Saskatchewan
Labour Relations Board

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v SASKATOON CO-OPERATIVE ASSOCIATION LIMITED, Respondent

LRB File No. 145-19; April 30, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Don Ewart

Counsel for the Applicant, United Food and Commercial Workers, Local 1400:	Dawn McBride, Heath Smith
Counsel for the Respondent, Saskatoon Co-operative Association Limited:	Kevin Wilson, Q.C., Tom Richards, Shane Buchanan

Scope of collective agreement – All-employee bargaining unit – Provincial scope – Application to employees brought in through acquisition of new locations – Board finds that application is automatic.

Prior acquisition – Representation vote – Legal effect of prior actions and present understanding on acquisitions.

Unfair labour practice application – Section 6-43 – Union dues – Section 6-62(1)(r) - Union security clause – Application of collective agreement – Board finds employer failed to do what it was required to do – Unfair labour practice established.

Section 6-62(1)(b) – Failure to recognize Union as bargaining agent – Unfair labour practice established.

Section 6-62(1)(d) – Allegation of failure to bargain in good faith – Unfair labour practice not established.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an unfair labour practice application filed with the Board on June 21, 2019. The applicant is United Food and Commercial Workers, Local 1400 [Union] and the respondent is Saskatoon Co-operative Association Limited [Employer]. The Employer operates a retail co-

operative business in and around Saskatoon, Saskatchewan. Among the locations belonging to Saskatoon Co-op are Warmen, Martensville, Colonsay, Watrous and Hepburn.[1]

[2] The acquisition of Watrous was approved by the membership at an annual general meeting held on April 24, 2018, and effected in or around August 9, 2018. The acquisition of Hepburn occurred in or around February 3, 2019. Prior to the acquisitions of Watrous and Hepburn, the employees at those locations were non-unionized. There are approximately 900 Saskatoon Co-op employees working for all of the locations except for Watrous and Hepburn. At the time of amalgamation, Watrous and Hepburn had approximately 110 employees, several of whom were long-term employees.

[3] The Union makes this application pursuant to sections 6-43 and 6-62(1)(b), (d), and (r) of *The Saskatchewan Employment Act* [Act]. The Union alleges that the Employer has refused to remit union dues for employees who work at Watrous and Hepburn. The Employer says that these operations were non-union prior to the acquisitions, and therefore remain non-union unless and until there is a vote of the employees in favour of joining the Union.

[4] The fact that the Employer has not remitted union dues for employees at Watrous and Hepburn is not contested. The central issue, instead, is whether the employees at Watrous and Hepburn are employees in the bargaining unit represented by the Union. In November 2014, Saskatoon Co-op acquired Colonsay Co-op and its employees became union members. According to the Employer, there was a vote of the employees at that location to join the Union, or at least, the management of Saskatoon Co-op was under the impression that said representation vote took place. The Employer relied on the alleged representation vote at Colonsay as a precedent for what it believed to be a necessary representation vote of the employees of Watrous and Hepburn.

[5] The Union and the Employer are parties to an amended certification order dated November 7, 2002 which covers "all employees employed by Saskatoon Co-operative Association Limited, working in or from its places of business in Saskatchewan" except for specified exceptions.[2] That certification order was again amended on November 1, 2018 to exclude the employees at the grocery store and gas bar located at 8th Street East in Saskatoon, near Circle Drive [Circle Drive store]. Following this Board's decision in *Saskatchewan Joint*

[1] Although the Board refers to them as Watrous and Hepburn, it recognizes that these locations comprise various stores, gas stations, and a farm location, some of which are outside of Watrous or Hepburn.
[2] LRB File No. 197-02.

Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limited and United Food and Commercial Workers, Local 1400, 2018 CanLII 68443 (SK LRB) [*RWDSU v Saskatoon Co-op*], a vote of those employees took place and the RWDSU was chosen as the employees' representative. These employees number approximately 150.

[6] The last collective bargaining agreement [CBA] had a term of May 1, 2013 to November 19, 2016, and included a scope clause that stated:

> *This Agreement shall cover all employees of the Saskatoon Co-operative Association Limited working in or from its places of business, in the Province of Saskatchewan except the…*[3]

[7] That CBA also included the following union security clause:

> *ARTICLE 6 – UNION SECURITY*
>
> *6.01 Every employee who is now or hereafter becomes a member of the Union shall maintain his membership in the Union as a condition of employment. Every new employee whose employment commences hereafter, shall make application on the official membership application form within ten (10) calendar days of the date of his employment, and shall become a member of the Union within thirty (30) calendar days of this date. All present employees who are eligible, but are not now members of the Union, shall immediately apply for and maintain membership in the Union as a condition of employment.*
>
> *6.02 The Co-operative agrees to provide each new employee with the Union Security card, and will have said employee complete the card and return it to the Union office at the same time as the Union dues and check off report. The Co-operative will retain its copy of the check-off authorization. The Union will provide the Co-operative with the documentation for this purpose.*
> …

[8] After attempts were made to negotiate a renewal of the CBA, the Union took strike action from November 1, 2018 to mid-April, 2019. Employees returned to work in or around April 21, 2019. Negotiations in relation to the CBA continued throughout the strike. Prior to the return to work in 2019, the parties successfully negotiated a renewal of the CBA. The memorandum of agreement [MOA], signed April 14, 2019, added to the scope clause a named exception for the Colonsay Manager. The MOA did not include any exclusions of Watrous or Hepburn employees.

[9] On May 1, 2019, the Union wrote to the Employer demanding that it provide union cards, dues, and other payments respecting the employees at Watrous and Hepburn. Prior to May 1, 2019, the Union had not made this request. The Employer replied on May 24, 2019:

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[3] The Board notes that the scope clause of the CBA was not updated to reflect the Board order excluding employees from the Circle Drive store.

> *Further to your May 1, 2019 correspondence, the employees of the former Watrous and Hepburn Co-operatives which merged into the Saskatoon Co-op months ago do not automatically become unionized employees under the UFCW 1400 Collective Agreement with the Saskatoon Co-op. As occurred with the Colonsay Co-op several years ago, the Union would have to show majority support from the add-on employees. This is not the same situation as the Saskatoon Co-op opening up a brand new store and hiring new employees to staff that store. These employees were non-union prior to the merger and are employed on their own terms and conditions of employment. It would be inappropriate and contrary to the rights of the employees to sweep them into the UFCW 1400's bargaining unit without regard to their wishes.*

[10] In its application, the Union requests the following orders:

> *a. Declaring that the Saskatoon Co-op and/or its agents, have engaged in Unfair Labour Practices, requiring that those responsible cease committing Unfair Labour Practices, and including any other terms that may be just in the circumstances;*
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> *b. That the Saskatoon Co-op cease and desist from any further violations of the Act, specifically withholding dues to which the Applicant is entitled;*
>
> *c. That the Saskatoon Co-op make whole all employees at the Hepburn and Watrous locations for any monetary loss suffered by the Saskatoon Co-op's failure to pay the wage rate, benefits or pay or provide other entitlements as set out in the collective agreement.*
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> *d. That the Saskatoon Co-op reimburse UFCW in an amount equal to all dues that it has failed to remit to UFCW, plus pre-judgment interest;*
> *…*

[11] In the Employer's reply, it says that the Union is required to demonstrate majority support on the part of the former Watrous and Hepburn employees. This approach is in accordance with the well-established accretion principle, and is triggered when a unionized entity acquires or amalgamates with a non-union entity. The purpose of the principle is to protect the rights of employees to determine their representation status. The Union has not provided this evidence. The Union is aware of this principle because it followed it in relation to the Colonsay Co-op, or at least had intended to follow it.

[12] Furthermore, the conduct of the employees at Watrous and Hepburn during the recent strike establishes that those employees are not members of the Union's bargaining unit. Those employees continued to work throughout the strike. There were no Union pickets in those locations.

[13] Lastly, the Employer asks the Board to dismiss the application, pursuant to subsection 6-111(3) of the Act, due to a lack of timeliness. The amalgamations were a matter of longstanding public record. Furthermore, during a phone conversation in the summer of 2018 between Norm

Neault [Neault], President of the Union, and Grant Wicks [Wicks], CEO of the Saskatoon Co-op, Neault confirmed that a representation vote was the process that was required to be followed. The Union had, or ought to have had, knowledge of the actions that form the basis of the application for over 90 days before the application was filed.

[14] The parties agreed to bifurcate the proceedings to reserve the issue of damages in the event that the Board found that an unfair labour practice had occurred.

Evidence:

[15] The following witnesses were called to testify for the Union: Neault, Darryl Orischuk [Orischuk], Roger Haatvedt [Haatvedt], Lucia Flack Figueiredo [Figueiredo], Gail Ponak [Ponak], Linda Parish [Parish], and Patricia Brenda Kachur [Kachur]; and for the Employer: Wicks. The following is a summary of the evidence.

[16] The first witness was Neault. At the material times, Neault was the President of the Union. He was on leave from March 2018 until the end of August, except for a brief return from June to July. Neault was at the bargaining table once at the beginning and once at the end.

[17] In planning for the Colonsay acquisition, Wicks had expressed to Neault that the Employer had viability concerns about the existing wage rates being applied to rural locations. The parties had entered into a Letter of Understanding dated November 28, 2014 outlining terms and conditions of employment for employees working in locations outside a 35 kilometre radius of Saskatoon [LOU]. In Neault's view, the LOU was not specific to Colonsay. It states:

> *Rural Locations*
>
> *In addition to the terms and conditions outlined in the collective agreement, the Union and Employer agree the following applies to each location outside of a thirty-five (35) kilometer radius of Saskatoon:*
>
> *…*
>
> *8. Employees in rural locations as described above will form a separate seniority area in each Location. No provision of the CBA (recall, article 11.1 (c)(iv), etc.) that forces employees to take a different position would force an employee to take a position in a different seniority area. Employees from such rural locations who come under the agreement through a purchase or into the agreement through a merger will have their seniority based on their original date of hire with their pre-existing employer.*

[18] Other than the LOU, Neault was aware of no other agreements in relation to Colonsay.

[19] On cross, Neault stated that he could not recall having a conversation with Wicks about a representation vote at Colonsay. The first time he heard that the Employer felt there had been a vote was when he reviewed the reply to this application. The scope of the certification precluded any need to have a vote.

[20] Neault was on leave at the time of the AGM and so did not attend. At the AGM Wicks was purported to have suggested that a representation vote had occurred among the Colonsay employees. None of the union members who had attended the AGM reported back to Neault about Wicks' comments. Neault learned about the anticipated acquisitions of Watrous and Hepburn in July 2018.

[21] Neault acknowledged that the Watrous and Hepburn employees did not go on strike or participate in pickets (nor were there picket lines at those locations) during the full-scale strike. In defense of this, Neault relied on the "applications pending" issue, and the failure of the Employer to submit union cards, which allegedly created difficulties with initiating the employees with the International to provide strike pay. The Union has not appointed any shop stewards, filed any grievances in the related locations, reviewed any job postings, and is not aware of any union presence at the locations.

[22] Neault denied coming to an agreement with Wicks about the vote of the Watrous and Hepburn employees, stating: "why would I agree to that? We had a certification order." He did not agree to a vote for "those units". Furthermore, there was no representation vote of the employees of Colonsay or the employees of the 22nd Street gas bar.

[23] When asked on cross, Neault acknowledged that he could not recall the conversation with Wicks, as described. He could not recall bringing up Watrous and Hepburn, but it did come up at later dates. He could not recall Wicks saying that there would have to be a vote as had happened with Colonsay. He recalled a call with Wicks about gaining access to the employees of the Circle Drive store.

[24] In cross, he acknowledged that the Union could have sent the letter requesting maintenance of membership at the date of amalgamation instead of waiting until May 1, 2019. On the date that the employees become employed the Union has rights and obligations in relation to those employees. By the dates of the amalgamations, the Union knew that the Employer was not following Articles 6.01 and 6.02 of the CBA. He then suggested, however, that it is rare that the Union receives dues remittances within ten days, and that he learned of the Employer's position

when he received the letter in reply to the request for maintenance of membership. Before that, the Union was not getting any answers from the Employer.

[25] In an odd bit of testimony on cross, Neault pointed out that the Union was not expecting the Employer to be submitting dues for employees who were on strike. He then reversed course and suggested that dues should have been paid during that time.

[26] Next, the Union called three witnesses in chief and then in rebuttal.

[27] Ponak is a clerk at the Colonsay store, and she has worked there since before the store was bought out. She testified that management came out to tell the staff that they were buying the Colonsay store if the vote passed and that the employees would then be employees of Saskatoon Co-op. She said that she was never contacted about a vote, nor did she participate in a vote.

[28] Entered into evidence was a letter, dated October 29, 2014, addressed to Ponak at "Colonsay Co-op" from the Operations Manager of Saskatoon Co-op extending an offer of employment with the Saskatoon Co-op. The letter references a hiring package which includes a copy of the CBA and states,

> *As an employee of Saskatoon Co-op, you become a member of UFCW 1400. Your rate of pay can be found on page 49 "Courtesy Clerks". All items negotiated in this Collective Agreement apply to you with the exception of Article 12 (Page 12). This process will be explained to you in person.*

[29] As employees, they felt they would have a choice, but that is not how the message was delivered. Craig Thebaud [Thebaud] was the union representative at the time. She did not ask him if there would be a vote.

[30] In rebuttal, Ponak testified that in early October, the store was shut down early to hold a meeting with the Co-op membership about joining Saskatoon Co-op. The issue was member equity. There was no representation vote.

[31] Kachur worked at the Colonsay store before the takeover. She received the same letter as Ponak. It was included in the hiring package. Management had come by to drop off the packages. At the time, one of her coworkers asked if they were going to be a part of the Union. The answer was "yes". They did not have to sign but then they would not have a job. When she

arrived home she discovered she would be making less money because of union dues. She was unhappy. She stated that she was never contacted about participating in a vote.

[32] In rebuttal, Kachur testified that there was a meeting in early October with the Co-op members for a vote about joining Saskatoon Co-op. There was a concern about member equity. The store was shut down early. There was no vote to join the Union.

[33] Parish has worked for Saskatoon Co-op, and previously Colonsay Co-op, for about 18 years. She could not recall much about the circumstances surrounding the takeover. She recalled management providing the staff with a package. She could recall a coworker asking whether a vote would occur and being told that it would not. It was a “take-it-or-leave-it” situation. She was not contacted about a vote and did not take part in a vote. She recalls that the staff were upset because they thought they would be paid more.

[34] In rebuttal, Parish testified that the Co-op membership meeting was held at the Town Hall. This was many months before the merger. There was a vote of the membership. The store was closed early. There was no representation vote nor a meeting for that purpose. She could not recall an early store closure in October.

[35] Orischuk has worked for Saskatoon Co-op for 30 years. He was on the last two collective bargaining committees and on the joint labour-management committee [JLM]. He explained that the members had to vote to join the Saskatoon Co-op but there was no vote of the employees. He was at the AGM when Wicks explained that there had been a vote at Colonsay and did not do anything with the information.

[36] Orischuk stated that the Watrous and Hepburn locations did not come up once during collective bargaining negotiations. The employees at these locations did not go on strike because they were not unionized employees. They were told it was a fight for another day and that it was not a priority at the moment. The Watrous and Hepburn employees did not vote in the strike vote.

[37] Haatvedt has worked for Saskatoon Co-op for 46 years. He testified that in 2014, Wicks formally announced that a vote had occurred and that Colonsay would be joining Saskatoon Co-op in the Fall of that year.

[38] There was a JLM meeting on October 16, 2014. Haatvedt testified that the management advised that the Colonsay Co-op members had voted to join Saskatoon Co-op. This was the first time Haatvedt was notified of the Colonsay amalgamation. He initially attributed this

communication to Wicks but when presented with his notes from the meeting realized that Wicks may not have been in attendance at the meeting. In the notes, however, the vote is described as a “vote to dissolve”. He testified that there was no representation vote in relation to the amalgamation.

[39] Soon after, Haatvedt was asked to meet with management about rural wage rates. The meeting took place on October 22. Wicks and Sharon Schultz [Schultz] were in attendance for management. There was a concern about viability if city rates were paid to rural employees. In this meeting, Wicks apparently referred to the vote to dissolve Colonsay Co-op, which had occurred on October 6 or 8. The meeting notes suggest that Saskatoon Co-op had been approached by other rural Co-ops by that time, or at least, was communicating that it had been. At the meeting, the issue of seniority was also discussed. According to the notes, Schultz was concerned about the Union’s proposal and suggested that, based on the affordability (or lack thereof) of that proposal, they could never again acquire another business.

[40] The next witness was Figueiredo. While Neault was on leave in 2018, Figueiredo took over his responsibilities in an acting role.

[41] Figueiredo testified that there is no record of a representation vote among the Colonsay employees. In her view, the vote would have had to have been initiated through an application and a Board imposed process. At no time did Wicks ever ask Figueiredo about the process for a representation vote.

[42] The CBA expired in November, 2016. Although notice to bargain had been provided, the Employer was not prepared to bargain until around February, 2017, which is when proposals were exchanged. Figueiredo was involved initially, took a break, and then took over in August, 2017. A strike vote was taken at the end of that year so that the Union could be in position to strike if needed.

[43] Bargaining lasted until the Fall of 2018. Then, the Union received a Board decision in the Summer of 2019 and, as a result of the decision, there was to be a representation vote of the employees at the Circle Drive store. Based on the results of the vote, RWDSU and not UFCW, was chosen to represent the employees at that store. The Union then provided strike notice to the Employer.

[44] Figueiredo testified that she had learned of the first acquisition in the summer of 2018 - the bargaining committee had been discussing it during a caucus. The Union was on the picket

line when the second acquisition took place. The topic of the acquisitions did not enter into collective bargaining. There were no proposals from the Employer or the Union on the matter. From Figueiredo's point of view, bargaining overall was contentious and difficult.

[45] Figueiredo confirmed that the Watrous and Hepburn employees did not participate in the strike. In defense of this decision, Figueiredo explained that the bargaining committee had chosen not to include the employees who were a part of the initial acquisition (Watrous), the Employer had provided the Union with no information about the identity of the employees anyway, and there was an issue about whether the employees would be entitled to strike pay.

[46] Figueiredo acknowledged that she had no knowledge of the Union having made efforts to include the Watrous and Hepburn employees in the ratification vote for the renewed CBA. She did not look into whether this impacted the validity of the renewal. There was no discussion with the Watrous and Hepburn employees after ratification.

[47] With respect to the timing of this application, Figueiredo explained that the Union was having conversations with the Employer, and was hopeful that the matter would be resolved, and besides, the Union had to wait until the Employer had "violated", that is, did not remit. After the strike and until the end of May, Figueiredo was not expecting any remittances.

[48] The Employer's only witness was Wicks.

[49] Wicks spoke about the Colonsay acquisition. The Colonsay Co-op was acquired effective November 2, 2014. It was a non-union entity at the time. The employees of the Colonsay Co-op were ultimately brought into the Union.

[50] In the summer of 2014, Wicks called Neault. He advised Neault that a possible acquisition was being considered. However, maintaining the current wage rates would not be sustainable. Wicks advised Neault that, in the event that the employees chose to join the Union, to make it worthwhile a rural rate would have to be applied. Neault asked if the Employer would get involved in the vote. Wicks replied that his understanding was that the Employer is not allowed to get involved. Neault reminded Wicks of the employer's attempt to influence the vote at the Affinity Credit Union. Wicks stated that he understood that management could not be involved. That was where it was left. In subsequent conversations, Neault confirmed that the Union was in support of a rural rate.

[51] Wicks testified that the Union had raised concerns about the practicalities of accessing Colonsay employees, and so he had suggested closing the store early to gather the entire group to address everyone at once and to "make their pitch". By October 22, 2014, he believed that the vote had occurred; he maintained that understanding until the day before this hearing.

[52] In cross, Wicks recalled that the store was closed on an evening two or three hours early. He acknowledged that the Union did not ask the Employer to do that. He stated that he heard from Schultz the next day that the meeting was held, and that the employee group had voted to join the Union. He did not recall any involvement from this Board, and received no written communication about a vote. At the time, he had never had any experience with a representation vote. Whether the vote took place prior to or after the amalgamation, it occurred when it was far enough along in the process.

[53] The acquisition discussions for Watrous and Hepburn started in 2017. The membership of the Saskatoon Co-op was required to vote on the acquisitions. A vote or votes took place at the April 2018 AGM. Wicks was present. Among those in attendance were union staff members and officers and members of the bargaining committee and JLM. At the AGM, the following exchange occurred:

> *[Co-op member]: …I am wondering if these branches that are applying, I believe, to come to Saskatoon Co-op, will they join the Co-op union membership? Saskatoon Co-op is a union shop.*
>
> *[Wicks]: You are correct Saskatoon Co-op is a union shop. In circumstances like this, there is provincial legislation that governs this and I am not an expert on that legislation – neither is Nancy – I am not a labour lawyer and neither is Nancy, but my understanding is that, there-ah, the way the process works is that the union, the UFCW, Local 1400 would have the opportunity to go and meet with the employees and ultimately it would be up to the employee group. An example would be Colonsay, ok?*
>
> *[Co-op member]: Well, did Colonsay become union when they…?*
>
> *[Wicks]: Colonsay voted to join the union, correct.*

[54] Wicks' statement was not challenged at, or immediately after, the meeting. At the meetings convened for a vote of the Watrous and Hepburn Co-op membership, similar questions were asked and Wicks' answers were similar. At the meetings of management and the employees of Watrous and Hepburn, Wicks conveyed a similar message.

[55] In the summer of 2018, Wicks and Neault had a phone conversation about the Watrous Co-op. Neault said that he understood new employees were coming on board on "August 18". He

said “we” will need to make sure they are signed up, have dues paid, and see that their membership is formalized. Wicks replied that the situation was exactly the same as Colonsay. He mentioned the vote. Neault paused, and said, “yeah, I guess that is what we did.” Wicks could not recall having any conversations with Figueiredo of a similar nature.

[56] In cross, Wicks testified that he relayed the content of the phone call with Neault in a later conversation with Schultz, explaining that he had understood that a vote would be required. He has nothing in writing about the conversation with Neault or about a vote.

[57] In cross, the Union pursued a line of questioning suggesting that Wicks was confused between the meeting with employees of the Circle Drive store in 2018 and the Colonsay vote in 2014.

Argument:

Union:

[58] The Union relies on the fact that the operating certification order is “province-wide,” encompassing “all employees employed by Saskatoon Co-operative Association Limited, working in or from its places of business in Saskatchewan,” except for those occupying certain managerial positions. It says that there is no question whether the certification order is valid and subsisting. It is, and as explained by the Court of Appeal in *Army & Navy Department Store Ltd. v Retail Wholesale and Department Store Union*, 1962 CanLII 279 (SK CA) [*Army & Navy*], “[a]s long as that order is valid and subsisting, the status of the union as representing a majority of employees in the appropriate unit for the purpose of bargaining collectively cannot be questioned” (para 7).

[59] The Employer has misconstrued the concept of “accretion” and misapplied it to this case. It is where existing employees are drawn into the boundaries of a certification order for the first time as a result of an amendment to a certification order that an accretion is said to occur. Instances in which new employer operations become subject to existing province-wide certification orders are not instances of accretion, but are instead the results of the regular operation of existing Board orders. The Union relies for this argument on the Board’s decision in *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union Local 1-184 v Premier Horticulture Ltd*., 2019 CanLII 10580 (SK LRB) [*Premier Horticulture*][4].

[4] Reviewed and upheld in *Premier Horticulture Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184*, 2020 SKQB 77.

[60] More directly on point, the Board has already described this same certification order and provided a complete answer to the question of scope in *RWDSU v Saskatoon Co-op*. Likewise, the scope clause set out in the previous and current CBAs stipulate coverage of all employees of the Saskatoon Co-operative Association Limited working in or from its places of business, in the Province of Saskatchewan, except for stated exclusions.

[61] The Union also relies on the parties' experience with Colonsay. According to the Union, in or about 2014, the Saskatoon Co-op acquired Colonsay, and its employees were immediately signed up as members of the Union. In anticipation of the acquisition, the parties negotiated the LOU, which has since been renewed. The Union says that, during negotiations of the current CBA, the Employer did not seek to exclude the employees at Watrous or Hepburn from the CBA, nor were such exclusions included in the current CBA.

[62] The Union also argues that the Employer's application is barred by principles of estoppel. According to the Union, the doctrine of approbation and reprobation prevents a party from taking both a position and a contrary position for the sake of expedience and to the detriment of another party. The doctrine has been held to prevent a party from asserting inconsistent legal rights, including by taking inconsistent legal positions. The issue of the effect of the certification order has previously been raised in a hearing before this Board involving these parties. In *RWDSU v Saskatoon Co-op*, the Employer took the unambiguous position that the Union holds a province-wide certification order and therefore had a legitimate claim to represent all of the Employer's employees. The Employer is estopped from taking a contradictory and incompatible position in the case at bar.

[63] Finally, the Union argues that the Employer has either demonstrated its disregard for the collective bargaining process, or, has actively attempted to undermine the Union. The Employer has displayed an unacceptable pattern of behavior that has resulted in multiple sanctions meted out by this Board. And, in this case it has failed to bargain by taking an unreasonable position about the application of the scope clause and has refused to engage with that question in meaningful collective bargaining. The Employer has therefore breached clause 6-62(1)(d) of the Act, and has also breached clause 6-62(1)(b) of the Act by not remitting maintenance of membership, and therefore interfering with the internal administration of the Union.

Employer:

[64] The Employer argues that the Union's application has been filed late, there are no countervailing considerations that weigh in favour of allowing the application, and therefore the application should be dismissed pursuant to subsection 6-111(3) of the Act. There are three possible periods representing the starting point for the application of the 90-day time period – the date of the AGM, the date of the telephone conversation in the summer of 2018, and the dates of the amalgamations. No matter which option the Board chooses, the Union's application was filed late.

[65] The Union is a sophisticated applicant, and the reasons it has provided to justify the delay lack credibility. The Union had full knowledge of the facts but chose not to act and to sit on its rights. It is not the job of the Board to save the Union from its own inaction. The prejudice arising from the delay is two-fold: the parties have missed the opportunity to negotiate a resolution in collective bargaining and the Employer is potentially facing the retroactive payment of union dues, which would now be compounded. The Employer argues that the alleged breach is not a continuing breach – under this theory, the Union could sit on its rights for ten years. The cause of action, if it exists, occurred no later than the date of amalgamation.

[66] On the substantive issues, the Employer argues that the premise of the application, which is that the Watrous and Hepburn employees automatically joined the bargaining unit upon acquisition, is incorrect. The case law is clear that employee choice of bargaining agent is paramount. This principle must be upheld in determining the composition of bargaining units. The Union has failed to provide any evidence that the Watrous and Hepburn employees wish to join the bargaining unit. Nor has the Union made an application to add those employees to the bargaining unit.

[67] Besides, the Employer says that there was an agreement between Neault and Wicks about a representation vote, and if the Union had changed its mind about that agreement, it should have advised the Employer. Instead, for at least 9 months, being the period of time in-between the phone call in the summer of 2018 and the conclusion of the new CBA, negotiations continued based on the mutual understanding that the Watrous and Hepburn employees were not considered part of the bargaining unit. This suggests that the Union engaged in bad faith bargaining. Furthermore, it is clear that the parties had intended the LOU respecting rural rates to apply only to newly acquired locations if and when employees had voted in favour of the Union.

[68] The Employer operated on the understanding that a vote had occurred for Colonsay and should occur for Watrous and Hepburn. It now appears, based on the evidence, that the Union did not conduct a vote of the employees of Colonsay. However, the key is that there was to be a vote. Union representatives Thebaud and Darren Kurmey could have been called to testify about this. The Board should therefore draw an adverse inference from the Union's decision not to call these individuals, and conclude that their evidence would not have supported the Union's position.

[69] At no point prior to May 1, 2019 did the Union purport to represent the employees at the Watrous and Hepburn stores. It did not purport to represent the Watrous employees after the amalgamation and before the strike, the Watrous employees were not included in the strike vote, and none of the Watrous or Hepburn employees participated in the strike. The Union did not raise the topic in collective bargaining and did not include the employees in the ratification vote. The Union has taken no action to represent the employees of Watrous or Hepburn. Even Orischuk has boldly admitted that the Union did not represent the employees at ratification and does not represent the employees now.

[70] On the issue of estoppel, the Employer says that the Board has never applied the approbate and reprobate principle. Besides, the relevant applications raise different issues and it is open to the parties to make the arguments available to them. At paragraph 94 of *RWDSU v Saskatoon Co-op*, the Board made clear that the matter of successorship had been made more complicated by the fact that the Employer's Greystone store, which was certified to the Union, had been closed and some of its operations transferred to the Circle Drive store. Also, the Union in that case had argued that the facts did not support that a transfer of business had occurred, only a transfer of assets. If estoppel were to be applied, it could be to the Union's detriment.

[71] The Board in *RWDSU v Saskatoon Co-op* did not find that the employees of the Circle Drive store were automatically included in the Union's bargaining unit.

[72] In the absence of a vote in favour of joining the Union, the Union is not entitled to dues for those employees, and there is no contravention of sections 6-43 or 6-62(1)(b) of the Act. Even if the employees had voted in favour of joining the Union, there is no evidence that any employees have authorized the deductions pursuant to section 6-43. Given that no dues are owed to the Union for the employees, the Employer has not contravened clause 6-62(1)(b). Further, the Employer has never denied the Union the opportunity to represent the Watrous or Hepburn employees nor interfered with the "formation" of the Union.

[73] As for clause 6-62(1)(d), there is no evidence to support the Union's allegation that the Employer has bargained in bad faith. If anything, it was the Union that bargained in bad faith, having failed to advise the Employer that it was reneging on its agreement that the Watrous and Hepburn employees were not automatically included in the bargaining unit. Lastly, there was no obligation to respond to the Union's demand letter, and therefore no breach of clause 6-62(1)(r).

Applicable Statutory Provisions:

[74] The following provisions of the Act are applicable:

> ***6-42****(1) On the request of a union representing employees in a bargaining unit, the following clause must be included in any collective agreement entered into between that union and the employer concerned:*
>
> *"1. Every employee who is now or later becomes a member of the union shall maintain membership in the union as a condition of the employee's employment.*
>
> *"2. Every new employee shall, within 30 days after the commencement of the employee's employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of the employee's employment.*
>
> *"3. Notwithstanding paragraphs 1 and 2, any employee in the bargaining unit who is not required to maintain membership or apply for and maintain membership in the union shall, as a condition of the employee's employment, tender to the union the periodic dues uniformly required to be paid by the members of the union".*
>
> *(2) Whether or not any collective agreement is in force, the clause mentioned in subsection (1) is effective and its terms must be carried out by that employer with respect to the employees on and after the date of the union's request until the employer is no longer required by this Part to engage in collective bargaining with that union.*
>
> *(3) In the clause mentioned in subsection (1),* ***"the union"*** *means the union making the request.*
>
> *(4) Failure on the part of any employer to carry out the provisions of subsections (1) and (2) is an unfair labour practice.*
>
> *(5) Subsection (6) applies if:*
>
> *(a) membership in a union is a condition of employment; and*
>
> *(b) either:*
>
> *(i) membership in the union is not available to an employee on the same terms and conditions generally applicable to other members; or*
>
> *(ii)an employee is denied membership in the union or the employee's membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the union as a condition of acquiring or maintaining membership.*
>
> *(6) In the circumstances mentioned in subsection (5), if the employee tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership, the employee:*
>
> *(a) is deemed to maintain membership in the union for the purposes of this section; and*
>
> *(b) shall not lose membership in the union for the purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members*
>
> ***6-43****(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay*

in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.
(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.
(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.
(4) Failure to make payments or provide information required by this section is an unfair labour practice.

. . .

6-62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

. . .
(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;
. . .
(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;
. . .
(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

. . .

6-111*(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
(4) The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.

Analysis:

Timeliness:

[75] The first issue is whether the application falls outside of the 90-day timeline and should be dismissed. On this issue, the onus rests with the Employer. Subsections 6-111(3) and (4) are the operating provisions:

6-111 (3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.
(4) The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.

[76] Subsection 6-111(3) provides the Board with discretion to refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or ought to have known of the action or circumstance giving rise to the allegation. As per *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union Local 1-184 v Premier Horticulture Ltd.*, 2019 CanLII 10580 (SK LRB) (para 24), the language of the provision suggests an initial analytical premise that the application should be heard. The Board must also consider the well-established jurisprudential principles on this issue.

[77] In considering whether to excuse the applicant's delay in filing an unfair labour practice application, the Board in *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB) [Sask Poly], at paragraph 18, outlined the principles to be applied:

- *Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation (ss.6-111(3)).*
- *The 90 day limitation period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of such disputes is essential to ensuring amicable labour relations in Saskatchewan (Dishaw, at para. 36; Peterson, at para. 29; SGEU, at paras. 13-14).*
- *It is important to identify with precision when the 90 day limitation commences. Typically, the alleged misconduct will be founded upon a particular fact situation and the clock starts running from that date (SGEU, at para. 29).*
- *A complaint may be based on a "continuing policy or practice rather than a discrete set of events". This fact makes it more difficult to ascertain the commencement of the 90 day limitation period and may make it easier to justify a delay (Toppin, at para. 29; SGEU, at para. 30).*
- *The Board will adjudicate applications filed outside the 90 day limitation period provided the other party consents or otherwise waives the application of the limitation period (ss. 6-111(4)).*
- *Where no such consent or waiver is given, the Board possesses discretion to adjudicate the application (ss. 6-111(3); SGEU, at para. 24).*
- *When exercising this discretion, the Board should apply the non-exhaustive list of counter-vailing factors identified in Toppin (SGEU, at paras.26-27; Toppin, at para. 30)*
- *Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.*

[78] In *Neville Toppin v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488*, [2006] Alta LRBR

31, 123 CLRBR 253 [*Toppin*], the Alberta Board listed the principles to be applied in assessing an allegation that a party was late in filing an unfair labour practice application:

> *1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
>
> *2. "Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
>
> *3. Late complaints should be dismissed unless countervailing considerations exist.*
>
> *4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*
>
> *5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>
> *(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
>
> *(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*
>
> *(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
>
> *(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[79] The first issue is the length of the delay. To make this determination, it is necessary to identify the date at which the clock began to run, which is the date that the complainant knew or, in the opinion of the Board, ought to have known of the action or circumstances giving rise to the allegation.

[80] Here, the allegation is that the Employer refused to provide union cards, dues, and other payments for the employees at Watrous and Hepburn. The obligation to provide maintenance of membership arises when there are employees in the bargaining unit. Therefore, the clock began to run when the Union knew or ought to have known that there were employees in the bargaining unit for whom the Employer had not made it a condition of their employment to become union members and to pay union dues.

[81] The acquisition of Watrous occurred in or around August 19, 2018. The acquisition of Hepburn occurred in or around February 3, 2019. At the AGM in April 2018, prior to the acquisition of both locations, Wicks made it clear that he believed that a vote of the employees was necessary. There were multiple union members in the audience. There is no evidence that the

Employer at any time changed its position with respect to the need for a vote. Figueiredo suggested that there were ongoing discussions about the issue, but there is no other evidence to support this suggestion.

[82] After the August acquisition and before the strike began, the Union received no union cards or dues for the Watrous employees. Articles 6.01 and 6.02 of the CBA set out a deadline for a new employee to apply to become a member. Every new employee shall make an application for union membership within ten calendar days of the date of employment. Therefore, within ten days after the acquisition the Union ought to have been aware that the Employer was not complying with the union security clause.

[83] The Employer suggests that the clock started to run earlier than this, that is, on either of the date of the AGM, the date of the conversation with Neault, or the date of the acquisition of Watrous. In our view, on either of the two former dates, the Union ought to have been on notice of the Employer's position, but the alleged breach had not yet occurred. The clock does not begin to run on the date when a breach is anticipated; it begins when the breach has occurred.

[84] Neault suggested that the Union was aware that the Employer was not following the union security clause as of the date of the acquisitions. In the normal course, it might have taken some time to receive the paperwork, but the Union ought to have followed up with the Employer on the date of the Watrous acquisition or soon after. Given the Union's knowledge of the Employer's position, this would have been the prudent approach.

[85] Therefore, on or around the date of the Watrous acquisition, the Union ought to have known that the Employer had not made it a condition of the employees' employment to become union members and therefore to pay union dues. The application was filed on June 21, 2019. Applying the 90-day timeline to a start date of August 19, 2018 means that an application with respect to the Watrous employees ought to have been filed by November 19, 2018. Instead, the application was filed on June 21, 2019, which is approximately seven months after the expiry of the 90-day timeline.

[86] The Hepburn acquisition is another matter. As mentioned, the clock does not begin to run when a breach is anticipated. It begins when the applicant knew or ought to have known of the action or circumstances giving rise to the allegation. Prior to the Hepburn acquisition, it is not true to say that the Union knew or ought to have known of the action or circumstances giving rise to the allegation. Prior to the Hepburn acquisition, there were no Hepburn employees in the

bargaining unit. Therefore, it makes sense to treat the timelines separately with respect to the two separate acquisitions.

[87] The Hepburn acquisition took place on February 3, 2019 in the middle of the strike. The union security clause was not in force at the time. The MOA for the renewed CBA was signed on April 14, 2019. The date of ratification is unclear on the evidence. The general return to work occurred in or around April 21, 2019. Obviously, the Hepburn employees continued to work the entire time. According to the Union, the Hepburn employees were covered by the scope clause in the CBA, and it is the CBA that the Union is relying upon.[5] Therefore, the operative date for the Hepburn employees is the date that the parties became bound by the renewed CBA. Due to the lack of clarity around ratification dates, the Board will select April 14, 2019 as the operative date.

[88] By this date, the Union ought to have been exercising due diligence to, in the least, inquire about the Employer's approach to the Hepburn employees. The Union ought to have known that the Employer was not treating the Hepburn employees as members of the bargaining unit. Prior to this date, the Union could have anticipated a breach but the alleged breach had not yet occurred.

[89] Unfortunately, the Hepburn matter is complicated by the fact that neither the Hepburn nor the Watrous employees participated in the strike. They continued to work and continued to receive wages. It is also complicated by the fact that neither of the parties raised the issue during collective bargaining. However, the Union's allegations rest on its assertion that these employees were automatically added to the bargaining unit. The combined breaches of section 6-43 and 6-62(1)(r) would not arise in the absence of a CBA. The application does not allege that the Employer refused to include a union security clause in a CBA (subsections 6-62(2) and (4)).

[90] Applying the 90-day timeline to a start date of April 14, 2019 means that the application, to the extent that it deals with the Hepburn employees, was filed on time.

[91] Similar to *Premier Horticulture*, the alleged breach was continuing as of the date of the application. The Employer has chosen not to follow the union security clause in relation to the Watrous employees. Granted, this could be interpreted as a discrete act given the timelines for compliance with the Article 6 of the CBA. However, Article 7 imposes an obligation on the Employer to deduct union dues out of the wages due to each employee "eligible for Union membership" on each pay period. The Employer's failure to meet the deadline does not mean

[5] As opposed to an allegation of an unfair labour practice specifically pursuant to subsection 6-42(2).

that it is absolved from remitting dues, or that the obligation to remit dues does not continue to arise on each pay period for employees who are "eligible".

[92] In *United Steelworkers, Local 7656 v Mosaic Potash Colonsay ULC*, 2016 CanLII 79631 (SK LRB) [*Mosaic*], the issue of continuing breaches was not directly addressed. *Premier Horticulture* provides the following guidance with respect to continuing breaches:

> *[35] This means that the application was filed out of time. The Employer did not waive the late filing. The Board would note, however, that as of the date of the hearing, the unfair labour practices were continuing. This is similar to the situation in Saskatchewan Government and General Employees' Union v Saskatchewan (Government), 2009 CanLII 30466 (SK LRB) where, after finding that the unfair labour practice was founded on a particular fact situation, and therefore the application was filed after the 90-day deadline had expired, stated the following, at paragraph 30:*
>
> > *That having been said, however, as noted in the Toppin case, supra, at para. 29 "Delay may be excused where the complaint concerns a continuing policy or practice rather than a discrete set of events: UNA, Loc. 23 et al v. Chinook RHA [2002] Alta. L.R.B.R. LD-056." This case clearly concerns a continuing policy implemented by the Employer which may have a considerable impact on its current and future employees. It was in force throughout the period in question and remains in force at present.*
>
> *[36] Keeping this additional circumstance in mind, the Board now turns to the countervailing considerations described in the Toppin guidelines to determine how to exercise its discretion.*

[93] Bearing this in mind, the Board will now consider the countervailing factors with respect to the Watrous allegations. The delay in question is a period of seven months. The longer the delay, the stronger must be the countervailing considerations to allow the complaint to proceed.

[94] First, there is no doubt that the Union is a sophisticated applicant. This factor is easily addressed, and it weighs against the Union.

[95] The second factor assesses the reasons for the delay. The reasons that have been provided relate to the labour dispute and the supposed ongoing discussions between the parties about the matter. The issues around the labour dispute include the Union's stated concern with "applications pending" and the fact that the Employer was not deducting dues for any employees.

[96] The Board will deal with each of these concerns, in turn.

[97] The applications pending concern is relevant only for the period of time prior to the commencement of the strike. The strike began on November 1, 2018. The 90-day timeline ended on November 19, 2018. Between November 1 and November 19, 2018, the Union could have

filed an application without concern for its strike timeline. Instead, the Union made a decision to prioritize the strike.

[98] Next, the Union's assertion that the Employer was not deducting union dues during the strike has limited application to the circumstances involving the Watrous employees. Clearly, the union security clause was not in effect. This means that the pay periods were not in effect. However, the Union did not need regular pay periods to understand the Employer's position on the matter. The Union knew the Employer's position. Finally, Figueiredo's suggestion that there were ongoing discussions between the parties does not stand up to scrutiny. There is no evidence that the Employer retracted its position that a vote was required.

[99] While the Board has concerns about the reasons presented by the Union, including the Union's rather casual approach to the argument on this point, it is well-established that the fact that the alleged breaches are continuing may make it easier to justify a delay.

[100] To illustrate, while August 19, 2018 is the date on which the Union ought to have known that the Employer was not treating the Watrous employees as members of the bargaining unit, the Union's application rests on the premise that its rights arise automatically as a result of the operation of the certification order. The Employer's obligation then arises automatically at each instance in which the union dues become payable, and in each instance that the Employer refuses to remit, then it has breached its obligation. If a union ignored such breaches for a period of time, an employer might choose to pursue an application for abandonment. In that case, the usual tests would have to be applied. At this stage, however, the Board is considering whether the Union's delay can be justified, not whether the Union abandoned its bargaining rights.

[101] In summary, the Union's explanation for the delay is not overly helpful, but its position does benefit from the continuing nature of the alleged breach.

[102] The next consideration is prejudice to the Employer. The Board is not persuaded that the delay has caused significant prejudice to the Employer. The Employer relies on the fact that the negotiations for a renewal of the CBA concluded prior to the commencement of this application. If the Union had raised the issue in a timely manner, the parties may have been able to bargain a resolution. However, if the employees were by law automatically employees of the bargaining unit, then any potential "resolution" would be constrained by that fact. The Union certainly would not have been required to bargain the inclusion of employees in the bargaining unit who were automatically members of the bargaining unit.

[103] On the other hand, the Employer may have wished to bargain the exclusion of some of those employees, or to bargain matters in relation to or arising from the inclusion of the Watrous employees in the bargaining unit. This is a matter of some concern.

[104] However, this concern must be considered in context. There is no evidence that management sought out the results of the anticipated representation vote. While the Board finds it difficult to believe that this sophisticated Employer did not understand the mechanics of a representation vote, a lack of understanding does not excuse a lack of due diligence. There is no evidence that the Employer ever asked about the results of the vote, or raised the issue of the Watrous and Hepburn employees in bargaining in case they had voted or were going to vote. This is despite a lengthy period of bargaining. It is very difficult to understand why the Employer would not have done its due diligence if it was so concerned about negotiating potential exclusions.

[105] The Employer also claims that the potential for liability for payment of retroactive union dues causes prejudice. This argument seems to overlook the fact that the union security clause was not in effect during the strike. Furthermore, the Board in *Mosaic* observes at paragraph 48 that "this is not necessarily the kind of litigation prejudice contemplated in *Toppin* and other authorities". In our view, the matter of retroactive union dues can be addressed in determining the appropriate remedy in the event that a breach is found. It is not relevant at this stage.

[106] The Employer states that this application is corrosive to the parties' ongoing relationship and is an impediment to their ability to move past what was a highly divisive strike. The Union has exacerbated the tension in the parties' relationship by filing this application late. The Board agrees that the delay in labour relations litigation is presumptively prejudicial and corrosive to the relationship between the parties: *Mosaic* at para 47. However, the corrosive effect is mitigated by the Union's relative dispatch in relation to the Hepburn employees. The application raises the same or similar issues with respect to both locations. There is no presumption about a corrosive effect with respect to the Hepburn employees. Furthermore, there are likely very good labour relations justifications (consistency, harmony) for addressing both matters in the context of this one application.

[107] In addition, the Board is not persuaded that the delay has prejudiced the Employer's ability to defend its position in this matter.

[108] The final factor, being the importance of the rights at stake, is one that the Board is to assess in evenly balanced cases. Although it is difficult to conclude with precision when a case is

one that is “evenly balanced”, the Board has concluded that this is one of those cases. Therefore, the Board will now consider the importance of the rights at stake.

[109] In short, the central issue is very important. For the Board to exercise its discretion to refuse to hear this application due to the Union’s delay would have the effect of denying bargaining rights which the Union asserts arise automatically. Furthermore, these rights relate, not to one or two employees, but to the entire group of employees (save exceptions) located at one of its stores.

[110] Although the importance of the rights should have motivated the Union to act more quickly than it did (*Mosaic*, para 58), this does not mean that, on balance, the Board should disregard this final factor and not give effect to the importance of the rights asserted. On this point, the Board prefers the approach taken in *Premier Horticulture*, as follows:

> *[41] While consideration of the Toppin guidelines has not led to an evenly balanced case, the Board will nevertheless comment on the final consideration, the importance of the rights asserted. The rights asserted by the Union are very important; they are core to the purpose of certification. The Employer cannot choose to ignore the Union and the rights of its employees. The Employer cannot choose to ignore its obligations under the Act, the certification order and the Collective Agreement. …*

[111] Within the final factor, the Board may also consider the apparent strength of the complaint. Here, the issue is, first, whether the Employer had an obligation to provide maintenance of membership and, second, whether it breached that obligation. The Employer admits that it did not provide maintenance of membership. The Employer does not admit that it had an obligation. Therefore, the case turns on whether the Employer had an obligation.

[112] Given the foregoing, the Board has decided not to exercise its discretion pursuant to subsection 6-111(3) to dismiss the application for delay.

Was a Vote Required?

[113] The next question is whether, apart from any question of whether there was an agreement between the parties, a vote was required of the employees of Watrous and Hepburn. The short answer to this question is “no”. The certification order sets out a bargaining unit that includes all employees, other than listed exceptions, within the Province of Saskatchewan. This is an all-employee bargaining unit with a provincial scope. The Employer has filed numerous cases which it says stand for the proposition that a vote is required in this case; however, the Board has reviewed each of these cases in detail and does not agree.

[114] First, in *University of Saskatchewan v Saskatchewan Labour Relations Board*, [1978] 2 SCR 834 [*University of Saskatchewan*], the Supreme Court of Canada overturned a decision of the Board which had the effect of enlarging the membership of the existing unit. The Board had allowed the certification order to be amended, consolidating a number of bargaining units and sweeping into the new unit employees who were members of an uncertified association, without evidence of their support. The Supreme Court approved the dissenting judgment of Bayda J.A. (as he then was), who suggested that the Board should take into account the same considerations when amending an order as it does when granting the initial order: [1977] SJ No 361.

[115] The Employer relies on Bayda J.A.'s statement to the effect that where a "new" bargaining unit is established, the employees in that unit have the right to choose their union, through evidence of majority support (para 24). The question this raises is whether the bargaining unit in the current case is, in fact, "new". Subsequent case law has provided further guidance.

[116] In *Prince Albert Co-operative Assn. Ltd. v R.W.D.S.U., Local 496*, 1982 CarswellSask 216, [1983] 1 WWR 549 (SK CA) [*Prince Albert Co-operative*], the Court of Appeal confirmed that the Board needs evidence of the support of a majority of the employees in a new bargaining unit. Bayda C.J.S., with Cameron J.A. concurring, found that the Board was entitled to rely on the presumption of continuance as proof of the subsistence of the certification order, and therefore had circumstantial evidence of the choice of the majority before enlargement. Hall J.A. agreed with the result but, relying on *Army & Navy*, disagreed with the suggestion that the existing certification order "does not conclusively establish, without further evidence, that the union represents a majority of the employees included in the first bargaining unit" (para 14).

[117] The Board has since held that a union can rely on a valid and subsisting certification order as proof of majority support in an existing unit, but should produce evidence of majority support for a group of employees being added to the unit "before the unit can be reshaped to include them": *Wascana Rehabilitation Centre (Re) (1993)*, [1993] SLRBD No 12 (Sask LRB) [*Wascana Rehabilitation Centre*]:

> *…this approach…seems to provide an appropriate balance between the secure and stable status for a trade union, and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are to be determined, whether that be through representation by some organization other than a union, or by some other means.*[6]

[6] At 4.

[118] In coming to this conclusion, the Board described three common methods by which employees are added to an existing unit, and determined that in the case before it, the third method was applicable. The employees in issue had been explicitly excluded from the bargaining unit, and therefore, the Board found, at 3, that the "addition of these employees to the bargaining unit would require the unit to be redefined, given that they have been explicitly excluded in a succession of Board decisions and collective agreements".

[119] The Employer relies on the third method, arguing that it is clearly applicable to the circumstances arising in the present case. To adequately appreciate the Employer's argument, it is helpful to reproduce the Board's description of these methods in full (at 2):

> *The first method of adding employees to an existing unit is through the union security clause in a collective agreement. Once a trade union has been certified to represent the employees in a bargaining unit which is defined, the resulting collective agreement typically requires that employees who are added to the workforce in the unit must obtain membership in the union as a condition of employment. Though the majority of bargaining units are defined in terms of one workplace, there are bargaining units which have a wider geographical scope, covering a municipal area or even the province as a whole; in these cases, if the employer, for example, opens a new outlet into which the kinds of employees described in the certification order are hired, those employees will be added to the existing bargaining unit.*
>
> *The second method by which employees are added to an existing unit is through bargaining between a trade union and an employer concerning the scope of the bargaining unit. In these cases, which often involve questions of whether newly created positions will be excluded from the unit, the parties may agree that the description of the unit should be amended, and apply to the Board to have this amendment recorded in the certification order. Section 5(j) contemplates such an application where the employer and the trade union agree to the proposed amendment.*
>
> *The third way by which a trade union may ask to have employees added to the bargaining unit is by bringing an application to have the description of the bargaining unit altered to reflect the inclusion of these employees. The circumstances under which this may be done, and the criteria which the Board will use in determining whether to allow such an amendment, have not been fully articulated, but it is possible to discern from previous Board and judicial statements on this issue some principles which should be applied in a case such as this.*

[120] In relying on the third method, the Employer distinguishes from the first method, citing *UFCW, Local 1400 v Saskatchewan (Labour Relations Board)*, 2011 SKCA 100 at para 31, 341 DLR (4th) 168 [*UFCW v SLRB*]. In *UFCW v SLRB*, the Board provided a pithy description of the Board's holding in *Wascana Rehabilitation Centre* to the effect that "new employees being hired into an existing facility or a new facility within the geographical limits of the certification order are added to the existing bargaining unit".

[121] The Employer draws a distinction between circumstances in which an employer opens a new facility within the geographical limits of the certification order and circumstances in which an employer acquires an existing business with existing employees whose terms and conditions of employment are already determined through other means. The Watrous and Hepburn employees were not hired into existing or new facilities, but were working in established businesses with pre-existing conditions of employment. It is on this basis, the Employer says, that the current circumstances do not fit into the first method.

[122] *Wascana Rehabilitation Centre* confirms that in circumstances in which the unit needs to be reshaped to include new employees it is necessary to provide evidence of support of the employees to be added. However, unlike in *Wascana Rehabilitation Centre*, in the current case there is no explicit exclusion of the employees said to be "added" to the bargaining unit. Nor is there evidence that the bargaining unit, as described in the certification order, needs to be "reshaped". Still, this is not a full answer to the distinction that the Employer has raised.

[123] To make its point, the Employer relies on *Canadian Association of Fire Bomber Pilots and James Stockdale v The Government of Saskatchewan and the Saskatchewan Government Employees' Union*, [1993] SLRBD No 17 [*Fire Bomber Pilots*]. In *Fire Bomber Pilots*, the Board acknowledged that it is not necessarily easy to determine whether a particular case calls for the application of the union security provisions of an agreement or the redefinition of a bargaining unit. The Board provided a description of common issues that might come before the Board, at 11, to provide some guidance as to where the line might fall. Although the relevant excerpt is lengthy, it is necessary to review it in full:

> *It is not always a straightforward matter to determine whether the circumstances in any given case call for the simple application of the union security provisions of an agreement, or whether what is taking place requires a redefinition of the bargaining unit. Neither is it always easy to draw the balance between the interest of a trade union in consolidating its position as a bargaining unit when new employees are brought into the bargaining unit, and the interest of employees in being able to voice their wishes with respect to representation. To give some indication as to where the line may be drawn in various circumstances, it may be helpful to consider several examples of common issues which come before this Board.*
>
> *It is clearly the case on an ordinary application for certification that there may be individual employees or groups of employees who decide not to lend their support to the trade union. Though they are entitled to participate in the decision as to whether the union can gain sufficient support to be certified, they will be included, notwithstanding their dissent, in a bargaining unit which is determined to be appropriate for collective bargaining. Given the preference frequently expressed by the Board for more inclusive bargaining units, neither are they likely to be allowed to carve out a smaller unit on the basis of their minority view: see Professional Engineers Employees Association v. Government of Saskatchewan, LRB File No. 085-73-74.*

> *In circumstances where individual new employees are hired into an existing bargaining unit, or where an employer sets up a new enterprise or administrative unit which falls within the scope of the bargaining unit and new employees are hired into that, the union has generally been found to represent these "new" employees without demonstrating that they have obtained the support of any of them: see, for example, Retail, Wholesale and Department Store Union v. Western Grocers, LRB File Nos. 232-92 and 233-92; and United Food and Commercial Workers v. Westfair Foods Ltd., LRB File No. 096-92.*
>
> *Another example which might be contrasted with the case before us is the circumstance in which the group of employees who are being added to the bargaining unit have engaged in collective bargaining with their previous employer through a different union. If it is established that the bargaining rights of the trade union are preserved by Section 37, then, depending to some extent on the relative sizes of the groups of employees, this Board has found that the concept of "intermingling" applies, and that, in appropriate circumstances, the group of employees as a whole must be asked to make a choice as to which of the two bargaining agents will represent them in the future.*
>
> *In our view, the situation in the case before us can be distinguished from all of these examples. In this case, the pilots and flight-watch co-ordinators were previously part of a unit, latterly known as Northern Air Operations, in which they had a continuing relationship with the Government of Saskatchewan. This relationship took various forms, of which the latest is a relationship of direct employment by the Government. The change in their relationship with the Government which took place approximately two years ago was analogous to the acquisition of a business by the Government which already had a cohesive group of employees who were used to having their terms and conditions of employment determined in a different way. This "acquisition" places these employees in a different position than employees who are hired into a bargaining unit in which they clearly belong. When the most recent description of the bargaining unit was made, neither the Employer nor the Union had in mind this particular group of employees - or, to put it more accurately, the parties considered them excluded as outside contractors.*

[124] To fully understand the context of *Fire Bomber Pilots*, it is also helpful to consider the manner in which the application was brought to the Board. The application was brought by the Canadian Association of Fire Bomber Pilots for the purpose of excluding the pilots from the SGEU bargaining unit on the ground that it did not fall within the jurisdiction of the Board to make orders which govern their industrial relations. The Board resolved the central issue, which pertained to the constitutional jurisdiction of the Board to make a disposition that would affect the applicants, finding that the pilots fell within the scope of provincial jurisdiction with respect to labour relations. The Board then went on to consider whether the group of employees automatically become members of the SGEU bargaining unit. This question is similar to the question before the Board in the present case.

[125] The language of the existing certification order is not included in the decision. However, the Board does note, at 2:

> *A number of other pilots are employed by the Government of Saskatchewan, in the Executive Air Service, for example. Some of these are within the scope of the S.G.E.U.*

> *bargaining unit and others are out-of-scope. The constitutional status of these other pilots is not raised as an issue in this application.*

[126] However, in our view, the Board's reasoning in *Fire Bomber Pilots* is explained by its findings of fact. A central finding was that the pilots had an ongoing relationship with the government that predated the acquisition, at 11:

> *…In this case, the pilots and flight-watch co-ordinators were previously part of unit, latterly known as Northern Air Operations, in which they had a continuing relationship with the Government of Saskatchewan. This relationship took various forms, of which the latest is a relationship of direct employment by the Government…*

[127] The pilots had previously provided, to the government, fire-fighting services through a number of vehicles, including contracts with private airlines and contracts with the same group of pilots who were now direct employees of the government. The Board found that the pilots were operating in a relatively "autonomous and self-contained way, and that their degree of interaction with other employees [was] limited" (at 2), and that they were a "cohesive group of employees who were used to having their terms and conditions of employment determined in a different way". A key distinction with the present case is that the pilots had a long-standing relationship with government in which the pilots had operated non-union and therefore had the terms of their employment determined in a different way while still providing services to the government. Therefore, when the most recent description of the bargaining unit was drafted, the parties had "considered [the pilots] excluded as outside contractors".

[128] The Board is very aware of the remaining language of the cited paragraphs, including the Board's suggestion that the circumstances in *Fire Bomber Pilots* were "analogous to the acquisition of a business". The Board recognizes that this statement might be taken to imply that circumstances involving "acquisitions" are distinct from the circumstances described in the excerpts of *Wascana Rehabilitation Centre* that deal with the three methods. The Board has borne this statement in mind in reviewing the balance of the case law, as follows.

[129] The Employer says that recent case law has expanded on the third method and, in doing so, has confirmed that previously unrepresented employees cannot be added to a bargaining unit without evidence of their support for the union. To assess this argument, it is necessary to carefully consider the case law upon which the Employer relies.

[130] First, the Employer relies on *CUPE, Local 4799 v Horizon School Division No. 205 (2007)*, 144 CLRBR (2d) 271 (Sask LRB) [*Horizon School Division*]. There, the Board declined to sweep

the unrepresented employees into the existing bargaining units or into a consolidated unit on the basis of the evidence presented. The Board observed at paragraph 109 that, “where it is sought to add a significant number of employees to existing bargaining units or a consolidated unit, we are of the opinion that in the absence of evidence of their wishes, it is not appropriate to sweep them in”.

[131] The background to this case is important. Horizon *School Division* came about after the provincial government had instituted a compulsory general restructuring of the public boards of education and their school divisions across the province. The Horizon School Division was created by the amalgamation of six smaller school divisions, which were referred to as the legacy school divisions, and was therefore a new entity. Six CUPE locals were certified as the collective bargaining agents for certain support staff units of employees of the legacy school divisions. There was no certified bargaining unit of employees in one of the legacy school divisions. A new union local was created as a result of the merger and transfer of obligations of the locals for the legacy school divisions.

[132] As a result of this restructuring, the union applied to the Board for a declaration recognizing it as the bargaining agent for the six bargaining units previously represented by the locals, an employer successorship declaration, and an order that the support staff employees of the employer constituted a single all employee unit, and that the union represented a majority of the employees in the unit. Included in the union’s request for relief was a request for an order making amendments to the certification orders and collective agreements.

[133] Among the employees sought to be represented were 155 non-unionized employees, comprising nearly one-third of the employees sought to be represented by the union. Neither of the parties had sought to have a representation vote of any of the constituencies. The Board found that it was appropriate to consolidate the existing bargaining units, but held at paragraph 109 that it was not appropriate to sweep those employees into the bargaining unit:

> *[109] In the present case, where it is sought to add a significant number of employees to existing bargaining units or a consolidated unit, we are of the opinion that in the absence of evidence of their wishes, it is not appropriate to sweep them in. This is in accordance with the Board’s long-standing historical position and what we consider to be the interpretation of s. 37 (2) in light of s. 3 of the Act and the overarching principle of employee choice. Had the legislature, in consolidating the many school divisions as at January 1, 2006, seen fit to establish a “Dorsey-style” solution to the bargaining unit configurations and labour relations complexities resulting therefrom it could easily have done so. But it did not and so we have determined to essentially follow the same path taken by the Board when health care was reorganized prior to the Dorsey Report and to allow the parties to*

> *sort out the problems themselves through the collective bargaining process with such guidance as they may seek from the Board from time to time.*
>
> *[110] Accordingly, we decline to sweep the presently unrepresented employees into the existing bargaining units or a consolidated unit on the basis of the evidence presently before us.*

[134] Because of the absence of any submissions from the parties on a vote, the Board reserved its discretion whether to order a representation vote. As the Board explained at paragraph 105, one of the requirements or criterion when it is sought to include previously unrepresented employees in existing bargaining units, is that "the wishes of such employees be canvassed before the unit is reshaped".

[135] Next, the Employer relies on *Prairie South School Division No. 210, Re (2008)*, 189 CLRBR (2d) 150 (Sask LRB) [*Prairie South*]. This case also dealt with the aftermath of the restructuring of education in the public system. The Prairie South School Division was created through the amalgamation of five smaller school divisions and portions of two other school divisions. The union brought the application for an all-employee unit under the successorship provisions. The union filed support from both the existing group of represented employees, as well as some of the accretive employees, but did not provide direct evidence of majority support from the latter group. It could not be concluded that a majority of the non-union employees supported the union. The Board declined to sweep the employees into the bargaining unit.

[136] The Board relied on the holding in *Horizon* and decided to declare that the employer and the union were successors to their predecessors, and amended the certification orders to reflect the successorships. The Board remained seized with the option of ordering a representation vote should the parties so desire. Member Wagner dissented, finding that the union had filed sufficient evidence of majority support.

[137] The application for judicial review of *Prairie South* was refused, and that refusal was affirmed: 2010 SKQB 77, 353 Sask R 235; 2011 SKCA 54, 371 Sask R 224. In the Court of Appeal's reasons, Jackson J.A. explained:

> *15 The Board had concerns about declaring the larger unit the appropriate bargaining unit in this case because such a declaration would draw into the unit non-unionized employees who had been historically excluded from the ambit of the existing units and agreements. On this point, the Board followed its earlier decision in [Horizon School Division].*
>
> *…*
>
> *17…After concluding that it was necessary to determine the wishes of the unorganized employees, before determining the appropriate bargaining unit, the Board in Horizon recognized that conflict is the inevitable result when unionized and non-unionized*

> *employees work side by side with the same job description. The way out of the difficulty would be to present evidence of support for unionization from the non-unionized employees in one way or another…*

[138] Again, the holding in *Prairie South* was premised on the required "reshaping" of the bargaining unit arising from the creation of the new entity and resulting successorship.

[139] Similarly, in *Communications Energy and Paperwork's Union v Saskatchewan*, [2002] SLBRD No 62, the union had made a successorship application resulting from the creation of a new Treasury Board Crown Corporation and its assumption of the functions and work previously performed by three different entities. The Board decided a vote was not necessary because of the small number of previously unrepresented employees that were now employees of the new entity. Being a successorship case, the Board's application of the relevant intermingling principles was appropriate.

[140] The Employer argues that the fact that the Watrous and Hepburn employees were employed and unrepresented prior to the amalgamation distinguishes these circumstances from circumstances in which the Union has successfully relied upon an all-employee certification order to hold that newly created positions fall within the scope of that order: for example, *UFCW Local 1400 v Westfair Foods Inc.* (2007), 140 CLRBR (2d) 143 (Sask LRB) [*Westfair Foods*].

[141] In *Westfair Foods*, the employer had created new positions since the initial certification orders were issued, and therefore, the Board found that the employees were covered by the union security clause. The union was certified to represent all employee units, with certain named exceptions, of certain divisions of the employer. The employer argued that the positions were employed by a division that had never been certified. The Board found that the positions were sufficiently integrated into the divisions at which they were working to be considered a part of the bargaining unit (para 68). The Employer argues that, unlike in *Westfair Foods*, the Watrous and Hepburn employees are employed in positions that pre-exist amalgamation.

[142] The Board in *Westfair Foods* relied on the principles set out in *UFCW, Local 1400 v Inner-Tec Security Consultants Ltd*., (December 1, 1994), Doc 089-94 (Sask LRB) [1994] 4th Quarter Sask Labour Rep 183, LRB File No 089-94 [*Inner-Tec Security*]. In *Inner-Tec Security*, the Board was asked to determine whether the employees of an uncertified business, which had recently been acquired by Inner-Tec Security, were within the scope of the bargaining unit represented by the union. The bargaining unit was defined in the certification order as including "employees of

[Inner-Tech Security Consultants Ltd.] 'operating under the business name of Inner-Tec Security Services'" (*Westfair* at para 66).

[143] A review of *Inner-Tec Security* reveals that the Board identified with some clarity the first issue that was to be determined and held that, if the employees of the acquired business were employed within the bargaining unit outlined in the certification order, then the employer would be obligated to recognize the union as their representative, at 4:

> *The first issue to determine is whether following the sale the Argus employees became employees of ITSC Ltd. and were employed within the bargaining unit set forth in the Union's certification order. The bargaining unit is defined in the certification order as including only those employees of ITSC Ltd. "operating under the business name of Inner-Tec Security Services." If the employees are employees of ITSC "operating, under the name of Inner-Tec Security Services," then ITSC Ltd. must recognize the Union as the representative of these employees. If the Argus employees are not employed by the business which operates under the name ITSS then this part of the Union's application must be dismissed.*

[144] The Board in *Inner-Tec Security* analyzed the issue according to the principles from *Micro-Data Consulting Services*, [1992] 1st Quarter Sask Labour Rep 35, LRB File No. 172-90 [*Micro-Data Consulting*] (187 and 188). *Westfair Foods* includes a large excerpt from *Micro-Data Consulting*, of which the following is only the first paragraph:

> *Applying these principles to this case, for the Union to gain representation rights over the 70 Argus employees without regard to their wishes, the Union must establish two facts. First, the Union must establish that the Argus employees became employees of ITSC Ltd. Second, the Union must establish that they were employed within the classifications, geographic boundaries or other words in the certification order which define the extent of the Union's bargaining rights. In this case the Union is certified for all employees and for the entire Province, so the only words of limitation are the ones which limit the bargaining unit to employees of ITSC Ltd. "operating under the name Inner-Tec Security Services."*

[145] The Board confirmed the importance of the reality, as opposed to the form, of the employment relationship and proceeded to consider that relationship, finding that the employees of the acquired business had little to do with the Inner-Tec Security employees and that the business continued to operate as a separate entity. Therefore, there was no reason to deprive the employees of their right to choose whether to be represented. The Board's decision turned on its factual findings with respect to the operation of the acquired business:

> *To the general public, the customers and the employees of the two security businesses, there would be little in the outward appearance or conduct of the two businesses to suggest that one had been purchased by the other or that anything had changed as a result. …*

> *…A finding that leads to such a result will not be made lightly and in this case cannot be made as Argus and ITSS have not been integrated to the extent that the Argus employees are now operating "under the business name of Inner-Tec Security Services".*

[146] In *Inner-Tec Security*, the acquired business continued to operate as a separate entity. For this reason, the employees did not fall under the scope of the certification order because it was limited to employees of the employer operating under the Inner-Tec name. While these circumstances set the case apart from the current case, the decision confirms the central role of the certification order and the scope as set out therein in defining the existing bargaining rights.

[147] In support of its argument that the Watrous and Hepburn employees are not automatically added to the bargaining unit "simply" because they "nominally" fall within the geographical scope of the certification order, the Employer relies on *UFCW Local 1400, v Saskatoon Credit Union Ltd. (2009)*, 167 CLRBR (2d) 155 (Sask LRB) [*Saskatoon Credit Union*]. In this case, the union was designated as the bargaining agent for a unit of employees of Saskatoon Credit Union Limited, Saskatoon Credit Union (2002), FirstSask Financial Group Inc., FirstSask Employee Services Inc., Canada Loan Administration Services Inc., and First Sask Mortgage Inc. "in their places of business located in Saskatoon, Saskatchewan and surrounding area". The union sought to amend a certification order pursuant to section 5(j) of *The Trade Union Act* to reflect a corporate restructuring, expand the geographic scope of the order from "Saskatoon and surrounding area" to "in the province of Saskatchewan", and to include a new list of exclusions.

[148] Until 2006, the Saskatoon Credit Union had seven branches, and other offices, all located in Saskatoon except for one in Warman. In 2006 or 2007, Saskatoon Credit Union merged with Langham Credit Union and Shellbrook Credit Union. The merger resulted in the formation of FirstSask Credit Union. A vote, not supervised by the Board, was conducted of the employees of the two new branches, separately. Langham voted to join the union and were "voluntarily recognized", and Shellbrook Credit Union voted not to join.

[149] In 2008, FirstSask Credit Union merged with Affinity Credit Union, which latter Credit Union consisted of branches in 23 rural locations, two Saskatoon branches, and three Regina branches. The employer and the union had entered into an agreement to the effect that new branches would be unionized; upon a successful union vote, the union would apply for a provincial certification; and, if the vote was not successful, the union would have the opportunity to organize in future mergers without the interference of the employer.

[150] At the time of the application, the parties were not in agreement as to the list of corporate entities that should be subject to the certification order. It became apparent through the evidence that the corporate history was complicated and the corporate changes had occurred to facilitate the mergers and comply with regulatory requirements.

[151] The union argued that, even if the application was not granted, many of the "add-on" employees were already covered by the certification order because their branches were within the existing geographic scope of the certification order, and thus a representation vote of these employees was not required. The union then argued that, after removing the employees within the geographic scope, the small number of add-on employees justified adding those employees without evidence of majority support.

[152] The Board dismissed the application, finding it defective, first, because the union did not present direct, acceptable evidence of support for the group of employees proposed to be added, and second, because the employer's consent to the amendment was required under the Act. The Board explained:

> *131 The Board is not prepared to accept the argument of the Union that it is "deemed" to enjoy the support of the majority of employees working in the legacy branches of the former Affinity Credit Union falling within the geographic scope of its existing certification Order nor is the Board prepared to sweep in the remaining employees outside of this region on the basis that their numbers are insufficient to warrant a representative vote.*
> *…*
>
> *133 Secondly, the Union did not apply to amend its certification Order to add previously unrepresented employees acquired by the Employer within the geographic scope of its existing certification Order; it applied to add a different; a larger group of employees. In the Board's opinion, the onus is on the Union to demonstrate majority support from that group of employees; the group of employees that it proposes be added to the existing certification Order.*

[153] The union had brought an application to amend the certification order to reflect the corporate restructuring and expand the geographical scope. The original certification did not include Affinity Credit Union. In its analysis, the Board characterized the application as an application to add employees to the bargaining unit. Paragraph 133 suggests that one option was to bring a successorship application. However, there was no successorship application before the Board and therefore one could not be determined. Instead, the union was asking the Board to accept the deemed support of the employees within the geographical scope of the certification order for the purpose of sweeping in other employees. This was clearly unacceptable. Besides, the "larger group" mentioned in paragraph 133 is the group outside the geographical scope.

[154] The Board's decision should not be taken to mean that the union was required to file an application to "add" employees who were covered by the geographical scope of the order, other than through a successorship application (leaving aside the question of evidence on the definition of "surrounding area"). And if there is any doubt, *Saskatoon Credit Union* does not analyze the question of automatic bargaining rights to an extent that is sufficient to draw conclusions about how it might have decided a different application. The decision turned on whether the union had brought the requisite support evidence, in a form acceptable to the Board, relevant for the application that was before the Board.[7] In considering the requisite evidence, the Board's starting point was the existing application.

[155] Next, the Employer relies on *RWDSU v Sunnyland Poultry Ltd.*, [1993] SLRBD No 43 [*Sunnyland Poultry*] for the proposition that when the Board has a "choice between two methods", one which permits employees to decide the representation question and one that does not, it should choose the method that allows the employees to express their wishes. Again, this was a case involving an application for an amendment to a certification order to cover groups of employees who had previously been excluded. The amendment that was sought would change the geographic scope from the Town of Wynyard to the Province of Saskatchewan. The issue was whether the union was required to demonstrate majority support among the group being added or whether it was sufficient to prove majority support in the overall "post-amendment" bargaining unit. The Board found that the union was required to demonstrate majority support of the add-on group.

[156] Although *Sunnyland Poultry* is not directly on point, the principle of employee choice is not to be overlooked. The holding in *Mounted Police Assn. of Ontario v Canada (Attorney General)*, 2015 SCC 1 underscores its importance:

> *85 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…*

[157] However, the Board should be reluctant to apply the principle of employee choice to defeat the existing scope of a valid and subsisting certification order. If the scope is clear, to inquire *post*

[7] The Board also found the employer's consent was required because the application was brought outside of the open period. The employer had not consented to the amendment.

facto into the wishes of the employees can have the effect of abridging the Union's rights and destabilizing the labour relations environment.

[158] On clarity of scope, the Union argues that *RWDSU v Saskatoon Co-op* is a complete answer to what is a straightforward issue. *RWDSU v Saskatoon Co-op* was a union successorship case involving UFCW (Local 1400), RWDSU, and Saskatoon Co-op. The issue was which union, as between UFCW and RWDSU, was the exclusive bargaining agent for employees at the recently acquired Circle Drive store. The background to the acquisition was this. In 2013 or 2014, Federated Co-operative Limited [FCL] had acquired a number of stores, among which was the Circle Drive store. The Saskatoon Co-op later acquired the assets of the Circle Drive store from its parent company, FCL.

[159] UFCW was certified to represent all of the employees at stores across the province pursuant to the predecessor certification order; whereas RWDSU was the certified bargaining agent of the employees at that store pursuant to an order of this Board. RWDSU brought an application for successor rights. UFCW intervened in that application due to the wording of its certification order which covered the province. The Board found that Saskatoon Co-op was a successor employer but decided to make an otherwise order to call for a vote to protect the right of the employees to choose their bargaining agent.

[160] The Board made the following findings of fact:

> *102 First, the facts on the ground support a finding of 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.*

[161] The Board also described 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* [sic] *dueling unions.*

[162] Thus, the UFCW had relied upon the subsistence of the existing certification order and the geographical coverage of that order as including the entire province of Saskatchewan. The Board had no trouble finding that it was dealing with a case of dual unionism, in part, because the existing

certification order for UFCW "plainly applies to all stores owned and operated by the Employer" including those "employees working at stores which the Employer acquires":

> *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.*

[163] The Board summarized the Employer's position as suggesting that the certification orders were conflictual "on their face", and that the certification of RWDSU would result in a carve-out from UFCW's province-wide certification:

> *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.*
>
> …
>
> *127 Fourth, relying on Roca Jack's Roasting House and Coffee Co., Re 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.*
>
> …
>
> *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.*

[164] Unlike the current case, the Board concluded that there were two unions competing for bargaining rights in relation to the Circle Drive store, and therefore it was necessary to employ the well-established "intermingling principles" to address the situation. RWDSU had represented employees at the Circle Drive store for decades. The Board found that it was necessary to consider the employees' choice of representative.

[165] This case is supportive of the Union's argument, that is, that it has a valid and subsisting certification order with provincial scope that applies to employees who are brought into the workplace through an acquisition. The issue of intermingling, which was relevant in *RWDSU v Saskatoon Co-op*, is not a relevant consideration in the current case.

[166] Finally, the Employer acknowledges that there is one Board decision that "could arguably support a claim that the Hepburn and Watrous employees should be characterized as having joined the UFCW Bargaining Unit at the time that those locations were acquired by the Saskatoon Co-op".[8] However, the Employer suggests that this case, which is known as *Micro-Data Consulting*, is of no jurisprudential value because it is anomalous, and simply wrongly decided.

[167] The Board in *Micro-Data Consulting* outlined three general scenarios that might arise in cases involving a certified business that acquires an uncertified business. The third scenario directly contemplates the facts that are in issue in the current case:

> *24 The third possibility is that, after the sale, the MSL employees were employed by Westbridge in classifications that brought them within the bargaining unit for which the applicant union is certified. In this situation, the principles are straightforward: if an employer brings non-unionized new employees into its unionized business and their functions include them within the scope of the bargaining unit, the employer must recognize the union as their lawful representative. In such circumstances, it matters not how the new employees come to the employer: whether they are hired in one's and two's off the street; whether they come in large numbers because of a major expansion; or, because the employer purchased a large competitor, the result is the same.*

[168] In our view, *Micro-Data Consulting* is not an anomalous case. The Board has adopted related reasoning in *Westfair Foods*, *Inner-Tec Security*, and *RWDSU v Saskatoon Co-op*.[9] It is supported by the well-established line of cases that uphold the validity and subsistence of an existing certification order. Many other cases, such as *Wascana Rehabilitation Centre* and *Prairie South*, demonstrate that where a bargaining unit needs to be reshaped then an application, accompanied by evidence of the majority support of the employees to be added to the bargaining unit, would usually be required.

[169] It is not always a straightforward matter to determine whether the existing circumstances justify the simple application of the union security provisions or whether the circumstances represent a redefinition or reshaping of the bargaining unit. *Fire Bomber Pilots* demonstrates that complex situations do arise. However, this is not a case like *Fire Bomber Pilots*, in which there

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[8] Employer's Brief at para 107.
[9] The Manitoba Board followed *Micro-Data Consulting* in *United Food and Commercial Workers Union, Local No. 832 v Red River Co-operative Ltd.*, 2020 CanLII 43057 (MB LB) at para 66.

was a pre-existing relationship and the acquisition of the business had placed the employees in a different position than employees who were hired into a bargaining unit in which they clearly belonged. Nor is this a case like *Saskatoon Credit Union*, in which the union argued that the majority support of the employees within the geographical scope should be deemed to exist and the remaining employees should be swept in. Furthermore, there is nothing in the language of the certification order or the CBA that suggests any lack of clarity around scope.

[170] Having made these determinations, the next question is whether there was an agreement to hold a vote and whether that agreement has a legal effect.

Notwithstanding the foregoing legal principles, was there an agreement to hold a representation vote with respect to Watrous and Hepburn? Have the parties set a precedent in the circumstances of the Colonsay Co-op?

[171] To begin, the witness testimony confirms that there was no representation vote of the employees of Colonsay. Despite this, the Employer says that it understood that there was to be a vote and that the conversation that took place in the summer of 2018 confirms this understanding. The Employer states that Colonsay was a much smaller transaction and yet the parties treated it as sufficient to trigger the requirement for a representation vote. The Employer operated according to that understanding for the months prior to the strike, during the strike, and during collective bargaining. The rural rates LOU only applied once affected employees had voted in favour of the Union.

[172] The Union failed to call individuals who would have knowledge of this understanding. The Union's failure to call these individuals should persuade the Board that the testimony would not have assisted the Union. The Employer asks the Board to draw an adverse inference against the Union: *Murray v Saskatoon*, [1952] 2 DLR 499 at 506.

[173] This argument needs to be addressed in context. The Union did call witnesses to disprove the Employer's assertion that a vote occurred, and did so effectively. It also called Neault. Neault was the President of the Union at the time of the Colonsay acquisition. It called Figueiredo. Figueiredo was in charge of the Union at the time of the strike. If there were any "understanding" one of these two witnesses would have known about it. They denied it. Neault's memory of the conversations was imperfect, but that did not compel the Union to call yet another witness. Neault and Wicks were operating at comparable levels within their organizations and both were called. Schultz, on the other hand, was allegedly reporting back to Wicks about the vote. Wicks believed

that a vote had occurred because of what she told him. Despite this, the Employer did not call Schultz.

[174] More importantly, the concept of an understanding, as it has been described, defies common sense. Saskatoon Co-op is a sophisticated employer. The notion that the Employer relied on an unwritten understanding that the Union would conduct its own vote of the employees of a newly acquired store, and not allow for any employer-side involvement or scrutiny, is at best misguided and at worst, implausible. It is difficult to understand how the Employer, at all material times, did not understand the mechanics of a representation vote, did not understand the extent of its role, did not understand that it should have been provided with an opportunity to scrutinize the vote and the tabulation, and did not understand that it should have been provided with the results of the vote, and then did not perform due diligence to gain some understanding. The exchange between Wicks and Neault about improper employer influence is not a sufficient explanation.

[175] Approximately six years earlier, the parties in *Saskatoon Credit Union* entered into a detailed written agreement to provide a limited degree of reliance on the results of a representation vote supervised by both the employer and the union.[10] And then, in 2009, the Board issued a decision, leaving no doubt as to whether it would accept the results of a vote that was not supervised by the Board:

> *[137] The Union asks the Board to accept, as evidence of support for the Union, the results of the vote conducted by the Employer and the Union as part of its voluntary recognition agreement. However, and with all due respect to the level of cooperation and effort demonstrated by this process, the Board is not prepared to accept the results of this vote for the purposes of the Act because the vote was not supervised by the Board and, thus, was not in compliance with the Act. In this regard, the Board notes that there was no evidence of inappropriate or objectionable conduct on the part of either the Employer or the Union associated with their vote or the information they provided to affected employees. Nonetheless, the vote did not comply with the requirements of the Act in a number of important respects…*

[176] The current legislative framework is clear. A secret ballot vote is required. The vote is to be supervised by the Board.

[177] The evidence leading up to and with respect to the Colonsay acquisition does not establish a mutual understanding or a legally binding agreement about that location or any other. The conversation with Neault did not result in an agreement. Nothing was ever formalized. Nothing

[10] Article 3.a) states, “Upon a successful union vote, the union will apply for a provincial certification.”

was in writing. Wicks' reliance on Schultz's communication about the vote is hearsay. His recollection about closing the store early is contradicted by Colonsay employees. Parish, in particular, was a very credible witness. For the store to have closed early it would have had to have happened on short notice and without her knowledge.

[178] The Board has also carefully considered the evidence of the Union's representation of the Watrous and Hepburn employees prior to the May 1 letter. The Watrous employees were not included in the strike vote, and none of the Watrous or Hepburn employees participated in the strike. The Union did not file a grievance. The Union did not raise the topic in collective bargaining and did not include the employees in the ratification vote. Even Orischuk suggested that the Union did not represent the employees at ratification and does not represent the employees now. This suggests that the Union did not prioritize the matter, and perhaps, that certain members did not fully understand the Union's rights and obligations, but it is not proof of an agreement not to enforce the union security clause.

[179] Finally, for estoppel to apply in these circumstances, the Employer is required to establish, at a minimum, that the Union had made a clear and unequivocal representation that was intended to, and did, affect the legal relations between the parties to the agreement. The evidence does not establish that the Union made a clear and unequivocal representation that a vote was to occur in Colonsay or in Watrous or Hepburn.

[180] In conclusion, the evidence does not displace the application of the clear geographical scope of the subsisting and valid certification order. The Union is not seeking to inappropriately extend its rights; it is seeking to preserve them. The Watrous and Hepburn employees are covered by the order and are included in the scope of the bargaining unit.

Did the Employer Commit an Unfair Labour Practice?

[181] The next question is whether the Employer has contravened section 6-43 of the Act. It is acknowledged that the Employer has not deducted union dues for the Watrous or Hepburn employees.

[182] It is well established that an employer's obligation to pay dues comes into effect on the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit. The Union has presented no evidence of a request in writing of an employee. The Employer relies on this fact to suggest that the Union has failed to prove a

contravention of section 6-43. For this proposition, the Employer relies on *CUPE Local 88 v St. Elizabeth's Hospital*, [1995] SLRBD No 55 [*St. Elizabeth's*], at 6-7:

> *Section 32 imposes upon an employer an obligation to deduct union dues from the wages of employees and to forward these sums to the trade union; according to Section 32(2), an employer commits an unfair labour practice by failing to carry out this responsibility. The obligation which is set out in Section 32(1) is contingent, however, on the submission of authorization for the deduction from both the trade union and the employee. The Union acknowledged in this case that they have never received any signed authorizations from the incumbents whose positions are in dispute.*
> *…*
> *There was no suggestion here that the Union had made efforts to assert a claim arising under Article 5.02 of the collective agreement for enforcement of the union security clause, and no cards had ever been signed by the incumbents in the disputed positions either applying for membership in the Union or authorizing the deduction of dues. In our view, there could therefore not be an unfair labour practice within the terms of Section 32.*

[183] The Employer also relies on *USW, Local 2014 v United Cabs Ltd*., 2019 CarswellSask 247, in which the Board confirmed that section 6-43 is not intended to apply automatically (para 110).

[184] In this case, the Union's application could have benefited from greater clarity, but it leaves no doubt as to what wrong is being alleged:

> *7. UFCW has requested Saskatoon Co-op to follow the terms of the collective agreement and provide the union cards, dues and other payments respecting the employees at the Hepburn and Watrous lcoations and it has refused to do so. On May 1, 2019, [Figueiredo] wrote to the Saskatoon Co-op requesting the maintenance of membership and dues and the Employer has failed to do so.*
>
> *8. Saskatoon Co-op has a duty to collect dues from employees and to pay them to UFCW with respect to all employees employed at both the Watrous and Hepburn locations, according to Section 6-43 of [the Act], after a written request is made.*

[185] The Union has filed the application pursuant to sections 6-43 and 6-62(1)(r) of the Act. Section 6-62(1)(r) states that it is an unfair labour practice for an employer to contravene an obligation, a prohibition or other provision of [Part VI] imposed on or applicable to an employer. Section 6-41 of the Act states that a person bound by a collective agreement must in accordance with the provisions of the collective agreement do everything the person is required to do. The Union relies on section 6-41 in its argument.

[186] Article 5 of the CBA sets out the scope clause. The Employer shall recognize the Union as the sole collective bargaining agent for the employees set out in the scope clause. Article 6 sets out the union security provisions which include an obligation on the Employer to provide the

union security card. In its application, the Union has made clear that it has requested the union security cards and the Employer has refused.

[187] Pursuant to subsection 6-43(3), the Employer has an obligation to provide names of the employees who have given their authority to have the dues paid to the Union. The Employer has refused to do so, in breach of its obligation to furnish information under the CBA and section 6-43.

[188] In *St. Elizabeth's*, the applicant union relied solely on section 32 of *The Trade Union Act*. The Board was prepared to consider the impact of section 36 of the Act, but found that the applicant's claim did not fall under either provision, and while the union may have had some other provision in mind, it had failed to state how the alleged wrong fit within the provisions of the Act.

[189] In our view, to dismiss the Union's application for the reasons as stated by the Employer would be to adopt an unduly technical approach. The absence of written authorizations is not the fault of the Union, but the fault of the Employer for not ensuring that the employees sign union security cards. The Employer has clearly refused to provide any maintenance of membership because it believed that the subject employees were not employees in the bargaining unit.

[190] Next, the Union alleges that the Employer's failure to deduct union dues constitutes a contravention of clause 6-62(1)(b) of the Act. If there is no obligation to deduct dues, then there can be no violation of this section. In our view, the failure to recognize the Union as the exclusive bargaining agent representing the employees at the Watrous and Hepburn stores is a clear violation of clause 6-62(1)(b).

[191] Next, the Union alleges that the Employer has contravened section 6-62(1)(d) of the Act. The Union argues that the Employer has demonstrated its complete disregard for the collective bargaining process and has failed to bargain in this case by taking an unreasonable position with respect to the Union's membership and refusing to engage that question in meaningful collective bargaining.

[192] The Board does not agree that the Union has demonstrated that the Employer breached clause 6-62(1)(d). First, the Union's argument with respect to this provision was superficial. Second, the evidence before the Board on collective bargaining is insufficient to establish such a breach. Furthermore, it appears that neither the Employer nor the Union raised the Watrous or Hepburn issues in collective bargaining.

[193] As mentioned, the parties have reserved with respect to the matter of damages. For the foregoing reasons, the Board makes the following Orders:

(a) A declaration that the Employer committed unfair labour practices contrary to sections 6-41, 6-43 and 6-62 of the Act; and

(b) An order requiring the Employer to cease, desist, and refrain from committing said unfair labour practices and contraventions of the Act.

[194] The Board will remain seized to deal with the matter of damages, including liability and quantum. For this purpose, either party may bring this matter back to the Board.

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

DATED at Regina, Saskatchewan, this **30th** day of **April, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson