The Labour Relations Board
Saskatchewan

SASKATCHEWAN GOVERNMENT and GENERAL EMPLOYEES' UNION, Applicant v. YORKTON MENTAL HEALTH DROP-IN CENTRE INC., Respondent

LRB File No. 027-09; June 23, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Bruce McDonald[1] and Greg Trew

For the Applicant Union: Juliana Saxberg
For the Respondent Employer: Randy Kachur

Successorship – Section 37(1) & (2) – Board determines that Union successor in accordance with *Act* – Former certified Employer voluntarily gives up contract to provide services to drop-in centre clients – New Employer set up for that purpose enters into new contract to supply similar services – former employees hired by new Employer to provide the same services as formerly provided by former Employer – New Employer rents the space previously occupied by former Employer to operate drop-in centre – all furniture and equipment owned by former Employer given to new Employer to provide services.

Successorship – New Employer and Union continue to operate under collective agreement negotiated with former Employer – Grievances filed by Union and adjudicated in accordance with collective agreement – all working conditions the same under new Employer as old Employer.

Successorship – Parties initially agree that there had been a successorship and file memorandum of agreement with Board – Employer later recants agreement and alleges that no successorship occurred – Board finds successorship in accordance with s. 37(1) – Board determines that it is not necessary to deal with matters arising out of agreement in face of finding of successorship.

Practice and Procedure – Union files preliminary objections alleging bias demonstrated by Board towards Union – Following *in camera* discussion with parties, Union agrees not to call evidence with respect to bias issue – Union counsel later advises Board that her instructions are to proceed with bias argument – Board finds that bias allegation has been abandoned by Union.

[1] Member, Bruce McDonald passed away on May 19, 2011 and did not participate in this decision.

REASONS FOR DECISION

Background:

[1] Saskatchewan Government and General Employees' Union (the "Union") is the certified bargaining agent for a unit of employees of the Canadian Mental Health Association of Canada, ("CMHA"), which unit included "all employees…working at…Yorkton, in the Province of Saskatchewan, except the Program Directors", by an Order of the Board dated April 6, 1993. The Union applied to the Board on March 25, 2009 to be named as the successor pursuant to s. 37 of the *Act* in respect of employees employed by Yorkton Mental Health Drop-in Centre Inc., (the "Employer") which the application alleged was a successor to CMHA in respect of its employees in Yorkton, Saskatchewan.

[2] For the reasons which follow, the application is granted.

Facts:

[3] CMHA provides mental health services throughout Saskatchewan. Prior to March 31, 2007, CMHA provided mental health services in the City of Yorkton, which services included the operation of a Drop-In Centre pursuant to a contract between CMHA and the Sunrise Health Region ("Sunrise"). On December 18, 2006, CMHA wrote to Sunrise to advise that, effective March 31, 2007, CMHA would no longer provide services to Sunrise pursuant to the contract between them.

[4] CMHA also advised Sunrise in its correspondence that CMHA anticipated that the services previously provided to Sunrise under its contract with Sunrise would be continued by a newly incorporated entity which would be an autonomous branch of CMHA in Yorkton. This newly incorporated entity, they expected, would, following its incorporation, become an affiliate of CMHA and would enter into Affiliation Agreements and Staffing Transfer Agreements with CMHA. The newly incorporated entity would then, it advised Sunrise, "sign its 2007/2008 service contract with" Sunrise "as an autonomous Branch and its own bargaining unit with SGEU".

[5] On January 15, 2007, CMHA also wrote to Darlene Stakiw, the then President of the Yorkton Branch of CMHA. Ms. Stakiw was the President of the Yorkton advisory committee to CMHA. The letter from CMHA outlined the process by which an "orderly transfer of the

contract with the Regional Health Authority and the Bargaining Unit (staff)" was proposed to occur.

[6] The process set forth by CMHA involved three steps. These were:

1. CMHA gave permission for the Yorkton Branch to incorporate under the name "Canadian Mental Health Association, Yorkton Branch Inc." until March 1, 2007.

2. Upon incorporation of the new Yorkton Branch Inc., the new entity would then sign and return an 'Affiliation and Transfer Agreement" which would licensee the new entity to use the CMHA name for up to 3 years.

3. The Affiliation and Transfer Agreement would also provide for the "orderly transfer of all Branch Staff to the employ of the new entity.

[7] Consistent with its letter to the Yorkton Branch, on January 15, 2007, CMHA wrote to the Corporations Branch for the Province of Saskatchewan granting permission for the Yorkton Branch to incorporate under the name "Canadian Mental Health Association, Yorkton Branch Inc.".

[8] Also, on January 15, 2007, CMHA provided notice to its employees in Yorkton of the termination of their employment effective March 31, 2007. The notices of termination also noted that "[D]ivision Office will be working with the Yorkton Branch to facilitate the transfer of staff and you will be contacted personally by the Yorkton Branch and SGEU in this regard".

[9] The Union also wrote to the Yorkton Branch on February 22, 2007 advising that it was aware of the pending transfer of the services previously provided by CMHA in Yorkton to a newly incorporated entity. That letter noted that the Union believed that this transfer of services to the new entity constituted a s. 37 Transfer of Obligations. It provided notice that it would continue to assert bargaining rights to the former employees of CMHA in Yorkton.

[10] Unfortunately events did not unfold as expected. Apparently, a rift had developed between the Yorkton Branch of CMHA and CMHA prior to 2007. On June 13, 2006, certain of

the members of the Yorkton Advisory Board of CMHA and other citizens of Yorkton, incorporated the Employer under *The Non-Profit Corporations Act*[2]. Subsequently, the Yorkton Branch refused to enter into the Affiliation and Transfer agreements with CMHA.

[11] On January 30, 2007, CMHA wrote in response to correspondence received from the Yorkton Branch with respect to "plans to have the contract for services for the Drop-in Centre in Yorkton operated by the 'Yorkton Mental Health Drop-In Centre Inc.' effective April 1, 2007". The letter went on to advise Ms. Stakiw that notwithstanding that all of the assets of the current Drop-In Centre were assets of CMHA, that they would "give permission for the furnishings and equipment currently in the CMHA Yorkton Branch Drop-In Centre to be transferred to and used by the 'Yorkton Mental Health Drop-In Centre Inc".

[12] Following this exchange of correspondence, the Employer proceeded to negotiate a new lease for the space previously occupied by the Drop-In Centre, a Conditional Grant Agreement with Sunrise Regional Health Authority for the operation of the Drop-In Centre, and the rehiring of all of the former staff employed by the Yorkton Branch.

[13] There was some conflict in the evidence with respect to how the former staff was rehired and the terms under which they were engaged. The Employer asserted that the former staff was required to apply for the new positions, while the Union maintained they were more or less rehired without interruption in service or benefits. Based upon the evidence and testimony heard by the Board, we are satisfied that the transition of the employees from CMHA to the Employer was seamless and that there was no disruption in service at the Drop-In Centre or any changes in personnel.

[14] Subsequent to the Employer taking over responsibility for the Drop-In Centre, the Employer and CMHA had some disagreement insofar as funds held by the former Branch were concerned, but that disagreement was subsequently resolved between the parties.

[15] After April 1, 2007, the Employer continued to recognize the Union and operated in accordance to the then current collective agreement, which had expired on March 31, 2006. On May 2, 2007, the Union Shop Stewart wrote to the Union regarding an Administrative Assistant position which the members in Yorkton felt should be within the scope of the

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[2] R.S.S. 1978 c. N-4.2

bargaining unit. On June 21, 2007, the Union responded to confirm that the Administrative Assistant position should be considered to be within the scope of the collective agreement, which position, the employer took no issue with.

[16] The Employer and the Union also negotiated wage rates in July of 2009. The Employer passed along an increase in funding provided by the Government of Saskatchewan to Non-government organizations like the Employer. The Employer and the Union also considered and resolved a grievance brought under the terms of the collective agreement in May of 2009 related to a reduction in hours of work for employees of the Drop-In Centre.

[17] On October 31, 2008, the Union filed an application for certification of the employees of the Employer with the Board. The application was processed by the Board in its usual fashion. On November 20, 2008, the Acting Registrar of the Board wrote to the Union advising that the Board had received "no response from the employer to the captioned application within the mandated time period. As such, the application will be treated as uncontested and the Board will consider it without a hearing." In addition, in accordance with recent amendments to the Act, the Board arranged for the conduct of a secret ballot by the employees of the Employer to determine their wishes regarding the application for certification.

[18] However, on December 1, 2008, the Union wrote to the Board withdrawing its application for certification. In that correspondence, the Union advised that they intended to file an application for successorship, "in due course". In her testimony, Hannah Gasper, advised that she had sent the letter withdrawing the application for successorship because of a telephone conversation she had had with Ms. Kelly Miner, who was at that time the acting Registrar of the Board. It was Ms. Gasper's testimony that Ms. Miner had advised her that the Union should have brought an application for successorship rather than an application for certification.

[19] The Union filed its application for successorship with the Board on March 24, 2009. By correspondence dated March 31, 2009, the Board was advised by CMHA that it was "not in disagreement that we transferred the business of our Yorkton Branch to the Yorkton Mental Health Drop-In Centre Inc." CMHA furthermore advised that it would not oppose the successorship application.

[20] On April 15, 2009, counsel for the Drop-In Centre wrote to counsel for the Union outlining 3 concerns which it had related to the application for successorship[3]. These were:

> *Yorkton Mental Health has only three concerns with the Application of Transfer of Obligations, and these are as follows:*
>
> 1. *New Certification Order for all employees of Yorkton Mental Health;*
>   *Many years ago there was an employee of Canadian Mental Health Association (Saskatchewan Division) Inc. (hereinafter "CMHA"), at the Yorkton Branch, by the name of David Gorecki. Apparently, Mr. Gorecki has been receiving some type of disability benefits since around 1995. Yorkton Mental Health has no knowledge of the circumstances or the benefits or anything and do not want to assume any obligations with respect to Mr. Gorecki in this regard. Yorkton Mental Health will assume the obligations with respect to the employees that were actually working for CMHA at the Yorkton Branch on March 31, 2007 and which became employed by Yorkton Mental Health effective April 1, 2007;*
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> 2. *All employees except the Executive Director;*
>   *Although there is no person occupying the position of Executive Secretary at the present time, Yorkton Mental Health would like this position to be excluded, along with the position of Executive Director. This was one of the positions excluded in the Certification order dated July 4, 2007;*
>
> 3. *Negotiate a collective agreement to replace the existing collective agreement;*
>   *Please confirm that the existing agreement is the one which expired on March 31, 2006. Yorkton Mental Health understands that there have been negotiations between SGEU and CMHA since April 1, 2007 and Yorkton Mental Health does not want to be bound by any terms or agreements negotiated by CMHA since April 1, 2007. Yorkton Mental Health understands and agrees that a new collective agreement has to be negotiated with SGEU with respect to its employees in Yorkton.*

[21] Notwithstanding the correspondence between counsel concerning the application, the Employer filed a reply to the application with the Board on April 17, 2009. Subsequent to the April 15, 2009 correspondence, and the reply having been filed by the Employer, counsel for the Union wrote the Board on May 6, 2009 requesting that the Board hold the scheduling of the hearing of the application in abeyance.

[22] In May of 2009, the Employer advised their employees that as a result of budget concerns, the employees' hours of work would be cut back. The Employer copied the Union with this notification to the affected employee. As noted in paragraph [16], this notification resulted in

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[3] See Exhibit U-19

a grievance being filed by the affected employee, which grievance was ultimately settled between the parties.

[23] On July 31, 2009, counsel for the Union wrote to counsel for the Employer in response to the concerns raised in the letter of April 15, 2009. In his correspondence, counsel for the Union advised as follows:

> *I have now instructions to answer your letter of April 15, 2009. You raised three issues in relation to our Application. The first has been the most difficult. Nonetheless, SGEU is now prepared to agree that Mr. David Gorecki, who has been on the SGEU LTD Plan since 1995, will not be treated as an employee of Yorkton Health Drop-In Centre Inc.*
>
> *Second, we have confirmed that there are no excluded Executive Secretaries at the other Branches. Accordingly, this position should not be listed as an exclusion from the bargaining unit at the Yorkton Health Drop-In Centre Inc. I have provided copies of the Certification Orders for Saskatoon, Regina, Prince Albert, Swift Current and the Battlefords.*
>
> *Finally, we confirm that the most recent Collective Bargaining Agreement expired on March 31, 2006. Accordingly, the parties are obligated under The Trade Union Act to negotiate a revised Agreement from that date forward.*

[24] That correspondence went on to say: "[I]f you are in agreement on these points, we can then advise the Board that the Application can proceed on an uncontested basis."

[25] By correspondence dated August 14, 2009, counsel for the Employer advised:

> *This letter is in response to your letter dated July 31, 2009.*
>
> *I am in agreement with the contents of your said letter. Perhaps you can draft a short memorandum of agreement to deal with the David Gorecki matter, and once the same is signed I can advise the Labour Relations Board that Yorkton Mental Health Drop-In Centre Inc. has no objection to the relief being sought in paragraph 5 of the application of Transfer of Obligations dated March 24, 2009, subject to the proviso that subparagraph 5(a) is not entirely correct as only certain obligations have been undertaken by Yorkton Mental Health Drop-In Centre Inc. In other words, Canadian Mental Health Association (Saskatchewan Division) Inc., Yorkton Branch, still operates in a certain capacity.*

[26] On November 26, 2009, counsel for the Union wrote again to counsel for the Employer enclosing a Memorandum of Agreement for execution by the parties. In that correspondence, counsel for the Union advises: "[I]f the Memorandum of Agreement is

acceptable, please give me the name of the person who will be signing the document for the Employer. I shall then arrange for Mr. Bymoen to sign three copies and send them to you for execution by this person at your earliest convenience."

[27] Counsel for the Employer responded on January 5, 2010 that the memorandum of agreement was satisfactory and would be executed by Lisa Washington on behalf of the Employer.

[28] That Memorandum of Agreement, was executed by the Employer and returned to the counsel for the Union with correspondence dated February 11, 2010. In that correspondence, counsel for the Employer says: "[I] presume that the Labour Relations Board will provide to the Employer a copy of the new Order(s) in this matter". The Memorandum of Agreement was then forwarded to the Board on February 18, 2010. That Memorandum of Agreement provides as follows:

> 1. *The Applicant and the Respondent agree that there has been a successorship of part of the business of the Canadian Mental Health Association (Saskatchewan Division) Inc. in relation to the Yorkton branch to the Yorkton Mental Health Drop-In Centre Inc.*
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> 2. *The parties agree that the new bargaining unit shall be described as follows:*
>
>   > *All employees of Yorkton Mental Health Drop-In Centre Inc., working at Yorkton, Saskatchewan, except the Executive Director, are an appropriate unit of employees for the purpose of bargaining collectively.*
>
> 3. *The Saskatchewan Government and General Employees' Union (SGEU), a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set forth in paragraph 2.*
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> 4. *The Yorkton Mental Health Drop-In Centre Inc., the employer, shall bargain collectively with the trade union set forth in paragraph 3, with respect to the appropriate unit of employees set out in paragraph 2.*
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> 5. *Upon the issuing of a new Certification Order, LRB File No. 027-09, SGEU shall request that the Board amend Certification Order LRB File No. 047-05 as it pertains to the Yorkton Mental Health Drop-In Centre Inc.*
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> 6. *SGEU agrees that Mr. David Gorecki, who is on the SGEU LTD Plan, is not an employee, nor has he ever been, of Yorkton Mental Health Drop-In Centre Inc.*
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> 7. *The parties hereby agree and confirm that the Collective Bargaining Agreement from 2002 – 2006 negotiated between SGEU and the Canadian Mental Health Association (Saskatchewan Division) Inc. remains in effect*

until SGEU and Yorkton Mental Health Drop-In Centre Inc. negotiate a revised Collective Bargaining Agreement.

8. *The parties agree that the current employees retain their seniority, if applicable, from any unbroken service with the Canadian Mental Health Association (Saskatchewan Division) Inc.*

9. *Upon the signing of this Memorandum of Agreement, the parties agree to file it with the Registrar of the Labour Relations Board as proof of settlement of the SGEU Application. The Labour Relations Board shall be entitled to use the Memorandum of Agreement as the basis for a new Certification order between SGEU and Yorkton Mental Health Drop-In Centre Inc.*

[29] In the letter enclosing the Memorandum of Agreement, counsel for the Union requested that the Board "provide both parties with a new Certification Order between SGEU and Yorkton Mental Health Drop-In Centre Inc.

[30] On February 22, 2010, the Board Registrar wrote to counsel for the Union acknowledging receipt of the Memorandum of Agreement. In that correspondence, the Board Registrar advises:

> *This will acknowledge the duly signed agreement between the SGEU and the Yorkton Mental Health Drop-In Centre Inc. At point 5 of said agreement, there is a request that the Board amend an existing Order, LRB File No. 047-05 through the removal of the Yorkton reference. This will not take place. There has been confirmation that the Canadian Mental Health Association (Saskatchewan Division) Inc., still has a management person hired at Yorkton. Further, that person may or may not hire employees, as defined under The Trade Union Act.*
>
> *Given this fact, it is inappropriate to modify an existing Order (LRB File No. 047-05) without the express consent of the parties identified in that Order. This does not preclude the Board's consideration of a Transfer of Obligation order, certifying the new employer as identified in the application under LRB File No. 027-09. This process will take place in-camera and the parties will be advised of the Board's decision in regard to the appropriateness of a new Order.*

[31] On March 17, 2010, a panel of the Board considered the parties request *in camera*. That panel refused to make the requested Order *in camera* and directed that the matter proceed to a hearing of a panel of the Board.

[32] On June 15, 2010, the Board Registrar emailed counsel for the Union and the Employer regarding the request by the parties that the Board issue a new certification Order between SGEU and Yorkton Mental Health Drop-In Centre Inc. In that email correspondence,

the Registrar advised the parties that the application would require a hearing before a panel of the Board.

[33] The application was scheduled by the Board to be heard on March 17 and 18, 2011 in Regina. However, on March 9, 2011, the counsel for the Employer wrote to the Union's counsel that it was recanting from the terms of the Memorandum of Agreement and would be taking the position at the hearing that no successorship had occurred and that the Employer was not the successor to CMHA.

Relevant statutory provision:

[34] Relevant statutory provisions of the *Act* provide as follows:

> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*
>
> *. . .*
>
> *38. Where an employer has by an order of the board been required to bargain collectively, he shall, while the order remains in force continue to be subject to the order and to any collective bargaining agreement entered into pursuant thereto notwithstanding that after the making of the order and while a collective bargaining agreement remains in force he at any time or from time to time ceases to be an employer within the meaning of this Act and the collective bargaining agreement shall while it remains in force continue to apply at all times during which he is an employer within the meaning of this Act.*
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> *. . .*
>
> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any*

> *regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis & Decision:

<u>A. Preliminary Issues</u>

[35] At the outset of the hearing, Ms. Saxberg advised the Board that she intended to make two preliminary objections regarding the Board's jurisdiction to hear and determine this matter. Her objections were:

1. That the Board was biased with respect to her client and should recuse itself from the determination of this matter; and

2. That the parties had previously reached an agreement with respect to their having been a successorship, which the employer had now recanted, and which the Union argued the Board should enforce.

[36] Ms. Saxberg then proceeded to file with the Board an Affidavit of Hannah Gasper in support of her bias argument. Mr. Kachur had not seen this Affidavit previously and the Board adjourned the hearing to allow him time to review the Affidavit.

[37] During the course of the adjournment, the Board requested that the parties join them *in camera*. Following that *in camera* meeting with the Board, the hearing reconvened. Ms. Saxberg acknowledged that she would not be leading any evidence with respect to the bias issue, but would continue to lead evidence regarding the alleged agreement that a successorship had occurred.

[38] As a result of the *in camera* discussions, the Board took it as settled that the Union attorned to the jurisdiction of the Board and that it was no longer suggesting that the Board was biased in respect of this matter.

[39] No evidence of bias was lead through Ms. Gasper when she was called to testify on behalf of the Union. Nevertheless, Ms. Saxberg advised the Board following the closing of

the evidentiary portion of the hearing that her instructions were to continue to argue that the Board was biased and therefore, the Board should decline to hear and decide this matter.

[40] Ms. Saxberg had made similar arguments of bias in two previous cases heard by Vice-chairperson Schiefner. Those files were *A.R.R. v. S.G.E.U.*[4] and *S.G.E.U. v. The Government of Saskatchewan.*[5]

[41] In each of those cases, the Board ruled orally as a preliminary matter that it was not biased with respect to the Union and went on to hear and determine the applications before it. In this case, the Board was not required to make any ruling with respect to the bias issue as the Union called no evidence and advised the Board that it was agreeing to a hearing of the matter on its merits, which the Board took as being an acceptance by the Union that it accepted the jurisdiction of the Board and that its argument concerning bias was abandoned.

[42] The second preliminary argument was that the Board should have given effect to the Memorandum of Agreement between the parties. They argued that the Board should give effect to the agreement, notwithstanding it having been recanted by the Employer, and issue the requested successorship Order.

[43] For the reasons which follow, the Board has determined that there has been a successorship as alleged by the Union, and it is, therefore, not necessary to deal with this issue.

B. The Successorship Issue

[44] The Union alleges that the Employer is a successor to CMHA within the meaning of s. 37 of the Act. The Employer initially accepted that it was a successor to CMHA, but now denies that that is the case.

[45] The statutory elements for the application of s. 37 were outlined by the Board in *Cana Construction Co. Ltd.* and *Pan-Western Construction Ltd.* and *Butchner Construction Inc.*[6]

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[4] [2011] CanLII 8557, LRB File No. 176-10
[5] L.R.B. File No. 005-11
[6] [1984] 9 CLRBR (NS) 175, LRB File Nos. 199-84, 201-84, 202-84 & 204-84

and *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd* [7] as follows:

(1) a predecessor employer who is certified by an order of the Board or who is party to a collective agreement;

(2) a sale, lease, transfer or other disposition of the predecessor employer's business or part of its business to the alleged successor employer; and

(3) a refusal by the alleged successor employer to recognize either the certification order or the collective agreement.

[46] The purpose of s. 37 of the *Act* was succinctly stated by the Board in *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd.*[8], as follows at 139:

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

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

> *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a going concern, something which is carried on. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However*

[7] [1994] 3rd Quarter Sask. Labour Rep. 136, LRB File Nos. 125-94, 130-94 & 131-94.
[8] *Supra* Note 5

> *intangible this dynamic quality, it is what distinguishes a business from an idle collection of assets...*
>
> *This distinction is easily stated, but the problem is, and has always been, to draw the line between a transfer of a business, or a part of a business and the transfer of incidental assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue shall be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in the business, or has set up a new business which resembles the old one in many respects.*

[48] It is not necessary that we find there was a transfer or acquisition of a business in the strict legal sense that pertains in other areas of law outside labour relations (e.g., conveyancing, insurance, contracts, etc.) in order to find that a successorship has occurred for the purposes of the Act. In *Service Employees International Union, Local 336 v. Eastend Wolf Willow Health Centre*[9], the Saskatchewan Court of Appeal described the Board's jurisdiction in this regard as follows at 53 through 56:

> *The Labour Relations Board concluded, after reviewing the state of integration and the degree of operation of the Centre, that its jurisdiction was engaged and, further, that it was appropriate to make the order sought. The Board said, inter alia:*
>
>> *Under Section 37 of The Trade Union Act, it is the transfer of something which is recognizable as the same 'business' or at least 'part of a business' that serves to impose on the successor the obligation to assume the collective bargaining relationship to which the predecessor was a party.*
>
> *. . .*
>
> *The Board is satisfied that, whatever the outcome of the current consultation and approval process, the Eastend Wolf Willow Health Centre will provide services which go beyond those provided in a long-term care facility, and which will comprehend services which continue or resemble those provided up to now at Eastend Union Hospital. We are also satisfied that the Health Centre is correct to regard itself as successor employer to both of the institutions which previously served Eastend.*

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[9] [1993] 1st Quarter Sask. Labour Rep. 52 (Sask. C.A.).

When the matter was raised in Queen's Bench Chambers on an application to quash, many issues, including the use of the transcript and the current state of the law in the Supreme Court on the standard of review of decisions of a board of this type were raised. The chamber judge did indeed, after concluding it was appropriate for him to do so, conduct an analysis of the evidence, addressing what he thought to be the pivotal question, that is, was there any evidence upon which the Board could conclude that the Centre was a successor employer. He said:

> *However, the Board goes on to say that 'the employer (i.e. the Centre) characterizes itself as a successor employer for employees of both of the previously existing facilities'. In my view, this statement is not supported by the evidence. The evidence of Mr. Grant does not indicate that he considers that the Centre is presently the employer of the employees previously employed by the Lodge and the Hospital, although it is fair to say that he envisages this will be the case when the appropriate agreements have been made, the necessary legislation passed, the additional construction completed and all of the employees then being housed in the new buildings. But my above review of the evidence makes it clear that none of these steps had occurred at the time of the hearing.*

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

. . .

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

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

residents had moved into the new building. It saw this as adequate to find the new entity to be successor employer.

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

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

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

*The authorities, including <u>Corn Growers</u>, <u>supra</u>, make it clear that **it is within the purview of the Board to interpret s. 37** and on an application to quash, the first question to be asked by the reviewing court is whether the interpretation is patently unreasonable. To jump immediately to an analysis in the facts premised on a different interpretation does not serve.*

In the circumstances we have looked at the interpretation of the Board of s. 37 and cannot in the circumstances find it to be patently unreasonable. It does not, as noted, apply to other areas of the law, such as financing, conveyance of property or insurance, where a more precise and predictable delineation of the moment of transfer may be appropriate. The Board is interpreting s. 37 for the purposes of labour law alone. This is its function. We cannot say that the lesser test set by it is patently unreasonable in context.

*We are of the view that this is the first issue which should have been addressed by the chamber judge. **The review of the evidence, given this answer, should have been conducted on the definition put forward by the Board, not on the more restrictive definition of the chamber judge.***

In summary we are of the view that the Board's findings of fact were unimpeachable, that its construction of s. 37 was not patently unreasonable, and that its conclusion ought not therefore to have been interfered with.

[**emphasis added**]

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

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

[50] Prior to March 31, 2007, CMHA was the provider of mental health services to the Sunrise Health Region pursuant to a contract for services. In December of 2006, CMHA determined that it would no longer provide those services as CMHA, and advised Sunrise that it would be undertaking to set up an autonomous branch in Yorkton to provide those services to Sunrise.

[51] The proposed "autonomous branch" of CMHA never materialized, but rather the Employer established itself as an independent entity, arranged for the service agreement with Sunrise Health Region to be executed in its name. It also arranged to enter into a new lease of the space formerly occupied by the Drop-In Centre operated by CMHA.

[52] By taking these steps, the Employer now argues that it is not the successor to CMHA, but rather is a new entity, unrelated to CMHA. It points to *Amalgamated Transit Union, Local 615 v. Saskatchewan Abilities Council, Wayne Bus Ltd. and Base Communications Ltd.*[10].

[53] We cannot agree with the Respondent that this case provides any support for its position. That case dealt with a unique situation where the City of Saskatoon was required to replace The Saskatchewan Council for Crippled Children and Adults as the provider of special needs transportation services to persons residing in the City of Saskatoon. It was alleged in that

case that the City of Saskatoon disposed of this business by dividing it between two entities, Wayne Bus Ltd. to provide the physical transportation services and Base Communications Ltd. who would provide the booking and scheduling services for the special needs transit facility.

[54] At paragraph [41], the Board says:

> *There is no doubt that the circumstances of the present case are unique. Because the City's needs transportation program is a public service delivered for the benefit of a vulnerable constituency, any hiatus in service, particularly in the depths of the winter months would have been disastrous. Again, the City had no choice but to ensure that the transition was "seamless", not because of any profit motivation but out of public consideration. In these circumstances, the absence of a hiatus in the operation of the service is not significant.*

[55] While these words could be applicable to the current situation, there are other factual discrepancies which point towards a successorship as distinct from a situation where no successorship would be found.

[56] In the *Wayne Bus* case, *supra,* when the Saskatchewan Abilities Council determined to discontinue operation of the special needs bus service it did so "because the City was not replacing an ageing fleet[11]" of buses. The Board also noted that the "City was able to circumvent those costs by awarding the contract to a contractor that would provide its own equipment." The Board went on to say:

> *SAC did not dispose or impart of anything to any one, rather , it simply walked away, leaving the City to deal with its vehicles, communications station and software, and fleet storage premises. The City had no choice but to find a new contractor or operate the service themselves, an undertaking for which they had no personnel or expertise.*

[57] The situation in this case was much different. The Employer re-employed all of the former employees of CMHA except for one employee who remained an employee of CMHA in Yorkton. The service of the employees who were rehired was uninterrupted and continued in accordance with the former collective agreement between CMHA and the Union. Wage rates

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[10] [2001] Sask. L.R.B.R. 180, LRB File No. 057-99

[11] *Supra* Note 8 at paragraph [40]

and benefits remained in accordance with the collective agreement and the parties operated as if the collective agreement continued to apply to the employees.

[58] All of the furniture and equipment formerly owned by CMHA was transferred to the Employer who utilized it in its ongoing operation. CMHA even provided some financial assistance to the Employer to allow it to commence its operations.

[59] The Employer points to the fact that it negotiated and executed a new funding agreement with Sunrise Health Region and with the Landlord of the facility in which the Drop-In Centre was located. However, this would be consistent with a transfer of the function formerly performed by CMHA since it was clear that they were abandoning the service provision and were supportive of the functions being acquired by the Employer, albeit they would have preferred that the Employer had been an independent branch of CMHA.

[60] All of the facts in this case point to a transfer of the "beating heart" of the business, being a transfer of the provision of services to clients of the Sunrise Health Region through the Drop-In Centre. That operation was the heart of the service provided to Sunrise under the contract with CMHA and was the heart of the service to be provided by the Employer under the new contract.

[61] The Employer also references the Board's decision in *Canadian Union of Public Employees, Local 4279 v. AFS Aboriginal Family Service Centre Inc. and Aboriginal Headstart Program, Little Eagles Language and Culture Nest – Regina Friendship Centre*[12]. That case, like the earlier decision in *Wayne Bus*, *supra,* dealt with the transfer of a social program funded by the Government of Saskatchewan. In that case, the Board recognized that the determination of whether there has been a successorship is not easy. At paragraph [33] it referenced its decision in *Canadian Union of Public Employees, Local 1975-01 v. Versa Services Ltd.*[13]

> *…As we have suggested earlier, to establish that an employer is a successor in the sense envisaged by Section 37, it must be established that something of a coherent and dynamic nature, something which may enjoy a separate existence as a "business," was passed on from the original employer to the successor. To quote the Board in the* Headway Ski *case, we must look to whether there is "a discernible continuity in the*

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[12] [2001] Sask. L.R.B.R. 602, LRB File No. 226-99

[13] [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92 at 179-80

> *business or part of the business formerly carried on by the predecessor and now being carried on by the successor.*

[62] In the *CUPE v. AFS Aboriginal Family Service Centre* case, the facts were much different than the present case. In this case, the Board found that the "only nexus between RFC and AFS with respect to the Little Eagle Program is the use by AFS of the Kitchener School premises and equipment formerly used by RFC." Furthermore, the Board found that RFC had terminated its lease of that space and there was a hiatus of several months until AFS negotiated its own lease of the premises. The Board then went on to say:

> *There was no communication or correspondence between RFC and AFS at any time. The Head Start Program, like the special needs transportation work in the SAC case, supra did not belong to RFC and was not its to alienate; rather, like the City in the SAC case, which itself had never performed any part of the work, Health Canada changed contractors. Pursuant to the Contribution Agreement, upon termination of the program RFC was bound to transfer title to the minister of any project assets specifically acquired for the purposes of the program. The assets and equipment acquired by RFC for the purpose of delivering the program did not really belong to it but were held in the form of a trust. In any event, they were not RFC's to transfer to AFS and no such transfer took place.*

[63] In addition to the furniture and equipment formerly used by CMHA being transferred to the Employer, there are other indicia of a transfer of the work. Attached as Schedule "A" to the Conditional Grant Agreement[14] with the Sunrise Health Region is a budget for operation of the Drop-In Centre, which is dated January 2007, a period of time in which CMHA was still responsible for the operation of the Drop-In Centre. While we have no direct evidence on this point, it would be logical to assume that the figures presented in this budget were based upon the costs associated with the operation of the Drop-In Centre by CMHA and that the contract, which was executed by the Employer on January 24, 2007, and prior to the expiry of the contract with CMHA, presumed that CMHA was co-operating in the transfer process. Similarly, the rental agreement[15] for the former space occupied by CMHA to operate the Drop-In Centre was dated March 22, 2007 which was prior to the expiry of the lease of the space by CMHA. Again, this presumes co-operation of CMHA in the transfer of the work.

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[14] Exhibit E-7
[15] Exhibit E-8

[64] All of these facts contribute to a finding by the Board of a seamless transfer of the work from CMHA to the Employer such that the successorship provisions of the *Act* would apply.

[65] Arguably, bargaining rights acquired by employees through the exercise of rights in accordance with s. 3 of the *Act* constitute a benefit to employees – and certainly, the responsibilities and obligations of an employer under a duly negotiated collective agreement constitute benefits that enure to the benefit of the employees in the bargaining unit. The maintenance of the integrity of the existing bargaining units at the Drop-In Centre likewise are of a benefit to the employees affected by CMHA discontinuing to operate the Drop-In Centre and the continuation of the operation by the Employer.

[66] On the basis of all the evidence, we find that the transition of service provision from CMHA to the Employer was seamless and that AHA Inc. acquired all or part of the business of CMHA – the "beating heart of the enterprise" which was the Drop-In Centre. Accordingly, we find that, effective April 1, 2007, that Yorkton Mental Health Drop-In Centre Inc. became the successor employer to CMHA and under s. 37 of the *Act* and is bound by all orders of the Board and the pertinent collective agreement to which CMHA was a party. The Employer shall forthwith comply with all applicable obligations and responsibilities as a result thereof.

[67] Having determined that successorship has occurred, the Board must then turn to s. 37(2) to determine:

(a) whether the disposition relates to a business or part of it;

(b) whether the employees constitute one or more units appropriate for collective bargaining;

(c) determining the appropriate unit of employees;

(d) determining what Trade Union, if any, represents a majority of employees in the appropriate unit;

(e) directing a vote to be taken among all employees eligible to vote in the appropriate unit;

(f) amending, if necessary, to the extent the Board determines necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) of the description of the unit contained in the collective bargaining unit; and

(g) giving any directions the board considers necessary or advisable as to the application of the collective agreement affecting the employees in the appropriate unit.

[68] In respect of the disposition, it is clear that it is not a disposition of all of the business formerly operated by CMHA. Only the operation of the Drop-In Centre was disposed of. CMHA continued to function, through its remaining employee, in the City of Yorkton, and carried out functions previously carried on by CMHA. Accordingly, the Board finds that there has been a transfer of only a portion of the business previously carried on by CMHA which is the operation of the Drop-In Centre.

[69] It is also clear from the evidence that the current "all employee" group of employees employed by the Employer is an appropriate unit of employees for the purposes of collective bargaining. The parties have continued the representation relationship during the interim period since the Employer took over responsibility for the Drop-In Centre. The Board therefore finds that "all employees of Yorkton Mental Health Drop-In Centre Inc. working at Yorkton, Saskatchewan, except the Executive Director, are an appropriate unit of employees for the purpose of bargaining collectively.

[70] Similarly, it is clear that the Union represents a majority of the employees in this appropriate unit of employees since it has represented those employees both before and after the Employer took over responsibility for the Drop-In Centre.

[71] Since the Union has, in the past, and will continue to represent this group of employees, a vote of the employees is not required. No new employees are being added to the appropriate unit.

[72] The current order of the Board which certifies CMHA as the employer requires no modification since it will continue to cover any employees in Yorkton who are within the appropriate unit described in that Order. The Union will continue to be responsible for collective

bargaining with CMHA with respect to such employees. The Collective Agreement between the Union and CMHA shall be amended as necessary to reflect this decision, which is to exclude the appropriate unit of employees, now employed by the Employer, from the operation of that collective bargaining agreement insofar as CMHA is concerned.

[73] An Order shall be issued as follows with respect to the Employer:

> **THE LABOUR RELATIONS BOARD**, pursuant to Sections 37(1) and (2) of *The Trade Union Act,* **HEREBY ORDERS**:
>
> (a) that all employees of Yorkton Mental Health Drop-In Centre Inc. working at Yorkton, Saskatchewan, except the executive director are an appropriate unit of employees for the purpose of bargaining collectively;
>
> (b) that Saskatchewan Government and General Employees' Union, a trade union within the meaning of *The Trade Union Act*, represents a majority of employees in the appropriate unit of employees set out in paragraph (a);
>
> (c) Yorkton Mental Health Drop-In Centre Inc., the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).

[74] The collective agreement currently in effect between CMHA and the Union shall be amended as necessary and shall continue to apply to the appropriate unit of employees set out above until such time as a new collective agreement is entered into between the parties.

[75] The Board, but not necessarily this panel of the Board, shall remain seized with any issues which may arise with respect to the implementation of the Board's Orders.

DATED at Regina, Saskatchewan, this **23rd** day of **June, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson