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SUCCESSOR RIGHTS IN THE UNIONIZED SECTOR IN CANADA

BY

FRANK ALBERT XAVIER LAVERGNE

A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS.

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ABSTRACT

Canadian successor rights laws permit bargaining rights with a predecessor employer to be binding on a successor employer when a business, or part of it, is sold, leased, transferred or otherwise disposed of. Conclusions are made related to perceived deficiencies in existing successorship provisions.

Intrajurisdictional transfers of a business, within a private sector labour statute, is covered. Conflicting interests, the theories of a business, the definition of a business, the factors considered in assessing a transfer of a business, the liability of a successor employer, the impact on contracting out, intermingling and the power of labour boards to amend collective agreements, are assessed.

Interjurisdictional transfers between the public and private sectors, and between the federal and provincial jurisdictions, is covered. A transfer of a business when there is government restructuring is taken into account. The transfer of a business between the federal jurisdiction and the provinces is evaluated.

DEDICATION & ACKNOWLEDGEMENT

This thesis is dedicated to employees, unions, employers and others in the hope that it will be of some assistance to them in understanding and dealing with successor rights.

I would like to take this opportunity to thank Professor Wood and Professor Dunlop for the assistance they have given me and for being my advisors. I would also like to thank the library staff for all of the assistance they have given me.

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CHAPTER 1

INTRODUCTION

Successor rights laws permit bargaining rights of a union with a predecessor employer to be binding on a successor employer when a business, or part of it, is sold, leased, transferred or otherwise disposed of (alienation in Quebec) when there is continuity of the business, or part of it, with a successor employer. This thesis explores and analyzes the existing successor rights laws in the unionized sector in Canada. It assesses whether the legislation is meeting the objectives intended and whether there is a need for improvement. As it is believed that employers, unions and employees can best manage their affairs when statutory rights are clearly established and understood, disparities are analyzed and suggestions for clarifying successor rights laws are made.

Successor rights law has a significant impact on workplace relationships and the stability of labour relations in Canada, where about one third of the workforce is unionized.[1] The goal of successor rights provisions is to prevent employees from losing continuous employment rights when a business is sold or transferred to another employer. Such occurrences may be for *bona fide* reasons or may be done to thwart labour obligations. Successor rights laws may be thought of as a continuation of bargaining rights or other obligations under a labour statute.

Successor rights are a complex, but important area of labour law in Canada. Successor rights in the union setting has been succinctly described by Professors Carrothers, Palmer and Rayner:

> A tricky part of the law relates to the preservation of collective bargaining rights, including an extant collective agreement, where two or more employers merge, or where there is a sale of a business or other form of entrepreneurial succession. . . . Legislation at a fairly early stage sought to

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[1] Ernest B. Akyeampong, "A Statistical Portrait Of The Trade Union Movement", *Perspectives On Labour and Income* (Ottawa: Statistics Canada, Winter, 1997) (Vol. 9, No. 4) 45, at 46; Alberta Department of Human Resources & Employment, *Labour Force Survey* (Ottawa: Statistics Canada, February 2001).

> manage the problems relating to mergers and successions. There are nice problems in the general law, such as the distinction between the sale of a business as a going concern and the sale of assets of a business, and labour codes are constantly being revised to dress up the law of succession.[2]

Businesses are dynamic entities. When businesses expand, merge, evolve, are reorganized, downsized and restructured, or are sold to another employer, the rights and obligations of employees, unions and employers come to the forefront. Sometimes, when such events occur, the workplace location for employees does not even change. Successor rights issues arise in such circumstances and rights, liabilities and obligations are important issues for employees, unions and employers. In the 1990's, it was popular for governments to cut costs by privatizing and transferring operations to the private sector. When that occurred, successor rights issues became more important for government, unions, employers and employees.

The unionized sector is regulated by labour legislation which is interpreted by various labour boards and sometimes by the courts. There are eleven jurisdictions in Canada responsible for labour legislation: ten provinces and the federal jurisdiction. The three territories are covered in the federal labour legislation.[3] There are successor rights provisions in all of those jurisdictions. The fact there are eleven labour jurisdictions in Canada adds to the complexity of successor rights.

There is comprehensive legislation governing successor rights in the unionized sector and there is a well developed successor rights jurisprudence in Canada. It is the general intent of legislation in the unionized sector to assist in creating harmonious relations between employees and employers in a state of free collective bargaining. The majority rule applies in the unionized sector where the majority of employees determine the direction a union is to take. A fundamental issue in successor rights matters is whether there are sound policy reasons to always continue certificates and collective

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[2] A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, *Collective Bargaining Law In Canada*, 2nd ed. (Toronto: Butterworths, 1986) at 74-75.

[3] *C.L.R.B. v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85 (S.C.C.). The third territory, Nunavut, was established on April 1, 1999: *Nunavut Act*, S.C. 1993, c. 28, ss. 3 & 79.

agreements when there are transfers of businesses, or parts of them, to another employer.

Intrajurisdictional transfers occur when a business, or part of it, is transferred to another employer that is covered under the same statute as the predecessor employer. Privity of contract problems have been overcome by legislation in respect of intrajurisdictional transfers of a business. Interjurisdictional transfers occur when a business, or part of it, operating in the federal jurisdiction, is transferred to an employer in a province, or vice-versa. Interjurisdictional transfers can also occur when a government privatizes and operations are transferred to the private sector, or when private sector operations are transferred to the government. When interjurisdictional transfers occur, disputes occur regarding whether a certificate and collective agreement are binding in the recipient statutory jurisdiction. Common law issues of privity of contract arise in interjurisdictional transfers. Although these problems can be overcome by bridging provisions in the legislation, such provisions have not been implemented in every jurisdiction.

Chapter two covers intrajurisdictional transfers of a business, or part of it, within a single labour statute in the private sector. The successorship legislation is reviewed and the conflicting interests of employees, unions and employers in successor rights is discussed. The meaning given to the terms sale, lease transfer, disposition and alienation are considered. Successor rights attach to a business and the functional theory, legal relation theory and organic theory applicable to a business are discussed. How a business has been defined in the various jurisdictions is analysed. What factors are considered by labour boards and the courts when assessing whether a business or part of it has been transferred to another employer is examined. The liability of a successor employer is evaluated. How successor rights laws impact on contracting and subcontracting is assessed. What happens to union rights when a union's members are mixed with another union or with non-union employees (intermingling) after the business is in the hands of the successor employer is evaluated. The power of labour boards to amend collective agreements when a successorship has occurred is taken into account. Conclusions are made which contemplate perceived deficiencies in the existing statutory successorship

provisions and suggestions are made for their improvement.

Chapter three covers successor rights related to interjurisdictional transfers. It considers the transfer of bargaining rights between the public and private sector labour statutes, and between the federal and provincial statutory jurisdictions. Interjurisdictional successor rights related to transfers of bargaining rights between the private and public sectors in each province and the federal jurisdiction are also examined. A transfer of a business, or part of it, from the public to the private sector, in times of government restructuring and downsizing, is taken into account. The effects of the transfer of a business, or part of it, between the federal jurisdiction and the provinces, and what happens to bargaining rights, is evaluated. The constitutional jurisdiction over labour is briefly examined in the context of transfers between the provinces and the federal jurisdiction. Conclusions are drawn and recommendations are made related to the continuity of bargaining rights when interjurisdictional transfers occur. Chapter four follows with conclusions.

CHAPTER 2

INTRAJURISDICTIONAL TRANSFERS

1. INTRODUCTION

Collective bargaining in Canada is a decentralized and an enterprise based system.[1] Canadian labour policy is interventionist with a focus on enacting legislation to create stability, prevent work stoppages and maintain industrial peace.[2] These principles are at the heart of successor rights legislation within the confines of the eleven labour jurisdictions which exist in Canada (ten provinces and federal jurisdiction (Canada)). The existence of successor rights provisions is of significant importance to unions, employees and employers, especially when there are changes in the economy and budget cut-backs that may force organizations to restructure as a matter of necessity rather than choice.[3] Compared to other countries, such as the United States, successor rights law in Canada permits a collective agreement and a certification to continue with a successor, rather than only a right to engage in bargaining when a successorship occurs. Throughout, a successor employer is referred to as a "successor", while a predecessor employer is referred to as a "predecessor".

Businesses are dynamic enterprises. They can amalgamate, restructure or merge, and can be sold, leased, transferred or otherwise disposed of to another company or person. In such circumstances, intrajurisdictional successor rights issues arise in labour statutes. The statutory successor rights provisions allow for the continuity of employee and union rights with a subsequent employer when a successorship is established, unless

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[1] George W. Adams, "Towards A New Vitality: Reflections On 20 Years Of Collective Bargaining Regulation" [1991] 23 Ottawa L. Rev. 139 at 172.

[2] M.A. Hickling, *Interjurisdictional Transfers: Successor Rights at Arbitration* (1991), 2 Lab. Arb. Y.B. 223 at 231.

[3] Philip L. Bryden, "Case Comment: *W.W. Lester (1979) Ltd.* v. *U.A., Local 740*" (1992), 71 Can. Bar Rev. 580 at 580.

a labour board orders otherwise. The statutory successor rights provisions abrogate the common law principle of privity of contract, where only the signatories to an agreement are bound by it. The Supreme Court has acknowledged that the goal of successor rights provisions is to continue bargaining rights to protect employees when a business is transferred or when changes to corporate structures occur, and the privity of contract problem has been resolved by legislation.[4] The fundamental purpose of successor rights laws is to prevent disruption of labour relations, to encourage stability of employment and to protect the rights of unions and employees when there is a change in an organization, or when an employer utilizes corporate machinations to escape a valid collective agreement.[5]

There are two ways that a union can establish bargaining rights with an employer: (1) by making a certification application to a labour board and becoming the certified bargaining agent, or (2) by an employer voluntarily recognizing a union, except in Quebec, where voluntary recognition does not exist.[6] A collective agreement can be considered the core substance of any bargaining relationship between an employer and a union since it governs the terms and conditions of employment and is at the heart of the relationship.

As a general rule, the labour statutes in Canada contemplate that a union will become the exclusive bargaining agent of a group of employees by obtaining certification, but entitlement to negotiate a collective agreement may also result from a voluntary recognition.[7] Voluntary recognition existed long before the certification process was

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[4] *W.W. Lester (1978) Ltd. v. U.A., Local 740* (1990), 76 D.L.R. (4th) 389 (S.C.C.) at 407 [hereinafter *W.W. Lester*].

[5] *United Food and Commercial Workers, Local 1252 v. R.L.B. Holdings Ltd.* (1997), 475 A.P.R. 294 (Nfld. S.C.T.D.) at 306.

[6] G.W. Adams, *Canadian Labour Law*, 2nd ed. (Aurora: Canada Law Book, 1993–) at p. 7-70 [hereinafter *Canadian Labour Law*]. Voluntary recognition was abolished in Quebec in 1969: *An Act To Amend The Labour Code*, S.Q. 1969, c. 47, ss. 2,(e), 21, 22.

[7] A.W.R. Carrothers, E.E. Palmer and W.B.Rayner, *Collective Bargaining Law In Canada*, 2nd ed. (Toronto: Butterworths, 1986) at 316-317.

legislated[8] and became an alternative to the recognition strike in order to avoid the social disruption such a strike caused.[9] The difference between the two methods is that when a union becomes the certified bargaining agent for a unit of employees, the employer is compelled to the bargaining table to negotiate a collective agreement, but in the case of voluntary recognition, the union is dependent upon the employer agreeing to recognize the union as the bargaining agent for a specified unit of employees. Voluntary recognition is common in the construction industry.[10]

A certificate is an ends, not a means, since it gets collective bargaining going and brings a union and an employer within the legal framework of the bargaining provisions in the labour statutes.[11] The advantage of the certification process is that it is orderly and is monitored by a labour board which has the responsibility for protecting employee, union and employer interests.[12] The main advantage of a voluntary recognition is that the employer and union are on amicable terms as opposed to being adversaries, the boundaries for the bargaining relationship are set by the union and the employer, it is less expensive than the certification process and there are not the delays prevalent in the certification process.[13] Regardless of how a bargaining relationship between an employer and a union originated, at its core is a collective agreement setting out the terms and conditions of employment. A collective agreement is a creature of compromise, a product of negotiations between a union and an employer.

To gain bargaining status with an employer, particularly through the certification

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[8] *Beverage Dispensers & Culinary Workers Union, Local 835 v. Terra Nova Motor Inn Ltd.* (1974), 50 D.L.R. (3d) 253 (S.C.C.) at 254-255, 259.

[9] *Sheet Metal Contractors Assn. of Alberta v. S.M.W., Local 8* (1988), C.L.R.B.R. (2d) 107 (Alta. L.R.B.) at 128-129; aff'd (1988), 93 A.R. 367 (Q.B.); See also: H.W. Arthurs et al., *Labour Law And Industrial Relations In Canada*, 3rd ed. (Deventer: Kluwer, 1988) at 43-46, 204.

[10] *Canadian Labour Law*, *supra* note 6 at p. 15-22.

[11] *Delta Hospital v. H.E.U., Local 180* [1978] 1 Can. L.R.B.R. 356 (B.C.L.R.B.) at 366.

[12] *Ibid.* at 367.

[13] *Ibid.*

process, in some cases unions may have had to fight a battle to obtain those rights and to negotiate satisfactory terms and conditions of employment in a collective agreement, while in other cases the gaining of bargaining status and negotiating a collective agreement may not have been so difficult. In either case, a union and employees have a vested interest in having a collective agreement and a certificate continue when a business, or part of it, passes to another employer. On the other hand, an employer has a vested interest in a business and desires to keep a business operating in an efficient, productive and economic manner, requiring some flexibility to meet those objectives. A purchaser has similar (if not the same) interests as those of a seller when a business, or part of it, is conveyed to it.

When a business, or part of it, is sold, leased, transferred, merged, amalgamated or otherwise disposed of, the issue is whether there are sound policy reasons for continuing certificates and the rights and obligations contained in collective agreements, in order to maintain industrial peace and harmonious relations.[14] In 1968 the Woods Task Force, in its comprehensive review of industrial relations in Canada, recommended a successor rights provision be added to the federal labour statute:

> 461. We recommend that
>
> a. where an employer or a union merely changes its name, the application, the certificate and the collective agreement should continue to bind the employer and the union;
>
> b. where there is a sale of assets as distinct from a sale of a business, neither an application, a certificate nor a collective agreement should follow the assets;
>
> c. where there is a business succession, the application, the certificate, and the collective agreement should follow the business. . . .
>
> d. where there is a corporate or union merger, the Canada Labour

[14] M.A. Hickling, "An Employer's Inheritance in Labour Law" (1967-68) 9 C. de D. 461, at 464-466 [hereinafter *Employer's Inheritance*].

> Relations Board should have discretion, as the Ontario Labour Relations Board now has, to sort out any issue relating to which union, if any, should succeed to the application and bargaining rights and in what unit, and to determine whether and to what extent a collective agreement should be binding on the parties; and
>
> e. where there is corporate . . . dissolution, an application, a certificate and a collective agreement should cease to be binding provided, however, that parties to collective bargaining should be free to negotiate terms in a collective agreement establishing rights in the event of dissolution.[15]

The recommendations of the Woods Task Force that were made over 30 years ago are important today, and reflect the wisdom and analysis of noted labour scholars, such as Dean H.D. Woods, Dean A.W.R. Carrothers, Professor J.H.G. Crispo and A.G Dion.

The eleven labour jurisdictions in Canada have successor rights provisions in their respective labour statutes. Successor rights provisions apply to *bona fide* business transactions, as well as those that are done with ulterior motives of attempting to avoid bargaining obligations.[16] The successorship legislation also applies to a chain of business transactions which may be done for legitimate business reasons, or to circumvent and avoid bargaining obligations. For successor rights to arise, there must be a change in ownership of a business, or part of it, and the identity of the employer must change. Successor rights do not apply when the same legal entity deals with its assets so that the legal ownership of the assets or the business does not transfer to another employer.[17]

The successor rights provisions attempt to strike a balance between competing interests. Unions desire that their bargaining rights continue with a successor. When the predecessor's employees are terminated, they may desire to have continued employment

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[15] Privy Council Office, *Canadian Industrial Relations: The Report of the Task Force On Labour Relations* (Ottawa: Queen's Printer, 1969) (Chair: H.D. Woods) at p. 145 [hereinafter *Woods Task Force*].

[16] *N.A.B.E.T. v. Radio CJYQ Ltd.* [1978] 1 Can. L.R.B.R. 565 (Can. L.R.B.) at 571 [hereinafter *Radio CJYQ*].

[17] *New Dominion Stores v. R.W.D.S.U., Local 414* (1989), 2 C.L.R.B.R. (2d) 299 (Ont. L.R.B.) at 303-304 [hereinafter *New Dominion Stores*].

with the successor, be represented by the same union, and be employed under the same terms and conditions in the collective agreement enjoyed with the predecessor.[18] Although the interests of a union and predecessor employees may be synonymous, a union may want successor rights regardless of the desires of employees. A union may not want to have the expense and expend the effort of organizing and certifying the successor's operations, or the union may want to have its bargaining rights attach to the successor so that it can further unionize the successor's operations. The entrepreneurial freedom of the predecessor must be considered since the marketability of a business is decreased to some extent when bargaining rights attach to a purchaser who may prefer to buy a business without the encumbrances of a certificate or a collective agreement.[19] The interests of the union, the predecessor's employees and of the purchaser are in greatest competition when the successor radically changes the nature of the business so that the predecessor's employees and the collective agreement are not suited to the subsequent operations.[20] When a successor employer has employees employed at the time it acquires a predecessor's business, this group also has an interest in the work performed since the business may not be able to provide work for those employees who worked for the predecessor as well as those that worked for the successor.[21]

This chapter reviews general successor rights of an intrajurisdictional nature, that is, within the confines of a single labour statute in the private sector in a province or the federal jurisdiction. The successor rights legislation and the jurisprudence are analysed to determine whether this provides adequate protection for employees and unions, and sufficient flexibility for employers. The test for successor rights in the various jurisdictions is analysed and the application of the test is reviewed. Contracting and

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[18] *S.E.I.U., Local 183 v. Riverview Manor* (1983), 5 C.L.R.B.R. (N.S.) 40 (Ont. L.R.B.) at 46 [hereinafter *Riverview Manor*].

[19] *Ibid.* at 46-47.

[20] *Ibid.* at 47.

[21] *Ibid.*

subcontracting of bargaining unit work and intermingling,[22] as they relate to successor rights, are also evaluated. The powers of labour boards to amend collective agreements upon a successorship is examined.

2. LEGISLATION

It took a period spanning 26 years, from 1947 to 1973, for all of the eleven jurisdictions to add successor rights provisions to their labour statutes.[23] All eleven jurisdictions allow bargaining rights to transfer from a predecessor to a successor when there is a sale of a business, or part of it.[24] Bargaining rights are continued automatically with the successor as of the date of the transfer.[25] The legislation and its application are complex, depending on principles developed by the labour tribunals and courts over time. In the federal jurisdiction, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario and Saskatchewan, the successor rights provisions apply when there is a sale, lease, transfer, or other disposition of a business, or part of it.[26] In Alberta,

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[22] Intermingling occurs when a business, or part of it, is transferred to a successor and the predecessor's employees are mixed with the successor's employees. Intermingling may be a mixture of employees who belong to two or more unions, or it might be a mixture of union and non-union employees.

[23] *Industrial Conciliation and Arbitration Act, 1947*, S.B.C. 1947, c. 44, s. 11(8); *The Manitoba Labour Relations Act*, S.M. 1948, c. 27, s. 10; *An Act To Amend The Labour Act*, S.A. 1950, c. 34, s. 21; *An Act To Amend The Trade Union Act, 1944* S.S. 1950, c. 92, s. 7; *The Labour Relations (Amendment) Act, 1960*, S.N. 1960, c. 58, s. 16; *An Act To Amend The Labour Relations Act*, S.Q. 1961, c. 73, s. 1; *The Labour Relations Amendment Act, 1962-63*, S.O. 1962-63, c. 70, s. 1; *An Act To Amend The Trade Union Act*, S.N.S. 1965, c. 53, s. 1; *Prince Edward Island Labour Act*, S.P.E.I. 1971, c. 35, s. 37; *Industrial Relations Act*, S.N.B. 1971, c. 9, s. 61; *An Act To Amend The Canada Labour Code*, S.C. 1972, c. 18, s. 1. Note the federal successor rights provision was not proclaimed until March 1, 1973: *Canada Gazette*, Vol. 107, at 632.

[24] *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 44-46; *Labour Relations Code*, R. S.A. 2000, c. L-1, ss. 46, 48; *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35; *The Labour Relations Act*, R.S.M. 1987, c. L10, ss. 56-58; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 60; *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93; *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 69; *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39; *Labour Code*, R.S.Q. 1977, c. C-27, ss. 45, 45.1, 45.2, 45.3, 46; *The Trade Union Act*, R.S.S. 1978, c. T-17, ss. 37, 37.1.

[25] *Canadian Labour Law*, *supra* note 6 at para. 8.20.

[26] *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 44(1); *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 46(1); *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35(1); *The Labour Relations Act*, R.S.M. 1987, c. L10, ss. 1, 56; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 60(1); *Labour Relations Act*, R.S.N. 1990,

it also applies to a merger of a business with another business,[27] while in Manitoba it extends to the merger or amalgamation of two or more businesses.[28] In Quebec the successor rights provision applies to the alienation or operation by another of an undertaking, or part of it.[29] The Quebec provision is broader than the provisions in the common law jurisdictions.[30] In Nova Scotia and Prince Edward Island the successor rights provisions apply to a sale, lease or transfer of a business, or part of it, and to an agreement to sell, lease or transfer.[31] Newfoundland has a similar provision.[32] To be consistent with the other jurisdictions, in Nova Scotia and Prince Edward Island the legislation should be amended to include an "other disposition" of a business.

It has been observed that "[a]morphous words like sale and business derive a more precise meaning from the purpose they were chosen to serve, and take on a very different hue in the world of labour relations than in a commercial law setting".[33] It is a business, or part of it, which has to be transferred to another employer in order for successor rights to arise. In Canada the reference is to a federal work, undertaking or business,[34] while in Alberta it is a business or undertaking.[35] In Quebec the reference is to

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c. L-1, s. 93(1); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 69(1); *The Trade Union Act*, R.S.S. 1978, c. T-17, ss. 37(1).

[27] *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 46(1).

[28] *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 58.

[29] *Labour Code*, R.S.Q. 1977, c. C-27, s. 45.

[30] *Canadian Labour Law*, *supra* note 6 at para. 8.480.

[31] *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(1); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(1).

[32] *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(1)

[33] *Riverview Manor*, *supra* note 18 at 46.

[34] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 44(1).

[35] *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 46.

an undertaking.[36] In the other provinces, the reference is to a business.[37] Manitoba is unique in that it defines a business as "any kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise and whether carried on by or as part of the operation of government and includes any part of a business".[38] In Canada, Manitoba, New Brunswick and Ontario, "sale", "sell" or "sells" is simply defined as including a lease, transfer or other disposition of a business.[39] There are no such definitions used in the other common law jurisdictions which makes the provisions unnecessarily wordy.

The Supreme Court has indicated that the words "transfer" and "other disposition" have been liberally interpreted to include transactions related to exchanges, mergers, amalgamations, gifts, trusts and take-overs, and the word "disposition" has been interpreted liberally to cover most any type of transfer.[40] The word "transfer" has been interpreted as "to make over the legal title or ownership of to another".[41] The phrase "otherwise disposed of" is a "catch-all term that refers to all methods of disposing of a business" apart from a sale, lease or transfer,[42] and the words "other disposition of a business" are unrestrictive.[43] The word "alienation" in the Quebec legislation means "a

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[36] *Labour Code*, R.S.Q. 1977, c. C-27, s. 45.

[37] *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35(1); *The Labour Relations Act*, R.S.M. 1987, c. L10, ss. 1, 56; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 60(1); *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(1); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(1); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 69(1); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(1); *The Trade Union Act*, R.S.S. 1978, c. T-17, ss. 37(1).

[38] *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 1

[39] *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 44(1); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 1; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 60(1); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 69(1).

[40] *W.W. Lester*, *supra* note 4 at 409-410.

[41] *Gill Lumber Ltd.* v. *United Brotherhood of Carpenters and Joiners of America, Local 2142* (1973), 42 D.L.R. (3d) 271 (N.B.C.A.) at 274 [hereinafter *Gill Lumber*].

[42] *Re Scollars* v. *C.U.P.E.* (1984), 9 D.L.R. (4th) 145 at 157 (Sask. C.A.).

[43] *Radio CJYQ*, *supra* note16 at 572.

transfer or ownership of property whether by sale or otherwise, but it is capable of bearing a wider meaning".[44] The Quebec provision is somewhat broader in scope than those in the common law jurisdictions since it refers to"alienation or operation by another".[45]

In all jurisdictions, when a business, or part of it, is transferred, a certificate and collective agreement pass to the successor.[46] In five jurisdictions the successor is also bound by all proceedings under the labour statute related to the predecessor.[47] When there is no collective agreement or certification, in six provinces a successor is only bound by an application for certification that was brought against the predecessor.[48] In Ontario and New Brunswick, the successor is also bound by an application for revocation brought against the predecessor, and, in both jurisdictions, a union that is entitled to do so may serve notice to bargain on the successor.[49] In four jurisdictions, a successor is also bound by a notice to bargain served on a predecessor.[50] In jurisdictions where a successor is bound by all proceedings under the statutes, George Adams has indicated that they should

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[44] *Employer's Inheritance*, *supra* note 14 at 488.

[45] *Canadian Labour Law*, *supra* note 6 at para. 8.480.

[46] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 44(2); *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 46(1); *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 35(1, 2); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(1); *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(2-4); *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(1); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(1); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69(2-4); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(1); *Labour Code*, R.S.Q. 1977, c. C-27, s. 45; *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 37(1).

[47] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 44(2); *Labour Relations Code*, R. S.A. 2000, c. L-1, s. 46(1); *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 35(1); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(1); *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 37(1).

[48] R.S.N.B. 1973, c. I-4, ss. 60(2); *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(1); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(1); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69(2); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(1); *Labour Code*, R.S.Q. 1977, c. C-27, s. 45.

[49] *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(2, 3); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69(2, 3).

[50] R.S.N. 1990, c. L-1, ss. 93(1); *Trade Union Act*, R.S.N.S. 1989, c. 475, ss. 31(1); *Labour Act*, R.S.P.E.I. 1988, c. L-1, ss. 39(1); *Labour Code*, R.S.Q. 1977, c. C-27, s. 45.

be bound to remedy the unfair practices of the predecessor.[51] In all jurisdictions a successor should be bound by all the proceedings brought against the predecessor which exist as of the date of the transfer, unless otherwise ordered by a labour board. The successor is in the best position to remedy proceedings against the predecessor, such as an unfair practice, since the successor can take the liabilities of the predecessor for those proceedings into consideration in the agreement it makes and the price it pays to the predecessor for the business.[52]

In all jurisdictions, the labour tribunals have broad powers to determine whether a business, or part of it, has been transferred and to deal with other issues related to the transfer, including intermingling and what rights, privileges and obligations exist after the transfer.[53] Six of the boards have the power to amend, modify or determine the extent to which collective agreements remain in effect. Four boards do not have such powers, while in British Columbia the board can only modify provisions in a collective agreement related to seniority rights and it can give directions as to the interpretation or application of a collective agreement.[54] In Alberta and Prince Edward Island the boards have the power to amend a collective agreement,[55] while in Newfoundland and Nova Scotia the labour boards have the power to modify a collective agreement.[56] In Newfoundland, Nova Scotia and Prince Edward Island, they can also restrict and interpret provisions of a

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[51] *Canadian Labour Law*, *supra* note 6 at para. 8.470.

[52] *Ibid.*

[53] *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 45, 46; *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 46(2); *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 35(3-5); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(4-8); *Labour Relations Act*, R.S.N. 1990, c. L-1, ss. 93(2-6); *Trade Union Act*, R.S.N.S. 1989, c. 475, ss. 31(4, 5, 7); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69(4-8); *Labour Act*, R.S.P.E.I. 1988, c. L-1, ss. 39(2, 5, 6); *Labour Code*, R.S.Q. 1977, c. C-27, s. 46; *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 37(2).

[54] *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 35(5)(d, f).

[55] *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 44(2)(c); R.S.P.E.I. 1988, c. L-1, ss. 39(3)(a).

[56] *Labour Relations Act*, R.S.N. 1990, c. L-1, ss. 93(3)(a); *Trade Union Act*, R.S.N.S. 1989, c. 475, ss. 31(5)(a).

collective agreement.[57] In Manitoba, the board has the power when there is intermingling to modify or restrict provisions in a collective agreement to remove inconsistencies and to redefine seniority rights.[58] If there is a conflict between bargaining units or intermingling after a successorship, the New Brunswick board has the power to declare the extent to which a collective agreement continues in force.[59]

In five provinces, despite the fact a notice to bargain was served by the union, a successor is not required to bargain with the union until the labour board has disposed of the successor rights application.[60] There are no similar provisions in the other jurisdictions, but there should be. A successor should not be obligated to engage in bargaining until the issues in dispute about successor rights are resolved by a labour board. Without such provisions, a successor could be obligated to engage in unnecessary bargaining with a union. If there is intermingling, the union the successor is required to negotiate with in the interim may not remain the bargaining agent after successorship issues are decided by a board.

In Manitoba, when there is intermingling, the board can permit a notice to be served requiring a successor to negotiate a new collective agreement, or to revise an existing collective agreement, if it is reasonable in the circumstances and if the employees, union or employer would suffer substantial or irremediable damage if negotiations were not permitted.[61] This provision should not be tied to intermingling since similar hardship situations can arise in successorship cases where there is no intermingling. Yet, it would be unreasonable not to allow the successor and the union to

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[57] *Labour Relations Act*, R.S.N. 1990, c. L-1, ss. 93(3)(f, h); *Trade Union Act*, R.S.N.S. 1989, c. 475, ss. 31(5)(f, h); R.S.P.E.I. 1988, c. L-1, ss. 39(3)(f, h).

[58] *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(2)(g, h).

[59] *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(4)(e), 60(6)(e).

[60] *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(9); *Labour Relations Act*, R.S.N. 1990, c. L-1, ss. 93(4); *Trade Union Act*, R.S.N.S. 1989, c. 475, ss. 31(6); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69(9); *Labour Act*, R.S.P.E.I. 1988, c. L-1, ss. 39(4).

[61] *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(3). See: *P.S.A.C. v. Deer Lodge Centre Inc.* (1983), 84 C.L.L.C. ¶16,003 (Man. L.R.B.) at 14,025.

negotiate a new collective agreement. For example, if a national employer had twenty large operations across Canada where there was chain bargaining of a collective agreement that covered all those operations, and one operation, or a part of it, was hived off and sold to another employer, there may be numerous terms and conditions in the collective agreement which could not apply to a single employer. The collective agreement provisions may be worded in such a manner that they cannot apply to the successor, or they might be irrelevant for employees and the union in a smaller setting. The terms in the collective agreement may be so inflexible that they cause the successor financial hardship. There are numerous fact specific possibilities of problems that might exist which could cause substantial loss or damage to a party after a successorship. All jurisdictions should have legislation to allow a labour board to order the parties to negotiate a new collective agreement mid-term in circumstances when it would be unreasonable not to. The good faith bargaining obligations which already exist in the statutes could apply to the parties. Boards should only be involved in amending collective agreements as a last resort since the parties are more apt to comply with what they mutually agree on.

In New Brunswick and Ontario, an application can be made to the labour board to terminate the bargaining rights of the union shortly after the transfer, if the character of the business has changed substantially from that which existed with the predecessor.[62] A change in a business that would make it substantially different from the predecessor's would have to be "a fundamental difference, affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate, or unreasonable in all the circumstances".[63] This is a high standard and a significant change is not a

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[62] *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(5); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69(5).

[63] *Winco Steak and Burger Restaurant Ltd. v. Hotels, Clubs, Restaurants, Taverns, Employees' Union, Local 261* [1975] Can. L.R.B.R. 296 (Ont. L.R.B.) at 296. See also: *Man of Aran Ltd.* [1973] O.L.R.B. Rep. June 313, aff'd (1973), O.R. (2d) 54 (H.C.); *International Beverage Dispensers' and Bartenders' Union, Local 280 v. 251628 Holdings Ltd. & Jimmy'z II* [1978] 1 Can. L.R.B.R. 28 (Ont. L.R.B.); *Vaunclair Meats Ltd. v. U.F.C.W., Local 633* [1981] 2 Can. L.R.B.R. 410 (Ont. L.R.B.) at 420 [hereinafter *Vaunclair Meats*].

substantial change.[64] These type of provisions, which only apply in exceptional circumstances, should be introduced in the other jurisdictions. If a business is not the same type of business in the hands of the successor shortly after a transfer, and bargaining rights are permitted to attach to the changed business, there is an expansion of bargaining rights, rather than a preservation of those rights as intended by successor rights laws.

In Alberta there are two successor rights provisions, one for general successor rights and another for governing bodies, which applies to cities, towns, villages, schools, hospitals and regional health authorities.[65] In four other provinces the successor rights provisions specifically state they apply to municipalities when they are annexed, joined together or amalgamated.[66] In Nova Scotia the provision also indicates it applies to school boards.[67]

Alberta is the only jurisdiction that makes a successorship contingent upon the control, management or supervision passing from the predecessor to a successor.[68] This requirement is superfluous. There have been no cases in Alberta where a successorship did not occur because the control, management or supervision did not pass to the successor when other aspects of a business passed to a successor. The governing bodies provision is not contingent upon the supervision, management or control passing to the successor.[69]

Successor rights attach to the successor as of the date of the transfer, without any

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[64] *R.W.D.S.U., Local 1065 v. Atlantic Wholesalers Ltd.* (1998), 98 C.L.L.C. ¶220-064 (N.B.L.E.B.) at 143,551.

[65] *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 46, 48.

[66] *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 60(11, 12); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(8); *Labour Relations Act*, S.O. 1995, c. 1, Schedule A, s. 69(11); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(7).

[67] *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(8).

[68] *Supra* note 65 at s. 46(1).

[69] *Supra* note 65 at ss. 46, 48.

order from a labour board. One major deficiency of the successor rights provisions in the common law jurisdictions is that a predecessor is not required to give a union any notice of a transfer of a business, but the law is clear that bargaining rights are to be preserved when a transfer occurs. It should be a requirement that advance written notice of a transfer be given to a union by the predecessor and it should be mandatory that the union and the successor make attempts to resolve bargaining rights issues prior to the transfer. Recently, the Quebec successorship provisions were amended to add s. 45.1 which requires a predecessor to give notice to a union of the date the transfer of a business or part of it is to take place.[70] The Quebec provision is deficient since it does not specify the amount of notice required to be given, nor does it specify that the notice must be in writing.

There is no requirement in the statutes for a predecessor to notify the successor that a business is bound by a certificate, a collective agreement or other labour relations proceedings. The legislation should be amended to make it mandatory that such notice be given to a potential successor within a reasonable period of time before a transfer so that the successor can make informed decisions and take appropriate action. The providing of such advance notices to a union and a successor may lessen or prevent successor rights disputes, and promote more peaceful and stable industrial relations when businesses, or parts of them, change hands.

Some of the successor rights provisions are ambiguous and overly complex, such as those in Manitoba, Ontario and New Brunswick.[71] The shortest successor rights provisions, in Quebec and British Columbia, are concise and give the labour boards in those provinces broad powers to deal with successor rights applications. The successor rights provisions in the other common law jurisdictions follow the Ontario style, or a combination of the Ontario and British Columbia models.

What is remarkable about the successor rights provisions is there is no consistency

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[70] *An Act To Amend The Labour Code*, S.Q. 2001, c. 26, s. 32 (Not yet proclaimed in force).

[71] *The Labour Relations* Act, R.S.M.1987, c. L10, ss. 56-58; Industrial *Relations Act*, R.S.N.B. 1973, c. I-4, s. 60; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, ss. 69.

in the language used in the common law jurisdictions. The terms used in Quebec are unique to that province because of the French language and the civil law. Given the lack of plain language, and the complexity of the successor rights provisions, it is doubtful the average person would be able to fully appreciate their impact and the rights and obligations imposed. The complexity of the successor rights provisions could be reduced if they were written in plain language. A model clause needs to be drafted, but it is beyond the scope of this paper.

3. CONFLICTING INTERESTS IN SUCCESSORSHIPS

George Adams has noted that the successor rights laws in Canada result in a balancing of interests:

> The interpretation and application of successorship provisions by Canadian labour relations tribunals and courts has been shaped by the need to balance two often conflicting principles: On the one hand, the recognition of legitimate expectations by trade unions and employees that bargaining rights and employment benefits not be lost simply because of a transfer of the business; and on the other hand, the established principle that employees should be free to choose their bargaining agent and that terms of employment be freely negotiated by the parties. The contemporary jurisprudence reveals, a significant consistency in the explicit acknowledgement of this balancing and in the principles developed to facilitate it by decision-makers in the various Canadian jurisdictions.[72]

In assessing an allegation of successor rights, the right of employees and employers to negotiate terms and conditions of employment has been recognized by labour boards.[73] A liberal view has been taken by labour boards regarding the definition of "sale", and of

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[72] G.W. Adams, "The Canadian Law of Successorship: An Overview," in *Développements Récents en Droit du Travail*, M. Briere, R.P. Gagnon and C. St. Germain, eds. (Cowansville: Éditions Yvon Blais, 1989) 71at 89 [hereinafter *Successorship Overview*].

[73] *Ibid* at 73-74.

"business", to protect the vested interests of employees in a business.[74]

The interests of a union may conflict with those of employees when there is a transfer of a business. A union may be influenced by internal and external politics related to the labour movement, and institutional interests in survival and growth.[75] Interests of employees may focus on the short term, self–preservation and continued employment.

The public interest is at the forefront of labour relations legislation. The objective is to further industrial peace, and labour statutes are to be interpreted broadly to achieve their intended purpose:

> . . . [L]egislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of Legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century.[76]

The goal of a successor rights provision is to protect the benefits that arise under a certificate and a collective agreement, and that purpose is consistent with the promotion of industrial peace and for creating equitable relations between employees and an employer.[77] When there is a change in the management or organization of a business, successor rights laws serve to promote stability in employment, discourage disruption of labour relations, and preserve union rights and employee rights.[78]

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[74] *Ibid.* at 73.

[75] A. Flanders, "Collective Bargaining: A Theoretical Analysis" in The Labour Law Casebook Group, *Labour Law*, 5th ed., (Industrial Relations Centre: Queen's University, 1991) at 163.

[76] *White Lunch Ltd. v. Labour Relations Board of B.C.* (1966), 56 D.L.R. (2d) 193 (S.C.C.) at 201-202.

[77] *U.E.S., Local 298 v. Bibeault* [1988] 2 S.C.R. 1048 at 1098-1099 [hereinafter *Bibeault*]; *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1948] 2 W.W.R. 1055 (P.C.) at 1064.

[78] *Adam v. Daniel Roy Ltd.* (1983), 1 D.L.R. (4th) 37 (S.C.C.) at 45 [hereinafter *Daniel Roy*].

Successorship laws safeguard the rights of employees when the business in which they are employed is conveyed to another as a result of a transaction which they had no opportunity to participate in.[79] Employees may not be aware of the change to a new employer until a transfer of the business occurs. An employer is free to transfer a business, but the interests of employees may not be at the forefront of the employer's mind when a transfer is being negotiated with another employer.[80] A labour board does not have the power to delay the transfer of a business from one employer to another.[81] The rights of employees are recognized through a union which results in a balancing of an employer's right to dispose of its business with a union's right to preserve its bargaining rights.[82] Employees expect that their statutory rights related to negotiated terms and conditions of employment will have some permanence.[83] If there were no successor rights provisions in the statutes, a change in the legal ownership of a business would result in a certification and collective agreement evaporating despite the fact that the employees might be still working at the same plant, operating the same machinery, under the same working conditions with the same supervisor. [84]

From a labour relations standpoint, the importance of a business is the work provided to employees,[85] although the focus of the successor rights provisions is on a

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[79] *603195 Sask. Ltd.* v. *H.E.R.E., Local 767* (1994), 25 C.L.R.B.R. (2d) 137 at 140 (Sask. L.R.B.) [hereinafter *603195 Sask.*].

[80] *C.U.P.E. v. Metropolitan Parking Inc.* [1980] 1 Can. L.R.B.R. 197 (Ont. L.R.B.) at 203-204 [hereinafter *Metropolitan Parking*]; *Kelly Douglas & Co. v. R.W.D.S.U., Local 580* [1974] 1 Can. L.R.B.R. 77 at 81-82 [hereinafter *Kelly Douglas*].

[81] *Kelly Douglas, ibid* at 81.

[82] *Kaverit Steel and Crane Ltd. v. I.B.E.W., Local 424* [1994] Alta. L.R.B.R. 11 at 21-22 [hereinafter *Kaverit Steel*].

[83] *Metropolitan Parking, supra* note 80 at 203-204; *Kelly Douglas, supra* note 80 at 81-82.

[84] *Metropolitan Parking, supra* note 80 at 203; *Kelly Douglas, supra* note 80 at 81-82.

[85] *Regina v. Labour Relations Board (Lodum Holdings Ltd.)* (1968), 3 D.L.R. (3d) 41 (B.C.S.C.) at 53 [hereinafter *Lodum Holdings*].

business and not just the work employees do.[86] Successorship laws do not guarantee a right of property in work done by a business.[87] The successor rights provisions were designed to serve a labour relations purpose to secure employee rights, rights arising under a collective agreement or certificate and rights related to proceedings before a labour board, and those rights are to be preserved.[88]

Although successor rights laws directly affect employees, unions and employers when a business or part of it is transferred to a successor, the legislation also provides a benefit to the general public. For example, when organizations that provide health, educational or municipal services, or businesses that provide electricity, oil, gas and groceries, are restructured, downsized or ownership changes to another person, the public has a vested interest in making certain there is no disruption in the services or supply of products. The successorship laws serve to protect the general public by promoting an orderly transition of collective rights passing from a predecessor to a successor.

4. EXPANSIVE MEANING GIVEN TO TERMS

The terms sale, lease, transfer and other disposition, are not to be given restricted meanings and cast a wide net for successorships:

> According to its strict signification, the term *sells* is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in s. 47a, however, the word *sells* has been given a wide definition which includes *lease, transfers and any other manner of disposition* of the business or part thereof. In legal parlance the word *lease* generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain

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[86] *Governing Council Salvation Army v. B.C.G.E.U. (Vancouver Transition House)* (1986), 12 C.L.R.B.R. (N.S.) 185 (B.C.L.R.B.) at 193-194 [hereinafter *Vancouver Transition House*].

[87] *A.T.U., Local 1374 v. Brewster Transport Co. Ltd.* [1982] Alta. L.R.B.D. 82-049 at 4.

[88] *Sheet Metal Workers International Association, Local Union No. 8 v. Crest Metal & Covering Ltd.* [1982] Alta. L.R.B.D. 82-029 at 10 [hereinafter *Crest Metal*].

> property for a period of time. The word *transfers*, however, is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word *transfers* to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word *transfers*, it is our opinion that the generality of the words *any other manner of disposition* is not intended to be in any way limited by or interpreted *ejusdem generis* with the words *leases, or transfers*. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that *sells* includes *leases or transfers*.
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> . . . [I]t is our view, that the transfer or other disposition contemplated in the section need not necessarily possess the legal accoutrements of a conveyance for good and valuable consideration at common law. While its applicability will, of course, depend upon the facts of the particular case, we are constrained to believe that the section does comprehend transactions including gratuitous dispositions or otherwise, which operate to dispose of the employer's business or a discernible part or parts thereof.[89]

The above approach to the expansive meaning of the terms used in the statutes for successorships, has been endorsed by the Supreme Court.[90] The term "alienation" used in the Quebec successorship provision has an expansive meaning of a change of ownership through transfer by sale or otherwise, but is capable of a broader meaning.[91] When an

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[89] *Thorco Manufacturing Ltd.* (1965), 65 C.L.L.C. ¶16,052 at 787-788 [hereinafter *Thorco*]. See also: *Employer's Inheritance, supra* note 14 at 485-486 and *I.A.T.S.E., Local 299 v. Cineplex Odeon Corp.* [1998] 6 W.W.R. 186 (Man. Q.B.) at 192-193 [hereinafter *Cineplex Odeon*].

[90] *W.W. Lester, supra* note 4 at 409-410.

[91] *Employer's Inheritance, supra* note 14 at 488.

application for successor rights is made, the application is not restricted to one particular term in a successorship provision, such as "sale", and all of the terms in a provision may be relied on by an applicant.

5. SUCCESSOR RIGHTS ATTACH TO A BUSINESS

Successor rights follow a business, or part of it; they do not follow job functions, which are insufficient alone to establish a successorship.[92] Bargaining rights, whether obtained by voluntary recognition or by certification, attach to a business. The word "business" has a broad meaning and is often used regarding operations without the expectation of profit.[93] Since the successor rights provisions apply to a business, the key to a successorship is determining what constitutes a business.

The leading case from the Supreme Court of Canada,[94]which sets out the guiding principles to be used in successor rights applications, originated from Quebec. Quebec cases have influenced labour boards in other jurisdictions, especially the federal jurisdiction. The successor rights provision in Quebec has always referred to the civil law concepts of alienation or operation by another of an undertaking, in whole or in part.[95] Those terms are the equivalent of a sale, lease, transfer or other disposition of a business, or part of it, in the common law jurisdictions.

It is a business, or part of it, that must transfer from a predecessor to a successor. A business is an elastic concept and what makes up a business is an important consideration in successor rights. What constitutes a business had been controversial for some years since there were three approaches used to define a business: the legal relation

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[92] *St. Louis Alcoholism Rehabilitation Centre v. S.G.E.U.* [1981] 3 Can. L.R.B.R. 428 (Sask. L.R.B.); *Metropolitan Parking, supra* note 80 at 214.

[93] *Canada Labour Relations Board v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85 (S.C.C.) at 91.

[94] *Bibeault, supra* note 77.

[95] *Labour Relations Act*, S.Q. 1944, c. 162A, s. 10a, as am. S.Q. 1961-62, c. 73, s. 1; *Labour Code*, S.Q. 1964, c. 45, s. 36; R.S.Q. 1964, c. 141, s. 36, as am. S.Q. 1969, s. 23, S.Q. 1969, c. 48, s. 19; R.S.Q. 1977, c. C-27, s. 45.

theory, the functional theory and the organic theory. The organic theory prevails.

(a) Legal Relation Theory

The legal relation theory of successorship originated in Quebec and consists of two major principles.[96] The first principle is that an undertaking is defined as consisting of functions and activities described in a certificate or a collective agreement.[97] The identity of employees who carry out those work functions, and the transfer of equipment and the like, are not determinative factors in the assessment of a successorship. The operation by another of the undertaking occurs when work covered by a certificate is put into the hands of a third party. The second principle is that a new employer has to receive a right from the predecessor.[98] For the certification and collective agreement to pass to the successor, there has to be a consensual transaction between the predecessor and the successor.

The legal relation approach essentially consists of a functional component and a component which required some direct relation or contract between the predecessor and a successor. The Quebec judiciary did not give unanimous acceptance to the legal relation theory.[99] The legal relation theory was not adopted in the common law provinces. The legal relation approach is objective since only work functions and the existence of a contract have to be determined to establish a successorship. The problem with the legal relation theory is that it does not take into account the various components of a business. There are more components of a business to consider than work functions and a contract between the predecessor and successor.

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[96] Catherine Saint-Germain, "Historique de la situation avant le jugement Commission scolaire régionale de l'Outaouais", in M. Brière, R.P. Gagnon and C. Saint-Germain, *La transmission de l'enterprise en droit du travail* (Cowansville: Yvon Blais, 1982) at 6, in *Bibeault, supra* note 77 at 1062 [Translated S.C.C.] [hereinafter Saint-Germain]. The legal relation theory was prevalent in Quebec from 1961 to 1975.

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.* The Quebec judiciary began rejecting the legal relation theory in 1975.

(b) Functional Theory

The functional theory views a business in the context of the certificate: a group of functions that are transferred to a successor where there is no legal relationship between the predecessor and successor.[100]

In *Jack Schwartz Service Station* v. *Teamsters, Local 900*,[101] a functional theory of successor rights was adopted. The Quebec Labour Court held that there was no need for a legal relationship between the predecessor and successor since an undertaking was defined as a group of functions. If the work being done with a successor was the same as that of the predecessor, the business was considered transferred whether or not new employees were hired by the successor.[102] In that case, a successorship resulted when identical successive leases of a service station passed to various operators and each operator hired new employees.[103] The functional theory adopted the functional definition of an undertaking that was one of the principles in the legal relation approach.[104]

The Supreme Court has held that the functional approach to the definition of an undertaking would lead to the wrong conclusion about a successorship because only the duties of the employees are considered.[105]As an example, the Court cited *Fondation-Habitation Champlain Inc* v. *Tribunal du travail*.[106] The Pavillion Beauharnois Inc. provided homes for the elderly in two establishments, one of which was closed down. Some of the residents moved to the other establishment of the Pavillion, while others moved to the Fondation-Habitation Champlain Inc. The Fondation bought some furniture

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[100] *Saint-Germain, supra* note 96 at 1063-1064. The functional theory was prevalent in Quebec from 1975 to 1987.

[101] [1975] T.T. 125.

[102] *Saint-Germain, supra* note 96 at 1063.

[103] *Successorship Overview, supra* note 72 at 76; *Saint-Germain, supra* note 96 at 1063.

[104] *Saint-Germain, supra* note 96 at 1063.

[105] *Bibeault, supra* note 77 at 1122.

[106] (1986), D.T.E. 86T-500 in *Bibeault, supra* note 77 at 1122.

and equipment from the discontinued home, but did not hire additional employees to run its operations. The Labour Commissioner granted a successorship based on similarity of functions performed at the discontinued home and at the Fondation. The Superior Court granted evocation on the basis that the transfer of residents was not equivalent to the operation of an undertaking by another.[107] The Supreme Court agreed with the approach of the Superior Court.

The functional approach has been used in some of the common law jurisdictions. There were several decisions from Ontario in the late 1980's where a functional approach was used.[108] In the early 1990's, the Ontario Board held that the functional approach was to be rejected.[109]A successorship cannot be determined by following a functional approach where predecessor employees are found working for a successor because if that were the approach used for successor rights, the new employer would simply not hire predecessor employees.[110] It would be illogical to continue bargaining rights and a collective agreement unless there was a continuation of jobs.

In the early 1980's, there were several decisions from the Canada Board which followed the functional approach.[111] The Canada Board subsequently made it evident that the functional approach should not be followed.[112] The functional approach has not been

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[107] *Ibid.* at 1122-1123.

[108] *Dunning Paving Limited* [1989] O.L.R.B. Rep. July 714, [1989] O.L.R.B. Rep. October 1028; *Charmaine's Janitorial Services* [1988] O.L.R.B. Rep. August 871; *KBM Forestry Consultants Ltd.* [1987] O.L.R.B. Rep. March 399, [1987] O.L.R.B. Rep. July 1007.

[109] *U.F.C.W. Int'l Union v. Parnell Foods Ltd.* (1992), 93 C.L.L.C. ¶16,025 at 14,181-14213. See also: *St. Leonard's Society of Metropolitan Toronto* [1993] O.L.R.B. Rep. January 56, aff'd [1994] O.L.R.B. Rep. January 126 (Div. Ct.); *Mil-Dom-Ex Packaging* [1992] O.L.R.B. Rep. December 1155.

[110] *Accomodex Franchising Management Inc. v. H.R.E.U., Local 75* (1993), 19 C.L.R.B.R. (2d) 1 (Ont. L.R.B.) at 23-24 [hereinafter *Accomodex*].

[111] *Québec-Sol Services Ltée v. I.A.M.* [1982] 2 Can. L.R.B.R. 369; *I.A.M. v. General Aviation Services Ltd.* (1982), 50 di 82; *Int'l Longshoremen's Ass'n Locals 1845 & 1932 v. Newfoundland Steamships Ltd.* (1981), 2 C.L.R.B.R. (N.S.) 40.

[112] *Int'l Longshoremen's Ass'n, Local 1845 v. Terminus Maritime Inc.* (1983), 83 C.L.L.C. 16,029 at 14,240 [hereinafter *Terminus Maritime]*; *Teamsters, Local 880 v. Freight Emergency Services Ltd.* (1984), 84 C.L.L.C. ¶16,031 at 14,272 [hereinafter *Freight Emergency*]; *Curragh Resources v. U.S.W.A.* (1987), 18

followed in Alberta. The Alberta Board has indicated that successor rights attach to a business or undertaking, not to work functions.[113] The other jurisdictions have not adopted the functional approach.

The functional approach is objective since it is only the occupational functions, or work performed at the successor's business, which have to be considered to determine if there is a successorship. The problem with the functional approach is that it does not take into account all of the components of a business, since a business is made up of more than work functions. The functional approach does not support the continuity of a business, it only supports the continuity of work. In all of the statutory successorship provisions, it is a business that is focussed on, not work. The functional approach is inconsistent with the principles in the labour statutes since bargaining rights attach to a business, not to a group of functions.

(c) Organic Theory

Under the organic theory, an undertaking is considered to be an organized whole, an entity consisting of various components which have to transfer to a successor, and there is a direct consensual transaction between the predecessor and the successor which occurs upon the transfer.[114]

The organic approach was confirmed by the Supreme Court in 1988 in *Bibeault.*[115] In that case, some of the judges of the Quebec Labour Court took an organic approach to successorship where the undertaking was considered to be an organic reality, a productive entity which has human, physical and intellectual elements consisting of employees,

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C.L.R.B.R. (N.S.) 233 at 237-239.

[113] *H.C.E.U. v. Versa Services Ltd. and Marriott Management Services* [1993] Alta. L.R.B.R. 452 at 463-467, aff'd reconsideration [1993] Alta. L.R.B.R. 650 [hereinafter *Versa Services* cited to [1993] Alta. L.R.B.R. 252].

[114] *Saint-Germain, supra* note 96 at 1063-1064.

[115] *Services Ménagers Roy Ltée v Syndicat national des employés de la Commission scolaire régionale de l'Outaouais* [1982] T.T. 115 (L.C.); *Bibeault, supra* note 77 at 1058.

equipment, work premises, a purpose and the like, and a legal relation was found to exist as a result of the transfer of an undertaking.[116] The Court accepted the organic approach and set out the principles to be followed when there is an alienation or operation by another of an undertaking, in whole or in part.[117]

In *Bibeault*, the Commission scolaire régionale de l'Outaouais historically hired subcontractors to clean six schools. The contracts for janitorial services were awarded each year by a tendering process and had been awarded to MBD Conceirgeries Limiteé and Enterprises Netco Inc. The union had four certificates covering Netco employees and two certificates covering MBD employees. The union went on strike and the Commission legally terminated the contracts after letting a call for tenders, where Services Ménagers Roy Limitée became the contractor for the janitorial services for the six schools. There was no legal relationship between any of the contractors. The Labour Commissioner granted successor rights to the union, ordering that Services Ménagers Roy was bound by the certifications of MBD and Netco, the legal strike and it became a party to any resulting proceedings in the place of MBD and Netco. The decision of the Commissioner was upheld by the Labour Court, but was overturned by the Superior Court. The Superior Court's decision was upheld by the Court of Appeal,[118]and the Supreme Court indicated that the question of what constituted an undertaking was a fundamental issue in making an assessment of whether there had been an alienation or operation by another of an undertaking.[119]

Beetz J. for the Court noted that collective bargaining and a collective agreement take place within a tripartite framework between an employer, the employer's undertaking and the association of employees connected to the employer's undertaking.[120]

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[116] *Successorship Overview*, *supra* note 72 at 76; *Saint-Germain*, *supra* note 96 at 1062-1063.

[117] R.S.Q. 1977, c. C-27.

[118] *Bibeault*, *supra* note 77 at 1058.

[119] *Ibid.* at 1075.

[120] *Ibid.* at 1101.

When an undertaking is alienated or operated by another, in whole or in part, components of the tripartite framework must continue to exist, otherwise the collective agreement cannot apply to the successor.[121] The Supreme Court found there must be a legal relationship between successive employers for successor rights to exist,[122]and due to the tripartite relationship, continuity of the undertaking is essential for a successorship.[123] Although the successor rights provision did not expressly state that a legal relation was required between the predecessor and the successor, it was inferred from the wording in the provision, collective bargaining principles and the history of the provision.[124]

The Supreme Court rejected the functional approach and indicated that when an employer parts with an undertaking by sale, gift or other means, the employer is not parting with a group of functions but with immovable property, equipment, work contracts, inventory, goodwill and the like.[125] An undertaking predates a certification and the certification sets out the duties carried out by the employees which permits a determination as to whether those functions exist with the successor.[126] In rejecting the functional approach, Beetz J. adopted the following definition of an undertaking:

> Instead of being reduced to a list of duties or functions, the undertaking covers all the means available to an employer to attain its objective. I adopt the definition of an undertaking proposed by Judge Lesage in a subsequent case, *Mode Amazone v. Comité conjoint de Montréal de l'Union internationale des ouvriers du vêtement pour dames*, [1983] T.T. 227, at p. 231:
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> [Translation] The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities.

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[121] *Bibeault, supra* note 77 at 1101-1102.

[122] *Ibid.* at 1102.

[123] *Ibid.* at 1103.

[124] *Ibid.* at 1111-1112.

[125] *Ibid.* at 1104.

[126] *Ibid.* at 1105.

> These resources may, according to the circumstances, be limited to legal, technical, physical, or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundation of the undertaking exist: in other words, when the undertaking may be described as a going concern. In *Barnes Security*, Judge René Beaudry, as he then was, expressed exactly the same idea when he stated that the undertaking consists of "everything used to implement the employer's ideas".
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> . . . [E]ach case is unique in terms of adding a number of components to determine the foundations of the undertaking, in whole or in part. It is not always necessary for the moveable and immoveable property to be transferred, for specialized technical resources to be transferred, for inventory and know-how to be included in the transaction. There must however be adequate resources, directed towards a certain activity by the first employer which are used by the second in an identifiable way for the same purposes in terms of the work required from employees, even if the commercial or industrial objective is different.
>
> Precisely because of the need to identify in the second employer's operation the same use of operating resources transferred by the first employer (otherwise there would simply have been a transfer of physical assets which can be used for any purpose), it was found to be desirable to simplify matters and to say that, once the same activities were carried on by a second employer, it followed that the latter must have acquired sufficient operating resources from the first to ensure continuity of the undertaking. Some have gone even further and, seeking simple guidelines and accessible formulas, have purported to see passages in certain judgements as affirming a so-called occupational theory of the undertaking. This in an indirect way of getting around the problem of the legal relation in the continuity of the undertaking. [127]

An undertaking consists of the "components of a business as a whole", "a series of different components which together constitute an operational entity" "providing the means available to an employer to attain his objective", the identity of which is determined by the "work done", "physical, intellectual, human, technical and legal

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[127] *Bibeault, supra* note 77 at 1105-1106 [Translated S.C.C.].

components".[128] Although the Supreme Court was referring to the definition of an undertaking, the same principles are applicable to the concept of a business.

The successor rights provision does not control the alienation or operation of another of a business, since the sale or operation by another occurs as a result of general rules of law. The only effect of the successor rights provision is to preserve the certification and the collective agreement when there is a sale of a business, as long as the business is continued in whole or in part.[129] The heart of the successor rights provision is the regulation of the labour law consequences of the transfer of an employer's undertaking to another employer.[130] Continuity of the undertaking is what triggers the successor rights provision since bargaining rights attach to an employer, not to functions.[131] In rejecting the functional approach for determining a successorship, the Supreme Court adopted the organic concept of a business. The Court reasoned that it had to be the same undertaking, or part of it, that ended up voluntarily in the hands of a new employer:

> The undertaking . . . "consists of a self-sustaining organization of resources through which specific activities can be wholly or partly carried on". . . . The nature of collective bargaining requires that this undertaking be that of an employer. The employer is the one designated in the certification, the collective agreement, or by any proceeding "for the securing of certification or for the making or carrying out of a collective agreement" (s. 45). Alienation or operation by another of this undertaking establishes, by means of a voluntary transfer of a right, a legal relation between successive employers.
>
> For a transfer of rights and obligations contemplated by s. 45 to operate, the fundamental components of an undertaking must be found to exist in whole or in part in the operations of a new employer following "The

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[128] *Bibeault, supra* note 77 at 1101, 1105.

[129] *Ibid.* at 1112.

[130] *Ibid.* at 1109.

[131] *Ibid.* at 1107.

alienation or operation by another . . . in part of" that undertaking.[132]

The Supreme Court acknowledged that similarity of functions in a predecessor and successor undertaking should be a component in the test for a successorship, but not the only factor.[133] Focussing only on similar functions indicated continuity of an undertaking to the extent that a business had no other special characteristics and did not permit a distinction between competing businesses.[134] If continuity of an undertaking is focussed on, the essential elements of a business must exist in the new employer's operations and each factor must be given the weight according to its importance.[135] Assets alone, or functions by themselves, are considered inadequate for the continuity of an undertaking.[136] In order for an undertaking to be alienated or operated by another, there has to be some legal relation between the predecessor and the successor in the sense of a voluntary transfer of the right of ownership.[137]

The approach of the Supreme Court in *Bibeault* meant that once the contract with one janitorial company expired, the certification and collective agreement could not apply to the new contractor, unless some essential part of the undertaking was transferred to the new contractor.[138] As the certification and the collective agreement attach to an undertaking and not functions, they follow the fate of the undertaking when it relies solely on a contract for its life:

> I can see no difference between the situation of a businessperson who withdraws when his contract ends and one who terminates his operations

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[132] *Bibeault, supra* note 77 at 1120-1121.

[133] *Ibid.* at 1107.

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.* at 1121-1124.

[137] *Ibid.* at 1110-1120.

[138] *Ibid.* at 1126.

> because of financial difficulty. No one would maintain that the businessperson acquires the undertaking of a rival who closes down, simply because he takes over his former competitor's customers; there is no reason for holding otherwise when a contract is lost by a business which nevertheless continues to operate elsewhere. In both cases the relationship between the undertaking and the customer has ended and a successor who takes over the market by concluding a new contract with the customer in question, and who has no dealings with his predecessor through which he could acquire the components of the undertaking, is not subject to the application of s. 45. The certification inexorably follows the fate of an undertaking whose viability depends on a contract, when no part of the undertaking survives in the operations of a new employer following termination of the contract.[139]

The principles set out by the Supreme Court in *Bibeault* also apply to the common law jurisdictions.[140] The functional approach cannot be relied on in assessing a successor rights case. As Chairman of the Ontario Labour Board, R.O. MacDowell, has noted, the operational definition of a business adopted in *Bibeault* allows "ample scope for jurisprudential development to meet the mischief to which the successorship legislation is directed" and "employers might be well advised not to trumpet too loudly that 'our business is people', given the "well recognized concept of 'human capital' or 'human resources'.[141]

The Ontario Board historically rejected a functional approach to successor rights and adopted an operational or instrumental approach.[142] The organizational or instrumental approach is the same as the organic approach and follows the principles for successorship mandated by the Supreme Court in *Bibeault*. The organic or instrumental

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[139] *Bibeault, supra* note 77 at 1123-1124.

[140] *Successorship Overview, supra* note 72 at 80. Note at the time of *Bibeault*, the Quebec Labour Commissioner only had the jurisdiction to record the transfer of an undertaking and not to make a determination of whether a there had been an alienation. In 1990 the Quebec *Labour Code* was amended to overcome that jurisdictional problem and to give the Labour Commission the same powers as other labour boards had: *An Act To Amend The Labour Code*, S.Q. 1990, c. 69, s. 2.

[141] R.O. MacDowell, "Contracting Out at Arbitration: An Arbitrator's Perspective", (1994-95) Lab. Arb. Y.B. 325 at 343 [hereinafter *Arbitrator's Perspective*].

[142] *Ibid.* at 341.

approach has been followed in the other jurisdictions.[143]

In the seminal case of *C.U.P.E.* v. *Metropolitan Parking Inc.*, the principles of which are followed in the common law jurisdictions, the Ontario Board indicated that a business had "organic qualities".[144] The operational or instrumental approach treats a business as a delivery system, or an organizational means of doing something, and it is the "vehicle" or "undertaking" to which bargaining rights attach and will continue when a business or part of it is transferred to another employer.[145] The instrumental approach indicates that a business is an economic vehicle consisting of the mechanisms, resources and facilities for which the purpose of business is served and indicate that a business consists of various elements.[146] Those descriptions are no different from the organic concept of a business, where the business or undertaking is viewed as a "living being" consisting of various components which make up an operational entity which give an employer the means to obtain desired objectives,[147]and which continues to "live on" with a subsequent employer when there is an alienation, operation by another, or a sale, lease, transfer or other disposition of a business or undertaking, or part of it.

As early as 1968 the Ontario Board was giving the concept of a business broad meaning:

> The meaning to be attached to the word "business" depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that business is the "totality of the undertaking." The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along

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[143] *U.F.C.W. Int'l Union v. Parnell Foods Ltd.* (1992), 93 C.L.L.C. ¶16,025 (Ont. L.R.B.) at 14,188 [hereinafter *Parnell Foods*].

[144] *Metropolitan Parking, supra* note 80 at 208.

[145] *Arbitrator's Perspective, supra* note 141 at 342; *Accomodex, supra* note 110 at 20-21; *Parnell Foods, supra* note 143 at 14,188.

[146] *Accomodex, ibid.* at 21-22.

[147] *Bibeault, supra* note 77 at 1101, 1105.

> with the management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitutes a business.[148]

Although there is no concrete definition of what is a business, in *Metropolitan Parking*, the Ontario Board stated:

> A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However, intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. . . .[149]

A business is a rational construction of a commercial vehicle which produces goods and services for a specific market and an "operational" or "instrumental" interpretation applies to it.[150] Since bargaining rights attach to an undertaking or a business, the instrumental or operational approach dictates that those rights attach to an economic vehicle, which consists of the resources, facilities and mechanisms for which the undertaking or business pursues its purpose.[151]

In 1987 in *United Iron Works*, the British Columbia Board indicated that a business is dynamic activity, a functional economic vehicle and the test is whether there is a discernible continuity of a predecessor's business in the hands of the successor:

> [T]he Board must not lose sight of the fact that the word "business", even from a labour relations perspective, connotes something more than the

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[148] *Raymond Coté* [1968] O.L.R.B. Rep. March 1211 at 1214.

[149] *Metropolitan Parking, supra* note 80 at 208. See also: *The Tatham Company Limited* [1980] O.L.R.B. Rep. March 366 at 374 [hereinafter *Tatham*].

[150] *Accomodex, supra* note 110 at 20; *Tatham*, ibid.

[151] *Accomodex, ibid.* at 20-21.

> sum of its parts. A business is a dynamic activity – something which serves as a functional economic vehicle – that can be carried on by a successor.[152]

The definition of a business in *Metropolitan Parking* has been followed by the British Columbia Board.[153] For the British Columbia Board, there are two basic questions for determining a successorship:

> (a) A determination is made of the nature of the predecessor's business and the various assets used in its operation.
>
> (b) A determination is made of whether there has been a sale, lease, transfer, or other disposition of that business, or a part of it, or a substantial part of its entire assets to a successor employer such that the bargaining rights of the employees of the predecessor employer should be preserved.[154]

The Canada Board has struggled with inconsistent approaches to a successorship. In 1978 the Canada Board indicated that functions alone were insufficient to establish a successorship and there must be some continuity in a business when it transferred from the predecessor to the successor.[155] It recognized that what it was following had already been adopted in the other common law jurisdictions, especially in Ontario and British Columbia.[156] Over the years, due to panels of the Canada Board following a functional approach, the Board has had to reiterate that it follows the organic approach to a business and that it follows the concept of a business adopted by the Ontario Board in

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[152] *United Iron Works (1985) Ltd.* (1987), 15 C.L.R.B.R. (N.S.) 272 at 281-282.

[153] *Blackdome Mining Corp. v. Construction & Specialized Workers' Union, Local 1611* (1999), 56 C.L.R.B.R. (2d) 271 (B.C.L.R.B.) at 276.

[154] *Frank Browne Acoustics Kamloops (1982) Ltd. v. U.C.J.*, (1984), 6 C.L.R.B.R. (N.S.) 247 (B.C.L.R.B.) at 254 [hereinafter *Frank Browne*].

[155] *Radio CJYQ, supra* note 16 at 574.

[156] *Freight Emergency, supra* note 112 at 14,264.

Metropolitan Parking.[157] In 1983, the Canada Board stated:

> . . . A business is not merely the sum total of its work functions. It must be viewed in its totality. This "dynamic" interpretation, which takes into account the evolution the business and its purpose, leaves room for consideration of its individuality and its particular characteristics which may undergo change depending on the economic climate. . . .We believe . . . given the individuality and dynamism of each business, that it is better to define a business using an inductive approach, that is, case by case. . . By considering the totality of a business's activities, we can define more clearly its purpose. . . .
> . . .[W]e will try, by examining various factors, to determine whether the business, as an organic entity, or a part thereof, was carried on by the purchaser.[158]

In two decisions in 1989 the Canada Board held that it followed the organic approach, and the principles in *Bibeault.*[159] The Board also recognized there was no constant test that could be used in successor rights cases, but set out a three part test:

(a) In what business is the applicant union certified?

(b) In what business is the alleged buyer involved?

(c) From where did the buyer's business originate? How did it come about?[160]

The Canada Board follows an organic or instrumental approach to successor

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[157] *Terminus Maritime, supra* note 112 at 14,239-14,240; *Freight Emergency, supra* note 112 at 14,264; *Curragh Resources v. U.S.W.A.* (1987), 18 C.L.R.B.R. (N.S.) 233 at 237-239.

[158] *Terminus Maritime, ibid.* at 14,240.

[159] *Canada Post Corp. v. C.U.P.W. (Rideau Pharmacy Ltd.)* (1989), 1 C.L.R.B.R. (2d) 239 at 253-261 [hereinafter *Rideau Pharmacy*];*Canada Post Corp. v. C.U.P.W. (Nieman's Pharmacy)* (1989), 4 C.L.R.B.R. (2d) 161 at 174-179, reconsideration application dismissed (1989), 7 C.L.R.B.R. (2d) 44.

[160] *Rideau Pharmacy, ibid.* at 261-262.

rights.[161] The approach has also been referred to by the Board as an inductive approach and the Board has labelled the approach taken by the Ontario Board in *Metropolitan Parking* as an inductive approach.[162] This approach allows the Board to consider the "particular characteristics and individuality of each business, having regard to a 'dynamic' interpretation of its reality. It is one thing to say that there may have been some form of a transfer, but it is another thing to say that what took place was the transfer of a 'business' within the meaning of" the successor rights provision.[163]

A business is a dynamic activity and a going concern, and the concept of a business and the principles described by the Ontario Board in *Metropolitan Parking*, and by the Supreme Court in *Bibeault*, have been adopted by the Alberta Board.[164] The Alberta Board has found that the terms "business" and "undertaking" in the successor rights provision imply an entrepreneurial focus, not a legal status.[165] The test for successor rights in Alberta consists of three requirements:

(a) There must be a business or an undertaking, or part of it;

(b) The business or undertaking, or part of it, must be sold, leased, transferred, merged or otherwise disposed of; and

(c) The control, management or supervision of the business or undertaking, or part of it, must pass to another employer.[166]

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[161] *U.S.W. v. Curragh Resources Inc.* (1996), 96 C.L.L.C. ¶220-035 (Can. L.R.B.) at 143,341 [hereinafter *Curragh Resources*].

[162] *Boreal Navigation Inc. v. U.S.W.A.* (1986), 15 C.L.R.B.R. (N.S.) 328 (Can. L.R.B.) at 364, 366.

[163] *Ibid.* at 366.

[164] *A.T.U., Local 1374 v. Ferguson Bus Lines Ltd.* [1991] Alta. L.R.B.R. 646 at 672-673; *Versa Services, supra* note 113 at 463-472; *Kaverit Steel, supra* note 82 at 22-23.

[165] *Kaverit Steel*, ibid. at 22.

[166] *Alberta Projectionists, Local* 302 *v. H.J.M. Investments Ltd.* [1982] 82-018 at 6-7; aff'd [1982] 82-018QB (Q.B.) at 2-4, 8-11; *Crest Metal, supra* note 88 at 10-17; *U.F.C.W., Local 1118P v. Fletchers Ltd.* [1985] Alta. L.R.B.D. 85-021 at 12-13; Kaverit Steel, *supra* note 82 at 22.

The Saskatchewan Board follows the concept of a business set out in *Metropolitan Parking*.[167] Manitoba follows an organic approach to a business.[168] The test followed in Manitoba is:

(a) Is the business the same or substantially the same as the former business?

(b) Have the essential features of the former business been transferred to the new business?[169]

As the New Brunswick successor rights provisions are nearly identical to those in Ontario, the Ontario approach to successor rights is followed.[170] The Newfoundland Board considers a business to be a going concern, a functional economic entity, and follows the Ontario Board's definition of a business in *Metropolitan Parking*.[171] The Newfoundland Board considers two issues when reviewing a successor rights application.[172] First, it is determined whether there is any connection between the predecessor and alleged successor for a sale, lease, transfer or other disposition. Second, there is an examination of the "thing" transferred to determine if it is the business or operations, or part of it, of the predecessor. Nova Scotia looks at the characteristics of a

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[167] *Regina Design Millwork* Ltd. *v. I.W.A., Local 1-184* [1981] 2 Can. L.R.B.R. 353 (Sask. L.R.B.) at 354 [hereinafter *Regina Design*]; JKT *Holdings Ltd. v. H.R.E.U., Local 767* (1989), 5 C.L.R.B.R. (2d) 316 (Sask. L.R.B.) at 319.

[168] *Canwest Galvinizing Inc. v. U.S.W.A., Local* 4095 (2000), 60 C.L.R.B.R. (2d) 255 (Man. L.R.B.) at 263-265 [hereinafter *Canwest Galvinizing*]; U.A.W., *Local 2169* v. *Fiat Products Ltd.* (1983), 83 C.L.L.C. ¶16,064 (Man. L.R.B.) at 14,503-14,504.

[169] *Canwest Galvinizing, ibid.* at 265.

[170] *C.B.R.T., Local 501 v. Taylor Ford Sales Ltd.* [1981] 1 Can. L.R.B.R. 138 (N.B.L.R.B.) at 141-145 [hereinafter *Taylor Ford*].

[171] *Memorial University of Newfoundland Student's Union v. N.A.P.E.* (1995), 28 C.L.R.B.R. (2d) 132 (Nfld. L.R.B.) at 140.

[172] *Ibid.* at 139-140.

business as a going concern.[173] There were no cases found for Prince Edward Island.

As businesses are dynamic and adapt to change, the concept of what is a business cannot be static. It has to be flexible enough to adapt to many different kinds of businesses in various industries. Whether the physical or tangible components of a business have been passed onto a successor can be determined objectively. The intangible components of a business, such as good will, have to be measured subjectively. The downside to the organic theory is that the intangible components of a business are measured subjectively. The objectivity in the legal relation theory and the functional theory are not sufficient alternatives to the organic approach because they do not accurately reflect the characteristics of a business.

6. CONSIDERATIONS IN THE TRANSFER OF A BUSINESS

In order for the successor rights provisions in the various labour statutes to be triggered, there must be something relinquished by the predecessor which ends up in the hands of the successor.[174] For a business transaction to result in a transfer under successor rights laws, the essential elements of the business must be transferred from the predecessor to the successor and the performance of similar functions by the successor, in itself, is insufficient to establish a successorship.[175] There does not have to be a direct transfer between a predecessor and a successor for successor rights to arise.[176] The transfer of a business in the context of a business reorganization does not preclude a

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[173] *Precision Floor & Roof Truss Ltd.* and *C.J.A., Local 2004* (1998), 41 C.L.R.B.R. (2d) 62 (N.S.L.R.B.) at 64-66 [hereinafter *Precision Floor*].

[174] *W.W. Lester, supra* note 4 at 410.

[175] *Metropolitan Parking, supra* note 80 at 217; *Conseil Scolaire Fransaskois de l'École Saint Isidore v. C.U.P.E., Locals 832-02 & 832-03* (1995), 28 C.L.R.B.R. (2d) 116 (Sask. L.R.B.) at 124-125 [hereinafter *Saint Isidore*].

[176] *S.E.U., Local 268* and *Thunder Bay Ambulance Services Inc.* [1978] 2 Can. L.R.B.R. 245 (Ont. L.R.B.) at 248 [hereinafter *Thunder Bay Ambulance*].

finding of successor rights.[177] A transfer or disposition of a business can occur without there being another legal entity involved.[178] The cases are not in agreement on whether the successor has to be another employer in order for a transfer to occur. Yet, in virtually all cases where a successorship has been found, an identifiable part of a business continued to operate as a functional economic vehicle in the hands of the successor.[179]

In British Columbia, it has been held that successor rights do not apply to transfers within the same company or to an inter-departmental transfer of work with the same employer.[180] The reasoning of the British Columbia Board is that since the successorship provision indicates that a collective agreement is to be treated as if it were signed by the successor, another employer must exist in order for a successorship to arise.[181]

The Ontario Board has found that there must be a change in ownership of a

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[177] *Radiomédia Inc.* v. *Syndicat des Employés de CHRC* (1997), 97 C.L.L.C. ¶220-070 (Can. L.R.B.) at 143,699; *C.B.R.T. v. Seaspan International Ltd.* [1979] 2 Can. L.R.B.R. 213 (Can. L.R.B.) [hereinafter *Seaspan International*].

[178] *Bakery, Confectionary &* Tobacco Workers, Local 410 *v. Bakery Confectionary & Tobacco Workers, Local 381* (1994), 369 A.P.R. 1 (Nfld. S.C.T.D.) at 12-14 [hereinafter *Tobacco Workers*].

[179] *Canadian Labour Law*, *supra* note 6 at para. 8-250.

[180] *Acklands Ltd. v. R.W.D.S.U., Local 580* [1976] Can. L.R.B.R. 71 (B.C.L.R.B.) at 75 [hereinafter *Acklands*]; *Napier Intermediate Care Home Ltd. v. H.E.U.* (1996), B.C.L.R.B. No. B37/96 at 8-9, aff'd reconsideration (1997), 36 C.L.R.B.R. (2d) 257 (B.C.L.R.B.).

[181] *Acklands*, *ibid*; *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35(2). In Alberta, the successor is bound by a collective agreement of a predecessor "as if the collective agreement had been signed by that person": *Labour Relations Code*, R. S.A. 2000, c. L-1, ss. 46(1(b). In Saskatchewan, the statute indicates that the predecessor's collective agreement is "deemed to apply to the person acquiring the business . . . as if the . . . agreement had been signed by him": *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 37(1). In Ontario and New Brunswick, the successor is bound by a collective agreement of the predecessor "as if the person had been a party thereto": *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 60(2); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 69(2). It has been held that the Ontario language means the successor is "deemed to be the original signatory to the collective agreement": *United Brotherhood of Carpenters & Joiners of America, Local 3054 v. Cassin-Remco Ltd.* (1979), 105 D.L.R. (4th) 138 (Ont. H.C.J.) at 142. In Newfoundland, the provision indicates the successor is "a party to or is bound by a collective agreement" of the predecessor: *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(1)(a). In the other jurisdictions, the legislation indicates the predecessor's collective agreement is binding on the successor: *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 44(2)(c); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(1)(c); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(1)(a); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(1); *Labour Code*, R.S.Q. 1977, c. C-27, s. 45.

business, or part of it, for a transfer to occur.[182] In Canada, Alberta and Newfoundland, a successorship can occur when there is a transfer within an employer's organization.[183] The Supreme Court has affirmed that an amalgamation of two bank branches in a town, by the same employer, resulted in a successorship.[184]

Successorships should be permitted when there is no change in the identity of an employer, especially when certificates or collective agreements are site specific. Otherwise, reorganizations by employers might be used to avoid collective agreement obligations. If a large company operates with several distinct divisions, such as manufacturing durable products, selling of a service and construction work, each division has its own objectives, customers and workers, but if the company merges the divisions, bargaining rights would be nullified if such changes were not covered by the successor rights provisions.[185]

The text book case of successor rights is where the ownership of a business changes from one employer to another, while the same employees perform the same duties, under the same supervision and with the same customers.[186] Not every business transaction results in a successorship and the interests of the successor are at the forefront of considerations by a labour board when the type of work performed has been changed.[187] In cases of inter-corporate relationships, there must be evidence that a transfer occurred to meet the test for a successorship.[188] Non-arms length transactions point in the

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[182] *New Dominion Stores*, *supra* note 17 at 303-304.

[183] *Tobacco Workers*, supra note 178; *Aardvark Express v. Teamsters, Local 938* (1988) 73 di 135 at 141-142, aff'd (1989), Docket A-500-88 (F.C.A.) [hereinafter *Aardvark Express*]; *Kaverit Steel*, *supra* note 82 at 23.

[184] *National Bank of Canada v. Retail Clerks' International Union* (1984), 9 D.L.R. (4th) 10 (S.C.C.) at 19-20 [hereinafter *National Bank*]. See also *W.W. Lester*, *supra* note 4 at 410.

[185] *Kaverit* Steel, *supra* note 82 at 23.

[186] *Riverview Manor*, *supra* note 18 at 47.

[187] *Ibid.* at 48.

[188] *W.W. Lester*, *supra* note 4 at 414.

direction of a successorship since they can be legal shams to avoid bargaining obligations.[189]

The fact that the two companies being considered in a successorship application carry on the same type of business is not determinative of whether a transfer occurred.[190] Where two organizations are genuinely independent, have a close relationship and use the same facility, but have independent access to it, there are no successor rights.[191] Where two parallel businesses are operating and one is integrated or merged with the other, a transfer has occurred within the successor rights provisions.[192]

Common ownership may be relevant for successor rights when there is a close connection between two corporations, which can infer a business transaction was made to avoid successorship provisions.[193] When there is a newly created company, the nature of a transaction is relevant in assessing whether the transaction falls within the boundaries of a successor rights provision, but the intention of the successor is not a determining factor in the overall assessment.[194]

Bargaining rights attach to a business not to employees, chattels, assets, or work, and for a successorship to occur, there must be more than a transfer of assets or work.[195] Each of those factors, or a combination of them, may be indicia that a transfer of a business has occurred, but by itself each is inconclusive.[196] For a successorship to exist, a

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[189] *Lyric Theatre Ltd. v. I.A.T.S.E.*, Local No. 348 [1980] 2 Can. L.R.B.R. 331 (B.C.L.R.B.) at 339 [hereinafter *Lyric Theatre*]; *U.A., Local 254 v. Peter's Mechanical & Installations Ltd.* (1989), 90 C.L.L.C. ¶16,006 (Man. L.R.B.) at 14,068 [hereinafter *Peter's Mechanical*].

[190] *Crest Metal, supra* note 88 at 13; *Thunder Bay Ambulance, supra* note 176 at 249.

[191] *Canadian Western Agribition v. Saskatchewan Joint Board, R.W.D.S.U.* (1995), 27 C.L.R.B.R. (2d) 268 (Sask. L.R.B.) [hereinafter *Agribition*].

[192] *Aardvark Express, supra* note 183 at 137, 142-143.

[193] *W.W. Lester, supra* note 4 at 413.

[194] *603195 Sask, supra* note 79 at 145.

[195] *Nieman's Pharmacy, supra* note 159 at 174.

[196] *Ibid.*

whole business, or part of it, has to be transferred to another employer.[197] A sale of a business in the labour relations context has a broader meaning than in the commercial arena.[198] The right to start a new business does not result in a successorship when no pre-existing going concern is inherited by the new business, although the businesses are similar.[199] If a successor steps into the shoes of a predecessor's operation, successor rights exist.[200]

A reasonableness standard is applied to determine whether a transaction results in a business, or part of it, being transferred to a successor as a functional economic vehicle.[201] In *Metropolitan Parking*, the Ontario Board recognized there is no single identifying factor that is determinative of a successorship:

> . . .[T]he problem is, and has always been, to draw the line between a transfer of a "business", or a "part of a business" and the transfer of "incidental" assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in the business, or has set up a "new" business which resembles the old "one" in many respects.[202]

(a) <u>Functional Economic Vehicle & Discernible Continuity</u>

The linchpin to a successorship is whether the successor obtains a functional economic vehicle, and in deciding whether a business or part of it has been transferred, an

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[197] *Ibid.*

[198] *Ibid.*

[199] *Ibid.* at 179-187; *Rideau Pharmacy*, *supra* note 159 at 261-263.

[200] *Interior Diesel and Equipment Ltd. v. I.U.O.E., Local 115* [1980] 3 Can. L.R.B.R. 563 (B.C.L.R.B.).

[201] *W.W. Lester*, *supra* note 4 at 411.

[202] *Supra* note 80 at 211.

assessment is made of the elements of the business which end up in the hands of the successor as a continuation of a business or part of it.[203] Since bargaining rights attach to a business, the question that must be answered is whether sufficient components of the business have been transferred to the successor from the predecessor, and a successorship results if what is transferred can be identified as a functioning entity, a coherent and severable part of a business or the whole business.[204] There must be a discernible continuity of the predecessor's business, or part of it, that is carried on by the successor.[205]

(b) Common Law & Commercial Law Principles

Common law and commercial law principles have no application to a successorship, and commercial law principles are of little assistance when deciding whether a successorship has occurred.[206] The technical legal form of business transactions is not decisive in a successor rights case.[207] Although the technical legal form of a transaction is downplayed and a flexible approach applied to assessing successor rights, the approach is not "infinitely elastic".[208]

Commercial and non-commercial operations can constitute a business or undertaking.[209] When assessing a transaction to determine whether there is a transfer of a business for successorship purposes, a labour board is concerned with the substance of a

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[203] *Metropolitan* Parking, *supra* note 80 at 209-210.

[204] *Kaverit Steel*, *supra* note 82 at 24-25.

[205] *Frank Browne*, *supra* note 154 at 254; *Headway Ski Corp. v. S.G.E.U.* (1987), 87 C.L.L.C. ¶16,050 (Sask. L.R.B.) at 14,380 [hereinafter *Headway Ski*].

[206] *Accommodex*, *supra* note 110 at 15, 21.

[207] *National Bank*, *supra* note 184; *W.W. Lester*, *supra* note 4 at 410.

[208] *Saint Isidore*, *supra* note 175 at 125.

[209] *Curragh Resources*, *supra* note 161at 143,342.

transaction and not its form.[210] The substance of the relationship between a predecessor and an alleged successor is focussed on since it would not be difficult for an employer to tailor the form of a transaction to defeat the purpose of the successor rights provisions.[211] The method by which a business transfers from one employer to another is irrelevant when considering whether a successorship occurred.[212] When a board is considering a successorship, it will examine corporate, commercial and familial relationships between predecessors and successors, or between the predecessor, the successor and a third party.[213]

(c) Nature of Industry & Economics

The nature of the industry and the type of business are of significant importance when determining whether a transfer of a business or undertaking, or part of it, has occurred.[214] The analysis of the nature of a business, and whether a discernible continuity exists, is determined from a labour relations perspective.[215] The economic context, such as the financial difficulty of a business, is a relevant factor to take into consideration when assessing whether a going concern passed from a predecessor to a successor, rather than an idle collection of assets.[216] When poor markets exist, or recessions occur, and business reorganizations arise, less significance is given to the dynamic quality of a

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[210] *Sunnylea Foods Ltd. v. U.F.C.W.* [1982] 1 Can. L.R.B.R. 125 (Ont. L.R.B.) at 138 [hereinafter *Sunnylea Foods*].

[211] *Lodum Holdings, supra* note 85 at 54.

[212] *Curragh Resources, supra* note 161 at 143,342.

[213] *Napier Intermediate Care Home Ltd. v. H.E.U.* (1997), 36 C.L.R.B.R. (2d) 257 (B.C.L.R.B.) at 262.

[214] *Curragh Resources, supra* note 161at 143,341.

[215] *Ibid* at 143,341.

[216] *Ibid* at 143-340-143,341.

business as a going concern before an alleged transfer occurred.[217] The fact that a business is in a "bruised" and "battered" state in the hands of the successor, does not stop a labour board from finding a successorship.[218] Just because a business is losing money, does not mean that it is not a business.[219]

(d) Assets

For a successorship to exist, there must be a change in ownership of assets, the identity of an employer must change and there must be continuity of the business with the successor.[220] For example, if a taxi company sells its cars to an insurance company that uses them for its sales personnel, there is no continuity of the taxi business.[221] Where the legal identity of an employer has not changed and assets are dealt with in a fashion so that the legal ownership of the assets or the business have not transferred to another employer, successor rights do not exist.[222]

(e) Part of a Business

A transfer of assets by itself may not be sufficient to establish a successorship when part of a business is disposed of if it is not a discernible part of a business.[223] For a part of a business to transfer to a successor, it must be a coherent and severable part of the

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[217] *Accomodex*, note 110 at 29-30.

[218] *603195 Sask*, *supra* note 79 at 146.

[219] *Headway Ski*, *supra* note 205 at 14,381.

[220] *New Dominion Stores*, *supra* note 17 at 303-304; *Homeco Industries Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local No. 2076* [1979] 1 Can. L.R.B.R. 453 (B.C.L.R.B.) at 455 [hereinafter *Homeco*].

[221] *Homeco*, *ibid.*

[222] *New Dominion Stores*, supra note 17 at 303-304; *Homeco Industries*, *supra* note 220 at 455.

[223] *W.W. Lester*, *supra* note 4 at 411.

business, a going concern and a functional economic vehicle able to stand on its own.[224] Both a continuity of the business and the nature of work have to exist in the hands of the successor for a successorship.[225]Although the requirement of a coherent and severable part of a business is stringent, it is necessary to avoid attaching bargaining rights to another employer on the sole basis of work contracts, equipment or assets being transferred from a predecessor to a successor.[226] This requirement is consistent with the purpose of successor rights laws to ensure that bargaining rights do not extend to non-union employers and their employees, without the employer being able to negotiate a collective agreement, and employees being able to have their views known through the certification process.[227] When a part of a business is disposed of, the control of it passes to another employer, and it has been relinquished, finished or gotten rid of.[228]

In order for successor rights to attach to a part of a business, the part must be capable of standing alone as a going concern and must have a significant number of elements of the predecessor's business, which when integrated with a successor's business, contribute to the successor's business as a going concern.[229] When part of a business is transferred to another employer, it must be a coherent and severable part of the economic organization of the business. [230] It is more difficult to determine whether a part of a business has been transferred to another employer than a whole business since almost anything could be identified as part of a business, but the successor rights legislation

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[224] *Kaverit Steel, supra* note 82 at 25; *Frank Browne, supra* note 154 at 257; *Nieman's Pharmacy, supra* note 159 at 174; *Canada Post Corp. v. C.U.P.W. (Sheldon Manly Drugs Ltd.)* (1987), 1 C.L.R.B.R. (2d) 218 (Can. L.R.B.) at 237-239; judicial review dismissed (1988), 1 C.L.R.B.R. (2d) 218n (F.C.A.).

[225] *Nieman's Pharmacy, ibid.* at 174-175; *Precision Floor, supra* note 173 at 64.

[226] *Nieman's Pharmacy, ibid.* at 175; *Curragh Resources, supra* note 161 at 143,341.

[227] *Nieman's Pharmacy*, ibid.

[228] *Alberta Projectionists, Local 302 v. H.J.M. Investments Ltd.* [1982] Alta. L.R.B.D. 82-018 at 5; aff'd [1982] Alta. L.R.B.D. 82-018QB (Q.B.) [hereinafter *H.J.M. Investments* cited to Alta. L.R.B.D].

[229] *U.F.C.W., Local 280-P v. Prairie Margarine Inc.* [1986] Alta. L.R.B.R. 417 at 425.

[230] *Metropolitan Parking, supra* note 80 at 210-211; *Headway Ski, supra* note 205 at 14,381.

could not have intended that a minor transfer of surplus assets would result in a successorship.[231] Where the new employer already had an existing business before a transfer of part of a business to it, a successorship is less likely to be found.[232]

There is no "mechanical test" that can be applied to distinguish a sale of assets from the sale of part of a business. In cases where part of a business was transferred and a successorship resulted, there was a "transfer of a distinct part of the predecessor's configuration of assets or capacity to carry on business, and no material change in the character of the work performed by the employees within the asset framework".[233]

Despite the focus on a functional economic vehicle, and the fact that government operations can be a business under the successor rights provisions, the British Columbia Board found that the reality is that some service oriented businesses are funded or subsidized by the government.[234] It has held that the concept of a business has to be adjusted to fit the circumstances, and it is not always appropriate to require that a government operation be a functional economic vehicle that is capable of standing alone.[235]

(f) Tracing Factors

In evaluating whether a business, or part of it, has been transferred to another employer, labour boards make an assessment of the type of business carried on by the predecessor and the type of business of the successor, to determine if the successor is carrying on the business of the predecessor.[236] It is irrelevant how a new employer came into possession of the instruments required to continue all or a part of a business because

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[231] *Accomodex*, *supra* note 110 at 25.

[232] *Ibid.* at 25-26.

[233] *Ibid.* at 27.

[234] *Vancouver Transition House*, *supra* note 86 at 197.

[235] *Ibid.*

[236] *W.W. Lester*, *supra* note 4 at 411.

the issue is whether the essence of the business has passed to a successor.[237] When many of the elements which constituted the predecessor's business are found in the possession of a successor and are used for the same business purpose, it can be inferred that the business continues and a successorship has occurred.[238] There is a focus on the character of the business and the characteristics that encompass the employment relationship, since, from a labour relations perspective, it is the work generated for employees that is important.[239] There is an inference of successorship when the nature of the work performed by the successor is substantially similar to that which was performed by the predecessor.[240]

The approach to a successorship in Canada is a derivation of the English standard, which has been relied on in several cases in Canada, including the seminal case of *Metropolitan Parking*.[241] In *Kenmir* v. *Frizzell*, Widgery J. stated:

> In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a

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[237] *Accomodex*, *supra* note 110 at 21.

[238] *Ibid.* at 22.

[239] *Ibid.* at 23.

[240] *Accomodex*, *supra* note 110 at 23; *Peter's Mechanical*, *supra* note 189 at 14,067-14,068; *Taylor Ford*, *supra* note 170 at 145, 148.

[241] *Metropolitan Parking*, *supra* note 80 at 208-209; *Tatham*, *supra* at note 149 at 375-376; *Sunnylea Foods*, *supra* note 210 at 138-139; *Crest Metal*, *supra* note 88 at 16.

> transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.[242]

A "tracing principle" applies to the determination of a successorship and labour boards consider the extent that the elements of a predecessor's business can be traced to the successor.[243] When making a determination about a successorship, labour boards make an assessment of a number of factors to determine if they have been transferred to the successor.[244] Those factors are: assets, goodwill, logos, trademarks, customer lists, accounts receivable, existing contracts, inventory, non-compete covenants, covenants to maintain a good name, same work, same location, same employees, any other obligations to assist the new employer in carrying on the business, a hiatus in production and service of the predecessor's customers.[245] This list is not exhaustive; the factors are looked at cumulatively and no single factor is determinative.[246] Factors which may be sufficient to

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[242] [1968] 1 All E.R. 414 at 418 (Q.B.).

[243] *Accommodex, supra* note 110 at 22; *I.L.G.W. v. 490296 Ontario Ltd.* (1982), 83 C.L.L.C. ¶16,185 (Ont. L.R.B.) at 821.

[244] *W.W. Lester, supra* note 4 at 411; *Culverhouse Foods Limited* [1976] O.L.R.B. Rep. November 691 at 697-698 [hereinafter *Culverhouse*].

[245] *W.W. Lester, ibid.*; *Grimm's Fine Foods Ltd. v. U.F.C.W., Local 312A* (2000), 61 C.L.R.B.R. (2d) 151 (Alta. L.R.B.) at. 158-159; *U.F.C.W., Local 401 v. Canada Safeway Ltd. & Family Foods* [1997] Alta. L.R.B.R. 574 at 582-584 [hereinafter *Family Foods*]; *Lyric Theatre, supra* note 189 at 334-339; *Canadian Merchant Service Guild v. Husky Oil Operations Ltd.* (1988), 75 di 115 at 125-126 ; *Terminus Maritime, supra* note 112 at 14,238, 14,240; Seaway *Bulk Carriers Inc.* and *S.I.U.* (1997), 38 C.L.R.B.R. (2d) 113 (Can. L.R.B.) at 121; *Peter's Mechanical, supra* note 189 at 14,067-14,068; *Canwest Galvinizing, supra* note 168 at 265; *Taylor Ford, supra* note 170 at 141-145; *Eastern Bakeries (Re)* [1993] Nfld. L.R.B.D. No. 27 at paras 10, 13, online: QL (NLRB), aff'd (1994), 369 A.P.R. 1 (Nfld. S.C.T.D.) [hereinafter *Eastern Bakeries* cited to Nfld. L.R.B.D.]; *Marriott Corp. of Canada Ltd. v. I.U.O.E., Locals 968 & 968B* (1998), 41 C.L.R.B.R. (2d) 71 (N.S.L.R.B.) at 80; *Precision Floor, supra* note 173 at 64-66; *Culverhouse, ibid.* at 698; *Thunder Bay* Ambulance, *supra* note 176 at 248-249; *Regina Design, supra* note 167 at 355; *Agribition, supra* note 191 at 270-271.

[246] *W.W. Lester, supra* note 4 at 411; *Eastern Bakeries, ibid.*; *Frank Browne, supra* note 154 at 254; *Precision Floor, supra* note 173 at 66.

find a successorship in one industry might be insufficient in another.[247] For example, a small construction company might have few assets to carry on its business and the transfer of a principal from the predecessor to the successor can be a significant factor in determining a continuity of a business.[248] The factors reviewed by labour boards recognize the organic theory of a business, which is appropriate, since the business is the focus of successor rights.

Transactions involving familial relationships may be more carefully examined than arm's length transactions.[249] The transfer of accounts receivable, existing contracts and inventory tend to favour successorship and can indicate that the new employer drew its "life blood" from the predecessor.[250] When the customers of the predecessor have been serviced or inherited by the purchaser, those are indicators in favour of successorship.[251] Lack of direct contact between a seller and a purchaser is usually not a factor that is a defence against a successorship and the intervention by one or more parties is not significant.[252]

A covenant to maintain a good name or a non-compete covenant are strong indicators of a successorship.[253] Customer lists are a factor supporting successorship, and while the servicing of customers can indicate the continuity of a business, it can also indicate a parallel business.[254] When a predecessor sends letters of invitation to customers

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[247] *W.W. Lester*, ibid.; *Accomodex*, *supra* note 110 at 28; *Frank Browne*, *ibid.* at 255.

[248] *Frank Browne*, *ibid.*

[249] *Peter's Mechanical*, *supra* note 189 at 14,067-14,068.

[250] *Lyric Theatre*, *supra* note 189 at 335.

[251] *Ibid.* at 338.

[252] *Ibid.*

[253] *Ibid.* at 335.

[254] *Ibid.* at 334.

to do business with the successor, that is a factor that favours successorship.[255] When a logo, trademark or use of an exclusive name are transferred to another employer, that is a strong indicator of successorship and is contrary to an argument that the new employer is starting up a new business.[256] Although logos, trademarks and exclusive names can be objectively viewed, they can have goodwill associated with them.

After reviewing the relevant factors, the question which always must be answered is whether the putative successor acquired anything from the predecessor that might be construed as a business or part of it.[257] In determining the "beating heart of a business", a labour board is not restricted to the number or type of factors relied on in assessing a successorship.[258] When a board considers the factors related to a predecessor's business, it takes a balancing approach. Not all factors will be present when a business, or part of it, is transferred from a predecessor to a successor. The factors reviewed by labour boards are the tangible and intangible components of a business. What factors may be determinative in one industry, may not be in another. Although there are similarities in the decisions from the various labour boards on successor rights, each case is fact specific and a court will not interfere with a labour board's decision unless it is patently unreasonable.

There is some divergence in the decisions of labour boards across Canada based on the specific facts of a case, but the general principles followed are the same. Although there is a balancing of interests when a labour board decides a successor rights case, employees do not have any significant involvement when there is a successorship since collective rights and the relationship between the union and the predecessor are focussed on, not individual rights. In some cases, employees are not aware of a transfer until it

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[255]Thorco, *supra* note 89 at 788.

[256] *Lyric Theatre*, *supra* note 189 at 334.

[257] *Agribition*, *supra* note 191 at 277.

[258] *S.E.I.U., Local 336 v. Eastend Wolf Willow Health Centre* (1993), 93 C.L.L.C. ¶14,016 (Sask. C.A.) at 12,070, leave to appeal to S.C.C. refused (1993), 157 N.R. 320n.

occurs. There should be some obligation on unions and predecessors to inform employees in advance of a transfers that it will occur. By doing so, employees may be more aware of their rights, better informed of the legal ramifications of a transfer, and if they are more informed, they can work with their unions to deal with issues of concern prior to a transfer occurring.

(g) Goodwill

Goodwill can be a strong indicator of successorship, but when it is absent in "good location" cases, it is not a strong indicator against successorship.[259] Goodwill in a business location lessens over time, particularly when premises become vacant or available for general rather than specific use.[260] While goodwill is a persuasive factor in favour of a successorship, its absence is not conclusive.[261] Goodwill can exist through predecessor employees who have customer contacts.[262]

Goodwill does not have to be specifically mentioned in a sale agreement in order for it to be transferred to another employer, and it may exist when no compensation is given for it.[263] Due to the nature of the business, there may not be much goodwill that a contractor in the construction industry has which can be transferred to another employer, but where senior managers of a construction company become employed with a another construction company, there can be some goodwill that flows with those managers to the other company.[264] A pre-existing retail location is of value and constitutes goodwill.[265]

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[259] *Lyric Theatre*, *supra* note 189 at 334.

[260] *Ibid.*

[261] *Taylor Ford*, *supra* note 170 at 144-145, 148.

[262] *Thorco*, *supra* note 89 at 788.

[263] *H.J.M. Investments*, *supra* note 228 at 7; *U.F.C.W., Local 401 v. Hull's Foods Ltd.* (1990), 90 C.L.L.C. ¶16,019 (Alta. L.R.B.) at 14,176 [hereinafter *Hull's Foods*].

[264] *Crest Metal*, *supra* note 88 at 15.

[265] *U.F.C.W., Local 401 v. Lansdowne Foods Ltd.* [1990] Alta. L.R.B.R. 350 at 356; *U.F.C.W., Local 401 v. Glenmore Square Guardian Drug Mart* [1989] Alta. L.R.B.R. 383 at 386.

Location goodwill and the goodwill of customer habits associated with the location of the premises, are factors that favour a successorship, especially when the successor draws its "life blood" from the predecessor.[266]

(h) Employees

The same employees and the same work are factors that have to be examined with great caution because together they are strong indicators of a successorship, but separately neither are as relevant as their combination.[267] When employees report for work and there are no changes from the previous day, except for a change in ownership of the business, there is a good chance that a successorship exists.[268] The continued employment of the predecessor's employees with the successor is only one factor to consider in the assessment, "unless the employees have some combination of accumulated skills, ability, know-how or business contacts which are crucial or irreplaceable and without which the business could not continue as a going concern".[269]

(i) No Employees

External forces acting upon a business may result in a sale with successor rights. When the Bureau of Competition ordered Canada Safeway to divest itself of some grocery stores in Alberta, Hull's Foods took over two stores and a successorship resulted based on part of a retail establishment continuing with the successor.[270] Inventory, contracts and stock were transferred to Hull's by Safeway and there was location

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[266] *Gordons Markets Ltd. v. Retail Clerks Union, Local 206* [1978] 2 Can. L.R.B.R. 460 (Ont. L.R.B.) at 465-466; *Hull's Foods, supra* note 263 at 14,176.

[267] *Lyric Theatre, supra* note 189 at 336; *H.J.M. Investments, supra* note 228 at 9. It is only in exceptional circumstances that a continuity of work or employees alone will be sufficient to establish a successorship: *Multi-Professional Support Services Inc. v. O.P.S.E.U.* (2000), 60 C.L.R.B.R. (2d) 55 (Ont. L.R.B.) at 67 [hereinafter *Multi-Professional Support*].

[268] *H.J.M. Investments, ibid.*

[269] *Multi-Professional Support, supra* note 267.

[270] *Hull's Foods, supra* note 263.

goodwill. No employees or management personnel of Safeway were hired by Hull's. Safeway's employees who so desired were transferred to other Safeway stores. The Alberta Board held that the fact that Safeway employees were not transferred to Hull's was irrelevant since bargaining rights attach to a business or part of it and not to employees, but what was important was that the work done and the skills of employees at Hull's were similar to Safeway's.[271]

The union continued to represent employees at Safeway. It also gained the representation of employees at Hull's. In this case there was an expansion of bargaining rights of the union, which is inconsistent with the underlying principle of successor rights. The Board should have placed more emphasis on the fact that predecessor employees did not continue to work for the successor. This case demonstrates one of the downfalls in a successorship assessment by a labour board. Whether predecessor employees are employed with the successor is a relevant consideration in the equation when assessing a successorship. On the other hand, if too much weight is put on whether predecessor employees continue to work for the successor, collective bargaining obligations could be avoided by the successor not hiring any predecessor employees. When similar jobs exist with a successor and predecessor employees do not transfer to the successor, a labour board should be careful not to expand the bargaining rights of the union. From a competition perspective, successor rights should not have attached to Hull's. Too much emphasis was put on location goodwill by the Board.

(j) Hiatus

A hiatus in operations from the time a predecessor's business becomes dormant and the time it becomes operational with a successor, is not, by itself, determinative of whether a successorship exists. A hiatus is but one of the many factors a labour board will use in assessing successor rights. The effect of a hiatus can vary according to the circumstances and industry in which successor rights are being evaluated. Whether a

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[271] *Hull's Foods, supra* note 263 at 14,176-14,177.

hiatus is *bona fide* is an important consideration for a labour board.[272]

Some hiatus in production is not a significant factor against successorship. Employers can artificially stop production to avoid bargaining obligations, or the new employer may take time to renovate and change the premises, and sometimes a business that is in financial difficulty is taken over by a new employer, but there is a fine line between resuscitation and reincarnation.[273] Sometimes a successor renovates or installs new equipment in a business before production resumes and such a hiatus should not prevent a successorship unless it is for a long period of time.[274]

The shut down or closure of a business is an important factor to consider when assessing a successorship, but as a result of more corporate restructuring and the impact of recessions, less significance has been given to a long hiatus between the closure of a business and it being continued with another employer.[275] Some hiatus in production is not a compelling reason for refusing to declare a successorship since labour relations obligations should not be cancelled by artificial stoppages of a business which would be successful in avoiding successorship obligations.[276] A six or seven month hiatus in the grocery business has been found to be significant because goodwill had expired.[277] There was no successorship when a mining company closed down and there was a three year hiatus before it was operated by a purchaser.[278]

The British Columbia Board has found that a one year hiatus from the time a

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[272] *Canadian Labour Law*, *supra* note 6 at para. 8.240.

[273] *Lyric Theatre*, *supra* note 189 at 336-337

[274] *H.J.M. Investments*, supra note 228 at 6.

[275] *Accomodex*, *supra* note 110 at 29-30.

[276] *H.J.M. Investments*, *supra* note 274.

[277] *Gilham Foods* [1984] O.L.R.B. Rep. October 1423 at 1428-1429. In Alberta it has been found that a seven month hiatus in the grocery store business reduced, but did not dissipate, all of the goodwill: *U.F.C.W., Family Foods*, *supra* note 345 at 587-589.

[278] *U.S.W.A. v. Cyprus Anvil Mining Corp.* (1987), 87 C.L.L.C. ¶16,015 (Can. L.R.B.) at 14,144.

business closes down until it is operated by another, does not prohibit a finding of successorship. [279] A four year hiatus is too long.[280] A fourteen month hiatus points towards non-succession, while the longer the hiatus, the more likely the intangible attributes of a going concern will pass from "limbo" to "oblivion".[281]

The Quebec Labour Court has indicated that a lengthy hiatus eventually turns from a suspension into a rupture and a 15 month hiatus did not permit successor rights to flow.[282] The Canada Board has found a hiatus of 2 years did not prohibit a successorship where a mining operation was dormant and did not operate until another company purchased it.[283]

The view of the Ontario Board regarding a hiatus in the continuity of a business has been stated as:

> . . .[A] hiatus between closure and opening is not determinative, but only one factor. The fact that the hiatus . . . was quite long, 22 months, does not itself mean that the business of the former has not been transferred to the successor. There is no temporal bright line beyond which bargaining rights will not transfer. If all the circumstances yield a conclusion that a business, or part thereof, has been transferred, then the appropriate declaration will issue, whether the interval be 12 months or 22 months.[284]

There should be a legislated maximum time period for a hiatus in successorship provisions in the various labour jurisdictions. Not having any set limitation period creates uncertainty and instability in the labour relations system since it is never known, with

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[279] *Redskin Cedar Co. Ltd. v. I.W.A., Local 1-367* (1986), 12 C.L.R.B.R. (N.S.) 153 (B.C.L.R.B.) at 165-168.

[280] *David Minerals Ltd. v. C.A.I.M.A.W.* (1982), B.C.L.R.B. No. L255/82.

[281] *Lyric Theatre, supra* note 189 at 333, 337-338.

[282] *Syndicat des Employés de Garage Matane (CSN) v. Marquis Pontiac Buick Inc.* (1983), 84 C.L.L.C. ¶14,022 (Que. L.C.) at 12,083.

[283] *Curragh Resources, supra* note 161 at 143,345.

[284] *New Dominion Stores, supra* note 17 at 307.

certainty, whether successor rights will flow. On the other hand, since a hiatus is only one of many factors a labour board will consider when assessing a successorship, it can be argued that there should not be any upper limit and matters should be left to a labour board to decide. Yet, in some cases, the length of a hiatus is a neutral factor in the overall assessment. If there has been a hiatus for 2 years, the likelihood of the business continuing as a going concern is very low, if non-existent. The passage of time, unlike some of the other factors reviewed when assessing a successorship, is objective, and can be concretely measured. Setting an upper limit on a hiatus of two years, lessens the likelihood that an employer will use delay and other legal machinations to avoid bargaining rights. An upper limit on a hiatus would still permit a labour board to find that a hiatus of a lesser time does not result in a successorship.

(k) Licenses

A licence passed from a predecessor to a successor can favour a successorship.[285] Examples are a timber license or a license to operate a nursing home. In *Thunder Bay Ambulance Services*,[286] two hospitals ceased providing ambulance services which were licensed to them by the government and a third party bid on the ambulance services and was issued a license to operate them. The Ontario Board found that the license issued to the new operator was an essential part of the predecessor's business, though it was not the same license issued to the predecessor by the government.[287] This case has not been followed in British Columbia for two reasons.[288] First, there was no direct transfer of the license from the predecessor to the successor, and the Ministry, as an intermediary, in re-

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[285] *Canadian Paperworkers Union, Locals 5, 113 and 108 v. Deniso Lebel Inc.* (8 April 1992) Fredericton, File No. I.R.B. 7-3-91, 7-4-91, 7-5-91 (N.B.I.R.B.), aff'd (1993), 372 A.P.R. 198 (N.B.C.A.); *Riverview Manor*, *supra* note 18 at 58-59.

[286] *Supra* note 176.

[287] *Ibid.* at 250.

[288] *D.A. Pogson & Associates Ltd. v. C.U.P.E., Local 3529* (1995), B.C.L.R.B. No. B141/95 at 9-10 [hereinafter *D.A. Pogson*].

granting the license, was a neutral factor. Second, there was no nexus between the predecessor and the successor which is required before a successorship can be established in British Columbia. The British Columbia approach is preferred as it is more consistent with the general principles applicable to successor rights.

(l) Key Person

Successorships have occurred in the construction industry where a principal in a unionized company quit and started up another non-union company where that person was the "key person" considered to be an essential asset of the unionized company.[289] Successorships have also occurred where a principal in a unionized construction company starts a non-union company which results in the union company losing work or in the union company closing down.[290] Yet, in such circumstances in the construction industry, where the union and non-union companies are completely operational and the principal works for the union and non-union companies, a successorship does not exist since there is no disposition of a business, or part of it.[291] Unless some aspect of the business is transferred with the key person, a successorship is usually not found.[292]

The successorship laws do not prohibit a company from engaging in double-breasting, nor do they prohibit a person from having ownership in, or working for, more than a single company.[293] Bargaining rights cannot be circumvented by incorporating new companies that operate non-union, but the fact that double-breasting itself exists, does not

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[289] *W.W. Lester, supra* note 4 at 412.

[290] *Ibid.* at 413; *048545 N.B. Ltd. v. S.M.W., Local 437* (1994), 24 C.L.R.B.R. (2d) 197 (N.B.I.R.B.) at 209-210.

[291] *W.W. Lester, note* 4 at 413.

[292] *Moretti v. O.P.C.M., Local 124* (2000), 60 C.L.R.B.R. (2d) 214 (Ont. L.R.B.) at 232; *CSE Corp. v. I.B.E.W., Local 353* (2000), 58 C.L.R.B.R. (2d) 280 (Ont. L.R.B.) at 291-296.

[293] *W.W.* Lester, *supra* note 4 at 413. Double breasting is when a union and non-union company operate where there is common ownership.

establish a successorship, since some transfer must occur.[294] To establish a successorship in a double-breasted operation, something must be conveyed from the unionized company to the non-union company and common shareholdings or a common business is not enough to result in bargaining rights being inherited by the non-union company.[295]

7. EMPLOYEES' RIGHT TO WORK FOR SUCCESSOR

The successorship provisions in the labour legislation cannot force a predecessor employee to automatically become an employee of the successor. When the government privatized laundry services, the British Columbia Court of Appeal held that a government worker had a choice of going to work for the successor employer or staying with the government and exercising lay-off rights under the collective agreement.[296] Subsequently, the British Columbia Board established guidelines regarding what rights employees have when there is a successorship.[297] First, there is no automatic transfer of employment from a predecessor to a successor and employees cannot be transferred against their will.[298] Second, when a successorship occurs, employees of the predecessor may be laid off or terminated by the predecessor and they may exercise their rights under the collective agreement which is in place with the predecessor.[299] Third, predecessor employees may continue employment with the successor and their terms and conditions of employment are those in the collective agreement which becomes binding on the successor.[300] Fourth, the successor is not obligated to create work to employ the total employee complement

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[294] *Ibid.* at 415.

[295] *W.W.* Lester, *supra* note 4 at 416; *Frank Browne, supra* note 154 at 256-257; *Intermountain Industries Ltd. v. B.C. Provincial Council of Carpenters* [1975] 1 Can. L.R.B.R. 123 (B.C.L.R.B.) at 127-128.

[296] *B.C.G.E.U. v. Indust. Rel. Council* (1988), 33 B.C.L.R. (2d) 1 (C.A.) at 21-23.

[297] *Granville Island Brewing Co. v. Brewery, Winery & Distillery Workers Union, Local 300* (1996), 34 C.L.R.B.R. (2d) 102 [hereinafter *Granville Island].*

[298] *Ibid.* at 110.

[299] *Ibid.*

[300] *Ibid.*

which can result from the successorship and there is no guarantee that a successor will have work available for predecessor employees.[301] Fifth, subject to any direction from the Board, when there is insufficient work available with the successor to accommodate the total employee complement, which employees work and those who are laid off will be determined by the provisions in the collective agreement relying on such provisions as seniority, recall rights and bumping rights.[302] Sixth, for *bona fide* reasons, such as lack of seniority or qualifications as indicated in the collective agreement, or for lack of jobs, the successor employer may decide not to continue employment of employees in the total employee complement that results from the successorship.[303] Seventh, the successor employer cannot "weed out" employees believed to be undesirable as a result of the successorship and bypass the just cause provisions in the collective agreement which binds it.[304]

The Ontario Board ruled that since collective bargaining legislation primarily benefits employees, the rights of employees 'run with the business' when a successorship arises.[305] It has found that when a predecessor terminated the employment of its employees just before a transfer of the business to the successor, and the successor treated the employees as new hires, the terminations were invalid because the provisions of the collective agreement had not been followed.[306] A successor "stands literally in the shoes" of the predecessor, it cannot 'weed out' undesirable employees' or layoff employees contrary to the provisions of a collective agreement.[307] As the successor takes the business as he receives it from the predecessor, the successor is obligated to follow the terms of the

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[301] *Ibid.*

[302] *Ibid.* at 111.

[303] *Ibid.*

[304] *Ibid.*

[305] *Emrick Plastics Inc. v. U.A.W., Local 195* [1982] 3 Can. L.R.B.R. 163 at 171.

[306] *Ibid.* at 171-172.

[307] *Ibid.*

collective agreement which cover employee rights.[308] The Alberta Board has followed the Ontario approach and found that an employee of the predecessor becomes an employee of the successor, subject to the provisions of the collective agreement.[309]

The British Columbia approach goes against the underlying purpose of successor rights laws, which is to have continued employment for predecessor employees. A major objective of successor rights laws is to deem service continuous for predecessor employees who are employed with successor employers and that is done through the continuation of a collective agreement with a successor. There is no guarantee of a right to work by legislation or at common law. The Supreme Court of Canada has recognized that employment is of central importance to Canadian society;[310] work is fundamental to a person's identity and the manner in which employment is terminated is equally important;[311] labour should not be viewed as a commodity;[312]the right to work represents a value which has the status of an international human right and needs to be protected;[313] the protection of employees as a vulnerable group in Canadian society is an objective with a high degree of importance attached to it;[314] this vulnerability of employees is underscored by the level of importance Canadian society attaches to employment;[315] an individual's employment is an essential component of the individual's sense of identity,

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[308] *Ibid.*

[309] *C.U.P.E., Local 38 v. City of Calgary and Enmax Corporation* [2001] Alta. L.R.B.R. 131 at 149, aff'd reconsideration *Calgary (City) (Re)* [2001] A.L.R.B.D. No. 136 at para. 61, online: QL (ALRB), Application for judicial review filed (adjourned *sine die*) [2001] Alta. L.R.B.R. xii.

[310] *Machtinger v. H.O.J. Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.) at 506 [hereinafter *Machtinger*].

[311] *Ibid.* at 507.

[312] *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) at 426.

[313] *Ibid.* at 427.

[314] *Ibid.* at 428.

[315] *Wallace v. United Grain Growers* (1997), 152 D.L.R. (4th) 1 (S.C.C.) at 32 [hereinafter *Wallace*].

self-worth and emotional well being;[316] work is a fundamental aspect of an individual's life and provides the individual with a means of financial support and a contributory role in Canadian society;[317] gaining a livelihood is a fundamental activity;[318] the law covering the termination of employment has a significant effect on the psychological and economic welfare of an employee;[319] the right to work is important;[320] there is a special relationship in contracts of employment since they have many characteristics that set them aside from commercial contracts;[321]there is a power imbalance which exists in all facets of the employment relationship;[322] the vulnerability of employees is recognized by the importance that society gives to employment;[323] the loss of an employee's job is a traumatic event;[324] and there is a duty of good faith and fair dealing in the manner of termination of the employment of an employee.[325]

The successorship provisions do not specifically indicate a right of an employee to work with a successor when a business or part of it is transferred. The right of an employee to work for a successor is indirectly imposed through a collective agreement. Collective agreements may not have adequate provisions which give sufficient protection to employees when a business or part of it is transferred. Given that the functional approach is wrong and a business is an organic being, something needs to be done to

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[316] *Reference re Public Service Employee Relations Act (Alta.)* (1987), 38 D.L.R. (4th) 161 (S.C.C.) at 199.

[317] *Ibid.*

[318] *Ibid.* at 226.

[319] *Machtinger*, *supra* note 310at 498.

[320] *McKinney v.* University of Guelph (1990), 76 D.L.R. (4th) 545 (S.C.C.) at 653.

[321] *Wallace*, supra note 315 at 32.

[322] *Ibid.*

[323] *Ibid.*

[324] *Ibid.* at 33.

[325] *Ibid.* at 33-34.

secure the rights of predecessor employees to work with a successor.

To recognize the importance of work that has been noted by the Supreme Court, the successorship provisions should clearly indicate that an employee has a right to work that follows the transfer of the business or part of it in which the employee worked. In the event there is no work available with a successor, a predecessor employee that was associated with the business or part of it that was transferred to a successor, should have a statutory entitlement to be called to work with a successor for a set period of time and the successor should only be able to forego employing predecessor employees when it has *bona fide* business reasons, or when predecessor employees waive their rights to work for the successor. This time period should be legislated for 1 year from the date of the transfer, which should be long enough to prevent the successor from delaying hiring predecessor employees to thwart the successor rights laws. Although the successor is bound by the recall rights provisions in a collective agreement, some may be less than a year. Where recall rights in a collective agreement are for more than a year, they would not be ousted by the legislation.

8. LIABILITY OF THE SUCCESSOR

Unless there is consent between a union and a successor, or unless otherwise ordered by a labour board, bargaining rights continue when there is a transfer of a business or part of it. A successor employer "stands in the shoes" of the predecessor regarding bargaining rights.[326]

When bargaining rights are limited to a geographic area in a certificate, those rights do not extend beyond the geographical parameters in the certificate, and successor rights do not attach to a business that is located outside the scope of the certificate.[327] If a business is intentionally relocated to avoid a certificate and there is anti-union animus, a remedy for an unfair practice can be fashioned by a labour board so that the union's

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[326] *Metropolitan Parking, supra* note 80 at 203.

[327] *Sunnylea Foods, supra* note 210 at 140; *Silverwood Dairies v. R.W.D.S.U., Local 440* [1981] 1 Can. L.R.B.R. 442 (Ont. L.R.B.) at 447-448 [hereinafter *Silverwood Dairies*].

bargaining rights bind the employer in the new location.[328] Despite a certificate which is geographically limited, if the scope clause in a predecessor's collective agreement is broad enough to cover the employees at another location, the collective agreement can be binding on the successor employer, subject to intermingling.[329]

A successor is responsible for the outstanding grievances regarding the conduct of the predecessor whether it was aware of the collective agreement and regardless whether the grievances were pending arbitration as of the sale date, but a labour board has difficulty finding that a successor is responsible for the unfair practices committed by its predecessor.[330] It is up to a potential purchaser to be prudent and investigate the bargain which a predecessor has made with a union, and to take that into account in the purchase price before the purchaser steps into the shoes of the predecessor.[331]

In Newfoundland, it has been found that a union which is on a legal strike with a predecessor, cannot legally continue the strike with the successor, since there is no compliance with the bargaining and conciliation procedures in the legislation.[332] The courts will grant an injunction to prohibit the illegal strike. A union that is on strike with a predecessor does not have the right to continue the strike with the successor until the union has met the conditions precedent in the statute with the successor, such as mediation and cooling off periods, but the union can serve a notice to bargain on the successor.[333]

When a successor employer claims a "fresh start" and refuses to hire predecessor

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[328] *Sunnylea Foods*, *ibid.* 140-141.

[329] *Silverwood Dairies*, *supra* note 327 at 448-449.

[330] *Sunnylea Foods*, *supra* note 210 at 142; *I.L.G.W. v. 490266 Ontario Ltd. (Chandelle Fashions)* (1982), 82 C.L.L.C. ¶16,185 (Ont. L.R.B.) at 824-826.

[331] *Kelly Douglas*, *supra* note 80 at 82.

[332] *Stephenville Minor Hockey Ass'n v. N.A.P.E., Local 1803* (1986), 86 C.L.L.C. ¶14,058 (Nfld. S.C.) at 12,335-12,336.

[333] *Davison-Walker Funeral Homes v. R.C.I.U., Local 206* [1981] 3 Can. L.R.B.R. 467 (Ont. L.R.B.) at 471-476.

employees, or to honour the collective agreement or engage in negotiations, the successor has committed an unfair labour practice and the predecessor employees are entitled to positions with the successor according to the provisions in the collective agreement and to be compensated for back pay.[334] A general assumption by a successor that it is cheaper to operate non-union or that there is less risk of a strike if operations are non-union, can amount to anti-union animus and interfere with workers' rights to join a union and bargain collectively.[335] When a union served a notice to bargain on a successor a day before a business was transferred to the successor, the Ontario Court of Appeal held the notice was valid and not a nullity since it was capable of "speaking to the successor employer" as of the date of the sale.[336]

The successor rights provision in Quebec indicates that a new employer is bound by not only the certification and the collective agreement, but also any proceeding to secure a certification or the making or carrying out of a collective agreement.[337] In *Adam* v. *Daniel Roy Ltd.*, the former employer had been certified before the sale, but no collective agreement was in effect.[338] Just before the new employer took over the business, the employment of an employee, who was a member and part of the negotiating team, was terminated. The employee claimed an unfair labour practice. The Supreme Court found the termination was an act intended to interfere with the progress of negotiations and was protected under the part of the successorship provision relating to proceedings regarding the securing of a collective agreement.[339] The Supreme Court confirmed that the former employee be reinstated with the successor and indemnified for

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[334] *603195 Sask.*, *supra* note 79 at 149-153.

[335] *General Teamsters, Local 979 v. Reimer Express Lines Ltd.* (1984), 84 C.L.L.C. ¶16,036 (Can. L.R.B.) at 14,312 [hereinafter *Reimer Express*].

[336] *United Headwear, Optical and Allied Workers Union, Local 3 v. Biltmore/Stetson (Canada) Inc.* (1983), 43 O.R. (C.A.) at 255.

[337] *Labour Code*, R.S.Q. 1977, c. C-27, s. 45. Formerly s. 36 of the *Labour Code*, S.Q. 1964, c. 45.

[338] *Supra* note 78.

[339] *Ibid.* at 44.

her losses.

The Supreme Court has confirmed that when a bank merged a unionized branch with a non-union branch in the same town, which occurred on the heels of certification and a first notice to bargain, successor rights existed and the notice to bargain served on the branch was binding on the merged branch operations.[340] When there is an application for certification filed against a company which amalgamates with another company that has a different name, there is a disposition of a business and the certification application is binding on the amalgamated company.[341]

The purpose of the successor rights legislation is to bind the successor to the bargaining rights associated with the predecessor. Arbitrators and the courts have made the successor liable for the breaches of the collective agreement by the predecessor that existed as of the date of the transfer of the business, even where there were no grievances filed at the time of the transfer.[342]

Absent notice, unless there is a statutory provision, a successor is not bound to remedy the unfair labour practices of the predecessor.[343] An employee terminated contrary to the provisions in the labour statutes, is entitled to be reinstated with the successor if a board issues a reinstatement order against the predecessor.[344] A successor who knowingly engages in an unfair labour practice can be liable for it. In five jurisdictions a successor is bound by all proceedings that were in effect under the labour statute with the predecessor when the transfer occurred.[345] In those jurisdictions, successors are responsible for the unfair labour practices of the predecessor provided they were pending as of the date of the

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[340] *National Bank*, *supra* note 184 at 20.

[341] *Gill Lumber*, *supra* note 41 at 275.

[342] *Canadian Labour Law*, *supra* note 6 at paras. 8.460-8,470.

[343] *Ibid.* at para. 8.470.

[344] *Ibid.*

[345] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 44(2)(d); *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 46(1); *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35(1); *The Labour Relations Act*, R.S.M. 1987, c. L10, ss. 56(1)(d); *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 37(1).

transfer. It is logical that the successor be made liable for the wrongs committed by the predecessor related to bargaining rights since that is a cost of doing business that the successor can factor into the price paid to the predecessor for the business, but there is no obligation on the predecessor to make the successor aware of breaches of the collective agreement and complaints or proceedings filed at a labour board. There should be a statutory obligation on the predecessor to make full disclosure to the successor in advance of the transfer. There should also be a statutory obligation in all jurisdictions which makes a successor liable for all proceedings under a labour statute and obligations for breaches of a collective agreement.

9. CONTRACTING & SUBCONTRACTING

The contracting and subcontracting of bargaining unit work to another employer is lawful in appropriate circumstances without successor rights applying. Although an employer may have sound business reasons for contracting work to another employer, such as efficiency, an employer's decision to contract or subcontract work can have a negative impact on employees and a union.[346] The general rule regarding genuine contracting out is that successor rights do not attach to the contractor since work functions alone are insufficient to establish that all or a part of a business has been transferred to a contractor. The same principles applicable to general successor rights apply to contracting and subcontracting. If there are to be restrictions on contracting out, the parties should negotiate those restrictions.

The terms "contracting out" and "subcontracting" have been used interchangeably, without regard to technical meanings. Parties to a contract for the lease and hire of work may be considered contractors.[347] On the other hand, contracting out may be referred to as subcontracting. Subcontracting can occur when a company assigns

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[346] *Marriott Corp. of Canada Ltd. v. I.U.O.E., Locals 968 and 968B* (1998), 41 C.L.R.B.R. (2d) 70 (N.S.L.R.B.) at 73 [hereinafter *Marriott Corp.*].

[347] *Bibeault, supra* note 77 at 1080-1081; Gérard Dion, *Dictionnaire canadien des relations du* travail, 2nd ed. (Québec: Presses de l'Université Laval, 1986) at 449, cited in *Bibeault, supra* note 77 at 1080-1081.

work to a specialized contractor where the contractor assumes full responsibility for the work which the contractor performs on the premises of the party awarding the contract or, outside the premises.[348] Contracting and subcontracting may be done because of a lack of material or labour, the need for specialized personnel or in the pursuit of lower costs. Subcontracting can occur when a contractor with a general contract contracts out certain aspects of it to a subordinate. For example, when a construction company obtains a general construction contract to build an oil refinery where it contracts out mechanical and electrical work to other employers. Contracting out has also been referred to as "contracting in" when a contractor performs work on the premises of the company who awards the contract to it.[349]

In limited circumstances, there is statutory protection of bargaining rights when contracting out occurs in Nova Scotia, Saskatchewan and in the federal jurisdiction. In Nova Scotia, when an employer contracts out work which is regularly done by its employees with the purpose of avoiding obligations under the labour statute, the Board can order that the successor rights provisions apply to the contractor.[350] Contracting out is defined in Nova Scotia as meaning "to make a contract or agreement in accordance with which a significant part of the work regularly done by the employees of an employer is to be done by some other person or persons".[351] This definition covers the contracting out of all or a part of a particular type of work of an employer.[352]

In Nova Scotia the contracting out provision is not violated unless the purpose of the employer was to avoid obligations under the labour statute, and because there is a reverse onus on the employer in the provision, the employer must prove, on the balance

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[348] *Ibid.*

[349] *Canadian Labour Law*, *supra* note 6 at para. 8.260.

[350] *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(2).

[351] *Ibid.* s. 2(1)(i).

[352] *Modern Building Cleaners Ltd. v. I.B.E.W., Local 1651* (1985), 11 C.L.R.B.R. (N.S.) 123 (N.S.L.R.B.) at 126 [hereinafter *Modern Building Cleaners*].

of probabilities, that it did not intend to avoid statutory obligations.[353] In the view of the Nova Scotia Board, the provision was designed to protect employees where an employer sought to avoid obligations to bargain through the manipulation of the corporate form or other legalistic devices.[354] As an example, the Board indicated the provision would apply where an employer, operating double breasted, sought to avoid bargaining obligations related to wages and the like.[355] An accused employer must demonstrate there was a business justification for the contracting out in order to counter an allegation of avoiding its statutory obligations.[356] In all cases the issue is whether the work contracted out was significant.[357] When a Nova Scotia company that made listening devices for detecting submarines was losing money and it contracted out some manufacturing and cleaning services, which resulted in a cost savings to the company, the company was not caught by the successor rights provision.[358] Its intentions were motivated by business considerations and not by an attempt to avoid statutory obligations

In Saskatchewan, the successorship provisions apply to cafeteria, food, janitorial, cleaning and security services, when an owner or manager of a building owned by the government of Saskatchewan or by a municipal government, hospital, university or other public institution, contracts out the work.[359] There is a deemed successorship when the employees perform work at a building or site which is their principal place of work, the employer ceases to provide the services, in whole or in part, at the building or site, and substantially similar services are subsequently provided by another employer.[360] The

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[353] *Ibid.* at 127.

[354] *Ibid.* at 128.

[355] *Ibid.*

[356] *Ibid.*

[357] *Ibid.*

[358] *Ibid.* at 123-128.

[359] *Trade Union Act*, R.S.S. 1978, c. T-17, s. 37.1.

[360] *Ibid.*

employer who subsequently provides the services is deemed to be the transferee for successor rights purposes.[361]

In the federal jurisdiction, a contractor that provides pre-board security screening services at an airport is required to pay its employees not less than what was paid to the previous contractor's employees under a collective agreement, as long as the same or substantially the same services are provided.[362]

In 1992, when the New Democrats were in power,[363] s. 64.2 was added to the Ontario labour statute.[364] It indicated the general successorship provisions applied to contract services provided to a building owner or manager that were related to servicing a premises, including cleaning services, food services and security services.[365] The provisions did not apply to construction, or maintenance other than activities related to cleaning, or the production of goods other than goods related to food services for consumption on a premises.[366] A sale of a business was deemed to have occurred if employees performed the services at a premises that was their principal place of work, the employer ceased in whole or in part to provide such services and if substantially similar services were provided at the same premises under the direction of a new employer.[367] In 1995, after the Conservatives returned to power, s. 64.2 was repealed.[368]

In mid 1997 British Columbia proposed adding a provision to its labour statute for successor rights when building cleaning services, food services and security services were

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[361] *Ibid.*

[362] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 47.3

[363] The New Democrats were in power from September 6, 1990 until June 7, 1995: *Canadian Parliamentary Guide* (Scarborough: Gale Canada, 1996) at 889 [hereinafter *Canadian Parliamentary Guide*].

[364] *Labour Relations and Employment Statute Law Amendment Act, 1992*, S.O. 1992, c. 21, s. 31.

[365] *Labour Relations Act*, R.S.O. 1990, c. L.2, as am. S.O. 1992, c. 21, s. 64.2(1).

[366] *Ibid.*, s. 64.2(2).

[367] *Ibid.*, s. 63.2(3).

[368] *Labour Relations Act, 1995*, S.O. 1995, c. 1, s. 1(3). The Conservatives are the party most often in government and they returned to power on June 8, 1995: *Canadian Parliamentary Guide, supra* note 363.

directly or indirectly provided to a building owner or manager at a premises.[369] The provision did not apply to construction services, maintenance other than maintenance related to cleaning of a premises, or the production of goods other than goods related to food services.[370] A business or part of it was deemed to be transferred when a premises was the principal place of employment for the employees who performed the work at it, their employer ceased in whole or in part to provide such services and substantially similar services were provided at the premises under the direction of another employer.[371] The employer subsequently providing the services was deemed to be the transferee.[372] Unlike the Saskatchewan provision, the proposed British Columbia provision was not tied to public services. There was strong opposition to the proposed changes in British Columbia. In 1998 a Labour Relations Review Committee, which was reviewing proposed changes to the British Columbia labour legislation, did not recommend that successor rights be extended to cover contracted services.[373] To date, the proposed legislative changes have not been implemented.[374]

In November 1997, the British Columbia government implemented a policy where successor rights protection was provided for security, janitorial and food services in contracts for services which applied to all government operations, ministries, agencies, boards, commissions and the British Columbia Building Corporation.[375] The government planned to extend its policy to the broader public service which included universities and hospitals. The Review Committee recommended the government give further

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[369] Bill 44, *Labour Statutes Amendment Act, 1997*, 2nd Sess., 36th Parl., 1997 (First Reading 15 June 1997), s. 5 [hereinafter *B.C. Bill 44*].

[370] *Ibid.*

[371] *Ibid.*

[372] *Ibid.*

[373] British Columbia, *Managing Change In Labour Relations: The Final Report* (Vancouver: Queen's Printer, 25 February 1998) (Co-Chairs: V. Ready & S. Lanyon) at 49 [hereinafter *Managing Change Report*].

[374] *B.C. Bill 44*, supra note 369.

[375] *Managing Change Report, supra* note 373 at 50.

consideration and review before extending its policy.[376] The Review Committee indicated further review was required to determine whether successor rights in contracting out cases could be resolved by legislation as a mechanism for achieving better wages, benefits, job security and working conditions, and indicated the experience with the government's policy in the public sector, may not fit well in the private sector.[377]

The British Columbia Board has indicated that there are three types of contracting out, one of which attracts successor rights.[378] The first type is where there is a contracting arrangement where a primary employer maintains control over the work and the employees who perform it, but the employees are really employees of the primary employer.[379] It is not a true contracting out situation and the primary employer and the contractor may be common employers. The first type of contracting out may also amount to a contracting in. The second type of contracting out involves a loss or transfer of work and occurs where work is initially contracted out and then sometimes recaptured, or where work is transferred from one contractor to another by an employer.[380] There is no transfer of a business or part of it. The third type involves contracting out where not only work is transferred, but also some other components of a business are transferred to the contractor.[381] This third category results in successor rights attaching to the contractor. The question to be answered in contracting out cases is whether the primary employer has transferred or disposed of part of its business, or whether the method of carrying out the work of a part of its business has been contracted to another to perform.[382] It is only the former that results in a successorship.

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[376] *Ibid.*

[377] *Ibid.*

[378] *Vancouver Transition House*, *supra* note 86 at 191.

[379] *Ibid.*

[380] *Ibid.* at 191-192.

[381] *Ibid.* at 192.

[382] *Ibid.* at 194-195.

A contracting out may result in a successorship in exceptional circumstances, but not if it is only the work functions that are contracted to be performed by another party. Chair Blair of the Alberta Board has succinctly put the issue when he stated:

> That is not to say, however, that contracting out and a Board finding of a successorship are mutually exclusive. In circumstances where it can also be said that a "business" or "part of a business" has been disposed of in the context of the contracting out, successorship may apply. For example, if an employer transfers more than just work opportunities to the contractor, and instead allows it to do work using a coherent part of the employer's existing assets or business organization, the mere fact that a contracting out forms part of the commercial arrangement should not be determinative of whether there has been a successorship. . . .The point is, however, that the mere transfer of work away from bargaining unit employees as a result of contracting out has never been found to trigger a successorship. . . .[383]

In *Metropolitan Parking*, successor rights did not attach when a contract for the operation of a parking lot at an airport was tendered and awarded to a new contractor since there was no relationship between the former contractor and the new contractor, nor was there any coherent or several part of the previous contractor's business transferred to the new contractor.[384] The Ontario Board recognized there is a symbiotic relationship between the parties involved in contracting out, but the close relationship in itself does not establish a successorship, and successor rights only attach to a contractor when the contractor acquires a severable and coherent part of a predecessor's business.[385]

In *Charterways Transportation Ltd.*,[386] the Town of Ajax had contracted with a company for about 15 years to provide bus drivers, mechanics and cleaners to operate its transit system. The Town cancelled its contract and hired its own employees, a substantial

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[383] *H.C.E.U. v. Danfield Security Services Ltd.* [1996] Alta. L.R.B.R. 27 at 32-33 [hereinafter *Danfield Security*]. See also: *General Teamsters, Local 362 v. Aspen View Regional Division No. 19* [2000] Alta. L.R.B. R. 535 at 544-549.

[384] *Metropolitan Parking, supra* note 80.

[385] *Ibid.* at 213-214.

[386] *Charterways Transportation Ltd. v. CAW-Canada & Local 22* (1994), 24 C.L.R.B.R. (2d) 280 (Ont. L.R.B.); aff'd (2000), 185 D.L.R. (4th) 618 (S.C.C.) [hereinafter *Charterways* cited to C.L.R.B.R.].

number of whom worked for the contractor. The complement of workers assembled over the years by the contractor allowed for considerable continuity in the operation of the transit system and continuity of the workforce was stipulated in the contract with the same drivers being assigned to the same routes. The contractor considered its drivers to be an essential asset in its operations. The business of the contractor was carried on through an identifiable employee complement, which was a distinguishing part of the business.[387] By hiring most of the contractor employees, the Town took back more than it contracted out, and a successorship resulted. The Town received an essential part of the business of the contractor. On judicial review, the Ontario Board's decision was upheld, as it was not patently unreasonable. The principle followed in this case is close to a functional approach, but the employee complement of the contractor was the base asset of its business. If an owner or general contractor takes back more than what is contracted out, they run the risk of having bargaining rights attach to them. The unsatisfactory result of this case will encourage owners and general contractors not to hire any of the employees of a contractor.

Successor rights provisions were never intended to apply to a loss of business to a competitor or when there is genuine contracting out since that would result in extending bargaining rights to non-union employers and their employees.[388] In order for a successorship to exist when there is contracting, there must be a continuation of a business or part of it that transfers to the contractor or subcontractor as a functional economic vehicle, or a discernible continuity of a business.[389] When there is not a continuity of the business, successor rights do not attach to a contractor or

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[387] *Ibid.* at 300-301.

[388] *Freight Emergency, supra* note 112 at 14,270.

[389] *H.S.A.A. v. Dynacare Kasper Medical Laboratories (Northern Alberta) Inc.* [1997] Alta. L.R.B.R. 57 at 68-71; *Reimer Express, supra* note 335 at 14,314-14,319; *Metropolitan Parking, supra* note 80 at 211-214; *Maison L'Integrale Inc. c. Le Tribunal Due Travail* [1996] R.J.Q. 859 (C.A.) at 863 [Translated C. Mazur]; *Hnatiw v. R.W.D.S.U., Local 544* [1981] 1 Can. L.R.B.R. 489 (Sask. L.R.B.) at 491.

subcontractor.[390]

There remains some confusion in Quebec regarding subcontracting and whether successor rights apply, although matters have stabilized somewhat since *Bibeault*,[391] where the functional approach was rejected. In recent years in Quebec, a review was conducted by a Labour Relations Review Committee regarding the application of successor rights to subcontracting and the Mirealt Report was issued.[392] It recommended the successorship provisions should not apply to subcontracting when it is job duties that are contracted and a business or part of it is not transferred, but it also recommended that section 46.1 be added to the statute so the Labour Commissioner has the power to grant a single employer declaration, when the appropriate circumstances and relationship exists between the party granting a contract and a contractor.[393] Section 46.1 has not been added to the statute. In April 1997, Bill 195, a Private Member's Bill, was tabled in the Quebec Legislature, which proposed prohibiting successor rights in contracting out situations when functions and their management are transferred to another employer.[394] The Bill has not been passed.[395]

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[390] *Danfield Security, supra* note 383; *D.A. Pogson, supra* note 288; *Versa Services, supra* note 113; *Vancouver Transition House, supra* note 86; *Air* Canada *v. I.A.W., Lodge 2413* (1993), 18 C.L.R.B.R. (2d) 295 (Can. L.R.B.); *Terminus Maritime, supra* note 112; *M.G.E.U. v. The Queen in Right of Manitoba* (1992), 92 C.L.L.C. ¶16,057 (Man. L.R.B.); *The Charming Hostess Inc.* [1982] O.L.R.B. Rep. 536; *Marriott Corp., supra* note 346; *Memorial University of Newfoundland Students' Union v. N.A.P.E.* (1995), 28 C.L.R.B.R. (2d) 132 (Nfld. L.R.B.); *Metropolitan Parking, supra* note 80; *Syndicat des Travailleuses et Travailleurs du Manoir Richelieu c. Quebec Commissaire du Travail)* (1997), 70 A.C.W.S. (3d) 1012; leave to appeal to S.C.C. denied [1997] S.C.C. Bulletin at 1665; *Wilson v. Access Transit Ltd.* (1992), 17 C.L.R.B.R. (2d) 283 (Sask. L.R.B.); *S.G.E.U. v. Saskatchewan Liquor Board* (1985), 85 C.L.L.C. ¶16,039 (Sask. L.R.B.).

[391] Québec, *Rapport: Groupe De Travail Sur L'Application Des Articles 45 Et 46 Du Code Du Travail* (Québec: Biblothèque Nationale du Québec, Janvier, 1997) (Président: Réal Mireault) at 35-60, 62 [Translated C. Mazur][hereinafter "Mireault Report"].

[392] *Ibid.*

[393] *Ibid.* at 197-198.

[394] *An Act To Amend The Labour Code As Regards The Transfer Of An Undertaking*, 2nd Sess., 35th Leg. Que., 1997. (First Reading April 15, 1997: *Provincial Legislative Record* (North York: CCH, 1998), Issue No. 5, at 57).

[395] *Provincial Legislative Record* (North York: 1998), Issue No. 5, at 38, 57.

Two recent Supreme Court cases from Quebec affirm that a successorship can arise when similar functions and a right to operate part of a predecessor's business passes to a successor, and confirm that the organic theory of a business applies to contracting out.[396] Both decisions do not give much guidance for the future since the decisions of the Labour Commissioner were found not patently unreasonable. It remains to be seen whether these decisions assist in stabilizing successor rights related to contracting out in Quebec. If the successorship provisions are to apply to contracting out of work in Quebec, legislation is the best way to clearly indicate the circumstances in which it would apply.

Genuine contracting out and subcontracting of bargaining unit work is something that is generally outside of the successor rights provisions in the various jurisdictions, except where limited statutory protection exists in Nova Scotia, Saskatchewan and the federal jurisdiction. When contracting out results in all or part of a business being transferred to another employer, successor rights can exist.

At the present time, there is insufficient authority to support extending successor rights provisions to cover contracting out situations when functions alone are transferred to another employer. It may be said that once a certification is issued and a collective agreement negotiated, the contracting out of bargaining unit work undermines the intent and purpose supporting the legitimacy of a union's "collective relationship" with an employer. On the other hand, there is a strong argument that contracting out is better left to the parties to negotiate collective agreement protection. A certification only establishes a right to bargain with an employer, and except for the minimum requirements in employment standards legislation, all terms and conditions of employment between an employer and a union are negotiable. Contracting and subcontracting are matters that can affect terms and conditions of employment and should be left to the parties to decide.

The labour relations regime in Canada is based on a fundamental principle: free collective bargaining. The Supreme Court has recognized that free collective bargaining

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[396] *Sept-Îles (City) v. Quebec (Labour Court)* [2001] S.C.J. No. 48 at paras. 22-48, online: QL (SCC); *Ivanhoe v. U.F.C.W., Local 500* [2001] S.C.J. No. 47 at paras. 45-96, online: QL (SCC).

is sacred and cherished in the labour relations system in Canada.[397] The successorship legislation already attaches bargaining rights to a contractor or subcontractor when there is more than work that is contracted. There is no need to have legislative protection for contracting out.

In contracting out situations, there is an avenue of redress available for a union. A union can organize and certify a contractor's employees, albeit with some effort and expense. In some cases the union may be able to enter into a voluntary recognition relationship with the contractor. There is insufficient authority or policy considerations to support extending bargaining rights to cover contracting out when only work functions are contracted given that the fundamental purpose of successor rights legislation is to preserve existing bargaining rights, and not to expand them. If employees and unions want further protection against contracting out, the best place for them to put restrictions on it is at the bargaining table through free collective bargaining.

10. INTERMINGLING

Intermingling occurs when a business, or part of it, is transferred to a successor and the predecessor's employees are mixed with the successor's employees. Intermingling may be a mixture of employees who belong to two or more unions, or it might be a mixture of union and non-union employees. George Adams has aptly described the concept of intermingling:

> Although 'the central character of the intermingling concept' is the 'mixing of members of two unions or persons covered by separate collective agreements who perform the same job function', 'intermingling' is to be given a 'liberal and broad interpretation'. Therefore, intermingling provisions also apply to the absorption of a group of unionized employees into a non-unionized workplace. In such situations, the relevant labour tribunal is given a discretion to deal appropriately with the realities of each particular case. In the merger of unionized employees into a non-unionized workplace, the labour tribunal may adopt one of several approaches. It

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[397] *Royal Oak Mines v. Canada (Labour Relations Board)* [1996] 1 S.C.R. 369 at 379 [hereinafter *Royal Oak Mines*].

> may characterize the situation as one where the union's bargaining rights should be terminated if the union represents only a small percentage of employees; or a vote may be ordered to determine the union's status; or the union's status may be continued without a vote if it has sufficient support among the employees in the relevant bargaining unit. . . .[398]

Intermingling in the conventional sense means members of different bargaining units working side by side, but the concept of intermingling is sufficiently broad to cover different groups of employees working under different collective agreements performing similar work for the same employer.[399] Where there are two groups of unionized employees which are intermingled, labour boards examine the existing bargaining units to determine whether there is justification for maintaining them.[400]

There are two policy goals which are recognized when there is intermingling: (1) labour boards recognize the employees' choice of their existing bargaining unit, unless collective bargaining would be undermined, and (2) labour boards prefer all employee bargaining units.[401] Undue fragmentation and industrial peace are considerations of labour boards when the two policy goals conflict.[402] It has been held that when there is intermingling, two factors are of particular relevance: (1) the appropriate bargaining unit, if any; and (2) whether the employees in the unit desire to be represented by the union.[403] The second consideration is believed to be critical.

When there is a successorship issue before a labour board, existing bargaining rights are not added to, diminished or altered unless business integration and

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[398] *Canadian Labour Law*, *supra* note 6 at para. 8.320.

[399] *South Peace Health Unit No. 20 v. Mistahia Regional Health Authority* [1996] Alta. L.R.B.R. 362 at 387-390.

[400] *Canadian Labour Law*, *supra* note 6 at para. 8.330.

[401] *Ibid.* at para. 8.330.

[402] *Ibid.*

[403] *Price-Daxion v. C.P.U., Locals 539 & 1118* [1986] Alta. L.R.B.R. 216 at 217.

intermingling have caused an unworkable and fragmented bargaining structure.[404] The fact that intermingling does not occur until several months after a business is disposed of does not stop a labour board from granting relief under the successor rights provisions.[405] In a union and non-union intermingling, a representation vote is akin to a revocation vote since the question is whether the employees wish to retain the union as the bargaining agent, and not whether the employees wish to be represented by the union.[406] The end result is the same. If there are conflicts between two or more unions as a result of intermingling, the successor business should not be overly disadvantaged in the way it functions.[407] Once a labour board has declared that one union represents the appropriate bargaining unit, the collective agreement of another union ceases to operate.[408]

The British Columbia Board has indicated the underlying labour policy related to the identity of the bargaining agent when there is intermingling is the choice of the majority of the employees in a unit, and in a case of serious doubt about the proportional representation between groups, a vote should be ordered.[409] When majority support for a particular union is readily ascertainable by labour boards, a vote is not ordered. [410]

The Ontario Board may order a representation vote when it is clear there is no substantial majority of a particular union, but if only a small number of employees in the

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[404] *C.U.P.E., Local 3203 v. Horizon School District No. 67* [1995] Alta. L.R.B.R. 439 at 447.

[405] *Silverwood Dairies, supra* note 327 at 450.

[406] *H.S.A. v. Associated Clinical Laboratories* [1996] Alta. L.R.B.R. 70 at 79.

[407] *Perth & Smiths Falls District Hospital v. O.P.S.E.U.* (1997), 36 C.L.R.B.R. (2d) 1 (Ont. L.R.B.) at 37.

[408] *S.I.U. v. Seaspan International Ltd.* [1979 2 Can. L.R.B.R. 493 (Can. L.R..B) at 502.

[409] *Kelly Douglas, supra* note 80 at 84.

[410] Boilermakers, *Local 146 v. Barber Industries Ltd.* [1992] Alta. L.R.B.R. 41 at 48; *General Teamster's Union, Local 362 v. T.N.T. Railfast and Clarke Railfast* [1991] Alta. L.R.B.R. 256 at 272, 275; Application for judicial review dismissed [1992] Alta. L.R.B.R. (iii) [hereinafter *T.N.T. Railfast*]; *Teamsters Union, Local 987 v. York Farms* [1987] Alta. L.R.B.R. 541 at 548; *Kelly Douglas, supra* note 80 at 85; *Seaspan International, supra* note 177 at 222; *Canadian Union of Industrial Employees v. Bermay Corp. Ltd.* [1980] 2 Can. L.R.B.R. 107 (Ont. L.R.B.) at 112 [hereinafter *Bermay Corp.*].

unit are union members and the rest non-union, the Board may terminate bargaining rights without a vote.[411] The jurisdiction to terminate a collective agreement when there is intermingling is an extraordinary power and must be exercised with restraint.[412] In a border line case, a vote will be ordered.[413]

Although a union had substantial support in two bargaining units, a vote was ordered since substantial representation was only one factor to consider and there were labour relations reasons for holding the vote, such as a free expression of support.[414] The vote was viewed as an opportunity to clear the air once and for all regarding which union would represent employees since there was a historical conflict between one union and the successor.

It may be hard to preserve bargaining unit structures that existed before a successorship without hindering the successor's operation or prejudicing the rights of employees.[415] The factors relied on by labour boards are not the same as those when considering a certification application since priority is given to existing bargaining unit structures if they can be accommodated with the successor.[416] A bargaining unit which might be appropriate for intermingling, may not be appropriate on certification. When considering intermingling, generally labour boards look at factors which include similarity of job functions, community of interest, preference of the employer for a single unit, the degree of integration and the length of time the bargaining unit's existence.[417] Generally, employees who perform the same job functions are grouped together when there is intermingling, and the larger the employer, the greater likelihood of community of

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[411] *Bermay* Corp., ibid. at 112.

[412] *Ibid.* at 113.

[413] *Silverwood Dairies*, *supra* note 327 at 453.

[414] *Seaway Bulk Carriers Inc. v. S.I.U.*. (1997), 38 C.L.R.B.R. (2d) 113 (Can. L.R.B.) at 122.

[415] *Canadian Labour Law*, *supra* note 6 at para. 8.330.

[416] *Ibid.*

[417] *Ibid.*

interests in specialized bargaining units.[418] In the private sector, there is a presumption that existing bargaining unit structures are appropriate, but when there is a transfer from the public sector to the private sector, bargaining units must be reconfigured.[419]

The Ontario Board has indicated when it is determining the appropriate bargaining unit, regard must be had to the principles applied when there are certification proceedings and the board must also attempt to balance the interests of the union and the employees of the transferred business with the interests of the successor employer and its employees and union.[420] In considering the appropriate bargaining units, an attempt is made to try to reasonably accommodate existing bargaining rights within the confines of the successor's administrative structures.[421] There is a reluctance to dismantle a bargaining unit that has endured the test of time.[422] Where employees under the transferred bargaining unit work in separate locations from other employees of the successor, have a history of working and bargaining together, share a separate community of interest related to the nature of their work, its location and the supervisors under whom they report, and continued bargaining rights do not unduly hamper the successor's operations, there is a viable bargaining unit.[423]

The policy of the Canada Board related to intermingling favours single all employee bargaining units, avoids fragmented or balkanized bargaining units and there must be compelling reasons for the Board to deviate from this policy.[424] Section 18.1 of the *Canada Labour Code* provides that when there is intermingling, the Board must first allow the parties to come to an agreement about bargaining unit structures and related

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[418] *Ibid.*

[419] *Canadian Labour Law*, at para. 8.350.

[420] *City of Peterborough v. Division 1320, A.T.U.* [1979] 2 Can. L.R.B.R. 112 (Ont. L.R.B.) at 115.

[421] *Ibid.*

[422] *Ibid.*

[423] *Ibid.* at 115-116.

[424] *C.B.R.T. v. Seaspan International Ltd.* [1979] 2 Can. L.R.B.R. 213 (Can. L.R.B.) at 219.

issues within a reasonable period set by the Board, but if the parties fail to agree or the bargaining units agreed to are inappropriate, the Board can set them.[425] This is a sound approach because it is the parties that have to live with the bargaining unit structures agreed to. It also makes the parties responsible for attempting to work out issues related to intermingling, and if they are not able to, the Board will decide them.

If there is intermingling of two groups of employees resulting from a successorship, the intermingling takes effect as of the date of the sale, even if most unionized employees were laid off.[426] Where a larger group of union employees is absorbed into a small group of non-union employees with the successor, the bargaining rights of the predecessor are extended to cover non-union employees of the successor.[427]

The integration of seniority lists can be quite complex when intermingling occurs.[428] One method of integration is dovetailing where two or more seniority lists are combined and all employees are ranked according to their previous seniority.[429] Another option is endtailing where two or more seniority lists are combined and the seniority of the predecessor's employees is placed below that of the successor's employees.[430] Other types of integration of seniority lists can exist. When seniority lists were integrated on the

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[425] R.S.C. 1985, c. L-2.

[426] *Winter (T. & M.) Ltd. v. Transport and Allied Workers Union, Local 855* (1992), 329 A.P.R. 128 (Nfld. S.C.T.D.) at 132 [hereinafter *Winter*].

[427] *Ibid.*

[428] *U.F.C.W., Local 1973 v. B.C.T.W., Local 446* (1986), 193 A.P.R. 79 (N.S.S.C.T.D.) at 81.

[429] *Edmonton Firefighters' Union v. City of Edmonton* [1996] Alta. L.R.B.R. 449 at 462-463; *Edmonton Firefighters' Union v. City of Edmonton* [1997] Alta. L.R.B.R. 71 at 79; *Granville Island Brewing Company Ltd. v. Brewery, Winery & Distillery Workers Union, Local 300* [1995] B.C.L.R.B. No. B418/95; *Field's Welding & Industrial Supplies Ltd. v. Teamsters Local Union No. 213* [1994] B.C.L.R.B. LD-B343-94; *Crestwood Kitchens Ltd. v. I.W.A.* [1984] B.C.L.R.B. B343/84; *FMG Timberjack* Inc. [1995] O.L.R.B. Rep. February 115; C.U.P.E., *Local 1234 et al. v. City of Miramichi* [1995] N.B.L.E.B. No. 27(N.B.L.E.B.), online: QL (NBLB); *Winter, supra* note 426; *U.F.C.W. Local 1973 v. B.C.T.W.I.U., Local 446* (1986), 193 A.P.R. 79 (N.S.S.C.T.D.); *Estevan Coal Corp. v. U.M.W.A., Local 7606 & U.S.W.A., Local 9279* [1998] S.L.R.B.D. No. 57 (S.L.R.B.), online: QL (SLRB).

[430] *Great Atlantic & Pacific Tea Company Ltd.* [1986] O.L.R.B. Rep. April 485, *Silverwood Dairies, supra* note 327.

ratio of two predecessor employees for each successor employee with the successor employees having higher ranking and resulted in some predecessor employees being laid off, that was found to be reasonable when a vote was held by the union before it agreed to the integration, and it was the same union with different locals that represented the employees with the predecessor and successor.[431] Seniority is fundamental because many benefits and rights in collective agreements are tied to it. Dovetailing is the preferred method since it is more equitable and fair than endtailing or a "two for one" exchange.

The particular labour relations environment of the day may affect the direction a board takes regarding intermingling. The amount of restructuring and downsizing in the 1990's has had an impact on the approach of labour boards when there is intermingling, especially when there is multi-party intermingling (union and union or union and non-union intermingling).

Due to restructuring in healthcare, in 1994 the Alberta Board developed a guideline, the "80-20 rule", to be used when there is intermingling in successor rights cases.[432] It was a rough guideline.[433] If one union represented 80% or more of the employees in a consolidated unit, it became the bargaining agent without a vote. If 80% of the employees were non-union, there was no vote and bargaining rights were terminated. If a union represented between 80% and 20% of the employees in the consolidated bargaining unit, a vote was held to determine the wishes of the employees. A union that did not fall into that category was not included on the ballot. The 80-20 rule has subsequently been used as a general rule in other successor rights cases.[434]

Under the 80-20 rule, bargaining rights and collective agreements can be

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[431] *Forestburg Collieries (1984) Ltd. v. Manalta Coal Ltd.* [1999] Alta. L.R.B.R. LD-055. Note: The writer was counsel for one group of applicant employees in that case.

[432] Alberta Labour Relations Board, *Information Bulletin #21 Successor Employers* (Effective January 1, 1998), at 7-8 [hereinafter *Alberta Bulletin*]. See also Alberta Labour Relations Board, *Information Bulletin #T-2 Regional Health Authorities Transition* (Effective June 22, 1994)

[433] *Chinook Regional Health Authority v. C.U.P.E., Local 408 v. I.U.O.E., Local 955* [1996] Alta. L.R.B.R. 412 at 419-420.

[434] *Alberta Bulletin, supra* note 432.

cancelled when there is intermingling. When five community health units, or parts of them, were absorbed into a regional health authority that was represented by three different unions, but 84% of the intermingled employees were non-union, the unions' bargaining rights were revoked [435]

In recent years, when there has been intermingling in Ontario, if the parties agree on a bargaining structure, the Board is inclined to accept their agreement since the parties are best able to assess potential problems and have to live with a poor agreement.[436] There are two main factors that affect this environment. First, the downsizing and restructuring in the private and public sectors tends to indicate that historical bargaining structures should not remain the same and consideration should be given to bargaining unit consolidation.[437] Realities of the day should be taken into consideration when assessing an appropriate bargaining unit when there is intermingling. Second, broader based bargaining units are usually better for bargaining and for employers and employees.[438]

Unless there are sound countervailing reasons, labour boards throughout Canada have recognized that broader based bargaining units promote stability, administrative efficiency, permit increased mobility of employees, give a framework within an organization for the generation of employment conditions and because of their bigger size, are more capable of facilitating and accommodating change.[439] Broader based bargaining units contribute to smooth and successful negotiations, whereas fragmented bargaining units can cause labour relations problems.[440]

Although bigger might not always be better, broader based bargaining units are preferred over fragmented bargaining units and the "direction of the law, the direction of

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[435] *David Thompson Health Region v. S.N.A.* [1996] Alta. L.R.B.R. 347 at 361.

[436] *Humber/Northwestern/York-Finch Hospital v. S.E.I.U., Local 204* (1997), 38 C.L.R.B.R. (2d) 210 (Ont. L.R.B.) at 214.

[437] *Ibid.* at 217-218.

[438] *Ibid.* at 218.

[439] *Ibid.* at 218-222.

[440] *Ibid.* at 219.

policy, the metamorphosis of employer and union organizations, and the evolution of thinking on these issues have, for the most part, all pointed towards broader based bargaining units and extended area bargaining".[441] When there are different ways to define the structure of bargaining units in intermingling, and different "degrees of appropriateness", a board might choose the "more appropriate" bargaining unit.[442]

In multi-union intermingling, less weight is given to the status quo, and the focus is on avoiding fragmentation in favour of a broader based bargaining unit which is a coherent structure in the new business environment.[443] For example, when several hospitals were amalgamated, several units of operating engineers and maintenance employees, which were previously separate bargaining units, were amalgamated into a general service bargaining unit by the Ontario Board.[444] Recently, the Ontario board indicated it would prefer to let employees exercise democratic rights in a representation vote, than follow its previous rule of permitting a group to vote if it represented 20 or 25% of the intermingled unit.[445]

Where hospitals merge due to government dictated restructuring, successor rights exist and there is labour relations fall out which naturally results from such restructuring.[446] The problems encountered in labour relations due to restructuring in the health care sector is exacerbated by the fact that bargaining unit fragmentation is common.[447] Usually there are four or five unions representing bargaining units at a hospital, and when it is merged with another hospital with a similar number of unions, the

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[441] *Ibid.* at 220.

[442] *Ibid.* at 222.

[443] *Ibid* at 223.

[444] *Ibid.* at 210-224.

[445] *Pembroke Civic Hospital v. Pembroke General Hospital* (1997), 38 C.L.R.B.R. (2d) 224 (Ont. L.R.B.) at 234.

[446] *Perth & Smiths Falls District Hospital v. O.P.S.E.U.* (1997), 36 C.L.R.B.R. (2d) 1 (Ont. L.R.B.) at 38-39.

[447] *Ibid.* at 39.

operational difficulties can be phenomenal.[448] For example, when two hospitals in Ontario merged resulting in four unions representing ten bargaining units, the Board combined the ten bargaining units into two units and ordered a representation vote where all unions that represented the combined bargaining units were on the ballot.[449] It was not appropriate to include an option of no union representation on the ballot when the overwhelming majority of employees in the combined unit belonged to a union and it was inappropriate to allow the representation vote to become a decertification vote.[450] The reasoning of the Ontario Board for not having a non-union choice on the ballot is not justified, given that the Board allowed all unions who represented employees within the new appropriate unit to have their names on the ballot regardless of what percentage of support each enjoyed. Although a union can lose its bargaining rights as a result of intermingling in a successorship, decertification, like certification, is a totally separate provision and concept in the statute. A union that does not win an intermingling vote loses its bargaining rights and can be considered to be in effect "decertified", but the loss of bargaining rights is according to the successorship provisions not the decertification provisions. The two provisions are totally independent.

In 1997 legislation was introduced in Ontario to provide a framework for promoting stability and industrial peace when dealing with restructuring in the public sector. The *Public Sector Labour Relations Transition Act, 1997* ("PSLRTA") applies to certain bargaining issues which result from municipal amalgamations and other changes at the municipal level, changes to school boards, hospital restructuring and other occurrences during a transition period which started on October 29, 1997 and which ends on December 31, 2002, unless extended by regulation.[451] The purposes of the PSLRTA are to encourage the best practices which ensure quality, affordable and effective services

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[448] *Ibid.*

[449] *Ibid.* 3, 33, 39, 42-44.

[450] *Ibid.* at 43.

[451] S.O. 1997, c. 21, Schedule B, ss. 2, 3-10.

are provided to taxpayers, to facilitate establishing rationalized bargaining units in the restructured broader public service, to facilitate bargaining between unions and employers where the unions are the freely designated representatives of employees after restructuring occurs and to allow for the prompt resolution of workplace disputes resulting from restructuring.[452] The successor rights provisions of the Ontario *Labour Relations Act, 1995* do not apply to the restructuring covered by the PSLRTA.[453]

The PSLRTA establishes like bargaining units for predecessor employees who are employed by the successor and collective agreements with the predecessor continue with the successor.[454] After the changeover date, a successor and all of the unions which represent employees in its establishment can agree to change the description of the bargaining units and the number of them, and if an agreement has been reached, the unions may agree which union will represent each unit in the agreement[455] Unanimous consent to the agreement is required by the successor and all of the unions.[456] If there is agreement on the scope of the bargaining units, but no agreement made within 10 days following its execution regarding which unions will represent the units, the Labour Board can determine which union represents which unit, if any.[457] If 40% or more of the employees in a bargaining unit were non-union prior to the changeover date, a ballot must include not having a union as a choice.[458] When an employee of the predecessor was a Crown employee that is employed by the successor, the employee is deemed to be non-union for the purposes of calculating the 40%, but the Crown employee's bargaining

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[452] *Ibid.* s. 1.

[453] *Ibid.* s. 13.

[454] *Ibid.* ss. 14, 15.

[455] *Ibid.* ss. 20, 21.

[456] *Ibid.* ss. 20(1, 7).

[457] *Ibid.* s. 21(4).

[458] *Ibid.* s. 21(5).

agent prior to the changeover date must be included on the ballot as a choice.[459]

When the parties do not agree on the scope of bargaining units, the Board can set them, and in doing so, the Board must have regard to the purposes of the PSLRTA.[460] The Board will conduct a representation vote in each bargaining unit to determine which union will represent the employees, and to win a vote a union must receive more than 50% of the votes cast.[461] This implies that a runoff vote may be required. If 40% of the employees in the bargaining unit are non-union and there are at least two unions representing the employees in it, the voting process consists of succeeding votes where not having a union must be a choice on the first ballot, and in each succeeding vote, the choice with the fewest votes is cut from the ballot.[462] A union can be appointed as the bargaining agent for a unit when the Board decides to keep the bargaining unit structures that existed prior to the changeover date, or when the existing bargaining agents have agreed which one will represent the employees in the unit.[463] If there are Crown employees employed with the successor that were represented by a union prior to the changeover date, the union must be included in the agreement.[464] A vote is required and no agreement allowed when at least 40% of the employees in the new unit were non-union or were former Crown employees.[465]

The PSLRTA is one way to force the parties to deal with intermingling when there is major restructuring of the public and quasi-public sectors. The alternative is to have the labour board deal with all of the intermingling issues. Yet, it seems odd to classify former Crown employees as non-union for calculating the 40% threshold for having a non-union

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[459] *Ibid.* ss. 23(4, 6).

[460] *Ibid.* ss. 22, 22(7).

[461] *Ibid.* ss. 23, 23(13).

[462] *Ibid.* s. 23(14).

[463] *Ibid.* ss. 23(10, 11).

[464] *Ibid.* s. 23(12).

[465] *Ibid.* s. 23(11).

category on a ballot, especially when the former Crown employees are represented by a union and the name of that union will be on the ballot.

It is a major concern in successorship cases, when intermingling occurs, that a union does not violate its duty of fair representation.[466] A union must be cognizant of the "danger" and has to be careful when there is intermingling so it does not violate its duty of fair representation by taking the position of some members over that of others without reasonable and due consideration.[467] There is a danger in the Ontario approach under the PSLRTA that a union may violate its duty of fair representation, especially if there is an agreement on which unions will represent bargaining, as there is no required involvement of employees in the selection of the bargaining agent for a particular unit. Also, the PSLRTA may cause unions to prefer self-preservation over the interests of employees.

When applying the intermingling powers, a labour board must keep in mind the intent of the successor rights provision to preserve bargaining rights and continue a collective agreement.[468] Intermingling as a result of regionalisation of health care in Alberta depends to a large degree on whether a regional health authority has integrated its business operations, but the amount of intermingling need not be great at the time of a successorship application if the business operations have been integrated to such a degree that the bargaining unit has or will become inappropriate.[469] When there is intermingling, the test to be applied is whether the existing bargaining unit is appropriate, not that it is the most appropriate unit.[470]

When there is intermingling, the parties should first be given the opportunity to agree on bargaining unit structures as long as they do not result in undue fragmentation or

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[466] *Edmonton Fire Fighters' Union v. The City of Edmonton* [1997] Alta. L.R.B.R. 71 at 79-80 [hereinafter *Edmonton Fire Fighters*].

[467] *Rita Vickers v. H.S.A.A. v. University of Alberta Hospitals* [1997Alta. L.R.B.R. 11 at 26; *Edmonton Fire Fighters, ibid.*

[468] *T.N.T. Railfast, supra* note 410 at 267-269; Boilermakers, *Local 146 v. Barber Industries Ltd.* [1992] Alta. L.R.B.R. 41 at 48.

[469] *H.S.A. v. Chinook Regional Health Authority* [1996] Alta. L.R.B.R. 289 at 315.

[470] *C.U.P.E., Local 3203 v. Horizon School District No. 67* [1995] Alta. L.R.B.R. 439.

tag ends, are suitable for the successor's operations and are subsequently approved by a labour board. If bargaining unit structures cannot be agreed on within a reasonable period, a labour board should set them. It should be left up to the various labour boards whether a vote needs to be conducted in a case of intermingling. The approach of giving the parties a set period to agree on bargaining unit structures when there is intermingling which has to be approved by a labour board, or in the absence of agreement a board sets them, makes sense. It is the parties who have to live with what they agree on. If what is agreed to later needs adjusting, the parties can amend their agreement, or make an application to a labour board for a determination.

The same criteria used in certifications should be used in finding appropriate bargaining units when there is intermingling. The general principles applicable to certification applications for finding an appropriate bargaining unit, not the most appropriate bargaining unit, include community of interest, bargaining history, nature of the employer's organization, viability of bargaining units, avoidance of fragmentation and tag ends, similarity of working conditions, integration of production processes, common supervision, labour relations sense and the wishes of the union, employees and the employer.[471] If the principles applicable to certification were applied to intermingling, there would be more consistency in the principles applied to bargaining unit configuration. Although it can be said that when there is intermingling, there should not be a test for union support like there is in a certification application, that is true as long as there is one union involved in intermingling with non-union employees. Even then, if there is doubt about the union not having majority support, a vote is the only way to determine whether the employees support the union and the outcome is the same as if there were a certification vote. When two or more unions are involved in intermingling, and there is only one bargaining unit, there is a test for union support the same as in a certification since one union will win and the rest will lose.

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[471] *Canadian Labour Law*, *supra* note 6 at paras. 7.10-7.725; Alberta Labour Relations Board, *Information Bulletin #9 Bargaining Unit Descriptions* (Effective January 1, 1998).

11. AMENDING COLLECTIVE AGREEMENTS

There is a lack of jurisprudence regarding the amending of collective agreements when there is a successorship. A collective agreement negotiated with a predecessor is rarely a "perfect fit" when it attaches to a successor.[472] As the Ontario board has stated:

> This automatic "flow through" of the predecessor's agreement will always create some transition benefit or hardship and a successor can as easily inherit a "cheap" agreement as a "rich" one. Indeed, this is one of the factors which should influence the price of the sale transaction. Moreover, every collective agreement negotiated for a "whole" will be more or less appropriate when applied to a part. Job descriptions may need to be modified, and some may be entirely redundant. Grievance procedures may be too simple or too complex. Contractual provisions respecting union stewards or safety committees may not fit well in the new circumstances. If the agreement provides a means for dealing with these issues, it must be followed. If it does not, then the employer can probably act unilaterally.[473]

The power to amend a collective agreement upon a successorship is an extraordinary power. Unless there is specific statutory authority, a labour board cannot use its general powers to amend a collective agreement when there is a successorship. The Saskatchewan Board has recognized it does not have the power to amend a collective agreement under its "otherwise order" powers of the successorship provision, it can only declare that a collective agreement is in effect.[474]

Six labour boards have the power to modify and amend a collective agreement when there is a successorship. The labour boards in Alberta, Manitoba, Newfoundland, Nova Scotia and Prince Edward Island have broad powers to modify and amend provisions in a collective agreement when a successorship occurs.[475] The power to modify

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[472] *Penmarky Foods Limited* [1984] O.L.R.B. Rep. September 1214 at 1229.

[473] *Vaunclair Meats*, *supra* note 63 at 420.

[474] *Headway Ski*, *supra* note 205 at 14,383.

[475] *Labour Relations Code*, R.S.A. 1988, c. L-1 s. 46(2)(c); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(2)(g); *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(3)(a, f); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(5)(a, f); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(3)(a, f).

and amend a collective agreement is not tied to intermingling in Alberta, Newfoundland, Nova Scotia and Prince Edward Island.[476] In Manitoba the power to modify the provisions of a collective agreement are tied to intermingling.[477] The British Columbia Board's power is restricted to modifying the seniority provisions of a collective agreement as a result of intermingling.[478] The underlying policy of the labour statute is that an employer and a union should settle the terms and conditions of employment by free collective bargaining and that is why the British Columbia Board does not have the power to engage in interest arbitration or to amend a collective agreement when a successorship occurs.[479] The Canada Board has the power to amend a collective agreement when there is intermingling and the parties fail to agree to amendments.[480] In British Columbia and Manitoba, when there is intermingling, the boards can give directions regarding the interpretation or application of a collective agreement.[481] In Newfoundland, Nova Scotia and Prince Edward Island, the labour boards can interpret any provision of a collective agreement whether or not there is intermingling.[482]

Although the Alberta Board has the power to amend a collective agreement when a successorship occurs, the scope of that power is not defined. The purpose of the power is to give substance to a successorship.[483] The power to amend is discretionary and

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[476] *Labour Relations Code*, R.S.A. 200, c. L-1, s. 46(2)(c); *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(3)(a, f); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(5)(a, f); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(3)(a, f).

[477] *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(2)(g).

[478] *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35(5)(d).

[479] *Kelly Douglas & Co. Ltd. v. R.W.D.S.U., Local 580* [1974] 1 Can. L.R.B.R. 426 at 426-427.

[480] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 18.1.

[481] *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35(5)(e); *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(2)(h).

[482] *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 93(3)(h); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 31(5)(h); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 39(3)(h).

[483] *Edmonton Fire* Fighters' *v. City of Edmonton* [1996] Alta. L.R.B.R. 449 at 457 [hereinafter *City Firefighters*].

limited, allowing the Board to order amendments to accommodate the continuous employment of the group of employees who are transferred into another bargaining unit.[484] The Board may hesitate to amend a collective agreement when it contains a successor rights clause, especially when the purchaser buys the business with its "eyes open" and reviewed the collective agreement beforehand.[485] The power to amend a collective agreement should be exercised sparingly and the Alberta Board is reluctant to "cut and paste" a collective agreement to fit a successor's circumstances, although it has amended a collective agreement when the parities could not agree on changes to it.[486]

The power to amend does not allow a board to engage in interest arbitration, but allows it to review provisions in a collective agreement having regard to the interests of the employees, the union and the employer who are affected by the collective agreement.[487] The Alberta Board has indicated it is unlikely that it would impose a collective agreement negotiated with a big employer on a small employer, without making substantial amendments to it.[488]

The labour relations regime in Canada is based on a fundamental principle: free collective bargaining. Although in exceptional circumstances, labour boards in some jurisdictions can amend terms in collective agreements and impose those terms on a successor, they should do so with caution and pay heed to the comments of Lamer C.J.C., in his concurring judgement in *Royal Oak Mines* v. *Canada (Labour Relations Board)*.[489] There, after a bitter and protracted labour dispute, the Canada Board ordered the employer, who had bargained in bad faith, to tender a collective agreement to the union for ratification absent several proposals which the employer had changed its

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[484] *Ibid.* at 458.

[485] *T.N.T. Railfast, supra* note 410 at 276.

[486] *Ibid.*; *City Firefighters, supra* note 483 at 458-466.

[487] *Ibid.* at 458.

[488] *Family Foods, supra* note 345 at 591.

[489] *Supra* note 397.

position on and which the parties were to try to resolve by further negotiations, failing which compulsory mediation was required. The Chief Justice stated:

> . . . I wish to stress that such an extraordinary order, while justified in these circumstances, runs against the established grain of federal and provincial labour codes by overriding the cherished principle of "free collective bargaining" which animates our labour laws. While Cory J. is correct in emphasizing that the principle of "free collective bargaining" is not the only policy interest advanced by the Code, it is undoubtedly one of the most important and one of the most sacred. Labour movements in Eastern Europe have fought for decades to resist state-imposed collective agreements, and it would be an ironic and tragic development in our labour law if the principle of free collective bargaining were to be regularly subordinated to the societal goal of the "constructive settlement of disputes". With those thoughts in mind, I find that in the absence of exceptional and compelling circumstances such as those prevailing in this case, it will normally be patently unreasonable for a labour board to impose such an invasive remedial order in light of the core value of free collective bargaining enshrined in the Code.[490]

Something which is imposed is far removed from being freely negotiated. Parties to a collective agreement can best live with its terms when the agreement is mutually negotiated, which is consistent with the principle of free collective bargaining. Although labour boards should have the power to amend a collective agreement when there is a successorship, they should do so only as a last resort. A board should direct a successor and a union to negotiate, in good faith, amendments to a collective agreement and when those negotiations come to an impasse, the parties should be required to engage in mediation. The good faith requirement serves as a check and balance on the behaviour of a successor and a union at such negotiations, since a board can provide a party with a remedy for bad faith or surface bargaining. It is only after mediation that a board should exercise its powers to amend a collective agreement when there is a successorship. By following such a process, there is less interference with free collective bargaining, and the primary responsibility is on the parties to resolve matters, rather than having them race to

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[490] *Ibid.* at 379.

a board for a resolution when they may have made little effort to resolve matters between themselves.

Due to the differences in the organizational structure of a predecessor and a successor, an inherited collective agreement in the hands of the successor may have so many provisions which cannot apply to it because of the way clauses are drafted that the collective agreement as a whole may be considered "stripped down" and be devoid of meaningful application, or there may only remain a "bare bones" collective agreement with only the recognition clause, or a few other clauses, that can be applied to the successor. It would be a futile process for the parties or a labour board to attempt to amend a collective agreement in such circumstances. In such cases, a labour board should direct the parties to negotiate a new collective agreement following the same process as outlined for making amendments.

12. CONCLUSION

The successor rights provisions are triggered when there is a sale, lease, transfer or other disposition (alienation in Quebec) of a business or part of it. The test for a successorship is whether a business, or part of it, continues in an identifiable form with a successor as a functional economic vehicle or there is a discernible continuity in the business, or part of it, in the hands of the successor. The key to determining a successorship is determining what the business of the predecessor consists of that is transferred to the successor.

The legal relation theory and the functional theory related to a business have been rejected by the Supreme Court and the organic theory has been adopted. A business is a living being consisting of a number of different components. Work functions alone are insufficient to establish a successorship. For a successorship to occur, there must be a transfer of a business, or part of it, from a predecessor to a successor and there has to be some nexus between the two. There has to be something relinquished and conveyed to the successor by the predecessor. When there is a successorship, the bargaining rights of the predecessor attach to the successor and the successor stands in the shoes of the

predecessor with respect to those bargaining rights. In successorship cases, there is a balancing of interests of a union, employees and employer. The goal of successor rights is to preserve jobs and to continue benefits and terms and conditions in collective agreements for the benefit of employees.

All of the labour boards have an obligation to reflect the policy which flows from the labour legislation in which they are governed, but each board has flexibility when applying policy when interpreting the successor rights legislation within the factual context of a case.[491] A decision in one jurisdiction may not be the same in another, even when the facts are similar, and a board is not required to accept a decision from another jurisdiction as binding on it. All jurisdictions are bound by the principles in the successor rights cases which have been decided by the Supreme Court. Although one labour board does not have to decide a case on similar facts the same way as another labour board, inconsistent decisions make for poor policy making and give mixed signals to employers, employees and unions who use labour board decisions for guidance in day to day activities.

The recommendations of the Woods Task Force in 1968 regarding successor rights are born out in the successor rights legislation and jurisprudence.[492] As recommended, and as has been followed by labour boards, a sale of assets alone does not result in successor rights. Assets alone are not a continuity of a business or part of it. Where there is a business succession, the jurisprudence bears out that a certificate and collective agreement follow the business to the successor, as was recommended by the Task Force. In some jurisdictions, all of the proceedings under a labour statute that existed with the predecessor, also pass to the successor.

When deciding a successor rights application, labour boards balance interests and make an assessment of tangible and intangible factors. Factors which favour a successorship in one industry, may not be applicable in another. Each successor rights case is evaluated on its own merits, and although there are many similarities in decisions

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[491] *Cineplex Odeon, supra* note 89 at 194-195.

[492] *Woods Task Force, supra* note 15 at 145.

from the different labour boards on successor rights, and the general principles applied are the same, each case is fact specific. A court will not interfere with a labour board's decision as long as it is not patently unreasonable. If there are facts to support a board's decision on a successorship, when such a determination is within the jurisdiction of a board, the courts will not interfere with a labour board's decision.

No two similar fact situations need be decided the same way by a board. It is bad policy for a labour board not to give consistent decisions for similar fact situations since uncertainty results and can create disharmony in the labour relations community. The existence of a labour board, as a quasi-judicial tribunal with specialized expertise, is to simplify, accelerate, finalize and resolve issues which come before it.[493] The issues labour boards face regarding successor rights are quite complex, especially in times of restructuring and downsizing. The existing successor rights provisions work well, but are lacking in several areas and could be improved.

All jurisdictions should have provisions which indicate a successor does not have to bargain with a union while there is a successor rights application pending before a labour board. If there are bargaining unit structures that have to be determined, there is no need for the successor to engage in wasteful negotiations when bargaining units may change due to intermingling, or when bargaining rights might be terminated if there is a substantial change in the character of the business.

In cases where the collective agreement of the predecessor imposes undue hardship on employees, a union or the successor, a successor or union should be able to apply to a labour board to re-open negotiations. A board should have the authority to order the parties to negotiate a new collective agreement mid-term, if it is reasonable to do so. What amounts to undue hardship, has been addressed in human rights cases, and similar principles can also be applied in the labour context. The Supreme Court has indicated undue hardship includes an assessment of factors such as financial cost, disruption of a collective agreement, problems of morale of other employees, safety

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[493] *Cineplex Odeon, supra* note 89 at 191.

concerns and interchangeability of a workforce and facilities.[494] The size of an employer's operation can affect whether financial cost is undue and the ease which a workforce can adapt to changes.[495] The list is not exhaustive. The Supreme Court has further indicated undue hardship means some hardship is acceptable, but more than minor inconvenience must exist in order for hardship to be undue, and the hardship must be substantial rather than trivial.[496] Allowing parties to negotiate a collective agreement mid-term would occur only in the appropriate circumstances. It is better to permit the parties to negotiate a new collective agreement when the predecessor's collective agreement causes undue hardship rather than having the employees, the successor or the union suffer unduly until the next round of negotiations, which may be several years down the road. The test of undue hardship is a high threshold which would deter frivolous claims to open negotiations mid-term.

If the character of a business is substantially changed shortly after a transfer, there should not be a continuation of bargaining rights. The applicable threshold is high. If bargaining rights continue when the nature of a business is substantially changed, there is an expansion of bargaining rights rather than a continuation of them, which is contrary to successorship principles.

A more proactive approach needs to be taken regarding successor rights. The successorship provisions make the transfer of a business to a successor effective as of the date of the transfer. Communication and knowledge are two factors which assist informed parties in acting rationally and allows them to deal with issues related to successor rights in a responsible and timely manner before a transfer of a business or part of it occurs. Advance communication between affected parties before the transfer of a business, or part of it, is lacking. Advance notice in writing of a transfer would give the affected parties the opportunity to address bargaining rights issues before the transfer.

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[494] *Central Alta. Dairy Pool v. Alberta (Human Rights Comm.)* [1990] 6 W.W.R. 193 (S.C.C.) at 217.

[495] *Ibid.*

[496] *Renaud v. Central Okanagan School District No. 23* [1992] 6 W.W.R. 193 (S.C.C.) at 202-203.

The current successorship provisions impose no obligation on a predecessor to give notice to a potential successor regarding existing obligations under a labour statute and a collective agreement. There is no obligation on anyone currently to inform employees in advance of a transfer that it will occur. A predecessor and union should be required to give employees advance notice of a transfer so that they are aware of their rights and have some participation in events that will affect their working lives.

When there is a transfer of a business or part of it, there is currently no requirement for a predecessor to inform a union about the transfer in advance of it occurring. A predecessor generally knows well in advance that its business or part of it will be transferred to another employer in the future. If a predecessor was required to inform a union of its intent to transfer its business to another employer, the union could engage in informed discussion with the successor regarding the rights and obligations which would apply upon the transfer. If this were done, disputes related to successor rights could be minimized, reduced or resolved long before they reached a labour board. It should be mandatory that the union and successor attempt to resolve issues before the transfer. When the successor and union cannot do so, the legislation should permit applications to be made to a labour board in advance of the transfer for advance rulings on the continuity of bargaining rights. The present provisions give labour boards the power to rule on successor rights when the transfer occurs, not before it occurs.

As it is the successor who will inherit the bargaining rights, it makes sense that the successor would have discussions with a union prior to the transfer taking place in order to deal with anticipated problems. A successor may already have a union in its workplace, and it should be obliged to have discussions with it in advance of the transfer in an attempt to work out any issues which may affect bargaining rights after the transfer. More responsibility is cast onto a successor since, as an inheritor of bargaining rights and of a business, it is in the best position to deal with issues related to the transfer and it is in its best interests to do so because it desires to continue the business. A predecessor may simply try to wash its hands of the labour issues once it knows the business or part of it will be transferred.

The present successor rights legislation is too complex and needs to be simplified. In most jurisdictions, the language used in the successorship provisions is unnecessarily complex and sometimes ambiguous. It is doubtful that the average person is able to understand the rights and obligations imposed in the successorship provisions. The successor rights provisions need to be written in plain language and they need to be simplified. There is a lack of consistency in the powers of labour boards and in the language used in the successorship provisions in the various jurisdictions. The legislation in all of the jurisdictions needs to be changed and written in clear and precise terms so that anyone reading a labour statue can easily understand what is intended in the successor rights provisions. There is a need to have consistency in the wording of successor rights provisions and to have consistent powers for the labour boards in the eleven jurisdictions. Commonality of successor rights laws is more important today than previously, given the number of reorganizations, restructuring and transfers of businesses which occur.

The policy principles espoused by the Supreme Court about the importance of work in Canadian society are not sufficiently emphasized in the current successor rights provisions. Although there is no guarantee of a job, further emphasis should be put on the continuity of work for employees in a successor's establishment when a business or part of it is transferred. The importance of work and employees being treated fairly is underscored by what the Supreme Court has said about work and employees being a vulnerable group. Although the Supreme Court's policy directives regarding the importance of work are set out in the union and non-union environments, the policy principles underlying the importance of work in the non-union sector are just as applicable in the union sector.

A way to further emphasize the importance of work when there is a successorship is to put more responsibility on a successor. This can be accomplished by making it mandatory that an employee of the predecessor who works in the business or part of it which is transferred, becomes an employee of the successor as of the date of the transfer. The employment of the employee with the predecessor should be deemed to be

continuous with the successor, and the successor would be required to follow the collective agreement or any other agreement in effect between it and the union, in the event the employee was subsequently terminated. Terminations by the successor would be permitted for legitimate reasons such as layoffs due to economics, the introduction of technology and organizational changes. Predecessor employees should have a legislated right to be recalled to work by the successor for one year from the date of the transfer.

A business should be considered dead if there has been a two year hiatus and no successor rights should flow. That period should be the maximum length of a hiatus that is allowed. If a business is not operational after a two year hiatus, the likelihood of it becoming a functional economic vehicle are nearly non-existent. If there is a two year maximum in the successorship provisions for a hiatus, labour boards can still rely on lesser periods of a hiatus in their assessment of whether the business, or part of it, is continued with the successor.

All jurisdictions should have successor rights clauses which indicate a successor is bound by all breaches of the collective agreement, and all proceedings under a labour statute, which existed as of the date of the transfer. Any such proceedings or obligations under a collective agreement of a predecessor should be continued with, and remedied by, the successor. A predecessor may cease to exist after a transfer and that is why it is important for a successor to have liability for the predecessor's breaches under a collective agreement and for any proceedings before a labour board, such as unfair labour practices. The general rule of *caveat emptor* applies in the commercial context, and a prudent buyer should enter into a transaction with its "eyes open", but there is no obligation under the successor rights provisions which require a transferor to inform a potential purchaser of the obligations under a collective agreement, or other proceedings under a labour statute which are related to a business or part of it. If there was an obligation of full disclosure on a predecessor under the successor rights laws, there would be a more orderly transition of labour rights from a predecessor to a successor. A prudent successor, knowing it may have potential liability for obligations of the predecessor, can let the deal between it and the predecessor reflect compensation for those risks and the

successor can negotiate a lower purchase price with the predecessor as a result of potential liabilities.

Presently, there is no need to change the rules of successorship to allow successor rights when bargaining unit work is contracted or subcontracted. If contracting or subcontracting is not genuine, the successor rights rules apply and a contractor can be caught if there is a discernible continuity of a business or part of it which passes to the contractor. If unions and employees want restrictions on contracting and subcontracting of work, they should negotiate those terms into a collective agreement. Changing the legislation to support successor rights in contracting and subcontracting situations would require a focus on functions alone, which goes against the grain of the direction from the Supreme Court on the governing principles for successor rights. It would also be an interference with the free collective bargaining process. An owner or a general contractor has to be careful not to take back more than what was contracted, otherwise a successorship could flow back to it.

The general rule of successor rights is that a union's bargaining rights are to be preserved, but the issue in intermingling becomes which union, if any, should have bargaining rights. In deciding the appropriate bargaining unit, the same criteria that are used in certification applications should be used. Representation votes in intermingling cases should be left to the discretion of labour boards. The parties should be required to attempt to agree on appropriate bargaining unit structures in a set period, and if there is no agreement, a labour board should determine the bargaining units. The bargaining units agreed to by the successor and a union should be subject to approval by a labour board to ensure they are appropriate and to avoid undue fragmentation and tag ends. When there is intermingling, it cannot be presumed that existing bargaining unit structures will be appropriate for a successor. Bargaining unit structures need to fit the successor's operations and need to be appropriate to ensure stability and industrial peace.

There may perhaps be a case for the view that the representational threshold for a union needs only to be tested at the time of certification and not when there is a successorship since employees have an opportunity when there are open periods in a

collective agreement to bring an application for revocation. However, the rules related to successorship, regarding the continuation of bargaining rights, change once there is intermingling. When there is intermingling between two unions in a single bargaining unit, one will win and the other will lose its bargaining rights. In essence, one of the unions will be "decertified".

When there are successor rights and intermingling, unions have to be cognizant of their duty of fair representation and must not make unilateral decisions; they must respect and pay attention to minority views, regardless what the majority decides in the end result. As unions have a duty of fair representation which continues to apply when there is a transfer and successor rights, a union should be obligated to consult with its members prior to the transfer so that informed decision making can take place in advance of the union entering into any agreement with a successor regarding issues related to the transfer. Unions who fail to consult with employees when there is intermingling leave themselves exposed to a charge of failing to meet their duty of fair representation.

When successor rights are being considered, sometimes the interests of the union and that of employees may conflict. A union may focus more on institutional interests and its self-preservation over the long run, while employees are interested in self-preservation and continued employment with the successor in the short run. Although the general duty of fair representation provisions in a labour statute apply to a union at all times, there should be something mentioned in a successor rights provision to remind a union that it must consult with its members before it enters into any agreement with a successor, regarding rights and obligations, which affect employees of the predecessor upon the transfers.

The process of free collective bargaining focusses on the employer and a union negotiating the terms and conditions of employment and it should be interfered with as little as possible. All labour boards need the ultimate power to amend a collective agreement when there are successor rights, but such powers should only be used after the parties themselves have attempted to amend the collective agreement, by negotiating in good faith, and after mediation has been attempted. The responsibility for making

changes to a collective agreement should be within the hands of the successor and a union, under the monitoring eye of a labour board. If the parties cannot agree on amendments, after negotiating in good faith, mediation can be engaged, failing which a labour board, as a last resort, could amend the collective agreement. When many of the terms in a collective agreement are clearly inapplicable to a successor or the collective agreement is stripped to its bare bones after a transfer because provisions do not fit with the successor's operations, it makes labour relations sense for the parties to negotiate a new collective agreement rather than attempting to negotiate numerous amendments, which might result in full blown negotiations in any event.

CHAPTER 3

INTERJURISDICTIONAL TRANSFERS

1. INTRODUCTION

Businesses and organizations are generally dynamic rather than static. As businesses and organizations expand, contract or otherwise evolve, sales, leases, transfers, mergers, amalgamations and other dispositions occur, often across labour relations statutory jurisdictional boundaries. As a result, successor rights of an interjurisdictional nature arise and the successorship provisions, which exist in the various labour statutes, become important for unions, employees and employers with respect to rights, obligations and liabilities. A successor employer desires to know whether a certificate and a collective agreement will be inherited from the predecessor in the originating jurisdiction, while unions desire to know whether bargaining rights will attach to the employer to whom the business has been transferred. In some cases, a union and employees may have had to fight hard and spend significant resources to obtain recognition rights with an employer, and when such a business, or organization, or part of it, is transferred to another sector where a different statutory regime applies, the union would like to continue its representation rights and have the terms in the collective agreement apply to the successor employer. On the other hand, a recipient employer may not want to automatically inherit the obligations of the transferor and may prefer to remain non-union or to negotiate a new collective agreement with the union which is more suitable to its operations. A balance must be struck between these competing interests when interjurisdictional transfers occur.

As early as the 1980's, privatization was a political goal of governments in Canada and unions have opposed it.[1] In the 1990's governments were pressured to reduce deficits, become more efficient and to restructure government controlled operations. In 1996 the

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[1] Gene Swimmer & Mark Thompson, *Public Sector Bargaining in Canada: The Beginning of the End or the End of the Beginning?*, (Kingston: IRC Press, 1995) at 166, 169 [hereinafter *Public Sector Bargaining*].

Sims Task Force, in reviewing the *Canada Labour Code*, noted that both federal and provincial governments are continuing to commercialize and downsize governmental activities:

> (1) by privatization or by transferring government ownership of a crown corporation, corporate holding or government service to the private sector; (2) by commercialization or by applying business-like approaches and using market forces, incentives or mechanisms in the delivery by the government of services; and (3) by contracting out or by entering into contractual agreements, which are not employment relationships, for securing the provision of goods and services to government or for the provision of government services to the public or to specific interests.[2]

To combat privatization, unions have opposed it by trying to gain political support from sympathetic political parties, negotiated collective agreement clauses to restrict the employer's right to divest its operations and pursued litigation.[3] Restructuring of government operations is ongoing and brings with it interesting issues of successor rights. The impact of the political and economic climates on labour relations has caused stakeholders to focus on interjurisdictional transfers.

Some jurisdictions do not allow the continuation of a certificate or a collective agreement which existed in one statutory jurisdiction to transfer into another jurisdiction. This gap between statutory jurisdictions creates instability, litigation and can cause disruption and unrest in labour relations. On the other hand, where there is bridging legislation between jurisdictions, there must be the means available for the affected parties to effectively enforce the valid obligations obtained in a collective agreement when they enter into the new jurisdiction or when the parties negotiate new terms.

Since a collective agreement sets out the terms and conditions of employment, while a certificate only gives the right to bargain, it is the collective agreement that is more valuable to a union and employees when a transfer occurs, as long as it can be made

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[2] Canada, *Seeking A Balance: Review of Part I of the Canada Labour Code*, (Ottawa: Queen's Printer, 1996) (Chair: A.C.L. Sims) at 76 [hereinafter *Sims Task Force*].

[3] *Public Sector Bargaining, supra* note 1 at 170.

binding on a successor employer. The purpose of successor rights legislation is to preserve bargaining rights, not to enable a union to gain additional rights. The practical outcome of a successorship in an interjurisdictional transfer may result in a union gaining bargaining rights that it would not otherwise have had.

There are two major types of interjurisdictional transfers: (1) transfers from the federal jurisdiction to a province (and vice-versa), and (2) transfers from government operations to the private sector (and vice-versa). The third type is transfers between provinces, but the jurisprudence has seldom addressed the issue.

Where bridging legislation exists between jurisdictions, a labour relations board will have to assess the appropriateness of the predecessor bargaining unit in the recipient jurisdiction, but there is no guarantee that it will not be modified to have a "goodness of fit" with the successor employer's operations. Regarding transfers from the public to the private sector, George Adams has observed:

> When there is a transfer of an undertaking from the public to the private sector, legislation substantially similar to the successor employer provisions may govern these "Crown transfers". Without it, the private sector statutes could not apply to at least one entity involved in the transfer. Such legislation empowers a board to determine the appropriate bargaining unit where there has been a transfer and a subsequent intermingling. Unlike a transfer within the private sector, where the transfer is between sectors there is no presumption that the already existing bargaining units are "appropriate" and, thus, should continue unaltered. On the contrary, the existing units must be adapted to fit the bargaining structure of the sector into which they have been transferred. That which will be "appropriate" will correspond to the existing pattern in the industry. . . .[4]

Privity of contract issues arise in interjurisdictional transfers. The principle has been stated as:

The rule relating to privity of contract has been stated in many authorities

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[4] G.W. Adams, *Canadian Labour Law*, 2nd ed, (Aurora: Canada Law Book, 1993-) at p. 8-29 [hereinafter *Canadian Labour Law*].

in sometimes varying form, but a convenient expression may be found in *Ansons's Law of Contract*, 25th ed. (1979), p. 411, in these terms:

> We come to deal with the effects of a valid contract formed, and to ask, To whom does the obligation extend? What are the limits of a contractual agreement? This question must be considered under two separate headings: (1) the imposition of liabilities upon a third party, and (2) the acquisition of rights by a third party. . . .[T]he general rule of common law is that no one but the parties to a contract can be bound by it, or entitled under it. This principle is known as that of privity of contract.[5]

In the absence of bridging legislation, privity of contract rules. When a third party is not a party to a collective agreement, there is no "meeting of the minds," mutuality or agreement, and the union and the employer who negotiated the collective agreement cannot force it upon another employer without that employer's consent. Some boards have not respected privity of contract and have inappropriately overlooked its strict application to permit a successorship in the absence of bridging legislation between jurisdictions. This has caused uncertainty and instability in the labour relations community.

Although most of the jurisdictions require bridging legislation to establish successor rights when interjurisdictional transfers occur in order to overcome privity of contract, in some of the jurisdictions without bridging legislation, a union may be able to preserve its rights through a voluntary recognition of a collective agreement negotiated in another jurisdiction. Voluntary recognition of a prior collective agreement in a new jurisdiction can occur in two ways: (1) when it is the same employer operating in the recipient jurisdiction who is signatory to the collective agreement, or (2) when a new employer in the recipient jurisdiction agrees to become signatory. Another solution available to a union in the absence of bridging legislation is for it to certify the employees in the successor jurisdiction.

This chapter reviews interjurisdictional transfers in Canada. References to the

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[5] *Greenwood Shopping Plaza Ltd. v. Beattie* (1980), 111 D.L.R. (3d) 257 (S.C.C.) at 262.

"public sector" refers to operations for which a government and its agencies are responsible for labour relations usually under public or civil service labour legislation,[6] while the reference to "private sector" refers to operations for which employers other than government or its agencies are responsible for labour relations under the general labour statutes of the federal and provincial jurisdictions and includes the quasi-public sector covered by those statutes.[7] The quasi-public sector includes municipalities, hospitals, schools and the like who are usually covered under the private sector labour relations statutes.

2. PUBLIC & PRIVATE TRANSFERS

(a) Ontario

Ontario has the most extensive interjurisdictional transfers jurisprudence of all the jurisdictions and privity of contract is strictly followed. Prior to 1977 in Ontario, there was no bridge between the public and private sectors which allowed for the continuation of bargaining rights when a transfer occurred from the Crown to the private sector. The need for bridging legislation was borne out in 1975 by the Ontario Board in *The Municipality of Metropolitan Toronto*,[8] a decision by Vice-Chair George Adams (as he then was). There, a sale occurred and ambulance services, equipment and employees were transferred from the provincial government to the municipality. While the

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[6] For example, *Public Service Staff Relations* Act, R.S.C. 1985, c. P-35; Public *Service Employee Relations* Act, R.S.A. 2000, c. P-43; Public *Service Labour Relations Act*, R.S.B.C. 1996, c. 388; *Public Service Labour Relations* Act, R.S.N.B. 1973, c. P-25; *Public Service Collective Bargaining Act*, R.S.N. 1990, c. P-42; *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c. 71; Crown *Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38, as am. 1995, c. 1, ss. 11-70; *Civil Service Act*, R.S.P.E.I. 1988, c. C-8. Note that in Manitoba and Saskatchewan only one labour statute applies to the public and private sectors: *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 4; *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 2(g).

[7] *Canada Labour Code*, R.S.C. 1985, c. L-2; *Labour Relations Code*, R.S.A. 2000, c. L-1; *Labour Relations Code*, R.S.B.C. 1996, c. 244; *The Labour Relations Act*, R.S.M. c. L10; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4; *Labour Relations Act*, R.S.N. 1990, c. L-1; *Trade Union Act*, R.S.N.S. 1989, c. 475; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A; *Labour Act*, R.S.P.E.I. 1988, c. L-1; *The Trade Union Act*, R.S.S. 1978, c. T-17.

[8] [1975] O.L.R.B. Rep. October 777 [hereinafter *Metropolitan Toronto*].

government operated the ambulance services, the Civil Service Association of Ontario represented the employees and a collective agreement was in effect with the Crown. After the transfer, the Association applied for successor rights under s. 55 of the private sector *Labour Relations Act*[9]. The Board ruled that the successor rights provision in s. 55 was not designed to allow the transfer of bargaining rights under the *Crown Employees Collective Bargaining Act* [10] to an employer under the *Labour Relations Act*[11]. The Board also indicated that a collective agreement under *The Crown Employees Collective Bargaining Act*, was "integrally related to specific provisions of that legislation."[12] In essence, there was a gap between the two statutory jurisdictions. As a result of this decision, the Ontario legislature enacted *The Successor Rights (Crown Transfers) Act, 1977*[13] ("*Crown Transfers Act*") and this bridging legislation permitted the continuation of bargaining rights from the Crown to a private sector employer, and vice versa, when a transfer occurred.

The purpose of the *Crown Transfers Act* was to provide a statutory bridge between an employer in the public sector and an employer in the private sector where employers are covered by the *Labour Relations Act*, unionized operations of the Crown were transferred to the private sector or transfers occurred from the private sector to the Crown. The policy reason for the *Crown Transfers Act* was aptly stated by the Ontario Board in the following passage:

> The Act is clearly designed to permit the Board to weigh and resolve competing interests affected by the transfer of an undertaking from the Crown to the private sector. The union representing the Crown employees has an interest in preserving its bargaining rights after the transfer. A union

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[9] R.S.O. 1970, c. 232. Subsequent versions of s. 55 are: R.S.O. 1980, c. 228, s. 63; R.S.O. 1990, c. L.2, s. 64; S.O. 1995, c. 1, s. 69.

[10] S.O. 1972, c. 67.

[11] *Metropolitan* Toronto, supra, note 8 at 779.

[12] *Ibid.* at 780.

[13] S.O. 1977, c. 30. Subsequent versions are: R.S.O. 1980, c. 489; R.S.O. 1990, c. S. 27.

> with prior bargaining rights for employees of the purchaser has an interest in protecting the integrity of its bargaining rights by seeing that the scope clause in its collective agreement is given full force and effect. The employer and the employees each have an interest in seeing collective bargaining between them continued in bargaining structures most conducive to a sound relationship, with a minimum of dislocation and fragmentation.[14]

The *Crown Transfers Act* was modelled after the successor rights provision in the *Labour Relations Act*, to make certain that transfers to and from the Crown would be treated in the same manner as private sector employers were under the *Labour Relations Act*, when the economic activity and collective bargaining relationship did not arise in a "pure" business setting, and the motivation for the transfer was not "purely" commercial.[15]

The *Crown Transfers Act* was designed to provide a flexible approach regarding successorship applications made under it, to resolve disputes about bargaining rights and to provide relief to unions, employees and employers when the employer changed and an undertaking transferred from the government to the private sector, or vice versa.[16] Under the *Crown Transfers Act*, an "undertaking" was defined as a "business, enterprise, institution, program, project, work or part of any of them,"while a "transfer" was defined as being a "conveyance, disposition or sale."[17] The Board dealt with issues involving transfers to the private sector, while the Public Service Labour Relations Tribunal dealt with transfers to the government. When an undertaking was transferred to the private sector from the Crown, or from the private sector to the Crown, any collective agreement in effect with the predecessor remained in effect until the Board or the Tribunal declared otherwise.[18] The Board or the Tribunal had the power to amend any certificates, amend

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[14] *The Corporation of The Regional Municipality of Sudbury* [1981] O.L.R.B. Rep. March 251 at 256 [hereinafter *Municipality Sudbury*].

[15] *C.U.P.E. v. Metropolitan Parking Inc.* [1980] 1 Can. L.R.B.R. 197 (Ont. L.R.B.) at 205.

[16] *Municipality Sudbury, supra* note 14 at 257.

[17] *Successor Rights (Crown Transfers) Act*, R.S.O. 1990, c. S. 27, s. 1(1).

[18] *Ibid.* at ss. 2(1), 3(1).

the description of a bargaining unit defined in a collective agreement, determine the appropriate bargaining unit for the parties and decide conflicting claims for employees when a transfer occurred.[19] An important part of the *Crown Transfers Act* was the ability of an employer or union to apply to the Tribunal or the Board within 60 days after a transfer occurred or within 60 days after a union's notice to bargain was given, to terminate the bargaining rights and the Board or Tribunal could do so if the successor had substantially changed the character of the undertaking from that which existed just before the transfer.[20] The Board and the Tribunal also had broad powers to deal with all issues related to intermingling.[21] If there was a certification or revocation application before the Tribunal when the transfer occurred to the private sector, it was transferred to the Board and the successor employer was deemed to be the employer named in it until the Board decided otherwise, but if such an application was before the Board and the transfer was to the Crown, the Crown was the party named in the certificate or revocation application until the Tribunal declared otherwise.[22] Where a union had given notice to bargain before the transfer, it was entitled to serve notice to bargain on the new employer after the transfer.[23] If the union was entitled to give notice to bargain after the transfer, this right was also preserved.[24] In both cases, the union's bargaining rights were retained until the Board or Tribunal ruled otherwise.

The principles for dealing with Crown transfers were set out in the first case dealt with by the Ontario Board under the *Crown Transfers Act*: *Owen Sound General and Marine Hospital*.[25] In that case, a psychiatric hospital was transferred from the

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[19] *Ibid.* at ss. 4(1), (2).

[20] *Ibid.* at s. 4(3).

[21] *Ibid.* at s. 5.

[22] *Ibid.* at ss. 2(2), 3(2).

[23] *Ibid.* at ss. 2(3), 3(3).

[24] *Ibid.*

[25] [1978] O.L.R.B. Rep. May 445 [hereinafter *Owen Sound Hospital*].

government to a general treatment hospital in the private sector. The Ontario Public Service Employees Union represented the employees at the psychiatric hospital under a province wide bargaining unit for government employees and a collective agreement was in effect. The general hospital had three existing bargaining units, one with the International Union of Operating Engineers, and a full-time and a part-time unit with the Ontario Nurses Association. Under the *Crown Transfers Act*, a transfer had occurred and the general hospital was bound by the provincial collective agreement until the Board defined the appropriate bargaining structures and determined which bargaining agents would represent the employees at the general hospital.[26] Bargaining unit structures which exist with government operations in the public sector are most often unsuitable in the private sector and the Board recognized that fact when it stated:

> In this case we have an undertaking being moved from the government sector to what might be called the quasi-public sector. The Crown has relinquished its role of employer and has given it to a public hospital board. Of even more significance is the fact that the collective bargaining structures existing in the two sectors are completely different. It should not be surprising, therefore, that the provisions of *The Successor Rights (Crown Transfers) Act, 1977* contain no reference to "the like bargaining unit" as does section 55 [successor rights] of the *Labour Relations Act.* Where transfer between sectors occurs there can be no presumption . . . that existing bargaining units will continue in the same form. In the Board's view, the presumption is the opposite - that existing bargaining units must be adapted to fit the bargaining structure of the sector they have just entered. To take the other approach would be to create an anomalous and unwieldy bargaining structure that would defy all common sense.[27]

The Board found the structure of the bargaining units should be the same as were found in general hospitals in the private sector.[28] The Board further indicated that transfers from the public sector to the private sector make it difficult to compare the employee support

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[26] *Ibid.* at 447.

[27] *Ibid.* at 449.

[28] *Ibid.*

for a particular union because like bargaining units cannot be compared.[29] Eight bargaining units were found appropriate and as a result of intermingling, a representation vote was ordered to determine the wishes of the employees.

As a result of several decisions of the Ontario Board which strayed from the traditional test for successorship by finding that work or functions were part of a Crown undertaking,[30]in 1992 the Board reconfirmed that the test applied to determine whether successor rights attach to a private sector employer under the *Crown Transfers Act* is the same test used to determine successor rights under the *Labour Relations Act*, which involves an instrumental approach where there must be some organizational nexus between the predecessor and the successor.[31] Successorship is not established by the mere fact that employees of a successor perform work functions that were previously performed by predecessor employees; instead, they attach to an economic vehicle, or coherent part of it, and there must be some organizational nexus between the two employers in addition to any functional connection.

When there was a transfer to the private sector, there was no presumption that a Crown bargaining unit would continue in the same form when it entered the private sector.[32] Transfers from the government to the private sector which the Board reviewed have included janitorial services, child care services, hospitals, nursing homes, water and sewage treatment plants, food services, public works services, garbage disposal, forestry

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[29] *Ibid.* at 450.

[30] *Dunning Paving Limited* [1989] O.L.R.B. Rep. July 714; *Dunning Paving Limited* [1989] O.L.R.B. Rep. October 1028; *Charmaine's Janitorial Services* [1988] O.L.R.B. Rep. August 871, *KBM Forestry Consultants Ltd.* [1987] O.L.R.B. Rep. March 399; *KBM Forestry Consultants Ltd.* [1987] O.L.R.B. Rep. July 1007.

[31] *U.F.C.W. Int'l Union v. Parnell Foods Ltd.* (1992), 93 C.L.L.C. ¶16,025 (Ont. L.R.B.) at 14,181-14,213 [hereinafter *Parnell Foods*]. See also: *St. Leonard's Society of Metropolitan* Toronto [1993] O.L.R.B. Rep. January 56, aff'd [1994] O.L.R.B. Rep. January 126 (Div. Ct.); *Mil-Dom-Ex Packaging* [1992] O.L.R.B. Rep. December 1155.

[32] *Parnell Foods, ibid.* at 14,197.

services and maintenance services.[33] Although the Board and the Tribunal shared jurisdiction for transfers under the *Crown Transfers Act*, there was not the same volume of cases from the private sector to the Crown as from the Crown to the private sector, and according to the Labour Board, there were only a few cases dealt with by the Tribunal.[34] This is not surprising since the operations of private sector employers seldom become government undertakings.

The political party in power has a definite impact on the labour legislation of the day.[35] The dominant political party in the last century in Ontario was the Progressive Conservatives. Since 1905 the Conservatives have governed, except for several periods from 1919 - 1923 when the United Farmers of Ontario were elected, 1934 - 1943 and 1987 - 1990 when the Liberals were in power, and from 1990 to 1995 when the New Democrats governed.[36] The New Democrats were elected on September 6, 1990 and governed until June 8, 1995.[37] While the New Democrats were in power, they made significant changes to the labour legislation in Ontario by repealing the *Crown Transfers Act* in February 1994,[38] and at the same time, making amendments to the *Crown Employees Collective Bargaining Act*[39] so that the successor rights provisions in the

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[33] *Parnell Foods*, *supra* note 31; [1992] *Shalom Village South* [1992] O.L.R.B. Rep. July 827; *Dunning Paving Ltd.* [1989] O.L.R.B. Rep. July 714; *Dunning Paving Limited* [1989] O.L.R.B. Rep. October 1028; *KBM Forestry Consultants Ltd.* [1987] O.L.R.B. Rep. March 399; *KBM Forestry Consultants Inc.* [1987] O.L.R.B. Rep. July 1007; Owen *Sound Hospital*, *supra* note 25; *Beechgrove Regional Children's Centre* [1978] O.L.R.B. Rep. August 716; *The Regional Municipality of Halton* [1978] O.L.R.B. Rep. August 750.

[34] *Parnell Foods*, *supra* note 31 at 14,200.

[35] For a summary of the changes in Ontario labour laws due to the change in government refer to *Canadian Labour Law*, *supra* note 4 at Supp. 1-12.

[36] *Canadian Parliamentary Guide* (Gale Canada: Scarborough, 1996) at 889.

[37] *Ibid.*

[38] *Public Service and Labour Relations Statute Law Amendment Act, 1993*, S.O. 1993, c. 38, s. 70. When this Act was proclaimed, s. 73(2) indicated the name changed to the *Crown Employees Collective Bargaining Act, 1993*. See also: J. Sack, C.M. Mitchell and S. Price, *Ontario Labour Relations Board Law and Practice*, 3d ed. (Markham: Butterworths, 1997) at p. 6.46-6.47 [hereinafter *Ontario Labour Law*].

[39] S.O. 1993, c. 38.

Labour Relations Act, with modifications, applied to the Crown and its employees.[40] For successor rights purposes, the bridge between the public and private sectors continued to exist until the Conservatives returned to power in June 1995. Then, in November 1995, the Conservatives repealed most of the labour law changes made by the New Democrats and passed legislative amendments which removed the successor rights provisions from the *Crown Employees Collective Bargaining Act* and which further clarified that the successor rights provisions in the *Labour Relations Act, 1995* were not applicable to the Crown.[41] These changes were made due to privatization plans of the government. The net effect of the changes to the Ontario legislation, with one minor subsequent exception, is that the bridge between the public and private sectors was blown away and presently continued bargaining rights for unions and unionized employees are not protected when businesses or undertakings are sold, leased, transferred or otherwise disposed of, to or from the Crown .[42]

Although the changes made to the *Labour Relations Act* by the New Democrats and the Conservatives were much more than successor rights, the stated purposes are relevant from a policy perspective. In the amendments made in 1992 by the New Democrats to the *Labour Relations Act*, the purpose provision indicated the objectives were to ensure the free exercise of workers' right to organize, to encourage collective bargaining to enhance the ability of employees to negotiate terms of employment with an employer, create co-operative approaches between employers and unions, to adjust to economic changes, develop work force skills and promote productivity, increase employee participation in the workplace, effective dispute resolution and to promote harmonious relations.[43] Clearly, the changes by the New Democrats were favourable to unions.

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[40] *Ibid.* at s. 10. See also: *Ontario Labour Law*, *supra* note 38 at p. 6.46-6.47.

[41] *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, ss. 1, 10.

[42] *Ontario Labour Law*, at p. 6.48.

[43] *Labour Relations and Employment Statute Law* Amendment Act, 1992, S.O. 1992, c. 21, s. 5.

The theme of the changes to the labour legislation by the Conservatives in 1995 was to "restore balance and stability to labour relations and to promote economic prosperity.[44] The Conservatives embarked on a massive restructuring of the public service, cost cutting and removed any legal impediments to its restructuring plans.[45] The stated purpose of the changes made by the Conservatives to the *Labour Relations* Act were to facilitate collective bargaining between employers and unions who are freely designated representatives of employees, the ability of workplaces to adapt to change, promotion of flexibility, productivity and employee involvement in the workplace, encourage communications between employees and employers, recognize the importance of economic growth, promote cooperative participation in resolving workplace disputes and to expeditiously resolve workplace disputes.[46] These changes were favourable to businesses and focussed on workers, not unions.

Harish Jain and S. Muthu have indicated that the stated purpose of the legislation implemented by the New Democrats was to encourage collective rights, collective bargaining and order employers to stop resisting the spread of unionism, while the stated purpose of the legislation introduced by the Conservatives were similar to a company's policy statement or production manual.[47] William Hayter argued that the changes made by the Conservatives restored the balance of bargaining power to where it was before the New Democrats changed the legislation and the complaints of unions that the changes were anti-union were unfounded because the unions were not providing good leadership to keep in tune with social and economic changes that were affecting workplaces.[48]

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[44] H. C. Jain & S. Muthu, "*Ontario Labour Law Reforms: A Comparative Study of Bill 40 and Bill 7*" (1996) 4 C.L.E.L.J. 311, at 311 [hereinafter *Ontario Labour Law Reforms*].

[45] J.B. Rose, "From Softball To Hardball: The Transition in Labour-Management Relations in the Ontario Public Service" in G. Swimmer ed., *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills: Oxford University Press, 2001) 66 at 67.

[46] *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 2.

[47] *Ontario Labour Law Reforms*, *supra* note 44 at 314.

[48] W. Hayter, "*Ontario' Bill 7: Advance or Retreat?*" (1996) 4 C.L.E.L.J. 331, at 331-332.

However, the discontinuance of a bridge for transfers between the public and private sectors went beyond the status quo before changes were made by the New Democrats.

Kevin Burkett indicates that the changes made in the 1990's were due to political partisanship resulting in uncertainty and divisions in the labour community, which has a negative impact on society and foregoes opportunities for collaborative approaches to economic challenges.[49] He prefers a more consultative and collaborative approach, regardless which government is in power, which had been present in Ontario before the changes in 1990. Judith McCormack argues that labour laws have always been political, governments legislate based on their view of labour relations, and the changes in Ontario's labour laws in the 1990's resulted from the polarized views of the Conservatives and New Democrats.[50] Ms. McCormack's view is an apt assessment of reality, although a collaborative consultative process is preferred because the interests and input of all parties are considered.

In 1997, the *Public Sector Labour Relations Transition Act, 1997 ("PSLRTA")* was passed and it is binding on the Crown.[51] The *PSLRTA* addresses successor rights issues related to restructuring associated with municipalities, the New City of Toronto, the New Ontario Hydro Electric Commission, hospitals, schools and other circumstances as prescribed for a transition period which ends on December 31, 2001.[52] The Labour Board is designated to deal with successor rights issues and the Crown is affected under the hospital provisions in the *PSLRTA* since it has some psychiatric facilities which are

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[49] K. M. Burkett, "*The Politicization of the Ontario Labour Relations Framework in the 1990's*" (1998) 6 C.L.E.L.J. 161, at 161, 176.

[50] J. McCormack, "*Comment on 'The Politicization of the Ontario Labour Relations Framework in the 1990's'*" (1999) 7 C.L.E.L.J. 325, at 330.

[51] S.O. 1997, c. 21, Schedule B, s. 11. Proclaimed October 29, 1997: O. Gaz. 1997, at 1962.

[52] *Public Sector Labour Relations Transition Act, 1997*, S.O. 1997, c. 21, Schedule B, ss. 2(1), 3 - 10 [hereinafter *Public Sector Transition Act*].

staffed by government workers.[53] Under the legislation, a sale includes a transfer and other disposition.[54]

The successor rights provisions in the *PSLRTA* do not preserve bargaining rights where the predecessor is the Crown, and the certificate and collective agreement of a union with the predecessor Crown are discontinued when a transfer occurs.[55] The rules the Board is to follow when assessing the common seniority of the employees of the predecessor who transfer to the successor do not apply when there is a sale of a business by the Crown; however, the rules regarding the seniority of former Crown employees may be prescribed by regulation.[56] In essence, former government employees are treated as non-union if they are working for a successor employer, except for purposes of seniority, and the terms and conditions of employment of a successor employee who is not in a bargaining unit is that which is amended from time to time.[57]

Under the *PSLRTA* a collective agreement which is binding on the successor employer cannot prohibit the hiring or continued employment of, or assignment of work to former Crown employees when they are doing essentially the same work after the transfer.[58] If the parties cannot agree on bargaining unit descriptions after the transfer and the Board defines them, a representation vote must be held and the union which represented the former Crown employees who are employed with the successor, must be a bargaining agent of choice on a representation ballot.[59] Also, when 40% of the employees

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[53] *Ibid.* at ss. 2(1), 8, 11. See also: *Public Hospitals Act*, R.S.O. 1990, c. P.40, s. 1; *Mental Health Act*, R.S.O. 1990, c. M.7, ss. 1, 7, R.R.O 1990, Reg. 741, s. 1, Schedule 1; *Mental Hospitals Act*, R.S.O. 1990, c. M.8, s. 6; *Community Psychiatric Hospitals Act*, R.S.O. 1990, c. C.21, ss. 1, 5, R.R.O. 1990, Reg. 91, s. 8; *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38, s. 1.1.

[54] *Public Sector Transition Act, supra* note 52 at s. 2(1).

[55] *Ibid.* at ss. 14(2), (3); 15(5).

[56] *Ibid.* at ss. 12(3), 33(5).

[57] *Ibid.* at s. 15(6).

[58] *Ibid.* at s. 15(7).

[59] *Ibid.* at ss. 23(1), (2), (4), (6).

in the newly described bargaining units set by the Board are non-union before the transfer date, a non-union choice must be included on the representation ballot, and for assessing the threshold, former Crown employees are deemed to be non-union.[60] In short, the *PSLRTA* provides little protection for those employees and unions of the predecessor Crown who are covered by it, especially when compared to the *Crown Transfers Act*.

In Ontario bridging legislation must exist if successor rights are to be imposed on a third party as a result of an interjurisdictional transfer. There are at present no bridging provisions for continuity of bargaining rights and collective agreements for cross-jurisdictional transfers between the government and the private sector. It seems rather odd that bridging legislation which existed governing dispositions between government operations and the private sector which were well entrenched for about 18 years in Ontario labour laws, and which served a labour relations purpose, were discontinued by the Conservatives when it was the Conservatives that were in power when the *Crown Transfers Act* was enacted in 1977. What has occurred in Ontario clearly demonstrates the vulnerability of labour legislation in changing times when there is a focus on privatization and cost cutting by government, but it also demonstrates the democratic process at work. As the New Democrats are an ally of labour, had the majority of the general electorate been satisfied with their performance, the Conservatives would not have been returned to power and the bridges for interjurisdictional transfers would still exist. The pendulum of change regarding bridging legislation has swung back regressively to the state of affairs that existed prior to 1977. A possible explanation for the Conservatives taking such action is to give the government unbridled discretion regarding privatization of its operations without successor rights hindering sales and transfers to the private sector.

(b) British Columbia

There are two collective bargaining regimes in British Columbia which are

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[60] *Ibid.* at ss. 23(5, 6).

mutually exclusive: the private sector, which includes quasi-public employers, and is covered by the *Labour Relations Code*, and the public sector which is covered by the *Public Service Labour Relations Act*.[61] In British Columbia, a collective agreement between the Crown and a union in the public sector can be transferred to the private sector, but a collective agreement cannot be transferred from the private sector to the public sector.[62]

The successorship provisions in the private sector *Labour Relations Code*[63] fill in and supplement the *Public Service Labour Relations Act* [64] (*"PSLRA"*), although there are no such provisions in the *PSLRA*.[65] Certificates issued under the *PSLRA* are considered to be certificates under the *Labour Relations Code*, provided they do not conflict with any provisions in the *PSLRA*.[66] Although certificates and collective agreements under the *PSLRA* might have aspects different from those under the *Labour Relations Code*, they are considered proceedings under the *Code* for successor rights purposes and are subject to the provisions in the *Code* as long as they are not inconsistent with the *PSLRA*.[67] The current provision of the *PSLRA* that provides for bridging from the Crown to the private sector states:

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[61] *Government of Province of B.C. (Internal Auditors) v. B.C.G.E.U.* (1989), B.C.I.R.C. No. C225/89 at 15; aff'd (Reconsideration) B.C.I.R.C. No. C55/90.

[62] *Narcotic Addiction Services of the Vancouver Resources Board & Department of Health of Government of B.C. v. Vancouver Municipal and Regional Employees Union* & B.C.G.E.U. (1977), B.C.L.R.B. No. 7/77 at 9-10 [hereinafter *Narcotic Addiction Services*].

[63] R.S.B.C. 1996, c. 244, s. 35 [hereinafter *Labour Relations Code*]. Prior versions: S.B.C. 1992, c. 82, s. 35; R.S.B.C. 1979, c. 212, s. 53; S.B.C. 1973, c. 122, s. 53.

[64] R.S.B.C. 1996, c. 388 [hereinafter *Public Service Labour Relations Act*]. Prior versions: R.S.B.C. 1979, c. 346; S.B.C. 1973, c. 144.

[65] *Government Employee Relations & Ministry of Human Resources v. Y.M.C.A.* and *B.C.G.E.U.* (1980), B.C.L.R.B. No. 3/80 at 13 [hereinafter *British Columbia Y.M.C.A.*]; *Government of the Province of B.C.* and *B.C.G.E.U.* (1977), B.C.L.R.B. No. 78/77 at 9-10.

[66] *British Columbia Y.M.C.A., ibid.* at 14.

[67] *Ibid.* at 15.

> 23. Unless otherwise provided in this Act, the Labour Relations Code applies, but, if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.[68]

When there is a transfer from the public sector to the private sector the Board can use its powers under the successor rights provisions of the *Labour Relations Code* to determine whether a certificate and collective agreement attach to the successor, define the appropriate bargaining units, determine which bargaining agent is to represent employees, deal with issues of intermingling, order representation votes as necessary, modify or restrict a provision in a collective agreement relating to the seniority rights of the employees affected by the transfer, and give directions as necessary for the interpretation of a collective agreement which affects the employees of a unit determined by the Board.[69]

Both a certificate and a collective agreement under the *PSLRA* can transfer to the private sector. In an appropriate case, a collective agreement can legally flow to the private sector from the *PSLRA* since the definition of collective agreement in the private sector *Labour Relations Code* is broad enough to encompass a collective agreement that was negotiated with the Crown in the public sector.[70] Each case is decided on its own merits and intermingling can affect the final determination of bargaining rights. When the British Columbia government sold its environmental laboratory services to a private sector employer, successor rights existed and the certificate that was issued under the *PSLRA* passed to the private sector employer, but the collective agreement did not attach because it had expired before the transfer and no new collective agreement had been negotiated.[71] The private sector employer was obligated to bargain in good faith to reach a

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[68] *Public Service Labour Relations Act, supra* note 64. Prior versions: R.S.B.C. 1979, c. 346, s. 26; S.B.C. 1973, c. 144, s. 26.

[69] *Labour Relations Code, supra* note 63 at s. 35.

[70] *Zenon Environmental Inc. v. B.C.G.E.U.* (1992), B.C.I.R.C. No. C74/92 at 11, 15-17.

[71] *Ibid.* at 15; *Zenon Environmental Inc. v. B.C.G.E.U.* (1992), B.C.I.R.C. No. C50/91.

new collective agreement with the union.

Successor rights have passed to the private sector where there was a discernable continuity in business operations including the privatization of motor vehicle services, laboratory services, ski-hill operations and forestry training.[72] Where only work (log scaling) was transferred from the government to the private sector, no successorship existed as there was not a transfer of a business or part of it.[73]

When operations are transferred from the *PSLRA* jurisdiction to the private sector, the successor rights test under the *Labour Relations Code* still has to be met in order for a successorship to exist. For example, when the government transferred day care centres to the YMCA, assets and good will passed to the YMCA and what was transferred was a discernible continuity of a business.[74]

Although successor rights often result in public sector employees being transferred to a private sector employer, there is no obligation on an employee to accept work with the new employer. When government laundry services were privatized and successor rights existed, the British Columbia Court of Appeal held that the predecessor could not force an employee to transfer to the private sector employer, and the employee could remain working for the government and take advantage of layoff rights under the collective agreement.[75] Although the Court of appeal's decision may be right in law, the underlying purpose of successor rights is to preserve jobs for employees who belong to a union.

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[72] *Insurance Corp. of British Columbia (Re)* (1998), B.C.L.R.B. No. B71/98; *Insurance Corp. of British Columbia (Re)* (1997), B.C.L.R.B. No. B157/97; *Insurance Corp. of British Columbia (Re)* (1997), B.C.L.R.B. No. B25/97; *Griffin Laboratories Corp. v. B.C.G.E.U.* (1988), B.C.I.R.C. No. C181/88 [hereinafter *Griffin Laboratories*]; *Cypress Bowl Recreations Limited Partnership v. B.C.G.E.U.* (1986), B.C.L.R.B. No. 24/86; *Lorax Forestry Ltd. v. B.C.G.E.U.* (1985), B.C.L.R.B. No. 162/85 [hereinafter *Lorax Forestry*]; *Harbour Ferries Ltd. v.* B.C.G.E.U. (1985), B.C.L.R.B. No. 86/85 [hereinafter *Harbour Ferries*].

[73] *Slocan Forest Products Ltd. v. B.C.G.E.U.* (1986), B.C.L.R.B. No. 76/86.

[74] *British Columbia Y.M.C.A., supra* note 65 at 16-26.

[75] *B.C.G.E.U. v. Indust. Rel. Council* (1988), 33 B.C.L.R. (2d) 1 (C.A.).

(c) Canada

From 1972 to 1996 there was bridging legislation in the *Canada Labour Code* (s. 47) which permitted a collective agreement to transfer from the federal public service to an employer that was a Crown agency under the *Code*.[76] During that period, the successorship provision did not preserve a collective agreement when government operations were transferred from the public service to a private sector employer (other than a Crown agency), unless the statute which created the corporation specifically indicated it could continue.[77] At that time, the only option available to a union was to certify the employees of the private sector employer.[78]

In reviewing the *Canada Labour Code* in 1996, the Sims Task Force recommended that s. 47 of the *Code* be amended to cover transfers from the public service to Crown corporations that were not agents of the Crown and other private sector employers.[79] The Task Force indicated that since the federal government continued to privatize and in the past had enacted specific legislation to continue bargaining rights in the case of museums and airport transfers, it could continue to deal with such matters on an individual basis, or amend s. 47 to include transfers from the public service to the private sector.[80]

The recommendation of the Task Force was adopted, and in 1996 s. 47 was amended to allow for collective agreements and arbitration awards to transfer from the federal public service to any *Code* employer when a part of the public service was

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[76] R.S.C. 1970, c. L-1, s. 145; as am. S.C. 1972, c. 18, s. 1. R.S.C. 1985, c. L-2, s. 47; S.C. 1996, c. 18, s. 9; S.C. 1998, c. 26, s. 22; *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, s 54; *Canada (Labour Relations Board) v. Canadian National Railway Co.* [1975] 1 S.C.R. 786 at 795; *G.S.U. v. Northern Sales Co. Ltd.* [1980] 3 Can. L.R.B.R. 15 at 18, 19,21.

[77] *Yukon Hospital Corporation* (1995), 96 di 162 at 171.

[78] *Ibid.* at 173-174.

[79] *Sims Task Force, supra* note 2 at 78.

[80] *Ibid.*

severed.[81] Lengthy waiting periods apply before applications can be made to the Canada Board for determinations related to successor rights.[82]

When a transfer occurs, the provisions in a public service collective agreement continue to apply to a *Code* employer and are interpreted according to the provisions in the *Public Service Staff Relations Act*.[83] As a result of the nuances in collective agreements in the public sector which cannot be applied by a *Code* employer, legislative mechanisms exist in s. 47 for opening up a collective agreement for mid-term negotiations.[84] Under s. 47(2), a union can apply to the Canada Board for certification during the open periods in a collective agreement which are the same as when a certification application can be brought by any union. In ss. 47(3)-(4) during the open window of 120 to 150 days after the portion of the public service was transferred to a *Code* employer, the union or employer can apply to the Board to determine whether one or more bargaining units are appropriate, which union will represent each bargaining unit and whether the collective agreement or arbitral award will remain in effect, and if so, for how long. Under s. 47(5), if the Board determines that the collective agreement or arbitral award will remain in force, the union or the employer can apply for leave to serve notice to bargain within 60 days after the Board makes such a determination. In s. 47(6), if no application is made by either party for a determination by the Board under s. 47(3), the union or employer can apply for leave to serve notice to bargain in the open window period of 151 to 210 days after the part of the public service was transferred to a *Code* employer.

Section 47.1, which was added to the Code in 1996, continues a notice to bargain that had been served before a part of the public service was transferred to the private

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[81] *Budget Implementation Act, 1996*, S.C. 1996, c. 18, s. 9 [hereinafter *Budget Implementation Act*].

[82] R.S.C. 1985, c. L-2, as am. S.C. 1996, c. 18, s. 9.

[83] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 47(1)(b).

[84] Ibid.

sector, and freezes the terms of the collective agreement until a strike or lockout occurs.[85] In s. 47.1(c) the employer or union can make an application to the Board, during the freeze period, in the open window of 120 to 150 days after the severance from the public service, for an order determining the appropriate bargaining units and which union will represent the bargaining units. Under s. 47.1(d), once the Board has made an order related to appropriate bargaining units and bargaining agents, the employer or the union can serve notice to bargain and bargaining will commence in accordance with the provisions of the *Code*.

The procedures under ss. 47 and 47.1 are cumbersome and restrictive. The time periods in s. 47 are too long from the time a part of the public service is transferred to a *Code* employer for it to make determination applications to the Canada Board. As a collective agreement continues which may have provisions in it that a *Code* employer cannot comply with because they are specifically tied to the public service regime, the new employer or union should be able to make immediate determination applications to the Board once part of the public service has been transferred to a *Code* employer regarding opening up a collective agreement for bargaining, to determine bargaining units and to determine which collective agreements apply. Although the time periods in s. 47.1 for when a determination application can be made to the Board may encourage the parties to bargain, there is little value in bargaining when the appropriate bargaining units have not been determined, especially in cases where there is more than one union representing employees before the transfer. Another option for resolving bargaining rights issues related to transfers from the public sector to the private sector is to change ss. 47 and 47.1 to permit applications to the Board in advance of the transfer occurring. The argument for immediate or advance applications to the Board is supported by the case law and the nature of public service collective agreements.

The unique features of public sector labour relations recognized in public sector

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[85] *Budget Implementation Act*, supra note 81; R.S.C. 1985, c. P-35. See also: Graham J. Clarke, *Canada Labour Relations Board: An Annotated Guide* (Aurora: Canada Law Book, 1992–) at I/287 [hereinafter *Clarke's Canada Labour*].

collective agreements sometimes make those collective agreements inappropriate in the private sector. For example, benefits, interest arbitration and procedures for position abolishment can be tied to civil service legislation which cannot apply to a private sector employer. The Sims Task Force acknowledged the differences that often exist between public sector and private sector labour relations:

> There are unique features to collective bargaining for those in the federal public service. Employees are covered not only by the collective bargaining legislation, but by the *Public Service Employment Act* and by government pension arrangements. The resulting collective agreements, which cover a wide range of federal employees are sometimes quite inappropriate for a private sector employer, not just because of what they include, but also because of what they do not include, for example matters dealt with by statute.[86]

The difficulties faced by a successor employer is shown when postal services were privatized to the Canada Postal Corporation in 1982.[87] When the Corporation was established by enactment, the bargaining units that were certified under the *Public Service Staff Relations Act* were deemed to be the bargaining units under the *Canada Labour Code*.[88]

Canada Post inherited almost 60,000 employees, in 26 bargaining units with 8 bargaining agents.[89] The Board acknowledged that bargaining units and collective bargaining in the public sector are quite different from those found in the private sector, and when a bargaining unit moved from the public to the private sector, there was a need to review its configuration.[90] Taking into account the history of the bargaining units when they existed in the public service, the structural, operational and administrative changes

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[86] *Sims Task Force, supra* note 2 at 78.

[87] *Canada Post Corporation* (1988), 19 C.L.R.B.R. (N.S.) 129.

[88] *Ibid.* at 137.

[89] *Ibid.* at 138-139, 143.

[90] *Ibid.* at 137-138, 155.

that occurred when Canada Post took over the operations and general principles regarding determination of bargaining units, such as community of interest and the wishes of the employees, the Board found four bargaining units were appropriate in the private sector.[91]

In 1990, federal museums were established into separate corporations, which were Crown agencies.[92] Employees of the museums were represented by the Public Service Alliance of Canada and the Professional Institute of the Public Service. The Crown agencies inherited 21 bargaining units and 23 collective agreements, which included two framework collective agreements. The Board took into account the history of the previous certificates and the operations and negotiations in the public service, and found a general unit and another unit for scientific researchers, to be appropriate.[93]

In 1997 the Board had the opportunity to interpret s. 47 as it applies to a private federal business in *Saskatoon (City) Re*.[94] The John G. Diefenbaker Airport was owned and operated by Transport Canada and the City of Saskatoon contracted with the Airport to provide emergency response services (firefighting, rescue and crash services) through its fire department, which services were provided out of a newly created Airport Division. The services were previously provided by Transport Canada and the employees were part of the federal public service represented by the Public Service Alliance of Canada ("PSAC"). Thirteen former public service employees accepted employment with the City performing emergency response work at the airport. They joined the International Association of Fire Fighters, Local 80, which was certified with the City under the provincial labour legislation. PSAC applied for certification of those employees under s. 47(2) of the *Code*. The fire hall, fire trucks and emergency response equipment was the same as those used when the services were provided by Transport Canada.

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[91] *Ibid.* at 153-164.

[92] *Canadian Museum of Civilization* (1992), 87 di 185.

[93] *Ibid.* at 198-200.

[94] *Saskatoon (City) v. P.S.A.C.* (1997), 39 C.L.R.B.R. (2d) 161 (C.L.R.B.); aff'd (1998), 229 N.R. 207 (Fed. C.A.); leave to appeal refused (1998), 236 N.R. 392 (S.C.C.) [hereinafter cited to C.L.R.B.R].

The Board found that the emergency response services provided at the airport by the City fell under federal labour jurisdiction and were a severable part of the City's fire department based on organization of the work, the assets and equipment used, the functions performed by the employees, the specialized nature of the work, and the direction and control of the work.[95] The Board ruled that, if a part of the public service is carved out and set up as a private federal business or part of it, then s. 47 of the *Code* will cover the labour relations that result from the transfer.[96] The Board also noted that a recipient employer did not need to be a federally regulated employer before a part of the federal public service was transferred to it in order for s. 47 to apply after the transfer, since what was important was whether the recipient employer was operating a federal activity after the transfer.[97] PSAC was certified for a unit of fire fighters who provided emergency response services at the Airport.

(d) <u>Alberta</u>

In Alberta, the private sector is covered by the *Labour Relations Code*,[98] while the public sector is governed by the *Public Service Employee Relations Act* ("*PSERA*").[99] There is no bridging legislation between the two statutes. A certificate issued under one statute cannot flow to a successor employer under the other statute. Under the *PSERA*, Crown employees constitute a single bargaining unit and the Alberta Union of Provincial Employees is deemed to be the bargaining agent for all Crown employees.[100] Presently, the interjurisdictional transfer jurisprudence in Alberta is unsettled.

In 1995, in *N.A.S.A.* v. *University of Alberta and Focus Bldg. Services et al.*, the

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[95] *Ibid.* at 170.

[96] *Ibid.* at 178.

[97] *Ibid.* at 178-179.

[98] R.S.A. 2000, c. L-1. (Prior to January 1, 2002 it was S.A. 1988, c. L-1.2).

[99] R.S.A. 2000, c. P-43. (Prior to January 1, 2002 it was R.S.A. 1980, c. P-33).

[100] *Ibid.* at ss. 10, 74(2). (Prior to January 1, 2002 it was R.S.A. 1980, c. P-33, ss. 19, 99(2)).

Alberta Board (Vice-Chair Asbell, as he then was) ruled that in theory a collective agreement negotiated in the public sector could transfer to the private sector as a voluntary recognition agreement.[101] The Board followed and expanded on the principles set out by previous Chair Sims in *Ferguson Bus Lines*,[102]where it was held that a collective agreement could transcend the constitutional divide to Alberta as long as the scope of the recognition clause in it did not expressly or impliedly restrict it to some other jurisdiction.

The Non-Academic Staff Association ("N.A.S.A.") was the bargaining agent for general support services at the University, the University was an employer under the *PSERA* and there was a collective agreement in effect between the parties. The University contracted out building cleaning, printing and food services to employers who were covered under the *Code*. N.A.S.A. made a successor rights application to the Board under the successor rights provision (s. 44) of the *Code*. The Board indicated that "where a certification was null for lack of jurisdiction, the Board can still find a valid voluntary recognition and a binding collective agreement, depending on the express language in the agreement".[103]It was further indicated that a collective agreement with a public entity could transfer from a public body, like the University, which is regulated under the *PSERA*, to an employer covered by the *Code*.[104]

The Board noted that the successorship provisions in s. 44 of the *Code* were different from those found in other jurisdictions, such as Ontario and the federal regime, since the focus in s. 44 was on the function or activity and not on the legal entity, whereas the provisions in other jurisdictions focussed on an employer's status.[105] The Board did

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[101] [1995] Alta. L.R.B.R. 396; aff'd *Alberta v. Labour Relations Board (Alta.)* (1998), 226 A.R. 314 (Q.B.) [hereinafter *N.A.S.A.* cited to Alta. L.R.B. 396].

[102] *A.T.U., Local 1374 v. Greyhound Lines of Canada Ltd. & Ferguson Bus Lines Ltd.* [1991] Alta. L.R.B.R. 646 [hereinafter *Ferguson Bus Lines*].

[103] *N.A.S.A.*, *supra* note 101 at 404.

[104] *N.A.S.A.*, ibid. at 405.

[105] *Ibid.* at 406.

not reference the British Columbia legislation.

The Board reviewed the recognition and other clauses in the collective agreement between the University and N.A.S.A., concluded they tied the collective agreement to the public service regime, and as a result, the collective agreement was incapable of being transferred to a private sector employer.[106] The decision of the Board was upheld on judicial review on the basis that it was not clearly irrational.[107] The Court found there was no issue about whether the Board had jurisdiction to consider whether a collective agreement between N.A.S.A. and the University could cross jurisdictional boundaries from the public sector tc the private sector because the applicant N.A.S.A. did not object to the Board's decision that a collective agreement could survive such a transfer.[108]

In 1996, in somewhat unique circumstances, in *A.U.P.E.* v. *Municipal District of Saddle Hills No. 20 et al.*,[109] the Alberta Board (Vice-Chair Asbell as he then was) held that a collective agreement between the Alberta Union of Provincial Employees ("AUPE") and the Crown, negotiated under the *PSERA*, could cross statutory jurisdictional boundaries and transfer to a municipality under the *Code*. The writer was counsel for the municipalities in the hearings before the Board, at the Court of Queen's Bench, the Court of Appeal and now on an application for leave to appeal to the Supreme Court.

As part of government restructuring, four improvement districts were formed into municipalities on January 1, 1995. The improvement districts were part of the Crown under the control of the Minister of Municipal Affairs, they were covered under the *PSERA* and their employees were in a deemed bargaining unit under a province wide certificate with AUPE.[110] There was a province wide collective agreement between AUPE

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[106] *N.A.S.A., supra* note 101 407-408.

[107] *Alberta v. Labour Relations Board (Alta.)* (1998), 226 A.R. 314 (Q.B.) at 336.

[108] *Ibid.* at 335.

[109] [1996] Alta. L.R.B.R. 1 [hereinafter *Saddle Hills Asbell Panel*].

[110] *Public Service Employee Relations Act*, R.S.A. 1980, c. P-33, ss. 18, 99(2).

and the Crown. The improvement districts were run by advisory councils, the members of whom were first elected and then appointed by the Minister of Municipal Affairs. The members of the advisory councils of the former improvement districts were deemed to be the councils of the municipalities until new councils were elected on October 16, 1995.[111] In s. 4(2)(a) of the *Code*, a PSERA employer is excluded from the *Code*, but if an employer is not a *PSERA* or federal employer, then it is by default a *Code* employer.[112]

The Alberta Board found that the municipalities were employers under the *PSERA* until the election since all or a majority of the councils were considered to be appointed or designated by the Crown. It ruled that an employer could move in and out of employer status under the *PSERA* and the *Code*.[113] After the election, the Board found that the municipalities were private sector employers covered by the *Code* and the Board could use its general powers in s. 11(3) of the *Code* to determine whether a collective agreement existed between the parties. There was no successorship from the *PSERA* to the *Code*, as the successorship had already occurred under the *PSERA*, and it was solely by operation of law that the municipalities fell under the *Code's* jurisdiction after the election.[114]As there was no legislative bridging provision which allowed the AUPE certificate to transfer bargaining rights to the Code, the certificate had no effect on the relationship with the municipalities after the election. The Board ruled the collective agreement could transfer to the *Code's* jurisdiction as a voluntarily recognized collective agreement.[115]

The Board recognized the differences between the *PSERA* and the *Code* and acknowledged that the biggest difference was the requirement of mediation and compulsory interest arbitration under the *PSERA*, where the scope of arbitral issues is

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[111] S.A. 1983, c. L-27.5, ss. 1(n), 9, 10.

[112] *Saddle Hills Asbell Panel, supra* note 109 at 8.

[113] *Ibid.* at 14.

[114] *Ibid.* at 14-15.

[115] *Ibid.* at 17, 20.

well defined in the legislation, while the *Code* permits strikes and lockouts, and there are no restrictions on negotiations or arbitration.[116] The Board analysed the scope and other clauses in the collective agreement to determine whether a voluntary recognition collective agreement existed after the election. The recognition clause stated:

> 6.01 The Employer recognizes the union as the exclusive bargaining agent for all Employees covered by this Agreement.[117]

The Board found that the recognition clause amounted to a voluntary recognition and then looked at other clauses in the collective agreement to determine whether it was intended to be confined to the *PSERA* jurisdiction.[118] It was acknowledged by the Board that many clauses in the collective agreement identified the *PSERA* as the statute under which it was entered into, and other provisions tied it to *PSERA* and the *Public Service Act*, including definition clauses. The Board found that the collective agreement did not contain any clause which specifically limited its jurisdiction to a particular labour statute.[119] It stated that although a collective agreement might be considered unique, the applicable test is whether "the parties intended to limit the scope of the collective agreement to the specific statutory regime".[120]

The Board ruled that Article 7.01 in the collective agreement, regarding changes in legislation, which was a savings clause, indicated a clear intention by the parties that they did not intend the collective agreement to be limited to the *PSERA* jurisdiction:

> 7.01 In the event that any law passed by the Government of Alberta or Canada renders null and void, or reduces any provision of this Agreement, the remaining provisions shall remain in effect for the

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[116] *Ibid.* at 20.

[117] *Ibid.* at 22.

[118] *Ibid.*

[119] *Ibid.* at 23-24.

[120] *Ibid.* at 24.

> term of the Agreement and the Parties hereto shall negotiate, in accordance with the bargaining procedures of the Public Service Employee Relations Act, a satisfactory provision to be substituted for the provision rendered null and void, or reduced.[121]

The Board ruled that the reference to the *PSERA* in Article 7.01 was not restrictive, as it was a "short hand method for the parties to incorporate a mechanism for negotiating replacement clauses" by referring to the bargaining procedures in the *PSERA*.[122] The Board concluded the collective agreement continued to bind the municipalities under the *Code* as a voluntary recognized collective agreement as a result of the recognition clause, and Article 7.01 indicated the intent of the parties to be bound by the collective agreement regardless of whether they were in the public or private sector.[123] If the parties could not agree as to the changes to the collective agreement, the Board reserved its jurisdiction to amend the collective agreement under s. 90 of the *PSERA*.[124]

There is a great deal of difficulty encountered in trying to assess the intention of two parties solely from clauses in a collective agreement on a broad issue of successor rights when there is no clause in the collective agreement that specifically covers the subject. Absent such a specific clause, it can be presumed there was no mutuality between the parties on the issue and that is why such a clause is not in the collective agreement. Even if such a successor rights clause were in the collective agreement, privity of contract prevents it from binding a third party, absent some contrary legislative provision. By reference in Article 7.01 of the collective agreement to the bargaining procedures of the *PSERA*, it is evident there was intent on the part of the Crown and AUPE to use the interest arbitration procedures in the *PSERA*, if need be, to resolve differences related to changes in legislation, but those provisions are not available to a private sector employer

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[121] *Ibid.*

[122] *Ibid.* at 24-25.

[123] *Ibid.* at 25.

[124] *Ibid.* at 26.

under the *Code*, and are not binding on a private sector third party unless there is some statutory provision indicating otherwise.

Although the Board reserved jurisdiction to amend the terms of the collective agreement, it is arguable that the Alberta Board does not have the statutory authority to amend the provincial collective agreement once it passed to the municipalities since s. 90(e) (now s. 65(e)) of the *PSERA* only states that the Board can "declare which collective agreement, if any, continues in force and to what extent it continues in force and which collective agreement, if any, terminates". Under that provision, the power of the Board is limited to declaring what parts of a collective agreement continue and it does not give the Board the power to amend the clauses in the collective agreement. If the municipalities and AUPE could not agree on the applicable provisions of the collective agreement, it would be improper for the Board to declare that clauses specifically tied to the public service and the government of Alberta would apply to the municipalities when the municipalities are not part of the public service, nor are they part of the provincial government. In the event the Board engaged in an exercise of declaring what parts of the collective agreement applied to the parties, the collective agreement, in its stripped down form, could become a document void of many meaningful terms and conditions usually found in a collective agreement.

The municipalities and the Crown applied for judicial review of the Board's decision[125] and they also applied for the Board to reconsider its decision. The judicial review applications were adjourned pending the Board's Reconsideration decision.

In the Reconsideration decision of the Board in *Saddle Hills*, former Chair Blair held there were no substantial errors in the Board's original decision, and agreed with the result, but gave different reasoning in several areas.[126] This decision fundamentally overrides the previous jurisprudence in Alberta related to successor rights for

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[125] *Municipal District of Saddle Hills #20 et al. v. Alberta Labour Relations Board* [1996] Alta. L.R.B.R. iv.

[126] *A.U.P.E. v. Municipal District of Saddle Hills #20 et al.* [1996] Alta. L.R.B.R. 260 [hereinafter *Saddle Hills Blair Panel*].

interjurisdictional transfers. The Reconsideration Panel agreed that the municipalities were employers under the *PSERA* when they were formed.[127]

Although historically municipalities have been under the jurisdiction of the *Code* and may be a better fit with that statute, the Reconsideration Panel rejected policy arguments that the presumptive statute for all private sector employers, like the municipalities, was the *Code*, and it rejected arguments that it did not make labour relations sense that the Legislature intended a large public sector bargaining unit, the broader public sector bargaining regime and provincial collective agreement, would apply to small municipalities.[128] It reasoned that the municipalities, as successor employers, would not acquire some of the provisions in the AUPE collective agreement, which consisted of a master collective agreement and 12 sub-agreements covering occupational groupings, since they were clearly inapplicable or inappropriate, and the collective agreement could be amended by agreement between the parties or by the Board under s. 90 of the *PSERA*.[129]

There was found to be little difference between a federal-provincial transfer and a public-private sector transfer, since the Reconsideration Panel indicated the issue is whether the collective agreement in the predecessor jurisdiction meets the definition of a collective agreement in the *Code*, of being a document in writing between an employer and a union.[130] Most importantly, this new approach was a significant departure from the previous jurisprudence of the Board:

> [T]he troubling feature of *Ferguson* is that it suggests to parties they ought to be turning their collective bargaining energies toward the ability of their collective agreement to bind a third party, under a different piece of legislation. The very nature of such an enterprise smacks of bargaining

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[127] *Ibid.* at 274.

[128] *Ibid.* at 278.

[129] *Ibid.* at 279. As of January 1, 2002 it is s. 65: *Public Service Employee Relations Act*, R.S.A. 2000, c. P-43.

[130] *Ibid.* at 280-281.

> recognition or scope, and it has generally been the view of labour boards that such issues are not to be bargained to impasse. As well, there is something patently artificial about analysing a collective agreement to discern the intentions of the parties in this regard. Can it seriously be thought that the *Ferguson* parties bargained with a view as to how their bargain would be construed under Alberta's *Labour Relations Code*? Or (in the case at hand) that the Crown and the Union had any intentions at all about how their bargain would be interpreted as it applied to a stand alone-alone municipal district coming under the *Code* instead of *PSERA*? We find it doubtful that they did, and have serious reservations about whether they ought to be expected to have put their minds to the issue in any event.[131]

The end result of the Reconsideration Panel's ruling is that the *Code* does not have to apply to an employer at the time when a collective agreement is entered into in order to make the collective agreement subsequently binding on an employer under the *Code's* jurisdiction.[132] The successor employer needs to fit the broad definition of employer as someone who "customarily or actually employs an employee."[133]As well, a bargaining agent, does not have to be a bargaining agent under the *Code's* jurisdiction when a collective agreement is entered into, nor does it need to be a certified bargaining agent, it only needs to be an organization "acting on behalf of employees," which is consistent with the definition of "bargaining agent" in the *Code*.[134] The Reconsideration Panel's reasoning is based on the policy premise that collective agreements should not "evaporate" when an employer transfers from one statutory regime to another and such a notion was "not intuitively attractive".[135]

The Reconsideration Panel rejected the proposition that the collective agreement could not cross statutory boundaries after the municipal election and compared it to

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[131] *Ibid.* at 281-282.

[132] *Ibid.* at 282.

[133] *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 1(m); R.S.A. 2000, c. L-1, s. 1(m).

[134] *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 1(b); R.S.A. 2000, c. L-1, s. 1(b).

[135] *Saddle Hills Blair Panel, supra* note 126 at 282-283.

commercial contracts which continued to be binding on the municipalities.[136] It noted that important changes took place regarding the laws which governed the employees of the municipalities after the election and the collective agreement was no different than commercial contracts that continued to be binding on the municipalities.[137] The Reconsideration Panel found it was incomprehensible that a legislative scheme could allow for the voiding of a collective agreement, and it would take clear direction from the Legislature to void a collective agreement.[138]

There are several difficulties with the Reconsideration Panel equating a collective agreement to any other contract. When the municipalities were formed, there was a legislative provision which indicated that any agreements entered into by the Minister of Municipal Affairs for the improvement districts, were binding on the municipalities.[139] This included individual contracts of employment. The collective agreement was not entered into by the Minister of Municipal Affairs. Instead, it was signed by the Public Service Commissioner, the person responsible for representing the Crown in all matters under the *PSERA*.[140] By a legislative provision, the employees of the improvement districts were continued as employees of the municipalities,[141]but there was no provision which indicated a collective agreement was to pass to the municipalities.

Regarding the collective agreement being voluntarily recognized after the election, the Reconsideration Panel arrived at the same result as the First Panel, but for different reasons:

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[136] *Ibid.* at 280.

[137] *Ibid.* at 283.

[138] *Ibid.* at 284.

[139] *Municipal Government Act*, R.S.A. 1980, c. M-26, s. 13.1(2)(d); Repealed S.A. 1994, c. M-26.1 [hereinafter *Former MGA*].

[140] *Public Service Act*, R.S.A. 1980, c. P-31, ss. 5(1)(i). Master Collective Agreement Between The Crown in Right of Alberta and A.U.P.E., dated October 4, 1994 (Term: September 1, 1994 - August 31, 1997).

[141] *Former MGA, supra* note 139 at s. 13.1(2)(b).

> We do not believe that a recognition clause is a precondition for the survival of the collective agreement. Nor, where a collective agreement has been entered into between an employer and a trade union, is it a necessary element of a voluntary recognition. In our view, the existence of a collective agreement is itself evidence of *de facto* recognition of the union as bargaining agent. Recognition clauses, as they are called, often add to the agreement valuable information about the scope of the bargaining unit. We are all familiar with "pure" recognition agreements, where the terms of a collective agreement or agreements are yet to be negotiated. Where, however, a completed collective agreement is entered into, there is no room for argument that the employer has not recognized the union as the bargaining agent for its employees. Obviously it has.[142]

The Reconsideration Panel found that the term "voluntary recognition" meant the "recognition of a union as bargaining agent in the absence of a certification order compelling such recognition."[143] It was noted by the Reconsideration Panel that the word "voluntary" goes less to how the relationship came about than to what is at the foundation of the relationship and the continuing nature of the relationship.[144]

The municipalities and the Crown applied for judicial review of the Board's reconsideration decision.[145] When there was an open period in the collective agreement near the end of its term, AUPE certified two of the municipalities under the *Code*.[146] After the first decision in *Saddle Hills*, AUPE brought successorship applications against five additional municipalities, which were formed in the same manner as those in *Saddle Hills*.[147] Those applications are held in abeyance until the final outcome in *Saddle Hills*. There is a good argument that there is no need for successor rights from the public sector

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[142] *Saddle Hills Blair Panel, supra* note 126 at 285.

[143] *Ibid.* at 286.

[144] *Ibid.* at 287.

[145] *A.U.P.E. v. Saddle Hills #20 et al.* [1997] Alta. L.R.B.R. iii.

[146] *A.U.P.E.* and *Municipal District of Saddle Hills #20*, Alta. L.R.B., Cert. No. 21-97; *A.U.P.E.* and *Municipal District of MacKenzie #23*, Alta. L.R.B., Cert. No. 22-97.

[147] *A.U.P.E. v. Municipal District of Yellowhead #94 et al.* (March 18, 1996) (Board File: GE-02110).

to the private sector since AUPE can apply under the *Code* to certify a group of former public sector employees, as it did for several of the municipalities. On the other hand, there is an equally good argument AUPE's concern is continued government privatization and the erosion of bargaining rights, which supports a need for successor rights from the public to the private sectors.

The difficulty with the Reconsideration Panel's broad approach in *Saddle Hills* is that a collective agreement negotiated in Mexico, Brazil or the United States, which is imported into the Alberta jurisdiction, could be considered a collective agreement under the *Code* because it is a document in writing between a union and an employer. Absent bridging legislation, it does not make sense that collective agreements negotiated in other jurisdictions would attach to a third party employer under the *Code*.

The definition of collective agreement in Alberta, which is the linchpin to the decisions of the Alberta Board, is essentially the same in all other jurisdictions in Canada, except Quebec. The statutes define a collective agreement as a written document between an employer and a union setting out the terms or conditions of employment, while Quebec's statue includes the additional factor that the agreement be with a certified union.[148] The Board's approach in *N.A.S.A. supra*, and in *Saddle Hills*, *supra*, is inconsistent with the overwhelming jurisprudence in the other jurisdictions that bridging legislation must exist for an interjurisdictional transfer to occur.[149]

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[148] *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 3; *Labour Relations* Code, S.A. 1988, c. L-1.2, s. 1, R.S.A. 2000, c. L-1, s. 1; Labour *Relations Code*, R.S.B.C. 1996, c. 244, s. 1; *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 1; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1; *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 2; *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 2; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 1; *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 7; *Labour Code*, R.S.Q. 1977, c. C-27, s. 1; *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 2.

[149] *Metropolitan Toronto, supra* note 8; *Successor Rights (Crown Transfers) Act, 1977*, S.O. 1977, c. 30, R.S.O. 1980, c. 489, R.S.O. 1990, c. S. 27, repealed *Public Service and Labour Relations Statute Law Amendment Act, 1993*, S.O. 1993, c. 38, s. 70; *Crown Employees Collective Bargaining Act*, S.O. 1993, c. 38, s. 10, repealed *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, ss. 1, 10; *Municipality Sudbury, supra* note 14; *Owen Sound Hospital, supra* note 255; *Durham Transport, infra* note 224; *Beacon Transit, infra* note 226; *Labour Relations and Employment Statute Law Amendment Act, 1992*, S.O. 1992, c. 21, s. 30, repealed *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, s. 1; *Narcotic Addiction Services, supra* note 62; *Public Service Labour Relations Act*, S.B.C. 1973, c. 144, s. 26, R.S.B.C. 1979, c. 346, s. 26, R.S.B.C. 1996, c. 388, s. 23; *British Columbia Y.M.C.A.*,

The Alberta Board has not dealt squarely with the issue of privity of contract that would occur when there is a third party involved in an interjurisdictional transfer. The Board avoided having to explore privity of contract issues in detail in *Saddle Hills* since once the municipalities were found to be successors under the *PSERA*, they were deemed to be signatory to the collective agreement. When they shifted to the private sector *Code* jurisdiction, it was the same parties to the collective agreement.

The interjurisdictional transfer law in Alberta is inconsistent and demonstrates the need for legislation to clarify matters. In the absence of successor rights bridging legislation, the Board should not be imposing the predecessor collective agreement on an employer in a recipient jurisdiction. It is doubtful the Legislature of Alberta could have intended that the collective agreement with the Crown, which is province wide and covers all government employees as a result of a deemed certificate, would be binding on a small municipality with about 20 employees. If the Legislature wanted bargaining rights to continue from a public sector to a private sector employer, surely it would have passed bridging legislation to clearly outline its intent.

In 1977 when the *PSERA* was being discussed in the Legislature before it was passed, it was acknowledged that there were differences between public and private sector labour relations. The Honourable M.L.A. Mr. Leitch, on behalf of the Conservative government, indicated that binding arbitration was required rather than a strike provision since the government is an employer unlike any other, and negotiations with the government take place in an economic environment which is quite different from the private sector where negotiations are based on economics.[150] He also indicated that the

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supra note 65; *Insurance Corp. of British Columbia (Re)* 1998, B.C.L.R.B. No. B71/98; *Insurance Corp. of British Columbia (Re)* (1997), B.C.L.R.B. No. B157/97; *Insurance Corp. of British Columbia (Re)* (1997), B.C.L.R.B. No. B25/97; *Griffin Laboratories*, *supra* note 72; *Cypress Bowl Recreations Limited Partnerships v. B.C.G.E.U.* (1986), B.C.L.R.B. No. 24/86; *Lorax Forestry*, *supra* note 72; *Harbour Ferries*, *supra* note 72 ; *Western Stevedoring Co. Ltd. v. Pulp, Paper & Woodworkers of Canada* (1975), 61 D.L.R. (3d) 701 (B.C.C.A.); *Wholesale Delivery Service (1972) Ltd. v. The General Truck Drivers & Helpers' Union, Local 31* [1979] 3 Can. L.R.B.R. 543 (B.C.L.R.B.); *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 36; *Royal Roads*, *infra* note 242.

[150] *Alberta Hansard*, 3rd Sess., 18th Leg., May 10, 1977, at 1248.

government has responsibilities at the bargaining table which are not found in the private sector since economics is but one factor for the government to consider, and the government plays a third party role in the private sector by regulating matters for the public interest, while at its own negotiations it plays the role of negotiator and has to also keep the public interest in mind.[151]

When Regional Health Authorities were formed in Alberta as part of government restructuring plans, the labour relations of some health care facilities were covered under the *PSERA*. Yet, the Legislature clearly indicated in the *Regional Health Authorities Act* that the *PSERA* did not apply to Regional Health Authorities, replacement certificates were issued under the Code for health care facilities that were previously covered under the *PSERA* and collective agreements negotiated under the *PSERA* were deemed to be covered by the jurisdiction of the *Code*.[152] Also, when the Banff Centre was restructured, legislation was enacted that was nearly identical to that applicable to Regional Health Authorities regarding certificates and collective agreements that were under the *PSERA* jurisdiction.[153] In *Saddle Hills*, the Board acknowledged this legislation governing Regional Health Authorities and the Banff Centre, but indicated the same clear intent by the Legislature was not present regarding the municipalities being under the *Code's* jurisdiction from the time of their formation.[154]

A voluntarily recognized collective agreement is not one that is imposed by the Alberta Board or a labour board in any other jurisdiction. It is a misnomer to call a collective agreement that an employer was forced to enter into or recognize in one jurisdiction as being voluntarily recognized in another jurisdiction. The Alberta Board has previously stated that "[a]part from this Board certifying a bargaining agent, only the

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[151] *Ibid.*

[152] S.A. 1994, c. R-9.07, ss. 24.1, 25(32), 27, as am. S.A. 1996, c. 22, s. 3.

[153] *Banff Centre Amendment Act, 1994*, S.A. 1994, c. 35, ss. 16(2), 17.

[154] *Saddle Hills Asbell Panel, supra* note 109 at 15-16; *Saddle Hills Blair Panel, supra* note 126 at 278-279.

employer can confer upon a trade union the status of a bargaining agent, by voluntarily agreeing to engage in collective bargaining with it".[155] "Voluntary" and "voluntarily" mean without compulsion and of one's own free will.[156] A collective agreement imposed by the Board in interjurisdictional transfer cases is clearly not a voluntarily recognized collective agreement, it is forced recognition or a deemed recognition since it comes about from proceedings before the Board and an order from the Board.

As the Reconsideration decision of the Board in *Saddle Hills* significantly changed the law, the *N.A.S.A.* and *Saddle Hills* cases were ordered heard *in tandem* before the Courts.[157]On judicial review, the original decision of the Board and the Reconsideration decision in *Saddle Hills* were set aside by Veit J. when she ruled that the municipalities were employers under the *Code* from the time they were formed.[158] The Court noted there were legitimate reasons for the privatization that occurred, and recognized there were fundamental differences between public and private sector labour relations in Alberta regarding certification since AUPE was the deemed bargaining agent under *PSERA*, the inability of *PSERA* employees to strike, and the fact that interest arbitration had to occur under *PSERA* related to such matters as pensions, promotion, appointment, selection, training of employees, transfer of employees, the organization of work, the number of employees and the assignment of duties.[159] Veit J. stated that having public sector collective agreements binding on private sector employers has a significant impact on government privatization policy.[160] The Court further noted that the Legislature clearly intended to distinguish between labour relations in the public and private sectors

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[155] *I.B.E.W., Local 1007 v. City of Edmonton* [1985] Alta. L.R.B.R. 85-047 at 9.

[156] *The Dictionary of Canadian Law*, 2nd ed. (Toronto: Carswell, 1995) at 1334.

[157] *Crown in right of Alberta v. M.D. Saddle Hills #20* [1997] Alta. L.R.B.R. 50 (Q.B.).

[158] *Alberta v. Labour Relations Board (Alta.)* (1998), 226 A.R. 314 (Q.B.); Notice of appeal filed January 1999 [2000] Alta. L.R.B.R. i-ii [hereinafter *Saddle Hills Queen's Bench* cited to A.R.].

[159] *Ibid.* at 322, 339.

[160] *Ibid.* at 343.

by the fact there are different Acts, the *PSERA* and the *Code*.[161] Veit J. found that the Board did not address the public policy issues of whether the Legislature intended the municipalities to have the provincial collective agreement attach to them:

> Although the government gave to the Board broad powers to interpret the term "employer", the decision about whether new municipalities, and the taxpayers in those municipalities, should be burdened with the bargaining regime developed in the public sector is a major issue of public policy which the Board cannot abrogate itself. I use the term "burden" in this situation not as any prejudgment of the issue, but as a reflection of reality: the new municipalities in this case are four, small, remote, communities in Northern Alberta. There can be no doubt that if the new municipalities must provide the salaries, wages and benefits package that has been negotiated for all provincial government employees, this will be costly for the taxpayers in those municipalities. The determination of the way in which this contest between municipal taxpayers and municipal employees will be resolved is a matter for the government, by legislation. The government's decision is embodied in the various statutes that apply to this issue.[162]

The additional costs to the municipalities if they had to apply the provincial collective agreement (impact costs), was about $1.25 million for the remaining term of the collective agreement (January 1, 1995 to August 31, 1997).[163] The Court noted that the Board had acknowledged that the municipalities were a better fit under the *Code* and it questioned why it was assumed that the government intended that the municipalities would be saddled with a grossly inapplicable collective agreement for a 9 month period.[164]

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[161] *Ibid.* at 344.

[162] *Ibid.* at 345.

[163] *Alberta v. Labour Relations Board (Alta.)* (1998), 240 A.R. 81 (Q.B.) at 84-85.

[164] *Saddle Hills Queen's* Bench, *supra* note 158 at 348.

Although Veit J. set aside the decisions of the Board in *Saddle Hills* on the basis the municipalities were employers under the *Code*, she commented on other issues in the case. Regarding the collective agreement transferring from the public sector to the private sector, she noted that the Board may only have limited powers to act as a legislator to provide a bridge between the two sectors when the Legislature has demonstrated that it knows how to provide bridging mechanisms when it wants to, as in the cases of Regional Health Authorities and the Banff Centre.[165] The Court further noted that the weight of Canadian labour authorities is that collective agreements do not transfer between the public and private sectors without a bridging mechanism, which goes against the position of the Board that a collective agreement can transcend the public-private sector divide unless the Legislature passed legislation to prohibit the collective agreement from doing so.[166] The Court also pointed out that the Board may not be able to "invoke a notion of fairness" in treating collective agreements like commercial contracts where the privity problem was cured by legislation.[167] Veit J. also noted that when the Board deems a collective agreement from another jurisdiction to be a voluntary recognition agreement under the *Code*, it may be required to receive evidence on whether in fact there was a voluntary recognition.[168]

The decision of Veit J. was appealed to the Court of Appeal by AUPE and the Board. The Court of Appeal gave its decision on January 4, 2002, overturned Veit J. and found that the Board's decisions were not patently unreasonable.[169] They were as 'reasonable as the alternative'.[170] Hunt J.A. stated that if the government did not want the

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[165] *Ibid.* at 349.

[166] *Ibid.*

[167] *Ibid.*

[168] *Ibid.*

[169] *Alberta v. Alberta (Labour Relations Board)* [2002] A.J. No. 4 (C.A.), online: QL (AJ); leave to appeal to S.C.C. filed March 4, 2002.

[170] *Ibid.* at para. 70.

result given by the Labour Board which could affect privatization, it could express its future intentions by legislation.[171] The Court found that "[l]egislative silence often challenges decision-makers because its intended effect can be puzzling. The Respondents sought to put one interpretation on that silence. But the Board's decision to view it from the opposite direction cannot be considered irrational".[172] The Municipalities have applied for leave to appeal to the Supreme Court.

The dispute in *Saddle Hills* has been ongoing for about seven years. The case demonstrates the uncertainty which arises when there are transfers between the public and private sectors. It also shows the difficulty that employers, unions, employees, labour boards and the courts encounter when interjurisdictional transfers arise.

(e) Manitoba & Saskatchewan

There is a unified labour statute in Manitoba (except teachers) and Saskatchewan with successor rights provisions that apply to the public sector and private sectors.[173] In both provinces, certificates and a collective agreements can attach to a successor employer when there is a transfer between the public and private sectors.

When there is intermingling after a transfer between the public and private sectors, the Manitoba Board has broad powers to determine the appropriate bargaining units, which certificates and collective agreements remain in effect, modify provisions in collective agreements and re-define seniority rights.[174] After a transfer occurs in Manitoba, if there is intermingling and the Board is of the view it is reasonable in the circumstances that the employees, employer or union would suffer substantial and irremediable damage or loss if notice to bargain was not allowed to be served to revise or

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[171] *Ibid.* at paras. 41-43.

[172] *Ibid.* at para. 88.

[173] *The Labour Relations Act*, R.S.M. 1987, c. L10, ss. 1, 3, 4, 56; *Trade Union Act*, R.S.S. 1978, c. T-17, ss. 2(g), 37.

[174] *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 56(2).

negotiate a new collective agreement, the Board can authorize the giving of early service of a notice to bargain.[175]

In Saskatchewan when cafeteria, food, janitorial, cleaning or security services are provided to an owner or manager of a building owned by the Government of Saskatchewan, a municipal government, hospital, university or other public institution, a sale of a business is deemed to have occurred if the site of the work was the principal place of work for the employees, the predecessor ceases providing such services and the successor provides substantially similar services.[176] When a transfer of part of a business occurs between the public and private sectors in Saskatchewan, there is no presumption that the existing bargaining units are appropriate and should remain unaltered; existing bargaining units must be adapted to fit the bargaining structure of the sector they are transferred into.[177]

In *Saskatchewan Government Employees Union* v. *Headway Ski Corp.*, the Parks and Recreation Department, which was part of the Saskatchewan government, operated a ski hill and the facilities and operation were transferred to the successor Headway under a lease agreement.[178] The Board indicated there was an automatic certification of the successor regarding employees in a defined bargaining unit without regard to their wishes, whether or not they become employees of the successor's business.[179] The Board placed the employees in a new bargaining unit with the successor, amended the union's previous certification order, and ordered the parties to negotiate a new collective agreement. Even under the Board's broad power to "otherwise order" in s. 37 of the Act, it had no power to alter the collective agreement and could only declare that the

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[175] *Ibid.* at s. 56(3).

[176] *Trade Union Act*, R.S.S. 1978, c. T-17, s. 37.1.

[177] *S.G.E.U. v. Headway Ski Corp.* (1987), 87 C.L.L.C. ¶16,050 at 14,382 [hereinafter *Headway Ski*].

[178] *Ibid.* at ¶16,050.

[179] *Ibid.* at 14,382.

collective agreement did or did not apply to the successor employer in its entirety.[180] The collective agreement with the Government was for a "service-oriented government operation and was obviously never intended to apply to a small private sector, profit-oriented employer."[181]

The unified approach to successor rights in Manitoba and Saskatchewan eliminates the need for bridging provisions between the public and private sectors. In these two provinces the governments have chosen not to make distinctions between labour relations in the public and private sectors related to successor rights.

(f) The Maritimes & Quebec

In New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island, the private sector labour statutes exclude operations of the Crown.[182] There are no bridging provisions between the private sector and the public sector in those jurisdictions.

In Quebec, the *Labour Code* applies to the Crown, and the successor provisions in s. 45 of it regarding the alienation of an undertaking applies to the private sector and to the public and parapublic sectors.[183] The public and parapublic sectors refers to colleges, schools and the government, government departments, agencies and bodies whose personnel are appointed under the *Public Service Act*.[184] It has been held that transfers from the private to the public sector are to be treated differently than from the public to the private sector, since the Quebec *Labour Code* is a statute of general application, whereas the *Public Service Act*, is a special law of exception and a person cannot become an employee of the government unless he or she is appointed according to the provisions

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[180] *Ibid.* at 14,383.

[181] *Ibid.* at 14,383-14,384.

[182] *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 3; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1(8); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 4; *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 7(i).

[183] *Labour Code*, R.S.Q. 1977, c. C-27, ss. 1(l), 111.1.

[184] *Ibid.* at ss. 1(l), 111.2.

of the Act.[185] A certificate and a collective agreement can transfer from the public to the private sector under the successor rights provision in the *Code*.[186] Since there is no voluntary recognition in Quebec,[187] if a certificate did not attach to a private sector employer on an alienation of a public sector undertaking, the collective agreement would not bind the private sector employer.

3. FEDERAL & PROVINCIAL TRANSFERS

(a) Federal v. Provincial Constitutional Jurisdiction Over Labour[188]

Whether jurisdiction over labour matters is federal or provincial is an important consideration for employers and unions when considering successor rights applications. If a business has been transferred from a province to the federal setting, a provincial labour board will not have jurisdiction to consider the application. The same applies if a federal business becomes provincial in nature since the federal labour board will not have the power to deal with a successor rights application under its legislation. Jurisdiction over labour relations is presumptively provincial in nature.[189] The Parliament of Canada has jurisdiction over a number of areas and the split between federal or provincial jurisdiction over labour relations is constitutionally based. In s. 91 of the *Constitution Act, 1867* ("*Constitution*"), the Parliament of Canada has power over the postal service, national defence, banking, shipping, navigation, lighthouses, inland and costal fisheries, ferries

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[185] *Le Syndicat des Fontionnaires Provinciaux du Quebec v. Centre D'Insemination Artificielle du Quebec Inc.* (1987) 88 C.L.L.C. ¶14,022 (Que. C.A.) at 12,122.

[186] *Ibid.* at 12,122-12, 123; *Labour Code*, R.S.Q. 1977, c. C-27, s. 45.

[187] Voluntary recognition was abolished in Quebec in 1969: *An Act To Amend The Labour Code*, S.Q. 1969, c. 47, ss. 2(e), 21, 22.

[188] *Canadian Labour Law*, *supra* note 4 at paras. 3.10-3.650.

[189] *Toronto Electric Commissioners v. Snider* [1925] 2 D.L.R. 5 (P.C.); *Four B Manufacturing Ltd. v. United Garment Workers of America* (1979), 102 D.L.R. (3d) 385 (S.C.C.) at 395 [hereinafter *Four B Manufacturing*].

between provinces, aboriginals and penitentiaries.[190] By way of exclusion from provincial authority under s. 92(10) of the *Constitution* over local works and undertakings, the Parliament of Canada has authority over ships, railways, telegraphs and any other works which are inter-provincial or that extend beyond the boundaries of a province, and any local works that are for the general advantage of Canada or for two or more provinces. Provincial jurisdiction for labour relations flows from property and civil rights in s. 92(13) of the *Constitution*. In its review of Canadian labour relations in 1968, the Woods Task Force recognized the problems caused by the division of powers in the *Constitution* for labour relations:

> 768. Some industries, particularly transportation, find that at a given moment they may be the victim of divided jurisdiction; they may find that they are claimed by both federal and provincial jurisdictions or by neither. Litigation doubtless resolves some of these issues from time to time, but it is an expensive and piecemeal way of seeking a solution. We can do no more than comment on the existence of the constitutional no-man's land that may at any point be claimed by both or neither and the difficulty in which it must place the industrial relations in certain industries.[191]

The *Canada Labour Code* (Part I)[192] covers labour relations in the federal sector, and about 700,000 employees fall under its jurisdiction.[193] The *Code* applies only to federal works, undertakings or businesses,[194] and its jurisdiction mirrors the *Constitutional* authority of the Parliament of Canada. Telecommunications, inter-national and inter-provincial transportation or trucking, fall under federal labour

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[190] (U.K.) 30 & 31 Vict., c. 3.

[191] Privy Council Office, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: Queen's Printer, 1969) (Chair: H.D. Woods) at p. 214.

[192] R.S.C. 1985, c. L-2.

[193] Canada Labour Relations Board, *23rd Annual Report 1995-1996*, (Ottawa: Queen's Printer, March 1997) (Chair: J.F.W. Weatherill) at 2 [hereinafter *Canada Board Annual Report*].

[194] *Supra* note 192 at s. 4.

jurisdiction.[195] The *Code* also applies to Crown corporations that are agents of the Crown and to provincial Crown agents in the area of telecommunications.[196] As a result of parliamentary powers in the *Constitution* for matters declared to be for the general advantage of Canada, there is federal labour jurisdiction over uranium mining, nuclear power installations, grain handling, and flour and feed mills.[197]

There is no simple rule for determining whether an undertaking falls under federal labour jurisdiction or that of a province, and each case has to be evaluated on its own merits. Often employers and unions engage in "constitutional hopping" between federal and provincial jurisdictions. If work being scrutinized forms an integral, vital or essential part of an operation which is under Parliament's competence, federal labour laws will apply.[198] Aeronautics falls under federal competence as a result of the peace, order and good government power in s. 91 of the *Constitution,*[199] but the construction of a runway at an airport is not an integral part of federal jurisdiction over aeronautics.[200] Stevedoring is an essential part of the transportation of goods related to shipping and is under federal labour jurisdiction.[201] Highway construction in a national park is under provincial labour jurisdiction since it is not essential to the operation of the park.[202] Reconstruction of railway bridges for an inter-provincial railway is under provincial jurisdiction as it is a

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[195] *Clarke's Canada Labour, supra* note 85 at LC/5-LC/6.

[196] *Supra* note 192 at ss. 5, 5.1.

[197] *Canada Board Annual Report, supra* note 193.

[198] *Reference re Industrial Relations and Disputes Investigation Act (Canada)* [1955] 3 D.L.R. 721 (S.C.C.) [hereinafter *Disputes Investigation Act*]; *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)* (1978), 93 D.L.R. (3d) 641 (S.C.C.) [hereinafter *Construction Montcalm*]; *Bell Canada v. Quebec (Commission de la santé et de la sécurité de travail)* (1988), 51 D.L.R. (4th) 161 (S.C.C.).

[199] *Re Aerial Navigation* [1932] 1 D.L.R. 58 (P.C.); *Johannesson v. The Rural Municipality of West St. Paul* [1951], 4 D.L.R. 609 (S.C.C.).

[200] *Construction Montcalm Inc., supra* note 198.

[201] *Disputes Investigation Act, supra* note 198.

[202] *Midvalley Construction Ltd. v. I.U.O.E., Local 955* [1974] 6 W.W.R. 575 (Alta. S.C.).

one time occurrence similar to initial construction.[203] Reconstruction work of an inter-provincial pipeline is provincial work since replacement or repair of pipe is not a continuing activity that contributes to the ongoing operation of the pipeline.[204]

Jurisdiction depends on the overall legislative authority, rather than an employer's identity, and the focus is on what an employer does when determining federal or provincial jurisdiction.[205] For example, although an employer's railway operations fall under the federal labour jurisdiction, a hotel operated by the railway is under provincial labour relations jurisdiction since the hotel is not essential to run the railway.[206]

In determining if a subsidiary undertaking of an employer is within the federal labour jurisdiction, the relationship between the core undertaking and the subsidiary operation is examined, and the nature of the business as a going concern is considered without regard to occasional or exceptional factors.[207] The linchpin to determining jurisdiction is the whole relationship between the core undertaking and the subsidiary operation. A functional approach is used to assess the facts, and there must be a high degree of operational integration of an ongoing nature in order for federal jurisdiction to apply.[208] If the subsidiary operation is found to be an essential or an integral part of the core undertaking, it will be found to fall within the federal jurisdiction. Runway maintenance has been found to be an integral part of an airport and under federal jurisdiction.[209] Maintaining, inspecting, repairing and certifying aircraft is under the

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[203] Re *Canada Labour Code* (1986), 34 D.L.R. (4th) 228 (F.C.A.) [hereinafter *Canada Labour Code*].

[204] *Waschuk Pipeline Construction Ltd. v. General Teamsters, Local 362* [1987] Alta. L.R.B.R. 611; aff'd [1988] Alta. L.R.B.R. 369 (Q.B.).

[205] *Canada Labour Relations Board v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85 (S.C.C.) at 90.

[206] *C.P.R. v. Attorney-General of British Columbia* [1950] 1 D.L.R. 721 (P.C.).

[207] *Construction Montcalm, supra* note 198 at 653; *Northern Telecom Ltd. v. Communications Workers of Canada* (1979) 98 D.L.R. (3d) 1 (S.C.C.) at 14 [hereinafter *Northern Telecom*].

[208] *Canada Labour Code, supra* note 203.

[209] *Re Kelowna (City) v. C.U.P.E.* (1974), 42 D.L.R. (3d) 754 (B.C.S.C.).

federal domain.[210] Airport security services related to pre-boarding and frisking of passengers are vital, essential and integral services related to aeronautics and are under federal labour jurisdiction.[211] The operation of limousine or taxi services to an airport are not within the federal domain as they are only incidental to aeronautics.[212]

Sometimes the split in constitutional jurisdiction results in bifurcated labour relations for an employer, but administrative inconvenience is irrelevant to a jurisdictional consideration.[213] Where a hydro company runs a nuclear generating station, the employees doing work for the production of nuclear energy fall under federal labour jurisdiction since nuclear energy is integral to Parliament's power over peace, order and good government in the *Constitution*, while those employees using the energy from the nuclear reactors to run turbines, which run generators to produce electricity, are under provincial labour jurisdiction.[214]

Although Indian reserves are under federal jurisdiction, when a company was incorporated by natives and a shoe making business was operated on a reserve, it was found to be under provincial authority for labour relations purposes since the functional nature of the operation and its normal activities were not necessarily incidental to native status.[215] Where the major function of a ship is to transport supplies and material to offshore drilling rigs and ships, labour relations is governed by the federal jurisdiction,[216]

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[210] *Field Aviation Co. v. Alberta (Industrial Relations Board)* (1974), 49 D.L.R. 234 (Alta. C.A.); Butler *Aviation of Canada Ltd. v. I.A.M.A.W.* (1975), 76 C.L.L.C. ¶14,008 (F.C.A.)

[211] *C.G.A. v. Pinkerton's Of Canada* (1990), 90 C.L.L.C. ¶16,061(Can. L.R.B.), aff'd (1992), No. A-1078-90 (F.C.A).

[212] *Colonial Coach Lines Ltd. v. Ontario (Highway Transport Board)* (1967), 62 D.L.R. (2d) 270 (Ont. H.C.); aff'd (1967), 63 D.L.R. (2d) 198 (Ont. C.A.).

[213] *Ontario Hydro v. Ontario (Labour Relations Board)* (1993) 107 D.L.R. (4th) 457 (S.C.C.) at 486-487.

[214] *Ibid.* at 457-459.

[215] *Four B Manufacturing, supra* note 189 at 395.

[216] *Seafarers' International Union of Canada v. Crosbie Offshore Service Ltd.* (1982), 135 D.L.R. (3d) 485 (F.C.A.); leave to appeal to S.C.C. refused (1982), 135 D.L.R. (3d) 485n.

whereas shipping operations which are carried on solely within the boundaries of a province are under provincial labour jurisdiction.[217]

The Supreme Court has summarized a general approach that is used by the courts and labour boards in determining whether an operation is in the federal or provincial labour jurisdiction:

1. Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

2. By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

3. Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

4. Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of it labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

5. The question is whether an undertaking, service or business is a federal

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[217] *Agence Maritime Inc. v. Canada (Labour Relations Board)* (1969), 12 D.L.R. (3d) 722 (S.C.C.).

one depends on the nature of its operations.

6. In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a "going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.[218]

Due to the legislative authority which stems from the *Constitution*, jurisdiction over labour relations is fragmented and there are grey areas. Road transportation is an industry where, as a result of business expansion and reorganization, businesses or parts of them move in and out of federal and provincial labour jurisdiction.[219] Resolution of jurisdictional issues can result in delays in processing applications before a labour board, especially if the courts become involved. When there is doubt about which jurisdiction applies, prudent parties file applications at both the Canada Board and the respective provincial labour board, to preserve interests.

Professor Hickling argues that it is theoretically open to the courts and labour boards to develop a common law successorship doctrine to bridge the gap between the federal and provincial jurisdictions, the same as was developed in the United States.[220] He also asserts privity of contract should not have any application in successorships and that absent bridging legislation, the only way unions can protect their rights is to negotiate a successorship clause in a collective agreement.[221] A common law doctrine of successorship has never emerged in Canada and a legislative solution is required to bridge

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[218] *Northern Telecom, supra* note 207 at 13.

[219] James E. Dorsey, *Canada Labour Relations Board: Federal Law and Practice* (Toronto: Carswell, 1983) at 79.

[220] M.A. Hickling, "*Interjurisdictional Transfers: Successor Rights At Arbitration*" (1991) 2 Lab. Arb. Y.B. 223 at 225, 227-236 [hereinafter *Successor Rights At Arbitration*].

[221] *Ibid.* 237-251.

gaps between statutory jurisdictions. Since the courts and labour boards have narrowly interpreted the definitions of employee and employer in the labour statutes in Canada as covering those subject to the superintending jurisdiction of a given board, statutory bridges are required in a recipient jurisdiction for the continuation of bargaining rights.[222] The federal and provincial legislatures can enact legislation which recognizes bargaining rights from each other's jurisdiction since they are enacting legislation that is within their constitutional jurisdiction.[223] Privity of contract continues to apply in Canada, unless legislation has usurped it. Without legislation to continue a collective agreement from one jurisdiction to another, a successorship clause negotiated in a predecessor jurisdiction is worthless.

(b) Ontario

The Ontario Board has held fast to the principle that a bridging provision must exist between two statutory jurisdictions in order for successor rights to result, otherwise privity of contract prevails. Even where the Board was considering an application regarding a transfer of trucking operations from the federal sector to the province, it indicated that the focus is not so much an issue of constitutional jurisdiction, but whether there is some legislation to bridge the gap between the jurisdictions:[224]

> . . .[T]he Board finds it is a precondition . . . that a trade union that is seeking to preserve certified bargaining rights must have obtained these rights from this Board. . . . [T]he Board confirms applicant counsel's expressed concern that there is a gap in the legislation in respect to preservation of bargaining rights when the sale of a business takes place between two employers whose bargaining relationship with their employees is governed by different legislative or statutory jurisdictions. However, that is not a problem which the Board has the power to cure;

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[222] Thomas S. Kuttner, "*Federalism and Labour Relations in Canada*" (1997) 5 C.L.E.L.J. 196 at 214 -215.

[223] *Ibid.* at 215 -216.

[224] *Durham Transport Inc. v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141* [1978] 2 Can. L.R.B.R. 555 (Ont. L.R.B.) at 557 [hereinafter *Durham Transport*].

> rather it is a problem that would have to be dealt with by the appropriate legislative authority.[225]

The Ontario Board has dealt with the issue of privity of contract regarding interjurisdictional transfers in *Beacon Transit Lines Inc.* v. *Teamsters Union, Local 938.*[226] In that case, Humes Transport was an employer in the federal jurisdiction and it carried on trucking operations inter-provincially. It was certified by the Teamsters and there was a collective agreement in effect. The company went bankrupt and Beacon Transit bought the Ontario trucking licenses. The collective agreement contained a successor and assigns clause in Article 39 which stated:

> The terms of this agreement shall be from April 1, 1986 to March 31, 1987. This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns.[227]

The Teamsters filed a grievance claiming successorship and wanted the matter to proceed to arbitration. Before appointing an arbitrator, the Minister of Labour asked the Board to determine whether there was a collective agreement in effect. The Teamsters claimed the successor and assigns provisions made the collective agreement binding on Beacon Transit, but the Board held that privity of contract prevailed and the collective agreement was not binding on Beacon Transit. The Board further stated:

> The successor rights provisions of the Act were introduced in response to the findings of the *Report of The Royal Commission on Labour-Management Relations in the Construction Industry* (H. Carl Goldenberg, Commissioner, (1962)), that in the absence of specific legislative authority, privity of contract applies to prevent the imposition of terms negotiated and agreed to by one party upon a successor to that party. Although it is agreed that collective agreements are unique contractual arrangements and that they are not generally to be interpreted or applied in accordance with ordinary common law doctrines of contract law, it is

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[225] *Ibid.* at 558.

[226] (1987), 17 C.L.R.B.R. (N.S.) 265 [hereinafter *Beacon Transit*].

[227] *Ibid.* at 266-267.

> difficult in these circumstances to see how, in the absence of a statutory remedy, any rules of interpretation can apply to bind a party such as Beacon to a document to which it was not a party. It is true that bargaining unit employees, who are not signatories to a collective agreement, are bound by the agreement. But these persons are bound by virtue of legislative provisions . . . not by virtue of contractual provisions analogous to art. 39. To the extent that the notion of privity of contract has not been abrogated by statutory provisions to the contrary, it applies to preserve contractual rights either to enter into, or not to enter into an agreement.[228]

In 1992, when the New Democrats were in power, s. 64.1 was added to the Ontario *Labour Relations Act* to bridge the gap between the federal and provincial labour jurisdictions so that successor rights could flow to a provincial employer by making the successor rights provisions in the Act applicable to such transfers.[229] Section 64.1 was short lived and it was repealed in 1995 by the Conservative government.[230] Section 64.1 was dealt with in *Charterways Transportation Ltd.* where the Town of Ajax contracted for many years for labour with Charterways to maintain and operate transit buses owned by the Town for a transit system.[231] Due to the interprovincial nature of its overall operations, the Ontario Board had previously determined that Charterways fell under federal jurisdiction for labour relations matters.[232] The Town terminated its contract with Charterways, and subsequently hired most of the unemployed Charterways drivers to operate the busses. The Board ruled that successor rights passed to the Town when it acquired the former Charterways employees because the Town transferred to itself a part of the business of Charterways, and by hiring the employees, it took back significantly more than it had contracted out. Subsequently, the Board has confirmed that where there is no statutory bridge between the federal and Ontario jurisdictions, a successorship

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[228] *Ibid.* at 268.

[229] *Labour Relations and Employment Statute Law Amendment Act, 1992*, S.O. 1992, c. 21, s. 30.

[230] *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, s. 1.

[231] *Charterways Transportation Ltd. v. CAW-Canada & Local 222*, (1994), 24 C.L.R.B.R. (2d) 280 (Ont. L.R.B.); aff'd (2000), 185 D.L.R. (4th) 618 (S.C.C.).

[232] *Charterways Transportation Limited* [1993] O.L.R.B. Rep. November 11251.

cannot occur.[233]

(c) British Columbia

In British Columbia transfers from the federal jurisdiction to the province cannot occur without bridging legislation. In *Western Stevedoring Co. Ltd.* v. *Pulp, Paper & Woodworkers of Canada*, the British Columbia Court of Appeal held that a collective agreement from the federal jurisdiction could not be transferred to the province since the definition of employer in the British Columbia *Labour Relations Code* required that the collective agreement be between a union and a provincial employer.[234]

In *Wholesale Delivery Service (1972) Ltd.* v. *The General Truck Drivers & Helpers' Union, Local 31*, the company was under federal labour laws and there was a certificate and collective agreement with the Teamsters.[235] Wholesale went bankrupt and its intra-provincial motor carrier licences were transferred to Overland Freight. Alliance Brokers employed most of Wholesale's former employees and had an agreement with Overland Freight for use of the licenses. The Teamsters applied for successor rights under s. 53 of the British Columbia *Labour Code*, which stated in part:

> 53(1) Where a business or part thereof, or a substantial part of the entire assets thereof, are sold, leased, transferred, or otherwise disposed of, the purchaser, lessee, or transferee is bound by all the proceedings under this Act before the date of the sale, lease, transfer, or other disposition, and the proceedings shall continue as if no change had occurred; and, where a collective agreement is in force, that agreement continues to bind the purchaser, lessee, or transferee to the same extent as if it had been signed by him.[236]

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[233] *Rogers Cantel Paging Inc.* [1997] O.L.R.B. Rep. January/February 129.

[234] (1975), 61 D.L.R. (3d) 701 at 707-708.

[235] *Wholesale Delivery Service (1972) Ltd. v. The General Truck Drivers & Helpers' Union, Local 31* [1979] 3 Can. L.R.B.R. 543 (B.C.L.R.B.) [hereinafter *Wholesale Delivery*].

[236] *Labour Relations Code*, R.S.B.C. 1979, c. 212.

The Board found that the word "business" was not defined in the *Labour Code*, its meaning was not confined to a provincial business and a federal business was a business for the purposes of s. 53.[237] The Board held that a certificate issued by the Canada Board could not be transferred to the provincial jurisdiction as it did not result from a "proceeding under this Act" in s. 53(1), and a collective agreement from the federal jurisdiction could not be recognized since the employer was not a provincial employer because the Board was bound by the Court of Appeal's decision in *Western Stevedoring*:[238]

> Having decided that Section 53 does not permit the Board to import a federal certificate into the provincial jurisdiction, we turn to the question of whether any collective agreement in force between the Teamsters and WDS could continue to bind a provincial "successor" by operation of Subsection 53(1). The term "collective agreement" which appears in that subsection is defined in Subsection 1(1) as "an agreement in writing between an employer . . . and a trade-union . . . ". The word "employer" used in that definition is in turn defined in Subsection 1(1) and was the subject of the B.C. Court of Appeal decision in Western Stevedoring 61 D.L.R. (3) [sic] 701 at p. 707-8:
>
> > Turning now to the provincial Code, it must follow that, if it is intended to apply to employers in the stevedoring business, it is beyond the powers of the Legislature of the Province. To avoid such a result one must, therefore, construe the word "employer", which is thus defined in the Act:
> >
> > > 'employer' means a person who employs one or more than one, employee, and includes an employer's organization;
> >
> > as not including an employer the regulation of whose relations with his employees is within the exclusive jurisdiction of the Dominion. Put another way, the word "employer" must be confined in scope to employers whose relations with their employees are within the legislative

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[237] *Wholesale Delivery, supra* note 235 at 545.

[238] *Ibid.*

jurisdiction of the Province.

> As a result of this decision we must define collective agreement as an agreement between a trade union and a provincial employer. Consequently, any collective agreement which may have been in force under the Canada Labour Code between WDS and the Teamsters is not a collective agreement for the purposes of Subsection 53(1) and cannot continue to bind the provincial "successor".[239]

In 1992, s. 36 was added to the *British Columbia Labour Relations Code* to permit a federal-provincial successorship:[240]

> 36. If collective bargaining relating to a business is governed by the laws of Canada and that business or part of it is sold, leased, transferred or otherwise disposed of and becomes subject to the laws of British Columbia, section 35 [successor rights] applies and the purchaser, lessee or transferee is bound by any collective agreement in force at the time of disposition.[241]

Under s. 36, a certificate cannot transfer into the British Columbia jurisdiction, only a collective agreement can survive the transfer.

In 1996, the Labour Relations Board had an opportunity to review s. 36 in *Royal Roads University* v. *P.S.A.C.*[242] The Royal Roads Military College was run by the Department of National Defence and was transferred to the province when federal budget cuts occurred. Materials and equipment of a nonmilitary nature were transferred to the province, while everything that related to the military was transferred to the Royal Military College in Kingston. The Public Service Alliance of Canada ("PSAC") had a bargaining certificate and a collective agreement covering the support employees at the

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[239] *Ibid.*

[240] *Labour Relations Code*, S.B.C. 1992, c. 82.

[241] *Labour Relations Code*, R.S.B.C. 1996, c. 244, as am. *ibid.*

[242] (1996), 31 C.L.R.B.R (2d) 1 [hereinafter *Royal Roads*].

College under the *Public Service Staff Relations Act.*[243] PSAC applied for successorship under the general successorship provision (s. 35) and under the federal - provincial transfers provision (s. 36) of the *Labour Relations Code.*[244] The Board denied successorship under s. 35 since no discernible continuity passed from the College to the University and there was no sale, lease, transfer or other disposition of a business within the meaning of the provincial legislation. The Board found without hesitation that the essence of the business was transferred to the Royal Military College in Kingston which was under federal jurisdiction.

Although it was unnecessary for the Board to deal with the issues arising from s. 36 due to its findings under s. 35, it decided to do so on the basis that guidance regarding the section was required. The Board recognized the difficulty in interpreting the bridging provision in accordance with the definition provisions of the *Labour Relations Code*, which if strictly followed, would lead to an inappropriate result of a successorship never occurring:

> Treating the words "collective agreement" as a defined phrase for the purpose of s. 36 leads to an absurdity. If, in s. 36 of the *Code*, the words "collective agreement" in the phrase "collective agreement in force at the time of disposition are to be read as defined by the *Code*, then the phrase means "a written agreement between an [provincial] employer . . . and a [provincial] trade union . . . in force at the time of disposition." (We insert the word "province" in the rendition on the strength of the definition of trade union and the *Wholesale Delivery* case). No such agreement can ever exist because in any disposition from the federal jurisdiction to the provincial, the collective agreement will have been concluded under the federal jurisdiction between a federal employer and a trade union: *Wholesale Delivery, supra.* . . .
>
> Even if PSAC now, or at the time its collective agreements were negotiated with Treasury Board, met the requirements of a local or provincial organization, as required by the *Code* for provincial purposes, this would still not avoid the problem identified in the *Wholesale Delivery (1972) Ltd.* case. Treasury Board was, at the time the collective

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[243] R.S.C. 1985, c. P-35.

[244] S.B.C. 1992, c. 82.

> agreements were negotiated, an employer whose relations with its employees was not within the legislative jurisdiction of the province: see *Western Stevedoring, supra*, at pp. 707-708 D.L.R. Thus, the product of that relationship could never meet the definition of collective agreement under the *Code*, not because of the status of the union, but because of the status of the employer at the time the agreement was concluded. . . .
> . . . In short, if the terms in s. 36 are read as defined terms, then the whole of the section is rendered ineffective, unenforceable and absurd.[245]

The Board concluded that s. 36 was designed to facilitate a successorship from the federal to the provincial jurisdiction and the intention of the Legislature was that the words "collective agreement"and "collective bargaining" in s. 36 were to be given a "common generic understanding" contrary to the definitions of those terms in s. 1 of the *Code*.[246] Therefore, if there was otherwise a successorship, the collective agreement would bind the provincial employer. Once a collective agreement was transferred to the provincial jurisdiction from the federal, it would be a voluntary recognition collective agreement, and if the employer refused to recognize the union, it had two options.[247] First, the union could make an application to the Board for a declaration that a collective agreement was in effect. Secondly, it could use the procedures in the *Labour Relations Code* to apply to certify the employees. Presuming the union meets the registration and union status requirements in the provincial legislation to represent employees, and on a certification application the employees have majority support for the union, the Board believed both options gave a remedy which was legally binding on the recipient employer.[248] The option of applying to certify the provincial employer is not a remedy with much substance since even without s. 36 a union from the federal jurisdiction could make efforts to organize the employees and certify the successor, as long as it first took steps to gain provincial union status, which could be done with little difficulty. For policy

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[245] *Royal Roads, supra* note 242 at 31-32.

[246] *Ibid.* at 33-34.

[247] *Ibid.* at 35.

[248] *Ibid.* at 35-37.

reasons, the Board requires that a union have a local presence in the province so it can administer a collective agreement and have a bargaining relationship which is under the jurisdiction of the Board.[249]

In *Royal Roads University*, the British Columbia Board recognized that it viewed s. 36 as facilitating a federal-provincial interjurisdictional successorship by providing a narrow exception in terms of the definition of "collective" agreement in s. 1 of the *Labour Relations Code* to make the successor provision work.[250] This interpretation of s. 36 indicates how the Board will interpret the provision in the future. However, the interpretation is open to a challenge before the courts since s. 1(1) of the Code is clear that the definitions of collective agreement, bargaining agent and employer are limiting in nature and not open to modification. Those definitions state:

> "bargaining agent" means
>
> > (a) a trade union certified by the board as an agent to bargain collectively for an appropriate bargaining unit, or
> >
> > (b) a person, or an employers' organization accredited by the board, authorized by an employer to bargain collectively on the employer's behalf;
>
> "collective agreement" means a written agreement between an employer, or an employers' organization authorized by the employer, and a trade union, providing for rates of pay, hours of work or other conditions of employment, which may include compensation to a dependent contractor for furnishing his or her own tools, vehicles equipment, machinery, material or any other thing;
>
> "employer" means a person who employs one or more employees or uses the services of one or more dependent contractors and includes an employers' organization.[251]

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[249] *Ibid.* at 34.

[250] *Ibid.* at 37.

[251] *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 1(1).

It is equally clear that the words "bargaining agent" and "collective agreement" in s. 36 do not meet those definitions. The Board indicated its interpretation is supported by ss. 8 and 12 of the *Interpretation Act*,[252] which indicate that a fair, broad and liberal approach should be taken when interpreting legislation, and the definition provisions of a statute are applicable to the whole statute unless a contrary intention appears in the statute. The Board's interpretation of s. 36 may be in conflict with the Court of Appeal's decision in *Western Stevedoring*. It is a general rule of interpretation that there is uniform expression in words used in an enactment and that same words have the same meaning.[253] On the hand, the context in which the words are used and the intent of the Legislature is important in interpreting s. 36 as it was enacted after *Western Stevedoring*.[254]

It is evident that more careful drafting of s. 36 should have been done so that no part of it was in conflict with the definition provisions of the *Labour Relations Code*. If that had been done, the success of a court challenge would be unlikely. One option to alleviate the problem, is if the words, "Notwithstanding any section in this Act", preceded the current wording in s. 36. Another option would be to add a subsection to s. 36 which defines bargaining agent, employer and collective agreement, making it clear that they refer to an employer under the federal labour legislation.

A union that has been voluntarily recognized in the federal jurisdiction can avail itself of s. 36.[255] When a successorship declaration under s. 36 is being sought where it is not clear that a voluntary recognition existed in the federal jurisdiction, the union should first apply to the Canada Board for a ruling on the validity of a collective agreement

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[252] R.S.B.C. 1996, c. 238.

[253] Pierre-André Côté, *The Interpretation Of Legislation In Canada*, 2nd ed. (Cowansville: Yvon Blais Inc., 1991) at 55-57; Sullivan, Ruth, *Dreidger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 163-165 [hereinafter *Sullivan Construction of Statutes*].

[254] *Sullivan Construction of Statutes*, *ibid.* at 131-135, 193-195

[255] *Burlington Northern Santa Fe Railway* [1999] BCLRB No. B511/99 at para. 28, online: Q.L. (BCLB)

governed by the laws of Canada before making a s. 36 application.[256] Otherwise, the union runs the risk of not having its collective agreement recognized as being in force at the time of the disposition of the business. Once the federal bargaining relationship crosses to British Columbia, the relationship between the union and the successor is a voluntary bargaining relationship and the Board has the authority to determine the appropriate bargaining unit structure.[257] Bargaining unit structures are reviewed with "fresh eyes" by the Board since a large employer in the federal jurisdiction has little in common with a smaller employer in British Columbia.[258]

(d) Canada

The Canada Board has long recognized that labour relations are affected by transfers across constitutional boundaries which occur as part of everyday business transactions and by employer reorganizations.[259] In 1977 the Board observed that rather than leaving successor rights to the interpretation of statutes in the recipient jurisdiction, a better solution was for federal and provincial reciprocal interjurisdictional legislation to deal with issues of successorship.[260] This suggestion has not been adopted.

Until 1996, the successorship provision in the *Canada Labour Code* required that the predecessor and the successor be a federal work or undertaking in order for a sale of a business to occur.[261] Constitutional jurisdiction was the first hurdle a union had to overcome when making an application for successor rights to the Canada Board when

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[256] *Ibid.* at para. 46.

[257] *E & N Railway Co.* [1999] B.C.L.R.B. No. B319/99 at para. 66, online: Q.L., (BCLB).

[258] *Ibid.* at para. 80.

[259] *Brotherhood of Railway, Airline and Steamship Clerks* and *Canadian Pacific Ltd. (Marathon Realty Co. Ltd).* [1978] 1 C.L.R.B.R. 493 at 501.

[260] *Ibid.*

[261] R.S.C. 1985, c. L-2, s. 44(1); *Burns International Security Services Ltd. v. C.U.P.W.* (1989), 3 C.L.R.B.R. (2d) 264 (Can.) at 265-266; *Val Nord Bus Lines Ltd. v. Syndicat des Travailleurs(euses) de Larose-Paquette (CNTU)* (1990), 14 C.L.R.B.R. (2d) 132 at 153 [hereinafter *Val Nord Bus*].

there was a provincial interjurisdictional transfer. For example, where an inter-provincial trucking company had a provincial terminal that was integrated into its operations and could not be severed from the whole of those operations, the Board lacked jurisdiction for a successorship determination when the terminal was taken over by parties who operated it only provincially.[262]

The Canada Board has indicated that provincial certificates cannot be imported into the federal jurisdiction.[263] Until 1990, there were a few cases decided by the Canada Board where collective agreements negotiated in a province were permitted to transfer into the federal sector as voluntarily recognized agreements.[264] In 1978 the Canada Board indicated that it was only in a "colloquial sense" that a union was voluntarily recognized by an employer under the *Code* when the constitutional character of the employer changed from provincial to federal in the trucking industry and the union's certified status in the province was at best a voluntarily recognized bargaining agent in the federal setting.[265]

In somewhat unique circumstances in 1979, the Canada Board ruled that a collective agreement from the provincial private sector could transfer into the federal jurisdiction, as a voluntary recognition agreement, based on the recognition clause in the agreement. In *Cable T.V. Limited* v. *Syndicat Des Employees De Service Technique De Cable TV (CNTU)*, the union was mistakenly certified in Quebec and had negotiated several collective agreements with the provincial employer for cable television work.[266]

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[262] *General Teamsters, Local 362 v. Stern Transport Ltd.* (1986), 12 C.L.R.B. R. (N.S.) 236 (Can. L.R.B.).

[263] *General Truck Drivers and Helpers, Local Union Nos. 31 and 213 v. Goodman Motor Transport Company (1973) Ltd.* (1985), 10 C.L.R.B.R. (N.S.) 1 (Can. L.R.B.) at 15 [hereinafter *Goodman Transport*].

[264] *Transport Labour Relations Association v. Wholesale Delivery Service* [1979] 1 Can. L.R.B.R. 90 [hereinafter *Transport Labour Relations Association*]; *Cable T.V. Limited* v. *Syndicat Des Employees De Service Technique De Cable TV (CNTU)* [1980] 2 Can. L.R.B.R. 381 [hereinafter *Cable T.V.*]; *Goodman Transport, ibid.* at 1.

[265] *Transport Labour Relations Association, ibid.* at 91, 95-96.

[266] *Cable T.V., supra* note 264.

The relationship at the provincial level continued for about five years until the employer applied to the court for a writ of certiorari regarding the certificate. The Superior Court of Quebec held that cable television was under federal jurisdiction and the certificate was voided.[267] The union applied to the Canada Board for certification for the same unit of employees it covered provincially and it was granted. The Board assessed the application of the provincially negotiated collective agreement and reviewed the recognition clause:

> 1.01 The employer recognizes the Syndicat des employes de service technique de Cable TV (CNTU) as the sole bargaining agent and representative of the union members covered by the certification certificate issued on March 22, 1974, which reads as follows:
>
> All service employees working within the franchise area.[268]

The Board concluded that based on the recognition clause, the collective agreement was binding on the employer as a voluntarily recognized collective agreement under the *Canada Labour Code* and it had the same effect as a collective agreement that resulted from a certification.[269] This was a case of the union and employer being mistaken about the applicable labour jurisdiction because the parties thought they were under provincial jurisdiction, and treated their relationship as being provincially regulated, but later found they were under federal jurisdiction.

Either a labour board has jurisdiction over a matter or it does not, and the Quebec Labour Court should not have attorned jurisdiction in the case to grant the union a certificate. The federal labour laws were applicable to the parties from the inception of the bargaining relationship between them. The Canada Board was creative in finding a remedy to continue bargaining rights when there was no sale, transfer or other disposition of a business. Privity of contract issues did not arise because it was the same employer

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[267] *Ibid.* at 385. See also: *Quebec (Public Service Board) v. Francois Dionne* [1978] 2 S.C.R. 191; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141.

[268] *Cable T.V., supra* note 264 at 382.

[269] *Ibid.* at 386.

and union in the provincial and federal jurisdictions. Yet, it was impossible for the parties to enter into any type of voluntary recognition in Quebec since it was abolished in 1969.[270] The only way to establish bargaining rights in Quebec was, and is, by certification. The foundation of the relationship between the parties was based on a certificate which was a nullity, and everything that flowed from the certificate, including the collective agreement which arose out of the provincial statutory obligations to bargain, should have been void. The Canada Board was wrong in finding that it could recognize the collective agreement in the federal jurisdiction as a voluntary recognition.

In the case of *Cable T.V.*, it is important to note that as a result of the mistake of labour jurisdiction, there was no cross jurisdictional transfer. Quebec never had constitutional jurisdiction over the labour relations of cable television regardless of what the parties might have thought and what the Quebec Labour Court ordered. If the Canada Board was right in *Cable T.V.*, there never would have been a need to amend the *Code* to permit transfers of bargaining rights from a province to a federal employer, or to add a legislative bridge so that collective agreements could transfer from the public sector to the private sector. Use of the term "voluntary recognition" to describe a bargaining relationship between parties, that is deemed by the Board to exist upon a transfer, is a misnomer. The Canada Board recognized that using the term voluntary recognition to describe the relationship between a union and an employer after labour jurisdiction shifted to the federal sector, confused the issue.[271] In 1990, the Canada Board concluded that bridging provisions were necessary for it and provincial boards to be able to assess successor rights in interjurisdictional transfer cases to remedy the negative effects on employees of such transfers.[272]

Upon review of the *Canada Labour Code* in 1996, the Sims Task Force recognized that the successorship provisions in the federal setting were jurisdictionally

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[270] *An Act To Amend The Labour Code*, S.Q. 1969, c. 47, ss. 2(e), 21, 22.

[271] *Goodman Transport, supra* note 263 at 16.

[272] *Val Nord Bus, supra* note 261 at 153.

limiting and that a vendor and a purchaser had to be federal undertakings as that was what triggered the application of the *Canada Labour Code*.[273] It noted that unnecessary disruption in labour relations can result when there are changes in an employer's operating style, resulting in bargaining relationships moving in and out of the federal labour jurisdiction, especially in the transportation industry.[274] The Task Force concluded that but for the restrictive definition in s. 44, which required that a predecessor and successor had to be federal undertakings, a provincial collective agreement could be treated as a voluntary recognized collective agreement in the federal jurisdiction after the transfer.[275] It recommended that s. 44 of the *Code* be amended so the predecessor employer did not have to be a federal undertaking, and that provincial collective agreements and certificates (with any required modifications), be continued in the federal regime when there was a disposition of a business.[276]

In 1998 the *Canada Labour Code* was amended to add in provisions to recognize collective agreements which arose from provincial transfers to the federal jurisdiction.[277] The relevant interjurisdictional successorship provisions state:

> 44(1) . . . "provincial business" means a work, undertaking or business, or any part of a work, undertaking or business, the labour relations of which are subject to the laws of a province; . . .
>
> 44(3) Where as a result of a change of activity, a provincial business becomes subject to this Part, or such business is sold to an employer who is subject to this Part:

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[273] *Sims Task Force, supra* note 2 at 73.

[274] *Ibid.* at 73-74.

[275] *Ibid.* at 73.

[276] *Ibid.* at 74.

[277] *An Act To Amend The Canada Labour Code (Part I)*, S.C. 1998, c. 26, s. 21, Proclamation, 1 January, 1999, S.I./99-2, C. Gaz. 1999. II. 350 [hereinafter *1998 Canada Labour Code Amendment*]. First introduced in 1997 in Bill C-66, 2nd Sess., 35th Parl., 1996-97, was awaiting third reading by Senate and died on Order Paper when Parliament dissolved April 27, 1997: *News Release 97-59*, Office of Minister of Labour (November 6, 1997). Bill C-19, 1st Sess., 36 Parl., 1997-1998, replaced Bill C-66 and was introduced into the House of Commons in November 1997.

> (a) the trade union that, pursuant to the laws of the province, is the bargaining agent for the employees employed in the provincial business continues to be their bargaining agent for the purposes of this Part;
>
> (b) a collective agreement that applied to employees employed in the provincial business at the time of the change or sale continues to apply to them and is binding on the employer or on the person to whom the business is sold;
>
> (c) any proceeding that at the time of the change or sale was before the labour relations board or other person or authority that, under the laws of the province, is competent to decide the matter, continues as a proceeding under this Part, with such modifications as the circumstances require and, where applicable, with the person to whom the provincial business is sold as a party; and
>
> (d) any grievance that at the time of the change or sale was before an arbitrator or arbitration board continues to be processed under this Part, with such modifications as the circumstances require and, where applicable, with the person to whom the provincial business is sold as a party.[278]

The amendments to the *Code* in 1998 replaced s. 45 with a general clause which gives the Board broad powers to determine whether one or more bargaining units are appropriate for collective bargaining when there is a transfer from a province.[279] Under s. 18.1 of the *Code*, which was added in 1998, an employer or union can apply for a review of bargaining structures and the Board must allow the parties a reasonable period of time to reach an agreement on issues related to collective bargaining and bargaining unit structures, failing which the Board can amend provisions in a collective agreement and

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[278] *1998 Canada Labour Code Amendment, ibid.* at s. 21.

[279] *Ibid.* at s. 22. Previously, ss. 45(1-4) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, permitted a union to apply to the Board in cases of intermingling for a determination of which union represented employees upon a transfer. Once that determination was made by the Board, either the union or the employer could apply to the Board after 60 days from the Board's determination ruling for leave to serve notice to bargain. In assessing whether to grant leave to bargain, the Board had to take into account the fairness of the seniority and other provisions in the collective agreement and the impact they had on employees.

order a party to issue a notice to bargain.[280] The interjurisdictional successorship provisions in the *Code* related to provincial transfers seem well drafted and do not appear to be inconsistent with other provisions in the *Code,* such as the definition provisions, or the provisions for intrajurisdictional transfers.

(e) Manitoba & Saskatchewan

The Manitoba Board has indicated that the only valid certificates in Manitoba are those issued by it.[281] Absent bridging legislation, the Manitoba Board has held that a collective agreement from the federal setting cannot be transferred into the provincial jurisdiction.[282] The word "employer" in the definition of collective agreement in the *Labour Relations Act* was interpreted by the Manitoba Board to be an employer that fell within the legislative jurisdiction of the province.[283] Without bridging legislation, even if an employer and union in the federal labour jurisdiction agree that a collective agreement under the *Canada Labour Code* will apply to an operation of the employer which is only provincial, that agreement has no validity and is not enforceable in Manitoba.[284]

In 2000 s. 58.1 was added to the Manitoba *Labour Relations Act* to allow a collective agreement from the federal jurisdiction to transfer to the province:

> 58.1 Unless the board orders otherwise, if collective bargaining relating to a business is governed by the laws of Canada and the business is sold and becomes subject to the collective bargaining laws of Manitoba, sections 56 to 58 [successor rights] apply with necessary modifications, and the person to whom the business is sold is bound by any collective agreement that is in force when the business becomes subject to the laws of Manitoba and

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[280] *1998 Canada Labour Code Amendment, ibid.* at ss. 7, 22.

[281] *P.S.A.C. v. Deer Lodge Centre Inc.* (1983), 84 C.L.L.C. ¶16,003 at 14,024 [hereinafter *Deer Lodge*]. *The Labour Relations Act*, R.S.M. 1987, c. L10, s 1.

[282] *Deer Lodge, ibid.* at ¶16,003.

[283] *Ibid.* at 14,024-14,025.

[284] *Kesmark Marine Div. v. I.U.O.E, Local 901* [1982] 4 W.W.R. 467 (Q.B.); rev'd [1982] 5 W.W.R. 767 (affirmed Manitoba Labour Board decision); leave to appeal S.C.C. denied, [1983] 1 W.W.R. li.

that applies to any employees of the business.[285]

In 1994, s. 37.2 was added to the Saskatchewan *Trade Union Act* to permit transfers from the federal jurisdiction to the province:[286]

> 37.2 Unless the board orders otherwise, if collective bargaining relating to a business is governed by the laws of Canada, and the business or part of it becomes subject to the laws of Saskatchewan, section 37 [successor rights] applies, with any necessary modification, and the person owning or acquiring the business or part of it is bound by any collective bargaining agreement in force when the business becomes subject to the laws of Saskatchewan.

To date, there have not been cases applying these successorship provisions.

Unlike British Columbia, Manitoba and Saskatchewan seem to have avoided any conflict with the definition provisions in the labour statutes since the successorship provisions indicate that the intrajurisdictional transfer successor rights sections apply with any necessary modification. These interjurisdictional transfer provisions give the Manitoba and Saskatchewan Boards broader discretionary powers than those in British Columbia since both begin with: "Unless the Board orders otherwise". This discretionary power of the Manitoba and Saskatchewan Boards could be exercised in the event a collective agreement transferred from the federal setting to a provincial employer which did not have a "goodness of fit" with the provincial employer's operation.

(f) Alberta

There is no bridging legislation in Alberta which allows a successorship from a federal sector employer to a provincial employer. The Alberta Board has found that a collective agreement between a federally regulated employer and union can apply in Alberta for solely provincial work. In *General Teamsters, Local Union 362* v. *Grey*

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[285] *The Labour Relations* Act, R.S.M. 1987, c. L10, as am. S.M. 2000, c. 21, s. 2.

[286] *The Trade Union Act*, R.S.S. 1978, c. T-17, as am. S.S. 1994, c. 47, s. 20.

Goose Bus Lines (Alberta) Ltd. and *C.B.R.T. Local 50*,[287] Grey Goose operated inter-provincially and the union ("C.B.R.T.") had obtained a certification from the Canada Board, which resulted in a series of collective agreements being entered into. Grey Goose bid on a transportation contract in Alberta and, in anticipation of being successful, negotiated suitable terms and conditions of employment with the C.B.R.T. A collective agreement was signed by the parties. After the work commenced, the Teamsters made a certification application to the Alberta Board to represent the employees working in Alberta. The Board ruled the certification application was barred because the Teamster's application was not brought within the open period and there was a valid voluntary recognition collective agreement in effect between Grey Goose and C.B.R.T. for the provincial work. The collective agreement was valid because it met the definition of "collective agreement" in the *Labour Relations Act*, since it was a document in writing between an employer and a union, which contained terms and conditions of employment.[288]

In upholding the Board's decision, the Court reasoned that the collective agreement was voluntarily recognized for the Alberta work, the C.B.R.T. was a trade union and bargaining agent and, although a bargaining agent had to be a trade union, it did not have to be a certified bargaining agent.[289] Although the employer and union had a certification and collective agreement in the federal arena, they negotiated a collective agreement for the Alberta work, and since it was work of a provincial nature, the Alberta labour legislation applied to that collective agreement. There was no cross jurisdictional transfer since Grey Goose was under the federal jurisdiction for its inter-provincial operations and, while that legislation had no application to the Alberta work, Grey Goose and C.B.R.T. chose to voluntarily negotiate a collective agreement to cover the solely provincial work. The manner in which Grey Goose and the C.B.R.T. entered into a

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[287] [1985] Alta. L.R.B.R. 85-007; aff'd [1985] Alta. L.R.B.R. 85-007A (Q.B).

[288] R.S.A. 1980, c. L-1.1, ss. 1(1)(f).

[289] *General Teamsters Union Local 362* v. *Grey Goose Bus Lines (Alberta) Ltd.* [1985] Alta. L.R.B.R. 85-007A (Q.B.) at 12-13.

collective agreement is the general way that an employer and a union would enter into a voluntary recognition relationship. There was mutual agreement about which employees the union was representing, and the terms and conditions of employment were negotiated in a collective agreement.

In 1991 in *Amalgamated Transit Union, Local 1374* v. *Greyhound Lines Of Canada Ltd. and Ferguson Bus Lines Ltd.*,[290] the Alberta Board (Chair Sims) ruled that, in the appropriate circumstances, a successorship could be available for a federally regulated employer that transferred operations to a provincial employer on the basis of a voluntary recognized collective agreement. The Amalgamated Transit Union ("A.T.U.") had certified Greyhound under federal labour legislation and a collective agreement had been entered into covering Greyhound's inter-provincial operations. Greyhound discontinued two bus routes in Alberta, but kept the transportation permits to operate them, and contracted with Ferguson to operate them. Ferguson had its own buses which operated within Alberta, but bought two motor coaches from Greyhound. Ferguson's operation was non-union and it assigned its own drivers to the two routes it acquired from Greyhound.

The A.T.U. made a successor rights application to the Canada Board, which was granted on the basis that while Ferguson was operating the two routes, it was operationally part of the overall single Greyhound undertaking. The Federal Court of Appeal quashed the Board's ruling on the basis that the routes operated by Ferguson were not under federal constitutional jurisdiction, the operation of the routes was not an integral part of Greyhound's operation and the arrangement between Greyhound and Ferguson was in the nature of contracting out.[291] The A.T.U. then applied to the Alberta Board for a successor rights declaration under s. 44 of the *Labour Relations Code*[292] based on the recognition clause in the collective agreement, which indicated the company

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[290] *Supra* note 102.

[291] *Ferguson Bus Lines Ltd. v. A.T.U., Local 1374* (1990), 68 D.L.R. (4th) 699; leave to appeal to S.C.C. refused (1990), 74 D.L.R. (4th) viii.

[292] S.A. 1988, c. L-1.2. As of January 1, 2002 it is s. 46: R.S.A. 2000, c. L-1.

recognized the union as the sole bargaining agent for its operations, except for several exclusions.[293]

The Alberta Board recognized that multi-jurisdiction employers may have collective agreements which are national or international in scope, may cover an employer's operations in several provinces, and sometimes in the provincial and federal jurisdictions.[294] The Board held that the fact Greyhound was a federally regulated employer did not prohibit a successorship declaration. It was found that a predecessor does not have to be an employer in Alberta since the test is whether the transferred business falls into the hands of the successor who is under provincial constitutional jurisdiction.[295] There do not have to be any proceedings under the Alberta *Code* before bargaining rights can attach to a successor employer, nor does a collective agreement have to be between an Alberta employer and a union for it to be recognized in Alberta, as long as the recognition clause in the collective agreement does not expressly or impliedly limit the scope of the collective agreement to a jurisdiction other than Alberta:

> It is a question of fact in each case whether the parties to the collective agreement in question have directly or impliedly limited their recognition to the employees working within a given jurisdiction. The existence of a certification is evidence that might support that conclusion (for example, a scope clause saying the employer recognizes the Union for employees covered by the Certificate Number x would seem to limit recognition to those within one jurisdiction). However, it would normally be one piece of evidence on the question, rather than deciding it conclusively.[296]

The Alberta Board reasoned that the recognition clause in a collective agreement under federal jurisdiction had to be broad enough to cover employees in an undertaking

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[293] *Ferguson Bus Lines*, *supra* note 102 at 654.

[294] *Ibid.* at 663.

[295] *Ibid.* at 670-671.

[296] *Ibid.* at 671.

which was in the hands of a purchaser within the jurisdiction of Alberta.[297] The Board concluded that a collective agreement, like the one between Greyhound and the A.T.U., could be binding on a provincial employer if a suitable sale of a business occurred under the successor rights provision of the *Code*, but a certificate could not transfer between jurisdictions because it did not result from a "proceeding" under the *Code*. In the end result, the Board did not issue a successor rights declaration against Ferguson, as there was no sale of a business, since the two bus routes were not a functioning economic vehicle, and the arrangement between Greyhound and Ferguson was a subcontracting of work, rather than a transfer of part of Greyhound's operation.

The *Ferguson Bus Lines* case indicates that, given the right circumstances, a collective agreement might be able to cross statutory jurisdictional boundaries depending on the recognition clause in the agreement. The case does not clearly outline in what circumstances a transfer would result in a successorship based on the recognition clause in a collective agreement, other than to indicate that it would depend on the evidence in each case and the express and implied terms. Invariably, the examination by the Board might lead to an assessment of the intent of the parties related to the scope of a recognition clause in a collective agreement. Privity of contract was overcome in *Ferguson Bus Lines* since the Board believed that, because of the way the successor rights provisions are worded in the *Code*, there did not have to be any proceedings under it and a collective agreement from the federal sector could attach to a provincial employer, as long as it met the definition of collective agreement in the *Code* of being a document in writing between an employer and union covering terms and conditions of employment.[298] In a different case in 1991, Chair Blair, of a Reconsideration Panel of the Board, rejected the analysis in *Ferguson Bus Lines* and noted that it is doubtful that parties negotiating a collective agreement turned their minds to it attaching to a third party in another jurisdiction and found there was "something artificial" about analyzing a

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[297] *Ibid.*

[298] *Ibid.* at 670-671.

collective agreement to determine the intention of the parties.[299] Instead, in determining whether a collective agreement from another jurisdiction attaches to an employer in Alberta, the Blair Reconsideration Board ruled that, a collective agreement from a foreign jurisdiction, need only fit the definition of collective agreement in the *Code* of being an agreement in writing between an employer and an union, and an employer did not have be an employer under the *Code* when a collective agreement was entered into.[300] The Reconsideration decision was affirmed recently by the Court of Appeal.

In *Ferguson Bus Lines*, the Board indicated that the Ontario and federal successor rights provisions focus on the selling employer, while Alberta's focus on the purchaser.[301] The Alberta Board noted that the British Columbia case most directly related to that in *Ferguson Bus Lines*, due to the similarity of the legislative provisions, was *Wholesale Delivery Service (1982) Ltd.* v. *General Truck Drivers and Helpers' Union, Local 3*, supra.[302] In *Wholesale Delivery*, the British Columbia Board ruled that it was bound by the Court of Appeal's decision in *Western Stevedoring* that for a collective agreement to be recognized in the province, it had to be a collective agreement between a provincial employer and a bargaining agent under the British Columbia labour statute. As a result, a collective agreement between a federal employer and union could not be recognized in British Columbia.

The similarity of the successor rights provisions in Alberta and British Columbia warrants examination. Section 44(1) (now s. 46(1)) of the Alberta *Code*, which was in effect in 1991 and continues, states:

> 44(1) When a business or undertaking or part of it is sold, leased, transferred or merged with anther business or undertaking or part of it, or otherwise disposed of so that the control, management or supervision of it passes to the purchaser, lessee, transferee or person acquiring it, that

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[299] *Saddle Hills Blair Panel, supra* note 126 at 281.

[300] *Ibid.* at 282-285.

[301] *Ferguson Bus Lines, supra* note 102 at 664-665.

[302] *Ibid.* at 665.

> purchaser, lessee, transferee or person is, where there have been proceedings under this Act, bound by those proceedings and the proceedings shall continue as if no change had occurred, and
>
> > (a) if a trade union is certified, the certification remains in effect and applies to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and
> >
> > (b) if a collective agreement is in force, the collective agreement binds the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it as if the collective agreement had been signed by him.[303]

The comparable British Columbia successor rights provision in 1991 was:

> 53(1) Where a business or a substantial part of it is sold, leased, transferred, or otherwise disposed of, the purchaser, lessee, or transferee is bound by all proceedings under this Act before the date of the disposition, and the proceedings shall continue as if no change had occurred; and where a collective agreement is in force it continues to bind the purchaser, lessee, or transferee to the same extent as if it had been signed by him.[304]

The Alberta Board found that the words, "if a collective agreement is in force" in s. 44(1)(b) of the *Code*, did not relate back to the words, "where there have been proceedings under this Act", in s. 44(1).[305] The same analysis could be applied to the comparable British Columbia successorship provisions. In addition to the successor rights provisions being similar and focussing on the successor rather than the predecessor, the statutes in British Columbia and Alberta, in 1991 and subsequently, define a collective agreement as being a written agreement between an employer and a union covering terms

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[303] *Labour Relations Code*, S.A. 1988, c. L-1.2. As of January, 1 2002, the same provision is in s. 46(1): *Labour Relations Code*, R.S.A. 2000, c. L-1.

[304] *Industrial Relations Act*, R.S.B.C. 1979, c. 212, s. 53, as am. S.B.C. 1987, c. 24, s. 29. The subsequent provisions are nearly identical to those that existed in British Columbia in 1991: *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 35.

[305] *Ferguson Bus Lines*, *supra* note 102 at 664, 670.

or conditions of employment.[306]

Although the Alberta Board is not bound by British Columbia decisions, the interpretation in *Wholesale Delivery*, *supra*, seems compelling, especially given the similarities of the legislation. In *Wholesale Delivery*, the British Columbia Board indicated that the words, "proceedings under this Act" in s. 53(1), would relate to a certificate issued for bargaining rights by it, and a federal certificate could not be imported into the province.[307] It then considered the application of the words, "where a collective agreement is in force" in s. 53(1), and found them to be confined to the definition of a collective agreement in the Act, which was an agreement in writing between an employer and union covering terms or conditions of employment. The British Columbia Board was bound by the Court of Appeal's decision in *Western Stevedoring*, *supra*, to find that the collective agreement had to be between a provincial employer and a union in order for the successor rights in s. 53(1) to apply in British Columbia. In short, the analysis of the respective successor rights provisions by the Alberta and British Columbia Boards is the same, and whether a collective agreement can flow from a federal employer to a provincial employer depends on the interpretation of the word "employer" in the statutes.

In Alberta, an employer is defined as "a person who customarily or actually employs an employee".[308] In 1979, when the *Wholesale Delivery* case was decided, a British Columbia employer was defined as "a person who employs one or more employees and includes an employer's organization", and subsequently it has been "a person who employs one or more employees or uses the services of one or more

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[306] *Industrial Relations Act*, R.S.B.C. 1979, c. 212, s. 1, as am. S.B.C. 1987, c. 24, s. 1; *Labour Relations Code*, S.B.C. 1992, c. 82, s. 1; R.S.B.C. 1996, c. 212, s. 1; *Labour Relation Code*, S.A. 1988, c. L-1.2, s. 1.

[307] *Wholesale Delivery*, *supra* note 235 at 545.

[308] *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 1(m). As of January 1, 2002 it is R.S.A. 2000, s. 1(m).

dependent contractors and includes an employers' organization.[309] In substance, the definitions of employers in the two jurisdictions is the same, but the Alberta Board chose not to follow the British Columbia jurisprudence. The British Columbia Board's reasoning is sound and is more compelling since it is supported by a Court of Appeal ruling on the definition of an employer, which was found to be jurisdictionally limiting.

In *Ferguson Bus Lines*, the Alberta Board relied on two cases where collective agreements continued across federal and provincial boundaries: its decision in *Grey Goose Bus Lines*, *supra*, which was affirmed on judicial review, and the Canada Board's decision in *Cable T.V.*, *supra*. The principles in *Grey Goose, supra*, do not support a cross jurisdictional transfer. The case only demonstrates that a union and an employer can enter into a valid voluntary recognition collective agreement for work which falls under the constitutional jurisdiction of the province. The principles in *Cable T.V., supra*, were not subsequently followed by the Canada Board and it was necessary to pass bridging legislation to effect a transfer of a collective agreement from a province to the federal sector. Furthermore, in *Cable T.V.*, the Canada Board indicated that if it was wrong in its ruling about a collective agreement entered into in a province being classified as a voluntarily recognized agreement in the federal jurisdiction, the parties had negotiated a new collective agreement several months after the courts ruled that cable television fell under federal constitutional jurisdiction, which supported a voluntary recognition agreement.[310]

(g) The Maritimes & Quebec

There is no bridging legislation which permits transfers from the federal jurisdiction to the provinces in New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island. In an unusual case, the Nova Scotia Board found that an interjurisdictional successorship occurred when a federal crown agency sold a golf resort

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[309] *Labour Code*, R.S.B.C. 1979, c. 212, s. 1(1). *Labour Relations Code*, S.B.C. 1992, c. 82, s. 1(1); R.S.B.C. 1996, c. 244, s. 1(1).

[310] *Cable T.V.*, *supra* note 264 at 386.

to a provincial company.[311] In that case, the union and employer members of the Board found that the collective agreement of the federal employer became a voluntarily recognized agreement under the successorship section in the provincial labour statute on the basis that the successorship provision was not jurisdictionally limiting, but recognized their decision was contrary to rulings made on the same issue by the Boards of British Columbia, Canada and Ontario.[312] Chairman Peter Darby dissented on the basis that the successorship provision was jurisdictionally limiting and both the predecessor and successor had to be provincial employers for it to apply.[313] The Chairman's decision seems right in law since the successorship provision in the Nova Scotia statute refers to an employer transferring a business, which is jurisdictionally limited to a provincial employer.

Quebec recently added s. 45.3 to the *Labour Code* to permit interjurisdictional transfers from the federal sector:

> 45.3 Where an undertaking subject to the Canada Labour Code . . . as regards labour relations becomes, in that regard, subject to the legislative authority of Quebec, the following provisions shall apply:
>
> > (1) a certification granted, a collective agreement made and proceedings commenced under the Canada Labour Code for the securing of certification or the making or carrying out of a collective agreement are deemed to be a certification granted, a collective agreement made and filed and proceedings commenced under this Code;
> >
> > (2) the employer remains bound by the certification or collective agreement or, where section 45 [successor rights] would have been applicable had the undertaking been under the legislative authority of Quebec, the new employer becomes bound by the certification or collective agreement as if the employer were named therein and becomes *ipso*

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[311] *Odyssey Tourist Attractions Ltd. v. L.I.U.N.A., Local 1115* (1991) 14 C.L.R.B.R. (2d) 255.

[312] *Ibid.* at 266-268.

[313] *Ibid.* at 270-271.

> *facto* a party to any related proceeding in the place and stead of the former employer;
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> (3) proceedings in progress for the securing of certification or making or carrying out of a collective agreement shall be continued and decided according to the provisions of this Code, with the necessary modifications.
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> However, the collective agreement made by an uncertified association binds the new employer only until the expiry of 90 days after the date of alienation or transfer of operation if the association has not filed, during that time, a petition for certification in respect of the bargaining unit governed by the collective agreement or in respect of an essentially similar unit. If such a petition for certification is filed within that time, the collective agreement continues to bind the new employer until the date of a decision rendered by the Commission refusing, as the case may be, to grant certification.
>
> No certification may be applied for by another association of employees in respect of such a bargaining unit before the expiry of 90 days or, if the a petition for certification is filed during that time, before the date of the decision of the Commission refusing, as the case may be, to grant certification.[314]

The Quebec Board has broad powers to determine all matters related to such transfers.[315] Unlike British Columbia, Manitoba and Saskatchewan, where the federal-provincial successorship provisions are broadly worded to permit collective agreements that were subject to the laws of Canada to transfer to a province, s. 45.3 is restricted to collective agreements, certificates and proceedings that occurred under the *Canada Labour Code*. Although "subject to the laws of Canada" is used in the provisions in British Columbia, Manitoba and Saskatchewan, it is most likely that transfers to provinces would be from employers under the jurisdiction of the *Canada Labour Code*. It is doubtful that parts of the federal public sector would transfer directly to a province since transfers from the federal public sector have been to employers governed by the *Canada Labour Code*. By deeming a collective agreement from an employer covered

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[314] *Labour Code*, R.S.Q., 1977, c. C-27, as am. S.Q. 2000, c. 26, s. 32.

[315] *Ibid.* at s. 46.

under the *Canada Labour Code* to be a collective agreement in Quebec, the issue of classifying it as a voluntary recognition collective agreement has been avoided. Section 45.3 is broader than the interjurisdictional successorship provisions in British Columbia, Manitoba, Saskatchewan and the federal sector since certificates issued under the *Canada Labour Code* can transfer to Quebec.

4. PROVINCE TO PROVINCE TRANSFERS

A province only has legislative jurisdiction for labour relations matters within its geographical boundaries.[316] Interjurisdictional transfers from one province to another have not been dealt with in the jurisprudence, which indicates there is not a problem that needs to be fixed. Although it is open to a province to enact successorship legislation to accept a collective agreement from another province, much the same as has been done in some provinces regarding transfers from the federal sector, there are no identifiable problems that would merit enacting such bridging legislation at this time.

5. CONCLUSION

It would be easier to resolve issues related to interjurisdictional transfers in Canada if there was only one labour jurisdiction, rather than eleven (ten provinces and the federal sector). The jurisdictional split over labour relations in Canada results from the Constitution, which is not about to change. Each labour jurisdiction is responsible for legislating matters related to labour relations. There is no obligation on any jurisdiction to legislate in accordance with what another jurisdiction is doing.

It has been recognized by the various labour tribunals in Canada that a certificate cannot be transferred from one statutory jurisdiction to another unless there is some bridging legislation to allow its continuation in the receiving regime. Absent bridging legislation, if a certificate cannot transfer, it begs the question as to why some labour

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[316] *Labour Relations Board of New Brunswick v. Eastern Bakeries* (1960), 26 D.L.R. (2d) 332 (S.C.C.); *MacLeans Magazine* [1983] Ont. L.R.B. Rep. March 401; *St. Paul University* [1972] O.L.R.B. Rep. July 729; *C.U.P.E., Local 3432 v. Lloydminster School Division #99* [1990] S.L.R.B.D. No. 32, online: QL (SLRB).

boards believe that collective agreements can transfer between jurisdictions. If a collective agreement can transfer between jurisdictions, there would be no need for legislation to bridge the gap between statutory jurisdictions. The overwhelming balance of the jurisprudence is that some legislative mechanism is required to continue bargaining rights from one statutory jurisdiction to another. A few jurisdictions have legislation which permits interjurisdictional transfers. The lack of bridging legislation regarding interjurisdictional transfers has resulted in uncertainty as to how such transfers should be treated by some labour boards. The lack of successor rights interjurisdictional transfer legislation causes uncertainty in day to day labour relations and results in prolonged litigation. A review of the interjurisdictional transfer jurisprudence reveals a need for bridging legislation between the federal and provincial jurisdictions and between the public and private sectors in those jurisdictions that do not have such legislation.

There are two ways that a union can gain bargaining rights: by certification or by an employer voluntarily recognizing the union, except in Quebec where voluntary recognition is not possible. Voluntary recognition existed many years before certification was legislated.[317] The certification process was brought about to avoid the unnecessary social disruption caused by a recognition strike.[318]Certification results in the parties being obligated to negotiate a collective agreement, and while there is no obligation on the parties to agree to certain terms, there is an obligation to bargain in good faith to reach a collective agreement. Although certification is valuable for forcing an employer to negotiate with a union, the ultimate objective is to have a collective agreement in place which sets out the terms and conditions of employment. In the case of voluntary recognition, the employer and union mutually agree the union will represent certain employees of the employer, and a labour board is not involved in the recognition process. A voluntary recognition avoids expenses or delay related to the certification process, lets

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[317] *Beverage Dispensers & Culinary Workers Union, Local 835 v. Terra Nova Motor Inn Ltd.* (1974), 50 D.L.R. (3d) 253 (S.C.C.) at 254.

[318] *Sheet Metal Contractors Association of Alberta v. Sheet Metal Workers' International Association, Local 8* (1988), 1 C.L.R.B.R. (2d) 107 (Alta.), aff'd (1988), 93 A.R. 367 (Q.B.).

the employer and union mutually agree on the description of a bargaining unit and is a non-adversarial manner in which an employer and a union can engage in negotiations.[319] None of those advantages appear when a labour board declares that the collective agreement from a predecessor jurisdiction attaches to an employer in a recipient jurisdiction as a voluntary recognition agreement.

In 1991 Professor Hickling indicated that privity of contract should have no application in successorship cases and that interjurisdictional gaps should be closed:

> Is it sound labour relations policy from the point of view of stable and peaceful industrial relations to permit a union's bargaining status and the rights and obligations contained in collective agreements to be set at naught by an employer's unilateral decision on business reorganization? The answer given by Parliament and the provincial legislatures when they enacted successor provisions was unanimous. It was also negative. Under that legislation a collective agreement runs with the business. Unfortunately, recent decisions have exposed a gap in coverage of which road transport companies have recently sought to take advantage. The legislation does not cover interjurisdictional transfers.[320]

Although it is not sound labour relations policy to allow a collective agreement to evaporate when there is an interjurisdictional transfer, privity of contract prevails unless it is abrogated by legislation. Absent bridging legislation, the only way around privity of contract is if a predecessor union and a successor employer enter into a voluntary recognition collective agreement in the successor jurisdiction, or the union certifies the successor employer.

It is apparent that when there is no bridging legislation in place covering successor rights in interjurisdictional transfers, there is disruption, uncertainty and protracted litigation which does not promote harmonious relations between unions, employers and employees. Some labour boards have tried to create novel solutions when there is no bridging legislation, but that has caused ongoing disruption and created situations where

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[319] *Canadian Labour Law*, *supra* note 4 at par. 7.1330.

[320] *Successor Rights At Arbitration*, *supra* note 220 at 251.

there were inconsistent directions from boards regarding what guidelines would be used in interjurisdictional transfer cases.

An employer is bound by a collective agreement if it voluntarily recognizes a union, but there must be clear and unequivocal evidence of the voluntary recognition and evidence of intention is not sufficient to establish a voluntary recognition.[321] The fact that voluntary recognition agreements are accepted in most jurisdictions (except Quebec), can entice a labour board to classify a collective agreement that crosses statutory jurisdictions as being voluntarily recognized when there is no bridging legislation. The position of several labour boards in finding a collective agreement negotiated in a predecessor jurisdiction, which resulted from a certification, to be a voluntarily recognized collective agreement in a successor jurisdiction, is a misnomer since such a collective agreement cannot be voluntarily recognized if it did not result from mutual agreement between the parties. If it results from a board order, it is not a voluntary recognition agreement, it is a forced, or deemed recognition, agreement.

The labelling of a collective agreement in an interjurisdictional transfer case as a voluntarily recognized collective agreement is inconsistent with the traditional definition of a voluntarily recognized collective agreement. There would be no need for a labour board to use the term "voluntary recognized collective agreement" if there were bridging legislation in a recipient jurisdiction which allowed the board to issue a new certificate for the bargaining unit that was transferred from the predecessor jurisdiction. The new certificate could be issued in the successor employer's name with the bargaining unit that was described in the predecessor jurisdiction, or as amended by the board. If legislation permitted that to be done, there would be clarity in the process and a board would not try to label a collective agreement as being voluntarily recognized when in fact it is not a genuine voluntary recognition. When an interjurisdictional transfer occurs, there is nothing stopping the predecessor union and the successor employer from entering into a voluntary recognition collective agreement in the successor's labour jurisdiction, since in

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[321] *United Ass'n Of Journeymen & Apprentices Of The Pipefitting Industry Of The United States & Canada* v. *SCC Construction* Ltd . (1987), 41 D.L.R. (4th) 46 (Nfld. C.A.) at 67-68

doing so, there is mutuality between the parties.

The federal government and most of the provinces have participated in privatization.[322] One of the distinct features of the public sector is that there are Crown corporations that perform functions which traditionally are not performed by governments and which are run as commercial enterprises.[323] Public sector undertakings can be transferred intact or in part to the private sector, or shares in them can be sold to the private sector, while transfers are often to a single private sector employer who incorporates them into existing operations.[324] The rationale for privatization in Canada is not explicitly stated, but the reasons relate to better efficiency, reduction in operating losses of governments and reducing the scope of public sector activities which reduces the demands on governments for making decisions.[325]

In the 1990's all governments in Canada faced large deficits and took steps to reduce them by reducing labour costs.[326] The alterative was for governments to increase taxes, but that was not a viable option politically. Some time ago there was job security for employees who worked for governments, but that is not the case in today's fast changing world.[327]Compared to other nations, the formal private and public sector labour relations in Canada are more similar regarding the right to strike, collective agreement administration, union structures, the organizing process, freedom to organize and there are only modest variations between the two sectors.[328]

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[322] *Public Sector Bargaining, supra* note 1 at 165.

[323] *Ibid.* at 165-166.

[324] Mark Thompson & Allen Ponak, "Restraint, Privatization, And Industria Relations in the Public Sector In The 1980s", in R.P. Chaykowski and A. Verma, *Industrial Relations In Canadian Industry*, (Toronto: Dryden, 1992) at 310.

[325] *Public Sector Bargaining, supra* note 1 at 170.

[326] Gene Swimmer, *Public Sector Labour Relations in an Era of Restraint and Restructuring*, (Don Mills: Oxford University Press, 2001) at 3-9.

[327] *Ibid.* at 26-29.

[328] *Public Sector Bargaining, supra* note 1 at 431, 445.

As governments downsize and restructure, successor rights issues become more prevalent for unions, employers and employees. Public sector unions want to know if their bargaining rights continue when operations are transferred to the private sector. Employees want to know if their terms and conditions of employment set out in public sector collective agreements will continue after a transfer to the private sector. Private sector employers want to know what their obligations are after they have acquired an undertaking or part of it from the public sector. When governments privatize and restructure, there are interjurisdictional transfers from the public sector to the private sector, and there should be clear legislation, which spells out the applicable rules. In those jurisdictions that do not have bridging legislation, the existing labour statutes are inadequate in setting out the rights of the parties when interjurisdictional transfers occur from the public to the private sector and that creates uncertainty, insecurity and lack of harmony. The solution to such problems is to have legislation in place that clearly indicates what the rights and obligations of the parties are when interjurisdictional transfers occur.

Although there is justification for having successor rights from the public sector to the private sector, there does not seem to be a need to permit successor rights from the private sector to the public sector. Even in Ontario where transfers between public and private sectors were permitted for many years, there were few cases of transfers from the private sector to the public sector.

It is evident that public sector bargaining units do not fit well when transferred to the private sector and need to be reconfigured to fit the employer's operations in the private sector. If there are not appropriate mechanisms in place to permit flexibility and adaptation to the successor's operations in the private sector, then transfers from the public to the private sectors should not be permitted. Collective agreements in the public sector often have provisions which tie them to civil service legislation which cannot apply to a private sector employer. The public sector can generally enjoy economies of scale regarding benefits in collective agreements which a smaller private sector employer cannot take advantage of.

For a successorship to exist between a province and the federal sector, the Constitutional divide must be crossed. Statutory bridges have been built into the legislation to allow for collective agreements to transfer between the federal and provincial jurisdictions in Canada, British Columbia, Manitoba and Saskatchewan. These jurisdictions permit bargaining rights to attach to a successor which comes within their jurisdiction when there is a transfer of a business or part of it. In those jurisdictions, the Constitution can no longer be used to prohibit successor rights. In Quebec, bridging legislation exists to permit certificates and collective agreements under the *Canada Labour Code* to transfer to a Quebec employer. There is no reason why there should not be such bridging legislation in the other provinces for federal-provincial transfers since the reality is that employer operations sometimes move in and out of the private sector federal and provincial jurisdictions for legitimate business reasons.

There are statutory mechanisms which allow for the continuation of bargaining rights from the public to the private sectors in British Columbia, Canada, Manitoba, Saskatchewan and Quebec. There is no sound reason for such legislation not to exist in the other jurisdictions.

It can be argued that there is no need for interjurisdictional transfer legislation between the public and private sectors, or between the federal and provincial jurisdictions since the union in the predecessor jurisdiction can organize the employees in the successor jurisdiction by making an application for certification. It can also be argued that the union in the predecessor jurisdiction ought not to have too difficult of a time certifying the successor employer since it represented the employees previously. Yet, this approach does not preserve existing bargaining rights, nor does it promote harmonious labour relations throughout jurisdictions, and it does not take into account situations of intermingling. If employees and a union have a representational relationship in a predecessor jurisdiction, there is little, if any reason, why that familiar relationship should not be continued in an interjurisdictional transfer case provided that appropriate mechanisms are in place for making any necessary adjustments in the successor jurisdiction.

One of the basic tenets of the Canadian industrial relations system is free collective bargaining. When a transfer occurs between jurisdictions, certain provisions in the predecessor's collective agreement may need to be modified, as it might be impossible for some of them to apply to the successor employer. In such cases, if there is legislation which bridges the gap between the two jurisdictions, the union and the employer in the recipient jurisdiction should first be obligated to amend the terms of the collective agreement through negotiation, followed by mediation utilizing existing services under the labour statutes, and failing such efforts, an application could be brought to the appropriate labour relations board to amend the agreement. The power of a labour board to amend a collective agreement should be used as a last resort, and used sparingly. A limit could be put on the amount of time the parties have to amend the terms of the collective agreement to ensure that matters are dealt with in a timely manner. The reason for having the parties sort out amending the collective agreement themselves is that they are more apt to find the modified terms agreed upon acceptable than if they were imposed by a third party labour board. The good faith bargaining rules could be made to apply to such negotiations and would act as a control on the parties to reach an amicable settlement on the modified terms of the collective agreement.

If bridging legislation allows a collective agreement to survive a transfer to another statutory jurisdiction, there is no reason why the recipient labour board in an interjurisdictional transfer should not have the power to issue a new certificate for the bargaining unit that the successor rights attach to. In an intrajurisdictional transfer case, the certificate is amended and issued in the successor employer's name when a labour board determines such a case, sometimes after determining which unions and bargaining unit descriptions are the appropriate for the successor employer. When an interjurisdictional transfer occurs, a labour board will often have to assess appropriate bargaining unit issues, especially if more than one union has bargaining rights with the successor employer after the transfer, or there are many bargaining units, or there are non-union employees with the successor. In the process of doing so, a labour board sets out the unit description that is put into the certificate and should have the power to issue new

certificates.

When there are interjurisdictional transfers from the public to the private sector and from the federal to the provincial sector, there may be a need by the successor to open up the collective agreement and renegotiate the terms of it with a union. There should be some mechanism in the legislation that permits such "mid-term" negotiations to commence shortly after the transfer occurs. In an interjurisdictional transfer case, a recipient labour board should have the same general powers it has in intrajurisdictional transfer cases. In addition, the recipient labour board should have the power, after receiving an application from an employer or union, to order the parties to negotiate a new collective agreement when it is clear that the majority of the provisions in the predecessor's collective agreement are not suitable for the bargaining relationship in the recipient jurisdiction. For example, a collective agreement with a federal employer, which is Canada wide, may not be suitable for a small employer's operation in a province where the same economies of scale and resources do not exist; or a province wide collective agreement with a large public sector employer, such as a provincial government, may not be suitable for a small employer in the private sector.

It makes no sense for terms in a predecessor's collective agreement to continue until the end of the agreement, when the parties cannot apply those terms, or the terms are impossible to meet. The terms of some collective agreements may be inconsistent with usual terms in the recipient jurisdiction and they may not be suitable for the union or the employer, or they may create financial hardship on the employer that threatens continuation of a going concern. Certainly, it is not the intent of successor rights legislation for a successor business not to continue to be viable, since if a business does not continue, neither does work for employees. In these types of cases, the recipient labour board ought to have the discretionary power to order the parties to negotiate a new collective agreement. In assessing such an application, the factors the board could consider are whether there is undue hardship on the union, employees or the employer resulting from provisions in the collective agreement, and whether the employees, employer or union would suffer substantially by continuing the collective agreement for

its term.

In some cases, when there is an interjurisdictional transfer, the bargaining unit and the collective agreement may be wholly inappropriate for the successor. In such cases, a union or an employer should be able to apply to a labour board to terminate the bargaining relationship between the parties if the character of the successor's business has substantially changed compared to that of the predecessor's.

One issue that needs to be dealt with expeditiously in interjurisdictional transfer cases is the determination of what bargaining unit will apply to the successor employer. If there are several bargaining units, or many bargaining units applicable to a predecessor, the same number and descriptions may not be practical for a successor. In such cases, there should be a mechanism that permits the union or the employer to apply to a labour board immediately upon a transfer to have the bargaining units decided.

There are two procedures that would promote more harmonious labour relations in interjurisdictional transfers, which are not present in those jurisdictions that have interjurisdictional transfers legislation. First, there should be a legislated obligation on the the union and the successor employer to attempt to work out all bargaining rights issues that will affect the parties, in advance of the transfer occurring. Second, in the event the parties cannot resolve bargaining rights issues before the transfer, there should be a procedure in the applicable labour statutes that gives the successor employer and the union the right to apply to a labour board in advance of a transfer taking place to have the board decide bargaining rights issues related to the transfer. These type of advance procedures will work in public and private sector transfers because Canada and the provinces have the jurisdiction to legislate matters which come under their respective labour jurisdictions. In the case of interjurisdictional transfers between Canada and the provinces, the Constitutional divide over labour relations would prevent these advance procedures since the Canada Board or a provincial board would not have jurisdiction over a matter until the transfer actually occurred. Although a Convention between the federal jurisdiction and the provinces might be a solution for such advance procedures, it is unlikely that a Convention would withstand a Constitutional challenge. The solution to

the problem is to add a provision in the statutes that obligates the predecessor to give advance notice to the union and the successor, and make it a mandatory term of any transfer arrangement between the predecessor and the successor that attempts be made to resolve bargaining rights issues with the union before the transfer occurs.

As the objective of successor rights is to preserve bargaining rights and not to expand them, employees of the predecessor's operations should transfer with the undertaking to the successor when there are positions available for them in the successor's operation. Otherwise, if the employees of the predecessor are permitted to remain working for it, the union's bargaining rights could be expanded when the transfer to the successor occurs.

There is a need for successor rights legislation regarding interjurisdictional transfers between the federal and provincial sectors and between the public and private sectors in those jurisdictions that currently do not have such legislation. The legislation would allow for the preservation of bargaining rights, give the labour boards broad powers to deal with all issues involved in interjurisdictional transfers and promote harmonious and stable labour relations.

CHAPTER 4

CONCLUSION

1. INTRAJURISDICTIONAL TRANSFERS

Presently, the successor rights provisions in the labour statutes engage when a transfer of a business, or part of it, occurs. In order for a successorship to bind a successor to a collective agreement and certificate, there must be a continuity of the business, or part of it, and something must be relinquished by the predecessor and passed to the successor. What the successor receives must be a functional economic vehicle. The key to a successorship is determining what the business of the predecessor consists of that is transferred to the successor. A business is a living being consisting of a number of different components and work functions alone are insufficient to establish a successorship. A successor stands in the shoes of the predecessor with respect to the bargaining rights of the predecessor. In successor rights cases, there is a balancing of interests of a union, employees and employer. The underlying goal of successor rights is to preserve jobs and to continue benefits and terms in collective agreements for the benefit of employees.

The successor rights provisions in the labour statutes in the eleven jurisdictions in Canada have been governing the rights of employees, unions and employers when there is an intrajurisdictional transfer of a business, or part of it, for quite some time. This legislation can be improved to have the parties take a more proactive role in resolving successorship issues in advance of a transfer, which would lead to more harmonious labour relations between the parties. The parties should also have additional rights which are not currently in the successorship provisions.

All jurisdictions should have provisions which indicate a successor does not have to bargain with a union while there is a successor rights application pending before a labour board. When a collective agreement of the predecessor imposes undue hardship on employees, a union or the successor, a successor or union should be able to apply to a

labour board to open up negotiations to negotiate a new collective agreement. A test of undue hardship would apply in such circumstances, which is a high threshold that would deter frivolous claims to open negotiations. If the character of a business is substantially changed shortly after a transfer, there should not be a continuation of bargaining rights.

Advance communication between affected parties before the transfer of a business, or part of it, is lacking. A predecessor and union should be required to give employees advance notice of a transfer so that they are aware of their rights and have some participation in events that will affect them. A predecessor should be required to inform a union of its intent to transfer its business to another employer, which would allow the union and the successor to agree on rights and obligations that would apply upon the transfer. The labour statutes should permit applications to be made to a labour board in advance of the transfer for rulings on the continuity of bargaining rights when a union and the successor cannot agree on bargaining rights issues.

The present successor rights legislation is too complex and needs to be simplified. There is a lack of consistency in the powers of labour boards and in the language used in the successorship provisions in the various jurisdictions. There should be a legislative provision which deems an employee of the predecessor, who works in the business or part of it which is transferred to a successor, to be an employee of the successor as of the date of the transfer. Predecessor employees should have a legislated right to be recalled to work by the successor for one year from the date of the transfer. An upper limit of two years should be put on a hiatus, and after that time, a business should be considered ineligible for successor rights. All jurisdictions should have successor rights provisions which indicate a successor is bound by the predecessor's breaches of the collective agreement, and all proceedings under a labour statute, which existed as of the date of the transfer. Any such proceedings or obligations under a collective agreement of a predecessor should be continued with, and remedied by, the successor. There is no need to change the rules of successorship to allow successor rights when bargaining unit work is contracted or subcontracted.

In determining the appropriate bargaining unit, the same criteria used in

certification applications should be used. Representation votes in intermingling cases should be left to the discretion of labour boards. A union and successor should be required to attempt to agree on appropriate bargaining unit structures in a set period, and if there is no agreement, a labour board should determine the bargaining units. The bargaining units agreed to by the successor and a union should be subject to approval by a labour board to ensure they are appropriate and to avoid undue fragmentation.

Unions must remain cognizant of their duty of fair representation when there is intermingling. The successor rights provisions should obligate a union to consult with its members before it makes decisions related to bargaining rights. Although labour boards need the power to amend a collective agreement when there are successor rights, such power should be exercised sparingly. An affected union and successor should be required to attempt to amend a collective agreement, by negotiating in good faith, followed by mediation if negotiations reach an impasse. It is only when those efforts have failed that a labour board should amend the collective agreement for the parties.

2. INTERJURISDICTIONAL TRANSFERS

In order for collective agreements and certificates to transfer to another statutory regime, a legislative bridge must exist to overcome privity of contract problems. A few jurisdictions have legislation which permits interjurisdictional transfers. The lack of bridging legislation regarding interjurisdictional transfers has resulted in uncertainty as to how such transfers should be treated by some labour boards. The lack of interjurisdictional transfer bridging legislation causes uncertainty in day to day labour relations and results in prolonged litigation. There is a need for bridging legislation between the federal and provincial jurisdictions, and between the public and private sectors in those jurisdictions that do not have such legislation to overcome privity of contract problems. It is not equitable and fair that bargaining rights be set at naught when there are interjurisdictional transfers.

When there is no bridging legislation for interjurisdictional transfers, there is disruption, uncertainty and protracted litigation which does not promote harmonious

relations between unions, employers and employees. When a labour board declares that a collective agreement from another jurisdiction is recognized as a voluntary recognition in a recipient jurisdiction, that is a misnomer since there is no mutuality between the parties under the deemed voluntary recognition collective agreement.

There has been ongoing privatization by the federal government and most of the provinces in the last decade. As governments downsize and restructure, successor rights issues become more prevalent for unions, employers and employees. In those jurisdictions that do not have bridging legislation, the existing labour statutes are inadequate in setting out the rights of the parties when interjurisdictional transfers occur from the public to the private sector and that creates uncertainty, insecurity and lack of harmony. The solution to such problems is to have legislation in place that clearly indicates what the rights and obligations of the parties are when interjurisdictional transfers occur. There is no justification for having successor rights flowing from the private sector to the public sector. Public sector bargaining units do not fit well when transferred to the private sector and need to be reconfigured to fit a successor's operations in the private sector.

There need to be appropriate mechanisms in place to permit flexibility and adaptation to the successor's operations when there are transfers from the public to the private sector and when there are transfers between the federal jurisdiction and the provinces. For a successorship to exist between a province and the federal sector, the Constitutional divide must be crossed. There should be bridging legislation in all of the jurisdictions to permit bargaining rights to transfer between the federal jurisdiction and the provinces.

When a transfer occurs between jurisdictions, certain provisions in the predecessor's collective agreement may need to be modified. There should be statutory provisions which permit collective agreements to be modified mid-term. A union and the employer in the recipient jurisdiction should first be obligated to amend the terms of the collective agreement through negotiation, followed by mediation utilizing existing services under the labour statutes, and failing such efforts, an application could be

brought to the appropriate labour relations board to amend the agreement. The power of a labour board to amend a collective agreement should be used as a last resort, and used sparingly.

A labour board in a recipient jurisdiction should have the power to issue a new certificate for the bargaining unit that the successor rights attach to. When there are interjurisdictional transfers, there may be a need by the successor to open up the collective agreement and renegotiate the terms of it with a union. There should be some mechanism in the legislation that permits such "mid-term" negotiations to commence shortly after the transfer occurs. In an interjurisdictional transfer case, a recipient labour board should have the same general powers it has in intrajurisdictional transfer cases. In addition, the recipient labour board should have the power, after receiving an application from an employer or union, to order the parties to negotiate a new collective agreement when it is clear that the majority of the provisions in the predecessor's collective agreement are not suitable for the bargaining relationship in the recipient jurisdiction.

When bargaining units and collective agreements are wholly inappropriate for the successor, a union or an employer should be able to apply to a labour board to terminate the bargaining relationship between the parties if the character of the successor's business has substantially changed compared to that of the predecessor's.

There should be a legislated obligation on the union and the successor employer to attempt to work out all bargaining rights issues that will affect the parties, in advance of a transfer occurring between the public and private sectors. In the event the parties cannot resolve bargaining rights issues before the transfer, there should be a procedure in the applicable labour statutes that gives the successor employer and the union the right to apply to a labour board in advance of a transfer taking place to have the board decide bargaining rights issues related to the transfer. In the case of transfers between the federal jurisdiction and the provinces, the predecessor should be obligated to give advance notice to the union and the successor, and it should be made a mandatory term of any transfer arrangement between the predecessor and the successor that attempts be made to resolve bargaining rights issues with the union before the transfer occurs.

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