Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 Applicant v. WAL-MART CANADA CORP. operating as WAL-MART, WAL-MART CANADA, SAM'S CLUB and SAM'S CLUB CANADA, WAL-MART STORES, INC., and F.W. WOOLWORTH CO. LIMITED, WOOLWORTH CANADA INC., VENATOR GROUP CANADA INC. and FOOT LOCKER CANADA INC., Respondents

LRB File No. 194-04; January 12, 2009
Chairperson, James Seibel; Members: Ken Ahl and John McCormick

For the Applicant:	Drew Plaxton
For Wal-Mart Canada Corp.:	John Beckman, Q.C. and Catherine Sloan
For Foot Locker Canada Inc.:	Kevin Wilson and Chris Veeman
For Wal-Mart Stores, Inc.:	George Avraam

REASONS FOR DECISION – PRELIMINARY ISSUES

Background:

[1] In 1992, the Applicant United Food and Commercial Workers, Local 1400 (the "Union") obtained a certification Order for a unit of all employees of Woolco Department Store in Moose Jaw, Saskatchewan operated by F.W. Woolworth Co. Limited (the "certification Order"). In the captioned application, filed July 20, 2004, the Union alleges, *inter alia*, in a very summarized fashion:

(1) that, through a series of subsequent mergers, amalgamations or name changes, F.W. Woolworth Co. Limited became Woolworth Canada Inc., Venator Group Canada Inc. and/or Foot Locker Canada Inc. ("Woolworth/Venator/Foot Locker");

(2) that, in 1994, Woolworth/Venator/Foot Locker transferred part or all of its retail store business in the province, including its business in Moose Jaw, to Wal-Mart Stores, Inc. ("Wal-Mart U.S.") through to Wal-Mart Canada Corp. ("Wal-Mart Canada"), transactions that may have employed the use of one or more subsidiary, numbered or "shell" companies;

(3) that most of the non-unionized stores continued to carry on business as Wal-Mart stores, but the unionized store in Moose Jaw was closed,

pursuant to an agreement between Wal-Mart Canada and Woolworth/Venator/Foot Locker;

(4) that, in 1999, Wal-Mart Canada opened a store in Moose Jaw which the Union alleges was a successorship of the transferred business in Moose Jaw;

(5) that, in 2004, the Union made a request that Wal-Mart Canada recognize union security and commence bargaining, which has been refused;

(6) that Wal-Mart Canada and Wal-Mart U.S. are associated or related undertakings pursuant to s. 37.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*");

(7) that the entities comprising Woolworth/Venator/Foot Locker are associated or related undertakings;

(8) that, pursuant to s. 37 of the *Act*, the Respondents are bound by the certification Order; and

(9) that each of the Respondents has been engaging in unfair labour practices and violations of certain subsections of s. 11(1) and s. 36 (re: union security) of the *Act*.

[2] In accordance with the Order of the Board dated January 20, 2005, the Board heard argument on a number of preliminary issues raised by the Respondents, following the filing of affidavit evidence, as follows:

(a) Whether the application is barred by s. 3(1)(j) of *The Limitation of Actions Act*, R.S.S. c.-L-15 (now repealed);

(b) Whether the application ought to be dismissed for delay or laches;

(c) Whether Woolworth/Venator/Foot Locker and/or Wal-Mart U.S. are properly respondents to the application and ought to be removed; and

(d) Whether the subpoenas issued by the Applicant against the Respondents are overly broad.

[3] It is not necessary to deal with certain other issues that were raised because of the view we have taken of certain other issues.

[4] The parties were represented as follows: Mr. Plaxton on behalf of the Union; Mr. Beckman and Ms. Sloan on behalf of Wal-Mart Canada; Mr. Wilson and Mr. Veeman on behalf of Woolworth/Venator/Foot Locker; and Mr. Avraam on behalf of Wal-Mart U.S. Mr. Avraam advised that his client did not attorn to the jurisdiction of the Board.

[5] We have reviewed the written briefs of argument filed by certain parties.

Arguments and Decisions:

(a) Limitation of Actions

[6] With respect to the issue of limitation of actions, it is observed that the matters and events complained of in the application occurred approximately ten years before the application was filed. The application was filed while the former *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, was in force, and before it was repealed by the current *The Limitations Act*, S.S. 2004, c.- L-16.1.

[7] Mr. Wilson, counsel on behalf of Woolworth/Venator/Foot Locker, argued that there was a limitation period of six years for "any other action not in [the Act] or any other *Act* specifically provided for" pursuant to s. 3(1)(j) of *The Limitation of Actions Act*, R.S.S. The word "action" is defined in s. 2(a) as including "a civil proceeding". Counsel argued, citing the labor arbitration decision in Re *Harry Woods Transport Ltd.*, 25 LAC (2d) 60, that the words "civil proceeding" includes applications before tribunals other than the courts.

[8] Mr. Beckman, counsel on behalf of Wal-Mart Canada, argued that *The Limitation of Actions Act*, as a law of general application, applies unless, by virtue of section 3(2), another applicable statute specifically limits the time for bringing an action.

The Trade Union Act contains no specific time limitations for the commencement of a complaint, and that, accordingly, the Union's application is barred having been commenced more than six years after the "cause of action" arose. Counsel also argued that the union bears the onus of establishing that it could not by the exercise of due diligence have discovered the material facts giving rise to the cause of action at an earlier date.

[9] Mr. Yves Room, counsel on behalf of Wal-Mart U.S., agreed with the submissions made on behalf of Wal-Mart Canada.

[10] Mr. Plaxton, counsel on behalf of the Union, pointed out that there is no authority directly on point. While the term "action" is defined by the *Act*, the term "civil proceeding" is not. Counsel pointed out that the term "action" is defined in the *Queen's Bench Act, 1998*, S.S., as "a civil proceeding commenced by statement of claim …". Counsel referred to the decision of the Nova Scotia Supreme Court, Appeal Division, in *Re Provinces and Central Properties Ltd. and City of Halifax, et al.* (1969), 5 DLR (3d.) 28,which held that proceedings to invoke an arbitration clause in an urban redevelopment contract was not an "action" and was not statute barred by a general limitation period. Counsel also referred to the decision of the Ontario Court of Appeal in *West End Construction Ltd. v. Ontario Human Rights Commission* (1989), 70 O.R. (2d) 133, where it was held that the Ontario *Limitations Act* did not apply to a complaint of discrimination under human rights legislation. Counsel stated that the general limitation period in the Act did not apply to the present proceedings because the Union's application refers to continuing matters (i.e., unfair labour practices) and a matter of status (i.e. successorship).

[11] In the Board's opinion, the view argued by Mr. Wilson is overly broad, and our reading of *The Limitation of Actions Act* as a whole leads us to conclude that it was meant to apply to actions commenced in the courts by statement of claim or other originating notice or writ in which a right is litigated between parties, and not to proceedings before statutory tribunals. Certainly, it did not apply to judicial review proceedings of decisions from those tribunals despite the fact that there is no statute governing judicial review in general that provides a limitation period that would override *The Limitation of Actions Act*.

[12] In any event, with respect to the successorship application, the event of successorship under *The Trade Union Act* occurs *at the time of the transfer of the business*, and the purpose of the application, *inter alia*, is to obtain recognition of that past event. There is no limitation on that recognition because the event is a fact that occurred at the time. Whether the applicant seeking recognition can enforce the consequences thereof is another matter (i.e., what are the monetary consequences that might flow from the failure of the successor to acknowledge the successorship, collective agreement and the union's status as bargaining agent). With respect to the alleged unfair labour practices in the present case, failure to recognize the Union's representational status (if so found) is in the nature of a continuing violation of the *Act*. Again, the monetary or other consequences that would flow from such a violation is a matter for decision by the panel that hears the final application. Accordingly, we have determined that the present application is not barred by the statute.

(b) Delay

[13] Mr. Wilson argued that failure to bring the application again his client, Woolworth/Venator/Foot Locker, the predecessor employer, after a delay of more than 10 years is sufficient to shift the onus to the union to rebut a presumption of prejudice to said respondent. That is, the union must provide a credible explanation for the delay and demonstrate that there is no prejudice to the respondent. Counsel referred to jurisprudence holding that extreme delay has an inherently corrosive effect on the memory of potential witnesses. Counsel pointed out that his client has been unable to locate documents that may have existed in the past regarding collective bargaining with the union and they may no longer exist.

[14] Mr. Beckman made similar arguments, and further asserted that the "closure agreement" between the former Woolco store and the Union provided that any dispute regarding closure of the store should be taken to arbitration.

[15] Mr. Plaxton, argued that the application ought not to be dismissed for delay because the successor is still bound by the certification order and collective bargaining agreement with the union. Counsel argued that if the Board finds that the

effluxion of time resulted in unfairness to the respondents, the board could deal with that in terms of the remedy.

[16] Some of the more important decisions cited by the parties included: *Kinaschuk v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 and Saskatchewan Government Insurance*, [1998] Sask. L.R.B.R. 528, LRB File No. 528; *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd*., [1999] Sask. L.R.B.R. 238, LRB File No. 363-97; *Re Corporation of the City of Mississauga*, [1982] O.L.R.B. Mar. 420; *Neskar v. Civic Employees Union, Local 21 (C.U.P.E.)*, [1995] 4th Quarter Sask. Labour Rep. 70, LRB File No. 122-95.

[17] In the present case, we are of the opinion that excessive and undue delay in the prosecution of the application insofar as it alleges a conspiracy to commit unfair labour practices has resulted in substantial prejudice to the Respondents which presumption has not been rebutted by the Applicant Union. That is, the Respondents are substantially prejudiced in their ability to meet the allegation that there was an arrangement between Wal-Mart Canada and/or Wal-Mart U.S. and Woolworth/Venator/Foot Locker to defeat the Union's bargaining rights.

[18] However, if successorship is found to have occurred, failure by the alleged successor to recognize the Union and ignore the certification order and collective agreement, is a continuing violation of the *Act* – any doctrine of delay or laches would not apply to fresh violations, the matter of the consequences flowing there from, monetary or otherwise, is a matter to be determined by the panel that hears the final application. Accordingly, the application respecting alleged violations of s. 11(1) and 36 of the *Act* as against Wal-Mart Canada and Wal-Mart U.S. shall continue and is not dismissed.

[19] However, the alleged predecessor, Woolworth/Venator/Foot Locker, has no continuing responsibility with respect to union recognition or security after the transfer took place, and the application is dismissed as against such respondent with respect to allegations of unfair labour practices in violation of ss. 11(1) and 36 of the *Act*.

[20] As concerns the application regarding successorship, if Wal-Mart Canada or Wal-Mart U.S. are prejudiced by delay, then they are the authors of their own misfortune. Under *The Trade Union Act*, successorship occurs automatically at the time that the transfer of business takes place. Pursuant to s. 37 of the *Act*, the successor is immediately bound by the orders of the Board and the obligations of the predecessor. The passage of time does not undo that legal status. Indeed, although such applications are generally made by unions, it was open to the Respondents to make application to the Board to determine whether there was a successorship. As concerns, the status of Woolworth/Venator/Foot Locker regarding the successorship application is dealt with in the next following section of these Reasons.

(c) The Status of Woolworth/Venator/Foot Locker and/or Wal-Mart U.S. as Respondents to the Application Regarding Successorship

[21] Mr. Wilson argued that the predecessor is not properly a party to an application regarding successorship, because no obligations are placed upon it under s. 37 of the *Act* to ensure that the successor meets its obligations, pointing out that the Board found that the predecessor was inappropriately named as a respondent to the application for this reason.

[22] However, Mr. Plaxton pointed out that in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union, v. Canada Safeway Ltd.*, [1997] Sask. L.R.B.R. 472, LRB File No. 143-97, the Board held that the predecessor may be made a party to the application although any relief granted by the Board under s. 37 may only be made against the successor. For example, the Board stated as follows in, at 475:

> *Normally, an application is made under s. 37 of the Act by the trade union against the successor employer requiring the employer to comply with any existing certification orders and collective agreements that applied to the predecessor employer. The predecessor employer may be a party to the application; however, the focus of the Board's attention generally is on the successor and any orders that issue are directed toward the successor employer.*

[23] While the *Town of Maple Creek, supra,* and *Canada Safeway, supra,* decisions appear to be at odds with one another, closer reading reveals that in the former, the Union's reason for naming the predecessor was because it had the sole

knowledge as to the identity of the alleged successor. In our opinion, it is improper to read *Town of Maple Creek, supra,* as establishing a dogmatic principle and that *Canada Safeway, supra,* confirms that in certain circumstances the predecessor may be made a party to a successorship application. However, such exigent circumstances do not exist and we find that Woolworth/Venator/Foot Locker has inappropriately been made a party to the application, and ought to be removed.

[24] The situation is different, however, as concerns the status of Wal-Mart U.S. It is common knowledge that Wal-Mart Canada Corp. is a wholly owned subsidiary of Wal-Mart U.S. The nominal purchaser of the former Woolworth/Venator/Foot Locker businesses in 1994 was incorporated the day before the sale took place as 056217 New Brunswick Inc. – Wal-Mart U.S. acted as guarantor. The New Brunswick corporation became Wal-Mart Canada Inc. a short time later. Wal-Mart Canada Inc. became Wal-Mart Canada Corp by amalgamation. It is alleged that the purchase was actually put together by Wal-Mart U.S. and that certain documents that may be relevant to the application regarding the alleged successorship are in or have been removed to the United States, and are in the possession or are under the control of Wal-Mart U.S. It is not possible on the materials filed to determine the extent to which the entities are related or linked, most particularly in the context of the alleged successorship. In the circumstances, we cannot find that Wal-Mart U.S. is inappropriately a party to the application. It shall be for the panel of the Board that hears the final application to determine after hearing *viva voce* evidence and cross-examination.

(d) <u>The Scope of the Subpoenas</u>

[25] As we have determined above that the application regarding unfair labour practices is dismissed as against Woolworth/Venator/Foot Locker and that it is not an appropriate party to the successorship application, we need not address the breadth of the subpoena issued against it, but simply declare that it is now null and void.

[26] Mr. Beckman argued that as Wal-Mart Canada claims it has only one document relevant to the issue of successorship – a “redacted” stock purchase agreement. In our opinion, that is not a compelling or sufficient argument with respect to the breadth of the subpoena issued against it – it has a duty of continuing discovery and disclosure of documents. Otherwise, the position of counsel’s client appears to be that

any documents located outside the Province of Saskatchewan, though they be relevant, do not have to be disclosed or produced. In our opinion, that is a wrong view. A party cannot escape its responsibilities under the *Act* by storing its documents in another jurisdiction. The event of successorship occurred in Saskatchewan and imposes certain obligations upon a successor doing business in the province. It is immaterial that it keeps its records elsewhere, even in another country. If the evidence at the hearing of an application for successorship discloses that there are relevant documents located anywhere that the alleged successor refuses to disclose or produce, then an adverse inference may be drawn. In this respect, documentary evidence is no different than the relevant *viva voce* evidence possessed by a witness under the control of a party that that party refuses to have testify. Failure to make discovery and disclosure carries such risk. Certainly, this is not a valid argument against the breadth of a subpoena *duces tecum* that is otherwise not inappropriately broad. Service need only be made in accordance with *The Business Corporations Act*, S.S. and common law.

[27] Mr. Avraam made much the same argument with respect to Wal-Mart U.S., which he said did not attorn to the jurisdiction. However, in our opinion, this is no basis for the parent of a wholly-owned subsidiary to refuse to discover and disclose documents relevant to the obligations of its subsidiary carrying on business in the province that are in its possession or under its control, no matter where they are located. We do agree, however, that it is necessary for the Union to serve the party in accordance with the requirements of *The Inter-provincial Subpoenas Act, S.S.* The subpoena stands.

[28] Finally, Wal-Mart Canada alleged that the Union is a company-dominated organization, and ought not to be allowed to prosecute the unfair labour practice application. Counsel for Wal-Mart Canada, Mr. Beckman, conceded that the pleading is not relevant to the successorship application. We have read the affidavit evidence as concerns this allegation, and have determined that it is without merit. The fact that the Union may have accepted monies from a competitor of the respondents for the ostensible purposes of aiding in an attempt to certify the respondent's store – an event that purportedly would benefit both the Union and the competitor – does not make the Union an organization dominated by the competitor within the meaning of the *Act*.

Summary of Findings:

[29] Therefore, the application with respect to the unfair labour practice allegations insofar as they allege a conspiracy by the Respondents is dismissed.

[30] The application as regards unfair labour practices in violation of ss. 11(1) and 36 of the *Act* by Woolworth/Venator/Foot Locker is dismissed. However, the application continues as against the remaining Respondents.

[31] Woolworth/Venator/Foot Locker shall be removed as a respondent to the application with respect to successorship, but such application remains extant as against Wal-Mart Canada and Wal-Mart U.S.

[32] The subpoena against Woolworth/Venator/Foot Locker is vacated. The subpoenas against Wal-Mart Canada and Wal-Mart U.S. continue to stand.

[33] We are not further seized with this matter. Any issues related to the implementation or interpretation of these directions may be determined on application to the Executive Officer of the Board in accordance with s. 4(12) of the *Act*.

DATED at Saskatoon, Saskatchewan this **12th** day of **January, 2009.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson