ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0353-18-R
Review of Structure of Bargaining Units

University of Ontario Institute of Technology Faculty Association, Applicant v University of Ontario Institute of Technology , Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - August 07, 2018

DATED: August 07, 2018

Catherine Gilbert
Registrar

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Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0353-18-R**

University of Ontario Institute of Technology Faculty Association, Applicant v **University of Ontario Institute of Technology**, Responding Party

BEFORE: Elizabeth McIntyre, Vice-Chair

APPEARANCES: David Wright, Christine McLaughlin, Kimberly Nugent and Mike Eklurd appearing for the Applicant; George Avraam, Krista Secord and Caitlin Crompton appearing for the Responding Party

DECISION OF THE BOARD: August 7, 2018

1. This is an application under section 15.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, (the "Act") for a review of the structure of the bargaining units for which the Applicant holds bargaining rights at the Responding Party. The Applicant union seeks to combine three bargaining units into a single consolidated unit. The application is opposed by the Responding Party.

The Legislation

2. Section 15.1 of the *Labour Relations Act* is a new provision added to the legislation in 2018; the relevant subsections are:

> **Review of structure of bargaining units — consolidation after certification**
>
> 15.1 (1) If the Board certifies a trade union or council of trade unions as the bargaining agent of the employees in a bargaining unit, the Board may review the structure of the bargaining units if all of the following conditions are met:

1. The employer, trade union or council of trade unions makes an application to the Board requesting the review at the time the application for certification is made, or within three months after the date of certification.

2. A collective agreement has not yet been entered into in respect of the bargaining unit.

3. The same trade union or council of trade unions that is certified as the bargaining agent of the employees in the bargaining unit already represents employees of the employer in another bargaining unit at the same or a different location. 2017, c. 22, Sched. 2, s. 4.

Same

(2) If an application for review under subsection (1) is made at the same time as an application for certification, the applications may be heard together, but the Board shall determine the application for certification first. 2017, c. 22, Sched. 2, s. 4.

Agreement of parties
(3) If the Board reviews the structure of the bargaining units, the Board,

(a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from its review; and

(b) may make any orders it considers appropriate to implement any agreement. 2017, c. 22, Sched. 2, s.

Orders

(4) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board shall determine any question that arises and make any orders it considers appropriate in the circumstances. 2017, c. 22, Sched. 2, s. 4

Contents of orders

(5) For the purposes of subsection (4), the Board may,

(a) consolidate the bargaining unit in respect of which the trade union or council of trade unions was certified with an existing bargaining unit or units of employees of the employer represented by the same trade union or council of trade unions;

(b) amend any certification order or description of a bargaining unit contained in any collective agreement;

(c) order that a collective agreement between the employer and the trade union or the council of trade unions that applied to an existing bargaining unit that is consolidated under clause (a) applies, with or without modifications, to the consolidated bargaining unit;

(d) declare that the employer is no longer bound to a collective agreement that applied in respect of an existing bargaining unit before the consolidation;

(e) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;

(f) if the conditions of subsection 79 (2) have been met with respect to some of the employees in a consolidated bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the consolidated bargaining unit or the conditions of that subsection are met with respect to that unit; and

(g) authorize a party to give notice to bargain collectively. 2017, c. 22, Sched. 2, s. 4.

Factors to consider

(6) In making a determination in an application for review under subsection (1), the Board shall take into consideration all factors that the Board considers relevant, including whether consolidating the bargaining units would,

> (a) contribute to the development of an effective collective bargaining relationship; and
>
> (b) contribute to the development of collective bargaining in the industry. 2017, c. 22, Sched. 2, s. 4.

Evidence

3. The evidence before the Board consists of undisputed documents filed by each of the parties. No witnesses were called by either party.

4. The Responding Party was established pursuant to the *University of Ontario Institute of Technology Act, 2002* under which the university is charged with the mission of providing "career oriented university programs and to design and offer programs with a view to creating opportunities for college graduates to complete a university degree". The objects of the university set out in section 4 of the legislation are as follows:

> (a) to provide undergraduate and postgraduate university programs with a primary focus on those programs that are innovative and responsive to the individual needs of students and to the market-driven needs of employers;
>
> (b) to advance the highest quality of learning, teaching, research and professional practice;
>
> (c) to contribute to the advancement of Ontario in the Canadian and global contexts with particular focus on the Durham region and Northumberland County; and
>
> (d) to facilitate student transition between college-level programs and university-level programs. 2002, c. 8, Sched. O, s. 4.

5. The Applicant has represented approximately 180 tenured and tenure-track faculty ("tenured faculty") since being voluntarily recognized by the Responding Party in 2008. The collective agreement for this group, which expired on June 30th, 2018 has the following recognition clause:

> Tenured and tenure-Track Faculty:
>
> The Employer recognizes the Association as the sole and exclusive bargaining agent for all full-time tenured and tenure-track faculty members of the University of Ontario Institute of Technology at Oshawa, save and except Associate Deans and Associate Provosts, and those above the level of Associate Dean or Associate Provost, Emeritus Professors, Librarians, Visiting Appointments, and members of the Board of Governors.
>
> Clarity Note:
> Post-Doctoral and Research Fellows are not UOIT Faculty.

6. The Applicant was subsequently certified for a unit of approximately 60 permanently appointed teaching faculty ("permanent faculty") in 2012. The collective agreement for this group which expires on June 30th, 2020 has the following recognition clause:

> Teaching Faculty:
>
> The Employer recognizes the Association as the sole and exclusive bargaining agent for all Teaching Faculty Members of the University of Ontario Institute of Technology at Oshawa, save and except Associate Deans and Associate Provosts, and those above the level of Associate Dean or Associate Provost; employees who are hired on a definite term appointment; Post-Doctoral Fellows; Research Associates; Emeritus Professors; Librarians; Visiting Appointments; and member of the Board of Governors.

7. A bargaining unit was certified for approximately 20 temporary full-time teaching staff ("temporary faculty") on April 20, 2018. The parties have not commenced bargaining in respect of this unit. This unit is described in the certificate as follows:

> Limited and Definite Term Faculty (the Unit certified in Board File No. 0016-18-R):
>
> All academic associate employees appointed to teach at the University of Ontario Institute of Technology on definite/limited term appointments of twelve months or longer, save and except:

a. those employed on sessional limited term contracts as lecturers to teach one or more degree credit courses;

b. those employed as postdoctoral fellows;

c. those employed as teaching and research assistants;

d. those who are employed in a professional capacity within the meaning of s. 1(3)(a) of the *Labour Relations Act*; and

e. those who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations within the meaning of s. 1(3)(b) of the *Labour Relations Act*.

For clarity, the term "academic associate employees" encompasses those appointed to teach as a "Limited Term Academic Associate" under the current Limited Term Academic Associates Procedure (ADM 1319.02), and employees who are appointed to perform such duties in the future, regardless of their title.

For further clarity, employees in the bargaining unit may hold multiple contracts or appointments at the University of Ontario Institute of Technology in more than one bargaining unit, and are employees in this bargaining unit to the extent that they are preforming bargaining unit work as described above.

8. The part-time sessional faculty, who teach on a course by course basis, are represented by Public Service Alliance of Canada. The permanent faculty and temporary faculty units are, where appropriate, referred to in this decision as the "teaching faculty" or "teaching units".

Submissions of the Parties:

9. Both parties agree that the conditions of sections 15.1(1) and 15.1(3) have been met. Since the parties are unable to come to an agreement under 15.1(3), the Board must make a determination of whether the application should be granted. In the event that the application is granted the parties agree that the Board should refer the

matter back to them and remain seized regarding any orders that may be required under section 15.1(5).

10. The determination to be made by the Board rests on an application of section 15.1 (6) and it is to that subsection that the parties addressed their arguments. The Applicant suggested that section 15.1(6)(b) which requires the Board to consider how a consolidation of bargaining units would contribute to the development of collective bargaining in the industry has little or no application in this case as the university sector is already highly unionized. The Responding Party did not disagree with that position. The parties submissions focused on other factors.

11. The Applicant takes the position that the Board should exercise its discretion to combine all three groups represented by them into one unit. They base their argument on the similarity of interests of the three groups, the efficiencies achieved by having a single collective agreement, and on the fact that the norm in the university sector is to have these groups bargain together. They also assert that consolidation is consistent with the Board's preference for larger groups when called upon to define the most efficient bargaining unit.

12. On the first point, Mr. Wright, counsel for the Applicant, argued that while there are some differences between the groups, the interests of the three groups are fundamentally the same. They are all full-time, they are all involved in teaching and they are all required to give service time to the university. The major difference between the tenured faculty and the other two groups is research. The former group are required to do research; the latter two, while having no obligation to do research, are allowed to do so. Under the tenured faculty collective agreement the standard workload is balanced between 40% research, 40% teaching, and 20% service. Under the permanent faculty collective agreement the standard workload balance is 70% teaching, 20% service and 10% other. The union asserted that the other time can be used for research. The union filed two job postings for temporary faculty, one of which has the same time balance as the permanent faculty and one of which specifies that 80% of the time will be devoted to teaching and 20% to service.

13. The Applicant also relied on the fact that, while there may be some exceptions, it is the norm for all faculty members to have a PhD. The Applicant filed three job postings for permanent faculty positions and two temporary faculty positions. All five mention a PhD in the

qualifications, although one temporary faculty position also accepts a master's degree in the relevant field of study.

14. Both the agreement for the tenured faculty and the agreement for the permanent faculty provide for a joint union-management committee to discuss issues arising from the agreement and/or issues of mutual concern. The Applicant filed agendas and meeting notes from joint committee meetings for November, 2017 to May, 2018 to establish that there was an overlap of the issues discussed at the two sets of meetings. The Applicant argued that there is a similarity of interests between the employees in all three units.

15. The Applicant also relied on the similarity of many parts of the tenured faculty collective agreement and the permanent faculty collective agreement to demonstrate an overlap of interests between the two groups. The Applicant asserts that while there are some differences between the agreements, they both follow the same model and fundamentally overlap with many duplicative provisions. They argue that to the extent there are different interests between the groups, the parties can negotiate separate provisions or appendixes to deal with any issues unique to one group or the other.

16. The Applicant addressed several of the specific differences between the two existing collective agreements. With respect to the provisions relating to the research obligations of the tenured faculty, it was acknowledged that there was no need for these provisions in the collective agreement for the permanent faculty. Regarding the provisions in the tenured faculty collective agreement relating to tenure, counsel for the Applicant pointed to the process for continuing appointment in the permanent faculty agreement, which he argued is similar to the tenure process in the tenured faculty agreement. While there are differences in process, the provision is fundamentally similar as both are based on peer review. The promotion language is similar in both agreements.

17. The second argument made by the Applicant is that it would be more efficient for bargaining to have one unit rather than three. A combined unit would require only one round of bargaining for each collective agreement term whereas if there are three units, with three expiry dates, the Applicant argued that the parties would be in perpetual bargaining. The Applicant referred to a summary of bargaining for the tenured faculty and the permanent faculty, filed by the Applicant, which shows the following time spent in bargaining for each group:

Tenured and Tenure Track:

1st CA-July 1, 2009-June 30, 2010-held **40** bargaining meetings between December 2008 and May 2010-completed bargaining May 14, 2010

2nd CA-July 1, 2010-June 30, 2015-held **24** bargaining meetings between January and November 2011-completed bargaining November 22, 2011

3rd CA-July 1, 2015-June 30, 2018-held **32** meetings between August 2015-March 2016-completed bargaining March 16, 2016

Teaching Faculty:

1st CA-July 1, 2014-June 30, 2017-held **31** meetings between October 2012- and February 2014-completed bargaining Feb 12, 2014

2nd CA-July 1, 2017-June 30, 2020-held **16** meetings between April and November 2017-completed bargaining Nov. 7, 2017

18. Counsel for the Applicant advised that the parties were on the eve of strike in the last two rounds of bargaining and argued that, with a single unit, there will be a decreased risk of labour stoppages. With three units there could be an impasse in negotiations which would impact on students in every academic year. It would also be more efficient to have one joint committee rather than three.

19. The third argument of the Applicant is based on the single unit composition of faculty bargaining units at other universities across the province where the norm is to have limited term appointments in the same bargaining unit as permanent appointments. Furthermore, to the extent that other universities have non-tenure track teaching faculty, it is the norm for them to be in the same bargaining unit as tenure track faculty.

20. The Applicant provided evidence of the bargaining unit structure for faculty at the other 21 universities in Ontario. Of the 18 universities at which the faculty are unionized all but two have bargaining units that include tenured and tenure-track faculty with limited term faculty. Of those that employ non-tenure stream teaching faculty, none are

represented in a bargaining unit separate from the tenured/tenured stream faculty. The Applicant acknowledges that there are exceptions to the norms. However, with respect to Osgoode Hall Law School, an affiliate of York University, there is currently an application before the Board to consolidate the newly certified limited term appointments with the tenured track faculty group. See *Osgoode Hall Faculty Association v York University*, 2018 CanLII 50613 (ON LRB). At Nipissing there is an agreement between the parties to consolidate the two existing bargaining units. Counsel for the Applicant asserted that the bargaining structures at the other universities which combine research faculty with teaching faculty and permanently appointed faculty with temporarily appointed faculty have been shown to be efficient and work well.

21. The Applicant filed collective agreements for the faculty at the other universities in Ontario drawing particular attention to the agreements at Lakehead and Laurentian which are of similar size to the Responding Party. The Lakehead agreement applies to tenured, tenure-track, limited term and permanent teaching faculty. Counsel argued that this agreement shows the ease with which the parties can adapt a collective agreement to deal with any unique interests of the different groups covered under the agreement. The Laurentian agreement applies to tenured, and tenure-track faculty as well as permanent, limited term and sessional teaching faculty. The master lecturers under this agreement are required to spend 88% of their time in teaching with the remaining for service or scholarly work. This is a greater proportion of teaching time than the 70% required of the permanent faculty at the University of Ontario. Counsel argued that this agreement also shows that even groups with more focus on teaching fit happily in a bargaining unit with tenured faculty and that the Responding Party in this case is like other institutions in Ontario which have teaching-intensive faculty.

22. As this is a new provision there are no prior Board decisions in which it has been applied. However, counsel for the Applicant relied on Board decisions regarding appropriate bargaining units made under other statutory provisions to support the proposition that generally the Board's approach has been "the bigger the better". According to the Applicant, while bigger is not always found to be better, if everything else is equal, the Board has expressed a preference for a broader based unit as being the more efficient unit.

23. Mr. Wright relied on three certification cases in which the Board considered an appropriate bargaining unit but pointed out that in the current case the Board need not be concerned about the impact of its

decision on the right to organize, a concern that is found expressed in many certification decisions. In *National Trust*, [1986] OLRB Rep. February 250 the Board determined that a bargaining unit consisting of employees at a number of branches at which the union was certifiable, was an appropriate bargaining unit. In *Tiercon Industries Inc.*, [2003] OLRB Rep. July/August 664, the Board accepted the larger unit proposed by the Employer as being the better unit in that it would meet the Employer's needs for administrative efficiency, would permit greater industrial stability, would allow lateral mobility and would achieve a common framework for employment conditions. *Selwyn Community Child Care Centre*, 2018 CanLII 11541 (ON LRB) is a recent example of the Board's preference for comprehensive bargaining units.

24. Counsel for the Applicant also referred to three merger cases from the public sector in which the Board accepted that broader-based bargaining units are preferable. *Humber/Northwestern/York-Finch Hospital*, [1997] OLRB Rep. September/October 872 was decided under the successor rights provisions of the *Labour Relations Act*, prior to the enactment of the *Public Sector Labour Relations Transition Act, 1997*, S.O. 1997, c.21, Schedule B ("PSLRTA"). *Kenora-Rainy River Districts Child and Family Services*, 2012 CanLII 11121 (ON LRB) and *North Bay Regional Health Centre*, 2017 CanLII 16969 (ON LRB) were decided under PSLRTA.

25. Finally, the Applicant relied on *The Hudson's Bay Company,* [1993] OLRB Rep. October 1042, a decision made under the previously enacted, but repealed, provision of the *Labour Relations Act,* which gave the Board the power to combine bargaining units. The union argues that although the statutory language of the old provision differs from the recently enacted section 15.1, the principles outlined by the Board are still applicable.

26. In summary, the Applicant argued that the prior decisions of the Board are persuasive in support of a larger bargaining unit and that there is no good reason to reject that approach in this case. This university is not unique. Other universities have the three groups combined in a single bargaining unit. The members of all three groups are employed for the same purpose; they are all faculty whose interests overlap as shown by the existing collective agreements and joint committee meeting minutes. It is more efficient to have a single collective agreement so that the parties are not continually bargaining and so that there is a reduced risk of work stoppages.

27. It is the position of the Responding Party that while an application to consolidate the newly certified temporary faculty with the existing permanent faculty unit would make sense, the application to consolidate all three units should be dismissed. Mr. Avraam, counsel for the Responding Party, asserted that the existing bargaining structure has resulted in effective collective bargaining with no work stoppages and that there have been no problems in the administration of the collective agreement. The tenured faculty and the teaching faculty do not have the same interests and the application to combine their unit with the other two units does not satisfy the requirements of 15.1 (6). Referring to the first factor identified in article 15.1(6) he argued that consolidation of the teaching units with the tenured/tenured stream unit will not contribute to a more effective collective bargaining relationship.

28. The Responding Party relied on the special mission and objects set out for this university in the *University of the Ontario Institute of Technology Act, 2002* to argue that the bargaining structure at this university reflects its unique legislative mandate. The permanent faculty collective agreement is negotiated in the context of market oriented career programs provided by the teaching faculty. These programs need to be responsive to market needs. Consolidating the bargaining units for the teaching faculty with the tenured faculty would run counter to effective collective bargaining.

29. The Responding Party also argued that, as the tenured faculty are the largest unit, their interests would override the interests of the teaching faculty in the negotiation and administration of a combined collective agreement.

30. The Responding Party pointed out that while there is overlap in some of the basic language of the existing collective agreement for the tenured faculty and the permanent faculty, there are fundamental differences between the two agreements. The tenured faculty collective agreement has a number of provisions that have unique application to that group. This includes provisions related to appointments, research, performance review, promotion and tenure. Provisions regarding research rights are an important issue for the tenured faculty; these provisions are not necessary in the agreement for the permanent faculty. The permanent faculty also have unique interests. There are elaborate lay off provisions in their collective agreement which are irrelevant to the tenured faculty who cannot be laid off; they can only lose their tenure rights through retirement or discharge.

31. The Responding Party disputed the Applicant's assertion that consolidating the bargaining units would result in increased efficiency in bargaining. Counsel reviewed the bargaining history between the university and the tenured faculty which shows that it took 40 bargaining sessions to reach the first collective agreement, 24 bargaining sessions to reach the second and 32 bargaining sessions to reach the third. Counsel argued that efficiencies in bargaining have already been accomplished and that, while there are some common provisions, in bargaining, the parties focus on the unique issues of the tenured versus the teaching faculty. While acknowledging that the collective agreement could be merged counsel questioned why that should be required when it would be disruptive to the bargaining relationship.

32. In response to the Applicant's arguments regarding the overlap of issues at the respective joint committee meetings, counsel for the Responding Party argued that many of the overlap issues, such as harassment and Ministry of Labour workshops would be common to the entire institution, and not just to the tenured and teaching faculty. The evidence regarding an overlap of issues does not satisfy the statutory requirements of article 15.1(6).

33. The Responding Party argued that the evidence of bargaining structures in place at other universities across the province is also not helpful to the Applicant. The fact that other universities have different faculty in the same bargaining unit is immaterial given that the statutory mandate at this university is unique. Counsel also pointed out that the union conceded that contribution to the development of collective bargaining in the industry, as referenced under section 15.1(6)(b), is irrelevant in this case as the university sector is already heavily unionized. Accordingly, the bargaining structures elsewhere should not be considered in the exercise of the Board's discretion under the provision.

34. In summary, it is the Responding Party's position that the parties already have an effective bargaining relationship and therefore the Applicant has not met the necessary onus to satisfy the statutory test for combining the units. Even though there is some commonality of language in the existing collective agreements, the parties take substantial time in dealing with the distinct circumstances of each group. Given the unique goals of the Responding Party there is no compelling reason to consolidate and to do so would be to give tenured faculty dominance.

35. In the context of this case, the Responding Party says that bigger is not better. In support of its position that the Board does not always prefer a larger bargaining unit the Responding Party relied on *North Simcoe Hospital Aliance,* [1999] OLRB Rep. May/June 460. Reference was also made to *Hamilton Niagara Haldimand Brant Community Care Access,* [2007] OLRB Rep. May/June 548, a case in which the Board stated its preference for the status quo where there are existing collective bargaining relationships. These cases were both decided under PSLRTA.

36. In regard to *The Hudson's Bay Company (supra)* decision relied on by the Applicant, counsel for the Responding Party pointed out that this case was decided under the previously enacted, but repealed, section 7(3) which set out the following factors to be considered in the consolidation of bargaining units:

> 7(3)The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,
>
> (a)would facilitate viable and stable collective bargaining;
>
> (b) would reduce fragmentation of bargaining units; or
>
> (c) would cause serious labour relations problems.

37. Counsel argued that if the legislature wanted to use the factors in the prior legislation they could have done so. Instead they choose inclusive language in which the only applicable factor relates to effectiveness in the collective bargaining relationship. Based on the principles of statutory interpretation, counsel argued that the distinct statutory language should be given distinct meaning.

38. Counsel also argued that the certification and successor applications relied on by the Applicant are of no assistance in resolving the case before the Board. This case should be decided on the language of the section in question.

39. In reply counsel for the Applicant argued that every university has unique features, but that this fact should not lead to the conclusion that the bargaining units should not be combined. With respect to the career focused program of the University of Ontario both the tenured and teaching faculty are involved in providing career courses. Under the *University of Ontario Institute of Technology Act, 2002* the term

"teaching staff" includes faculty whether tenured or not. In response to the Responding Party's arguments based on the effectiveness of the current structure, the Applicant pointed to the fact that the parties have been to the brink of a strike with both the tenured faculty and the permanent faculty. The parties have been in bargaining over 50% of the time with just two bargaining units. While some efficiencies have been achieved in bargaining, there is now a third unit which will result in three separate rounds of bargaining.

Decision:

40. The issue in this case is whether the application for the consolidation of bargaining units should be granted. Should the Board exercise the discretion given to it under section 15.1(3) to consolidate the newly certified bargaining unit of temporary faculty with one or both of the existing bargaining units represented by the Applicant? Both parties agree that combining the newly organized temporary teaching unit with the existing permanent teaching unit would contribute to the development of an effective collective bargaining relationship. The Board agrees with the parties on this conclusion and therefore, given the Board's remedial powers under section 15.1(5)(a), the application will be granted at least to that extent. The real issue to be decided is whether the teaching units should be consolidated with the tenured/tenure-track unit.

41. In reviewing the structure of bargaining units section 15.1(6) firstly mandates the Board to take into consideration "all of the factors that the Board considers relevant". The Board is therefore given a very broad mandate in considering how to exercise its discretion under section 15.1. The specific factors the Board is required to consider are whether consolidating the bargaining units would "contribute to the development of an effective collective bargaining relationship" and "contribute to the development of collective bargaining in the industry".

42. It was suggested by the Applicant that the second specified factor has little or no application in this case as the university sector is already highly unionized. The Responding Party did not disagree with that position. While it is unnecessary for this issue to be decided in this case, the Board does not necessarily accept that the concept of "contribution to the development of collective bargaining in the industry" set out in section 15.1(6)(b) is necessarily limited to considering the impact of consolidation on future organizing. There may be industries which are highly organized but in which the bargaining unit structures

in place are fragmented. In such cases section 15.1(6)(b) may be relevant to the review of bargaining structures. However, as faculty in the university sector are not only highly organized, but are already structured in faculty wide bargaining units, the application of this factor is neutralized in this case. The factor related to effective collective bargaining, however, is a primary focus for determination of this application.

How should "development of effective bargaining relationships" be interpreted?

43. Although "the development of effective bargaining relationships" is not an exact term that is used elsewhere in its governing legislation, the concept is one which has been examined by the Board in other contexts in which the Board has been called upon to determine the descriptions of bargaining units. In both *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523 and *The Hudson's Bay (supra)* the Board found decisions involving certification to be useful in applying the former section 7 combination language. The old section provided as follows:

> 7.(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.
>
> (2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:
>
> 1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
>
> 2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
>
> 3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and

> that has applied for certification for the other proposed bargaining units.
>
> (3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,
>
> (a)would facilitate viable and stable collective bargaining;
>
> (b) would reduce fragmentation of bargaining units; or
>
> (c) would cause serious labour relations problems.
>
> (4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,
>
> (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
>
> (b) the employer's ability to continue to operate those places as viable and independent businesses.
>
> (5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.
>
> (6) This section does not apply with respect to bargaining units in the construction industry.

In *Mississauga Hydro-Electric Commission (supra)*, the Board pointed out that:

> 6. The task of facilitating viable and stable collective bargaining in connection with bargaining units is familiar territory for the Board, which has explored this theme extensively in the context of determining appropriate bargaining units at the point of certification. This is true as well for the proposition of reducing fragmentation, since the Board has sought to avoid undue fragmentation in shaping units. Much of the Board's jurisprudence reflects a relatively sophisticated approach to these issues, which has evolved over a number of years of considerable experience. Accordingly, we find it useful to review some of that jurisprudence under section 6 in considering these criteria in the context of combining bargaining units as well.

44. The Board's certification jurisprudence is relevant to determinations under section 15.1 as it was to determinations under the prior combination provision. Both statutory provisions give the Board broad discretion to consider all factors it considers relevant (or, under the former section 7, "such factors as it considers appropriate"). Furthermore, while the three specific factors enumerated in the former section 7 were differently worded from the one specified factor in section 15.1(6)(a), both provisions mandate similar considerations. The "facilitation of viable and stable collective bargaining" is something that the Board has determined contributes to an effective collective bargaining relationship. Similarly, both the reduction of fragmentation and the avoidance of serious labour relations problems have been part of the Board's analysis in determining what facilitates effective collective bargaining relationships.

45. In reviewing the Board's certification jurisprudence, the following comments were made in *Mississauga Hydro-Electric Commission (supra)*:

> 7. We observe firstly that viability, stability and fragmentation have been interwoven in the Board's determination of bargaining units. A review of the cases indicates that the Board has considered more comprehensive bargaining units and minimizing fragmentation to be key elements in facilitating viable and stable collective bargaining. For example, in The Board of Education for the City of Toronto, [1970] OLRB Rep. July 430, the Board expressed the view that fragmentation may make it impossible to have a viable and meaningful collective bargaining relationship:
>
> > 18.The fact-finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable

> and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. Waterloo County Health Unit, [1969] January OLRB Mthly. Rep. 1016.
>
> 8.The British Columbia Labour Relations Board set out the same kind of factors favouring broader bargaining units in the Insurance Company of British Columbia, [1974] 1 Can LRBR 403 (adopted by this Board in National Trust, [1986] OLRB Rep. Feb. 250) where it said at p. 259 as follows:
>
> > The simplest reason favouring one overall unit is ADMINISTRATIVE EFFICIENCY AND CONVENIENCE in bargaining [emphasis added in upper case text]. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.

46. The real distinction between the specified factors in the old statutory provision and the new one is the requirement to consider contribution to the development of collective bargaining in the industry. While referencing the decisions in certification applications, the Board in *Mississauga Hydro-Electric Commission (supra)*, recognized that the considerations to be applied in combination applications are different as follows:

> At the same time, it is also evident that the Board's approach to combining bargaining units must be somewhat different than the method the Board uses to structure those units at the point of certification. Although the criteria in section 7(3) echo some of the themes addressed by the Board under section 6, there are some notable absences. Section 7(3) does not employ the language of appropriateness set out in section 6, and there are obvious differences in the kinds of factors relevant even to viability. For example, the Board may not have the same concern that larger bargaining units might impede the right of employees to organize themselves in a combination application, when access to collective bargaining is not an issue. This brings the problems associated with fragmentation and its impact on viable and stable collective bargaining into sharper focus. Indeed, in the

> absence of this concern, the Board's views on the undesirable impact of fragmentation may suggest a more marked preference for larger units. Likewise, the Board's approach to displacement applications for certification is shaped to some extent by specific considerations with respect to gerrymandering, which may take a different form in the context of combination applications.

47. One of the distinctions drawn was that in certification cases, the Board considers the impact of larger bargaining units on the right to organize. While not a factor mentioned in the old section 7, the development of collective bargaining in the industry is specifically mentioned in section 15.1 (6)(b). It appears that the current legislative intent is to facilitate the organization of smaller units followed by the potential combination of those units to allow for a larger one. Otherwise the distinctions draw in *Mississauga Hydro-Electric Commission (supra)* between certification cases and combination cases are applicable to section 15.1 applications.

48. In this case, the Responding Party suggested that as the Applicant had failed to establish that the existing bargaining relationship was not effective, the application should fail. In *The Hudson's Bay (supra)* the argument was made that the Applicant should have to establish significant problems with the existing situation before the Board would combine the units. In rejecting that proposition the Board referred to these comments made in *Mississauga Hydro-Electric Commission (supra)*:

> 19. The employer in this case urged the Board to adopt an approach to section 7 in which bargaining units would not be combined unless the Applicant could point to serious labour relations problems in the existing bargaining framework. Implicit in this proposition is the idea that since the Board will have initially determined that one or more of the units was appropriate, there should be some significant threshold for an Applicant to overcome in terms of subsequent combination. Although at first glance this approach is not without some advantages, further examination reveals a number of flaws.
>
> 20. At the outset, it is important to note that the Board has acknowledged the elasticity of the concept of the appropriate bargaining unit. Rather than seeking to ascertain the one perfect bargaining unit in each

> situation, it has recognized that there may be more than one equally appropriate bargaining unit in a particular case. In The Hospital for Sick Children, [1985] OLRB Rep. Feb. 266, the Board noted as follows:
>
> 21. None of this is new of course. The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit. Full-time and part-time employees can be segregated, but there are many situations where they have not been.

If there can be more than one appropriate unit, the Board's determination at the certification stage may not carry as much weight in a subsequent combination application.

> 21.In addition, certifications for existing units have taken place over a span of almost fifty years. A number of them were based on assumptions, for example with respect to the part-time employees, which have come under increasing scrutiny in the wake of changing social and economic conditions. Moreover, as we noted above, some bargaining units may have been shaped to a very significant degree by factors more relevant to certification than combination, such as the concern that larger bargaining units may impede organization. It is also true that bargaining unit determinations in certification applications take place in a context in which the issues are often framed by the parties with reference to the impact it will have on the chances of certification. The parameters established by the parties in this regard may affect the ultimate decisions. Similarly, many bargaining unit determinations are also based on agreement by the parties, and the Board has often been

content to found its decisions in this area on such agreements, even to the point of accepting units it would not normally establish itself. Finally, many existing bargaining units are based on historical anomalies. For example, at one time, meat cutters in the retail sector had their own union and a quasi-craft status. When that union amalgamated with another, the pattern of separate organization continued to some extent, so that it is not uncommon to see units consisting of meat department employees only, a somewhat unlikely unit to be determined by the Board in the absence of this history. These kinds of historical anomalies can also be found in the printing industry, the health care sector, and so forth.

22. As a result, the current bargaining unit landscape represents a veritable hodgepodge of rational and sound structures, outdated assumptions, specific organizing patterns, historical anomalies, individual agreements by parties, and Board determinations in a context where the parameters of litigation may have been distorted by strategic concerns. To this extent, it may be difficult to marshal the status quo in aid of an approach to combination orders which requires the Applicant to meet a significant threshold.

23. We find it instructive as well that the language of section 7(3) does not suggest that the combination of units is to be resorted to only as a remedy for a problem of some kind. A comparison with the phrasing of other provisions such as section 41(2) highlights this difference. That section sets out criteria which must be met for the Board (as opposed to the Minister) to direct the arbitration of a first contract. Included is a stipulation that the collective bargaining process has been unsuccessful for a number of reasons, including several identified problematic situations. This somewhat more remedial focus is absent from section 7.

24. In addition, section 7(3) uses words like "the extent to which", "facilitate" and "reduce". "Facilitate" is defined in The Shorter Oxford English Dictionary (Oxford: Clarendon Press 1978) as "to render easier; to promote, help forward". This language suggests that it is not necessary to establish an existing problem to succeed in an application, but only that the combined unit might make viable and stable bargaining easier, for example.

We note as well that section 7(3)(b) refers only to fragmentation, and not undue fragmentation. This also implies a fairly low threshold for an applicant.

25. Counsel for the Applicant referred us to cases from British Columbia, including B.C. Ice and Cold Storage Ltd., [1978] 2 Can LRBR 545, where the British Columbia Labour Relations Board established two preconditions for an application for consolidation to succeed: one of the units must no longer be appropriate, and there must be some resulting jeopardy to the employer, potential or present. However, as counsel pointed out, the jurisdiction employed by the British Columbia Board to combine units derives from a general reconsideration power, rather than a specific statutory mandate which sets out criteria. In addition, the British Columbia power is used to consolidate units where there are different bargaining agents. Since the effect of combination in these circumstances is to extinguish the bargaining rights of one of the unions, it is not surprising that the British Columbia Board would be inclined to a narrow view of this exercise.

26. We were also referred to two cases from Saskatchewan, including Canada Safeway Limited, (1992) First Quarter, Sask. Labour Report, p. 47 in which the Saskatchewan Labour Relations Board found the B.C. Ice test to be too restrictive. It indicated that the central issue was whether the consolidated unit applied for would be appropriate, not whether one of the existing units was inappropriate. It then adopted the approach set out in SJBRWDSU v. OK Economy Stores Limited, [1990] 7 Can LRBR 286, where the same Board listed a number of factors in its consideration of whether a consolidated bargaining unit would be appropriate, including viability, community of interest, organizational difficulties, industrial stability, wishes or agreement of the parties, the organizational structure of the employer and the effect on its operations, and the historical patterns of organization in the industry. The Board went on to suggest that two of those factors would receive particular emphasis in combination applications: firstly, whether the employees in the proposed unit share a sufficient community of interest to warrant consolidation, and secondly, whether the consolidated unit will promote industrial stability. At the same time, because the bargaining unit is being considered in the

context of consolidation rather than certification, the Board will begin with the premise that an existing unit is appropriate and will look to whether the historical bargaining practices of the parties indicate a community of interest in a larger unit which is appropriate, given the considerations referred to above.

27. We find this approach somewhat unsatisfactory in the context of section 7(3) as well. For one thing, if the premise that an existing unit is appropriate simply reflects the fact that this was the configuration determined at the time of certification, this is of limited value for the reasons we set out earlier. Similarly, although we do not discount that some of the factors listed by the Saskatchewan Board may turn out to be useful in the Ontario context to the extent they affect viability and stability, there are a number of caveats worth noting at this time. Like the British Columbia provision, the Saskatchewan section is a more generalized power of reconsideration rather than a specific mandate, and there are significant differences in wording. In this regard, we have already commented on the issue of community of interest in terms of this Board's experience and the language of section 7(3). In addition, while we think that this is some obvious merit in considering on the employer's organizational structure and the effect on its operations under section 7(3), in considering the weight of this we cannot ignore the fact that section 7(4) focuses explicitly on the employer's operations in manufacturing in a way the Legislature did not see fit to apply more generally in section 7(3). Similarly, while we agree that the parties' historical bargaining practices may be of some value, it must be remembered that in Ontario, a party may propose changing the shape of the bargaining unit in negotiations, but cannot press the issue to an impasse without running afoul of the duty to bargain in good faith. Thus where the parties have agreed on a bargaining pattern different from that determined at certification, it may well be very instructive; where the parties have been unable to reach agreement, this fact may be of somewhat limited value.

28. Having carefully reviewed these cases, we are of the view that it is not appropriate to set up a particular onus in the face of the specific criteria set out in section 7(3). The test in the Ontario provision has already been

> provided by the Legislature. While that test is not exhaustive, and while our understanding of that test may be enriched by the Board's extensive experience in shaping bargaining units to date, the central issue before us is still whether an application meets that test. Accordingly, we find that we must consider whether the consolidated unit sought would, at least to some extent, facilitate viable and stable collective bargaining, reduce fragmentation, or cause serious labour relations problems.
>
> We find these comments equally pertinent to the case before us. Moreover, the proposition that an Applicant should have to establish some problem with the existing situation before the Board will combine units is even less persuasive in a context where the parties have themselves initiated a significant degree of combination in practical terms.

49. The Board in *The Hudson's Bay (supra)* found that these prior comments of the Board were pertinent to the case before it. They are also pertinent to the newly enacted section 15.1. In *Mississauga Hydro-Electric Commission (supra)*, the Board considered the use of the words "the extent to which" "facilitate" and "reduce" to conclude that the provision was not intended to be applied only as a remedy to a problem. Similarly, the use of the term "contribute to the development of an effective collective bargaining relationship" does not require proof that the existing relationship is a problem in the newly enacted section 15.1.

50. Furthermore, in determining that the section does not require proof that the existing collective bargaining relationship is ineffective or that the consolidated unit would improve the effectiveness of the bargaining relationship it is instructive to review the entire section. Under section 15.1, the Board's consideration of bargaining unit structure is limited to circumstances where the same bargaining agent holds bargaining rights for more than one unit of the same employer. Accordingly, in applying section 15.1(6)(a) the narrow question becomes whether having one rather than a number of bargaining units between the same parties would contribute to the development of an effective collective bargaining relationship. Section 15.1 is also limited to circumstances where the bargaining agent has recently certified a new unit but already represents an existing unit or units. Given that the bargaining agent is required to represent an existing unit, the legislation presumes that there is an existing "relationship" with the employer whether or not collective bargaining has occurred. Section 15.1(5) gives

the Board powers to apply an existing collective agreement to a consolidated unit, to declare that the employer is no longer bound to a collective agreement and/or to amend expiry dates, seniority rights and other provisions of an existing collective agreement. From this it is apparent that the legislature anticipated that consolidation of the bargaining units could occur in circumstances where the parties had already bargained one or more collective agreements and, therefore, had an existing "collective bargaining relationship". Reading subsection 15.1(6)(a) in the context of the entire section supports the conclusion that in respect of this factor, the Board need only consider whether or not consolidation would result in an effective collective bargaining relationship. It does not require that the Board conclude that the existing collective bargaining relationship is ineffective.

51. In support of its argument to maintain separate bargaining units for the tenured/tenure-track faculty, the Responding Party relied on the Board's preference for maintaining the status quo where there are existing collective agreement structures, as stated in *Hamilton Niagara (supra)*. In that case, decided under PSLRTA, the Board was required to choose between a single all employee bargaining unit and a two bargaining unit structure which separated the professional unit from the office and clerical unit. In choosing the latter the Board said:

> 25 As the parties argued, there are some limited drawbacks to each of the configurations. Two bargaining units could lead to jurisdictional disputes, although that has not been the experience of the predecessor CCACs who operated in the structure. Two bargaining units could also limit the mobility of employees, although, again, the number of occasions when that would likely occur (and assuming no provision negotiated in the collective agreement) has and will been extremely small.
>
> 26 A single all employee bargaining unit may also permit flexibility. The employer is arguably more able to shift job duties from position to position. Flexibility is important in the current and future health care environment. Of course, the party which should be most interested in flexibility-the employer-is not concerned by whatever flexibility limits may be caused by two bargaining units in this case.
>
> 27 These issues, or the potential for them, have driven the Board's stated preference for bigger, broader bargaining units. However, it is important to note that this preference has rarely led to the Board ordering a single large all employee bargaining unit. Instead the Board (and often the

> parties coming before it) has recognized that the benefits of larger bargaining units are largely achieved by large bargaining units whether there is one all employee unit or a division in units based on community of interest or other considerations.
>
> 28 I also agree that a single all employee bargaining unit has the potential for minor problems. First, there is a possibility that the interests of the office and clerical employees would be subsumed or obscured by the more numerous professional employee complement particularly since the bargaining unit covers a much wider geographic area than its predecessor. While community of interest has become of limited utility in determining whether a particular bargaining unit is appropriate for collective bargaining, it may still be of some value in choosing which one of two bargaining unit structures is better where, as here, that may be required. However, I do note that there is no evidence here that in Hamilton the interests of clerical employees have actually been limited as a result of being in the same bargaining unit as the professionals. Second, the inclusion of the two groups might complicate bargaining.
>
> 29 Third, and perhaps most importantly is the Board's preference to maintain the status quo where there are existing collective bargaining relationships. One sees this tendency in displacement certification cases where the Board has an overwhelming preference for a new bargaining unit which mirrors the existing one, largely on the theory that bargaining unit configurations which have been found to work ought not to be disturbed. One also sees this in the Board's jurisprudence under the Act. In this case four of five CCACs (with more than a majority of employees) operated under a two bargaining unit system and for them a single bargaining unit is a reasonably significant labour relations change.

52. The Board's comments regarding a preference for the status quo in *Hamilton Niagara (supra)* were made in a decision under PSLRTA. As was pointed out in *Hamilton Niagara (supra)* as well as in prior decisions determining bargaining unit structure under PSLRTA the Board is mandated to take into account the purpose and language of that particular statute which addresses situations in one or more employers have restructured, rendering the existing bargaining unit structure problematic. In *North Simcoe (supra)*, the Board made the following comments:

13. Counsel also reminded the Board that the task of determining the appropriate bargaining unit under section 22(1) of the Act is different from the Board's determination of the appropriate bargaining unit in a certification application made under the LABOUR RELATIONS ACT, 1995, S.O. 1995, c. 1. Section 9(1) of the LABOUR RELATIONS ACT, 1995 requires the Board to "determine the unit of employees that is appropriate for collective bargaining" whereas section 22(1) of the Act requires the Board to "determine the number and description of bargaining units that are appropriate for the successor employer's operations". The Board in CITY OF TORONTO, [1998] OLRB Rep. Sept./Oct. 772 commented upon the different considerations the Board must apply under the Act at pages 774-775:

> "Under Bill 136 [the Act], the Board has a wider range of criteria to consider than would be the case under the LABOUR RELATIONS ACT, because the Board is being asked to facilitate not ONLY the process of collective bargaining following restructuring, but also the objectives of restructuring itself. To put the matter another way: when redefining bargaining units under Bill 136, the Board is obliged to take into account the operational needs of the new employer and the transitional challenges occasioned by restructuring, as well as the "pure" collective bargaining considerations with which it is more familiar under the LABOUR RELATIONS ACT.
>
> This is not to say that the Board's experience under the LABOUR RELATIONS ACT is irrelevant. On the Contrary, it may be helpful to look at the factors that have influenced bargaining unit design under the LABOUR RELATIONS ACT, because those factors may also be relevant, to one or other of the articulated purposes of Bill 136. However, the legal landscape is quite different; so that what the Board might do on an application for certification (determining the "unit of employees - APPROPRIATE FOR COLLECTIVE BARGAINING") does not provide an unfailing guideline to the outcome under Bill 136. Under Bill 136, Board is being asked a somewhat different Question: to "determine the number and description of bargaining units that are APPROPRIATE FOR THE SUCCESSOR EMPLOYER'S OPERATIONS"; and in

> answering that question the Board has to accommodate somewhat different policy concerns."
>
> 14. In essence, counsel for the Applicant argued that the Board must give effect to the practical realities of the new organization and to do so, the Board must focus principally on the operational requirements of the employer. Those operational requirements, counsel submits, dictate that the bigger bargaining unit is better from an operational perspective and that the burden is on the unions opposed to the applicant's proposed bargaining unit to persuade the Board that the applicant's proposed larger, comprehensive bargaining unit is not appropriate.

53. The statutory mandate under section 15.1 is quite different from that under PSLRTA, making the decisions under the latter to be of limited value in making decisions under section 15.1. As the Board said in *North Simcoe (supra)*:

> 26 The objective of fostering prompt resolution of workplace disputes contains the assumption that the Board should try to avoid creating workplace disputes through its bargaining unit determinations under section 22 of the Act. The comments of the Board in GREY BRUCE HEALTH SERVICES, SUPRA, at paragraph 12: " ... given the upheaval and uncertainty present currently in the hospital sector, it is not necessary in this case to potentially further complicate matters by putting employees together who have not previously bargained together." and in CITY OF TORONTO, SUPRA, at page 775: "... Bill 136 does not necessarily demand massive changes on the collective bargaining front. The results can be much more incremental and respectful of established bargaining structures-provided they are workable or the parties agree to them. What Bill 136 does do, is require the Board to take into account both the imperatives and impact of restructuring, so that the Board can make the collective bargaining framework congruent with that process." are particularly apt in this context. Those comments suggest the Board should exercise some caution when asked to eliminate existing bargaining units by combining them after the Board has made a declaration under section 9 of the Act and should do so only when the established bargaining structures are not "workable" in the successor employer's operations.

In contrast, section 15.1 applications do not arise in the context of employer restructuring. As previously pointed out, this provision is

restricted to the narrow circumstances of a bargaining agent having recently certified a new bargaining unit when already holding bargaining rights with the same employer. Any such application, to be successful, would necessarily impact on the established bargaining structures

54. In summary, we conclude that the Board's prior jurisprudence on combination applications under the old section 7 provides a useful approach to applications under section 15.1. This is particularly so in cases such as this one, where consideration of the impact on the development of collective bargaining in the industry is of little importance. Accordingly, based on the facts of this case, the Board will consider the impact of consolidation on matters such as efficiency and convenience in collective bargaining and contract administration, industrial stability, jurisdictional disputes, employee mobility, and risk of strikes.

Consideration of the relevant factors

55. We then turn to the evidence in this case regarding whether a combination of the tenured faculty unit and the teaching faculty units would contribute to the development of an effective bargaining relationship between these parties. Counsel for the Applicant asserts that their proposed bargaining structure would be more effective. Counsel for the Responding Party disputes that a combination of those groups would contribute to the development of an effective collective bargaining relationship, asserting that the current structure is already effective. Beyond the assertions of counsel the evidence before the Board must be examined.

Work stoppages and efficient collective bargaining

56. The reduction of unnecessary work stoppages has frequently been identified by the Board as a relevant factor to be considered in bargaining unit design. In the *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, the Board said as follows in identifying the increase risk of work stoppages as a factor to consider in the creation of viable structures for ongoing collective bargaining:

> 15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See Usarco Limited, [1967] OLRB Rep. Sept. 526; K Mart Canada Limited, [1981] OLRB Rep. Sept. 1250; and Insurance

> Corporation of British Columbia, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.
>
> 16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.
>
> 17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitable [sic] spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. ALL OF THESE CONCERNS - WORK STOPPAGES, RESTRICTED EMPLOYEE MOBILITY, JURISDICTIONAL DISPUTES AND ADMINISTRATIVE COSTS - FAVOUR CONSOLIDATED BARGAINING STRUCTURES, ALTHOUGH THE FORCE OF EACH VECTOR VARIES FROM CASE TO CASE [emphasis added in upper case text].

57. In *Mississauga Hydro-Electric Commission (supra)*, the Board echoed similar concerns expressed in Board jurisprudence:

> 10. … in Kidd Creek Mines Ltd., [1984] OLRB Rep. Mar. 481, the Board suggested that fragmentation could contribute to labour management problems, tension

> within and between bargaining units, and an escalation of industrial conflict, and described fragmentation as "a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unraveling [sic]".

58. In *The Hudson's Bay (supra)*, the Board referenced comments made by the Board in *Olympia & York Developments Limited,* [1993] O.L.R.D. No. 1247:

> 7. This bargaining unit description consolidates the above-mentioned employee groupings into a single unit for collective bargaining purposes. It avoids fragmenting a group of building service workers into two legally distinct units, each of which would encompass only a handful of employees. And, of course, if there were two separate units, that could mean: separate bargaining, separate collective agreements, separate seniority regimes, a strike of one or other of these employee groupings at different times, and potentially two trades unions, should one or other of these employee groups choose to displace the Transit Union (as has happened before in this organization). This is not a recipe for stable or effective collective bargaining, nor (as noted) did the employer appear at the hearing to substantiate any concerns it might have.

59. Currently, there are two collective agreements between the parties. The tenured faculty agreement expired on June 30, 2018. The permanent faculty agreement expires two years later on June 30, 2020. There is no collective agreement for the newly certified temporary faculty group. The bargaining history for the two existing bargaining units establishes that these parties have historically spent a great deal of time in bargaining. In the last round of bargaining for the tenured faculty collective agreement the parties met 32 times between August of 2015 and March of 2016. The parties met 16 times between April and November of 2017 to complete bargaining for the last permanent faculty collective agreement. Adding a third collective agreement to be negotiated, with yet a different expiry date, would undoubtedly further burden the calendars and finances of the parties. This could be ameliorated by an agreement between the parties to have a common expiry date. However, without an agreement between the parties a common expiry date can only be achieved through a consolidation order from the Board. In our view, such an order would in the long term

lessen the lengthy and undoubtedly expensive bargaining between the parties.

60. Consolidation of the three bargaining units would result in one collective agreement, one expiry date and one set of negotiations. As a result the chance of an impasse in collective bargaining would only occur once in a bargaining cycle.

Contents of collective agreements

61. A review of the collective agreements establish that the parties have bargained many provisions which are duplicated in both agreements. The list of issues in each agreement follows the same sequence with the same issues being dealt with in under identical article numbers in each collective agreement. However, while there are many provisions that are virtually identical, there are also a number of significant issues that are quite different in the two agreements. Articles in which there is significant similarity include: recognition and definition of the bargaining unit, definitions, management rights, rights and privileges of the association, dues deduction, strike and lockout, correspondence, joint committee, discrimination or harassment, grievance procedure and arbitration procedure, health and safety, working environment, academic freedom, office files, intellectual property, discipline, pension and benefits, vacations and holidays and leaves of absence. The articles in which there are significant difference include academic and professional career, third year review procedures, tenure, promotion, layoffs and provision dealing with research leave.

62. In considering whether to combine bargaining units from separate stores, the Board in *The Hudson's Bay (supra)* noted:

> 43. In any event, it was apparent from the evidence before us that local autonomy and market flexibility were not inconsistent with a combined structure. In their centralized bargaining to date, the parties have from time to time agreed upon specific provisions for particular stores, classifications, or individuals in one set of negotiations leading to one memorandum of agreement. We accept that there is a need to maintain a balance between the convenience and strength of standardization and the need to be responsive to local conditions. However, as the evidence in this case demonstrates, there are a number of ways to do this, including letters of understanding and collective agreement provisions addressing particular problems. There are also other options in terms of bargaining arrangements

> with respect to the mix of local and central issues, although in this case, it was apparent that the parties had not adopted those options because the number of local issues was relatively minor in contrast to those which the stores held in common.

63. As argued by the Applicant, and conceded by the Responding Party, the parties in this case could meld the collective agreement and could deal with unique issues of either the tenured or teaching faculty by way of separate collective agreement provisions. The collective agreements from Laurentian and Lakehead demonstrate that issues unique to a particular faculty group can be dealt with in one collective agreement. There are many other examples of different groups with distinct interests being covered by the same collective agreement with some provisions only applicable to one group or another. This is the case for example in collective agreements covering both full-time and part-time bargaining units where some provisions apply only to the full-time employees and some provisions apply only to the part-time employees.

64. The real question is whether a combination of the bargaining units in this case would contribute to or detract from an effective bargaining relationship given the similarities and differences between the groups. Were the Board to order consolidation, the next round of bargaining would undoubtedly present some challenges in the merger of the collective agreements. Where this has occurred in other industries, it has required a great deal of hard work on the part of the parties. However, in this case the parties, in agreeing to a common format for the agreements and in adopting much of the same language, have already done a significant amount of the work. Furthermore, given that all faculty are working at one institution, the challenges should be less than the merging of multi-site bargaining units. More importantly, in the long term, efficiencies would be achieved in bargaining one collective agreement with one expiry date. Common issues could be resolved with common solutions while preserving the ability of the parties to reach distinct solutions on issues distinct to each group.

65. The only evidence regarding time spent in the administration of the collective agreement relates to meetings of the joint committee required under the collective agreement. The Responding Party provided minutes for both the tenured faculty from November 22, 2016 till May 7, 2018. The Applicant provided some of the same minutes as well as a document showing a comparison of the agenda items tabled for each group for the period from November 2017 till May of 2018. A

review of the minutes establishes that a number of issues were discussed at both tables including: harassment policy, Board of Governors materials and Ministry of Labour workshops. On the other hand there were a number of agenda items that are unique to each group. The existing collective agreements require meetings of each joint committee to occur at least twice each academic term with five representatives of each party in attendance in the case of the tenured faculty and for representatives of each party in attendance in the case of the permanent faculty. Although there may be some distinct issues related to each group that may be raised at joint committee meetings, it seems apparent that it would be more efficient if the joint meetings were combined. While there was no other evidence presented to the administration of the collective agreement it seems probable that administering one collective agreement would be more efficient then administering two or three collective agreements.

Other relevant factors

66. That leaves us with consideration of any other factors that may be relevant to the Board's consideration. Although disagreeing on its impact, both parties made submissions regarding the community of interest or lack thereof between the teaching faculty and the tenured faculty. We repeat the comments noted above, made in *Hamilton Niagara (supra)* regarding the consideration of community of interest in resolving a dispute regarding bargaining unit descriptions:

> 27. These issues, or the potential for them, have driven the Board's stated preference for bigger, broader bargaining units. However, it is important to note that this preference has rarely led to the Board ordering a single large all employee bargaining unit. Instead the Board (and often the parties coming before it) has recognized that the benefits of larger bargaining units are largely achieved by large bargaining units whether there is one all employee unit or a division in units based on community of interest or other considerations.
>
> 28. I also agree that a single all employee bargaining unit has the potential for minor problems. First, there is a possibility that the interests of the office and clerical employees would be subsumed or obscured by the more numerous professional employee complement particularly since the bargaining unit covers a much wider geographic area than its predecessor. While community of interest has become of limited utility in determining whether a particular

> bargaining unit is appropriate for collective bargaining, it may still be of some value in choosing which one of two bargaining unit structures is better where, as here, that may be required. However, I do note that there is no evidence here that in Hamilton the interests of clerical employees have actually been limited as a result of being in the same bargaining unit as the professionals. Second, the inclusion of the two groups might complicate bargaining.

67. In applying those comments to this case, it is important to note that the consolidated bargaining unit being sought is not an all-employee unit but rather one that encompasses only the full-time faculty. We were advised that the part-time sessional faculty are represented by a different bargaining agent. We were not advised as to whether the office, clerical, or maintenance groups are organized. While divisions in bargaining units based on distinctions in interest between full-time and part-time and between faculty, office and clerical and maintenance may be justified, the same is not the case between the various types of full-time faculty. The similarities within this group, all of whom spend part of their time teaching and all of whom work on a full-time basis, outweigh the differences based on tenure of employment and time spent in research. To allow these kinds of differences to require separate bargaining units could potentially result in significant fragmentation of bargaining units within the Responding Party. Accordingly, to the extent that community of interest is a relevant consideration in combination applications, in this case it points in the same direction as the development of an effective collective bargaining relationship.

68. We would also note that, unlike cases in which it is the employer who is seeking the broader based bargaining unit (such as under PSLRTA), in this case it is the union that applies for the consolidated unit. The union is the party that represents the interests of its members. In considering the weight to be given to the wishes of employees in the determination of bargaining units, the following comments were made in *The Hudson's Bay (supra)*:

> 26. In other words, the Board may consider factors in fashioning bargaining units at the time of certification which may be less relevant in combination applications where employees are already organized. For example, in Ponderosa Steak House (A Division of Foodex Systems Limited), [1975] OLRB Rep. Jan. 7, the Board noted that in determining appropriateness the Board had developed two general themes of fundamental importance, the right of self-

organization and the need for a viable collective bargaining relationship:

> Two themes of fundamental importance appear to emerge from these sources, the right of self-organization and the need for a viable collective bargaining relationship.
>
> A primary theme set out in the Labour Relations Act, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, s. 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, The Board of Education for the City of Toronto, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the Applicant union as the representative of the employees. This point was made by the Board in Board of Health of the York-Oshawa District Health Unit, (1969) OLRB M.R. 340.
>
> The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining." In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the McMaster University

> case, (1973), OLRB M.R. 102, and in the Board of Education for the City of Toronto case, supra.

69. To the extent that the wishes of employees are a relevant consideration in combination applications, in this case they point in the same direction as the development of an effective collective bargaining relationship.

70. It is not necessary to consider the argument of the Applicant based on the evidence of bargaining structure at other facilities in the university sector. Having decided that the application should be granted based on other considerations, the sector evidence, while relevant to determining the weight to be given to section 15.1(6)(b), would not change the outcome. Further, as there was no evidence regarding the impact of combining the teaching units with the tenured unit on jurisdictional disputes or mobility of employees, these matters are not being considered in this case.

71. Taking the evidence as a whole, and having regard to the Boards jurisprudence referred to above, we conclude that consolidating the tenured faculty bargaining unit with both the permanent faculty bargaining unit and the temporary faculty bargaining unit would contribute to the development of an effective collective bargaining relationship. As a result, pursuant to section 15.1(5), we direct that the three bargaining units be consolidated. We remain seized for twelve months with regard to any further relief that may be required. If the Board does not hear from the parties within twelve months of the date of this decision the application will be closed.

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APPENDIX A

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