrospectively alter an existing Certification Order in the fashion sought by the Union is most unusual and must be approached with caution by the Board. The Certification Order arose out of the Union's application and the Union must be assumed to have made its own determinations, at that time, as to whom it believed to be the appropriate employer for purposes of collective bargaining.

[95] The preponderance of probability is that the Union would have known that the Owner was the principal in the relationship and that LCC was a contractor providing services on a fee for services basis. Absent a compelling labour relations footing (the onus of which is on the Union to establish), the Board is not satisfied that this is an appropriate circumstance to exercise its discretion. Of particular significance to the Board was the fact that the relationship between the parties existed prior to the Union's Certification Order and the Board was not

satisfied that this relationship was formed for the purpose of obviating labour relations obligations.

[96] For the foregoing reasons, the Union's application for an Order of the Board amending the Union's certification Order to name the Broadway Terrace Joint Venture or the Owners as the "true" employer of the bargaining unit within the meaning of s. 2(g)(iii) is hereby dismissed.

Are the Owners and LCC related Employers within the Meaning of s. 37.3 of the *Act*?

[97] As indicated, the Union argued for and sought a determination from the Board that the Owners and LCC were related employers within the meaning of s. 37.3 of the *Act* and sought an Order from the Board that the Owners and LCC were one (1) employer for purposes of the *Act*.

[98] The Union argued that the purpose of s. 37.3 was to protect workers from the artificial erosion of bargaining rights by attaching collective bargaining responsibilities to a definable commercial activity and not necessarily the legal vehicle through which that activity is carried on. In other words, the Union argued that s. 37.3 allows the Board to pierce the corporate veil and ensure direct dealings between the bargaining agent and the entity with real economic power over the employees. In taking this position, the Union relied on the language used in the decisions of the Ontario Labour Relations Board in *Brant Erecting & Hoisting and Ironworkers' District Council of Ontario (Re),* [1980] O.L.R.B. Rep. July 945 and *Etobicoke (City) Public Library Board and BACIU* (1989), 4 C.L.R.B.R. (2^{nd}) 195.

[99] The Union took the position that the "definable commercial activity" of the parties was the operation of Broadway Terrace. The Union argued that there had been a function integration of plant and labour by the Owners and LCC and that the Joint Operating Agreement between the parties was evidence of that function integration. In this respect, the Union pointed again to the Owners' control over the budget process and argued that this control gave the Owners *de facto* control over the management, operations and labour relations at Broadway Terrace.

[100] In reply to this aspect of the Union's application, both the Owners and LCC denied that they were related employers or that s. 37.3 had application to their relationship or to their agreement respecting the operation and management of Broadway Terrace.

[101] Counsel for the Owners argued that, even with its budget control, the Owners had insufficient authority, control or involvement in either the day-to-day or overall operations of Broadway Terrace so as to create a related or common employer relationship. Counsel argued that the Owners did not purport to have, nor did they exercise, the requisite fundamental control over industrial relations (affecting the employees) in the work place to satisfy that the enumerated criteria for a finding pursuant to s. 37.3 of the *Act*. In taking this position, the Owners relied upon the decisions of this Board in *Amalgamated Transit Union v. City of Regina, supra*, and *Canadian Union of Public Employees, Local 59 v. City of Saskatoon and Saskatoon Regional Economic Development Authority Inc.*, [1998] Sask. L.R.B.R. 376, LRB File No. 164-97.

[102] Counsel for LCC took the position that, for the Board to make a finding pursuant to s. 37.3, it must be satisfied that the Owners and LCC were under "common direction and control". Counsel pointed to the evidence of Mr. Mitzel that there were no common members of the boards of directors of the Owners and LCC nor were there any common officers in these two (2) corporate entities. Counsel observed that, while the Owners exercised budgetary control, there was no evidence of any instances were the Owners exercised fundamental control over the operations of LCC and, certainly, no evidence of financial or any other control related to personnel issues. Simply put, LCC took the position that there was no interrelationship of operations between the two (2) corporate entities other than to the extent one would expect when any activity is subcontracted.

[103] In *Amalgamated Transit Union v. City of Regina, supra*, this Board outlined both the criteria required for a related business declaration under s. 37.3 and the circumstances under which the Board will exercise its discretion in the event the enumerated criteria has been fulfilled. Specifically, at pp. 148 and 149 the Board wrote:

> *Section 37.3 of the Act describes three requirements for its application:*
>
> *1. There must be more than one corporation, partnership, individual or association involved;*

> *2. These entities must be engaged in associated or related businesses, undertakings or other activities; and*
>
> *3. These entities must be under common control or direction.*
>
> *However, once these requirements have been fulfilled the Board must determine whether to exercise its discretion to treat the entities as one employer for the purposes of the Act. This discretion will be exercised where there is a valid and sufficient labour relations value, interest or goal contemplated by the Act that will be served by making a single employer declaration. Absent such a purpose, the discretion to make the declaration will not be exercised.*

[104] In the present case, the first two (2) of the enumerated criteria were admitted. The dispute between the parties arose as to whether or not the Owners and LCC were under common control and direction (or sufficient common control or direction) within the meaning subscribed by the Board and, if so, whether or not there was a valid and sufficient labour relations interest to be served by making a single employer declaration.

[105] In the Board's opinion, the relationship between the Owners and LCC does not satisfy the requirements enumerated by this Board for a related employer declaration pursuant to s. 37.3 of the *Act*. The uncontradicted evidence was that there was no common ownership or management between the Owners and LCC. There was, however, evidence of budgetary control over the operations at Broadway Terrace by the Owners, together with evidence of a certain intermingling of financial affairs (through the use of a joint bank account and through a debtor/creditor relationship between the parties), and some evidence of representations to the public as a single integrated enterprise (joint application for business name and signage located at the facility). While these facts may tend to support the Union's argument, the preponderance of evidence speaks otherwise. As the Board has stated, no single criterion can decide the determination. Rather the Board must examine the whole of the relationship between the parties.

[106] In the present case, the evidence establishes that both the Owners and LCC existed independent of their one (1) common association; namely, the management and operation of Broadway Terrace. The relationship between these two (2) corporate entities involved only a portion of their respective operations and the degree of their association for that purpose was reasonably consist with that which one would expect when an activity is subcontracted by a principal to contractor. Of particular significant, there was no evidence that

the Owners exercised meaningful control over labour relations or day-to-day operations at Broadway Terrace.

[107] Furthermore, there was no evidence that LCC was a mere "strayman" or hollow vessel for the corporate will of the Owners. There was no evidence of LCC's economic dependency on the Owners that LCC did not have control over its own profitability, particularly in light of the fact that Broadway Terrace was merely one (1) of many facilities being operated and managed by LCC throughout the province. Simply put, the Board was not satisfied that the Owners and LCC were under common direction and control or sufficient common direction or control to satisfy the threshold requirement for the application of s. 37.3 of the *Act*.

[108] Finally, as stated by this Board in *Amalgamated Transit Union v. City of Regina, supra*, a determination pursuant to s. 37.3 involves the exercise of discretion on the part of the Board and thus must be based on a sound labour relations footing. In this respect, the Board noted that there was no evidence that the Owners' decision to contract out the operation and management of Broadway Terrace was motivated by a desire to avoid collective bargaining obligations. Certainly, at that time it entered into its contract with LCC, there were no collective bargaining obligations on either party with respect to Broadway Terrace.

[109] For the foregoing reasons, the Union's application for an Order of the Board determining that the Owners and LCC were related employers within the meaning of s. 37.3 of the *Act* is hereby dismissed.

Did a Transfer or Disposition of a Business (or part thereof) occur?

[110] The third facet of the Union's application was based in successorship. Specifically, the Union argued for and sought a determination from the Board that a transfer or disposition of a business (or part thereof) had occurred between LCC and the Owners within the meaning of s. 37(1) of the *Act* on May 1, 2009 when the Owners assumed responsibility for the day-to-day operations and management of the Broadway Terrace; responsibilities previously held by LCC.

[111] In taking this position, the Union argued that LCC's "business" was the provision of management and labour necessary and incidental to the operation of Broadway Terrace. The Union argued that the Owners somehow acquired this business (a business previously held by

LCC) on May 1, 2009. The Union noted that almost all member of the bargaining unit were rehired by the Owners; that all past employees who re-applied were rehired; and that only a few employees were hired off the street. Counsel for the Union described this situation as a "sham" if successorship did not apply to these circumstances; particularly in light of the fact that on May 1, 2009 the majority of the employees in the bargaining unit went to work at the same facility, did essentially the same work, under essentially the same terms and conditions, but somehow their collective bargaining rights had been stripped away.

[112] The Owners took the position that no transfer or disposition of a business (or part thereof) had occurred between LCC and the Owners on the basis that the relationship between the parties was merely a contracting of services and not the sale of a business. Further, counsel for the Owners posited that, as a practical matter, LCC had no "business" to transfer to the Owners because the Owners had never transferred the business to LCC. In taking this position, counsel argued that the only "business" associated with Broadway Terrace was the provision of assisted living facilities, together with personal care and tenant services. Counsel argued that, as a mere subcontractor, LCC did not acquire a business from the Owners through the Joint Operating Agreement and thus s. 37 of the *Act* has no application to lay-offs arising from the termination of that agreement.

[113] Furthermore, the Owners argued that, not only did LCC not transfer any business to the Owners, it did not transfer its employees. Rather, LCC laid off its employees working at Broadway Terrace and did so in accordance with the terms of its collective agreement with the Union and relevant statutory requirements. The Owner advertised widely for new employees to operate their facility, received approximately 400 applications, conducted approximately 80 interviews, and ultimately hired thirty-six (36) individuals. Counsel for the Owners argued that, while many members of the bargaining unit were ultimately hired by the Owners, they competed for their position like everyone else (although obviously have the advantage of having previously performed the work).

[114] In support of their position, counsel for the Owners relied upon a number of cases, including the decision of the Ontario Labour Relations Board in *Canadian Union of Public Employees v. Metropolitan Parking Inc.*, [1980] 1 C.L.R.B.R. 197, together with the decisions of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Marriott Canadian Management Services Ltd.*, [1988] Fall Sask. Labour Rep. 69, LRB File No.

029-88; *Hotel Employees and Restaurant Employees Union, Local 767 v. Beaver Foods Limited*, [1989] Fall Sask. Labour Rep. 24, LRB File No. 022-89; *Saskatchewan Government Employees' Union v. Chatterson Building Cleaning Ltd.*, [1996] Dec. Sask. Labour Rep. 42, LRB File Nos. 193-86 to 196-96; and *Service Employees International Union, Local 333 v. Smiley's Buffet & Catering*, 2008 CanLII 75623, LRB File Nos. 007-08 & 008-08.

[115] 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 is no easy task. 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. Without the passing of a recognizable and distinct business (or part thereof), no obligations in successorship arise. Typically, such subcontracting 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*.

[116] As this Board has previously stated herein, we are satisfied that the relationship between the Owners and LCC was that of principal and contractor, with the Owners contracting with LCC for the provision of services necessary and incidental to the operation and management of Broadway Terrace. The distinguishing factor in the present case is that alleged transfer of business occurred as a consequence of the Owners' unilateral decision to terminate their operating agreement with LCC. In the Board's opinion, the termination of a contractual relationship is not the sale of a business within the meaning of s. 37 of the *Act*. The fact that the Owners hired many of LCC's former employees (employees that LCC no longer required), to perform essentially the same work as they had performed for LCC, under essentially the same conditions as before, does not change the essential nature of the relationship that existed between the Owners and LCC; that being, principal and contractor.

[117] The Board is satisfied that the Owners retained the services of LCC in 2004 to operate a facility for which they did not believe they had the capacity to operate and manage at

that time. At the conclusion of their contract with LCC, the Owners exercised their right to terminate that contractual relationship and thereby assumed direct responsibility for the services previously performed by LCC. The Board is not satisfied that these circumstances give rise to a transfer of obligations pursuant to s. 37 of the *Act*.

[118] For the foregoing reasons, the Union's application for an Order of the Board determining that a transfer or disposition of a business (or part thereof) had occurred between LCC and the Owners is hereby dismissed.

Alleged Unfair Labour Practice and Contravention of s. 43

[119] Based on the Board's findings with respect to the first three (3) components of the Union's application (*i.e.* the "true" employer, related employer and successorship allegations), the balance of the Union's application against the Broadway Terrace Joint Venture, Regina Lutheran Care Society, and Broadway Terrace Inc. are hereby dismissed.

[120] The final allegation of the Union was that the layoff of employees by LCC was a technological changed implemented by LCC contrary to s. 43(2) of the *Act*. The Union argued that, because LCC failed to give notice to the Union (pursuant to s. 43) of the fact that it had lost its contract with the Owners, the Union lost its chance to negotiate better arrangements for its members. The Union sought an Order of the Board directing the parties to bargain with respect to a workplace adjustment plan. In this component of its application, the Union relied on this Board's decision in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Acme Video Inc.*, [1995] 4th Quarter Sask. Labour Rep. 134, LRB File No. 179-95 to 182-95; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1997] Sask. L.R.B.R 749, LRB File No. 266-97; and *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Loraas Disposal Limited*, [1998] Sask. L.R.B.R. 1, LRB File Nos. 207-97 to 227-97, 234-97 to 239-97, (upheld on Appeal) [1998] Sask. L.R.B.R. c-73 (Sask. C.A.).

[121] LCC took the position that a technological change had not occurred in this work place and, as such, LCC was under no obligation to provide notice to the Union pursuant to s. 43 of the *Act*. Counsel for LCC argued that the layoff of LCC's employees had occurred because they lost their contract with the Owners to manage and operate Broadway Terrace and had nothing to do with any decision of LCC. Counsel noted that there were no cases where this

Board has found an employer had violated s. 43 where the closure of operations resulted from the loss of a management contract. Counsel for LCC argued that, where lay-off result from factors beyond the control of the employer, s. 43 of the *Act* does not apply. In support of this position, LCC relied upon the decision of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Off the Wall Productions Ltd*, [2000] Sask. L.R.B.R. 156.

[122] In the Board's opinion, there is no evidence that LCC proposed or made a decision to implement a technological change affecting the terms, condition or tenure of employment of the employees in the bargaining unit. The evidence established that LCC's reason for laying-off its employees at Broadway Terrace was because it lost its contract to manage and operate that facility. In these circumstances, these lay-offs do not fall within the technological change provisions set out in s. 43 of the *Act*.

[123] For the foregoing reasons, the Union's application for an Order of the Board determining that a violation of s. 43 of the *Act* is hereby dismissed.

Conclusion:

[124] In conclusion, the Board finds that the Union's application must be dismissed. In doing so, the Board is mindful of the fact that the employees at Broadway Terrace worked for a certified employer when the left work on April 30, 2009 and the majority of those same employees went to work at that same facility on May 1, 2009 for an uncertified employer; circumstances which cause the Board to be careful and deliberate in its analysis. However, having considered the evidence presented during these proceedings and the argument presented by counsel for the parties on each of the various aspects of the Union's application, the Board finds that the Union's collective bargaining rights are, as the certification Order indicates, in respect of LCC operations at Broadway Terrace. The circumstances of the present case do not satisfy the requirements of the Act for the transfer of collective bargaining obligations

to the new employer. As a consequence, the proper course of action for these individuals, if they continue to wish to be represented in collective bargaining with their new employer, is an application for certification.

DATED at Regina, Saskatchewan, this **9th** day of **October, 2009**.

LABOUR RELATIONS BOARD

Steven D. Schiefner
Vice-Chairperson