UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. COMPASS CANADA SUPPORT SERVICES LTD., Respondent

LRB File Nos. 233-13 & 234-13; May 29, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Shawna Colpitts and Greg Trew

For the Applicant Union: Ms. Dawn McBride
For the Respondent Employer: Ms. Susan B. Barber, Q.C.

Successorship – Deemed successorship – Public Institution – Trade union seeks deemed successorship declaration from Board with respect to unit of employees providing cleaning services at Saskatoon International Airport – Parties agree that central issue is whether or not airport is "public institution" within meaning of s. 37.1 of *The Trade Union Act* – Board concludes that term "public institution" was intended to be narrowly construed in this particular context - Board notes that most of airport's revenues come from fees imposed on airlines, passengers and tenants – Board notes that, while airport perform functions in public good, including security, airport is essentially commercial enterprise - Board concludes that airport is not "public institution" within meaning of s.37.1 of *The Trade Union Act* – Board dismisses trade union's application.

***The Trade Union Act,* s. 37.1.**

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: On September 6, 2013, the United Food and Commercial Workers, Local 1400 (the "Union") applied to the Saskatchewan Labour Relations Board (the "Board") pursuant to s. 37.1 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") seeking a declaration to the effect that there had been a deemed sale or disposition of a business (or part thereof) from Bee-Clean Building Maintenance Incorporated ("Bee-Clean") to Compass Canada Support Services Ltd. (the "Employer") with respect to the provision of janitorial and cleaning services at the Saskatoon John G. Diefenbaker International Airport (the "Saskatoon Airport" or the "Airport"). Concomitant therewith, the Union also filed an application

alleging the commission of various violations of *The Trade Union Act* arising out of the Employer's failure to recognize the Union.

[2] The Employer denied that it was a successor (deemed or otherwise) to the certification Order of this Board involving Bee-Clean and the provision of cleaning services at the Saskatoon Airport. The Employer argued that s. 37.1 of the *Act* did not apply to the Airport as it is not a named or analogous institution (i.e.: a "public institution") within the meaning of that section.

[3] The Union's application was heard on April 25, 2014, with the parties proceeding by way of an agreed statement of facts. The parties also agreed that the crux of the issue to be determined by this Board was whether the Saskatoon Airport was a "public institution" within the meaning of s. 37.1 of *The Trade Union Act*. As a consequence, the parties limited their arguments to that particular issue.

[4] For the reasons set forth therein, we are not satisfied that the Saskatoon Airport is a "public institution" within the meaning of s. 37.1 of *The Trade Union Act*.

Facts:

[5] The parties agreed that the facts relevant to these proceedings were as follows:

> *1. Compass Canada Support Services Ltd. ("Compass") is a member of Compass Group Canada, which provides a range of services for a variety of different facilities and clients across Canada, including contract cleaning services.*
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> *2. Compass participated in a request for proposal process respecting cleaning services with the Saskatchewan Airport Authority (the "Airport"), following the expiration of the contract for cleaning services between the Airport and Bee-Clean Building Maintenance. Compass was awarded the contract and offered services to the Airport as of midnight on September 1, 2013 (the "Contract"). Compass has a total of approximately 11 staff members working at the Airport.*
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> *3. The United food and Commercial Workers, Local 1400 (the "union") was certified as the bargaining agent for the employees Bee-Clean Building Maintenance by order of the Saskatchewan Labour Relations Board, dated November 4, 2010.*
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> *4. The Union has brought an unfair labour practice application (LRB File No. 233-13) and a Successorship application (LRB File No. 234-13) alleging that Compass is bound by that Union's collective bargaining agreement with Bee-Clean Building Maintenance, based on the Successorship provisions in ss. 37(1) and 37.1 of the Trade Union Act, RSS 1978, c T-17 (the ("Act").*

5. *The Union acknowledges that s. 37(1) of the Act has no application in the circumstances of this case and, accordingly, the sole matter for the determination of this Board is whether or not the deemed Successorship provision in s. 37.1 of the Act applies.*

6. *The Saskatoon airport is an international airport operated in accordance with and subject to the provisions of the Aeronautics Act, R.S.C. 1985, C.A-2;*

7. *The Saskatoon airport is situated on land owned by the federal government. The Saskatoon Airport is subject to a lease between the Saskatoon Airport Authority and the federal government;*

8. *The Saskatoon airport is registered as a class 2 aerodrome pursuant to the Canadian Aviation Security Regulations, SOR/2000-111 (the "Aviation Security Regulation");*

9. *As a registered aerodrome, the Saskatoon Airport must be operated in accordance with both the Aviation Act and the Aviation Security Regulations to maintain its registration status;*

10. *As an international airport granting landing rights to international flights, the Saskatoon Airport Authority must comply with the security and other requirements of foreign jurisdictions;*

11. *The Saskatoon Airport Authority is a non-profit corporation registered in the Province of Saskatchewan and is the aerodrome operator of the Saskatoon Airport;*

12. *Prior to 1999, the Saskatoon Airport was operated by Transport Canada but, in 1999, the Saskatoon Airport Authority took over the operations.*

[6] During the hearing, the Board asked the parties to obtain clarification as to whether or not the Federal or Provincial government imposed or regulated the fees charges by the Airport and, if so, by what means. The parties agreed to pose the Board's question to the Chief Financial Officer for the Saskatoon Airport Authority and agreed to transmit his response to the Board. The following response was received from the Authority's Chief Financial Officer and provided to the Board by the parties:

> *The Saskatoon Airport Authority is not subject to any Federally nor Provincially imposed restrictions on the fees and charges that we assess on the airlines and passengers who use the Saskatoon Airport. The fees are determined by the Saskatoon Airport Authority Management, subject to the approval of the Board of Directors.*

Union's argument:

[7] The Union argues that the Saskatoon Airport ought to fall within the definition of "public institution". The Union notes that it is both a commercial airport and a public enterprise.

The Union notes that, in the past, the Airport was operated by Transport Canada, which is an agency of the Federal government. Although it is now operated by the Saskatoon Airport Authority, the Union notes that it continues to be heavily regulated by the Federal Government pursuant to the *Aeronautics Act*, R.S.C. 1985, c.A-2. The Union noted that the Airport is open to the public and is operated largely for the benefit of the public.

[8] The Union argues that the Airport is clearly not a private institution; rather, the Union takes the position that it is analogous to a university, which provides educational opportunities to the public. The Union argues that the Airport exists for the purpose of providing transportation services to the public. Furthermore, the Union argues that the Airport is similar to a university because it receives some of its funding from users and some of its funding from the government. To which end, the Union notes that the Airport has received grants and other funding from the Federal government to assist with costs related to economic development for the community and/or for capital improvements. Finally, the Union notes that the Board of Directors of the Saskatoon Airport Authority includes a number of individuals intended to represent members of the public, including representatives appointed by the Federal government, by the City of Saskatoon, and by the Rural Municipality of Corman Park. The Union argues that these representatives are indicative of the public function performed by the Airport.

[9] The Union argues that the purpose for which s. 37.1 of *The Trade Union Act* was enacted was to protect organized workers working in areas where public employers tended to contract out certain services (cafeteria or food services, janitorial or cleaning services, and security services) and where these contracts tend to routinely pass from one operator to another. The Union argues that the organized employees who provide janitorial and cleaning services at the Saskatoon Airport are the very kind of employees for whom s. 37.1 was enacted.

[10] Counsel on behalf of the Union filed a written argument, which we have read and for which we are thankful.

Employer's argument:

[11] The Employer takes the position that no deemed successorship can be found to have occurred with respect to the work performed at the Saskatoon Airport because that facility is not a named or analogous institution (i.e.: a "public institution") within the meaning of that section. In taking this position, the Employer relies upon this Board's decision in *Service*

Employees International Union, Local 333 v. Smiley's Buffet and Catering, et. al., [2008] Sask. L.R.B.R. 888, 2008 CanLII 75623 (SK LRB), LRB File Nos. 007-08 & 008-08. The Employer argued that the Saskatoon Airport Authority is an independent, federally incorporated non-profit corporation. The Employer argues that, although the overall operations of the Airport are regulated by the Federal government, its day-to-day operations are largely independent from controls by either the Federal or Provincial governments. Furthermore, the Airport does not receive its operating revenues from either level of government; rather, the Airport is funded almost exclusively by the fees charged to the airlines, to passengers and to tenants. Finally, the Employer takes the position that the Airport is a private business that, while it provides a service to the public, it is not "public institution" similar in nature to either a hospital or a university. To the extent that the Airport performs any kind of public services, the Employer notes that it would be a Federal and not a Provincial service. While the Employer disputes that the Airport provides a public service, to the extent that it does, the Employer takes the position that the services it performs are not analogous to the services performed by hospitals or universities, which both fall under Provincial jurisdiction.

[12] Simply put, the Employer argues that Saskatoon Airport is not analogous to either a hospital or a university and thus not the kind of facility intended to be subject to the application of s. 37.1 of the *Act*. The Employer asks that the Union's applications be dismissed. Counsel on behalf of the Employer filed a memorandum of law, which we have read and for which we are thankful.

Relevant statutory provision:

[13] Section 37.1 of *The Trade Union Act* provides as follows:

> *37.1(1) In this section, "services" means cafeteria or food services, janitorial or cleaning services or security services that are provided to:*
>
> > *(a) the owner or manager of a building owned by the Government of Saskatchewan or a municipal government; or*
> >
> > *(b) a hospital, university or other public institution.*
>
> *(2) For the purposes of section 37, a sale of a business is deemed to have occurred if:*
>
> > *(a) employees perform services at a building or site and the building or site is their principal place of work;*

> *(b) the employer of employees mentioned in clause (a) ceases, in whole or in part, to provide the services at the building or site; and*
>
> *(c) substantially similar services are subsequently provided at the building or site under the direction of another employer.*
>
> *(3) For the purposes of section 37, the employer mentioned in clause (2)(c) is deemed to be the person acquiring the business or part of the business.*

Analysis:

[14] *The Trade Union Act* does not include a definition for the term public institution. Nonetheless, that term is used in s. 37.1 to define the type of facilities where the deeming effect of that provision may have application. This Board has had very few occasions to consider s. 37.1; let alone the meaning of "*other public institution*" as that terms is used in that particular section. In *Service Employees International Union, Local 333 v. Smiley's Buffet and Catering, el.al.,* 2008 CanLII 75623 (SK LRB), LRB File Nos. 077-08 & 008-08, the Board considered the application of s. 37.1 to an independent-living apartment complex catering to seniors; a facility that was funded by charges to the seniors who resided in that complex. The Board began its analysis by considering the legislative purpose of s.37.1:

> ***[66]*** *Section 37.1 was added to the Act in 1994. The rationale for doing so was canvassed by this Board in United Food and Commercial Workers Union, Local 1400 v. The Corps of Commissionaires, North Saskatchewan Division, [2002] Sask. L.R.B.R. 188, LRB File No. 276-00. The Board stated at paras. 32 and 33:*
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> > *The seminal decision of the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] OLRB Rep. December 1193, held that a change of a service subcontractor at a particular site would not constitute a "sale of a business" for purposes of successorship even if the same work was performed at the same site by many of the same employees, there being no transfer of anything from the predecessor to the alleged successor.*
> >
> > *However, s. 37.1 of the Act changes this approach with respect to certain services under certain circumstances. It supersedes the Metropolitan Parking analysis and deems there to be a successorship even though there is no direct or indirect transaction or dealings between the deemed predecessor and the deemed successor. There is a sale because the statute deems that there is. Section 37.1(1) defines the services to which s. 37.1 applies. Section 37.1(2) stipulates the three prerequisites that must be established before "a sale of a business is deemed to have occurred" for the purposes of s. 37. Standing on its own, s. 37.1 provides no protection for unions that have organized employees in the contract service sector; the protection is obtained by the legislation deeming that a sale of a business has occurred to which s. 37 applies. Bargaining rights with respect to the listed services, including security services, become attached to particular buildings and sites owned by the provincial or a municipal government, or public institutions such as hospitals and universities. The Board has no discretion to exempt the services or any site or building described in s. 37.1 from the deeming provision.*

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

[15] The Board is the *Smiley's Buffet* case went on to consider how broadly the term "*other public institution*" should be construed in the context of s. 37.1. The Board applied the principals of statutory interpretation to conclude that the term, in this particular context, was intended to be applied in a restrictive sense and was not intended to be broadly-inclusive. Simply put, the Board concluded that, in adding the term "*other public institutions*" to s. 37.1, the legislature was referring only to facilities and/or institutions that are similar in nature to hospitals or universities. The Board explained this conclusion as follows:

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

[16] In applying this analysis to the independent living apartment complex (referred to by the Board as the "Tower"), the Board considered two (2) factors in determining whether or not that facility was analogous to a hospital or a university; whether any government funding went to the apartment complex; and whether or not the facility was performing a public function:

> ***[70]*** *While LutherCare may receive government health funding through the Saskatoon Health District, no such funding is received by LutherCare for the Tower nor was there any evidence that the operation of the Tower directly or*

> *indirectly benefited from the funding that was received by LutherCare. Similarly, there was no evidence that any health care services (i.e. Level 3 and 4 care or otherwise) were provided at the Tower. LutherCare operates a number of facilities throughout the province, most of which are not accredited health care facility, nor do they receive health care funding, nor do they provide any form of acute care to tenants therein. LutherCare argued that receipt of government funding is not indicative of something being a public institution and that the Board must be cautious not to find all of LutherCare's facilities to be "public institutions" on the basis that some facilities within LutherCare's larger corporate structure performed public functions; a position with which the Board concurs.*
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> ***[71]*** *It was not clear to the Board that any facility operated by LutherCare, including the Home (which was accredited, which did receive health care funding, and which did provide acute care services), fell within the category of facilities that the authors of the 1994 amendment to the Act intended would be subject to the deeming effect of s. 37.1 (i.e. facilities similar in nature to hospitals or universities or facilities owned by the Government of Saskatchewan or a municipality). However, the Board had no difficulty concluding that the Tower, which for all intents and purposes is a privately-funded, apartment complex catering to seniors, is neither a "hospital" nor "public institution" within the meaning of s. 37.1.*

[17] Generally speaking, public institutions are supported with public funds; they provide services of general utility and application to the public; and they are controlled by the state. The common feature of all public institutions is that they perform functions deemed by the state to be sufficiently in the public interest to be worthy of public funding. However, it is important to note that many institutions have aspects of their existence that are both public and private, including public utilities, libraries, courts, stock exchanges, and private schools; to name but a few. In applying the term "other public institution" as used in s. 37.1 of *The Trade Union Act*, we are mindful that different institutions occupy different points on the spectrum spanning between public and private institutions, with many institution lying somewhere in the middle. However, as can be seen from this Board's decision in the *Smiley's Buffet* case, we believe the legislature intended that the deeming effect of s. 37.1 would only apply to those institutions that are well and truly on the public end of that spectrum; facilities that are analogous to hospitals and universities. In this regard, we take note of the fact that hospitals and universities are both institutions that are heavily funded and monitored by the Province.

[18] In our opinion, the Saskatoon International Airport is not the kind of facility the legislature meant when it included the term "*other public institution*" in s. 37.1 of *The Trade Union Act*. While undoubtedly performing a valuable service to the community by facilitating and ensuring the safety of air transportation, the kind of services offered by airports are not similar in nature to the services offered by hospitals and universities. On the spectrum of private vs. public

institutions, we find that airports are more in the middle, if not on the private end of that spectrum. The Saskatoon Airport operates largely from its own revenues and is the recipient of relatively little public funding. While there is no doubt that a component of the services performed by airports are in the public good, including security for airlines and passengers, in our opinion, the *raison d'etre* of an airport is primarily commercial. Furthermore, to the extent that the Airport provides a public service, it would be a service falling under Federal jurisdiction. See: *United Food and Commercial Workers, Local 1400 v. Canadian Corps of Commissionaires (North Saskatchewan) Inc.*, (2012) 209 C.L.R.B.R. (2nd) 1, 2012 CanLII 8531 (SK LRB), LRB File No. 114-11. In our opinion, the deeming effect of s. 37.1 was only intended by the Legislature to apply to those public institutions falling under its jurisdiction, namely provincial and municipal facilities. If the Legislature had intended the deeming affect of s. 37.1 to apply to the cafeteria or food services, janitorial or cleaning services or security services being performed at airports in the Province, it would have said so with clear language. It would not have used an ambiguous and generic term like "*other public institution*" to bring airports within the deeming affect of the provision.

Conclusions:

[19] For the foregoing reasons, we find that s. 37.1 does not apply to the cleaning services performed at the Saskatoon International Airport because that facility is not a public institution within the meaning of that section. Having failed this threshold question, the Union's applications must be dismissed.

[20] Board Members Shawna Colpitts and Greg Trew both concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this 29th day of May, 2014.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson