The Labour Relations Board
Saskatchewan

HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, Respondent and SEIU-WEST, Interested Party

LRB File No. 027-11; October 14, 2011
Chairperson, Kenneth G. Love, Q.C.; Members: Duane Siemens and Clare Gitzel

For the Applicant:	Mr. Gary Bainbridge
For the Respondent Employer:	Mr. Dale Halson
For the Interested Party	Mr. Drew Plaxton

Section 5(k) – Application for amendment of certification Order – Union applies for an amendment to its certification Order to include Midwives – Order sought to be amended granted by Board pursuant to *The Health Labour Relations Reorganization (Commissioner) Regulations.*

Jurisdiction of Board – Employer challenges the Board's jurisdiction to amend Order alleging that the facts do not disclose a sufficient "material change" – Board finds that establishment of new profession of Midwife pursuant to *The Midwifery Act* constitutes sufficient "material change" to justify the application to amend.

Jurisdiction of Board – Board finds that the powers granted pursuant to s. 5(k) of the *Act* are no longer proscribed by legislative provisions – Board determines that it has jurisdiction to make the requested change.

Appropriate Unit – Board considers nature of group to be added to the current unit and the nature of the existing unit – Board finds that group of Midwives is appropriately placed within the classification of "health support practitioners" and that inclusion of midwives within that classification is appropriate.

REASONS FOR DECISION

Background:

[1] Health Sciences Association of Saskatchewan, (the "Union") is certified as the bargaining agent for health services providers, a category of health service employees determined by *The Health Labour Relations Reorganization Commission* (the "Dorsey Commission"). The Saskatchewan Association of Health Organizations ('SAHO' or the "Employer") is the health sector bargaining agent for employers in the health sector.

[2] The Union was certified to represent health service providers by the Board by Order dated August 8, 2000. By that Order, the Union was certified to represent:

> *all health support practitioners employed by district health boards, St.Joseph's Hospital (lle-A-la-Crosse), Uranium City Municipal Hospital and all health sector employers listed in Table A of The Health Labour Relations Reorganization (Commissioner) Regulations who, on January 17, 1997, employed health support practitioners who were represented by a trade union for the purpose of bargaining collectively, except those positions listed in Tables 1 to 29 attached hereto*

[3] On February 7, 2011, the Union applied to the Board to amend this Order under *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), to add to the bargaining unit a group of midwives employed in the various health regions and to have its certification Order to read as follows:

> *all health support practitioners **and midwives** employed by district health boards, St. Joseph's Hospital (11e-d-la-Crosse), Uranium City Municipal Hospital and all health sector employers listed in Table A of The Health Labour Relations Reorganization (Commissioner) Regulations who, on January 17, 1997, employed health support practitioners who were represented by a trade union for the purpose of bargaining collectively, except those positions listed in Tables 1 to 29 attached hereto*

[4] In addition to SAHO and SEIU-WEST (the "Interested Party"), the Canadian Union of Public Employees ("CUPE") and the Saskatchewan Union of Nurses ("SUN") also filed Replies, but ultimately took no position regarding the application.

[5] Each of the Applicant, the Interested Parties, CUPE and SUN are trade unions recognized to represent health care workers by the Dorsey Commission.

Preliminary Matter:

[6] Shortly before the commencement of the hearing of this matter, counsel for the Employer advised the Board that it would seek to have a Constitutional issue determined concerning the application. He alleged that one of the employees for whom the Union had applied to be certified was employed at All Nations Healing Hospital Inc. in Fort Qu'Appelle, Saskatchewan and that this facility was the subject of certification Orders made by the Canada Industrial Labour Relations Board.

[7] At the opening of the hearing, the parties agreed that for the purposes of this application, the employee at the All Nations Healing Hospital Inc. would not be included within the group of employees for whom certification was sought. The Board concurred in this approach without making any determination as to the Constitutional issue regarding which Board had jurisdiction with respect to this facility.

Facts:

[8] The Union is the recognized bargaining agent for a group of Health Care Workers defined as "health support practitioners". That group was defined in the Regulations[1] as meaning:

> *… an employee of a health sector employer who:*
>
> > *(i) is functioning in one of the occupations listed in Table C; or*
> > *(ii) is in a position that requires as a minimum, registration pursuant to an Act giving the exclusive right to use a title or description of an occupation listed in Table C;*
>
> *but does not include a student of one of the occupations listed in Table C, or an intern or an assistant to an employee described in subclause (i) or (ii);*

[9] The list of occupational classes listed in Table C includes the following:

Addiction Counsellor/Therapist
Adjuntive Therapist
Audiologist
Certifies Prosthetist
Certified Orthotist
Dental Hygienist
Dental Therapist
Dietitian
Emergency Medical Technician
Exercise/Conditioning Therapist
Health Educator
Infection Control Officer
Mental Health Therapist
Music Therapist
Nutritionist
Occupational Therapist
Ophthalmic Dispenser
Orthopist
Paramedic
Perfusionist
Pharmacist
Physical Therapist
Psychologist
Psychometrician
Public Health Inspector
Recreation Therapist
Respiratory Therapist
Social Worker
Speech Language Pathologist

[1] *The Health Labour Relations Reorganization (Commissioner) Regulations* promulgated on January 15, 1997 pursuant to *The Health Labour Relations Reorganization Act* , R.R.S. c. H-0.03 Reg 1.

[10] It is to this group of workers that the Applicant seeks to join a group of employees practicing midwifery. There are seven midwives which are the subject of this application. Five (5) of them are employed in the Saskatoon Health Authority, one (1) is employed at the Cypress Health Authority and another one (1) is employed in the Regina Qu'Appelle Health Authority.

[11] The job description utilized by the Saskatoon Health Authority defines a midwife as follows:

> *POSITION SUMMARY:*
>
> *The midwife is a person who has acquired the requisite qualifications to be registered and/or legally licensed to practice midwifery in Saskatchewan. She is able to give necessary care and advice to women during pregnancy, labour and the postpartum period, to conduct deliveries on her own responsibility, and to care for the infant and the mother. This care includes preventative measures, the detection of abnormal conditions in the mother and child, accessing medical assistance when necessary and taking emergency measures in the absence of medical help. The midwife has an important task in health promotion, counseling and education, not only for the woman but also for the family and the community. Midwifery is traditionally holistic, combining an understanding of the social, emotional, cultural, spiritual, psychological and physical aspects of a woman's reproductive experience.*

[12] The Board heard testimony from Jessica Bailey, a midwife employed by the Saskatoon Heath Authority. She testified on behalf of the Applicant. The Employer called Shelia Achilles and Nancy Kybomb as witnesses. Shelia Achilles was the direct supervisor of all midwives practicing in the Saskatoon Health Authority. Ms. Kybomb was the Manager of Primary Health Department for the Saskatoon Health Authority, which department had responsibility for delivery of the Midwifery program in the Saskatoon Health Authority.

[13] The evidence regarding the position of midwife in the Saskatoon Health Authority was consistent from all of the witnesses. As described by the witnesses, the practice of midwifery, although it had existed in Saskatchewan for many years, came to be recognized by legislation passed in 1999[2], but not proclaimed in force until February, 2007. That *Act* recognized the practice of midwifery, prescribed standards for midwives

[2] *The Midwifery Act,* S.S. 1999, c. M-14.1

to achieve, established a governing and licensing body, and authorized midwives to perform certain medical procedures.

[14] All of the midwives covered by the application are members of the Saskatchewan College of Midwives and are licensed to practice as midwives under *The Midwifery Act*. In addition, midwives have hospital privileges which permit them to admit and discharge patients from hospital, and to order tests such as blood tests and ultrasound examinations. Under their governing statute, midwives are entitled to prescribe and administer certain medications associated with their practice as midwives.

[15] Midwives have irregular and often long working hours. They make home visits prior to the birth, attend and assist the birth (whether at home or in the hospital) and provide post partum care and advice. Due to the unpredictable nature of child birth, they are unable to work a 9 to 5 schedule since they accommodate their patients birthing schedules. Patients are self referred to midwives or are referred by other health care professionals. Patients are accepted for care based upon a midwife's availability to assist the patient.

Union's arguments:

[16] The Union filed a written argument and supporting case authorities with the Board which we have reviewed and found helpful. The Union argued that there were two fundamental questions for the Board to answer. These were:

1. *Whether the Board has the authority to amend the certification order; and*

2. *If so, whether the revised bargaining unit description is "an appropriate unit" for the purposes of collective bargaining.*

[17] The Union argued that the Board had jurisdiction to amend the current order which created the health support practitioners classification pursuant to the Dorsey Commission Regulations. In support of that proposition, the Union noted that the Board had previously made consequential amendments to the Union's certification order on at least two (2) prior occasions.

[18] Furthermore, the Union noted that the statutory "freeze" on changes to the health care units established by the Dorsey Commission was no longer in effect. One freeze was found in *The Health Labour Relations Reorganization Act*[3] which was for a period of three (3) years from the date the regulations are filed with the Registrar of Regulations.[4] Furthermore, the Union argued, these provisions were repealed in 2002.

[19] A second freeze was imposed when the health sector was reorganized to move from Health Districts to Regional Health Authorities in 2002. That legislation provided in s. 11.7:

> ***Board not to amend certain orders***
>
> *11.7 Until January 1, 2006 or any earlier date prescribed in the regulation, the board shall not make an order pursuant to clause 5(a) or (b) of The Trade Union Act that amends, varies, or rescinds an order made pursuant to this Part or an order made pursuant to a provision of the commissioner regulations except where authorized to do so by this Part or those regulations.*

[20] The Union argued that this freeze was also no longer operative so as to prevent the Board from the exercise of its normal authority under the *Act* to amend or vary its Orders.

[21] The Union argued that the classifications determined by the Dorsey Commission cannot be taken as "cast in stone". In fact, the Union argued that the Dorsey Commission expected that the Board would be required to modify, vary or amend the various classifications as the need arose in the future. The Union pointed to paragraph 63 of the Dorsey Commission report where the Commission says:

> *The listed excluded occupations are not included in any unit. These primary care providers are either not currently employed by a health sector employer or are excluded. Their inclusion in a bargaining unit in the future is not addressed in these regulations. Those questions, should they arise, will be addressed by the Labour Relations Board.*

[22] The Union also argued that inclusion of the midwives within health support practitioners classification was also appropriate and the resultant unit of

---

[3] S.S. 1996, c. H-0.03

[4] This freeze would expire (3) three years from January 15, 1997.

employees was and remained appropriate for the purposes of collective bargaining. In support of its position, it referenced numerous previous Board decisions.[5]

[23] The Union argued that a unit which included the midwives would be appropriate because "the midwives would join a bargaining unit that was constructed by the Dorsey Commission for people exactly like them". They argued that the only reason that midwives were not included on the list of Table C employees was because they were not, at the time of the Dorsey Commission, a recognized self governing, autonomous group of health care professionals.

[24] The Union argued that the midwives would have fit within the rationale promulgated by the Dorsey Commission for the creation of the "health support practitioner" classification. They quoted the following passage from the report at page 67 & 69:

> *Employees in the listed occupations are included in the unit if they are employed and function in one of the listed occupations. They are also included if they are employed in another position, regardless of its title, for which the employer requires, as a minimum, registration pursuant to an Act giving the exclusive right to use a title or description of a listed occupation. This will not encompass all of the listed occupations. Some of them do not have the protection of a title under a statute. It does not encompass any occupation that may have statutory protection of title if it is not a listed occupation.*
>
> *…*
>
> *The listed occupations in the areas of diagnosis and treatment have a common characteristics [sic] of being mainly involved in direct patient care in a continuing supportive role, not episodic, interventions. The list is expanded to stretch across the spectrum of health services.*

[25] The Union argued that the position of midwife, had it been a recognized profession in 1999 when the Dorsey Commission reported, that the midwives enjoyed sufficient similarity to the other occupations listed in Table C that they would have been included in that table. Furthermore, it argued that the midwives were "similarly situated" to the other occupations included in Table C. Midwives require registration under their *Act* to practice their profession and they enjoy, by their enabling legislation, the right to use the title "midwife".

---

[5] *Saskatchewan Joint Board, Retail Wholesale and Department Store Union and Regina Exhibition Association,* [1992] S.L.R.B.D. No. 35; *Re: Ranch Ehrlo Society,* [2008] S.L.R.B.D. No. 36; and

Employer's arguments:

[26] The Employer filed a written argument and supporting case authorities with the Board which we have reviewed and found helpful. The Employer argued (3) three issues before the Board. They were:

1. *Does the application meet the requirements for the Board to consider an amendment?*

2. *If the applicant passes the first threshold, is the bargaining unit proposed an appropriate bargaining unit/*

3. *if the amendment is granted, are the midwives covered by the collective agreement?*

[27] The Employer argued that before the Board had authority to amend a certification Order, the Board must first find that there had been a "material change" in circumstances. In support of this argument, the Employer cited the Board's decisions in *Sobey's Capital Inc. v. United Food and Commercial Workers Union, Local 1400*[6] and *University of Saskatchewan v. Administrative and Supervisory Personnel Association*[7].

[28] The Employer also argued that the wishes of an employee are insufficient to constitute a material change in circumstances. In support of this proposition, the Employer cited the Board's decision in *Service Employees' International Union, Local 299, v. Canadian Blood Services*[8]. The Employer argued that the evidence did not establish a material change so as to justify the Board amending the order as sought.

[29] The Employer argued that the Board, if it found a material change had occurred, must deal with the application for amendment as if it were an application pursuant to sections 5(a) and (b) of the *Act*. In support of that proposition, the Employer cited the Supreme Court of Canada decision which affirmed the dissent of then Chief Justice Bayda in *University of Saskatchewan v. CUPE Local 1975*[9].

Re: Plainsview Credit Union, [2011] S.L.R.B.D. No. 12.
[6] [2006] 127 C.L.R.B.R. (2d) 42
[7] [2007] S.L.R.B.D. No. 5
[8] [2007] S.L.R.B.D. No. 15

[30] The Employer also relied upon the Board's decision in *RWDSU v. Sunnyland Poultry Products Ltd.*[10] *and Chauffeurs, Teamsters and Helpers Union, Local 395 v. Inconvenience Productions Inc*[11]*.*

[31] In support of its position that the unit applied for was inappropriate, the Employer argued that the Board must look at the unit applied for to determine if it was appropriate for collective bargaining. The Employer cited the Board's decisions in *RWDSU v. O.K. Economy Stores (a division of Westfair Foods Ltd.*[12] and *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, a division of Hollinger Inc.*[13]

[32] The Employer cited a number of reasons, which in its opinion, made the unit applied for inappropriate for collective bargaining. These reasons were as follows:

> *a) The practice of midwifery is unique [sic] skill different to other health care workers and specifically to other HSAS members.*
>
> *b) Midwifery care is based on a respect for pregnancy as a state of health, and childbirth as a normal life process.*
>
> *c) Midwifery is traditionally holistic, combining an understanding of the social, emotional, cultural, spiritual, psychological and physical aspects of a woman's reproductive experience.*
>
> *d) Midwives have disparate interests from other HSAS members making it difficult or impossible to represent the collective.*
>
> *e) The inclusion of the midwives in the HSAS bargaining unit does not create a harmonious and viable collective bargaining relationship.*
>
> *f) Midwives believe that pregnancy and birth are natural physiological processes which in most cases proceed with minimal intervention.*
>
> *g) Midwifery empowers woman, their families and communities to work together in nurturing the unborn baby, supporting the birthing experience and providing a foundation for healthy growth and development of the child, and the family.*
>
> *h) Working schedules of midwives are subject to the most often unpredictable schedule of child birth.*

---

[9] [1978] S.CJ. No. 37, A.C.S. No. 37, 2. S.C.R. 834, 78 CLLC 238
[10] [1993] S.L.R.B.D. No. 43, LRB File No. 001-92
[11] [2001] S.LR.B.D. No 24, 74 C.L.R.B.R. (2d) 161, LRB File No. 144-98
[12] [1990] S.L.R.B.D. No. 21, 7 C.L.R.B.R. (2nd) 286, LRB File No. 264-89
[13] [1998] S.L.R.B.D. No. 65, LRB File No. 174-98

i) There is no intermingling or transferability between midwives and other HSAS members.

j) Although midwives are a relatively recent position within Saskatchewan, historically, like positions that have privileges, have been excluded by Commissioner Dorsey's Report and legislation.

k) Midwives have been granted privileges pursuant to the Regional Health Services Act. Privileges are only granted to a select group of health professionals: chiropractic, dentistry, medicine, midwife and nurse practitioner. None of these professions are unionized except nurse practitioners, and it is submitted that this is an anomaly based on the history and the unique community of interest among nurses.

l) Health professionals who have privileges are capable of spending and allocating the resources of the employer which is inconsistent the interest of the HSAS bargaining unit and with a collective bargaining regime.

m) The ability to allocate health resources attracts a different responsibility than other health professionals.

n) The Commissioner's Report specifically warned about amending the health support practitioner's unit (the HSAS unit) at 70:

> *The labour relations board will have to demonstrate resolve to maintain this unit's configuration or provide cogent reasons why occupations should be added to or removed from this unit. Every occupation outside will have an argument by analogy that is comparable to another or an amalgam of characteristics of others in the unit. Acceptance that employee choice is a determinant for inclusion will encourage unit hoping [sic] and perpetuate trade union rivalry and representation disputes.*

[33] The final point argued by the Employer was that if the amendment were to be granted, the Employer took the view that the current collective agreement should not apply to the midwives. They argued that the parties had not contemplated the special terms required for midwives in the collective agreement since they were not contemplated to be members of the bargaining unit at the time of negotiations.

[34] Finally, the Employer argued that in *RWDSU v. Kindersley and District Co-operative Association*[14], the Saskatchewan Court of Appeal determined that it was *patently unreasonable* for the Board to order that the collective agreement applied to a group of employees added by and amendment made pursuant to section 5(k) of the *Act.*

[14] [1998] S.J. No. 776, 167 D.L.R. (4th) 410, 48 C.L.R.B.R. (2d) 127, 172 Sask. R. 114 (Sask. C.A.)

Interested Party's arguments:

[35] Mr. Plaxton, on behalf of the Interested Party argued that the Board should respect and maintain the classification system adopted by the Dorsey Commission. The Interested Party agreed that midwives, under the Dorsey Commission classification system, should fall under the health support practitioners classification.

[36] The Interested Party submitted that the Board should apply a methodology consistent with the philosophy enumerated by the Dorsey Commission to place the midwives into one classification or another of the classes determined to be appropriate in the health care system by the Dorsey Commission. They argued that a stand alone unit of midwives would not be an appropriate unit of employees for collective bargaining.

Relevant statutory provisions:

[37] Relevant statutory provisions include s. 2(f), 5(a), (b) and (k) and 42 of the *Act*, which provide as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or*
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;*
>
> *(i.1) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining.*
>
> . . .
>
> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification*

> *by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *. . .*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> > *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
> >
> > *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> ***. . .***
>
> *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:

[38] For the reasons which follow, the Application to include midwives in the Union's bargaining unit is approved.

Board's jurisdiction to make the order sought:

[39] We concur with the arguments of the Union that there is no interdiction against the Board now amending or varying an order made by the Board pursuant to the Dorsey Commission regulations. Any proscription against the Board's authority to make such amendment has long passed.

[40] Any limitation on the Board's authority was always intended to be of limited duration and expired, in any event, on January 1, 2006 at the latest.

Furthermore, the Dorsey Commission itself recognized that the Board would, in the future, have to revisit the classification structure and modify it to meet the current needs of those involved in collective bargaining in the health care field.

[41] When table C was developed by the Commission, there were no licensed and practicing midwives employed in any of the health authorities (or districts at that time). The evidence from all of the witnesses showed that the nature of the practice by midwifes was the type of occupation contemplated by the Commission when it established Table C to the regulations. We concur with the arguments of the Union that had midwives been practicing at the time that table C was developed, that it is likely that the Commission would have included midwives in table C.

[42] We do not, however, agree with the position advanced by the Employer that there has been no material change so as to justify the Board making an amendment to the order. While the cases cited to us support the requirement that there must be a "material change" in the composition of the unit or some other change to justify the amendment, in our opinion, here there is sufficient material change to justify the Union seeking to amend its order pursuant to section 5(k)(ii) of the *Act*.

[43] The passage of *The Midwifery Act* and the establishment pursuant to that *Act* of the licensed practice of Midwifery in the Province of Saskatchewan is a material change. Prior to the making of the order by the Board pursuant to the Commission regulations, there was no licensed practice of midwifery, nor any midwives employed by the Health Authorities. It was not until the *Act*, passed in 1999, but not proclaimed until 2007, that the practice of midwifery became regulated and self governing.

[44] This occupation was not considered by the Dorsey Commission in the formulation of its regulations and classification of health care workers. Now that these employees are eligible to practice, are practicing, and seek to be represented that constitutes, in our opinion, a material change sufficient to justify the amendment of the Order pursuant to section 5(k)(ii) of the *Act*.

Is the Bargaining Unit Sought Appropriate?

[45] The Employer raised numerous objections to the composition of this unit as noted above. The Employer correctly identified the criteria utilized by the Board in the determination of the appropriateness of the unit. Furthermore, we concur with the Employer that the Board must follow the dissenting opinion of then Chief Justice Bayda in *University of Saskatchewan v. CUPE Local 1975*[15] that the Board must deal with the application as if it were an application under sections 5(a) and (b) of the *Act*.

[46] Primarily, as noted by former chief Justice Bayda, this involves the rights of employees under section 3 of the *Act* to choose to be represented by a trade union of their own choosing. That position was supported by this Board in the Sunnyland Poultry case[16], a case dealing with sweeping in employees through a successorship application.

[47] Being aware of this requirement, the Union provided evidence of support for the unit of employees which it sought to represent. Similarly, the Board, issued a Direction for Vote on March 29, 2011, which order allowed for a vote, by secret ballot of all of the midwives covered by the application. That vote, following its completion was sealed and retained by the Board Agent, unopened, pending final determination of this matter by the Board.

[48] As to the appropriateness of the Unit, the Board has recently dealt with cased involving under inclusive units. This cases[17] support the appropriateness of the current unit, particularly when it is combined with a larger, sophisticated bargaining unit such as the applicant Union.

[49] Section 3 of the *Act* embodies the Employees choice to seek the assistance of a trade union in collective bargaining with his/her employer. The Employer argues on a number of grounds that the unit of employees is not appropriate. However, none of the reasons cited are ones which the Board can rely upon to deny these employees section 3 rights.

---

[15] *Supra* Note 9.
[16] *Supra* Note 10
[17] *United Food and Commercial Workers Union, Local 1400 v. Plainsview Credit Union,* [2011 S.L.R.B.D. No. 12, LRB File Nos. 010-11 to 016-11, *Canadian Union of Public Employees, Local 5004 v. Saskatoon Housing Authority,* [2010] CanLII 42667, LRB File No. 048-10

[50] Only those persons who fall outside the definition of "employee" found in section 2(f) of the *Act* cannot seek to avail themselves of union representation under s. 3. That restriction is limited to those persons "whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character"; or someone who is "regularly acting in a confidential capacity with respect to the industrial relations of his or her employer".

[51] There was no evidence that midwives were subject to these exclusions. Both Ms. Achilles and Ms. Klebaum were direct managers of the midwifery program in the Saskatoon Health Authority. While the midwives had professional responsibilities to their clients and were able to order tests and procedures as well as to dispense and administer certain medications, none of these activities took them outside the definition of "employee" for the purposes of the *Act*.

[52] We can see no justification for denying the rights provided in section 3 of the *Act* to these employees. The wish of these employees to exercise that right can be determined from their secret ballot vote on the representation question.

Should the Collective Agreement Include the Midwives?

[53] In this respect, we must agree with the Employer. The application of the Collective Agreement to the midwives is outside the jurisdiction of this Board. At paragraph 42 of the Court of Appeal's decision in *RWDSU v. Kindersley and District Co-operative Ltd.*[18] Mr. Justice Vancise, writing for the court says:

> *In my opinion, there is no jurisdictional foundation for such an order. The Board is attempting to do what the Canada Labour Relations Board did in Acadie, National Bank and Canadian Pacific Airlines Ltd. et al v. Canadian Air Line Pilots Association et al. The Board exceeded its jurisdiction in making the order that the amended certification order be substituted for the scope clause and that the collective bargaining agreement apply to the employees who have been added to the bargaining unit. The order of the chambers judge setting aside the order of the Board is confirmed.*

[18] *Supra* Note 14

[54] The primary rational for the Court's decision in this case was that the Board lacked the jurisdiction to make the order which it made, rather than the order being patently unreasonable, as suggested by the Employer. Since the standard of review has been changed[19] by the Supreme Court of Canada the test of patent unreasonableness no longer is applicable, having been condensed into a test of reasonableness. However, with respect to questions of law, including questions of jurisdiction, the test of correctness remains in effect.

[55] Without having had the benefit of reviewing a copy of the collective agreement, we can only surmise that the agreement does not contain provisions to deal with the extraordinary working hours and conditions of the midwives. Nor, presumably does it provide for a salary scale for midwives as a part of the collective agreement. These are matters which are properly left to the parties to bargain collectively.

[56] The Board therefore orders:

1. That the seven midwives are an appropriate unit for collective bargaining.

2. That the Health Sciences Association of Saskatchewan, a trade union, subject to confirmation of the wishes of the employees being determined by secret ballot, has the ability to represent these employees for the purposes of collective bargaining.

3. That the ballot of the one employee employed by the All Nations Healing Hospital Inc. shall be segregated from the other ballots cast, and shall not be counted for the purposes of determining the representation question.

4. That the Board Agent, in the usual manner, shall forthwith open and count the ballots cast by the other employees eligible to vote to determine their wishes regarding representation by the Union.

---

[19] *Dunsmuir v. New Brunswick*, [2008] SCC 8 (CanLII), 1 SCR 190, 291 D.LR. (4th) 577

5. That following the counting of the ballots, the Board Agent shall report to an in camera panel of the Board to consider the issuance of an order amending the Board's Order of August 8, 2000 to add midwives to that group of employees represented by the Union for the purposes of collective bargaining.

6. This panel of the Board shall remain seized of any matters arising out of this decision save and except for matters related to the counting of the ballots, the conduct of the vote, and the issuance of the amending order as noted above.

DATED at Regina, Saskatchewan, this **14th** day of **October, 2011**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson