



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0068-14-R**

Canadian Union of Public Employees and its Locals 17-1, 17-04 and 1813, Applicant v **Lakeland Power Distribution Ltd.**, Bracebridge Generation Ltd., Parry Sound Power Corporation, Responding Parties

BEFORE: Derek L. Rogers, Vice-Chair, and Board Members Paul LeMay and D. A. Patterson

APPEARANCES: Dave Steele, Debbie Oldfield, Stephen Boyle, Kevin Robertson, Shawn Morrison, Matt Sandtner and Darrel Aulbrook for the applicant; Richard J. Charney, Chris Litschko, Miles Thompson, Monica Hall and Ted Panagiotoulis for the responding parties

DECISION OF THE BOARD: January 8, 2015

1. This is an application filed under the section 69 and subsection 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It arose in connection with a merger of certain of the responding parties, all as described in detail in the Agreed Statement of Facts and the Memorandum of Agreement that are set out in full below.
2. The title of proceedings is hereby amended as provided for in paragraphs 1 and 2 of the parties' Memorandum of Agreement.
3. The Agreed Statement of Facts is as follows:

**AGREED STATEMENT OF FACTS
(November 24, 2014)**

The Parties

1. Bracebridge Generation Ltd. ("**Bracebridge Generation**"), Lakeland Power Distribution Ltd. ("**Lakeland Distribution**") and Parry Sound Power Corporation ("**PS-Distribution**") are the only named Responding Parties that are bound to bargaining rights of and collective agreements with various locals of the Canadian Union of Public Employees ("**CUPE**").

2. Neither Lakeland Holding Ltd. ("**Lakeland HoldCo**") nor Parry Sound Hydro Corporation ("**PS HoldCo**") perform or have performed any distribution or generation work in the electricity sector. Further, neither of these two holding companies is bound to bargaining rights of or by a collective agreement with CUPE or any local of CUPE.

3. Parry Sound Energy Services Company ("**PSESC**"), pursuant to Articles of Amalgamation dated January 1, 2013 (Responding Parties' Book of Documents, Tab 1)' merged with Parry Sound Powergen Corporation ("**PS-Generation**"), following which PS-Generation became the surviving employer. In a Letter of Understanding between PS-Generation and CUPE, Local 17-1 dated November, 2012 (Responding Parties' Book of Documents, Tab 2), PS-Generation, as the surviving employer, agreed that it would continue to be bound by the collective agreement between PSESC and Local 17-1 until a new collective agreement was negotiated between the parties.

4. Local 17 is one of the founding locals of the Canadian Union of Public Employees in 1963. Local 17 was granted its Charter on September 24, 1963.

5. Local 1813 was certified as the bargaining agent for Bracebridge Water, Light and Power Commission, the predecessor employer of Bracebridge Hydro-Electric Commission, on February 21, 1972. On September 1, 2000, Bracebridge Hydro-Electric Commission was incorporated as Bracebridge Generation and Lakeland Power Distribution.

Introduction

6. This matter involves an Application by CUPE and its Locals 1813, 17-1 and 17-04 (the "**Applicants**") to retain bargaining rights in light of a merger between a variety of entities involved in the electrical power industry.

7. In particular, Lakeland HoldCo wholly owns two subsidiaries, Bracebridge Generation and Lakeland Distribution (together, the "**Lakeland Subsidiaries**"), which are involved in the generation and distribution of electricity respectively and which, prior to the merger, primarily carried on business in the District of Muskoka and parts of Almaguin Highlands in the District of Parry Sound.

8. Prior to the merger, Parry Sound HoldCo wholly owned two subsidiaries, PS-Generation and PS-Distribution (together, the "**Parry Sound Subsidiaries**"), which were involved in the generation and distribution of electricity respectively and which primarily carried on business in the Town of Parry Sound ("**Parry Sound**").

9. For the purposes of collective bargaining, the electricity distribution subsidiaries of Lakeland HoldCo and Parry Sound HoldCo (Lakeland Distribution and PS-Distribution) have merged, as did the holding companies' electricity generation subsidiaries, (Bracebridge Generation and PS-Generation), effective July 1, 2014, as set out in greater detail below.

Background

10. Prior to the merger, all of the issued and outstanding shares of Lakeland HoldCo were owned by the Town of Bracebridge ("**Bracebridge**"), the Village of Burk's Falls ("**Burk's Falls**"), the Town of Huntsville ("**Huntsville**"), the Municipality of Magnetawan ("**Magnetawan**"), and the Village of Sundridge ("**Sundridge**"). The shareholdings of Lakeland HoldCo were: Bracebridge (65.11%); Burk's Falls (3.96%); Huntsville (25.13%); Magnetawan (1.47%); and Sundridge (4.33%).

11. The Lakeland Subsidiaries were incorporated by Bracebridge, Burk's Falls, Huntsville, Magnetawan and Sundridge pursuant to section 142 of the *Electricity Act, 1998* (the "**EA**") for the purpose of distributing electricity, electricity generation and providing other electricity

services to the residents of the incorporating locations. As stated above, the Lakeland Subsidiaries were wholly owned by Lakeland HoldCo.

12. Bracebridge Generation is bound by a collective agreement with CUPE, Local 1813, with a term of July 1, 2013 to June 30, 2017 (the "**BG Collective Agreement**", Responding Parties' Book of Documents, Tab 3).

13. Lakeland Distribution is also bound by a collective agreement with CUPE, Local 1813, with a term of July 1, 2013 to June 30, 2017 (the "**LD Collective Agreement**", Responding Parties' Book of Documents, Tab 4).

14. Prior to the merger, all of the issued and outstanding shares of Parry Sound HoldCo were owned by the Town of Parry Sound.

15. The Parry Sound Subsidiaries were incorporated by Parry Sound pursuant to section 142 of the EA for the purpose of distributing electricity, electricity generation and providing other electricity services to the residents of Parry Sound. As stated above, all of the issued and outstanding shares of the Parry Sound Subsidiaries were owned by Parry Sound HoldCo.

16. PS-Distribution is bound by a collective agreement with CUPE, Local 17-04, with a term of January 1, 2012 to December 31, 2015 (the "**PS-Distribution Collective Agreement**", Responding Parties' Book of Documents, Tab 5).

17. PS-Generation is bound by a collective agreement with CUPE, Local 17-1, with a term of January 1, 2012 to December 31, 2015 (the "**PS-Generation Collective Agreement**", Responding Parties' Book of Documents, Tab 6).

18. Pursuant to a Merger Participation Agreement, dated December 16, 2013 (the "**Merger Agreement**", Responding Parties' Book of Documents, Tab 7), the holding companies Lakeland HoldCo and Parry Sound HoldCo agreed to the following mergers:

- a. Parry Sound HoldCo would merge into Lakeland HoldCo and the Town of Parry Sound would become a shareholder of Lakeland HoldCo,

owning approximately 13.5% of the issued and outstanding shares of Lakeland HoldCo;

- b. PS-Distribution would merge into Lakeland Distribution (where Lakeland Distribution would become the surviving employer) to form a new merged electricity distribution company to serve the residents of Bracebridge, Burk's Falls, Huntsville, Magnetawan, Sundridge and Parry Sound. All of the issued and outstanding shares of Lakeland Distribution would continue to be owned by Lakeland HoldCo; and
- c. PS-Generation would merge into Bracebridge Generation (where Bracebridge Generation would become the surviving employer) in order to form a new merged electricity generation company. All of the issued and outstanding shares of Bracebridge Generation would continue to be owned by Lakeland HoldCo.

19. Pursuant to the Merger Agreement, the above mergers became effective on July 1, 2014.

20. The mergers were akin to a take-over of Parry Sound HoldCo and the Parry Sound Subsidiaries. Prior to the mergers, Parry Sounds HoldCo and the Parry Sound Subsidiaries were struggling to remain economically viable. In particular, PS-Generation was at a roadblock with respect to securing the necessary funding for a vital generation plant upgrade. Parry Sound HoldCo and the Parry Sound Subsidiaries were in need of the information technology, engineering, and human resources of Lakeland HoldCo and the Lakeland Subsidiaries, as well as their financial strength. Day-to-day activities were becoming onerous at all of the Parry Sound companies where they fell behind in many areas and could not keep up. It became evident that the Parry Sound companies would not be able to survive financially, which would affect customer service, health and safety, and compliance with regulatory requirements. The Lakeland companies were able to provide the required resources and financial capabilities required for the Parry Sound employees to stay employed, and for the companies to regain strength in customer service, health and safety and regulatory compliance.

21. An outline/chart of the collective agreements in force with the Lakeland Subsidiaries and Parry Sound Subsidiaries and an approximate shareholding of Lakeland HoldCo both prior to and following the merger is attached as Appendix I.

Mergers

22. On or about January 20, 2014, all non-union and bargaining unit employees of PS-Distribution and PS-Generation were advised of the impending merger and informed of any changes resulting to their positions, wages and benefits following the effective date of the mergers. For greater certainty, all bargaining unit and non-union employees of PS-Distribution and PS-Generation were advised that they would continue to be employed by Lakeland Distribution and Bracebridge Generation, respectively, following the mergers. One bargaining unit billing employee who was employed by PS-Distribution accepted a non-union position in Lakeland HoldCo.

23. Bracebridge Generation is an electric generation company. Prior to the merger, it employed four people: two were supervisors, and two were members of the bargaining unit represented by Local 1813. In addition, there was one vacant bargaining unit Labourer position, which remains vacant. The two bargaining unit employees were engaged in generation work as technicians.

24. PS-Generation was also an electric generation company. Prior to the merger, it employed two people, both of whom were bargaining unit employees represented by Local 17-1 and performed work as technicians.

25. Following the merger, the two bargaining unit technicians of PS-Generation became employed by Bracebridge Generation, and occupy the same position that they had at PS-Generation prior to the merger. Bracebridge Generation now employs six people, consisting of two supervisors and four bargaining unit technicians represented by Locals 1813 or 17-01. There is one vacant bargaining unit Labourer position.

26. Lakeland Distribution is an electricity distribution company. Prior to the merger, it employed 16 people, nine of whom were members of the bargaining unit represented by Local 1813. In addition, there was a vacancy for one

bargaining unit Journeyperson in Bracebridge. The nine bargaining unit employees consisted of technicians and linemen engaged in distribution work, as well as one Stockkeeper. Of the seven non-union employees, there were a total of 4.5 employees (excluding managers) consisting of three billing clerks, a part-time collection person and a full-time conservation person. Following the merger, the part-time non-union collections employee became full-time.

27. PS-Distribution was an electricity distribution company. Prior to the merger, it employed two non-union supervisors or managers, and 6.5 employees were members of the bargaining unit represented by Local 17-04. Of the members of the bargaining unit, four employees were engaged in powerline maintenance and 2.5 performed billing / clerical work. On January 20, 2014, one of the 2.5 bargaining unit billing / clerical employees accepted a non-union position with Lakeland HoldCo. Effective the date of the merger, the billing / clerical employee started in the non-union position which reduced the billing / clerical employees in the bargaining unit to 1.5, thus reducing PS-Distribution's bargaining unit to 5.5 employees.

28. One bargaining unit billing employee of PS-Distribution in account payables was permanently laid-off in October, 2013 as a cost-cutting measure unrelated to any pending merger. In response, a policy grievance (2013-02) was filed by Local 17-04, which was ultimately settled on January 21, 2014 (attached as Appendix II [*but not included with the Board's decision*]). In the settlement, it was agreed that the employee would be given eight weeks' pay (as the employee was not returning to the workplace) and that all parties had conducted themselves in good faith. The Applicant asserts that this one employee should augment the numbers outlined in the preceding paragraph. The Responding Parties object on the basis that the facts set out in this paragraph are irrelevant, and maintain that the numbers should remain as outlined in paragraph 27.

29. Following the merger, Lakeland Distribution now employs 23.5 employees, of which nine are non-union, and 14.5 are members of the bargaining unit represented by Locals 1813 or 17-04. There remains one vacancy for a bargaining unit Journeyperson in Bracebridge.

Intermingling

30. Prior to the merger, there were instances of intermingling in which bargaining unit employees of the Lakeland Subsidiaries and the Parry Sound Subsidiaries performed work typically performed by the other. For example employees of Lakeland Distribution and PS-Distribution shared trucks as they performed their work. Further, Lakeland Distribution bargaining unit employees assisted PS-Distribution with metering and the engineering of its distribution system.

31. The Responding Parties agreed, pursuant to a Management Services Agreement (dated December 17, 2013, Responding Parties' Book of Documents, Tab 8), and two Memoranda of Understanding (dated January 31, 2013 and August 1, 2013, Responding Parties' Book of Documents, Tabs 9 and 10), to cooperate in sharing of resources and personnel leading up to the effective date of the merger.

32. That intermingling continued, and in fact, was steadily enhanced, up to the effective date of the mergers on July 1, 2014 and thereafter.

33. Following the mergers, there occurred a significant intermingling of personnel and resources between the merged entities. As a result, it would not make labour relations sense for each of Bracebridge Generation and Lakeland Distribution to be bound by two collective agreements with respect to groups of employees performing essentially the same duties.

34. There has been a significant operational integration of the businesses of Lakeland Distribution and the former PS-Distribution, and Bracebridge Generation and the former PS-Generation. Aside from the integration of management, the entities have planned for continued and increased synergy of billing, information technology, regulatory compliance, system backup, security, redundancy, resource expertise, transport and work equipment usage and upgrading, business processes, health and safety procedures training and certification, work planning, arrears management, payables and receivables, financial institution borrowing, stores materials planning and human resources functions going forward.

35. Furthermore, there has been a significant physical integration of employees from the various bargaining units at both Lakeland Distribution and Bracebridge Generation. There has been regular and consistent interchange and movement of employees between locations, with bargaining unit employees from the former Parry Sound Subsidiaries working side-by-side with the bargaining unit employees of the Lakeland Subsidiaries. PS-Distribution employees now work in six municipalities instead of one, and PS-Generation employees work at six generation stations rather than one. In addition to the regular and consistent sharing of bargaining unit personnel, resources and equipment are regularly shared by the bargaining units. Furthermore, job functions are often integrated, with employees from the different bargaining units working together and relying on one another in the execution of their duties. In addition, employees from the various bargaining units are trained together on various matters, including health and safety, work planning and crew operations, all as part of the ultimate goal of complete integration and synergy across the merged entities.

36. In particular, the former PS-Distribution bargaining unit draws significantly on the resources of Lakeland Distribution, including both Lakeland Distribution bargaining unit personnel and their additional skill sets, stores inventory and planning, transport and work equipment, and a variety of streamlined and efficient processes and procedures. In particular, the PS-Distribution bargaining unit relies on the Lakeland Distribution bargaining unit for engineering, metering, work planning and job function accountability. Furthermore, with respect to Bracebridge Generation, there has been a significant integration of business operations. For example, employees from both generation bargaining units have been heavily involved in working together to address the water control regulatory regimes in Parry Sound and beyond. Furthermore, both bargaining units have been heavily involved in ensuring the continued operation of the approximately 100 year old Cascade Generation Plant in Parry Sound, which is in need of upgrades due to its poor condition, and which has been deemed unsafe in certain areas. Bracebridge Generation's resources were and continue to be heavily relied on to improve the plant. In the past nine years, Bracebridge Generation staff have completed four multi-million dollar

upgrades and constructed one new plant, investing approximately \$30 million. The Cascade Generation Plant cannot operate without such upgrades and investment, as the old technology is time consuming, is deteriorating and is expensive to operate in comparison to more up-to-date technology.

37. With respect to billing / clerical functions, the merged entities have moved toward a more centralized payroll and payables system. Many of the administrative functions of the merged entities are being streamlined and synergized into the Lakeland Distribution models and systems. For example, the merged entities are moving toward a single billing engine, and the centralization of the finances and regulatory functions of the merged entities. The four non-union billing / clerical employees from Lakeland Distribution and the 1.5 union billing / clerical employees from the former PS-Distribution are functionally integrated and are trained as a single group of billing / clerical employees. As of January 2015, it is expected that the billing system will be centralized in Huntsville where all pre-merger Lakeland Distribution billing took place by non-unionized staff.

38. There have been some difficulties that have arisen from applying the different collective agreements to employees working side-by-side from the various bargaining units. For instance, the Lakeland Distribution bargaining unit is entitled to a one half hour lunch break per working day under Article 9 of the LD Collective Agreement. On the other hand, the PS-Distribution bargaining unit is entitled to a one hour lunch break per working day under Article 6 of the PS-Distribution Collective Agreement.

A. Generation

39. Prior to the merger, Bracebridge Generation had larger capacity than PS-Generation with respect to the number of electricity generation plants that it maintained (five) and with respect to the total wattage it produced (10,000,000 watts). PS-Generation oversaw one electricity generation plant, which produced 1,200,000 watts. In addition, prior to the merger, Bracebridge Generation employed four full-time employees, and had a vacancy for one bargaining unit Labourer. PS-Generation employed two.

B. Distribution

40. Prior to the merger, Lakeland Distribution was a larger entity than PS-Distribution. Lakeland Distribution had 9,850 customers, while PS-Distribution had 3,450 customers. Taking into account both non-unionized employees and bargaining unit employees, Lakeland Distribution employed 15.5 employees, whereas PS-Distribution employed 8.5.

41. Following the merger, the bargaining unit of Lakeland Distribution consists of nine employees, plus one vacant bargaining unit Journeyperson position. The PS-Distribution bargaining unit has 5.5 employees.

42. The bargaining units of Lakeland Distribution and PS-Distribution are not congruent. Prior to the merger, Lakeland Distribution did not include billing / clerical employees while the PS-Distribution bargaining unit did include billing / clerical employees. As a result, the positions / duties of four bargaining unit employees of PS-Distribution would be covered by the recognition clause of the LD Collective Agreement and nine Lakeland Distribution bargaining unit employees (and an additional vacant bargaining unit Journeyperson position) are and would continue to be covered by the LD Collective Agreement.

C. Bargaining unit billing / clerical employees of PS-Distribution

43. Subject to paragraph 28 if relevant, there were 2.5 bargaining unit billing / clerical employees with PS-Distribution. On January 20, 2014, one of the billing / clerical employees accepted a non-union position with Lakeland HoldCo. Effective the date of the merger, the employee began working at Lakeland HoldCo, with the result that PS-Distribution's bargaining unit billing / clerical employee count was reduced to 1.5. Following the merger, 1.5 bargaining unit employees and 5 non-union employees perform similar duties with Lakeland Distribution.

44. The PS-Distribution Collective Agreement covers billing / clerical employees and has specific provisions dealing with these employees. The LD Collective Agreement does not cover billing / clerical employees.

Collective Agreement Provisions Related to Mergers/Amalgamations/Sale of Business

45. All four collective agreements contain provisions (Article 16 in both the PS-Distribution Collective Agreement and the PS-Generation Collective Agreement, and Appendix "B" in both the BG Collective Agreement and LD Collective Agreement) dealing with merger and amalgamation situations.

Conclusion & Issues to be Determined

46. The parties agree that an intermingling has occurred, and that relief ought to be granted pursuant to section 69(6) of the *Labour Relations Act, 1995*, S0 1995, c 1, Schedule A. The parties further agree that there ought to be one collective agreement that applies to all bargaining unit employees of Lakeland Distribution, and one collective agreement that applies to all bargaining unit employees of Bracebridge Generation. Thus, the issues for determination are agreed to be as follows:

1. Which collective agreement ought to apply to the merged Bracebridge Generation bargaining unit;
2. Which collective agreement ought to apply to the merged Lakeland Distribution bargaining unit; and
3. Whether the merged Lakeland Distribution bargaining unit should include or exclude billing / clerical employees.

APPENDIX I

A. Collective Agreements

Company	CUPE Local	Collective Agreement Term
Bracebridge Generation	1813	July 1/13 -June 30/17
Lakeland Power Distribution	1813	July 1/13 -June 30/17
Parry Sound Powergen Corporation	17-1	Jan. 1/12 - Dec. 31/15
Parry Sound Power Corporation	17-04	Jan. 1/12 - Dec. 3 1/15

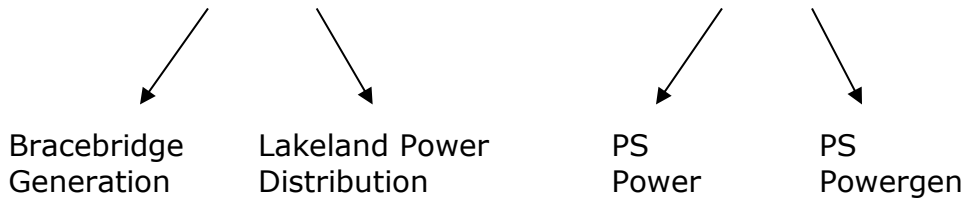
B. Previous Corporate Structure

Towns of Bracebridge (65.11%),
Huntsville (25.13%),
Sundridge (Village)(4.33%),
Burk's Falls (Village)(3.96%),
Magnetawan (Municipality)(1.47%)

Town of Parry Sound

**Lakeland Holding Ltd.
Corporation**

**Parry Sound
Hydro**

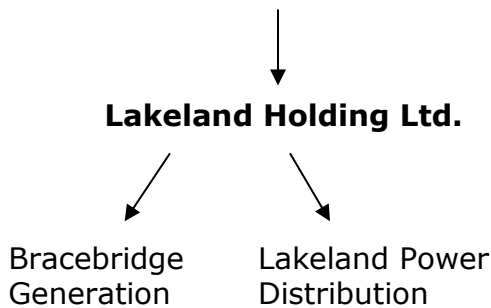


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C. Corporate Structure Following Mergers (July 1, 2014)

Shareholdings of merged Lakeland Holding:

Bracebridge (56.31%), Huntsville (21.74%),
Sundridge (3.75%), Burk's Falls (3.43%),
Magnetawan (1.27%),
Parry Sound (13.50%)



4. The parties entered into the following Memorandum of Agreement (the "Memorandum"):

**MEMORANDUM OF AGREEMENT
(November 25, 2014)**

(a) **WHEREAS** the Canadian Union of Public Employees ("**CUPE**") and its Local 1813 is the exclusive bargaining

agent for certain employees of Bracebridge Generation Ltd. ("**BG**"),

- (b) **AND WHEREAS** CUPE and its Local 1813 is the exclusive bargaining agent for employees of Lakeland Power Distribution Ltd. ("**LP**"),
- (c) **AND WHEREAS** CUPE and its Local 17-04 has been the exclusive bargaining agent for employees of Parry Sound Power Corporation ("**PS Distribution**"),
- (d) **AND WHEREAS** CUPE and its Local 17-1 has been the exclusive bargaining agent of certain employees of Parry Sound Powergen Corporation ("**PS Generation**"),
- (e) **AND WHEREAS** the BG Collective Agreement is for the term July 1, 2013 to June 30, 2017,
- (f) **AND WHEREAS** the LP Collective Agreement is for the term July 1, 2013 to June 30, 2017,
- (g) **AND WHEREAS** the PS Generation Collective Agreement is for the term January 1, 2012 to December 31, 2015,
- (h) **AND WHEREAS** the PS Distribution Collective Agreement is for the term January 1, 2012 to December 31, 2015,
- (i) **AND WHEREAS** the Responding Parties are the subject of a merger described more fully in the Agreed Statement of Facts dated November 24, 2014 entered into between the Applicant and the Responding Parties (collectively, the "**Parties**"),
- (j) **AND WHEREAS** it is agreed by the Parties that in all the circumstances there has been a sale of a business within the meaning of section 69 of the *Ontario Labour Relations Act, 1995* (the "**Act**"), and an intermingling of employees within the meaning of the *Act*,
- (k) **AND WHEREAS** on April 4, 2014 the Applicant filed with the Ontario Labour Relations Board (the "**Board**") an application pursuant to section 69 of the *Act* (the "**Application**") seeking certain relief as a result of such

intermingling,

- (l) **AND WHEREAS** the BG Collective Agreement and the PS Generation Collective Agreement both pertain to the electricity generation business and are hereinafter referred to as the "**Generation Agreements**",
- (m) **AND WHEREAS** the LP Collective Agreement and the PS Distribution Collective Agreement both pertain to the electricity distribution business and are hereinafter referred to as the "**Distribution Agreements**",
- (n) **AND WHEREAS** the Parties are desirous of fully and finally resolving all matters rising pertaining to and arising out of the Application,

NOW THEREFORE it is agreed:

1. PS Distribution is hereby added as a Responding Party to the Application and to this Memorandum.
2. Lakeland Holding Ltd., Parry Sound Hydro Corporation and Parry Sound Energy Services Corporation are hereby removed as Responding Parties to the Application and to this Memorandum.
3. The Responding Parties will continue to administer the Generation Agreements and the Distribution Agreements in accordance with the *status quo*, such that employees currently covered by a certain collective agreement will continue to be covered by that same collective agreement until and including December 31, 2015 or any statutory freeze therefrom pursuant to section 86 of the *Act*.
4. The Parties will commence collective bargaining in February of 2015 and will make every reasonable effort to conclude two separate collective agreements, namely a single Generation Agreement and a single Distribution Agreement, and all bargaining rights will be deemed to have merged into each of those two collective agreements. Each of these collective agreements will take effect on January 1, 2016 or at such later date upon which any such collective agreement is negotiated and ratified in accordance with the *Act*. For clarity, it is understood that:

- (a) the BG Collective Agreement and the PS Generation Collective Agreement will for all purposes terminate and be replaced and superseded by a single Generation Agreement effective January 1, 2016 or such later date as the Parties may agree; and
- (b) the LP Collective Agreement and the PS Distribution Collective Agreement will for all purposes terminate and be replaced and superseded by a single Distribution Agreement effective January 1, 2016 or such later date as the Parties may agree.

5. Subject to paragraph 6 below, the scope clause of the single Generation Agreement will be as set out in the BG Collective Agreement, and the scope clause of the single Distribution Agreement will be as set out in the LP Collective Agreement.

6. The Parties acknowledge that the BG Collective Agreement and the LP Collective Agreement exclude clerical employees while the PS Generation Collective Agreement and the PS Distribution Collective Agreement do not. It is agreed that the Parties will argue before the Board on November 25, 2014 whether such exclusion should continue or be discontinued, and the result, whether by Board decision alone or by Board decision following a representation vote, will determine the scope of the bargaining units for each of the Generation Agreement and the Distribution Agreement effective January 1, 2016 with respect to clerical employees.

7. To effect the foregoing, the Parties agree that the respective terms of the BG Collective Agreement and the LP Collective Agreement ought to expire on December 31, 2015 rather than the current date of June 30, 2017. Pursuant to sub-section 58(3) of the *Act*, the Parties hereby seek the Board's consent to such early termination, and declare that this Memorandum is subject to such consent.

8. It is understood that if the Parties are unable to finalize a single Generation Agreement and/or a single Distribution Agreement by December 31, 2015, the provisions of the *Act* will apply in the normal course, including but not limited to the statutory freeze set out in

section 86 of the *Act* and the right of either bargaining party to seek a "no-board report" which could lead to a lawful strike or lockout for either or both of the two merged bargaining units pertaining, respectively, to Generation and Distribution.

9. The Parties understand that Matt Sandtner ("**Sandtner**") is currently an employee of PS Distribution covered by the PS Distribution Collective Agreement as an apprentice powerline maintainer. It is agreed that Sandtner must report to the Bracebridge Operations Centre (the "**BOC**") by no later than July 1, 2015 to continue working in the same or similar position, but based at the BOC. Should Sandtner not so report, he will be deemed to be lawfully laid-off. Once reporting to the BOC, Sandtner must make himself available to report to the BOC for call-in work within 30 minutes of any such call. Despite paragraph 3 above, should Sandtner report to the BOC in accordance with this paragraph 9, his employment will thereafter be covered by the LP Collective Agreement until January 1, 2016 and any statutory extension thereto, following which his employment will be covered by the single Distribution Agreement. Nothing in this paragraph 9 impacts on management's general rights to administer the employment of Sandtner, nor does it impact upon Sandtner's right to resign from his employment.

10. Save and except paragraph 9 above, this Memorandum is enforceable as a settlement under subsection 96(7) of the *Act*.

11. Paragraph 9 above is enforceable through the grievance procedure of the applicable collective agreement.

12. Given the aforesaid merger, the signatory non-trade union parties below are the remaining employers and can bind the Responding Parties.

13. The Parties request that the Board make the necessary declarations and orders to give effect to this Memorandum.

Canadian Union of Public Employees ("CUPE") and each of its Locals 17-1, 17-04, and 1813 executed the agreement, as did Lakeland Power Distribution Ltd. ("Lakeland Distribution") and Bracebridge Generation Ltd. ("Bracebridge Generation").

5. For ease of reference, the Board will continue the parties' references to the BG Collective Agreement, the PS Generation Collective Agreement, the LP Collective Agreement, and the PS Distribution Collective Agreement.

Evidence

6. The scope provisions of the BG Collective Agreement and the LP Collective Agreement, Article 2 in both instances, read as follows:

Article 2 – Recognition

The Company hereby recognizes the Union as the sole collective bargaining agent for all employees of the Company save and except Supervisor, persons above the rank of Supervisor, office staff, co-operative students, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week.

As recorded in the Memorandum, that provision is to constitute the scope clause of the single Generation Agreement and of the single Distribution Agreement, subject only to the decision of the Board regarding the continuation or elimination of the exclusion of "office staff".

7. On the agreed facts and as summarized in an exhibit filed without dispute, it is evident that:

(i) prior to the merger, neither of the employer parties to the BG Collective Agreement and the PS Generation Collective Agreement employed persons in positions of "office staff" as the term is used in Article 2 of the BG Collective Agreement;

(ii) prior to the merger, the employer party to the LP Collective Agreement employed four full-time and one part-time non-union clerical/billing employees; however, the part-time employee became a full-time employee following the merger with the result that there were then five full-time non-union clerical/billing employees excluded from the bargaining unit under that collective agreement;

(iii) prior to the merger, the employer party to the PS Distribution Collective Agreement had employed two full-time and one part-time clerical/billing employees; they were included in the bargaining unit, but their number was reduced to one full-time and one part-time employee with the departure of an employee who had previously accepted a non-union position with Lakeland Holding Ltd., an entity that was removed from these proceedings by paragraph 2 of the Memorandum;

(iv) following the merger, the Bracebridge Generation operation had four bargaining unit positions occupied, one vacant bargaining unit position, and two non-union supervisors; and

(v) following the merger, the Lakeland Distribution operation employed five full-time non-union clerical/billing employees, one full-time and one part-time clerical/billing bargaining unit employees, 13 other full-time bargaining unit employees, and four non-union supervisors; it also had one vacant bargaining unit journeyman position.

8. The applicant made no submissions with regard to the individual referred to in paragraph 28 of the Agreed Statement of Facts and did not assert that the situation was relevant to the issue submitted for the Board's determination. Having regard for the facts recorded there and the terms of the settlement reached in January 2014, the Board would have concluded that the history regarding that individual could not alter the conclusion that, prior to the merger, there had been only one full-time and one part-time billing/clerical employee covered by the PS Distribution Collective Agreement as set out in paragraph 27 of the Agreed Statement of Facts.

9. Accordingly, the Board has proceeded on the bases that, following the merger: there were no "office staff" that might have been subject to the single Generation Agreement; Lakeland Distribution had one part-time employee and 19 full-time employees that might have been subject to the single Distribution Agreement; and seven persons in 6.5 positions constituted the "office staff" engaged by Lakeland Distribution.

10. The parties were in agreement that there was a "sale of business" and an intermingling of the relevant employees as contemplated by section 69 of the Act. The facts stipulated to by the parties support their agreement on both points.

Statutory Provisions

11. The provisions of the Act that are relevant to this matter are as follows:

58. (3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

...

69. (1) In this section,

"business" includes a part or parts thereof;

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

...

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the

employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

...

(6) Despite subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;

- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

...

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

The Issue

12. The parties have left for the Board's decision whether the exclusion of "office staff" in the BG Collective Agreement and the LP Collective Agreement is to be continued or discontinued in defining the bargaining units that are to be maintained after the negotiations provided for in their Memorandum.

The Positions of the Parties

13. The responding parties contended that the "office staff" exclusion should be maintained because the overwhelming number of clerical employees – 5 of 6.5 – were non-union and because, for more than 40 years prior to the merger, the clerical employees of Lakeland Power Distribution Ltd. and its predecessor entities had chosen not to be represented by CUPE or its Local 1813. Based on that numerical imbalance against the applicant, the responding parties submitted that it was not necessary or appropriate to require a vote to determine the issue. In the alternative, if the Board were persuaded to order a vote, the position of the responding parties was that the constituency should be limited to the clerical and billing staff (currently numbering 6.5 with the inclusion of one part-time employee) and should not include the other Lakeland employees. The inclusion of those 13 employees in the bargaining unit and their representation by the applicant was not in issue.

14. In so saying, the responding parties argued against "sweeping in" the non-union clerical/billing employees, citing section 2 of the Act

and its reference to “trade unions that are the freely-designated representatives of the employees”, and also invoking the representational processes inherent in the *Wagner Act* model. The responding parties noted in particular that the clerical component would not constitute a “minor add-on” as the five non-union clerical/billing employees would represent approximately 28% of the bargaining unit if they were included under the collective agreement. As for a vote, the responding parties argued that requiring the clerical/billing employees to vote along with the unionized employees that were not in issue would constitute “gerrymandering” and would bring labour relations into disrepute.

15. The responding parties relied on the following authorities: *Bracebridge Hydro-Electric Commission*, 2000 CanLII 12272 (ON LRB); *Independent Electricity Market Operator v. CUSW*, 2011 ONSC 81 (Div. Ct.), *aff’d* 2012 ONCA 293, leave to appeal to S.C.C. refused, [2012] SCCA No. 311; *Chatham Kent Hydro Inc.*, [2013] O.L.R.D. No. 57; *Lincoln Hydro Electric Commission*, [1999] O.L.R.D. No. 1264; *Lincoln Hydro Electric Commission* [1966] OLRB Rep. 366; and *R.W.D.S.U., Local 422 v. Mountainview Dairy Ltd.* [1967] OLRB Rep. Feb. 911.

16. The *Bracebridge Hydro-Electric* decision was noted for its involvement of the applicant and the entity that was subsequently incorporated as the responding parties, Bracebridge Generation Ltd. and Lakeland Power Distribution Ltd. The Board determined that there should be no interference with the subsisting bargaining structure. Accordingly, CUPE retained bargaining rights with respect to the “outside” unit in the face of the claim by the Power Workers Union (“PWU”) that the Board should have ordered a vote. The Board recorded that the CUPE bargaining unit excluded office staff and that there were two employees in those positions before the “sale of business”. The Commission had offered employment to a number of members of the PWU. Only one accepted a position in the “outside” group and one office employee accepted the Commission’s offer. In the result, the Board found that “there were 10 outside workers represented by CUPE Local 1457, one of whom was formerly represented by PWU, and there were 3 non-union office (inside) workers, one of whom was formerly represented by PWU”.

17. In rejecting the PWU’s position that there should be a single unit combining the inside and outside workers, the Board noted:

15. Moreover, it would be problematic to roll in the existing unorganized office employees with the outside

workers just because a sale of business has occurred and Bracebridge has hired an additional 2 employees from the vendor Hydro.

Accordingly, the PWU, with only one former member in a unit of 10, was denied a vote in the "outside" unit; however, as one-third of the three "inside workers" had been represented by the PWU it was awarded a vote to determine whether those workers wished to be represented by the PWU.

18. The responding parties relied on this decision as support for the proposition that the "office staff" affected by these proceedings should not be swept into a bargaining unit without their being given an opportunity to make their wishes known, particularly as they had not opted for trade union representation notwithstanding their employment in an environment in which the applicant and unionization were otherwise so prominent.

19. The Divisional Court decision in *Independent Electricity System* was cited in support of the responding parties' application of a "Charter prism" regarding the right of employees to associate and the need to consider their views. Referring to *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2007), 283 D.L.R. (4th) 40 (S.C.C.), the Divisional Court made the point forcefully at para. 65:

. . . it is important to keep in mind the way in which the Supreme Court of Canada framed the right to freedom of association in *Health Services*. The right is not that of the union. Rather, it is the right of an individual to associate with others to pursue workplace goals through a process of collective bargaining (at para. 3). Sometimes the Supreme Court describes it as a right of employees, sometimes as a right of workers, and sometimes as a right of union members. However, it is a right of individuals, not of the union as an institution.

20. Thus, the responding party argued that the policy behind the Act, the recognized freedom of association enjoyed by individuals, and the history of the preservation of the non-union status of the billing/clerical employees of Lakeland Distribution dictated a separate determination with respect to the clerical staff. Moreover, they submitted, as Lakeland Distribution was the dominant party in the merger and as the numerical disparity between the unionized "office

staff” (1 or 1.5) and non-union “office staff” (5) was so great, a representation vote was not needed to determine the appropriate outcome.

21. The responding parties referred to two passages in the *Chatham Kent Hydro* decision. In para. 26, the Board quoted extensively from George W. Adams, *Canadian Labour Law* (2d) (2008, Canada Law Book Inc.) at 8.330, including the following:

The Ontario board has held that the section of the Act dealing with intermingling [ss. 69 (6)] is directed at remedying a situation in which there is a *de facto* overlap or merger of bargaining units, so that it is difficult to preserve bargaining rights as they were prior to intermingling without creating operational problems for successor employers or *prejudicing the established rights of employees*.

(emphasis added)

Then, at para. 27, the Board noted:

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. October 1526 at paras. 26-29; *Pembroke General Hospital*, [1997] OLRB Rep. Sept./Oct. 918 at para. 15).

22. The responding parties asserted that the Board should not order a representation vote since almost 80% of the clerical/billing employees of Lakeland Distribution were non-union. Some support for that proposition comes from the *Lincoln Hydro* decision. There, the evidence established that there was only one Ontario Hydro employee, previously-represented by the PWU, who took employment with Lincoln Hydro. The Board determined that it was an appropriate case for the termination of the PWU’s bargaining rights without a representation vote, concluding, at para. 143: “Should the union wish to represent this largely (and historically) unorganized grouping of

employees at the now larger Lincoln Hydro, it must apply for certification”.

23. To the same effect, the responding parties relied on *Alliance Dairy* for the following observations, at para. 5:

Where two or more bargaining units are, as the result of a sale and the intermingling of employees, merged into one, as in the instant case, both the need for stability in collective bargaining relationships and plain common sense would require that, where there is a large disparity in the size of the two groups of employees, there would be no representation vote, with its necessary expense, propaganda and disruption, but rather a declaration should be made that the trade union representing the great majority of the employees is to be bargaining agent for the new bargaining unit.

24. The Board also declined to order a vote in *Mountainview Dairy* where the employees in the bargaining unit of the acquired business would account for no more than 25% of employees in the bargaining unit in which intermingling had occurred. The responding parties asserted that the same result should follow with respect to the billing/clerical employees at Lakeland Distribution as only 23% of their number had been represented by CUPE and 77% had been non-union. The responding parties contended that all of those employees should be excluded from the bargaining unit and that, based on their historical acceptance of non-union status, the group had spoken and did not require the taking of a vote.

25. The applicant reiterated its agreement to the facts underlying the Board’s jurisdiction to grant a remedy under subsection 69(6) of the Act and urged the Board “to give effect to the bargaining rights of Locals 17 and 1813 [by ordering] a vote of all employees at Lakeland”. The applicant contended that, since it represented 77% of all of the employees that might be included in the bargaining unit, it could argue that the non-union staff should simply be rolled into the bargaining unit. Nevertheless, the applicant proposed that a vote be held and that the voting constituency should comprise all employees that would be covered by Local 17-04’s scope clause in the collective agreement with PS Distribution.

26. The applicant argued that, in the numerical analysis, the Board should recognize that there were two unionized “office staff”

covered by the PS Distribution collective agreement and to be included in the Lakeland Distribution bargaining unit. On that basis, the applicant contended that it represented two or 28% of the seven persons in that position. Thus, while the applicant maintained that it would be entirely inappropriate to consider a specific job class and to "hive off" the billing/clerical employees as a separate group, if that were to be done the rate of unionization was sufficient, on the cases, to preclude the Board's acceding to the request that the exclusion of the "office staff" be determined without a vote.

27. The applicant contended that an all employee unit was most appropriate as it would preserve and not extend Local 17-04's bargaining rights. Moreover, it submitted, a vote of all would be appropriate as all would be subject to the collective agreement with the adoption of Local 17-04's scope clause. Taking a different perspective, the applicant asserted that there has been no case in which the Board has carved out a constituency in an otherwise appropriate bargaining unit to canvas the employees as to whether they wished to be in or out of the unit. Votes, the applicant argued, are "bargaining unit based".

28. The applicant accepted that the Board has jurisdiction to do what the parties asked of it, but it urged the Board to exercise that jurisdiction with restraint.

29. The applicant relied on the following authorities: *Calvert (Township) v Iroquois Falls (Town)*, [1969] OLRB Rep. Feb. 1208; *Bryant Press Limited*, [1972] OLRB Rep. 301; *City of Peterborough*, [1979] OLRB Rep. February 133; *Bermay Corporation Limited*, [1980] OLRB Rep. February 166; *Ronnie Gee's Sports Palace*, [1991] OLRB Rep. May 689; *PCL Constructors Eastern Inc.*, [1995] OLRB Rep. October 1277; *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887; and *Bracebridge Hydro-Electric Commission*, 2000 CanLII 12272 and 12271 (ON LRB).

30. The applicant noted the comparability of the numbers in this matter with those dealt with in *Calvert (Township)*. That was a case in which CUPE Local 109 represented 19 employees of the Township of Calvert in an all employee unit. The Township annexed the Town of Iroquois Falls. The Town had five non-union employees and the Board declared CUPE Local 109 to be the bargaining agent of all 24 employees.

31. The applicant cited *Bryant Press* as a case involving a sale of business, intermingling, and the Board's practice of ordering a vote of all of the employees in the bargaining unit. In that case, approximately two-thirds of the intermingled employees had not been represented by a trade union.

32. There was no finding of intermingling in the *City of Peterborough* case; however, the applicant cited the decision for its discussion of other points. The Board there had this to say:

13. The consistent point of departure in the decisions of the Board in applications under section 55 [now section 69] of the Act is a recognition that the primary purpose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structure. (*Oshawa Wholesale Ltd.* [1965] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener* [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.* [1975] OLRB Rep. Feb. 137).

14. A particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some

substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what The Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time.

33. In *Bermay Corporation*, the Board dealt with a successor employer's contention that the Board should relieve it of the obligation to adhere to the collective agreement after the union had succeeded in winning a representation vote ordered under what is now subsection 69 (8) of the Act. The Board ruled that, in those circumstances, it would declare the collective agreement to be no longer binding on the successor employer "only where there are extraordinary and compelling industrial relations reasons for doing so" (para. 22). The applicant also relied upon paragraph 28 of that decision. There the Board referred to its "authority to assess the merits of industrial relations problems that arise and, where appropriate, make a remedial order tailored to the facts" when there is intermingling following the sale of a business. The applicant noted the Board's stipulations that "vested contractual rights are not lightly to be interfered with", that any employer seeking the termination of a collective agreement "has a heavy onus to discharge", and that ". . . the employer must satisfy the Board that because of the intermingling a continuation of the collective agreement will work immediate and substantial prejudice to the operation of its business". The applicant noted the absence of any evidence to establish that the continuation of the inclusion of "office staff" as in Local 17-04's scope clause would prejudice the employer's business.

34. *Ronnie Gee's Sports Palace* had no direct bearing on matters in issue here. It did not involve intermingling, but addressed the successor employer's argument that the applicable collective agreement excluded part-time employees. The parties here have agreed to accept the scope clause in the Lakeland Distribution and Bracebridge Generation collective agreements, both of which exclude "persons regularly employed for not more than twenty-four (24) hours per week".

35. The applicant referred the panel to paragraphs 8 and 9 in *PCL Constructors* in which the Board noted the focus of section 69 on the

protection of a trade union's bargaining rights from being affected by commercial or corporate activities.

36. While the decision did not involve an intermingling of employees, *Antonacci Clothes* was referred to by the applicant for its reiteration of basic principles in paragraph 24 where the Board made these statements, among others:

Bargaining rights cover all those who, at any given time, fall within the reach of the bargaining unit definition. An employer's work force may expand or contract, new employees may be hired and old ones depart; while these events may change the number and identity of employees for whom the trade union has bargaining rights, the bargaining rights themselves remain unaffected. While a trade union's right to represent employees in a particular bargaining unit is initially determined by the wishes of the employees in the bargaining unit at the time of the determination, the union's status as exclusive bargaining agent is not continuously exposed to reappraisal of the desires of the employees who may from time to time thereafter find themselves within that bargaining unit.

37. The applicant also referred to the following statement in paragraph 25 of the *Antonacci Clothes* decision as identifying "exactly how CUPE asks the Board to give effect to Local 17's rights in the newly-merged entity":

When two or more bargaining units are merged by the Board in the exercise of its powers under subsection 63(6) [now subsection 69(6)], a substantial disparity in their relative sizes has been dispositive of the . . . resulting question of representation not only where persons employed by the successor prior to the sale were represented, as in *Alliance Dairy*, but also where one of the intermingled groups was not previously represented: *Town of Iroquois Falls*, [1969] OLRB Feb. 1208. Where disparity in size is not determinative of the issue of representation, the Board has exercised its power under subsection 63(8) [now subsection 69(8)] to direct a representation vote in order to assist the Board in resolving the issue of representation created by the redefinition of bargaining units.

38. The applicant also cited *Bracebridge Hydro-Electric*, noting that the Board there had found two units to be appropriate, the

outside unit that had been represented by CUPE and an "inside" unit for which CUPE had not had bargaining rights under its collective agreement. This was raised as a distinguishing point as the parties in this proceeding had agreed that there was to be only one collective agreement for Lakeland Distribution and the Board in *Bracebridge Hydro-Electric* was not dealing with a "sub-constituency" of a single unit, but a separate bargaining unit (or potential bargaining unit).

39. The applicant asked the Board to follow the practice of applying section 69 to preserve bargaining rights and submitted that a representation vote was in order since, on the cases, a vote would be ordered if the trade union represented 20% to 25% of the affected employees. Here, CUPE asserted that it represented 77% of the people in the appropriate bargaining unit, a single all employee unit, including "office staff", as in Local 17-04's collective agreement with PS Distribution. The constituency proposed by the applicant comprised 9 persons covered by the Local 1813 collective agreement with Lakeland Distribution, 5.5 individuals covered by Local 17-04's agreement with PS Distribution, and 5 billing/clerical employees of Lakeland Distribution, currently not represented.

40. The responding parties replied extensively to the applicant's submissions, first reiterating the view that CUPE's proposal was unprincipled and gerrymandering having regard for the facts that (i) almost 80% of the billing/clerical employees were non-union, (ii) the Lakeland Distribution bargaining unit was not otherwise contested or subject to a vote, (iii) Lakeland Distribution became the employer and was the dominant party in what amounted to a takeover of the Parry Sound operation, and (iv) the historical circumstances confirmed the appropriateness of the Lakeland Distribution scope clause. Ordering a vote as proposed by the applicant where the outcome is known in advance would, in the view of the responding parties, bring labour relations into disrepute.

41. The responding parties asserted that the purpose of section 69 had been recognized and met. Protection had been afforded the applicant's bargaining rights and the responding parties had accepted the collective agreements, with only one issue remaining – the status of the clerical employees. The responding parties argued that because the terms of the numerically superior and dominant party's collective agreement had excluded the "office staff" for years, the Board's discretion under subsection 69(6) ought to be exercised with due

attention to the principles of the legislation and its protection of representational rights.

42. Given the acceptance of the Lakeland Distribution scope clause except with respect to the exclusion of "office staff", the responding parties maintained that the actual count should exclude the part-time employee from the Parry Sound operation with the result that the relevant population of clerical/billing employees was six, with only one originating from the applicant's bargaining unit.

43. On the basis that the scope clause of the dominant party, Lakeland Distribution, should be the appropriate measure, the responding parties contended that the applicant's position went beyond the purview of section 69 in that the proposed inclusion of excluded personnel, "office staff", constituted an attempt to extend rather than to preserve the bargaining rights that the applicant had established at Lakeland Distribution.

44. The responding parties distinguished several of the cases relied upon by the applicant on the bases that there was no intermingling present or that the factual circumstances were otherwise unhelpful to the analysis. Specific reference was made to paragraph 14 of the *City of Peterborough* decision quoted above and the Board's recognition of the significance of a bargaining structure "with some substantial history to it". The responding parties noted that, from their perspective, the applicant sought to overturn the long-established structure at Lakeland Distribution relying on only "one relevant employee".

45. Finally, the responding parties took issue with the applicant's contention that *Bracebridge Hydro-Electric* was "entirely different". To the contrary, they argued, the situation was "entirely the same" in that the Board had there dealt with these parties and had required the PWU to contend with the clerical staff as a separate unit.

Decision

46. The Memorandum records the agreement of the parties to alter the terms of the BG Collective Agreement and the LP Collective Agreement, with the consent of the Board pursuant to subsection 58(3) of the Act, so that both would expire on December 31, 2015 rather than the current date of June 30, 2017. In

paragraph 7 of the Memorandum the parties declared that the Memorandum was subject to such consent.

47. Accordingly, the Board directs the parties to file forthwith their joint application so that appropriate notice may be given to the affected employees and this aspect of the matter might be decided.

48. In the circumstances agreed to by the parties, the Board has determined that the employees now engaged in the clerical/billing functions as employees of Lakeland Distribution should be allowed to vote and to do so separately. In that way, those employees will have an opportunity to demonstrate their wishes as to whether those positions will be included in the bargaining units or whether the exclusion of "office staff" shall be retained for the purposes of the collective agreements that are to be negotiated by the parties. The constituency for that vote is to be restricted to the employees now engaged in the clerical/billing functions as employees of Lakeland Distribution and shall not be open to or include any other members of the bargaining units. The reasons for the Board's decision follow.

49. As noted, the parties agreed that the conditions precedent to the application of subsection 69(6) of the Act had been satisfied, and they reached agreement on all consequential terms other than the treatment of "office staff". Under subsection 69(6) the Board has jurisdiction to choose between various courses of action in those circumstances. The Board could simply declare that Lakeland Distribution is not bound by the PS Distribution Collective Agreement and thereby terminate the union status of two individuals previously employed under that agreement by preferring the LP Collective Agreement. Alternatively, the Board might amend any bargaining unit definition. Here, that definition is settled in all respects other than the inclusion or exclusion of "office staff".

50. The Memorandum contemplated the Board's deciding that issue after a vote or without requiring a vote. The responding parties contended that no vote was required having regard for the disparity in the number of non-union clerical/billing employees and the number of unionized clerical/billing employees. The parties cited authorities on the strength of which the Board could arguably make a determination without directing a representation vote; however, none of the cases cited arose in circumstances that were directly comparable to these and none offered a compelling basis for a decision to proceed without taking a vote of the affected employees.

51. Moreover, the historical fact of the Bracebridge/Lakeland Distribution office staff's declining CUPE representation cannot be determinative. The Board received no evidence of their having been canvassed recently or at all since the vote ordered in the *Bracebridge Hydro Electric* case more than a decade ago.

52. Subsection 69(8) authorizes the Board to "hold such representation votes, as it considers appropriate" before disposing of an application under section 69. The applicant conceded that a vote should be held, but argued that the 13 bargaining unit employees that are not engaged in clerical/billing functions and are not part of any "office staff" should be permitted to vote.

53. The responding parties submitted that, if a vote were held, only the clerical/billing employees should be allowed to vote. The applicant observed in argument that there were no cases in which the Board had ordered a vote as proposed, in the alternative, by the responding parties. It is also noteworthy that the applicant did not identify any decisions in which the Board had ruled that such a course of action was not available.

54. The Board would not consider the result of a vote in the voting constituency proposed by the applicant to be appropriate in the circumstances of this matter. If a vote is to have more than merely symbolic value, it must, at a minimum, present the potential for its contributing meaningfully to the resolution of the issue between these parties.

55. It is extremely difficult to envisage that a vote in which the 13 non-clerical employees in the bargaining unit participate alongside the clerical/billing staff would be effective to do anything other than to rubber stamp the applicant's position before the Board. The votes of the clerical/billing employees must not be diluted to the point that their wishes might have no effect whatsoever on the outcome of the process. The Board is not satisfied that there is any justification for the ordering of a vote that would involve any of the bargaining unit employees that are not engaged in clerical/billing functions. There is simply no dispute or possible dispute regarding the appropriateness of their inclusion in the Lakeland Distribution bargaining unit. A vote involving those employees would serve no useful purpose.

56. The applicant did not suggest that a vote involving the bargaining unit employees that are not engaged in clerical/billing functions should be taken to determine whether they should continue to be included in the bargaining unit. Indeed, the representation vote proposed by the applicant would not address or advance any disclosed interests of that group of employees. In particular, the applicant did not assert that those employees have any interest in the outcome of the dispute regarding the inclusion or exclusion of the clerical/billing employees. The applicant's concession regarding the holding of a vote was clearly strategic, and the applicant offered no explanation – apart from essentially formulaic arguments – for those employees being called upon to vote. Having proposed the taking of a vote, it was not open to the applicant to deny those whose interests and rights are directly affected by these proceedings the right to a meaningful vote.

57. The Board is properly concerned with whether the true wishes of the employees will be determined as a result of a representation vote. Here the question is should the "office staff" be included or excluded or, more pointedly, do those employees wish to be represented by the applicant. Whether other bargaining unit employees wish to confirm their choice of the applicant as their exclusive bargaining agent is simply not in issue; their views and their votes are not relevant.

58. In the *City of Peterborough* decision, the Board observed that it must

. . . seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union".

The applicant's proposed voting constituency virtually ignores and subordinates the interests of the non-union employees of Lakeland Distribution. There is no evidence to suggest that the interests of those employees are aligned with the applicant and inclusion in a bargaining unit – or that they are not. Quite obviously, the means by which the Board might meet its obligation to establish a balance is to order a vote that will give the clerical/billing employees, and only those employees, the opportunity to express their choice and identify their interests on this singular issue.

59. The responding parties' argument based on section 2 of the Act and the employees' "freedom of association" as discussed by the Divisional Court in *Independent Electricity System* is compelling. The words of section 2 constitute more than a mere recital; they embody a statement of purpose and as such should inform the approach taken to the interpretation and application of the Act. Moreover, the Act in section 11 expresses the legislative concern for the conduct of votes as a means to determining the "true wishes" of employees when called upon to determine their "freely-designated representatives". Those principles would not be tested or applied with a vote as proposed by the applicant or without a vote as proposed by responding parties.

60. The applicant failed to demonstrate how its proposed voting arrangement respected the freedom of association of the affected employees, their right to freely-designate their exclusive bargaining agent (or to decline to do so), or the ability of the Board to determine the true wishes of the clerical/billing employees. This situation is not comparable to that in *Bermay*. Here, the employer maintains the collective agreement and seeks adherence to a subsisting collective agreement that excludes "office staff". The applicant correctly observed that the responding parties did not assert prejudice adverse to their business interests; however, the responding parties certainly raised the issue of potential prejudice to the rights of employees that have not previously been included in any of the applicant's bargaining units.

61. Given that the outcome of the vote will determine the ultimate bargaining unit definition and given that all of the clerical/billing employees might be affected by the results of the vote, all seven should be allowed to vote.

62. The Board is mindful that the parties agreed to a scope clause that excludes part-time employees; however, there was no evidence that either of the clerical/billing employees covered by the PS Distribution Collective Agreement would be excluded by virtue of that definition. The agreement under which they were employed did not distinguish part-time and full-time employees. Either or both of them might be "part-time", but working more than 24 hours per week. Therefore, the unionized component of the seven clerical/billing employees could be two employees, or 28%. On the cases cited by the parties, that level would justify a vote and the Board has decided that it would not deal with this issue without allowing all of the affected employees an opportunity to vote to determine whether the

"office staff" will or will not be included in the bargaining unit represented by the applicant.

63. These circumstances parallel the situation addressed by the Board in *Bracebridge Hydro Electric*. There, the PWU had one of three relevant employees. Here, two of seven relevant employees were employed under a collective agreement. There, the persons in issue, again the inside workers, were put to their election. Those employees were deciding whether there would be a second bargaining unit, an inside unit; here, the decision is whether the "office staff" will be included in a subsisting bargaining unit. The question is the same in principle: do they or do they not wish to be represented? The determination affects the interests of all seven and all seven should be permitted to vote.

64. Having regard for the foregoing, the Board orders that, if the parties' condition regarding the early termination of the BG Collective Agreement and the LP Collective Agreement is satisfied or withdrawn, a representation vote shall be taken among the employees employed as at the date of this decision in the following voting constituency:

all office and clerical staff employed by Lakeland Power Distribution Ltd., save and except Supervisor, persons above the rank of Supervisor, co-operative students, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week.

For greater certainty, if he or she remains employed by Lakeland Distribution, the person previously employed by PS Distribution in a part-time capacity shall be permitted to vote notwithstanding the above exclusion of "persons regularly employed for not more than twenty-four (24) hours per week".

65. The date of the vote will be determined forthwith after the parties' condition regarding the early termination of the BG Collective Agreement and the LP Collective Agreement is satisfied or withdrawn.

66. If the vote is held, employees will be asked whether or not they wish to be represented by CUPE in their employment relations with their employer, and the outcome of the vote will determine the issue between the parties regarding the continuation or the elimination of the "office staff" exclusion in the agreed bargaining unit description

for each of the single Generation Agreement and the single Distribution Agreement.

67. The responding parties are directed to post copies of this decision for 90 days adjacent to copies of the Application and the Notice to Employees and where they are most likely to come to the attention of the employees affected by the application and this decision.

“Derek L. Rogers”
for the Board