SASKATCHEWAN JOINT BOARD, RETAIL, WHOSESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATOON CO-OPERATIVE ASSOCIATION LIMITED and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondents

LRB File Nos. 081-14 & 235-16; July 24, 2018
Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Laura Sommervill and Kent Kornelsen

For the Applicant:	Gary Bainbridge, Q.C.
For the Respondent Employer:	Kevin C. Wilson, Q.C. and Brent M. Matkowski
For the Respondent Union:	Drew S. Plaxton, Q.C.

Successorship – Rehearing of application necessitated by Order of the Saskatchewan Court of Appeal as a consequence of a breach of the *audi alteram partem* principle by the Board in its' initial decision of this application.

Successorship – Board reviewed its jurisprudence respecting successorships under section 37 of *The Trade Union Act* and section 6-18 of *The Saskatchewan Employment Act* – Board finds that acquisition by Saskatoon Co-operative Ltd. of the Circle Drive Safeway's store in Saskatoon qualified as a successorship under both *The Trade Union Act* and *The Saskatchewan Employment Act*.

Successorship – Dual Successorship – Board finds a dual successorship on facts of this case – UFCW, Local 1400's province-wide certification Order applies to Circle Drive Store – Employer transferred goodwill and certain of its employees from Greystone Store to its' newly acquired Circle Drive Store.

Sucessorship – Intermingling – Board reviewed intermingling principles and found evidence of both organizational and physical intermingling in this case.

Successorship – Remedy – Board considered remedial options set out in section 37 of *The Trade Union Act* and section 6-18 of *The Saskatchewan Employment Act* and concluded that it is appropriate in this case to make an "otherwise order".

Successorship – Remedy – Board determined that as an "otherwise order" there should be a vote by secret ballot of all employees employed at the Circle Drive Store on the date of this order to determine whether RWDSU or UFCW, Local 1400 should be their collective bargaining agent – Board reasons that such an order is

consistent with "employee choice" a core value of section 2 (*d*) of the *Canadian Charter of Rights and Freedoms*.

Unfair Labour Practice – Practice and Procedure – RWDSU alleges the Employer breached its obligation under *The Saskatchewan Employment Act* to remit union dues to it – Since 2016 after the Saskatchewan Court of Appeal ordered this rehearing the Employer had deposited union dues into the trust fund of the law firm of which its counsel was a partner. – Board permits counsel for UFCW, Local 1400 to file formal written submissions before determining the merits of the unfair labour practice application – Board remains seized with this application.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** This is the rehearing of this matter ordered by the Saskatchewan Court of Appeal in *Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*[1] [*Saskatoon Co-operative*]. In that ruling, the Court quashed this Board's earlier Decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limited and United Food and Commercial Workers' Union, Local 1400*[2], and directed that a new hearing be held. Subsequently, the Supreme Court of Canada dismissed an Application for Leave to Appeal filed by the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union [RWDSU].[3]

[2] Briefly stated, the central issue in this application involves successorship rights, more particularly which union – RWDSU or United Food and Commercial Workers, Local 1400 [UFCW] – is the exclusive bargaining agent for employees at what was the Canadian Safeway Limited store located at 3310 – 8th Street East, Saskatoon, Saskatchewan [Circle Drive Store]. RWDSU is certified as the bargaining agent for all employees at that store by virtue of an Order of this Board dated November 25, 1991.[4]

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[1] 2016 SKCA 94, over-ruling *United Food and Commercial Workers, Local 1400 v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2015 SKQB 84.
[2] LRB File No. 081-14, 2014 CanLII 63997 (SK LRB)
[3] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited, et al.,* 2017 CanLII 23873 (SCC)
[4] LRB File Nos. 180-90 & 181-90.

[3] Sometime in late 2013 or early 2014, Federated Co-operative Limited [FCL] acquired a number of grocery stores formerly owned by Sobeys Inc., one of which was the Circle Drive Store. Subsequently, on or about May 13, 2014, the Saskatoon Co-operative Association Limited [Employer] acquired the assets of the Circle Drive Store from its parent company, FCL.

[4] Around the same time, RWDSU brought this application for successorship rights pursuant to then section 37(1) of *The Trade Union Act*, RSS 1978, cT-17 [*TUA*]. It asserted that as Saskatoon Co-op was the successor employer to Canada Safeway Ltd., RWDSU remained the bargaining agent for all employees at the Circle Drive Store.

[5] UFCW intervened in this application. It contended that because it was certified by an Order of this Board dated November 7, 2002[5] to represent all Co-op employees throughout the province, it, and not RWDSU, should be recognized as the bargaining agent for the employees at the Circle Drive Store.

[6] These Reasons for Decision explain why the Board has allowed RWDSU's application in part. The Board has concluded that Saskatoon Co-op is a successor employer under section 6-18 of *The Saskatchewan Employment Act*, SS 2013, c S-13 [*SEA*]. However, rather than make a bare declaration of successorship, the Board has determined it should invoke its' authority set out in clause 6-18(4)(d) of the *SEA*, and "direct[] that a vote should be taken of all employees eligible to vote" in order to settle conclusively the representational issue in this dispute. In our view, this Order is more appropriate, and, in the unusual circumstances of this case, more consistent with section 2(*d*) of the *Canadian Charter of Rights and Freedoms*[6] [*Charter*].

FACTUAL BACKGROUND

A. Events Leading to the New Hearing

[7] On or about May 13, 2013, Canada Safeway Limited and Sobeys Inc. concluded a transaction in which all, or substantially all, of the assets of Canada Safeway Ltd., which

[5] LRB No. 197-02
[6] Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

included approximately 213 retail grocery stores across Canada, were sold to Sobeys Inc. The Competition Bureau of Canada [Competition Bureau] reviewed this sale under the *Competition Act*, RSC 1985, cC-34. The Competition Bureau directed that Sobeys Inc. must divest 23 or those stores, one of which was the Circle Drive Store.

[8] On April 24, 2014, RWDSU commenced an application pursuant to the section 37(1) of the *TUA*. It asserted that as Saskatoon Co-operative was the successor employer to Canada Safeway Ltd., RWDSU remained the bargaining agent for all the employees at the Circle Drive Store by virtue of the certification orders in LRB File Nos. 180-90 & 181-90.

[9] That application was heard by the Board over two (2) days in July and August 2014. At the conclusion of the hearing on August 1, 2014, Chairperson Love on behalf the Board announced its decision that Saskatoon Co-operative was the successor employer to Canada Safeway Ltd pursuant to sections 6-11 and 6-18 of the *SEA*. As a consequence, RWDSU remained the bargaining agent for the employees at the Circle Drive Store. The Board proceeded to amend UFCW's certification order to exclude the Circle Drive Store. This was not a unanimous decision, however. Member Maurice Werezak dissented.

[10] On August 5, 2014, the Board issued a certification Order reflecting its decision.

[11] On September 10, 2014, the Board released its formal written decision.[7]

[12] Shortly thereafter, both UFCW and the Employer sought judicial review of the Board's decision. They cited a number of grounds alleging breaches of procedural fairness and natural justice. The central objection concerned the Board consulting the RWDSU's website while preparing its Reasons for Decision without notifying the parties that it had done so or seeking submissions from them on what information the Board had gleaned from that website.

[13] The Queen's Bench dismissed these applications.[8] Subsequently, both the Employer and UFCW appealed. As already stated, the Saskatchewan Court of Appeal disagreed with the Queen's Bench Judge. In a *per curiam* decision the Court concluded that the

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[7] *Supra* n. 2.
[8] *United Food and Commercial Workers, Local 1400 v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2015 SKQB 84.

Board's decision to consult *ex parte* the Union's website resulted in a breach of the principle of *audi alteram partem*. Consequently, it directed a new hearing.

B. Evidence at the New Hearing

[14] Prior to the new hearing, the Board determined that as the Court of Appeal had nullified the earlier proceedings before the Board, the hearing would proceed as a hearing *de novo* without regard for what had transpired previously.[9]

[15] At the new hearing of these applications, the Board heard oral testimony from four (3) witnesses over a period of three (3) days in April 2017. A considerable amount of testimony was received as well as numerous documents were entered into evidence. The following recitation of the facts does not purport to recount all of this evidence. Only a summary of the evidence the Board deems to be most pertinent to issues we are called upon to decide is set out.

[16] Additionally, at the outset of this section it is important to state that none of the parties raised concerns respecting the credibility of any of the witnesses who testified before the Board. As a consequence, we are relieved from embarking on any credibility assessments.

1. RWDS's Evidence

[17] RWDSU presented two (2) witnesses: Mr. Garry Burkart, RWDSU's Secretary-Treasurer, and Mr. Trevor Miller, the RWDSU Staff Representative who serves its' members employed at the Circle Drive Store.

1.1 Gary Burkart

[18] Mr. Burkart offered the Board an over-view of RWDU's history and experience representing employees at the Circle Drive Store. He testified that RWDSU had been certified to represent all employees at that store as well as other Safeway stores located in Regina, Saskatoon, Swift Current and Prince Albert by an Order of this Board that was last amended on

[9] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limite*d, 2017 CanLII 20059 (SK LRB), at paras. 59-61.

November 25, 1991. Prior to becoming Secretary-Treasurer, Mr. Burkart was the union's service representative for those stores.

[19] He indicated that he had heard rumours of the sale of the Circle Drive Store to the Employer. He formally learned of this sale when he received a letter from Mr. Grant Wicks, the Employer's General Manager, dated February 14, 2014. Mr. Burkart passed this letter on to Mr. Trevor Miller and directed him to deal with the situation. This correspondence pertained to which of the unions – UFCW, Local 1400 or RWDSU – was entitled to receive union dues paid by employees at the Circle Drive Store.

[20] A series of letters were exchanged between Mr. Burkart and Mr. Wicks. Mr. Burkart testified that his last letter to Mr. Wicks was dated April 21, 2014, and, to date, he has never received a reply. He indicated further that shortly after the Saskatchewan Court of Appeal quashed the Board's earlier decision in this application, union dues have been held in trust by MLT Aikins, the law-firm representing the Employer in this matter. Mr. Burkhart testified that RWDSU last received a dues payment in October 2016.

[21] He stated that Mr. Miller continues to represent the employees at the Circle Drive Store and RWDSU should be compensated for the work its representatives have done for those employees to date.

[22] On cross-examination by counsel for the Employer, Mr. Burkart acknowledged that there was still some acrimony between the two (2) unions, following an attempt by UFCW to raid RWDSU members approximately 35 years ago. He stated that over the intervening years, this ill-will had dissipated somewhat; however, the dispute between the unions in relation to the Circle Drive Store rekindled tensions in their relationship. He conceded that the unions have not co-operated on anything respecting the recent corporate changes related to the Circle Drive Store.

[23] Mr. Burkart testified further that in Regina, Sherwood Cooperative Limited had purchased a store owned by Safeway. Following negotiations between RWDSU and Sherwood Co-operative Association Ltd., an application was made to this Board to amend an existing certification Order to authorize RWDSU as the collective bargaining agent for all employees of

the former Sherwood Co-operative Association Ltd. This application proceeded as a joint amendment.[10]

[24] On cross-examination by counsel for UFCW, Mr. Burkart stated that at one time, RWDSU acted as the collective bargaining agent for employees at six (6) Safeway stores in Saskatoon. Over the years, however, the number of Safeway stores in the city dwindled. He estimated that there were between approximately 100-120 employees working at the Circle Drive store when it was owned by Safeway.

[25] He testified further that RWDSU represented Safeway employees in Regina and estimated that there were approximately 800 employees there. He indicated that Saskatoon comprised one (1) zone and Regina another. Safeway employees were only able to transfer within the zone in which they worked.

[26] Referring to the joint amendment application in Regina, Mr. Burkart testified that prior to the merger the two (2) locals involved had voted on which union the employees wished to be their bargaining agent. Following that vote, the locals agreed to dovetail the seniority of those employees. He opined that it is generally more beneficial to employees that when transfers are to be made it is done with the affected employees' consent.

1.2 Trevor Miller

[27] Mr. Miller is a RWDSU staff representative, a position he held at the time of this hearing, for approximately nine (9) years. He testified that he was responsible for five (5) workplaces in Saskatoon and one (1) in Swift Current. One of those locations was the Circle Drive Store in Saskatoon.

[28] After the Employer acquired that store, Mr. Miller was instructed by Mr. Burkart to continue serving it. This instruction was based upon correspondence to Mr. Burkart from Mr. Wicks dated February 14, 2014.[11] In part, Mr. Wick wrote:

[10] Exhibit E-1.
[11] Exhibit U-2.

> *We accept that we are in a position of a successor employer and agree to be bound by the terms of the collective agreement between the Union and Sobeys/Safeway, to the extent required by law.*
>
> *We would be pleased to arrange a meeting with you to discuss any transition issues you may foresee. We look forward to working with you.*

[29] Shortly after RWDSU received this letter, Mr. Miller notified the Employer by a letter dated April 21, 2014 that RSDSU wished to commence bargaining a revised collective agreement.[12] At that time, the collective agreement RWDSU had with Canada Safeway Ltd. was set to expire on June 21, 2014.

[30] The revised collective agreement was concluded on or about June 22, 2014.[13] Mr. Miller testified that to his recollection bargaining commenced sometime in September 2015. Bargaining continued for approximately seven (7) months. He stated that the bargaining sessions which took place were neither contentious nor confrontational. He stated that the Employer did not raise concerns about there being two (2) seniority lists. Nor did either side raise concerns about transfers of employees from one (1) store to another.

[31] Mr. Miller testified that RWDSU has a two (2) tier wage scale, while UFCW had only one (1) tier. The effect of this was that, for example, a new hire at the Circle Drive Store would be subject to the lower rate of pay. In the course of collective bargaining, RWDSU had proposed that the second tier of employee remuneration be removed in order to bring RWDSU's members in line with UFCW's members. However, the Employer rejected this proposal.

[32] Mr. Miller further testified that the working relationship between RWDSU and the Employer was an amicable one. Over three (3) years, the Employer had never expressed concerns about dealing with RWDSU in relation to the "island store" located on Circle Drive, until this proceeding. He indicated that during that time there had been a handful of grievances which had all been resolved. In addition, there were no recruitment problems experienced at the Circle Drive Store and the turn-over in staff at that location was comparable to that in the industry, generally.

[33] Respecting union dues, Mr. Miller testified that as the collective bargaining agent for employees at the Circle Drive Store, RWDSU was legally obligated to represent those

[12] Exhibit U-12.

employees, and to be compensated for their work. However, following the decision of the Saskatchewan Court of Appeal in July 2016, it was decided with UFCW's concurrence to have the union dues paid to the law firm of MLT/Aikins in trust pending a final determination as which of these two (2) unions would be designated as the collective bargaining agent.

[34] On cross-examination by counsel for the Employer, Mr. Miller testified that in the most recent round of collective bargaining certain changes were made to the previous bargaining agreement with Canada Safeway Ltd. He stated that these changes were intended to bring the collective agreement for employees at the Circle Drive Store more into line with the collective agreement the Employer had with UFCW. He acknowledged that RWDSU was attempting to harmonize as much as possible the two (2) collective agreements.

[35] On the issue of retention of employees at the Circle Drive Store, Mr. Miller stated that to his knowledge only two (2) employees have transferred to stores represented by UFCW in the past three (3) years.

[36] On cross-examination by counsel for UFCW, Mr. Miller testified that the last round of collective bargaining commenced in fall 2014 following this Board's earlier decision. He further advised that it had be completed, ratified and signed off prior to the ruling of the Saskatchewan Court of Appeal in July 2016 quashing that decision. He stated that there was a larger turn-out of members for the ratification vote than there had been at previous ratification meetings.

2. The Employer's Evidence

[37] The Employer called one (1) witness, Ms. Sharon Schultz, the Employer's Human Resources manager. Ms. Schultz has served in that capacity since 2010.

2.1 Sharon Schultz

[38] Ms. Schultz began her testimony by providing the Board with an over-view of the Employer's business. She explained that its business model was member owned, with a governing board comprised of members who were elected by the general membership. At the time of the hearing, she estimated that the Employer had approximately 1,000 unionized

[13] Exhibit U-13.

employees at approximately 37 locations. UFCW represents those employees in a province-wide bargaining unit pursuant to an Order of this Board dated November 2, 2002.[14] In addition to these unionized employees, the Employer also has approximately 105 non-unionized employees.

[39] Ms. Schultz then turned to describing the Employer's acquisition of the Circle Drive Store. A redacted version of the Retail Asset Purchase Agreement between Federated Co-operatives Limited and the Employer dated February 12, 2014 in relation to that particular store was introduced into evidence on conditions.[15] This document governed the transfer of assets to the Employer from Federated Co-operatives; however, from this document it is possible to trace this transfer back to the acquisition by Federated Co-operative of a certain number of grocery outlets from Sobey's. Of particular relevance to the issues before the Board is Article 5.7(b) which stipulates the Employer "shall employ all Union Employees as the successor employer…in accordance with the terms of each applicable Collective Agreement", and any successorship rights and responsibilities "shall be determined by the application labour relations board".

[40] Ms. Schultz explained that the Employer believed it was important for it to have a presence on 8th Street in Saskatoon. The Circle Drive Store was attractive to it because it had a large square footage, as well as a floral department which no other Co-op store offered. The transformation of the Circle Drive Store from a Safeway to a Co-op store was very quick. She estimated the store was "dark" for only approximately 24 hours. The first thing the Employer did after taking possession of the premises was to remove the signage, rebrand the shopping carts and change over the computer equipment, including cash registers.

[41] As a Safeway store, the Circle Drive location lacked the fresh look that the Employer preferred for its stores. Co-op stores are less dark and more airy than the standard Safeway store. Almost immediately, the Employer began a complete renovation of the store. A number of the Employer's employees were brought over to assist in the transition, to train former Safeway employees how to operate the store in accordance with the Employer's

[14] LRB File No. 197-02 found at Exhibit I-1, Tab 3.
[15] Exhibit E-3. The Board imposed the following conditions on this particular exhibit: (1) no copies are to be made; (2) used for purposes of this hearing; (3) retained by counsel on their file pending the Board's decision in this matter and then returned to counsel for the Employer, and (4) a copy will be retained on the Board's file in this matter for a period of 90 days following the release of its decision, and then returned to counsel for the Employer.

corporate policies. As well, in the certain departments such as meat and produce, the Employer transferred employees from other Co-op stores to train workers in those areas.

[42] Conversely, the floral department at the Circle Drive Store which was staffed by former Safeway employees prepared arrangements that would be distributed other Co-op stores in Saskatoon. It is anticipated that floral department will soon open in other Co-op store locations.

[43] Ms. Shultz testified that recruitment for the Circle Drive Store has been difficult because new employees want the flexibility to transfer to another store should they so wish. As employees at the Circle Drive Store are represented by RWDSU while employees at the Employer's other stores are represented by UFCW, it makes such transfers very difficult, if not impossible.

[44] The Employer also saw the Circle Drive Store as an opportunity to transfer its operations at its Greystone store to the new location. That store was in need of significant renovation and repair. After it acquired the Circle Drive Store, the Employer chose to close its Greystone store, which it did on or about June 13, 2014.

[45] As a consequence of this closure, the pharmacy team at the Greystone Store moved over to the Circle Drive Store, as well as approximately 2400 prescriptions from that pharmacy. In addition, some of the shelving units and stacking equipment was also transferred.

[46] Ms. Schultz elaborated on the frustration the Employer experienced because of the Circle Drive Store being an "island" store, *i.e.* a store where employees are represented by a union different from the one which represents all its other employees. For one thing, from an employee's perspective it is less than ideal because it impedes a worker's ability to transfer to another store in order to advance his or her career. As well, it makes it difficult for the Employer in circumstances of workplace harassment, for example, to remove one (1) or more employees to a different location in an attempt to rectify the situation.

[47] She testified that the Employer attempted to persuade UFCW to allow RWDSU members to transfer to stores for which UFCW was the bargaining agent. However, UFCW colorfully rebuffed the Employer's request. This left Ms. Schultz with the impression that there was considerable animosity between RWDSU and UFCW.

[48] Ms. Schultz also expressed the view that in the last round of collective bargaining, RWDSU had not fared particularly well. She stated that RWDSU achieved nothing better than what UFCW had gained. Indeed, RWDSU was unable to remove a historical two-tier wage scale from its collective agreement with the Employer, with the consequence that wages for RWDSU members are generally lower the those for UFCW members.

[49] On cross-examination by counsel for UFCW, Ms. Schultz testified that the Employer negotiated a new collective agreement with RWDSU after this Board's previous decision in this matter and before the Saskatchewan Court of Appeal quashed it on procedural fairness grounds. She stated that as a starting point the negotiators used the previous collective agreement RWDSU had negotiated with Canadian Safeway. She emphasized that, in her view, these negotiations did not amount to voluntary recognition of RWDSU.

[50] She explained that at the same time the Employer had been struggling with what to do about its 8th Avenue Store which required numerous upgrades and improvements. When the Circle Drive Store became available, the Employer determined that it made sense to purchase that store and relocate the operations of its Greystone Store to the Circle Drive site.

[51] Immediately upon acquiring the Circle Drive Store, the Employer moved quickly to transform and rebrand it as a Saskatoon Co-operative store. The Employer transferred management personnel as well as UFCW members to the Circle Drive Store in order to train employees on its procedures and policies. She explained that employees' uniforms were changed from Safeway uniforms to uniforms displaying Co-operative branding. She also indicated that the Federated Co-operative Limited warehouse supplied all stores which the Employer operated, including the Circle Drive Store.

[52] Ms. Schulz acknowledged that there is at least one (1) employee at the Circle Drive Store who has worked there and been a member of RWDSU since November 21, 1970. She also testified that she knew a number of employees had left since the Employer acquired that store; however, in her opinion departures of this kind are not unusual when such a transition takes place.

[53] When questioned by counsel for UFCW about her experience with "dove-tailing", Ms. Schulz testified that she had been involved in a dove-tailing exercise at the Employer's Colonsay site. She indicated that at the time the Employer acquired this store, the 12

employees who were brought in as UFCW members retained their Co-op Region Seniority (CSR).

[54] Turning to the issue of union dues, Ms. Schulz conceded this was a tricky situation and the Employer had to think carefully how it handled such dues until the representational issue is finally resolved. She explained that the Employer likes to adopt a collaborative approach and is content to let this Board make the decision.

[55] On cross-examination by counsel for RWDSU, Ms. Schulz stated that the Employer heard rumours about a possible sale of the Circle Drive Store in late January 2014. However, once the acquisition was concluded, the Employer knew that in light of the successorship this store was a "RWDSU shop", and this was the labour relations reality with which it had to deal. She acknowledged as well that the Employer's Greystone Store's business was absorbed into the Employer's other stores, all of which were "UFCW stores". It would be difficult to tie the business which migrated from the Greystone Store to any other of the Employer's stores.

[56] Initially when the Employer acquired the Circle Drive Store, it made cosmetic changes to the premises in order to brand it a Saskatoon Co-operative enterprise. However, it was only in 2017 when more substantial renovations to the premises were commenced in order to fully convert the Circle Drive Store from a Safeway store to a Saskatoon Co-operative store.

[57] Turning to collective bargaining with RWDSU, Ms. Schulz stated that she had a good working relationship with the union. She noted all the clauses in the most recent collective agreement were mutually agreed to by the parties. Respecting the two (2) tier wage scale that RWDSU negotiators insisted should be maintained, she conceded she harboured some concerns about it because she felt it may not treat all employees fairly.

[58] Apart from this, she believed that bargaining had proceeded relatively smoothly. She acknowledged that from her perspective RWDSU did not obtain anything better than UFCW had achieved through its negotiations. When the final agreement was presented to the membership for ratification, it was received very favourably.

3. <u>UFCW's Evidence</u>

[59] UFCW called one (1) witness, Mr. Norm Neault, the current President of Local 1400, a position he has held since approximately 2009.

3.1 Norm Neault

[60] Mr. Neault testified that Local 1400 has represented all of the Employer's employees since the late 1970's. A copy of the initial certification Order to this effect issued by this Board on August 8, 1979 was introduced into evidence.[16] Subsequent certification Orders amending the initial Order dated September 4, 1987[17], and November 7, 2002[18] respectively were also introduced into evidence. The most recent certification Order plainly stipulates that UFCW is the exclusive bargaining agent for "all employees employed by the Saskatoon Co-operative Association Limited, working in or from its places of business in Saskatchewan" subject to lengthy list of enumerated exceptions.

[61] He explained that Local 1400 is a composite bargaining unit including among other enterprises food, manufacturing, retail services, hospitality industry and libraries. He testified that it currently has approximately 6500 members comprising more than 100 bargaining units. He emphasized that in no other store owned by the Employer were the employees represented by a different union, except for the Circle Drive Store.

[62] Mr. Neault testified that UFCW strongly disagreed that the Employer's acquisition of the Circle Drive Store amounted to a successorship for the purposes of the *TUA* or the *SEA*. He emphasized that UFCW played no part in the Employer's acquisition of the Circle Drive Store nor was it consulted prior to the transaction in question. Once UFCW learned of the Employer's acquisition, it requested information respecting employees at the premises.

[63] On May 20, 2014, Ms. Schulz replied to these various requests and advised that the Employer would await the decision of this Board respecting the representational issue; however, until that decision was made, the Employer would continue to accept that RWDSU represented those employees.

[64] Once the Saskatchewan Court of Appeal had rendered its decision setting aside the Board's original determination identifying RWDSU as the appropriate bargaining agent, Mr.

[16] LRB File No. 163-79.
[17] LRB File No. 142-87.

Neault reiterated his earlier requests of the Employer for information respecting employees at that location.[19] In addition, he asked that union dues be remitted to the law firm of the Employer's legal counsel as had been done prior to the Board's original determination. A copy of this correspondence was forwarded to Mr. Gary Burkart.

[65] In a letter dated October 5, 2016 in response to Mr. Neault's earlier communication to Mr. Wicks, Mr. Miller on behalf of RWDSU advised the Employer that it cannot accede to Mr. Neault's request. In addition, Mr. Miller stated emphatically that no dues could lawfully be paid to UFCW or to the law firm, for that matter. In this correspondence, Mr. Miller wrote in part:

> *It is [RWDSU's] view that deducting dues without authorization from an employee and remitting them to anyone other than what they have authorized is legal, including remitting them to MLT. Such authorization does not exist from any of our members nor from our Union. We also note that the Collective Agreement between us does not authorize you to do so as requested by UFCW Local 1400.*[20]

[66] In the course of his testimony, Mr. Neault identified what he perceived to be the difficulties which would be occasioned by certifying RWDSU as the exclusive bargaining agent for employees at the Circle Drive Store. First, it would compromise the integrity of UFCW's province wide certification Order, an Order it has held for some considerable time.

[67] Second, UFCW's collective agreement allows for mobility of its employees. It permits its members to apply for different positions throughout the various stores owned and operated by the Employer. This kind of mobility would be denied to employees at the Circle Drive Store should they remain members of RWDSU.

[68] Third, Mr. Neault noted that UFCW had approximately 900 members spread amongst the various stores operated by the Employer, while there were only approximately 100-120 employees working at the Circle Drive Store. For example, employees at the Greystone location were able to exercise bumping rights in other of the Employer's stores.

[69] Mr. Neault opined that it would not be too difficult to integrate RWDSU members into Local 1400. He alluded to his experience with Affinity Credit Union where dovetailing took

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[18] LRB File No. 197-02.
[19] Exhibit I-5, Letter dated October 3, 2016 to from Mr. Neault to Mr. Grant Wicks.
[20] Exhibit I-6, Letter dated October 5, 2016 from Mr. Trevor Miller to Mr. Grant Wicks.

place which enabled employees to merge into the larger unit without losing their seniority. He cited the Colonsay Convenience Store as another example where employees were dovetailed into UFCW. He stated that currently mergers with other enterprises are happening more frequently for UFCW.

[70] He concluded his testimony by stating that UFCW is prepared to negotiate a dovetailing arrangement for all employees at the Circle Drive Store. He acknowledged that to date UFCW representatives had not had an opportunity to communicate or meet with employees at the Circle Drive Store. It had discussed this possibility with RWDSU; however, that union had refused UFCW representatives access to those premises.

ISSUES

[71] These applications present the following four (4) issues for decision:

1. Did a successorship occur when the Circle Drive Store converted from a Safeway store to Saskatoon Co-operative?

2. Is there a dual successorship in the circumstances of this case?

3. Should the Board issue an "otherwise order" pursuant to subsection 6-18(2) of the *SEA*?

4. How should the Board decide which union should be the collective bargaining agent for the employees at the Circle Drive Store?

RELEVANT STATUTORY PROVISIONS

[72] As already stated, this application was initiated under the *TUA*. In its entirety, then section 37 reads 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 original applied to him or the agreement had been signed by him.*
>
> *(2) On the application of any trade union, employer or employee directly affect by a disposition described in this section, the board may make order doing any of the following:*
>
> > *(a) determining whether the disposition or proposed dispotion relates to a business or part of it;*
> >
> > *(b) determining whether, on the completion of the disposition of a business or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
> >
> > *(i) an employee unit;*
> > *(ii) a craft unit;*
> > *(iii) a plant unit;*
> > *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> > *(v) some other unit;*
> >
> > *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
> >
> > *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*
> >
> > *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b), or (c) or the description of a unit contained in a collective bargaining agreement;*
> >
> > *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*

[73] With the coming into force of the *SEA* on April 29, 2014, the *TUA* was wholly repealed. In spite of this repeal, the Board has continued to rely upon its' jurisprudence under section 37 of the *TUA* for purposes of the *SEA*. For example, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Broadway Lodge Ltd. and 101239903 Saskatchewan Ltd.*[21] [*Broadway Lodge Ltd.*], this Board stated:

> ***[25]*** *Since 1972, when section 37 was first enacted, a large body of jurisprudence has evolved respecting its interpretation and application. The threshold question to the Successorship Issue in this matter is whether this*

[21] 2017 CanLII 6029, 291 CLRBR (2d) 122, LRB File No. 017-16 &018-16.

jurisprudence remains applicable for purposes of interpreting section 6-18 of the SEA. The answer to this question is "yes". The language of section 6-18 is for all intents and purposes virtually identical to the former section 37 of the TUA. To be sure, the text of section 6-18 has been modernized and organized in a way that comports with contemporary plain language drafting protocols. Apart from that, however, when the two provisions are scrutinized carefully there is no discernible substantive difference between them. As a result, the previous jurisprudence developed under section 37 of the TUA, is very relevant to the interpretation of section 6-18 of the SEA

[74] For purposes, the provisions of the *SEA* most relevant to this matter read as follows:

6-4*(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*

. . . . . .

6-18*(1) In this Division, "disposal" means a sale, lease, transfer or other disposition.*

(2) Unless the board orders otherwise, if a business or part of a business is disposed of:

> *(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and*
>
> *(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.*

(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:

> *(a) if before the disposal a union was determined by a board order to be the bargaining agent of any of the employees affected by the disposal, the board order is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person;*
>
> *(b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.*

(4) On the application of any union, employer or employees directly affected by a *disposal, the board may make orders doing any of the following:*

> *(a) determining whether the disposal or prosed disposal relates to a business or part of a business;*

> *(b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;*
>
> *(c) determining what union, if any, represents the employees in the bargaining unit;*
>
> *(d) directing that a vote be taken of all employees eligible to vote;*
>
> *(e) issuing a certification order;*
>
> *(f) amending, to the extent that the board considers necessary or advisable:*
>
> > *(i) a certification order or a collective bargaining order;*
> >
> > *(ii) the description of a bargaining unit contained in a collective agreement;*
>
> *(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.*
>
> *(5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4(e).*

ANALYSIS

A. <u>Onus</u>

[75] At the outset, it is useful to clarify which party bears the burden of proof in this matter. The Employer asserts that as RWDSU is the applicant, it bears the burden of proof to demonstrate that a successorship has occurred. In support of its' assertion, the Employer invokes *Ontario (Human Rights Commission) v Simpson Sears Ltd*.[22] UFCW also took the position that RWDSU bore the burden of proof, although it did not cite any legal authority in support of its position. For its part, RWDSU made no representations respecting this issue.

[76] The Board agrees with both the Employer and UFCW that RWDSU bears the legal burden of proof on this application. RWDSU must demonstrate on a balance of probabilities that the take-over of the Circle Drive Store by the Employer amounts to a successorship under the *SEA*, and UFCW's province-wide certification Order for such stores should be amended.

[77] Furthermore, in order to satisfy its burden of proof on a balance of probabilities, RWDSU needs to present evidence that is "sufficiently clear, convincing and cogent"[23].

B. Did a successorship occur when the Circle Drive Store converted from a Safeway store to Saskatoon Co-operative?

1. Overview of Relevant Legal Principles

[78] In *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd.*[24][*Regina Victoria Inn*], the Board offered this helpful description of the public policy objective animating section 37 of the *TUA*, and by implication section 6-18 of the *SEA*. At page 140, the Board stated:

> *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 s. 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 s. 37 is often a matter of some complexity. [Emphasis added.]*

[79] While the public policy objective of a successorship provision is easily identified, its proper application to a particular transaction or fact situation is far more elusive. As this Board acknowledged in *Canadian Union of Public Employees, Local 1975-01 v Versa Services Ltd., College West Building, University of Regina*[25] [*Versa Services Ltd.*] at pages 176 and 178:

> *If it is a fairly straightforward task to state a reason for the recognition of a continuing obligation on the part of the successor employer, it is much more difficult to articulate exact criteria for determining that a transfer has taken place within the meaning of Section 37. Time after time, labour relations boards faced with this task have fallen back defeated from the effort of arriving at a comprehensive portrait of a succession or a successor employer, deciding instead that the determination must be made in the context of the facts peculiar to the case before them.*
>
> *. . . . .*
>
> *What comes through clearly from the attempts by labour relations boards to arrive at a uniform definition of successorship is that there is no factor or single set of*

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[22] [1985] 2 SCR 536, at para. 28.
[23] *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at para. 46.
[24] (1995), 25 CLRBD (2d) 137, LRB File Nos. 125-94, 130-94 & 131-94.
[25] [1993] 1st Quarter Sask. Lab. Rep. 174, LRB File No. 170-92.

> *criteria which is a sine qua non for the transfer of collective bargaining obligations to occur. 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 qualify from the previous employer. This transmission is not tied to specific work, individual employees, or, naturally, the employment relationship which was already in existence.*
>
> *The putative successor must draw from the transaction which produces the new entity some viable, independent "business" which can be the basis of a collective bargaining relationship; it must, in some sense, to quote this Board in [Retail Wholesale and Department Store Union, Local 544 v Pauline Hnatiw, LRB File No. 190-80] "draw its life" from the predecessor employer. [Emphasis added.]*

[80] As *Versa Services Ltd.* expressly acknowledges, the determination of a successorship application is very much fact-driven. Recently, the Queen's Bench commended a contextual approach to deciding applications under the former section 37 of the *TUA.* In *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v K-Bro Linens System, Inc., The Saskatchewan Association of Health Organizations, Health Shared Services Saskatchewan and Regina-Qu'Appelle Health Region*,[26] [*K-Bro (QB)*], Barrington-Foote J. citing prior decisions of this Board concluded at paragraph 38:

> *Any acceptable and defensible interpretation of s. 37 must adequately reflect the purpose of that section, which relates to the protection of collective bargaining rights. It must focus on substance rather than form and thus calls for a broader "contextual" or fact-based analysis[.] Such an approach recognizes that there are myriad fact situations which may call for a successorship analysis. [Citations omitted.]*

[81] In *RWDSU v Hnatiw*[27] [*Hnatiw*], the Board first adopted the approach of the Ontario Labour Relations Board to the concept of successorship set out in its seminal decision in *Canadian Union of Public Employees v Metropolitan Parking Ltd.*[28] [*Metropolitan Parking*]. The *Metropolitan Parking* case has been regularly relied upon by this Board in many of its successorship decisions. It is especially instructive on the question of what constitutes a "business" for the purpose of the successorship provisions of the labour relations statute at issue – in *Metropolitan Parking*, that was section 55 of the 1970 Ontario statute. The Ontario Board stated at pages 208-9, and 211:

> *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",*

[26] 2015 SKQB 300.
[27] LRB File No. 190-80.
[28] [1980] 1 CLRBR 197

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 intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. This notion is implicit in the remarks of Widjery J. in Kenmir v Frizzel et al. (1968) 1 All E.R. 414 – a case arising out of legislation similar to section 55. At page 418 the learned judge commented:

> *In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the right which he acquires thereunder. Similarly, an express assignment of good will is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before. [Emphasis in original.]*

Widjery J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery J and the Board is whether the transferee has acquired from the transferrer [sic] a functional economic vehicle.

. . . . . .

The distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business" or "a part of a business" and 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 will be decided. [Emphasis added.]

[82] More recently, in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v Charnjit Singh and 1492559 Alberta Inc.*[29] [*Singh*], this Board attempted to itemize the various indicia employed in earlier decisions to determine whether or not a successorship had occurred. At paragraphs 45 and 46, the Board stated:

[29] LRB File No. 196-10, 2013 CanLII 3584 (SK LRB)

> *Numerous successorship cases have demonstrated a number of factors that have been considered by various labour boards to help in making this determination, including: the presence of any legal or familial relationship between the predecessor and the new owner; the acquisition by the new owner of managerial knowledge and expertise through the transaction; the transfer of equipment, inventory, accounts receivable, customer lists and existing contracts; the transfer of goodwill, logos and trademarks; and the imposition of covenants not to compete or to maintain the good name of the business until closing. While the presence of any of these factors can be indicative of successorship, their absence is often considered inconclusive. Labour boards have also considered factors such as the perception of continuity of an enterprise; whether or not the employees have continued to work for the purchase; whether or not these employees are performing the same work; and whether or not the previous management structure has been maintained or if there has been a commonality of directors and other officers. If the work performed by the employees after the transfer is substantially similar to the work performed prior to the transfer, an inference of continuity can be drawn. Similarly, Labour boards have also considered whether or not there has been a hiatus in production or a shutdown of operations. Depending upon the industry, the longer a property lays dormant, the more difficult it is to draw an inference of continuity. Of course, this list is not exhaustive of the factors that may be considered, and, depending upon the situation, certain factors will be given more import than others……*
>
> *In the end, the vital consideration for the Board is whether or not the effect of the transaction was to put the transferee into possession of something that could be considered a "going concern"; something distinguishable from an idle collection of surplus assets from which the new owner has organized a new business. To make a finding of successorship, the Board must be satisfied that the new owner acquired the essential elements of a business or part thereof; something of a sufficiently dynamic and coherent quality to be consider a going concern; and that the said business interest can be traced back to the business activities of the previous certified owner. In making this determination, this Board has cautioned that the test is not whether the business activities of the new owner resemble the previous certified business; but whether or not the business carried on after the transaction was acquired from the certified employer.*

[83] Like the Board in *Versa Services*, at page 177, the Board in *Singh* at paragraph 45 endorsed the view expressed by the Ontario Labour Relations Board in the following passage from its decision in *Culverhouse Foods Ltd.*[30] [*Culverhouse*]:

> *No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.*

[84] With these principles outlined, we now turn to consider the successorship issues presented in this application.

2. Position of the Parties

2.1 RWDSU's Position

[85] Counsel for RWDSU described this case as "a textbook successorship". He noted that within the space of 36 hours, a business is purchased, rebranded, and re-opened at the Circle Drive Store with the previous business' employees continuing to operate it. No employees were laid off or re-assigned to another store as a consequence of this transition. It was, in his words, "a seamless transition".[31]

[86] Counsel points to a number of factors that support his submission that a successorship has occurred. For example, the Employer, itself, acknowledged this fact in various ways. There is the statement found in Mr. Wick's letter to Mr. Burkart dated February 14, 2014 which is set out above that expressed the Employer's opinion that a successorship had occurred, and it would be bound by the collective agreement currently in place with RWDSU.[32]

[87] Next, in its formal Reply to RWDSU's application, the Employer expressly conceded that "its purchase effective May 13, 2014 of the assets of the retail grocery business located at 3310 8th Street East, Saskatoon, Saskatchewan (the "Former Safeway Store") constitutes a disposition on sale of part of a business pursuant to s. 37 of the [TUA] [33]." At paragraph 5(3) of its Reply, the Employer further acknowledges "that it is a successor and is bound by existing Safeway collective agreement, to the extent required by law and unless the Board otherwise orders".

[88] Furthermore, the Asset Purchase Agreement demonstrates a transfer of a business to the Employer. In particular, counsel for RWDSU highlighted Articles 5.7 and 5.10 of that document.

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[30] [1976] OLRB Rep November 691.
[31] RWDSU's Written Submissions, at para. 5.
[32] Exhibit U-2.
[33] Employer's Reply dated May 6, 2014, at para. 2(a).

[89] Counsel submits that taken together these factors engage the statutory presumptions set out in both section 37 of the *TUA* and section 6-18 of the *SEA*. Unless this Board "otherwise orders", a simple declaration to this effect is in order.

[90] He also submitted that the facts underlying this application must irresistibly lead to the conclusion that a successorship has taken place. The Employer acquired the Circle Drive Store then operating as a Safeway store and gas bar, from Federated Co-operatives which in turn had acquired it from Sobeys. This store continued to operate as a Safeway outlet until May 13, 2014. It then ceased operations, signage was removed, and Safeway branded products were removed from the shelves. New signage was immediately installed and the store shelves stocked with Co-op branded products. The Circle Drive Store re-opened as a Co-op store in less than 36 hours after the Safeway store closed its doors.

[91] On this aspect of the case, counsel for RWDSU relied on a number of authorities including: *Singh*[34]; *Metropolitan Parking Ltd.*[35]; *Versa Services Ltd.*[36]; *Culverhouse*[37], and *Hnatiw*[38].

2.2 The Employer's Position

[92] The Employer did not strongly dispute that its acquisition of the Circle Drive Store qualified as a successorship for purposes of the *TUA* and the *SEA*. Counsel for the Employer submitted that resolving this issue is fact-driven. Invoking *Monad Industrial Constructors Ltd. v UA, Local 179*[39] [*Monad*], he cautioned the Board against placing any weight on our earlier decision in this application which was subsequently quashed by the Saskatchewan Court of Appeal. That is because our previous decision must be considered to be a nullity.[40]

[93] The Employer acknowledged that it has taken the position from the outset that a successorship took place in this case. It did not resile from this position at the hearing. Rather,

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[34] *Supra* n. 29.
[35] *Supra* n. 28.
[36] *Supra* n. 25.
[37] *Supra* n. 30.
[38] *Supra* n. 27.
[39] 2013 CarswellSask 316, 223 CLRBR (2d) 1, at para. 80.
[40] See especially: *Saskatchewan Joint Board, Retail Wholesale and Department Store v Saskatoon Co-operative Association Ltd.*, 2017 CanLII 20059, LRB File No. 81-14 (SK LRB), at para. 59.

and appropriately so, counsel stated that ultimately this was a determination for this Board to make on the basis of its factual finding.

[94] The Employer further submitted that the successorship issue in this matter was complicated by the fact that there was a second or overlapping successor involved. By this, counsel was referring to closure of the Employer's Greystone Co-op Store which was certified to the UFCW, and the transfer of some of its operations to the Circle Drive Store. These submissions will be addressed in Part C below.

[95] On this aspect of the application, counsel for the Employer relied on a number of authorities, including: *Monad*[41]; *RWDSU v Saskatchewan Gaming Corp.*[42], [*Sask. Gaming*], and *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v Cana Construction Co. Ltd.*[43] [*Cana Construction*].

2.3 UFCW's Position

[96] UFCW takes the position that no successorship has occurred in this matter because no transfer of a business, in fact, took place. Counsel for UFCW submitted that Safeway's business was not continued by the Employer. Instead, a Safeway store closed its doors, and the Employer's well-established business continued in that location. This reality was underscored by the fact the Employer removed all Safeway branding and immediately rebranded it and presented it to the public as a Co-op Store. All that happened was the Employer moved its business a few blocks down 8th Avenue.

[97] UFCW further submitted that the facts do not support this Board concluding a transfer of a business had occurred. The Asset Purchase Agreement entered into evidence only spoke of a transfer of assets. Counsel submitted that the agreement was only between FCL and the Employer with a reference to Sobeys. However, neither FCL nor Sobeys ever carried on any business at the Circle Drive location.

[98] Finally, UFCW argued that the admissions made by the Employer that a successorship did in fact occur are not determinative. Furthermore, UFCW asserted that this

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[41] *Supra* n. 39.
[42] 2002 CarswellSask 861, 87 CLRBR(2d) 123 (SK LRB)

Board has already ruled in *Re Remai Investments Corp*[44] [*Remai Investments*] that while hearsay is permissible in proceedings before the Board, it cannot be used to prove a core issue on an application, in this case, whether a successorship has taken place.

[99] On this aspect of the application, UFCW relied on a number of authorities in addition to *Remai Investments* including: *Re JKT Holdings Ltd. (c.o.b. Memories Dining Room)*[45]; *Cana Construction Co. Ltd. v U.B.C.J.A, Locals 1805 and 1990, Pan Western Construction Ltd., Buchner Construction Inc., 309588 Alberta Ltd., Mortensen and Meier*[46] [*Cana Construction*], and *SGEU v Headway Ski Corporation*[47] [*Headway Ski*].

3. Analysis and Decision

[100] At the outset, is important to recall the interpretive principles underlying the application of section 37 of the *TUA*, and subsection 6-18 of the *SEA*. First, the purpose of these legislative provisions is the protection of the affected employees' collective bargaining rights. Second, the focus of the inquiry must be on the substance of the transaction and not its form. Third, the analysis of any successorship application must be contextual or fact-based.[48]

[101] Taking these principles into account, the Board is satisfied that the transfer of the Safeway business at the Circle Drive Store to the Employer qualifies as a successorship for the following reasons.

[102] First, the facts on the ground support a finding of a successorship. The evidence presented at the hearing supports RWDSU's position that a seamless, if not an immediate, transition between Safeway and the Employer occurred in these circumstances. As has already been discussed the Circle Drive Store was dark for only about 36 hours. In that time, the store was transformed from a Safeway store into a Saskatoon Co-op store. When it re-opened its doors the employees now working there were the same employees who previously worked at the Safeway store.

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[43] [1985] Feb Sask Lab Rep 29
[44] [1993] SLRBD No. 34, LRB File No. 058-90.
[45] [1989] SLRBD No. 21, LRB File No. 149-89
[46] [1985] Feb Sask Labour Rep 29
[47] [1987] August Sask LRBR 48, LRB File No. 396-86.
[48] *K-Bro (QB)*, *supra* n. 26, at para. 38. To similar effect, see also: *RWDSU v Saskatchewan Gaming Corporation*, [2001] Sask LRBR 752, 87 CLRBR (2d) 123, LRB File Nos. 163-01 & 164-01, at paras. 96-98; *Versa Services*, *supra* n. 25, and *Headway Ski*, *supra* n. 47, at p.53.

[103] This factual scenario is similar to that found in previous cases where this Board found a successorship to have occurred. The business carried on at the Circle Drive by the Employer is essentially the same business that Safeway had conducted at that very location. To paraphrase this Board's holding in *Hnatiw* the business carried on at the Circle Drive Store continued essentially unchanged except for a new operator, with the result that the Employer's "business 'drew it's life' from that of [its] predecessor"[49].

[104] Second, the Retail Asset Purchase Agreement permits the Board to trace the Employer's acquisition of the premises back to FCL and, ultimately, to Sobey's which had purchased the chain of Safeway stores, but had been ordered to divest a number of those stores by the Competition Bureau of Canada. In that disposition, the Circle Drive Store had been acquired by FCL which in turn transferred it to the Employer. It is important that the Board be attentive to the practical effect of a transaction and not its technical or legal form. As the Board stated in *Cana Construction*[50]:

> *In order to determine whether there has been a sale, lease, transfer or other disposition of a business or part thereof, the Board will not be concerned with the technical legal form of the transaction but instead will look to see whether there is a discernable continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer. The Trade Union Act does not contain a statutory definition of "business" and the Board recognizes that it is not a precise legal concept but rather an economic activity which can be conducted through a variety of legal vehicles or arrangements.*

[105] This Board has previously relied on asset transfer agreements to find evidence demonstrating a "disposal" has taken place for purposes of section 37 of the *TUA* or section 6-18 of the *SEA*.[51] Here the following provisions of the Retail Asset Purchase Agreement relevant here support the conclusion that a disposal has, indeed, occurred:

1. A preambular statement indicates that FCL purchased a number of assets from Sobeys. One of these assets was the Circle Drive Store.

2. Section 2.1(i) states that to the extent possible the Purchased Assets will be transferred directly from FCL to the Employer. These Purchased Assets included fixed assets, inventory, included intellectual property, books and records, leased property, goodwill, assigned contract, prepaids and cash floats.

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[49] *Supra* n. 27, at p. 3.
[50] *Supra* n. 43, at p. 37.
[51] See e.g.: *Monad Industrial Construction*, *supra* n. 41, at para. 92.

3. Section 2.1(g) indicates that the "goodwill" that is transferred includes the right of the Employer to "(i) represent itself as carrying on the Business in continuation of and in succession to Sobeys and the Vendor [FCL], and (ii) use any words indicating that the Business is so carried on." "Business" is defined in the Retail Asset Purchase Agreement as meaning "collectively the retail grocery, pharmacy and fuel business carried on at the Locations" which would include the business conducted by the Employer at the Circle Drive Store.

4. Section 5.7(b) requires the Employer to employ all unionized employees at the Circle Drive Store "as the successor employer".

5. Section 5.10 contains a non-solicitation clause ensuring that for a period of at least two (2) years, neither Sobeys nor any of its affiliates will attempt to solicit customers of the Circle Drive Store.

[106] In the Board's view, these provisions of the Retail Asset Transfer Agreement, among others, underscore that in the circumstances of this case, there was a disposal and acquisition of a business for purposes of the *TUA*, as well as the *SEA*.

[107] Third, there are the Employer's admissions that it was a successor employer found in correspondence from Mr. Wicks dated February 14, 2014 and the Employer's formal Reply. To be sure, these admissions which could properly be characterized as admissions against interest, are not binding on the parties or this Board. Yet, these admissions constitute evidence which should not be ignored.[52] They buttress our conclusion that what transpired here constitutes a "disposal", and at law a successorship has occurred.

[108] Accordingly, for these reasons, the Board finds that RWDSU has met its onus to demonstrate that a successorship occurred when the Circle Drive Store was transferred to the Employer. However, certain of the parties maintained that there were additional successorships involved in this case. The Board turns now to consider those submissions.

C. <u>If a successorship did take place, is there a dual successorship in the circumstances of this case?</u>

[109] Two (2) parties to this application – the Employer and UFCW – assert that there is another successorship involved in the circumstances of this case. RWDSU, on the other hand, made no representations on this issue. Rather, it focused its argument on whether in

[52] See: *United Food and Commercial Workers, Local 1400 v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2015 SKQB 84, at para. 20.

these circumstances, the unionized employees at the Circle Drive Store continued to qualify as an appropriate bargaining unit for certification purposes.

1. Positions of the Parties

1.1 The Employer's Position

[110] The Employer submitted that the successorship inquiry in this case was complicated by the fact there existed over-lapping successorships. In particular, counsel for the Employer pointed to a second successorship from the UFCW-certified Employer's Greystone food store to the RWDSU-certified Circle Drive Store. He highlighted a number of factors in support of his position including:

> 1. *The Circle Drive Store was located on 8th Street, a short distance away from the Greystone Store. This is a busy street in Saskatoon and a number of food store competitors are also locate on this street. The Employer wished to maintain its customer base and market share in this area. Acquiring the Circle Drive Store and transferring certain assets and goodwill from the Greystone Store to it was a strategic business decisions.*
>
> 2. *The Greystone Store was closed on June 13, 2014, as a direct consequence of the Employer's acquisition of the Circle Drive Store on May 13, 2014.*
>
> 3. *The Employer has membership program to promote customer loyalty that was used at the Greystone Store and is now fully operative at the Circle Drive Store. Unlike Safeway, the Employer does not utilize an "Air Miles" rewards program.*
>
> 4. *Approximately 2,400 prescriptions were transferred from the Greystone Store to the Circle Drive Store, as was the Greystone Store's pharmacy team. As a consequence, customers followed their prescriptions to the Circle Drive Store.*
>
> 5. *Certain assets from the Greystone Store were also transferred to the Circle Drive Store including some food inventory, end of isle shelving units and other shelving as well as a miscellaneous racking and stacking equipment.*
>
> 6. *The Employer operated a bus service which transported residents in seniors' homes to the Greystone Store. It now uses this service to transport its customers to the Circle Drive Store.*

[111] Counsel for the Employer submitted that the almost contemporaneous closure of its Greystone Store with its acquisition of the Circle Drive Store and the efforts it took to maintain its customer base at the new location demonstrate that a second successorship took place in the circumstances of this case.

1.2 UFCW's Position

[112] Counsel for UFCW asserts that what RWDSU is asking the Board to do is to "carve out" the Circle Drive Store from the province-wide certification Order identifying UFCW as the exclusive bargaining agent for all the Employer's employees. If this Board concludes that a successorship has taken place at the Circle Drive Store, then we are in a situation of a dual successorship involved dueling unions.

2. Analysis and Decision

[113] This particular aspect of this case may be quickly resolved. In the Board's view, the evidence presented at the hearing clearly demonstrated that this case presents an example of dual unionism for two (2) reasons. First, the Board concludes that the Employer moved aspects of its business including its goodwill from the Greystone Store to the Circle Drive Store. Materials used in the old store were transferred to the new one, pharmacy staff members also moved to the new store, and the Employer went out of its way to ensure that at least a portion of its regular customer base continued to shop at the Circle Drive Store. This objective was achieved in part by providing free transportation of residents in local seniors' residences as well as carrying over its customer loyalty program from the Greystone Store to the Circle Drive Store.

[114] Second, UFCW is the certified bargaining agent for all the Employer's employees. Consequently, its' certification Order plainly applies to all stores owned and operated by the Employer. This description would also include employees working at stores which the Employer acquires either through a sale or a transfer of assets.

[115] As the Board has already agreed with RWDSU that a successorship took place when the Employer acquired the Circle Drive Store, dual unionism arises. It is well-known that this Board, as do other Canadian labour relations boards, disapprove of the existence of dual unionism. This Board admirably summarized the reasons for such disapproval as follows in *United Steelworkers of America v A-1 Steel & Iron Foundry Ltd.*[53]:

> *In dealing with successorship situations, the Board will not only determine whether a business or part hereof has been transferred or otherwise disposed of, but will also consider what happens to collective bargaining when the business leaves the predecessor and arrives at the successor. Section 37 [of the TUA] was never intended to result in "dual unionism" likely to produce discontent among*

[53] [1985] October Sask Labour Rep 42, at p. 45.

> *employees, rivalry between unions, and disruption for the employer, because it would be inconsistent with the basic purpose of the [TUA], namely the promotion of industrial stability. It would also be inconsistent with the Board's determination of an appropriate bargaining unit under Section 5, clause (a) and the certified union's exclusive authority to represent employees in that unit. . . [Emphasis added, citations omitted.]*

[116] The Board now turns to consider how best to resolve this dilemma.

D. Should the Board issue an "otherwise order" pursuant to subsection 6-18(2) of the *SEA*?

[117] The third issue presented in this case pertains how to rectify the "dual unionism" at the Circle Drive Store. Not surprisingly, the various parties offered the Board competing options. Simply put, these options came down to two (2). Should we apply the general successorship principles set out in now subsection 6-18(2) of the *SEA*? Alternatively, should we make an "otherwise order" as authorized in that same provision? If so, what should this "otherwise order" look like?

1. Should the Board issue an "otherwise order"?

1.1 Position of the Parties

1.1.1 RWDSU's Position

[118] RWDSU submitted that the Board should apply its prior jurisprudence respecting successorships and conclude that it is the appropriate bargaining agent for employees at the Circle Drive Store. Counsel for RWDSU argued that this store should be "carved out" from UFCW's province-wide certification Order in relation to the Employer's stores and outlets. As described at the hearing, an order of this kind would render the Circle Drive Store, an "island" in the UFCW "sea".

[119] Counsel proffered the usual arguments in support of RWDSU being certified as the appropriate bargaining unit. While he conceded this was not the most optimal unit, he submitted that this Board has repeatedly stated that for certification purposes, the issue is whether a proposed unit is an appropriate one. He pointed to indicia such as the community of interest that existed among the employees at that store; RWDSU had negotiated a collective agreement with the Employer since 2014, and there is no indication that industrial instability

would ensue were the Board to certify RWDSU as the bargaining agent. Finally, counsel submitted that while "an 'island' of employees may not be the most ideal situation, it hardly forms the basis for ignoring the wishes of employees in the fact of a long and successful bargaining unit"[54].

[120] In the event this Board should decide to issue an "otherwise order", counsel submitted that rather than simply sweep the Circle Drive Store into UFCW's province- wide certification Order, the Board should direct a vote of the employees at the Circle Drive Store in order for them to express their preference for which union should serve as their bargaining agent.

[121] On this particular aspect of the application, RWDSU relied on a number of authorities, including: *Re Northern Lakes School Division No. 64*[55]; *Re O.K. Economy Stores Ltd.*[56]; *Re Arch Transco Ltd.*[57], and *Canadian Union of Public Employees, Local 79 v City of Toronto and Toronto Community Housing Corporation*[58].

1.1.2 The Employer's Position

[122] The Employer strongly encouraged the Board to issue an "otherwise order" in these circumstances. Counsel invoked a number of grounds supporting the Employer's position.

[123] First, the Employer submitted that there was considerable intermingling in this situation. There is intermingling of representation between RWDSU's successorship and UFCW's province-wide certification Order. Counsel highlighted the fact that the certification Orders conflicted on their face.

[124] Second, there was both physical and operational intermingling at play here. There was evidence that members from both unions worked at the Circle Drive Store. For example, maintenance staff members represented by UFCW were deployed to that store. So were employees from other stores operated by the Employer for the purpose of assisting employees at the Circle Drive Store to become familiar with the Employer's processes and

[54] Written Submissions on Behalf of RWDSU, at p. 22, para. 42.
[55] [1996] SLRBD No. 7, LRB File No. 322-95.
[56] [1990] SLRBD No. 21, 7 CLRBR (2d) 286, LRB File No. 264-89.
[57] [2000] SLRBD No. 63, LRB File No. 060-00.
[58] 2006 CanLII 33974 (ON LRB)

protocols. As well, employees in the Circle Drive Store's flower department will deliver flower arrangements to the Employer's other stores.

[125] Furthermore, there was complete operational intermingling. The Circle Drive Store would become just another store in the Employer's organization, be expected to abide by the Employer's corporate procedures and policies, and would be managed by members of the Employer's management team. Indeed, Ms. Sandra Schultz, the Employer's Human Resources manager testified at length about how she and other managers were dealing with issues as they arose at the Circle Drive Store.

[126] Third, the Employer argued that an "island store" was not in the best interests of its employees at that location. For one thing, there was little, if any, ability for employees at that store to seek other positions at, or transfer out to, the Employer's other stores. It emphasized that at the time of this hearing, there had been approximately 2,243 job postings for the UFCW bargaining unit, positions for which Circle Drive employees can apply only if they are prepared to forfeit the seniority they had earned in the RWDSU bargaining unit.

[127] Fourth, relying on *Re Roca Jack's Roasting House and Coffee Company*[59] [*Roca Jack's*], counsel for the Employer maintained that "carving out" the Circle Drive Store from UFCW's province-wide certification Order would erode the integrity of that Order. In *Roca Jack's*, this Board explained the rationale for crafting certification orders on a province-wide or municipality-wide basis as follows:

> *[4] In United Steel Workers of America v Industrial Welding (1979) Limited, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85, the Board observed that the application of these considerations may lead to different conclusions, depending on the circumstances, at 47:*
>
> > *This Board's frequently expressed policy favouring larger bargaining units in terms of employee complement is compatible with its preference for units encompassing whatever geographical area will promote the greatest degree of industrial stability with the least interference in employee freedom of choice. Depending upon the facts, an appropriate unit may comprise some or all of the employees of an employer in the entire province, in a portion of the province, in a municipality, or in a combination of municipalities. It may also be (and often is) restricted in area to a particular plant, retail out or shop.*
>
> *[5] In a decision in Communications, Energy and Paperworkers Union of Canada v Prince Albert Community Workshop Society Inc., [1995] 2nd Quarter Sask. Labour Rep. 294, LRB File No. 019=95, the Board followed the passage*

[59] [1997] SLRBD No. 20, LRB File No. 016-97.

> *just quoted from the Industrial Welding decision, supra with the following comment, at 302:*
>
> > *In the special circumstances of the construction industry, the Board has accepted that the geographical scope of bargaining units is appropriately described in terms of the province. In many other case, the Board has recognized municipal boundaries as providing the right balance between the protection of the bargaining rights obtained under the certification order, and the right of employees not currently included in the unit to make their own choice with respect to collectively bargaining at some time in the future.*
>
> *[6] In our view, particular attention should be paid to the second sentence of this passage, as we think it captures the position of the Board that bargaining units described in terms of municipal boundaries usually represent the most sensible balance between the stability and viability of the collective bargaining relationship, and the rights of hypothetical future employees to make a free choice with respect to trade union representation. In some special circumstances, such as those which obtain in the construction industry, the Board has concluded that the balance is best struck by determining bargaining units in province-wide terms. In other cases, the Board may conclude that a single plant or outlet of a number operated by the same employer in one municipality is the appropriate bargaining unit. [Emphasis added.]*

[128] Fifth, counsel for the Employer asserted that an "island" RWDSU unit lacks bargaining strength in relation to the much larger UFCW bargaining unit. He submitted that despite RWDSU's contention to the contrary, the evidence presented demonstrated that it had gained little, if anything, for its members. Among other failures, RWDSU most notably failed to negotiate away the two-tiered pay scale found in its previous collective agreements. Counsel submitted that in reality were RWDSU to remain the bargaining agent for the Circle Drive Store employees, it would always be playing catch-up with the UFCW collective agreement.

[129] Sixth and finally, the Employer contends that certifying RWDSU as the bargaining agent would not promote industrial stability. Counsel submitted, among other things, that because RWDSU and UFCW operate differently, have different cultures, and negotiate different collective agreements, the administrative toll to the Employer "cannot be understated".

[130] On this aspect of the application, counsel for the Employer relied on a number of authorities, including: *593516 Saskatchewan Ltd. (c.o.b. "Microdata Consulting Services (MCS)") (Re)*[60] [*Microdata Consulting*]; *CUPE, Local 4799 v Horizon School Division No. 205*[61] [*Horizon School Division*]; *Prince Albert District Health Board (Re)*[62]; *Roca Jack's*[63]; *Re Canada*

[60] [1992] SLRBD No. 2, LRB File No. 172-90.
[61] 2008 CanLII 64110, 162 CLRBR (2d) 286, LRB File Nos. 113-06 and 061-07 (SK LRB).
[62] 2007 CarswellSask 834, 144 CLRBR (2d) 271, LRB File No. 053-06 (SK LRB).
[63] *Supra* n. 59.

Safeway Ltd.[64]; *United Food and Commercial Workers International Union v Shelly Western*[65] [*Shelly Western*]; *Re Regina Exhibition Ltd.*[66]; *Re Young Women's Christian Association*[67], and *CUPE, Local 1975 v University of Saskatchewan Student's Union*[68].

1.1.3 UFCW's Position

[131] UFCW's principal position was that RWDSU had failed to meet its burden to demonstrate a successorship had occurred in the circumstances of this case. As explained above, the Board rejects this position and has determined that, indeed, a successorship did take place.

[132] Alternatively, UFCW rejects RWDSU's position that the Circle Drive Store should be "carved out" of its' province-wide certification Order authorizing UFCW to be the bargaining unit for all of the Employer's employees. UFCW offered a number of reasons for its position. Most notably, it asserted that because the sizes of the two (2) bargaining units are so disproportionate, certifying RWDSU as the bargaining agent for the Circle Drive Store, would result in signification fragmentation, and deny to the employees at that location any reasonable prospects for transfers or promotions.

[133] UFCW argued strenuously that the Board should make an "otherwise order" and certify it as the collective bargaining agent for the Circle Drive Store.

[134] On this aspect of the application, counsel for UFCW relied on various authorities, including: *A-1*[69]; *Shelly Western*[70]; *Royal Alexander Hospital v UNA Local 33 and 129*[71] [*Royal Alexander Hospital*]; *Re SMS Equipment Inc.*[72], and *Re Finning Ltd. and International Association of Machinists and Aerospace Workers, Local No. 99*[73].

1.2. Analysis and Decision

[64] [1991] SLRBRD No. 25, LRB File No. 25.
[65] [1980] Nov. Sask. Labour Rep 38, LRB File No. 195-79.
[66] [1992] SLRBD No. 35, LRB File No. 182-92.
[67] [1992] SLRBD No. 32.
[68] 2007 CarswellSask 759, LRB File No. 048-04.
[69] *Supra* n. 53.
[70] *Supra* n. 65.
[71] [1999] ALRBR 472.
[72] [2009] ALRBRD No. 24

[135] The Board has concluded that in the circumstances of this case, we should exercise our discretionary authority to issue an "otherwise order" for the following reasons.

[136] To begin, the Board appreciates the desire of RWDSU that once we have determined a successorship took place when the Employer acquired the Circle Drive Store, we should invoke the conditions set out in subsection 6-18(2) of the *SEA*, carve out the Circle Drive Store from UFCW's province-wide certification Order, and allow RWDSU to continue as the bargaining agent for that store. To be sure, RWDSU has ably represented employees of formerly Canada Safeway including those at the Circle Drive Store for almost 40 years. Furthermore, its representatives managed to negotiate a collective bargaining agreement with the Employer, an agreement that remains in force to this day, prior to the decision of the Saskatchewan Court of Appeal quashing this Board's earlier decision in this matter continuing RWDSU as the bargaining agent. Since that decision which necessitated this hearing *de novo*, the Employer has continued to work with RWDSU. All of these factors, we acknowledge, support RWDSU's position that it should continue as the bargaining agent for the Circle Drive Store.

[137] However, the evidence presented at the hearing *de novo* persuaded us that significant intermingling has occurred in these circumstances, as well as there continues to exist what may be characterized as "bad blood", if not outright animosity, between UFCW and RWDSU. These considerations, among others, have persuaded the Board that in the circumstances of this matter, we should issue an "otherwise order".

[138] Intermingling is a distinct concept in labour relations developed primarily to deal with successorships, and the practical difficulties that may arise when the transferred enterprise is already certified by another union.[74] In *Microdata Consulting*, for example, the Board offered this rationale for intermingling principles at page 8:

> *When a certified business is sold, section 37 of the [TUA] compels the purchaser to recognize the union and collective agreement. This creates a conflict where the purchaser is already certified and, as a consequence, members of two rival unions covered by certification orders and separate bargaining agreements will perform the same job functions in the bargaining unit. Some mechanism, i.e. the application of the intermingling principles, is necessary to adjust any conflict between the two certification order and collective agreements that now bind the*

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[73] [1998] ALRBR 440. 47 CLRBR (2d) 161.
[74] *Microdata Consulting*, *supra* n.60.

> *purchaser. The same holds true if the purchaser is uncertified: some mechanism is necessary to adjust any conflict between the incoming unionized employees and employer's pre-existing non-union workforce. Consequently, the Legislature gave the Board jurisdiction to modify the effects of section 37 when these problems arise[.] [Citation omitted.]*

[139] Generally speaking, there are two (2) kinds of intermingling. The first can be characterized as operational or organizational intermingling. The second kind of intermingling is actual physical intermingling which involves the mixing of members of two unions in separate bargaining units who perform the same or similar functions. Some Canadian labour boards have determined that intermingling principles should not be narrowly construed.[75] Furthermore, operational intermingling appears to be more significant than the mere physical intermingling of some employees.[76] It does not follow, however, that physical intermingling is unimportant. Rather, a more compelling argument for applying intermingling principles may be advanced when complete operational intermingling is present but not the "side-by-side" integration of two previously distinct workforces.[77] As well, in keeping with a purposive approach to intermingling generally, evidence of physical intermingling does not demand proof of employees actually working "side by side". Rather, it may be established by demonstrating that members of two competing unions are carrying out the same or similar job functions in close geographical proximity.[78]

[140] Taking these principles into account, the Board concludes that various forms of intermingling are present in this case. First, there is organizational intermingling as demonstrated by the existence of conflicting certification orders or "dual unionism". On one (1) hand through a successorship, RWDSU is certified to represent employees at the Circle Drive Store. On the other, UFCW holds the province-wide certification Order for the Employer's stores.

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[75] See *e.g.*: *Airwest Airlines Ltd.*, [1981] 1 CLRBR 427 (CIRB); *St. Mary's of the Lake Hospital and O.P.S.E.U.* (1995), 28 CLRBR (2d) 242 (ON LRB), at para. 10, and *Alberta Health Services and CUPE, Local 189 et al.* (2010), 176 CLRBR(2d) 163 (AB LRB) [*Alberta Health Services*], at paras. 79-80; judicial review dismissed: *Alberta Union of Public Employees v Alberta Health Services*, 2010 ABQB 344.

[76] *Niagara (Regional Municipality) and Canadian Union of Public Employees and Local 1263* (2004), 104 CLRBR (2d) 147 (ON LRB), at paras. 33-43.

[77] See *e.g.*: *Niagara (Regional Municipality)*, *ibid*. at paras. 42-3, and *St. Mary's of the Hospital*, *ibid.*

[78] See *e.g.*: *Alberta Health Services*, *supra* n. 75; *C.U.P.E., Local 4799 v Horizon School Division No. 205*, *supra* n. 57; *Prince Albert District Health Board (Re)*, [1996] SLRBD No. 23, LRB File No. 304-95, *SEIU, Local 333 v The Board of Governors, Fairhaven Long-term Care Centre, operating special care homes know respectively as the Frank Eliason Centre and the Saskatoon Sanitorium in Saskatoon, Saskatchewan et al.* [1991] Sask Labour Rep, 2nd Quarter 33, LRB File No. 212-86 [*Fairhaven Long-term Care Centre*]

[141] As this Board observed in *A-1*, the *TUA*, and now by extension the *SEA*, abhors "dual unionism". In such circumstances, the Board should employ intermingling principles to avoid such a situation occurring.[79] A good illustration of this may be found in this Board's decision in *Fairhaven Long-term Care Centre*[80]. There, Fairhaven Long-term Care Centre operated two (2) special care homes in Saskatoon: the Frank Eliason Centre, and the Saskatoon Sanatorium, formerly a hospital for patients with tuberculosis. Workers at the Frank Eliason Centre were represented by SEIU, Local 333, while workers at the Sanatorium were represented by CUPE, Local 77. A new special care home was close to completion and the employer intended to consolidate its operations and merge its employees in that facility. SEIU commenced a successorship application under the then section 37 of the *TUA*. All parties to that application agreed that "with the merger of the two facilities and the resulting intermingling of employees, it will be entirely inappropriate to have two different trade unions and two different collective agreements affecting employees in the new facility"[81].

[142] SEIU asserted that because it represented the majority of the employees who would be transferred to the new facility, it should be certified to represent all employees. CUPE opposed this proposal and, instead, urged the Board to hold a representational vote.

[143] The Board *per* former Chairperson Ball resolved the matter by ordering a representational vote of all employees. He reasoned as follows:

> *In the circumstances, the Board is satisfied that a transfer of the business of both the Frank Eliason Centre and Saskatoon Sanatorium to the Fairhaven Long-term has commenced within the meaning of section 37 of the [TUA] and that it will be completed on or about February 1, 1987. In view of the degree to which all of the employees will be intermingled within the new merged facility, the Board is also satisfied that all employees at the Fairhaven Long-term Care Centre will constitute a unit of employees appropriate for the purpose of bargaining collectively, with the exception of all nurses now represented by the Saskatchewan Union of Nurses, and with the further exception of persons engaged in exercising managerial or confidential functions within the meaning of section 2(f) of the [TUA].*
>
> *Pursuant to section 37, the Board must determine whether Fairhaven Long-term Care Centre is to be bound by the certification order and collective bargaining agreement affecting employees presently employed at the Frank Eliason Centre and represented by SEIU, or whether it is to be bound by the certification order and collective bargaining agreement affecting employees presently employed at the Saskatoon Sanatorium and represented by CUPE. Only one collective bargaining agreement should apply to them, and, in the Board's view, all of the*

[79] *Supra* n. 53, at p. 45.
[80] *Supra* n. 78.
[81] *Ibid*., at p. 34.

> *parties should know which agreement it is to be as soon as possible so that new employees can be hired in accordance with its terms.*
>
> *There is another reason why an early vote would be advantageous. Presently, vote eligibility is relative clear because an intermingling of existing employees has not yet taken place, and new employees have not yet been hired. There is a considerable amount of uncertainty about how many employees are to be hired and over what period of time the hiring will take place, and if a vote is delayed until after the hiring process has begun, voter eligibility will become confused and a vote will become more difficult to conduct. [Emphasis added.]*

[144] A similar situation arises here. There are two (2) certification orders and, at present, two (2) collective bargaining agreements currently in place. While not all employees are working under the same roof, as it were, (a matter which will be addressed below), these over-lapping certification orders on their face create a situation where certain of the Employer's workers operate under one collective bargaining regime while a significant number of the Employer's other workers operate under another. Such a situation may create resentments among employees depending upon which union is their bargaining agent and, to quote this Board in *Shelly Western*, is from a labour relations perspective "undesirable and unsatisfactory"[82].

[145] Second, this case also presents an example of operational intermingling. Intermingling of this kind typically arises in circumstances where employees performing the same or similar job responsibilities, yet belonging to separate unions, are subject to one (1) corporate management structure, and are expected to abide by one (1) set of corporate policies and procedures.[83] The evidence demonstrated that in this case the Employer quickly integrated the Circle Drive Store into its corporate structure. Its' single management team of which Ms. Schultz, the Employer's Human Resources Manager is a key member, assumed responsibility for the day-to-day operations of that particular store, in addition to all of its other stores.

[146] Furthermore, almost immediately after its acquisition of the Circle Drive Store, the Employer provided training to its employees at that location respecting the Employer's business policies and practices. In addition, and as attested to by Mr. Miller, Ms. Schultz has addressed labour relations concerns as they arose in accordance with the Employer's current operating policies.

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[82] *Supra* n. 65, at p. 38.
[83] See *e.g.*: *Alberta Health Services*, *supra* n. 75, at para. 78 , quoting from *Mistahia Regional Health Authority and South Peace Health Unit No. 20 Staff Nurses Assocation*, [1996] ALRBR 362, at paras. 48 and 65.

[147] These factors persuade us that in this case there is sufficient evidence of operational intermingling and administrative integration to warrant the Board making an "otherwise order".

[148] Third and finally, evidence presented at the hearing supports a finding that physical intermingling also occurred in this case. As already stated, physical intermingling implies much more than employees represented by different unions working side-by-side. Even so, the Board heard evidence of the actual intermingling of employees at the Circle Drive Store. Ms. Schultz testified, for example, that maintenance staff members represented by UFCW regularly work at that location. As well, following the closure of the Employer's former Greystone Store the pharmacy team from that location relocated to the Circle Drive Store.

[149] A further example of physical intermingling is the floral department of the Circle Drive Store. With the Employer's acquisition of that store, this floral department became the hub for providing floral arrangements to the Employer's other stores. Prior to acquiring the Circle Drive Store, the Employer's business did not include the sale of floral arrangements.

[150] This Board has considered physical intermingling in situations where there are disparate workplaces managed by the same employer with employees who are either represented by different unions or some of whom are unionized and some are not. For example, in *Horizon School Division*[84], an oft-quoted case, the Board listed an inventory of industrial relations problems that often arise in workplaces with intermingling of employees as follows:

> ***[111]*** *In our opinion, it is a certainty that, if intermingling of union and non-union employees doing the same jobs has not yet occurred, it will in the very near future and with increasing frequency. Conflict is inevitable when such employees work side by side with different terms and conditions of work, including access to grievance and arbitration procedures and will increase when problems of transfer, mobility, lay-offs, job posting, seniority and the application of multiple collective agreements, etc., occur more and more frequently. We can only assume that the parties have considered this and that they have so far chosen to deal with these issues through collective bargaining. A bargaining unit of all support staff employees would be more stable than the present configuration from an industrial relations and administration viewpoint and could be achieved in several ways: (1) the Union could file evidence of majority support among the group of presently unrepresented employees; (2) the Union could file direct evidence of support of the employees in the existing bargaining units that established the majority of support of the total number of support staff employees both within and outside of*

[84] *Supra* n. 57.

> *the bargaining units; (3) by representation vote of the group of previously unrepresented employees sought to be added that demonstrates their majority support; or (4) by a representation vote of all of the support staff employees that demonstrates their majority support. Of course, however, if process (4) was followed and the vote did not demonstrate majority support among all employees, the bargaining unit would cease to exist.*

[151] In addition to the issues of intermingling identified above, there are other considerations which support an "otherwise order" in this case. Counsel for the Employer submitted that leaving the Circle Drive Store as an "island" deprived the RWDSU's members of career advancement. To be sure, there was considerable evidence led at the hearing to indicate that the opportunities for employees at the Circle Drive Store to transfer or to be considered for promotions in the Employer's other stores would be minimal if they remained in a RWDSU bargaining unit. Ms. Schultz advised the Board that since 2014 there had been approximately 374 transfers among the various stores owned and operated by the Employer. Circle Drive Store employees would be unable to apply for any such transfers if they remained RWDSU members.

[152] It is true that the career prospects of employees are a factor to be considered on a successorship.[85] The Board acknowledges that any order we issue should attempt as much as possible to avoid limiting the employment opportunities for workers. That said, in the circumstances of this case, particularly when many workers at the Circle Drive Store have been loyal RWDSU members for many years, we fear it would be somewhat paternalistic for us to decide for them which option is in their best interests.

[153] Finally, it cannot be ignored that animosity still exists between RWDSU and UFCW, Local 1400. This was manifested by UFCW's refusal to permit RWDSU members from the Circle Driver Store to be transferred temporarily to other stores owned by the Employer with UFCW's members, while renovations were on-going at the Circle Drive Store. Representatives from each union testified that over time, hard feelings between the two (2) unions had dissipated; however, this recent acquisition of the Circle Drive Store plainly ignited old wounds.

[154] Accordingly, for all of these reasons, the Board has concluded that an "otherwise order" is appropriate in the circumstance of this case. We turn to consider what kind of "otherwise order" we should issue.

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[85] *Royal Alexandra Hospital*, *supra* n. 71, at p. 9

2. What Type of "Otherwise Order" Should Be Issued in This Case?

[155] Both subsection 37(4) of the *TUA* and subsection 6-18(2) of the *SEA* itemize the types of orders this Board can issue on a successorship application. For ease of reference, the following chart sets out the relevant provisions of those two (2) enactments:

The TUA	***The SEA***
37*(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make order doing any of the following:* *(a) determining whether the disposition or proposed disposition relates to a business or part of it:* *(b) determining whether, on the completion of the disposition of a business or of part of a business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:* *(i) an employee unit;* *(ii) a craft unit;* *(iii) a plant unit;* *(iv) a subdivision of an employee unit, craft unit or plant unit; or* *(v) some other unit;* *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);* *(d) directing a vote to be take among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);* *(e) amending to the extent that the board considers necessary or advisable an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;* *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*	***6-18****(4) On the application of any union, employer or employee directly affected by a disposal, the board may make orders doing any of the following:* *(a) determining whether the disposal or proposed disposal relates to a business or part of a business;* *(b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;* *(c) determining what union, if any, represents the employees in the bargaining unit;* *(d) directing that a vote be taken of all employees eligible to vote;* *(e) issuing a certification order;* *(f) amending, to the extent that the board considers necessary or advisable:* *(i) a certification order or a collective bargaining order; or* *(ii) the description of a bargaining unit contained in a collective agreement;* *(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to the certification order.*

[156] Of these various options for an "otherwise order", only two (2) were seriously debated during the hearing: (1) certify UFCW as the bargaining agent for employees at the Circle Drive Store and sweep them into UFCW's province-wide certification Order, or (2) direct a vote of the employees eligible to vote at the Circle Drive Store. Contention revolved around what that order should be.

2.1 Position of the Parties

[157] The positions advanced by various parties respecting an "otherwise order" can be summarized briefly.

2.1.1 RWDSU's Position

[158] Counsel for RWDSU submitted that if this Board was not prepared to certify his client as the bargaining agent for all employees located at the Circle Drive Store, then as an "otherwise order", we should direct a vote of those employees to determine which union they wish to have represent them.

2.1.2 The Employer's Position

[159] Counsel for the Employer stated that the circumstances of this case indicate that the "otherwise order" should adhere to this Board's long-standing preference for an "all employee" bargaining unit. This would mean that the employees at the Circle Drive Store would be swept into UFCW's province-wide certification Order. Relying primarily on this Board's decision in *Big Sky Rail Co. (Re)*[86] [*Big Sky Rail*], counsel submitted that the appropriate order would be to sweep RWDSU members at that location into the province-wide UFCW bargaining unit, and utilize dove-tailing to address seniority and other related concerns. He argued this approach is most consistent with the Board's view expressed in *Big Sky Rail* that "if the applicant trade union's bargaining unit would represent a very small percentage of an overwhelmingly larger combined workforce following a transfer of obligations, the Board would

[86] [2015] SLRBD No. 8; 2015 CanLII 19985 (SK LRB)

have the option of simply rescinding the union's certification order without a representational vote."[87]

[160] Counsel for the Employer noted that other labour relations boards adopt such an approach. For example, the Alberta Board developed a practice of not directing a vote in a successorship where intermingling had occurred, if one union had approximately 80% of the majority support of all workers.[88]

[161] Finally, counsel for the Employer strongly urged the Board to resist directing a representation vote for a number of reasons. First, he pointed to the fact that UFCW holds a province-wide certification Order, and, therefore, had a legitimate claim to represent all of the Employer's employees, including those now working at the Circle Drive Store. Second, neither the *TUA* nor the *SEA*, or for that matter section 2(*d*) of the *Canadian Charter of Rights and Freedoms* [89] [*Charter*] require a direction for such a vote in these circumstances.

[162] Finally, counsel for the Employer submitted that if the Board was to decide a representation vote should be held, then such a vote should be a province-wide vote and not limited only to the Circle Drive Store. He reasoned that if only the wishes of the employees at that store were solicited, the potential for continued fragmentation would remain if a majority of those employees select RWDSU as their bargaining unit.

2.1.3 UFCW's Position

[163] Counsel for UFCW submitted that as RWDSU failed to prove a successorship, UFCW must be certified as the bargaining agent for all employees at the Circle Drive Store.

[164] If, however, this Board should decide to direct a representation vote, counsel submitted that it should be a vote of only the employees located at the Circle Drive Store eligible to do so. However, in order to facilitate such a vote, counsel for UFCW requested that the Board as part of its Order impose a number of conditions. These are: (1) the ballot should include only one (1) question, *i.e.* do the employees wish to be represented by UFCW or by RWDSU, and (2) UFCW should be granted access to employees at that location and/or the

[87] *Ibid*., at para. 22, point #2.
[88] See *e.g.*: *O.E.M. Remanufacturing Co. (Re)*, [2011] ALRBD No. 1

employees' contact information so that UFCW may communicate with them appropriately prior to any vote. Counsel asserts that this last condition is needed because for many years, the employees at the Circle Drive Store were represented by RWDSU and know little, if anything, about UFCW and its operations. He maintained that this would ensure that Circle Drive Store employees would be fully informed and, therefore, able to exercise their freedom of association in a fair and unbiased atmosphere.

2.2 Analysis and Decision

[165] The Board acknowledges that issuing an "otherwise order" in a successorship application is unusual. Of the many authorities cited to us during oral argument, five (5) cases involving "otherwise orders" warrant careful scrutiny. In chronological order, they are: *Fairhaven Long-term Care Centre*[90]; *Saskatchewan Government Employees Union v Headway Ski Corporation*[91] [*Headway Ski*]; *Saskatchewan Health-Care Association et al. v CUPE, Local 2297, and Wolf Willow Lodge*[92] [*Wolf Willow Lodge*]; *Estevan Coal Corporation et al. v U.M.W.A., Local 7606*[93] [*Estevan Coal*], and *Big Sky Rail*[94]. The Board briefly reviews these decisions below.

[166] As explained above, *Fairhaven Long-term Care Centre*[95] concerned the amalgamation of two (2) separate care facilities, the employees of each being represented by separate unions. Prior to both work forces coming together under one roof, the Board directed that a vote of all employees should take place to determine which union would be their exclusive bargaining agent.

[167] *Headway Ski*[96] involved the acquisition by Headway Ski Corporation of the Mount Blackstrap Ski Area just outside Saskatoon, from the Government of Saskatchewan. At the time of this acquisition, the 11 employees at that resort were represented by SGEU. The Board determined that although on the facts a successorship had occurred, the workers had moved into the private sector, and, as a result, it would be unfair to have their collective

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[89] Part I of *the Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11
[90] *Supra* n. 78.
[91] [1987] Sask Lab Rep, August 1987, at 48, LRB File No. 396-86.
[92] [1992] SLRBD No. 25, LRB File Nos. 091-92, 099-92 and 155-92.
[93] [1998] Sask LRBR 709, LRB File No. 186-96 (SK LRB).
[94] *Supra* n. 86.
[95] *Supra* n. 78.
[96] *Supra* n. 91.

interests determined by a far large public sector bargaining unit. The Board reasoned at page 59 as follows:

> *This case presents another very unusual situation because the collective bargaining agreement between the S.G.E.U. and the Government of Saskatchewan was negotiated by and for a service-oriented government operation and was obviously never intended to apply to a small private sector, profit-oriented employer with only a few seasonal employees.*
>
> *The agreement's 240 pages include some 164 articles plus numerous appendices and schedules applicable to all employees in the government bargaining unit. It establishes seniority for permanent, temporary, part-time and casual employees on a unit-wide basis. Its scope clause defines the unit as including the greatest majority of employees of the Government of Saskatchewan, and to the extent that the clause supplants the unit description in the Board's Order under Section 5, clause (a) of the Act it too effectively subjugates the ability of Headway Ski Corporation's 11 employees to replace the S.G.E.U. as their bargaining agent to the wishes of some 13,000 Government of Saskatchewan employees. Pursuant to Article 23 of the agreement, vacant positions are filled by the transfer of employees within the Department of Parks and Renewable Resources or from any one of 47 other agencies listed in Article 41.1.6. It would be startling if Section 37 operated in a manner that could impose those obligations on [Headway Ski Corporation]. [Emphasis added.]*

[168] As a result, the Board made an "otherwise order" exempting Headway Ski Corporation from its earlier SGEU certification Order, and certifying a bargaining unit limited to all employees at the Mount Blackstrap Ski Area, save for certain managerial employees.

[169] *Wolf Willow Lodge*[97] presented a factual situation similar to that in *Fairhaven Long-term Care Centre*. Two (2) senior citizens' care homes – Wolf Willow Lodge and the Eastend Union Hospital – were to be amalgamated in a brand new facility known as the Eastend Wolf Willow Health Centre. For a variety of reasons, including a change of government, the completion of this facility was placed on hold; however, even though the final configuration of what the Wolf Willow Health Centre would look like was uncertain, it was clear that there would be a intermingling of employees from the two (2) seniors' homes – each represented by a different union. The Board concluded that an early vote was warranted in these circumstances. It explained why as follows:

> *In any situation in which the intermingling of employee groups is an issue, there are likely to be some items of unfinished business. These questions, by their nature, arise in circumstances of transition and change, in which it is difficult to predict what the enterprise will look like in a completed from. In the Fairhaven case itself, neither constituent institution had moved into the new facility. In a decision of the British Columbia Labour Relations Board in Canada Envelope*

[97] *Supra* n. 92

> *company and Barber-Ellis and Pulp, Paper and Woodworkers of Canada…the Board made a finding that the employee groups were sufficiently intermingled to justify a representation vote, although construction of the new plant in which they would be housed was not complete.*
>
> *In both of these situations, the Board acknowledged that the future shape of the enterprise in question would justify a representation vote, even though there were a number of aspects of these cases which were still contingent. It might be argued that it would be a mistake to reach a conclusion that intermingling will occur of a kind which would justify a vote so early that the outcome of the changes is as mysterious as it apparently is here. In our view, however, it would also be a mistake to grant one union successor rights simply because what is going to happen to the lodge aspect of the operation is much clearer than what is to be the fate of the service provided by the hospital; this would in effect be an unjustified windfall for them, based on the happy chance that the institution which largely resembled Wolf Willow Lodge gained access to the new facility first, while external circumstances delayed the completion of the second phase of the project, and rendered it somewhat unclear what its nature would be.*
>
> *. . . . .*
> *We are thus prepared to order that there should be a vote taken at an early date to determine which union should represent the employees currently represented by the Service Employees' Union and the Canadian Union of Public Employees after the transfer to the new facility. All employees with seniority in either of the current bargaining units will be eligible to take part in this vote. The Board expects that the Service Employees' Union and the Canadian Union of Public Employees will make arrangements for all employees entitled to vote to have access to both collective agreements. [Citation omitted.]*[98]

[170] In *Estevan Coal Corporation*, the next case in chronology, the Board had to address representational issues arising after a number of coal mines were purchased by Luscar Coal Income Fund, of which Estevan Coal was a subsidiary. As a consequence of this transfer, Estevan Coal became a common employer with another company, with the result that employees at the various mines were represented by two (2) unions – the United Steelworkers of America, Local 9279, and the United Mine Workers of America, Local 7606. To determine which of these unions should represent the workers at these mines, the Board directed that a vote be taken. It explained the reasons for this direction as follows:

> *With respect to the determination of a bargaining agent, the board directs that a vote be taken among the employees of ECC and PCL to determine which union represents a majority of the employees in the amalgamated bargaining unit. The practice of the Board is to direct a vote in circumstances where members of two or more bargaining units are intermingled unless the number of employees in one unit is insignificant to the overall representation issue. For instance, in a raiding situation, s. 6 of the [TUA] requires the Board to direct a vote if the applicant union demonstrates 25% support for its application. This provision provides an indication of the level of support required in ordinary circumstances to place the*

[98] *Ibid*., at p. 5.

> *representation issue in dispute. In this case, as the result of a corporate take-over and reorganization of the mines, one union will cease to represent the employees that it has ably represented for many years. Both unions represent more than 25% of the employees in the combined bargaining unit. It would seem to the Board that the objectives of the [TUA], which stress the right of employees to bargaining collectively through a trade union of their own choosing, are best met in this situation by ordering a vote.*

[171] At issue in *Big Sky Rail*[99] was the transfer of three (3) branch rail-lines in southern Saskatchewan owned by CN Rail to various rail companies including Big Sky Rail. The Teamsters Canada Rail Conference [Teamsters] applied to this Board for an order certifying it as the collective bargaining agent for all employees of those companies. Big Sky Rail, the only company whose employees were unionized, took the position that as no CN Rail employees had been transferred to any of these companies, employees from the other companies should be swept into the Teamsters' bargaining unit without first canvassing their wishes. The Teamsters concurred with this approach. Indeed the Teamsters further argued that ordering a vote would have the unintended consequence of "encouraging future purchasers of businesses (with unionized employees) to seek the termination of those employees before acquiring that business in the hopes that its new employees would displace the union"[100]

[172] Ultimately, the Board agreed and declined to order a vote in those circumstances. In arriving at this conclusion, the Board reviewed and summarized factors in successorship cases which would support an "otherwise order" of a representational vote. This helpful summary is reproduced below in its entirety:

> ***[22]*** *[W]e noted that s. 37(2)(d) of the [TUA] (as does s. 6-18(4)(d) of the [SEA] authorizes this Board to direct that a representational vote be taken of affected employees in determining the disposition of a successorship application. However, the long standing jurisprudence of this Board is not to do so except in specific circumstances. An examination of the Board's decisions reveals that representational votes are only conducted in successorship applications in three (3) types of circumstances:*
>
> 1. ***Multiple Bargaining Agents****: These circumstances arises where, following the transfer of obligations, there will be two (2) bargaining agents representing the same classifications or positions and it is not possible or appropriate to maintain two (2) separate bargaining units because of extensive intermingling of employees and/or where there is no discrete skill or geographic or other boundary that can be used to separate the two (2) bargaining units. In these circumstances, the normal practice of the Board would be to conduct a representational*

[99] *Supra* n. 86.
[100] *Ibid*., at para. 28.

> *vote of affected employees. The representational question that employees will be asked to determine is which of the two (2) bargaining agents they wish to be represented by in the future…*
>
> 2. ***Sweeping-in New Employees**: These circumstances arise where an applicant trade union is seeking to add positions to its bargaining unit that were not previously included within that union's bargaining unit prior to the transfer of obligations…In these circumstances, the Board will conduct a representational vote if the applicant trade union demonstrates the requisite threshold of support from the group of previously unrepresented employees. if the results of the representational vote indicate that the majority of the additional employees wish to also be represented by the application trade union, the union's certification order will be amended, if necessary, to include the additional position [sic]. If, on the other hand, the majority of employees do not wish to be represented, the applicant trade union's certification Order will exclude the previously unrepresented employees. Finally, if the application trade union does not file evidence of support, no vote will be conducted and the applicant trade union's certification Order will exclude the previously unrepresented employees…In all of these scenarios, the Board must be satisfied that the resultant bargaining unit is or continues to be appropriate for collective bargaining following the transfer of obligations.*
>
> 3. ***Bargaining Unit No Longer Appropriate After Transfer**: These circumstances can arise where the normal operation of the trade union's certification Order following the transfer of obligations would be to sweep in a number of positions that had previously been unrepresented and it is not possible to exclude the previously unrepresented positions because doing so would result in a unit that is inappropriate for collective bargaining. Such circumstances could arise where there is extensive intermingling of employees; where there is no discrete skill or geographic or other boundary that can be used to circumscribe the bargaining unit; and/or where the resultant bargaining unit would represent only a small fraction of the employees…In cases such as this, if the results of the representational vote indicate that the majority of employees wish to be represented, the applicant trade union's certification Order will apply to the expanded bargaining unit…If, on the other hand, the majority of employees do not wish to be represented, the applicant union's certification Order will be rescinded. Finally, it should be noted that if the applicant trade union's bargaining unit would represent a very small percentage of an overwhelmingly larger combined workforce following a transfer of obligations, the Board would the option of simply rescinding the union's certification order without a representational vote. [Citations omitted; emphasis added.]*

[173] In addition to the factors identified in the foregoing cases, there is, in our view, another consideration which should operate in the particular circumstances of this matter, namely the relevance of the fundamental freedom of association enshrined in section 2(*d*) of the *Charter*. Although none of the parties filed a formal constitutional challenge to section 37 of the *TUA* or section 6-18 of the *SEA*, this does not mean that an administrative tribunal such as this

Board should not be attentive to constitutional guarantees set out in the *Charter*, especially those expressly identified in that document as "fundamental freedoms". Indeed, very recently in *Trinity Western University v Law Society of British Columbia*[101] a majority of the Supreme Court of Canada stated:

> *[I]t should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority – and may look to instruments such as the Charter or human rights legislation as sources of these values, even when not directly applying these instruments.*[102]

[174] For purposes of this case, we look to *Mounted Police Association of Ontario v Canada (Attorney General)*[103] [*Mounted Police*], one (1) of the three (3) cases comprising the *Labour Trilogy, 2015*. There the Supreme Court clarified what rights lay at the heart of section 2(*d*) of the *Charter*. At paragraph 66, McLachlin C.J. and LeBel J. stated:

> *In summary, s. 2(d), view purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.*

[175] The Court went on to elaborate what was meant by the right to associate. McLachlin C.J. and LeBel J. explained that because "s. 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals"[104], a government or legislature "cannot enact laws to impose a labour relations process that substantially interferes with that right"[105]. Furthermore, an essential ingredient of "meaningfully pursuing collective workplace goals" is a degree of employee choice.

[176] Respecting employee choice, McLachlin C.J. and LeBel J. stated:

> *[85] The function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests. The degree of choice required by the Charter is one that enables employees to have effective input into the selection of their collective goals. This right to participate in the collective is crucial to preserve*

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[101] 2018 SCC 34.
[102] *Ibid*., at para. 46.
[103] 2015 SCC 1, [2015] 1 SCR 3.
[104] *Ibid*., at para. 81.
[105] *Ibid*.

> *employees' ability to advance their own interests, particularly in schemes which involve trade-offs of individual rights to gain collective strength. . .*
>
> *[86] Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations. Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the maintenance of the confidence of members in them[.]*
>
> *.*
> *. . . . . .*
>
> *[99] In summary a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(d).*
>
> *. . . . . .*
>
> *[101] So stated the notions of choice and independence, on the one hand, and representativeness, on the other, overlap considerably. However, we consider choice and independence best suited for the constitutional analysis at issue. If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice. Similarly, if employees must "have confidence in their spokespersons" (Rothstein J.'s reasons, at para. 219), the way to ensure such confidence is through a sufficient degree of employee choice in the selection of representatives. [Emphasis added, citations omitted.]*

[177] In the unusual circumstances of this case, employee choice, more particularly the choice of RWDSU members at the Circle Drive Store as to which union they desire to be their bargaining agent upon this successorship, would appear to us to be a relevant consideration.

[178] Neither the Employer nor UFCW shared this view, however. Counsel for the Employer among other things pointed to the fact that this Board's decision in *Big Sky*[106] - which endorsed our preference for all employee bargaining units, and our practice of declining to direct representation votes where only "a very small percentage of an overwhelmingly larger combined workforce" is directly affected – post-dated *Mounted Police*. This reality, he submitted should indicate that *Mounted Police* did not disturb the application of the usual principles on a successorship.

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[106] *Supra* n.

[179] Counsel for UFCW also maintained that the considerations set out in *Mounted Police* did not operate in the circumstances of this case. In particular, he pointed the Board to *Community Living Central Highlands v Canadian Union of Public Employees and Its Local 4603 and Ontario Public Service Employees Union and its Local 4603 et al.*[107] [*Community Living Central Highlands*], a decision of the Ontario Board in a successorship application. In that decision, the Ontario Board considered the impact *Mounted Police* had on the Board's unilateral ability to move employees from one union to another union in those circumstances. As it is a case relatively on point, it is worthwhile to pause and to analyze it with some care.

[180] The facts underlying *Community Living Central Highlands* concerned the merger of two group homes into one (1) entity known as Community Living Central Highlands. The workers at one (1) of those homes – 22 in number – were represented by CUPE Local 309. Workers at the other home – 102 in number – were represented OPSEU, Local 309. CUPE had a lengthy bargaining history with its members and relying on *Mounted Police* encouraged the Board to direct a representation vote before terminating its long-standing bargaining rights.

[181] The Board rejected CUPE's request. It noted that "it is 'rare' for the Board to order a vote when one trade union represents 80% of the intermingled unit of employees"[108]. Respecting the relevance of *Mounted Police*, the Board stated:

> *In my view, the [Mounted Police] decision has not altered this practice. Leaving aside that [Mounted Police] took place with completely different facts, that decision does not explicitly mandate representation votes in every case where an opportunity to order one arises or where employees' unions are changing regardless of other labour relations considerations. The purposes of the Board's practice is a recognition of the realities of holding a representation vote where the vast majority of a bargaining unit's employees are represented by a particular bargaining agent outside of an already legislative prescribed opportunity to change or get rid of unions (in the open period) and not to unduly disrupt the workplace when the result seems clear. Even if the Board was wrong about a likely outcome of the holding of a vote in a particular instance, unlike in the [Mounted Police], there is nothing to prevent employees later approaching another union, or any union might choose (in this case CUPE), from filing an application for certification to represent these employees during the open period, or for that matter to simply terminate the bargaining rights of any union (eg. OPSEU). Again, in my view, the [Mounted Police] decision does not*

[107] 2017 CanLII 6055, [2017] OLRD No. 379 (ON LRB)
[108] *Ibid*., at para. 17.

> *mandate the timing of employee choice, but only that employee choice be available.*[109]

[182] It is true, as noted in *Big Sky*[110], that this Board has also declined to direct a representation vote in successorship cases where there is a significant disparity between the membership of the two (2) competing unions. While the Board in *Big Sky*[111] did not identify a specific threshold to be met before such a vote should be ordered, in *Estevan Coal Corporation*[112], the Board suggested that 25% might be the appropriate threshold, analogizing it to the threshold identified in section 6 of the *TUA* for directing a vote in a raiding situation.[113] It is apparent, therefore, that this Board has not yet settled upon a firm threshold which must be satisfied before it will direct a representation vote in circumstances of a successorship.

[183] The Alberta Board, like its' Ontario counterpart, has also adopted an 80% threshold for ordering a representation vote in successorship applications.[114] Indeed, in *Alberta Health Services*,[115] for example, the Alberta Board concluded that this threshold did not contravene the *Charter*, albeit in a constitutional challenge which pre-dated the *Labour Trilogy, 2015*, by a number of years.

[184] To begin, it must again be emphasized that there is no formal challenge to the constitutionality of any part of section 37 of the *TUA* or, for that matter, section 6-18 of the *SEA*. Rather, the Board raises the application of section 2(*d*) of the *Charter* as just one (1) factor to consider when deciding what "otherwise orders" may be appropriate in this particular case. Our decision should not, in any way, be taken as expressing an opinion on the compatibility of section 37 (or section 6-18) with the *Charter*.

[185] Second, while the Board agrees with some of the views expressed by the Ontario Board in *Community Living Central Highlands*[116], we do not endorse the Ontario Board's narrow view of one of the central holdings in *Mounted Police*. The Ontario Board

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[109] *Ibid*., at para. 18.
[110] *Supra* n. 86.
[111] *Ibid*.
[112] *Supra* n. 93.
[113] *Ibid*., at p. 715. It should be noted that this threshold has now been raised to 45%, see: subsection 6-10(2) of the *SEA*.
[114] See: *Alberta Health Services*, *supra* n. 75, at paras. 191-192. On June 1, 2007, the Alberta Board issued "Information Bulletin #21 – Successor Employees" which expressly sets out a 80/20% guideline in situations where a successorship or merger has occurred. See further: *Alberta Union of Public Employees v Alberta Innovates*, 2017 CanLII 67965 (AB LRB) at paras. 37-42.
[115] *Ibid*.

suggests that it is limited in the main to circumstances involving an initial certification as this was what was directly engaged in *Mounted Police*. It is true that the Court in that case had to decide whether section 2(*d*) granted to members of the RCMP the right to unionize and select their bargaining agent, something which the *Public Service Labour Relations Act*[117], and the *Royal Canadian Mounted Police Regulations*, *2014*[118] - the legislation challenged in that case - denied them. The majority of the Court ruled that it did.

[186] However, a close reading of McLachlin C.J. and LeBel J.'s joint opinion in *Mounted Police* does not disclose the Court's intention that the constitutional value of employee choice is only relevant to those particular circumstances. We agree with the Ontario Board's observation that *Mounted Police* "does not mandate the timing of employee choice"[119]; however, we disagree with the its reasoning that the application *Mounted Police* is limited generally to the open periods mandated by all Canadian labour relations statutes. This appears to be an impoverished reading of *Mounted Police*, and not consistent with a "generous and purposive"[120] interpretation of a *Charter* guarantee or relevant Supreme Court jurisprudence which informs it.

[187] Simply put, the Board is of the view that "employee choice" as identified in *Mounted Police* may be a relevant factor to consider in successorship cases. Indeed, we are persuaded it should be a factor weighed in our determination of the kind of "otherwise order" to make in this case.

[188] Taking into account all of these factors, the Board has concluded that pursuant to clause 37(2)(d) of the *TUA*, and clause 6-18(4)(d) of the *SEA*, we will direct a vote of all employees at the Circle Drive Store eligible to vote. We make this Order for the following reasons.

[189] First, the Board acknowledges that our jurisprudence generally favours larger, all-employee bargaining units.[121] This is because "they tend to promote administrative effiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units

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[116] *Supra* n. 107.
[117] S.C. 2003, c. 22.
[118] SOR/2014-281.
[119] *Supra* n. 109.
[120] See e.g.: *R v Big M. Drug Mart Ltd.*, [1985] 1 SCR 295, at paras. 116-117 *per* Dickson C.J., and *R v Grant*, [2009] 2 SCR 353, 2009 SCC 32, at paras. 16 -17 *per* McLachlin C.J. and Charron J.

and promote industrial stability by reducing incidences of work stoppages at any place of work"[122]. However, this Board has consistently said that under the *TUA*, and now the *SEA*, the inquiry is what qualifies as an "appropriate unit", not the optimal one.[123] That is the question we must determine on this application, and how best to arrive at its answer.

[190] Second, the Board is of the view that the threshold for determining whether a representation vote should be directed which has been identified by other Boards' is not particularly realistic here. It is plain that the Employer's commercial empire employs a great number of employees against which the small number of employees at the Circle Drive Store pale in comparison. However, to compare these two stark (2) numbers is not an appropriate measurement, in our view, which perhaps may also explain why counsel for the two (2) unions involved in this case favoured a vote of only those employees at the Circle Drive Store.

[191] This is because the vast majority of the current employees of the Employer who are represented by UFCW are in no way affected – directly or indirectly – by what might happen at the Circle Drive Store. As noted above currently that location is an "island" in the "sea" UFCW represented stores. Were all of the Employer's employees to cast ballots, this would swamp the votes of those employees at the Circle Drive Store.

[192] In some ways, this case is analogous to *Headway Ski*[124]. There the Board determined that following a successorship the 11 employees working at Mount Blackstrap Ski Resort should be exempted from SGEU's certification Order in order to ensure those employees were not held hostage "to the wishes of some 13,000 Government employees"[125]. To be sure, the Board did not order a vote; however the motivation for exempting the 11 workers from the certification Order is the same as what motivates us to do exactly that in the circumstances of this case, *i.e.* to ascertain the true wishes of the small group of affected employees.

[193] Third – and this is where employee choice becomes most relevant – the employees at the Circle Drive Store as a group should be afforded the opportunity to decide which union they want to serve as their collective bargaining agent. As already stated, RWDSU

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[121] See *e.g.*: *Re O.K. Economy Stores Ltd*, supra n. 56.
[122] *Ibid*., at p. 66.
[123] See *e.g.*: *North Battleford Community Safety Officers Police Association v City of North Battleford*, 2017 CanLII 68783 (SK LRB), at para. 55.
[124] *Supra* n. 91.

has represented the workers at that location for decades. Indeed, in the course of the hearing the Board heard evidence that at least two (2) employees have worked at the location, and been RWDSU members since 1971. At no time did the Board hear evidence to suggest that the representation RWDSU provided to those workers was less than exemplary. In these unusual circumstances, it is the Board's considered view that the workers currently employed at the Circle Drive Store should have direct input into the decision as to which union should be certified as their collective bargaining agent.

[194] The Board acknowledges that when viewed objectively, it may seem that there are more opportunities available to employees at the Circle Drive Store were they to leave RWDSU and join UFCW. Yet, in our view this is a decision better made by them, and not by this Board acting unilaterally.

[195] The Board further acknowledges that directing a vote of only those employees at the Circle Drive Store raises the potential for fragmentation in the event that a majority chooses to remain members of RWDSU. However, it is not possible to predict the outcome of such a vote. Yes, a majority of the employees at that location may choose to remain RWDSU members. At the same time, once these employees are fully apprised about the UFCW collective agreement, and the opportunities open to them should they choose to join that union, the result may well be different. We just don't know at this point, and cannot predict the final outcome.

[196] In any event, the Circle Drive Store has operated as an "island" store for a number of years now. While this has created some administrative and logistical headaches for the Employer, this reality does demonstrate that although it is far from optimal, it is a functional arrangement.

[197] This observation turns the Board's attention to the task of crafting the Order directing a vote. Fortunately, it is not necessary to "re-invent the wheel" so to speak. The Order we craft is modelled on similar "otherwise orders" directing votes on a successorship issued in prior Board decisions, most notably *Fairhaven Long-term Care Centre*[126], and *Estevan Coal*[127].

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[125] *Ibid*., at p. 59.
[126] *Supra* n. 78.
[127] *Supra* n. 93.

[198] To begin, the Board agrees with counsel for UFCW that it representatives should have access to the names and addresses of all the employees at that location who are eligible to vote so that it may communicate with those individuals prior to the vote taking place. Also, UFCW representatives should be permitted to meet with employees at the Circle Drive Store at a date and time mutually agreeable to UFCW and store management. Finally, we will direct that the employees should be provided with a copy of the current UFCW collective agreement with the Employer so that they have an opportunity to review it carefully and be in a position to make a fully informed selection of a collective bargaining agent.

[199] The Board is also concerned that seniority should not be an issue which might impede eligible voters from exercising their free choice of an appropriate bargaining agent. In order to ensure this does not happen, the approach this Board adopted in *Estevan Coal*[128] commends itself to us as a fair and reasonable compromise. In that case, the Board stated:

> *The Board has also determined that it is appropriate for it to make a direction with respect to the dovetailing of the seniority lists. We appreciate the comments of counsel for UMWA that the Board should not underestimate the ability of either bargaining agent to deal with the matter of seniority in a fair manner with the Employer once the representation issue is decided. However, in this situation, there has been a disposition of Manalta's business to Luscar… While there may be a need to discuss the application of the seniority provisions to the amalgamated bargaining unit, in our view, these discussions should not be used as a method of undermining the basic seniority entitlements of either group of employees.*
>
> *When major amalgamations have occurred in other sections, notably in the health sector, the Legislature has taken care to ensure that seniority is not lost as a result of changes in the bargaining structures. When bargaining units in health care were radically restructured by The Health Labour Relations Reorganization Act, S.S. 1996, c. H-0.03, health care employees were permitted to retain the seniority they had earned in a former appropriate bargaining unit. In our view, this is a fair and just approach and is one that accords with the general principles set out in s. 37 of the [TUA]. Such an Order will be made in this instance.*[129]

[200] In conclusion, the Board makes the following Orders pursuant to section 37 of the *TUA*, and section 6-18 of the *SEA*:

- **THAT** a successorship occurred pursuant to section 37 of the *TUA*, and section 6-18 of the *SEA* when the Employer acquired the Circle Drive Store on May 13, 2014;

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[128] *Ibid*.
[129] *Ibid*., at p. 709.

- **THAT** a representation vote be taken by way of a secret ballot pursuant to section 6 of the *TUA*, and section 6-22 of the *SEA*, on a date to be agreed upon by the Board Registrar and all three (3) parties to this application in order to determine whether RWDSU or UFCW will represent the employees in the following described bargaining unit:

  > *That all employees employed in the store owned and operated by the Saskatoon Co-operative Association Limited at 331-8th Street East, in the City of Saskatoon, except the Store Manager, First Assistance Managers and Pharmacists is an appropriate unit of employees for the purpose of bargaining collectively.*

- **THAT** if no voting date is agreed to by September 4, 2018, this vote shall be held on September 28, 2018;

- **THAT** the sole question on the ballot shall be: “Do you wish RWDSU or UFCW to be the certified bargaining agent for employees at the Circle Drive Store?” or language to that effect;

- **THAT** all employees at the Circle Drive Store eligible to vote as of the date of this Order are entitled to cast a ballot;

- **THAT** the collective agreement that is currently in force with respect to the successful Union shall be the collective agreement in force for all employees in the bargaining unit described above;

- **THAT** the collective agreement that is currently in force with respect to the successful Union shall be amended to reflect its application to the appropriate bargaining unit described above;
- **THAT** representatives of UFCW shall be supplied with the names and addresses of all eligible voters in order to communicate with them prior to the vote including furnishing RWDSU members with a copy of the current collective agreement between UFCW and the Employer;

- **THAT** prior to the conduct of the vote taking place by way of secret ballot representatives of UFCW shall be permitted one (1) on-site meeting with the employees at the Circle Drive Store at a time convenient to the

management of that store. The management shall not unreasonably fail to co-operate with the representatives of UFCW in facilitating such a meeting;

- **THAT** every employee at the Circle Drive Store is entitled to retain the seniority he or she earned in his or her former appropriate bargaining unit and to have such seniority recognized under the terms of the collective agreement of the successful Union determined through the vote by secret ballot.

E. LRB File No. 235-16 – Unfair Labour Practice Application – Union Dues

[201] Subsequent to the Saskatchewan Court of Appeal's decision quashing this Board's initial holding that RWDSU should be certified as the collective bargaining agent for all employees at the Circle Drive Store, RWDSU commenced an unfair labour practice application. It took exception to the Employer paying union dues into the trust fund of MLT/Aikins pending a final resolution of the representation issue. In its Written Submissions, counsel for RWDSU colourfully summarized the essence of his client's allegation as follows:

> *96. The employer's actions in this case of unilaterally appointing itself as the custodian of the Union's dues constitute a clear and stark unfair labour practice. It is respectfully submitted that the Board must not sanction employers taking the law into their own hands: if a dispute about dues arises, parties must be directed to apply to the Board for relief, not "shoot first and ask questions later".*

[202] At the hearing all parties led evidence respecting the disputed issue of union dues. During oral argument both counsel for the Employer, and counsel for RWDSU presented extensive submissions respecting their respective positions on this application. However, counsel for UFCW did not offer any oral submissions on this issue. Instead, he requested that UFCW be permitted to file written submissions after the hearing, submissions which have not yet been forthcoming.

[203] This matter has been already been beset by alleged breaches of due process and procedural fairness, one (1) of which necessitated this rehearing. As a result, and out of an abundance of caution, the Board is prepared to allow counsel for UFCW to provide those written submissions to the Board and the other parties no later than August 31, 2018. All parties

closed their cases at the hearing, so it may be assumed that no further evidence needs to be received. Once the Board is in receipt of UFCW's submissions on the unfair labour practice, we will consider the matter on the basis of the written submissions and the evidence already tendered.

[204] We remain seized with the unfair labour practice application.

CONCLUSION

[205] The Board disposes of RWDSU's Application to Amend the certification Order designated LRB File No. 081-14 as set out above in paragraph 200.

[206] The Board wishes to express its gratitude to all counsel for their oral submissions and written legal memoranda. They were of great assistance to us.

[207] An appropriate Board Order will accompany these Reasons for Decision.

[208] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **24th day of July, 2018.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson