SERVICE EMPLOYEES INTERNATIONAL UNION – WEST, Applicant v SASKATCHEWAN HEALTH AUTHORITY and EXTENDICARE (CANADA) INC., Respondents and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5430, Intervenors

LRB File Nos. 180-22, 181-22 and 182-22; November 30, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Phil Polsom and Grant Douziech

Counsel for the Applicant, Service Employees International Union - West:	Shannon Whyley
Counsel for the Respondent, Saskatchewan Health Authority:	Paul Clemens
For the Respondent, Extendicare Canada Inc.:	Not Participating
Counsel for the Intervenor, Saskatchewan Government and General Employees' Union:	Andrea C. Johnson and Jacob D. Zuk
For the Intervenor, Canadian Union of Public Employees, Local 5430:	Andrew Restall

Successorship Applications – Section 6-18 of *The Saskatchewan Employment Act* – Health Sector Labour Relations – Transfer of Former Extendicare Facilities to Saskatchewan Health Authority – Deemed Successorship.

***The Health Labour Relations Reorganization (Commissioner) Regulations* – Health Services Providers – Bargaining Units Based on Health Districts/Regions – Separate Extendicare Bargaining Units – Transfer of Facilities to Province.**

CUPE – Exclusive Bargaining Agent for Former Regina Qu'Appelle Health Region – Health Services Providers – Successor Employer and CUPE Seek An Otherwise Order Including Employees of Former Extendicare Facilities.

Request for Otherwise Order Granted – Smaller Units Absorbed into Larger Units.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to three successorship applications filed by SEIU-West [SEIU] in relation to the five long-term care homes formerly operated by Extendicare Canada Inc., located in Moose Jaw, Regina,

and Saskatoon, identified as LRB File Nos. 180-22, 181-22, and 182-22, respectively. SEIU is certified to represent the health services providers at all of these homes. There is a separate certification order for each of Extendicare/Moose Jaw in Moose Jaw, Extendicare/Preston in Saskatoon,[1] and Extendicare/Parkside in Regina, Extendicare/Sunset in Regina, and Extendicare/Elmview in Regina (a unit for each geographic area).[2]

[2] SEIU is also certified for all health services providers employed by Saskatoon Regional Health Authority and affiliates[3] and for all health services providers employed by Five Hills Regional Health Authority and affiliates.[4]

[3] On September 1, 2022, it was announced that an agreement in principle had been reached for the transition of the Extendicare facilities to the Saskatchewan Health Authority [SHA], effective October 9, 2022.

[4] The applications before the Board were filed pursuant to section 6-18 of *The Saskatchewan Employment Act* [the *SEA*]. Section 6-18 provides that, unless the Board orders otherwise, a person acquiring a business is bound by all Board orders and the orders continue as if the business had not been disposed of. If a union was determined by Board order to be the bargaining agent, the relevant order and any collective agreement in force at the time of the disposal are deemed to apply to the person acquiring the business.

[5] When the Board orders otherwise, such an order is known, predictably, as an "otherwise order". The SHA seeks an otherwise order involving CUPE, Local 5430 [CUPE]. CUPE has a certification order for all health services providers employed by Regina Qu'Appelle Regional Health Authority and affiliates.[5] The SHA asks the Board to order that the health services provider employees of all former Extendicare facilities located in Regina be integrated into the regional bargaining unit represented by CUPE.

[6] CUPE participates in LRB File No. 181-22 (Regina facilities) as a direct interest intervenor.[6] CUPE's request is consistent with the SHA's proposal in relation to the Regina-based employees.

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[1] LRB File Nos. 111-97 and 113-97. All certification orders are subject to specific exceptions.
[2] LRB File No. 109-97.
[3] LRB File No. 204-02.
[4] LRB File No. 097-16.
[5] LRB File No. 202-02.
[6] LRB File No. 197-22, Order, dated February 21, 2023.

[7] The SHA also seeks an otherwise order incorporating SEIU's former Extendicare bargaining units located in Moose Jaw and Saskatoon into the regional bargaining units.

[8] SEIU opposes the requests for otherwise orders, seeks the continuation of its bargaining rights and the preservation of the units specific to the Extendicare locations.

[9] SGEU participates as an exceptional status intervenor in LRB File No. 181-22 to provide argument.[7] SGEU supports the position taken by SEIU.

[10] For the following reasons, the Board has decided to grant the otherwise orders requested by the SHA.

Background and Evidence:

[11] The following is a summary of the evidence and the relevant legislative history.

[12] The Board heard from six witnesses in total: Teena Foote, Barbara Cape, and William Laurie on behalf of SEIU; Kevin Zimmerman and Deborah Sinnett on behalf of the SHA; and Lori Sutherland on behalf of CUPE.

[13] Foote has been employed at Extendicare Sunset since 2002 and is a member of SEIU. Cape is the President of SEIU and has been a member since 1994. She has a significant history with successively more senior roles within the organization. In 1996/97 when she first became a shop steward, she was an employee of Parkside Extendicare. Laurie is the Director of Contract Bargaining and Enforcement for SEIU. He has served in that role since 2008. He started working for SEIU in 1997.

[14] Zimmerman is the Executive Director of Labour and Employee Relations with the SHA. Sinnett is the Executive Director of Continuing Care for the Regina area with the SHA.

[15] Sutherland is a CUPE National Servicing Representative.

[16] SEIU, in different incarnations, has represented employees of the Extendicare facilities and its predecessors since the late 1960s and early 1970s. The order certifying the Service Employees International Union, Local Union No. 299 for the Regina-based Extendicare employees is dated July 5, 1972.[8]

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[7] LRB File No. 001-23, Order, dated February 21, 2023.
[8] LRB File No. 028-72.

[17] The structure of health care in Saskatchewan has undergone many changes since the 1970s. In 1990, the Murray Commission wrote a report on health care restructuring that resulted in the creation of 32 health districts (in addition to the Athabasca Health Authority). The health districts were formed in 1992 and remained in place until 2002.

[18] In the 1990s, the Government of Saskatchewan established a commission led by Commissioner James E. Dorsey to examine the organization of labour relations between health sector employers and employees in Saskatchewan [Dorsey Commission]. The Commissioner was to be appointed by the minister pursuant to *The Health Labour Relations Reorganization Act*, SS 1996, c H-0.03 [*Reorganization Act*].

[19] The *Reorganization Act* required that the Commissioner make regulations "reorganizing labour relations between health sector employers and employees and resolving issues arising out of that reorganization".[9] It also defined "health sector employer" (including a district health board and "a special-care home licensed pursuant to *The Housing and Special-care Homes Act*").[10] Although there was no evidence presented as to whether Extendicare was licensed as such, it is safe to assume that it fell under this latter category. The Commissioner's mandate was to examine the organization of labour relations "between health sector employers and employees" (not any other entities).[11]

[20] In 1997, the Dorsey Commission issued its report, along with *The Health Labour Relations Reorganization (Commissioner) Regulations*, RRS 1997, c H-0.03 Reg 1 [*Dorsey Regulations*]. These Regulations remain in force under the *SEA*, as do the certification orders made pursuant to the *Reorganization Act*.[12]

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[9] Section 6, *The Health Labour Relations Reorganization Act*, SS 1996, c H-0.03.
[10] Clause 2(1)(f), *The Health Labour Relations Reorganization Act*, SS 1996, c H-0.03.
[11] Section 5, *The Health Labour Relations Reorganization Act*, SS 1996, c H-0.03. Note that Extendicare was not prescribed.
[12] *The Reorganization Act* was repealed by Chapter S-15.1 of the Statutes of Saskatchewan, 2013, effective April 29, 2014. The *Dorsey Regulations* were not repealed but are continued under the *SEA*. Subsection 2-8(8) of *The Legislation Act* states:

> ***2-8*** *(8) A statutory instrument enacted pursuant to a former enactment remains in force and is deemed to have been enacted pursuant to the new enactment insofar as it is authorized by and not inconsistent with the new enactment.*

The Lieutenant Governor in Council has broad regulation-making power, including expressly with respect to Division 14 of Part VI. As explained by Pierre-Andre Cote, "if the new provision allows for regulations, then the earlier regulations remain in force to the extent that they are compatible with the enabling provisions and the rest of the statute:" Cote, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thomson Reuters, 2011) [*Cote*] at 114.

Section 6-127 of the *SEA*, which applies to the *Reorganization Act*, includes the following relevant subsections:

[21] The Report comes with an express caveat that it "is not designed to interpret the legislation" and "is not intended to be used in court".[13]

[22] The *Dorsey Regulations* define certain categories of employees in the health sector and establish appropriate bargaining units related to those categories. The category of employees subject to the current applications is "health services provider", defined at section 2:

> ***2*** *In these regulations:*
>
> *…*
>
> *(g)* ***"health services provider"*** *means an employee of a health sector employer, but does not include a health support practitioner, a nurse, a chiropodist, a chiropractor, a dentist, a duly qualified medical practitioner or an optometrist;*

[23] "Health support practitioner" is also a defined term in the *Dorsey Regulations* but is not subject to the present applications.

[24] One multi-employer bargaining unit per health district was established comprising all health services provider employees employed by the district health board and their affiliates. The Regulations assigned "trade unions" to health sector employees on the basis of health district. CUPE was assigned to Regina; SEIU was assigned to Saskatoon and Moose Jaw.

[25] The Dorsey Report commented that,

> *Some of the health services providers units are overwhelmingly represented by SEIU or CUPE and should remain that way. Examples are Regina and Saskatoon. For others, some rationalization is required. These considerations are reflected in the reorganization of representation rights affecting CUPE and SEIU.*[14]

[26] The trade union assignments are set out in Table D of the *Dorsey Regulations*. Section 7 of the *Dorsey Regulations* makes clear that where a union was not assigned, a representation vote was to be conducted:

> *7(1) The trade unions listed in column 2 of Table D are determined as the trade unions to represent health sector employees for the purposes of bargaining collectively with respect to the appropriate units listed in column 1 of Table D opposite the name of the trade union.*

> (3) Every order, declaration, approval and decision of the board made pursuant to the former Acts continues in force as if made by the board pursuant to this Part and may be enforced and otherwise dealt with as if made pursuant to this Part.

[13] *Dorsey Report*, Prologue.
[14] *Dorsey Report*, at 83.

> *(2) As soon as possible after the coming into force of these regulations, the board shall conduct representation votes, in accordance with The Trade Union Act, for any appropriate unit that does not have a trade union determined pursuant to subsection (1).*

[27] SAHO was designated as the representative employers' organization (REO) for these purposes and the health sector employers were to be members of SAHO.

[28] Extendicare was excluded from the health district assignments. There was to be one appropriate unit for health services providers in each of the Extendicare locations and Extendicare was required to bargain on its own behalf. Not much was said in the Dorsey Report about this situation, except the following:[15]

> *There are only two health sector employers which are private for profit shareholder corporations. Both are affiliates in the districts where they operate homes. Extendicare (Canada) Inc. operates three special care homes in the Regina Health District, one in Saskatoon Health District and one in Moose Jaw/Thunder Creek Health District. It has provincial, multi-site collective agreements with SEIU and SUN. Chantelle Management operates one home in the Swift Current Health District. It has collective agreements with SEIU and SUN.*
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> *Because of their distinct minority and unique status as private for profit employers, each of these employers and their employees will be excluded from the multiemployer unit configuration which includes districts and affiliates. There will be two bargaining units at each – a unit for nurses and one for all other employees. The three nurse and the three all other employee units of Extendicare (Canada) Inc. in Regina will be consolidated into two units. There will be one provincial collective agreement for the resulting three nurse and three all other employee units in Regina, Saskatoon and Moose Jaw. SAHO will not be designated as the bargaining agent for either Chantelle Management or Extendicare (Canada) Inc. They will continue to conduct their own collective bargaining.*

[29] The Report's only other direct mention of Extendicare is:[16]

> *While integration holds the promise of improved, cost effective service delivery for the public funded health services, it means diminished autonomy for the affiliates. This commission's regulations further this loss of autonomy. As a result, the affiliates' relationship to the central health care employer agency, Saskatchewan Association of Health Organizations, will require further definition.*
>
> *Organizational and service patterns are not, and will not be, contained within, nor confined to, the geographic areas of the districts. Some health districts, like the large urban ones, supply services to other districts. Some affiliates, like Extendicare (Canada) Inc., are affiliated with more than one district. Some districts are partners in shared service providers like the North Saskatchewan Laundry and Support Services Ltd. Some contract service providers contract with more than one district.*
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> *Some of the public health services formerly provided by the provincial government are delivered on a service area basis. There are ten service areas among the 30 districts.*

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[15] *Dorsey Report*, at 65-6.
[16] *Dorsey Report*, at 16-7.

> *These service areas have coterminous boundaries with the districts and a contiguous landmass. They are self sufficient in these services, reflect trading and service patterns and accommodate the minimum relocation of devolved program staff.*
>
> *The regional structure for service delivery is intended to be flexible and adaptable to local priorities and to achieve integration in ways that have not yet been tried or even planned.*

[30] Although there was a separate bargaining unit for each of the Extendicare locations[17], one collective bargaining agreement [CBA] was to be negotiated for units represented by the same union. This requirement is set out at section 13 of the *Dorsey Regulations*:

> *13(1) Where a trade union represents health sector employees in more than one appropriate unit prescribed by section 3 or 5, the representative employers' association and the trade union shall negotiate one collective bargaining agreement that applies to all those appropriate units.*
>
> *(2) For the purposes of this section, Locals 299, 333 and 336 of the Service Employees International Union are deemed to be one trade union.*

[31] Section 13 clearly applies to the Extendicare units. It mandates one CBA for unions representing health sector employees in more than one appropriate unit prescribed by section 5. Health sector employees include providers who are included in an appropriate unit, not exclusive to health districts. Section 13 does not exclude from the single agreement structure any units, such as those prescribed by subsection 5(4).

[32] In addition, the use of the phrase "representative employers' association" is used only in section 7 of the Regulations – as distinct from the repeated use of "representative employers' organization". Applying the presumption of consistent expression ("different words have different meanings")[18], "representative employers' association" is intended to have a different meaning from "representative employers' organization" for the purposes of section 13.[19] This suggests that the one CBA structure applies not only to the health districts but also to the Extendicare bargaining units, who are not subject to the representative employers' organization, but may come together in an association.

[33] In addition to the *Dorsey Regulations*, the Lieutenant Governor in Council made regulations entitled *The Health Labour Relations Reorganization Regulations*, RRS 1997, c H-

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[17] On a geographic basis.
[18] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) [*Sullivan*] at 8.32.
[19] Unlike "representative employers' organization", there is no definition in the Regulations of the term "representative employers' association".

0.03 Reg 2 [*Reorganization Regulations*]. Section 4.1 of these Regulations, which remain in force, state:

> ***4.1*** *For the purposes of carrying out the intent of the Act, the board may make orders pursuant to clauses 5(a), (j) and (k) of The Trade Union Act determining a multi-employer unit to be an appropriate unit for the purpose of bargaining collectively.*

[34] The aforementioned provisions of *The Trade Union Act* (since repealed) provide for determinations of appropriate units, amendments of orders, and rescissions.

[35] In June 2000, then Premier Roy Romanow appointed the Commission on Medicare to identify key challenges in reforming and improving Medicare, recommend an action plan for the delivery of health care services, and make recommendations. The Commission was led by Commissioner Kenneth J. Fyke. In April 2001, the Fyke Report was released with recommendations for reducing the number of health districts. The Report commented on the benefits of districts:[20]

> *Health districts ensure that the different parts of the health system – acute care hospitals, home care, long term care, public health, mental health programs – are more integrated and coordinated at the local level. The result is better service to the people of Saskatchewan.*

[36] The move to fewer districts was recommended for many reasons, including avoiding overlap, duplication, and inefficiency.[21]

[37] As a result of this report, the health districts were combined to become health regions, for a total of 12 (plus Athabasca). Legislative changes were required. In 2002, the *Reorganization Act* was amended to refer to health regions and regional health authorities. Clause 11.1(f) states that a "health sector employer" includes a regional health authority (in Part III of that Act). Pursuant to the amendments, the Board was required to rescind the existing orders and to make new orders creating multi-employer appropriate units for health services providers for each of the regions. If one of the unions represented a clear majority of the employees then it would be certified. Otherwise, votes were required (unless agreement was reached).

[38] As such, the representation boundaries came to follow the boundaries of the health authorities/regions.

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[20] *Fyke Report*, at 55.
[21] *Fyke Report*, at 56.

[39] Again, this restructuring explicitly did not apply to Extendicare. The Extendicare facilities were still operated by a for-profit corporation.

[40] In the late 1990s, there was a movement towards the standardization of positions across the provider union bargaining units. After the process of standardization was completed in 2003, the Joint Job Evaluation Maintenance Committee (JJEMC) was created. In November 2006, an agreement was reached to allow Extendicare to participate in the Joint Job Evaluation (JJE) Plan with the provider unions. In this agreement, SEIU recognized SAHO as Extendicare's REO for the JJE Plan. Since the agreement was reached in 2006, SAHO has represented Extendicare in relation to the JJE Plan.

[41] On April 1, 2012, the Regina Qu'Appelle Regional Health Authority entered into a Principles and Services Agreement with Extendicare (Canada) Inc. for the delivery of services and funding. These agreements are in place for all third-party organizations that provide services within the SHA.

[42] In 2014, with the enactment of the *SEA*, the *Reorganization Act* was repealed and the definition of "health sector employer" was changed to mean the regional health authority, the Saskatchewan Cancer Agency, and a prescribed person. At that point, pursuant to an amendment made to the *Reorganization Regulations* in 2012, all health sector employers were required to bargain through SAHO.[22] Extendicare was not prescribed in those Regulations.

[43] In 2016, the Saskatchewan Advisory Panel on Health System Structure was appointed. Its mandate was to recommend a structure with fewer regional health authorities to achieve administrative efficiencies and improvements in patient care. In its report (also issued in 2016), the Panel recommended a single provincial health authority with health care organizations, including affiliates, to be contracted through and accountable to that authority.

[44] Then, in 2017, the Legislature enacted *The Provincial Health Authority Act*, SS 2017, c P-30.3 [*PHA Act*] amalgamating the regional health authorities. The definition of "health sector employer" in the *SEA* was amended from "regional health authority" to "provincial health authority".

[45] Pursuant to subsection 1-3(3) of the *PHA Act*, when applying another enactment to a matter governed by the *PHA Act*, references in other enactments to districts or regions are

[22] Section 2.1, the *Reorganization Regulations*.

deemed to be a reference to the SHA unless the context requires otherwise. Pursuant to clause 3-4(4)(a) of the *PHA Act*, the SHA is substituted for any regional health authority with respect to any collective agreements. In other words, the regional jurisdictions of the three health providers unions were unchanged with the creation of the SHA.

[46] The regional structure of bargaining is reflected in the relevant CBAs. The provider unions and SAHO have entered into Letter of Understanding (LOU) with respect to the application of existing CBAs to the SHA. The LOU provides for a process whereby the parties meet to discuss "organized and orderly procedures to protect the rights of all parties" and for coming "to a common agreement on an understanding of how the collective agreement(s) provisions will be applied within the SHA".

[47] Appendix 1 to the CUPE CBA lists the employers and locals that are covered.[23] The references to each of the former health regions have been replaced with references to the SHA and a CUPE region number. What were health regions are now considered "CUPE regions", per the CBA. The SEIU/SAHO agreement (covering April 1, 2017 to March 31, 2022; and April 1, 2022 to March 23, 2023) continues to refer to Regional Health Authorities.

[48] Furthermore, in 2017, the provider unions entered into a Letter of Intent [LOI] not to interfere with the jurisdictional or representation rights of any party and to negotiate the formation of an entity with an independent constitution to enable the parties to negotiate a common CBA with the SHA. The LOI, of course, was entered into before the Extendicare facilities were transferred to the SHA as owner.

[49] The Saskatchewan Association of Health Services Provider Unions Constitution was entered into on November 29, 2019. The Association is expressly composed of the health services providers employed by the former health regions and affiliates. Among its purposes are:

> *2.1 To have exclusive jurisdiction to bargain a single collective agreement with common terms and conditions, allowing for variances, covering all employees in the health services provider bargaining units described above, employed by the Saskatchewan Health Authority and represented by the constituent unions.*

[50] The jurisdiction of the Association is "limited and restricted to such areas as defined within the collective agreement, the constitution of the Association, and Division 14 of *The Saskatchewan Employment Act*, together with *The Provincial Health Authority Act*".

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[23] *CUPE-SAHO CBA*, April 1, 2022 to March 31, 2023, at 135.

[51] Extendicare is not included.

[52] The SHA (through SAHO or otherwise) has not recognized the Association.

[53] The provider unions also entered into LOUs with the SHA and SAHO. The LOU with SEIU states:

> *SAHO, the SHA and the Provider Unions (CUPE, SEIU-West & SGEU) agree that there is a need for labour relations stability in the health care sector as a result of the creation of the Saskatchewan Health Authority.*
>
> *SAHO and the SHA agree to a moratorium on initiating any application for an action or decision of the Saskatchewan Labour Relations Board (SLRB) that would affect, modify or change in any way, the current geographic boundaries and bargaining unit structure as described in the Provider Union certification orders as of August 1, 2017.*
>
> *The Provider Unions agree to maintain the current bargaining unit structure for the duration of this Letter of Understanding.*
>
> *The parties agree to commence discussions and/or negotiations to reach a single Collective Bargaining Agreement with common terms and conditions, allowing for variances as agreed to by the parties on or before March 31, 2021. These discussions and/or negotiations will not prejudice the parties' rights under The Saskatchewan Employment Act.*
>
> *This Letter of Understanding does not apply to any applications that may be made to the SLRB respecting the transferring of employees from other Employers into the SHA who were not previously part of the SHA or its predecessor Regional Health Authorities. The terms of this Letter of Understanding apply to preserve the status quo of the existing geographic boundaries and existing Bargaining Unit structure.*
>
> *This Letter of Understanding shall remain in force and effect until March 31, 2022.*
>
> *This Letter of Understanding is independent of the Collective Bargaining Agreements and may be renewed by the parties.*

[54] The LOU with CUPE was similar, however, it recognized that the parties were in the middle of negotiations, and it remained in force only until December 1, 2021.

[55] On March 17, 2020, Saskatchewan reported its first presumptive case of COVID-19. A state of emergency was declared in the Province on March 18, 2020. On November 20, 2020, a COVID-19 outbreak was declared at Extendicare Parkside facility, one of three Extendicare facilities located in Regina. By the end of the outbreak, 194 of the 198 residents tested positive and 39 residents had died of the virus.[24]

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[24] Ombudsman Saskatchewan, "Caring in Crisis: An investigation into the response to the COVID-19 outbreak at Extendicare Parkside", Public Report, August 2021 [Ombudsman's Report] at 3.

[56] On December 8, 2020, Extendicare (Canada) Inc. and the SHA entered into a co-management agreement.

[57] Due to the outbreak, there was a call for additional staff from outside of the existing bargaining unit. Critically, there was no continuity plan that would have allowed for the employment or contracting of external health services providers in a pandemic.[25] A series of emails were exchanged between the SHA and CUPE leadership about the terms under which the CUPE members would volunteer to work in the facility. To underscore the seriousness of the situation, CUPE leadership (apparently concerned about the employees' safety) communicated to the SHA's representative that the SHA did not have a basis to require its members to work at Parkside:

> *…The principles we put forward are what we require to be in agreement to our members going to work there. We were not asking for the SHA to choose what parameters they agree to. We do not believe that you have a basis in the collective agreement or the temporary LOU to move workers to another Employer's facility outside of those agreements. We are willing to test that if we have to.*
>
> *We are trying to work with you to ensure that this can happen and happen safety and fairly.*
> *…*

[58] On January 29, 2021, the Ombudsman was asked to investigate and report on the circumstances of the outbreak. In response, the Ombudsman advised that it would investigate "Extendicare Parkside's handling and response to the COVID-19 pandemic and outbreak, as well as the SHA's and the Ministry of Health's oversight of Extendicare Parkside and their support of its handling of the outbreak". Notably, the Ombudsman explained that it was not within the organization's mandate to "comment on or recommend what public services and programs the government will provide or how it should allocate public money".[26] As a result of its investigation, the Ombudsman made recommendations to Extendicare (Canada) Inc. and to the SHA.[27]

[59] On October 14, 2021, it was announced that the SHA would be taking responsibility for all of Extendicare's long-term care homes, and that they would continue to work "within the co-management agreement" that was in place. It was also stated that, "[a]t this time staff will continue to work under their [CBAs] negotiated with Extendicare". On September 1, 2022, the SHA announced an agreement in principle, effective October 9, 2022, with respect to the transition.

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[25] And at the time of the hearing, the testimony of Zimmerman suggested that there was not a continuity plan for a future pandemic either.
[26] *Ombudsman's Report*, at 4.
[27] *Ombudsman's Report*, at 4, 114, 115.

The SHA confirmed that "it will assume responsibility for the collective bargaining agreements and unionized employees as of the transition date" and that "[t]his approach will ensure our goal of a smooth transition with few changes for residents".

[60] A Master Transfer Agreement was entered into on October 6, 2022. A few provisions of the agreement stand out. First, in the preamble:

> *Whereas, Purchaser shall become the successor employer to the Vendor pursuant to certification orders 108-97; 109-97; 110-97; 111-97; 112-97 and 113-97 of the Saskatchewan Labour Relations Board , all dated March 14th, 1997 and operation of The Saskatchewan Employment Act;*

[61] And then, clause 4.17(d):

> *Except as set forth in Schedule 4.17(b) of the Disclosure Schedules, Vendor is not currently, and has not been, a party to any Collective Agreement. Except pursuant to a Collective Agreement, no trade union, council of trade unions, employee bargaining agency or affiliated bargaining agent holds bargaining rights with respect to any of the Transferring Employees including by way of certification, interim certification, voluntary recognition, related employer or successor employer rights, or, to the Vendor's knowledge, has applied or threatened to apply to be certified as the bargaining agent of any of the Transferring Employees.*

[62] On October 11, 2022, in a letter from the SHA to the employees, the SHA wrote:

> *…Our goal is to make your transition to SHA as seamless as possible. The successorship process has provided that stability and continuity, as did having the majority of non-unionized staff transition to SHA.*

[63] Then, on November 17, 2022, counsel for CUPE wrote to the SHA outlining its position:

- *That all health services providers employed by the SHA in the former Regina Qu'Appelle Health Region are CUPE employees;*
- *That the SHA was aware of this fact given the transition of SGEU employees of the Roy Romanow Provincial Laboratory [RRPL] to CUPE with the takeover of the lab by the SHA*

[64] At this juncture, it is worth noting that the transfer of RRPL employees from SGEU to CUPE was governed by an agreement signed by representatives of the SHA, CUPE, and SGEU, dated August 18, 2020.

[65] When the SHA did not commit to providing support for its successorship, SEIU filed the applications to assert its successorship rights.

[66] Due to the transition from Extendicare, there were a number of administrative matters, such as back-office systems, that needed to be addressed, with which SEIU was involved.

[67] As of 2022/23, there were approximately 13,186 CUPE employees, 10,710 SEIU employees, and 1,745 SGEU employees working for the SHA. Both CUPE's and SEIU's numbers have increased since 2018, SEIU by approximately 1,000 employees and CUPE by approximately 500. In the former Regina Qu'Appelle Health Region, CUPE has 6,333 members; in the former Saskatoon Region, SEIU has 8,930 members, and in the former Five Hills Region, SEIU has 1,250 members.

[68] There are approximately 870 SEIU employees working in the various Extendicare facilities. As of the most recent count, there were 94, 212, 300, 155, and 110 SEIU members at each of the Elmview, Sunset, Parkside, Moose Jaw, and Preston-Saskatoon former Extendicare locations, respectively.

[69] As for bargaining, monetary items follow non-monetary items. The provider unions negotiate non-monetary items separately but negotiate monetary items at the same table with SAHO (subject to JJE). SEIU and Extendicare have bargained with respect to non-monetary items only and adopted the same monetary terms as negotiated at the SAHO table.

[70] During the material times, there has been one bargaining table and CBA in relation to the three Extendicare units. Laurie, who is the Director of Contract Bargaining and Enforcement for SEIU, testified that Extendicare bargained the non-monetary items at the same time as the SAHO negotiations. Prior to the pandemic, the Extendicare agreement would be concluded within a month of the SAHO agreement. Then, due to the pandemic, Extendicare no longer had the resources to prioritize bargaining. Bargaining had to wait until the SAHO agreement was concluded, but when it began, it was concluded quickly.

[71] There was testimony about other certification orders that SEIU had presented as being exceptions to the geographic boundaries. First, in LRB File No. 040-99, the Board ordered a province-wide certification in favour of SGEU with respect to all employees of J.T. Ambulance Service Inc. Zimmerman testified that not all ambulance services are owned by the SHA and he was unable to speak to the status of this particular service. Second, in LRB File No. 257-00, the Board granted a province-wide certification order in favour of SGEU for all employees of the Saskatchewan Cancer Agency (SCA), which has facilities in Saskatoon and Regina. The SCA is a health system partner. Then, in LRB File No. 217-15, SGEU was certified in relation to all

employees of eHealth Saskatchewan, further to a joint application for successorship. The employees who transitioned from the provincial government were located in facilities all over the province.

[72] In LRB File No. 015-16, the Board issued a certification order in favour of SEIU in relation to employees of a medical clinic located in the Prairie North Regional Health Authority. The clinic, which was certified to SEIU, had been operated by a group of physicians who eventually transferred management and control of the clinic to the Region. The parties reached an agreement that SEIU would continue to represent employees of the clinic, including two health services provider positions.

[73] There was no evidence led as to the history or current state of Chantelle Management (in Swift Current) or its employees.[28] However, SEIU was appointed as the union for both the health district of Swift Current and Chantelle Management.

[74] SUN at Extendicare has agreed to move to the provincial SAHO agreement.

[75] Lastly, much of Foote's testimony revolved around her satisfaction with the service provided by SEIU. She explained that, in her view, it should not be a given that just because members work in Regina that they should be under the CUPE banner. They should have a say in who represents them.

[76] Foote provided hearsay evidence about the percentage of people who, in her campaigning, supported SEIU. While there were no objections to this evidence, the Board gave it very little weight. Not only was it hearsay; it was hearsay obtained in the course of a door-to-door campaign with no other context provided as to the nature of the conversations undertaken.

Arguments:

[77] What follows is a summary of the parties' arguments.

SEIU

[78] Section 14 of the *Dorsey Regulations* does not settle the issues raised by the successorship applications. Clause 14(2)(f) functions as a catch-all for the Board to alter the prescribed units on the basis of unanticipated circumstances. For the Board to do so, it must find that it is necessary and it must issue an order that is consistent with the Regulations. SEIU does

[28] See, clause 5(4)(d), Dorsey Regulations.

not dispute that the successorship is an unanticipated circumstance, however, an order maintaining SEIU as the bargaining agent would be consistent with the Regulations.

[79] Moreover, it is necessary for the Board to take into account successorship principles. An otherwise order is unusual and would undermine the stability of health sector labour relations. An otherwise order requires that "a valid and sufficient labour relations purpose will be served". The factors that favor the order must outweigh the incumbent union's legitimate expectations. An otherwise order would be unfair to the Union, given that the successorship occurred following Extendicare's significant shortcomings – the failings of the employer would cause a rupture in the Union's bargaining relationship and undermine the choice of the employees to rely on SEIU as their agent.

[80] In any event, the question in a certification application is whether the unit is appropriate – not whether it is the most appropriate. In this case, the factors that the Board considers in determining whether a unit is appropriate have been tested and proven over a matter of decades. The SHA seeks to disrupt a functioning system to gain efficiencies that can be made through other means.

[81] Maintaining the existing bargaining units would represent a "carve-out" from the existing geographic structure. However, there are many examples of such carve-outs, including the Meadow Lake Primary Health Centre, the Saskatchewan Cancer Agency, eHealth, and JT Ambulance. More geographic complexity is introduced into the system through the creation of primary health teams, which attend to patients where they reside.

[82] Employees have the right to engage in collective bargaining through a union of their own choosing. This principle is relevant here. Granting the otherwise order would disrupt an existing relationship without any evidence of employee choice.

[83] Alternatively, if the Board is inclined to make an otherwise order, it should order a vote of the employees in the Regina bargaining unit. Furthermore, the Board should maintain the separate bargaining units associated with the Moose Jaw and Saskatoon locations. The dual successorship issue is present only in relation to the Regina homes. There is no risk of imposing a change in union representation in Moose Jaw and Saskatoon.

SGEU (LRB File No. 181-22)

[84] This is a case of dual unionism. The question is how the Board should resolve the representation conflict between SEIU and CUPE. Section 6-18 creates a presumption in favour of existing bargaining rights through the use of the phrase “unless the Board orders otherwise”. To rebut the presumption, there must be “convincing evidence that the existing relationship is no longer viable in a labour relations sense”.

[85] It is not enough to present evidence of “operational change or discomfort”. Existing rights should be preserved unless to do so would undermine rational collective bargaining. Priority should be given to existing rights to the extent that they can be reasonably accommodated. The question is not whether the existing bargaining unit is appropriate, but rather, whether it is workable. This is a more defensive approach to determining jurisdiction, informed by the purpose of section 6-18.

[86] There is no doubt that the workability standard has been met in this case.

[87] In the alternative, the only appropriate otherwise order would be an order for a runoff vote among the transferred employees.

SHA

[88] The issue before the Board is whether it should amend the certification orders to place the Extendicare employees in the larger bargaining units.

[89] The Board disapproves of dual unionism. Such circumstances are likely to result in discontent, rivalry, and disruption, and are inimical to the promotion of labour relations stability. The successorship in the present case has resulted in operational intermingling.

[90] The criteria to apply to determine the appropriate unit resulting from a disposition are similar to but not the same as those in certification applications.

[91] All of these factors support the SHA’s position: community of interest; industrial stability; broader, more inclusive units; history and origins; employer preference. Relatedly, there are only minor differences between the relevant CBAs. This fact undermines the suggestion that an otherwise order would cause significant disruption.

[92] In this case, the applications arise in the unique context of the health care sector. The Dorsey Commission created the “rules of the game” to ensure a harmonious geographic structure for health sector labour relations. Maintaining the smaller bargaining units would be inconsistent

with the lessons learned from the three separate health care sector reviews, is less beneficial for employees, and preserves artificial barriers to providing quality and efficient health care. This case can be compared to circumstances involving new classifications; the existing framework supports integration into the larger bargaining units. The changes should follow the existing framework.

[93] When there is a transfer between the public and private sectors, the presumption of appropriateness no longer applies. This principle militates in favour of issuing an otherwise order in this case.

[94] The Board has the power to address any seniority issues that are impacted by its order. By doing so, the Board would reduce any transitional issues that could result from the integration of the Extendicare employees into the larger bargaining units.

[95] It would be inappropriate to order a vote in this case. The Board is not required to order a vote under the legislation. A vote would create disruption and increase fragmentation.

[96] Furthermore, the Board's practice has been to direct a vote in a case involving intermingling unless the number of employees in one unit is insignificant for the representation question. Here, the number of employees in the Extendicare units is much lower than the number of employees overall.

[97] If there were a vote, it would have to occur among the employees who are employed at all five Extendicare locations, not just the three located in Regina.

CUPE (LRB File No. 181-22)

[98] CUPE has the right to collectively bargain for all of the health services providers employed by the SHA in Regina.

[99] The Board has the jurisdiction and authority to determine which union is the exclusive bargaining agent further to a successorship application. The Board also has the power to amend or vary the existing unit, pursuant to the *Dorsey Regulations* in unanticipated circumstances. The transfer of the Extendicare facilities to the SHA is an unanticipated circumstance.

[100] In this case, the Board should consider which unit is the more appropriate one. A similar approach was mentioned in *Service Employees International Union, Local 336 v Board of Education of the Chinook School Division No. 211*, 2007 CanLII 68762 (SK LRB) [*Chinook School*

Division]. In considering this question, the Board should consider viability of collective bargaining; community of interest; historic, organizational difficulties; the structure of the health care sector in Saskatchewan; the promotion of industrial stability; and "other public policy considerations".

[101] Subsection 14(3) of the *Dorsey Regulations* requires that an order to amend must be consistent with the Regulations. Given that Extendicare is no longer the employer, this nullifies clause 5(4)(a) of the Regulations. Subsection 5(2) states that there can be only one multi-employer appropriate unit respecting health services providers. According to Table D of the Regulations, CUPE is the union for the Regina health district. The only amendment consistent with the Regulations is one that recognizes CUPE as the union for the Regina locations.

[102] Alternatively, a representation vote should be held at the Regina locations and CUPE should be provided the names and addresses of all eligible voters to communicate with them prior to the vote.

Applicable Statutory Provisions:

[103] The following provisions of the *SEA* are applicable:

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> *. . .*
>
> ***6-18****(1) In this Division, "disposal" means a sale, lease, transfer or other disposition.*
>
> *(2) Unless the board orders otherwise, if a business or part of a business is disposed of:*
>
> > *(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and*
> >
> > *(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.*
>
> *(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:*
>
> > *(a) if before the disposal a union was determined by a board order to be the bargaining agent of any of the employees affected by the disposal, the board order is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person; and*
> >
> > *(b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.*

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

(a) determining whether the disposal or proposed disposal relates to a business or part of a business;

(b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;

(c) determining what union, if any, represents the employees in the bargaining unit;

(d) directing that a vote be taken of all employees eligible to vote;

(e) issuing a certification order;

(f) amending, to the extent that the board considers necessary or advisable:

(i) a certification order or a collective bargaining order; or

(ii) the description of a bargaining unit contained in a collective agreement;

(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.

(5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4)(e).

. . .

6-81*(1) The purposes of this Division are:*

(a) to permit the establishment of multi-employer bargaining units in the health sector; and

(b) to require all health sector employers to use the designated employers' organization as their exclusive agent to engage in collective bargaining.

(2) Nothing in this Division precludes a union from seeking an order to be certified as bargaining agent for:

(a) employees of a health sector employer in one or more trade or craft; or

(b) all employees of a health sector employer.

(3) If there is a conflict between a provision of this Division and a provision of another Division of this Part or any other Part of this Act as the conflict relates to collective bargaining in the health sector, the provision of this Division prevails.

6-82 *In this Division:*

(a) "designated employers' organization" means a person designated in the regulations made pursuant to this Part as the bargaining agent for health sector employers;

(b) "health sector employer" means:

(i) the provincial health authority as defined in The Provincial Health Authority Act;

(ii) the Saskatchewan Cancer Agency as defined in The Cancer Agency Act; and

(iii) a prescribed person or category of persons.

6-83*(1) Bargaining units consisting of employees of two or more health sector employers may be established in the health sector.*

(2) The board may make any order respecting a bargaining unit in the health sector that the board is authorized to make pursuant to this Part and that the board considers necessary or appropriate for the purposes of this Division, including an order pursuant to subsection 6-18(4) if there has been a disposal, as defined in Division 4, of a business or part of a business from one health sector employer to another.

(3) The other provisions of this Part, other than Divisions 13 and 15, apply, with any necessary modification, to employees, employers, unions, persons acting on behalf of employers and unions and the board with respect to the bargaining unit in the health sector.

. . .

6-104 *(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

. . .

(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;

(g) amending a board order if:

(i) the employer and the union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;

…

6-127*(1) In this section, "former Acts" means:*

(a) The Construction Industry Labour Relations Act, 1992 as that Act existed on the day before the coming into force of this section;

(b) The Trade Union Act as that Act existed on the day before the coming into force of this section;

(c) The Health Labour Relations Reorganization Act as that Act existed on the day before the coming into force of this section;

(d) The Fire Departments Platoon Act as that Act existed on the day before the coming into force of this section.

(2) Every person who was a member of the board on the day before the coming into force of this section continues as a member of the board until he or she is reappointed to the board, or another person is appointed in his or her place, in accordance with this Part.

[104] The following sections of the *Dorsey Regulations* are applicable:

2 *In these regulations:*

. . .

*(g) "**health services provider**" means an employee of a health sector employer, but does not include a health support practitioner, a nurse, a chiropodist, a chiropractor, a dentist, a duly qualified medical practitioner or an optometrist;*

5*(1) The appropriate units prescribed in this section are prescribed as the appropriate units for bargaining collectively between health sector employers and health services providers.*

(2) Subject to subsection (5), for each health district, there is to be one multi-employer appropriate unit respecting health services providers composed of:

(a) all health services providers who are employed by the district health board; and

(b) all health services providers who:

(i) are employed by a health sector employer listed in Table A that operates a facility within the boundaries of that health district; and

(ii) on the day these regulations come into force, were represented by a trade union for the purposes of bargaining collectively.

(3) For each health sector employer listed in Table B, there is to be one appropriate unit respecting health services providers composed of all health services providers employed by that employer.

(4) There is to be one appropriate unit respecting health services providers for each of the following health sector employers composed as follows:

(a) for Extendicare (Canada) Inc. in the City of Regina, all health services providers employed by Extendicare/Parkside, Extendicare/Sunset, Extendicare/ Elmview;

(b) for Extendicare (Canada) Inc. in the City of Moose Jaw, all health services providers employed by Extendicare/Moose Jaw;

(c) for Extendicare (Canada) Inc. in the City of Saskatoon, all health services providers employed by Extendicare/Preston;

(d) for Chantelle Management Ltd. in the City of Swift Current, all health services providers employed by Chantelle Management Ltd. in the City of Swift Current.

(5) For the laundry facility of the Regina Health District Laundry Services located, on the day these regulations come into force, at 1001 Montreal Street, Regina, Saskatchewan, there is to be one appropriate unit respecting health services providers composed of all health services providers employed at that facility by the Regina District Health Board.

7*(1) The trade unions listed in column 2 of Table D are determined as the trade unions to represent health sector employees for the purposes of bargaining collectively with respect to the appropriate units listed in column 1 of Table D opposite the name of the trade union.*

(2) As soon as possible after the coming into force of these regulations, the board shall conduct representation votes, in accordance with The Trade Union Act, for any appropriate unit that does not have a trade union determined pursuant to subsection (1).
…

11*(1) Every health sector employee is entitled to retain the seniority he or she has earned in a former appropriate unit.*
…

12*(1) The Saskatchewan Health Care Association, commonly known as the Saskatchewan Association of Health Organizations, is designated as the representative employers' organization for all district health boards, all health sector employers listed in Table A or Table B and all other employers whose employees are added to a multi-employer appropriate unit.*

(2) Every employer mentioned in subsection (1) is to be a member of the representative employers' organization for the purposes of bargaining collectively.

13*(1) Where a trade union represents health sector employees in more than one appropriate unit prescribed by section 3 or 5, the representative employers' association and the trade union shall negotiate one collective bargaining agreement that applies to all those appropriate units.*

(2) For the purposes of this section, Locals 299, 333 and 336 of the Service Employees International Union are deemed to be one trade union.

14*(1) In this section, "affiliate" means an affiliate within the meaning of The Health Districts Act.*

(2) Subject to subsection (3), the board shall issue any orders amending or varying the relevant appropriate units that it considers necessary if:

(a) health districts amalgamate;

(b) services are transferred between district health boards;

(c) new health districts are created;

(d) the boundaries of health districts are amended;

(e) employees of an affiliate not represented by a trade union choose to be represented by a trade union; or

(f) there are any unanticipated circumstances, including any applications before the board which were adjourned pursuant to section 9 of the Act and were not resolved by these regulations.

(3) The orders of the board issued pursuant to subsection (2) must be consistent with these regulations.

(4) The board shall decide all questions concerning who is an employee that are not resolved by a health sector employer and a trade union that represents health sector employees.

(5) The board shall decide all questions pursuant to clause 5(l) of The Trade Union Act.

Analysis:

Has There Been a Successorship?

[105] SEIU has applied for successorship orders pursuant to section 6-18 of the Act.

[106] Subsection 6-18(2) provides that if a business is disposed of the person acquiring the business is bound by all Board orders before the acquisition and those Board orders continue as if the business had not been disposed of. It is the "business" not the employer to which the collective bargaining rights are attached. This ensures that the collective bargaining relationship has a degree of permanency while maintaining the ability of employers to freely dispose of their property.[29] The purpose of section 6-18 is to preserve collective bargaining rights.

[107] There is no dispute that the SHA is a successor to Extendicare in respect of the five former Extendicare facilities operating in Moose Jaw, Regina, and Saskatoon. In each of its replies to the three applications, the SHA explicitly agrees that it is a successor employer to Extendicare as "defined" in the Act.[30]

[108] The evidence establishes that the transfer of the business occurred on October 9, 2022.

[109] As a result of the operation of section 6-18, until and unless the Board orders otherwise, the SHA is bound by the existing certification orders with SEIU. The question is whether the Board should make an otherwise order in favour of CUPE and the larger bargaining units in the relevant locations.

What Interpretation Should be Given to the Legislation?

[110] The Board has general authority to make an otherwise order pursuant to subsection 6-18(4). The question is whether the Board should do so in this case. To answer this question, it is necessary to consider the relevant legislation, as a whole.

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[29] *RWDSU v Charnjit Singh and 1492559 Alberta Inc*, 2013 CanLII 3584 (SK LRB) [*Singh*], at para 41.
[30] Replies of the SHA, at 2(b).

[111] To do so, the Board should interpret the legislation in accordance with the modern rule of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd*., 1998 CanLII 837 (SCC), [1998] 1 SCR 27, the Court described the rule as follows:[31]

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[112] Under the modern principle of statutory interpretation, the Board may consider extrinsic aids, which include evidence of legislative history.[32] Professor Sullivan has explained that reports of a law reform commission or similar body were the first type of legislative history evidence to be admitted by the courts in statutory interpretation cases.[33] With the passage of time, any limits that had initially existed on the use of those reports have "disappeared".[34]

[113] Unlike a law reform commission, the Dorsey Report did not "simply" make recommendations for changes to the law. The Dorsey Report described the Commissioner's considerations in drafting the Regulations that were then enacted. The *Reorganization Act* established the mandate of the Commissioner to examine the organization of labour relations "between health sector employers and employees". The *Dorsey Regulations*, which were made pursuant to that Act, established the bargaining units that have prevailed in the health sector since 1997.

[114] The primary focus of Commissioner Dorsey's mandate, while prompted by concerns about labour relations instability, was described as follows:[35]

> *The emphasis and primary focus of the mandate is on creating structures that respond to the need to promote integration of health services delivery and orderly collective bargaining and to facilitate the development over time of consistency in terms and conditions of employment. Maintenance of existing rights, as reflected in the history of representation, is only one, not the primary, concern in reorganizing the entire health sector bargaining units, representation rights and collective bargaining structures.*

[115] The goal of the Regulations was to promote the integration of service delivery, orderly collective bargaining, and consistency in terms and conditions of employment.

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[31] *Rizzo & Rizzo Shoes Ltd*., 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para 21.
[32] *Arslan v Sekerbank TAS*, 2016 SKCA 77 (CanLII).
[33] *Sullivan*, at 23.68.
[34] *Ibid*, at 23.69.
[35] *Dorsey Report*, at 54.

[116] The *Dorsey Regulations*, while subordinate to the Act,[36] are "meant to work together, including with other Acts and other subordinate legislation".[37]

[117] When the health sector transitioned from health districts to regional health authorities, the Legislature added provisions to the *Reorganization Act* to ensure that the bargaining units were amended consistent with the restructuring. This meant that the organization of health sector labour relations continued along the lines of the former regional health authorities. The *Reorganization Act* built on the existing bargaining units, as set out in the *Dorsey Regulations*.

[118] When the *SEA* was enacted, the *Reorganization Act* was repealed. The certification orders, however, were continued. Subsection 6-127(3) of the *SEA* states that the certification orders remain in force as if made pursuant to Part VI and may be enforced and otherwise dealt with as if made pursuant to Part VI. At the time of the enactment of the *SEA*, the Extendicare bargaining units remained, and bargaining continued between Extendicare and SEIU.

[119] Unlike the previous restructuring phases, when the provincial health authority was created in 2017 the Legislature did not enact legislation requiring amendments to the existing certification orders. The result was that the certification orders remained in place. In turn, the organization of health sector labour relations continued along the lines of the former regional health authorities[38] and the Extendicare bargaining units remained intact.[39]

[120] Division 14 of the *SEA* provides the Board with the authority to establish and preserve the multi-employer unit structure. In the absence of Division 14, there would be no statutory basis for multi-employer units.

[121] Division 14 ensures that the REO system can remain, that multi-employer bargaining units in the health sector are permitted, and that the Board can continue to amend multi-employer bargaining units as changes are made in the health care sector. Pursuant to clauses 6-1(1)(a) and (q) of the Act, multi-employer bargaining units are not allowed unless authorized pursuant to Part VI. Pursuant to section 6-81, the express purposes of Division 14 are to permit the establishment of multi-employer bargaining units in the health sector and to require all health

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[36] *Sullivan*, at 11.56.
[37] *Ibid*.
[38] Understandably, none of the parties suggested that the orders should be amended to replace the regional health authorities with the new employer, the SHA.
[39] Also, when the provincial health authority was created there was only one amendment made to Division 14 - the definition of "health sector employer" in section 6-82 was changed from "a regional health authority" to refer to "the provincial health authority": 2017, c P-30.3, s 11-1.

sector employers to use the REO as their exclusive agent (section 6-81). To that end, subsection 6-81(3) overrides clauses 6-1(1)(a) and (q) and ensures that the multi-employer bargaining units in the health sector are permitted and may be amended.

[122] To be sure, subsection 6-81(2) explicitly does not preclude a union from seeking to certify as the bargaining agent for trade/craft units or all employee units. Craft units and all employee units are not the standard unit within the health sector, but they are permitted.

[123] Subsection 6-83(2) permits the Board to make orders respecting multi-employer bargaining units, including following a disposal:

> ***6-83****(1) Bargaining units consisting of employees of two or more health sector employers may be established in the health sector.*
>
> *(2) The board may make any order respecting a bargaining unit in the health sector that the board is authorized to make pursuant to this Part and that the board considers necessary or appropriate for the purposes of this Division, including an order pursuant to subsection 6-18(4) if there has been a disposal, as defined in Division 4, of a business or part of a business from one health sector employer to another.*
>
> *(3) The other provisions of this Part, other than Divisions 13 and 15, apply, with any necessary modification, to employees, employers, unions, persons acting on behalf of employers and unions and the board with respect to the bargaining unit in the health sector.*

[124] Considering the purpose of Division 14 (to create and amend multi-employer units) and the phrase “any order”, the Board may make an otherwise order in relation to the former Extendicare units. The reference to “health sector employer” is less clear, but any concerns about this language are overcome by the general language in the first part of the provision.

[125] While Division 14 permits an otherwise order, the other provisions of Part VI continue to apply. In other words, Division 14 must be read together with section 6-18. It must also be read together with the *Dorsey Regulations*, as amended pursuant to the *Reorganization Act*. The *Dorsey Regulations* were enacted to address specific circumstances in the health sector which, in the *SEA*, are addressed only generally. When an amendment to a bargaining unit is made it must be consistent with those Regulations.

[126] SEIU concedes that the transition of the Extendicare facilities to the SHA is an unanticipated circumstance pursuant to clause 14(2)(f) of the *Dorsey Regulations*.

[127] Where there is a conflict between bargaining rights, the Board has used the intermingling principles to resolve it. In *E.C.W.U., Local 911 v Brown*, 1992 CarswellSask 768, [1992] SLRBD No 2 [*Microdata Consulting*], the Board explained:

> *26 Where a certified business is sold, Section 37 of The Trade Union Act compels the purchaser to recognize the union and collective agreement. This creates a conflict where the purchaser is already certified and, as a consequence, members of two rival unions covered by certification orders and separate bargaining agreements will perform the same job functions in the bargaining unit. Some mechanism, i.e. the application of the intermingling principles, is necessary to adjust any conflict between the two certification orders and collective agreements that now bind the purchaser. The same holds true if the purchaser is uncertified: some mechanism is necessary to adjust any conflict between the incoming unionized employees and the employer's pre-existing non-union workforce. Consequently, the Legislature gave the Board jurisdiction to modify the effects of Section 37 when these problems arise; (see: S.E.I.U. v. Fairhaven. LRB File 212-86).*

[128] To be sure, CUPE's certification order refers to the "employer" as the Regina Qu'Appelle Regional Health Authority, which is an entity that no longer exists. The former authority did not include the former Extendicare facilities. Stated differently, when the Regina Qu'Appelle Health Regional Authority did exist, it did not include the Extendicare units. Therefore, on a strict reading of the certification orders, it could be argued that there is no overlap.

[129] However, CUPE's argument focuses on the wording of the *Dorsey Regulations* and its observation that Extendicare as employer, and therefore the "Extendicare bargaining units", are no longer provided for in those Regulations. According to CUPE, in the absence of Extendicare the Regina unit must be absorbed by CUPE.

[130] On this basis, there is overlap and potential conflict, and there is sufficient reason to cause the Board to take a second look at the viability of the existing former Extendicare unit in Regina.

[131] Furthermore, collective bargaining continues to be organized along regional lines. SEIU is a participant in this regional bargaining structure, as demonstrated by the definition of "employer" contained in the SAHO/SEIU CBA.[40]

[132] Even apart from the Dorsey issues, which are unique to this case, it has been said that a board may wish to review unit viability in the absence of conflicting scope clauses, where "an employer operates an integrated business out of two locations that are subject to different site-specific collective agreements".[41]

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[40] *SAHO/SEIU CBA*, at ii.
[41] *SEIU, Local 2 v Hallmark Housekeeping Services*, 2021 CarswellOnt 12577, [2021] OLRB Rep 505, at 13.

Is there a Problem of Dual Unionism to be Solved?

[133] A central issue in the current case is the specter of dual unionism within a geographic area (Regina). Labour relations boards discourage dual unionism, including in successorship cases:[42]

> *In dealing with successorship situations, the Board will not only determine whether a business or part hereof has been transferred or otherwise disposed of, but will also consider what happens to collective bargaining when the business leaves the predecessor and arrives at the successor. Section 37 [of the TUA] was never intended to result in "dual unionism" likely to produce discontent among employees, rivalry between unions, and disruption for the employer, because it would be inconsistent with the basic purpose of the [TUA], namely the promotion of industrial stability. It would also be inconsistent with the Board's determination of an appropriate bargaining unit under Section 5, clause (a) and the certified union's exclusive authority to represent employees in that unit. . .*
>
> *[Citations omitted.]*

[134] The case law emphasizes the following principles in successorship cases that result in dual unionism:

- Section 6-18 is intended to preserve bargaining rights[43] and an "otherwise order", in which the existing bargaining rights are not preserved, is unusual.[44]

- However, an "otherwise order" may be made if there is dual unionism resulting in an unacceptable level of intermingling.

- The Board is to balance employee wishes with its preference for single, all-employee bargaining units. Where a conflict arises between these two goals, "the interest of maintaining industrial peace may prevail and undue fragmentation avoided".[45]

- A bargaining unit that would be inappropriate on certification may be permitted if it has proved itself workable[46] and existing bargaining rights are to be maintained if they can be reasonably accommodated within the new structure.[47]

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[42] *United Steelworkers of America v A-1 Steel & Iron Foundry Ltd*., [1985] October Sask Labour Rep 42, at 45, cited in *Saskatoon Co-op*, at para 115.
[43] *Singh*; *Teamsters Canada Rail Conference v Big Sky Rail Corp*., 2015 CanLII 19985 (SK LRB), at para 23 [*Big Sky*]. See also, *Kelly Douglas and Co. and RWDSU, Local 580, Re*, 1974 CarswellBC 623, [1974] 1 Can LRBR 77, at para 21.
[44] *Saskatchewan Joint 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), at para 165.
[45] The Honourable George W. Adams, K.C., *Canadian Labour Law*, loose-leaf (8/2023 - Rel 3) 2nd ed (Toronto: Thomson Reuters, 2023) [*Adams*], at 8-66.
[46] *Headway Ski*, at 56.
[47] *Headway Ski*, at 56; *Big Sky.*

- However, where there is a transfer of part of a business between the public and private sectors, there is no presumption that the already existing bargaining units are 'appropriate' and thus should continue unaltered.[48]

- Similarly, where the new business is significantly different in character or operates in an entirely unrelated market, the Board may find that the certification order or collective bargaining could not have been intended to apply to it.[49]

- In appropriate circumstances, the Board may draw boundaries around a new bargaining unit and order a vote to determine the wishes of the majority.[50]

- The Board may terminate the rights of the union with a claim to only a small percentage of intermingled employees.

[135] The Honourable George W. Adams, K.C. has suggested that the threshold for the maintenance of separate units is "compelling reasons". However, the "compelling reasons" may include evidence that multiple units are workable within the employer's structure:[51]

> *Unless compelling reasons can be shown to justify the maintenance of separate bargaining units, employees performing the same job functions will be grouped into one unit. Instances where separate units have been maintained include: where the degree of intermingling is and will continue to be negligible; where there is significant decentralization of the employer's administrative structure so that a corresponding fragmentation of units is viable; and where there is a history of multiple units being workable within the employer's structure. A key factor to this determination is the size of the employer and its ability to deal with a plurality of bargaining units. The larger the employer the more predominant the issue of the shared community of interests and the need for specialized units.*
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> [citations removed]

[136] The factors to be applied in a dual unionism situation involving a successorship are not identical to those used in certification applications.[52]

[137] In a successorship situation, the Board will rely on the intermingling principles, broadly defined, in order to assess the potential for labour relations instability and will strive to avoid

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[48] *Headway Ski*, at 57.
[49] *Headway Ski*, at 56; *S.G.E.U. v Golf Kenosee Inc.*, [1987] Sept Sask Labour Rep 34; *S.G.E.U. v Mission Ridge Ski Development Inc.*, [1987] Aug Sask Labour Rep 46.
[50] *Headway Ski*, at 56; *Service Employees International Union, Local 333 v Fairhaven Long-term Care Centre, et. al & the Canadian Union of Public Employees, Local 77*, [1991] 2nd Quarter Sask Labour Rep 33.
[51] *Adams*, at 8-67, 8-68.
[52] See also, *Co-operative De Pointe-Aux-Roches v United Food and Commercial Workers International Union, Local 278W*, 1996 CanLII 11213 (ON LRB), at para 23.

fragmentation that could result in disruption. To determine whether an underinclusive unit can be maintained, it will consider the nature and structure of the existing bargaining rights (including history); similarity in job functions and shared community of interest[53]; the nature and degree of business integration and employee intermingling; career advancement[54]; and special considerations (such as demonstrated viability or workability of an existing unit). The Board has also considered whether there is animosity between the competing unions.[55]

[138] In the current case, consideration must also be given to the prevailing structure of health sector labour relations.

[139] This Board has not developed a bright line test for determining the nature and extent of intermingling required in order to alter bargaining structures in a successorship situation. The Alberta Board has made a similar observation:[56]

> *...Where we have a discretionary power to alter bargaining structures, it appears to us to be most in keeping with the spirit of the legislation to apply that discretion considering all of the facts in the case. So, for example, when the Board is presented with a successor employer application claiming amendment of the bargaining structure as consequential relief, there should not be one, hard-and-fast rule about the degree of intermingling present that we will require before concluding the existing structure is inappropriate. ...*

Where do the Moose Jaw and Saskatoon Units Fit In?

[140] Next, a secondary issue is the existence of smaller bargaining units within two geographic areas (Moose Jaw and Saskatoon). Here, the concern is not the specter of dual unionism but dual bargaining - the existence of separate sets of negotiations and separate CBAs in a single-CBA structure. The Moose Jaw and Saskatoon units are “under-inclusive” in that they permit the representation of employees on a smaller scale than is intended by the regulated framework.

[141] To illustrate, when the Extendicare facilities were separately owned, this meant that SEIU could negotiate one CBA with SAHO and one CBA with Extendicare. Now that these facilities are owned by the SHA, the only way to maintain the separate CBAs would be to permit an exception to section 13 of the *Dorsey Regulations*.

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[53] *Headway Ski,* at 56.
[54] *Peace Hills Emergency Medical Services Ltd. and CUPE, Local 3197, Re*, 2013 CarswellAlta 1378, [2013] Alta LRBR LD-044, at para 44, citing *Royal Alexandra Hospital v U.N.A., Locals 33 & 129 (1993)*, [1993] Alta LRBR 472 (AB LRB). See also, *Saskatoon Co-op*, at para 152.
[55] *Saskatoon Co-op*, at paras 137, 153.
[56] *H.S.A.A. v Calgary Regional Health Authority*, [1997] Alta LRBR 549 (Alta LRB), at 555, as cited in *C.U.P.E., Locals 189, 408, 3197, 3421 & 3671 v Alberta Health Services*, 2010 CarswellAlta 325, [2010] Alta LRBR 1 [*Alberta Health Services*], at para 77.

[142] Section 6-18 provides the Board with the authority to make an otherwise order, outlining the determinations and directions that the Board is authorized to make. It does not expressly restrict the circumstances under which the Board may make such an order. Instead, the Board has developed case law outlining the principles that apply on successorship applications. Much of the case law deals with dual unionism. While Moose Jaw and Saskatoon do not raise dual unionism, there is a comparison to be drawn between dual unionism and dual bargaining within a single CBA structure. It is also relevant that, although there is no dual unionism, there is also no overall threat to the continuation of SEIU's representation rights.

[143] In deciding whether to make an otherwise order in relation to Moose Jaw and Saskatoon, the Board may find some guidance in the successorship principles, to the extent that these principles can reasonably be transposed to the current situation.

[144] On this issue, the Board's assessment must be informed by the purposes of Part VI, including Division 14, and the *Dorsey Regulations*. The legislation must be read together, understanding that the *Dorsey Regulations* are subordinate legislation, but also that those Regulations and the provisions of Division 14 are express and specific to the health sector.

[145] The Dorsey Report explains the intent underlying the single CBA structure. The intent was straightforward - to reduce the number of CBAs that SAHO had to negotiate and to promote orderly collective bargaining:

> *The combination of a single representative employers' organization and one agreement per trade union or the three locals of SEIU will promote orderly collective bargaining.*[57]

[146] Achieving orderly collective bargaining was a central tenet of the Commissioner's mandate:[58]

> *The emphasis and primary focus of the mandate is on creating structures that respond to the need to promote integration of health services delivery and orderly collective bargaining and to facilitate the development over time of consistency in terms and conditions of employment.*

How Should the Intermingling Principles be Applied?

[147] Next, the Board will consider the evidence, apply the intermingling principles to that evidence, and then determine whether an otherwise order should be made in relation to the

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[57] *Dorsey Report*, at 85.
[58] *Dorsey Report*, at 54.

Regina units. At the conclusion of that analysis, the Board will summarize the principles that apply to Moose Jaw and Saskatoon and determine how to proceed with those units.

[148] Many if not all of the aforementioned intermingling factors were considered in *RWDSU v Saskatoon Co-operative Association Limited and United Food and Commercial Workers, Local 1400*, 2018 CanLII 68443 (SK LRB) [*Saskatoon Co-op*]. There, the Saskatoon Co-op acquired a Safeway store for which RWDSU was the certified bargaining agent. UFCW had a certification order covering all Co-op employees.

[149] The Board found that the evidence of operational intermingling was sufficient to make an otherwise order:

> *[145] Second, this case also presents an example of operational intermingling. Intermingling of this kind typically arises in circumstances where employees performing the same or similar job responsibilities, yet belonging to separate unions, are subject to one (1) corporate management structure, and are expected to abide by one (1) set of corporate policies and procedures.[83] The evidence demonstrated that in this case the Employer quickly integrated the Circle Drive Store into its corporate structure. [Its] single management team of which Ms. Schultz, the Employer's Human Resources Manager is a key member, assumed responsibility for the day-to-day operations of that particular store, in addition to all of its other stores.*
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> *[146] Furthermore, almost immediately after its acquisition of the Circle Drive Store, the Employer provided training to its employees at that location respecting the Employer's business policies and practices. In addition, and as attested to by Mr. Miller, Ms. Schultz has addressed labour relations concerns as they arose in accordance with the Employer's current operating policies.*
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> *[147] These factors persuade us that in this case there is sufficient evidence of operational intermingling and administrative integration to warrant the Board making an "otherwise order".*

[150] In the present case, there is no question that health services providers, across the sector, share similar job functions. Extendicare has been using existing JJE job descriptions and rates of pay are consistent across jobs.

[151] There is no question that there is administrative and managerial integration. Since the disposal occurred, the former Extendicare facilities are subject to the SHA's management structure. Under the SHA, the managers within the homes no longer report to one individual but, instead, there are multiple service lines reporting to separate directors: Support services (maintenance, laundry, environment, nutrition); care operations services (clinical, direct care, recreation); "back of house" services. In other words, management functions are not centralized within the homes (not standalone) but are organized along service lines that are integrated in the

SHA, with accountability to the SHA. The Directors have oversight for a number of sites and services.

[152] Not all out-of-scope employees were transferred into the new management structure. Extendicare continues to operate across Canada, which allowed for some internal transfers.

[153] The next issue is operational integration. The in-scope employees of the former Extendicare sites became employees of the SHA with the disposition of the business.

[154] From a front-line perspective, staff rosters and daily routines continue to operate in a manner similar to pre-SHA operations.

[155] However, SHA has implemented policies and procedures, common to the provincial health care facilities, at the former Extendicare facilities. Former Extendicare policies and procedures were removed, as they are proprietary. Training was required to support access to the new policies and procedures.

[156] Procurement, capital infrastructure, and equipment replacement are the SHA's responsibility. Replacements are addressed on an as needed basis.

[157] The SHA entered into a "back-office service agreement" with Extendicare to provide payroll, scheduling, finance, and IT services until May 1, 2023. The SHA systems have since been implemented for the Extendicare employees (or will be). Job postings have been centralized through the SHA's processes (Gateway online). There has been some confusion due to the differences with the SEIU/Extendicare CBA.

[158] As mentioned, "back of house" or "back office" services have been incorporated into a separate service line, not specific to the care home.

[159] Furthermore, the AIMS (Administrative Information Management System) project will consolidate payroll, scheduling, finance, supply chain management, and human resources information management systems across all SHA facilities, operations, and affiliates who are subject to the SAHO CBA. This system has to be built to accommodate the various CBAs.

[160] The extent of operational intermingling is *at least* equal to (but likely greater than) that which was found in the *Saskatoon Co-op* case, and which was the basis for the Board finding that it should make an otherwise order.

[161] As for physical intermingling, there is no evidence that the former Extendicare employees have been transferred to a different physical location as a result of the disposition, or vice versa. Other than a few exceptions and any existing co-working arrangements, the workforce at the former Extendicare sites is relatively distinct in that the employees, if working for those facilities and not in a co-working job, work at those sites.

[162] There are, however, centralized teams for the trades and maintenance work who attend multiple sites. Sinnett also talked about CUPE educators in clinical care services but did not provide enough information to allow for an understanding of the positions or the concerns. In either event, any issues that would arise from centralized teams would impact only the Regina unit.

[163] Furthermore, due to the existing CBAs, CUPE positions generally do not enter an SEIU site to provide services unless the site does not provide the services that the CUPE positions are fulfilling (for example, emergency medical services (EMS)). Zimmerman conceded that it is possible to negotiate agreements to allow teams to enter sites, as necessary, but pointed out that the need for additional negotiations reduces efficiency.

[164] Next, the bargaining unit structure presented additional challenges in achieving appropriate levels of staffing at Parkside (Regina) during the pandemic. To be sure, such challenges could have been alleviated through the creation of a continuity plan for the deployment of external staff in the event of a crisis. When there was none, the SHA was left negotiating with CUPE in the middle of the crisis.

[165] No evidence was presented to suggest that SEIU placed obstacles in the way of deploying external staff. Sinnett suggested that, in fact, the help from CUPE was welcome to meet the needs of the pandemic. It must be understood that the crisis was an exceptional circumstance, not indicative of regular operations. What the pandemic demonstrated, however, is that, within the SHA's structure, there is an additional layer of process and negotiation necessary so that the Regina Extendicare staffing levels, or at least staffing potentialities, may be consistent with the rest of the Regina geographic area. With such a significant disparity in staffing levels within one organization (one employer), questions arise about whether the existing structure continues to represent rational collective bargaining. Despite the large geographic unit, the Regina unit is a relatively isolated exception.

[166] In summary, there is clear operational and administrative intermingling. This extent of intermingling is more than sufficient to justify an otherwise order. There is lesser, but some physical intermingling. Where physical intermingling may be required, additional layers of negotiation may also be present.

[167] There is a conflict between the presumed employees' wishes (ie, the preservation of rights) and the preference for broad bargaining units. When this occurs, the Board may prioritize labour relations stability and make an order to avoid undue fragmentation.

[168] The question, of course, is how best to prioritize labour relations stability. There are divergent opinions about this. SEIU and SGEU argue that an otherwise order would undermine the cooperative efforts of the provider unions, as demonstrated by the JJE Plan and the LOU relating to the application of existing CBAs.

[169] However, the history of labour relations provides a different view. Early on, the provider unions came together to achieve greater labour relations stability. The overarching solution to the "undue fragmentation" was the creation and maintenance of geographic boundaries.

[170] The Dorsey Commission was appointed during an elevated level of labour relations instability in the health sector. Although inter-union rivalry had predated the health care reform, it escalated with widespread restructuring:

> *Inter-union representational disputes have been heightened by health care reform and its threat to job security because of facility closures, funding reductions, amalgamation of employers and devolution of programs and transfers of employees from the provincial and municipal governments to district employers. Either broadening or shrinking the horizons of the group of employees to which an individual relates for purposes of seniority and job security is a substantial alteration of existing rights and security for the individual. Depending on their situation, individuals and their unions face both group expansion and shrinking situations and have sought to assert and maintain their prior rights.*[59]

[171] During the pre-Dorsey period, this Board recognized the high degree of inter-union conflict but took a pragmatic approach consistent with its role to adjudicate rights and not to "preside over the implementation of some entirely new configuration of bargaining".[60]

[172] The unions recognized the severity of their labour relations challenges. Given these challenges, the provider unions and SUN made a request to the government for the appointment

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[59] *Dorsey Report*, at 37.
[60] *Dorsey Report*, at 43, citing *Saskatchewan Union of Nurses v Saskatoon City Hospital*, [1995] 2nd Quarter Sask Labour Rep 196.

of a commission, and in doing so, acknowledged the limited authority of the Board to achieve the solutions they were seeking.[61] It was due to this request that Commissioner Dorsey was appointed.[62]

[173] Consistent with the Board's preference, large bargaining units were created to reduce the fragmentation and the resulting disruption and fragility of health sector labour relations. As Dorsey explained:

> *Provincial consistency in terms and conditions of employment and attaining integration are interrelated. Each is needed to achieve the other and each is part of the cost to achieve the other. Both require broad based bargaining units and collective bargaining structures. Nurturing healthy values and goals within the spirited adversarial system of collective bargaining, while pursuing the shared goal of renewing the health system in a period of rapid and relentless change, requires that there be a broad perspective. The perspective has to be beyond organizational autonomy and group differentiation.*

[174] In large part, the *Dorsey Regulations* achieved the goal of promoting orderly collective bargaining. Since the Regulations came into effect[63], the number of disputes pertaining to bargaining unit boundaries has been minimal. In recent years, there have been disputes brought in relation to positions performing the duties of those within the scope of the Health Sciences Association of Saskatchewan [HSAS][64], newly licensed positions[65], new positions[66], or newly discovered positions[67]. In each of these disputes, the Dorsey/Fyke structure has provided goal posts for resolving the conflict.

[175] The Dorsey Commission had conducted a thorough review of the existing health care system and created rationalized collective bargaining structures to ensure long-term stability. The Fyke Commission and the resulting legislation continued this approach. The Extendicare units were treated as narrow exceptions to what was otherwise a highly comprehensive and rationalized structure. The only express basis for excluding the Extendicare units, that they were for-profit shareholder corporations, no longer exists.

[176] Each of CUPE, SEIU, and SGEU continues to represent health services providers in their respective "territories". When the health sector was operated by districts and then regions, these

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[61] *Dorsey Report*, at 47.
[62] *Dorsey Report*, at 48.
[63] And including since the transition from districts to regions.
[64] *Health Sciences Association of Saskatchewan v Sunrise Health Region*, 2008 CanLII 87263 (SK LRB).
[65] *Health Sciences Association of Saskatchewan v Saskatchewan Association of Health Organizations*, 2011 CanLII 64023 (SK LRB).
[66] *Saskatchewan Health Authority v Health Sciences Association of Saskatchewan*, 2020 CanLII 37240 (SK LRB).
[67] *Health Sciences Association of Saskatchewan v Saskatchewan Health Authority*, 2021 CanLII 67743 (SK LRB).

bargaining units were employer-specific, inclusive of multiple employers in each unit. Now that the health sector is operated by the provincial authority, each of these bargaining units is subject to the management structure of the SHA. Geography remains relevant to that structure. Of particular relevance, Sinnett is the Executive Director of Continuing Care for the Regina area, providing strategic oversight for long-term care, while setting a provincial direction.

[177] The former Extendicare facilities, however, remain located inside the geographic territories of the larger bargaining units.

[178] By contrast, there are also affiliates that operate long-term care homes in Regina and in the province. They typically have their own boards of directors. Some are unionized, some are non-union, and some are a combination (including non-unionized professional staff). One of the affiliates in Regina is non-union (Qu'Appelle House). Although affiliates are subject to the Principles and Services Agreements and the Program Guidelines for Special-care Homes, affiliate operations are not as uniform as operations within the SHA. SEIU suggested that front-line workers in these affiliates are not fully integrated into the SHA's payroll system, nor on the SHA's scheduling system for Regina.

[179] Again, the difference is that the unionized affiliates have been integrated into the Dorsey/Fyke structures, are bargaining on the geographic lines of the former regional health authorities and are subject to the SAHO CBA, all despite their differences and distinct status.

[180] To be sure, the "organizational and service patterns" have never been fully contained within the geographic regions.[68]

[181] For instance, the units of eHealth Saskatchewan and the Saskatchewan Cancer Agency demonstrate that specialized units can co-exist with the Dorsey/Fyke structure. However, the value of any comparison is limited. The similarity in health services provider jobs, at least in relation to eHealth Saskatchewan, is not apparent from the evidence. Nor did eHealth Saskatchewan exist at the time of the Dorsey Commission. The Saskatchewan Cancer Agency (then, the Saskatchewan Cancer Foundation) was excluded from the *Dorsey Regulations* entirely.

[182] Relatedly, there was so little information about the small J.T. Ambulance unit that it cannot be meaningfully compared with the present case. And, the agreement between the parties that

[68] *Dorsey Report*, at 16.

preceded the certification order of the Meadow Lake Clinic contrasts starkly with the current situation.

[183] There are other exceptions to regional health service delivery. For instance, there are health networks, which are primary health teams, that do not line up perfectly with the geographic boundaries of the provider unions.

[184] However, the Extendicare bargaining units are not specialized or unique organizations, such as eHealth Saskatchewan or the Saskatchewan Cancer Agency. They are not comparable to health networks. They are long-term care homes owned and operated by the SHA, along with many other long-term care homes that are included within the existing bargaining structure.

[185] The *Dorsey Regulations* were intended to promote consistency in terms and conditions of employment across the health services provider jobs. The Dorsey structure facilitates this goal through the one CBA structure.

[186] Maintaining the Extendicare exceptions to the Dorsey/Fyke structure risks increasing fragmentation, raising questions about the utility of the Dorsey/Fyke model, and creating more long-term disruption. Despite SEIU's excellent track record as an employee representative, it cannot be said that the existing units are viable. The prevailing structure of health sector labour relations, a hard-won compromise to ensure long-term stability, suggests otherwise.

[187] The relative staffing levels and unequal bargaining power between the CUPE and Extendicare units, operating within the same geographic region but requiring an additional layer of negotiation, raise concerns about the past and continuing viability of the Extendicare Regina units, given the new employer. These units are unnecessarily isolated and fragmented. These circumstances are likely to result in discontent, rivalry, and disruption.

[188] SEIU and SGEU argue that the preservation of bargaining rights is the best path for promoting stability. However, the value in preserving bargaining rights must be assessed against what would be lost (or severely eroded), which in this case would be a rationalized, regulated structure. Viewed in this light, the Regina unit cannot reasonably be accommodated within the existing structure.

[189] To be sure, the SHA appears to have changed its position with respect to the successorship since the transfer of ownership was announced. It has been suggested that the SHA could have made the separate bargaining units work and did so for a short while. The SHA

benefited from the stability that came with assuming responsibility for the unionized employees and working with an experienced bargaining agent.

[190] A new employer's recognition of a CBA may indicate that it is attempting to make the unit work. On the flip side, since the transfer the parties have not begun bargaining or reached a renewed collective agreement. However, it would be bad policy both to punish the SHA for complying with the law by upholding the existing CBAs and to reward the SHA for delaying negotiations if that is what has occurred.

[191] The SHA's change in position must be considered in context. Any attempts to make the new structure work do not mean that it is working as it should. The intermingling evidence, which arose after the transfer occurred, is indicative of the problems with dual unionism that the Board hopes to avoid.

[192] Furthermore, this is not a straightforward case involving "a history of multiple units being workable within the employer's structure". The Extendicare units prevailed outside of the SHA's structure. The multiple units which have been workable within the employer's structure have been very clearly defined and rationalized by geography. The recognized communities of interest are those communities that fall on geographic lines. As with the former Extendicare facilities, no doubt each of the affiliates has distinct cultures, but those differences have been managed within the geographic structure.

[193] Furthermore, this Board has found that where the new business is significantly different in character or operates in an entirely unrelated market, the Board may find that the certification order or collective bargaining could not have been intended to apply to it. Here, the markets are the same (health care), however, the Dorsey Report makes clear that the separate certification orders never would have existed if not for the for-profit status of the Extendicare corporation. Seen in this light, the certification orders for the smaller units could not have been intended to apply to the SHA.

[194] Fortunately, the Board is not being asked to "preside over the implementation of some entirely new configuration of bargaining". Instead, the Board is being asked to make amendments to maintain consistency with the prevailing structure, which is intended to promote stability. The structure of labour relations in the health care sector is unique, it is well tested, and it is working. The maintenance of a rationalized structure, rather than the preservation of an isolated exception to an otherwise rationalized structure, is what will best serve long term labour relations stability.

[195] With respect to the application of the CUPE collective agreement to the Regina Extendicare employees, the seniority provisions pose the biggest challenge. The issue, of course, is that seniority is calculated differently between the Extendicare (Regina) and CUPE units. CUPE and SEIU/SAHO have a date of hire system whereas the Extendicare units have an hours-based system.

[196] However, section 13 of the *Dorsey Regulations* suggests that the Regina, Moose Jaw, and Saskatoon employees should be subject to the common SAHO negotiations. The Board has the authority to order that the employees' seniority entitlements be preserved, to the extent reasonably possible. Further to such an order, the parties would be required to negotiate the preservation of seniority entitlements. In other words, the *Dorsey Regulations* indicate that transitional issues would exist both if the bargaining units were preserved and if they were all incorporated into the larger SEIU unit.

[197] For all of the foregoing reasons, the Board finds that an otherwise order is necessary to place the former Extendicare Regina employees in the CUPE/SAHO bargaining unit.

[198] None of this is to discount the effectiveness of SEIU as a bargaining agent and the strong relationship between SEIU and its members in Regina. SEIU has demonstrated commitment, professionalism, and responsibility, and in turn, it has engendered a certain loyalty. This was evident in the hearing.

[199] Nor is it to overlook the cooperative relationship among the provider unions. All of the provider unions have been willing and able to cooperate with each other to achieve orderly collective bargaining since 1997. The JJE process is an exemplary demonstration of this cooperation. The LOU relating to the application of existing CBAs to the SHA demonstrates renewed and necessary cooperation with the creation of the provincial health authority.[69] However, this level of cooperation has been achieved in the context of a clearly defined, rationalized bargaining structure. Permitting this exception to the structure will not assist the parties. It will only create a lack of clarity, invite questioning about the framework, and lead to conflict.

How Should the Board Address Moose Jaw and Saskatoon?

[69] To be sure, the LOU suggests that there is no legal impediment to bringing the present application (despite any argument that might be made about the earlier LOI).

[200] By asking the Board to preserve an additional set of negotiations, an additional CBA, and an additional set of terms and conditions of employment, SEIU is asking that the Board introduce fragmentation into the structure that was expressly designed to reduce fragmentation, enhance integration, and promote the consistency of terms and conditions of employment. Permitting isolated exceptions to section 13 of the *Dorsey Regulations* would introduce a lack of coherence into the Dorsey structure and undermine orderly collective bargaining. Incoherence may be taken as an invitation to challenge the existing structure. This is a situation that is best to avoid.

[201] The maintenance of a separate bargaining structure for employees who are performing the same jobs for the same employer will not promote stability. The shared community of interest within and among the units will decline with the removal of the Regina unit. It will also decline with the transfer to the SHA, as the employees come to share more in common with the larger units.

[202] When the *Dorsey Regulations* were enacted, the only express basis for excluding the Extendicare units was that they were for-profit shareholder corporations. This justification no longer exists. Again, the value in preserving bargaining rights must be assessed against what would be lost, which in this case would be a rationalized, regulated structure. The maintenance of a rationalized structure, rather than the preservation of an isolated exception to an otherwise rationalized structure, is what will best serve long term labour relations stability.

[203] Furthermore, there are no helpful examples of bargaining units that have been set apart in this way. The closest examples are the affiliates, however, all of those organizations are included in the geographic structure.

[204] Although there is no concern about dual unionism, there is also no concern about employees losing access to their chosen representative. Rather, placing the employees into the larger bargaining units would promote orderly collective bargaining and consistency in terms, be consistent with the intention of the *Dorsey Regulations*, and would maintain the employees' relationship with their bargaining agent.

What is the Influence of the Career Advancement Evidence?

[205] Next, the Board will also review the issue of career advancement. There is no doubt that by incorporating the smaller Regina unit into the larger bargaining unit, the employees would improve their job prospects.

[206] The majority of positions within the SHA are filled by employees who are already employed within the SHA, not external applicants. At present, Former Extendicare Regina employees would be external applicants for jobs within the CUPE unit.

[207] The CUPE unit provides for greater and more varied job opportunities, even accounting for the existence of the five Extendicare facilities. Those five facilities are located in Regina, Saskatoon, and Moose Jaw. To discount the hardship involved in transferring from one location to another would be to overlook a relevant factor in determining the relative portability of the Extendicare versus CUPE units. The limited job opportunities available through the Extendicare facilities could lead to recruitment issues, associated problems with working conditions, and employee resentments.

[208] Recruitment has been an issue at Sunset and Elmview (both located in Regina). Whether it is an issue with respect to FTEs or relief positions, it is still an issue. It is less of a concern at Parkside currently – there, the pandemic resulted in a 30% reduction in beds and therefore staffing needs. There are fewer positions in Parkside to fill. In the future, recruitment is expected to be more of an issue at Parkside.

[209] Sinnett explained that employees often look to have multiple jobs to be able to support themselves and their families. They are unable to utilize their Extendicare seniority to be able to access jobs with CUPE. When Extendicare was a separate employer, employees of those facilities could work multiple jobs that provided more than full-time hours. Now, this is no longer an option. Apparently, this is unlike the situation with affiliates, generally. The SHA has taken the position that employees working within affiliates and elsewhere may exceed full-time hours, subject to any provisions in the relevant CBA.

[210] Relatedly, it is easier to accommodate employees (further to the duty to accommodate) in the larger bargaining unit.

[211] The career advancement evidence provides further support for an otherwise order in relation to the Regina unit.

[212] The Board in *Saskatoon Co-op* also found that “the career prospects of employees are a factor to be considered on a successorship” and that the Board should avoid as much as possible limiting employment opportunities for workers.[70]

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[70] *Saskatoon Co-op*, at para 152.

[213] Despite this recognition, the Board found that it would be paternalistic to decide for the employees which option was in their best interests, observing that the workers had been loyal RWDSU members for many years.[71]

[214] There are obvious parallels with the current case (limited career prospects and long-standing bargaining relationship).

[215] However, the Board in *Saskatoon Co-op* found that the bargaining unit, while not optimal was "functional"[72], and then let the employees decide whether to remain in the functional unit.

[216] The Board's usual approach (and that of other boards) is to determine whether the bargaining unit can be sustained and then determine whether a vote should be ordered. If the answer to whether a unit can be sustained is "no" (for example, due to operational intermingling), then a vote is not ordered to determine whether to sustain the unit that is no longer viable. This approach can be distinguished from the approach taken to an amalgamated facility, for example, in which a vote might be ordered to determine which of two existing bargaining agents should represent employees in a different unit structure after unit boundaries have been redrawn.

Should There Be a Representation Vote?

[217] SEIU and SGEU argue that, if the Board decides that an otherwise order should be made, it should order a vote to determine the bargaining agent.

[218] In *United Steelworkers v Varsteel Ltd. and Evraz Inc. Na Canada*, 2021 CanLII 108434 (SK LRB) [*Varsteel*], the Board reviewed the case law outlining the circumstances in which a vote ought to be ordered:

> *[47] In Teamsters Canada Rail Conference v Big Sky Rail Corp[11] ["Big Sky Rail"], the Board found that a representational vote was not required:*
>
> > *[22] In coming to this conclusion, we noted that s. 37(2)(d) of The Trade Union Act (as does s. 6-18(4)(d) of The Saskatchewan Employment Act) authorizes this Board to direct that a representational vote be taken of affected employees in determining the disposition of a successorship application. However, the long standing jurisprudence of this Board is not to do so except in specific circumstances. . . .*
>
> *[48] The Board went on to determine that representational votes are only conducted in successorship applications in three types of circumstances:*

[71] *Saskatoon Co-op*, at para 152.
[72] *Saskatoon Co-op*, at para 196.

> *1. where multiple bargaining agents represent the same positions and it is not possible or appropriate to maintain separate bargaining units;*
>
> *2. where the applicant union is seeking to add positions to its bargaining unit that were not previously included within that union's bargaining unit before the transfer of obligations;*
>
> *3. if the bargaining unit would no longer be appropriate after the transfer.*

[219] Each of these categories is described in detail in *Big Sky Rail*. Based on those descriptions, the first category is the only one that arguably applies to the present case. It is described as follows:

> ***Multiple Bargaining Agents:*** *These circumstances arise where, following the transfer of obligations, there will be two (2) bargaining agents representing the same classifications or positions and it is not possible or appropriate to maintain two (2) separate bargaining units because of extensive intermingling of employees and/or where there is no discrete skill or geographic or other boundary that can be used to separate the two (2) bargaining units. In these circumstances, the normal practice[6] of the Board would be to conduct a representational vote of affected employees. The representational question that employees will be asked to determine is which of the two (2) bargaining agents they wish to be represented by in the future. These circumstances arose in Service Employees International Union, Local 333 v. Fairhaven Long-term Care Centre, et. al & the Canadian Union of Public Employees, Local 77, [1991] 2nd Quarter Sask. Labour Rep. 33, LRB File No. 212-86. See also: Estevan Coal Corporation v. United Mine Workers of America, Local 7606 and United Steelworkers of America, Local 9279, [1998] Sask. L.R.B.R. 709, LRB File No. 186-98.*

[220] In other words, if the Board finds that the bargaining unit is no longer appropriate, it may order a vote to determine the bargaining agent for the new, re-drawn unit. This approach was taken in the following cases:

a. In *Service Employees International Union, Local 333 v Fairhaven Long-term Care Centre, et. al & the Canadian Union of Public Employees, Local 77*, [1991] 2nd Quarter Sask Labour Rep 33, a new building was being constructed that would bring together care home residents and employees of previously separate care homes and separate unions. The employer had successor obligations in relation to two separate unions and bargaining units. Due to the extensive intermingling that would result from the combined facilities, the existing bargaining units (two) were no longer appropriate. It was necessary to order a vote to determine the bargaining agent that would represent the employees in the new, combined unit.

b. In *Wolf Willow Lodge*, the successor employer assumed the operation of two health care facilities which were to be operated in a single facility. The employer agreed that it was the successor to each facility. The Board found that a combined unit was appropriate and ordered a vote to determine the bargaining agent.

c. In *Prince Albert District Health Board*, 1996 CarswellSask 843, [1996] Sask Lab Rep 368, the Board found that two facilities should be treated as one, and that the bargaining units should be consolidated. The Board ordered a vote be conducted among all of the nurses at the facility.

d. In *Estevan Coal Corp. v U.M.W.A., Local 7606*, 1998 CarswellSask 913, [1998] Sask LRBR 709, the parties had agreed that an amalgamated bargaining unit was appropriate. Given the parties' agreement, the intermingling question was predetermined as was the question as to whether the existing bargaining units were appropriate, and the Board ordered a vote to determine which union would represent the employees.

[221] The parties have provided the Board with no case in which the Board has found that the existing unit was not viable and then ordered a vote that would determine whether the employees could remain in that unviable unit. Even if they had, it is not logical (or consistent with stable labour relations) to apply the intermingling principles to determine the continued maintenance of a unit, to find that the unit should not be maintained on the basis of those principles, and then find that the decision whether to remain in the unit that is no longer viable should rest with the employees.

[222] To be clear, the Board in *Saskatoon Co-op* found that the unit was "a functional arrangement" (and still ordered a vote). In the decision that preceded *Saskatoon Co-op*, the Board adopted similar principles.[73] In both cases, the Board considered the right of employees to choose their bargaining representative. In *Saskatoon Co-op*, the Board found that "employee choice as identified in *Mounted Police* "may be a relevant fact to consider in successorship cases".[74] However, it did not decide that in all cases involving dual unionism a run-off vote is necessary.

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[73] *Saskatoon Co-operative Assn. Ltd. and RWDSU, Re*, 2014 CarswellSask 564, 2015 CLLC 220-003 (rev'd on other grounds); *UFCW, Local 1400 v Saskatchewan Joint Board*, 2015 SKQB 84; 2016 SKCA 94.
[74] *Saskatoon Co-op*, at para 187.

[223] Furthermore, the majority of the Supreme Court in *Mounted Police* made clear that employee choice is not an absolute, but is complementary to employee independence, both of which need to be considered "globally" to determine the "constitutional compliance of a labour relations scheme".[75] If freedom of employee choice of bargaining agent was absolute, designated bargaining agent models (not preceded by votes) would not be constitutionally permissible. And, as explicitly stated by the majority, the "designated bargaining model …offers another example of a model that may be acceptable".[76]

[224] Furthermore, the industry and workplace in question is relevant context in assessing whether there is compliance with section 2(d) of the Charter:

> *99 In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(d).*

[225] Moreover, it is not the case that the Board has not considered employee choice as "a relevant factor". The existing certification orders have been granted within a majoritarian regime. In the present case, employee choice of the CUPE bargaining unit has been considered, as was outlined in the Dorsey Report:

> *Some of the health services providers units are overwhelmingly represented by SEIU or CUPE and should remain that way. Examples are Regina and Saskatoon. For others, some rationalization is required. These considerations are reflected in the reorganization of representation rights affecting CUPE and SEIU.*[77]

[226] The health services provider unit in Regina was "overwhelmingly represented" by CUPE.

[227] Through the *Reorganization Act*, unions were certified on a regional basis if they represented a clear majority of the employees.

[228] Furthermore, in cases where it is appropriate to order a vote, this Board and others have declined to do so if there was a significant disparity in the membership of the competing unions.[78]

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[75] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 SCR 3 [*Mounted Police*], at para 90.
[76] *Mounted Police*, at para 95.
[77] *Dorsey Report*, at 83.
[78] *Saskatoon Co-op*, at para 182. *Community Living Central Highlands v CUPE, Local 4603*, 2017 CarswellOnt 1668, [2017] OLRB Rep 22; *I.A.M. & A.W., Local 99 v O.E.M. Remanufacturing Co*., 2011 CarswellAlta 23, [2011] Alta LRBR 1, at para 195.

[229] The Ontario Board has explained:

> *11 Although the Board retains discretion under section 69(6) and (8) regarding whether to order a representation vote for the purpose of determining which bargaining agent will retain bargaining rights in order for the Board to make its declaration pursuant to section 69(6)(c), the Board has, generally speaking, not exercised this discretion where there is a "large disparity" in the size of the intermingled groups. As the Board noted in I.B. of T.C.W. & H. of A., Local 647 v. Silverwood Dairies, [1980] O.L.R.B. Rep. 1526 (Ont. L.R.B.), at paragraph 26:*
>
> > *... the Board has a discretion to direct that a representation vote be taken to enable the intermingled employees to choose which of the two trade unions will be their bargaining agent. However, where there is a large disparity in the size of the intermingled groups of employees, the Board will generally not direct that a representation vote be taken, but rather will declare that the trade union representing the great majority of employees is to be the bargaining agent for the new bargaining unit.*
>
> *12 The Board has frequently repeated its articulation of this principle. Recently, in Chatham Kent Hydro Inc. v. IBEW, Local 636 [2013 CarswellOnt 270 (Ont. L.R.B.)], 2013 CanLII 1952 at paragraph 27:*
>
> > *Where there is a "large disparity" in the size of the intermingled groups of employees, the Board will generally not direct that a representation vote be taken. The Board has been reluctant to define a minimum proportion of employees in the intermingled unit that a trade union must represent for a representation vote to be ordered. However, it is rare for the Board to order a vote when one trade union represents 80% of the intermingled unit of employees. (Silverwood Dairies, [1980] OLRB Rep. 1526 at paras. 26 - 29; Pembroke General Hospital, [1997], OLRB Rep. Sept./Oct. 918 at para. 15)*

[230] The standard practice is to presume that CUPE continues to enjoy the support of the majority of its members. There are approximately 13,000 CUPE employees in total, approximately 6,333 CUPE members in the former Regina Qu'Appelle Health Region, and approximately 600 SEIU members in Regina. The SEIU contingent represents approximately 5% (rounded up) of the overall group and 10% of the Regina area. Given these numbers, the various thresholds that have been applied by this Board and others do not justify ordering a vote. To the extent that a vote is even relevant to the Moose Jaw and Saskatoon units, the numbers do not improve SEIU's position.

[231] For all of the foregoing reasons, the Board will make an Order pursuant to subsection 6-18(4) of the Act, incorporating the health services providers employed by the Saskatchewan Health Authority in the former Extendicare/Parkside, Extendicare/Sunset, and Extendicare/Elmview, except specified exceptions, into the unit as per the certification order in LRB File No. 202-02. The existing CBA between CUPE and SAHO will apply with necessary

modifications, including to ensure no interruption of benefits to the employees and to ensure the dovetailing of seniority.

[232] Furthermore, all health services providers employed by the Saskatchewan Health Authority in Extendicare/Preston in Saskatoon and in Extendicare/Moose Jaw in Moose Jaw, except specified exceptions will be incorporated into the units as per the certification orders in LRB File Nos. 204-22 and 097-16. The existing CBA between SEIU and SAHO will apply with necessary modifications, including to ensure no interruption of benefits to the employees and to ensure the dovetailing of seniority.

[233] To the extent reasonably possible, every health services provider in the former Extendicare facilities will be entitled to retain the seniority they earned in their former appropriate bargaining unit and to have such seniority recognized under the terms of the collective agreements.

[234] The Board will make the appropriate orders that are necessary and incidental to these Reasons.

[235] The panel will remain seized to assist with the implementation of those orders.

[236] Finally, the Board wishes to extend its gratitude to the parties, and their counsel, for their exceptional professionalism and commitment to this complex case. All of the submissions and authorities were carefully considered in the Board's determination. Unfortunately, these Reasons cannot possibly capture the full value that each counsel provided to their clients and to the Board.

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

DATED at Regina, Saskatchewan, this **30th** day of **November, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson