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; November 3, 2009
Vice-Chairperson, Steven Schiefner; Members: Kendra Cruson and Duane Siemens

For UFCW, Local 1400:	Drew Plaxton
For Wal-Mart Canada Corp.:	John R. Beckman, Q.C. and Catherine Sloan
For Wal-Mart Stores Inc.:	George Avraam and Mark Mendl
For Foot Locker Canada Inc.:	Kevin Wilson and Chris Veeman

Reconsideration – Criteria - Board discusses criteria to be used on applications for reconsideration involving preliminary determinations of Board.

Reconsideration – Board reconsiders decision of previous panel. Board concludes that panel erred, under circumstances, in continuing successorship application of trade union against non-resident, foreign corporation.

Abandonment – Criteria – Board discuss criteria for application of doctrine of abandonment in non-construction sector. Board concludes that determinations related to abandonment ought not to be determined during preliminary proceedings.

***The Trade Union Act*, ss. 5(1).**

REASONS FOR DECISION – APPLICATION FOR RECONSIDERATION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: These proceedings involve multiple applications for reconsideration (and/or clarification) of a preliminary decision of the Saskatchewan Labour Relations Board (the "Board) dated January 19, 2009 in proceedings involving an application by the United Food and Commercial Workers, Local No. 1400 (the "Union") alleging contraventions by Wal-Mart Canada Corp. operating as Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada ("Wal-Mart Canada"), Wal-Mart Stores Inc. ("Wal-Mart US"), and F.W. Woolworth Co. Limited,

Woolworth Canada Inc., Venator Group Canada Inc., and Foot Locker Canada Inc. (the "Foot Locker Group of Companies").

[2] The impugned decision of the Board, which was not a final disposition on the merits, was issued by a panel comprised of Chairperson James Seibel (as he then was) and Board members Ken Ahl and John McCormick (the "original panel"). The circumstances leading up to the preliminary proceedings before the original panel were summarized in the panel's Reasons for Decision as follows:

> ***[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:*
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> *(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");*
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> *(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;*
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> *(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;*
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> *(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;*
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> *(5)* *that, in 2004, the Union made a request that Wal-Mart Canada recognize union security and commence bargaining, which has been refused;*
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> *(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");*
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> *(7)* *that the entities comprising Woolworth/Venator/Foot Locker are associated or related undertakings;*
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> *(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] On January 19, 2009, Chairperson Seibel, on behalf of the original panel, issued the following Order of the Board:

THE LABOUR RELATIONS BOARD*, pursuant to Sections 5(d), 5(e), 11(1) and 37 of The Trade Union Act,* ***HEREBY ORDERS:***

1. *THAT the application with respect to the unfair labour practice of allegations insofar as they allege a conspiracy by the Respondents is dismissed;*

2. *THAT the applications with respect to the unfair labour practices in violation of ss. 11(1) and 36 of the Act by F.W. Woolworth Co. Limited, Woolworth Canada Inc., Venator Group Canada Inc., and Foot Locker Canada Inc. are dismissed;*

3. *THAT the unfair labour practices in violation of ss. 11(1) and 36 of The Trade Union Act against Wal-Mart Canada Corp. operating as Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada, Wal-Mart Stores Inc. may be continued;*

4. *THAT F.W. Woolworth Co. Limited, Woolworth Canada Inc., Venator Group Canada Inc., and Foot Locker Canada Inc. shall be removed with respect to the application for successorship;*

5. *THAT with respect to the successor application Wal-Mart Canada Corp. operating as Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada, Wal-Mart Stores Inc., may be continued;*

6. *THAT any subpoenas against F.W. Woolworth Co. Limited, Woolworth Canada Inc., Venator Group Canada Inc., and Foot Locker Canada Inc. dated January 26, 2005 are vacated;*

7. *THAT any subpoenas against Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada, and Wal-Mart Stores Inc. dated January 26, 2005 shall continue to stand;*

8. *THAT any issues relating to the implementation or interpretation of this Order shall be determined on application to the Executive Officer of the Board in accordance with s. 4(12) of The Trade Union Act, and:*

9. *THAT this panel of the Board is not seized of this matter.*

LABOUR RELATIONS BOARD

[4] On February 23, 2009, counsel for Wal-Mart US filed an application for reconsideration of the original panel's decision advancing two (2) primary arguments, which are summarized by the Board as follows:

1. That the original panel erred in law and exceeded its jurisdiction in allowing the Union's application to continue against Wal-Mart US on the grounds that Wal-Mart US was a foreigner to the Province of Saskatchewan, did not conduct business in the Province, and was not a company incorporated under, or subject to, the laws of the Dominion of Canada.

2. That the original panel erred in law and exceeded its jurisdiction in concluding that the Board had authority to issue a subpoena against Wal-Mart US on the grounds that Wal-Mart US was a foreigner to the Province of Saskatchewan, did not conduct business in the Province, and was not a company incorporated under, or subject to, the laws of the Dominion of Canada.

[5] On February 26, 2009, counsel for Wal-Mart Canada filed an application for reconsideration of the original panel's decision Although an additional ground was raised in its application for reconsideration, Wal-Mart Canada confined its argument to three (3) primary grounds, which are summarized by the Board as follows:

1. That the original panel's decision turned on an erroneous conclusion/interpretation of law or that it made a significant/precedential policy adjudication (that requires reconsideration by the Board) in finding

that *The Limitation of Actions Act*, R.S.S.1978, c.L-15, did not apply to proceedings before the Board, as a statutory tribunal.

2. That the original panel's decision turned on an erroneous conclusion/interpretation of law or that it made a significant/precedential policy adjudication (that requires reconsideration by the Board) in not finding that the successorship aspect of the Union's application was barred due to abandonment, laches and/or inexcusable delay on the part of the Union.

3. That the original panel's decision turned on an erroneous conclusion/interpretation of law or that it made a significant/precedential policy adjudication (that requires reconsideration by the Board) in finding that Wal-Mart Canada and Wal-Mart US were related or common employers within the meaning of s. 37.3 of the *Act*.

[6] On March 4, 2009, the Union filed replies to both applications for reconsideration.

[7] On August 16, 2009, the Union filed an application for reconsideration of the original panel's decision seeking clarification from the Board as to whether or not the Union was entitled to seek and obtain a new subpoena or subpoenas directed to the Woolworth Group of Companies following the original panel's decision to vacate the subpoena previously issued by the Board directed to the Woolworth Group of Companies.

[8] With the consent of the parties, all three (3) applications for reconsideration were joined and heard together before the Board on September 21, 2009. 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. Avraam and Mr. Mendl on behalf of Wal-Mart U.S; Mr. Wilson and Mr. Veeman on behalf of the Foot Locker Group of Companies. Counsel for all of the parties filed written Briefs of Law and Argument and/or Books of Authorities, for which the Board is thankful.

[9] Finally, it should be noted that Mr. Avraam advised the Board that his client, in authorizing his participation in the proceedings, was not attorning to the jurisdiction of the Board.

Preliminary Applications:

[10] At the commencement of the hearing, the Union took the position that Wal-Mart US's application for reconsideration should be summarily dismissed on the basis that Wal-Mart US had not yet filed a reply (*i.e.* the Union's application filed June 20, 2004). During the hearing, the Board orally ruled that it was satisfied that Wal-Mart US had the right to bring an application for reconsideration of the preliminary matters previously adjudicated by the Board notwithstanding that it had not yet filed a reply to those proceedings. In the Board's opinion, Wal-Mart US's right to bring a reconsideration application flows as a natural consequence of the discretion exercised by the original panel, allowing it to challenge the jurisdiction of the Board by way of preliminary application without filing a reply. To the extent (and in the event) that leave of the Board was required by Wal-Mart US to bring its application for reconsideration, the Board was prepared to grant such leave.

Statutory Provisions:

[11] The Board's authority to reconsider its prior decisions finds its genesis in section 5(j) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), which provides as following:

> *5 The board may make orders:*
>
> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

Analysis and Decision:

[12] The Board recognizes that in every application for reconsideration there is a need to achieve a balance between the Board's authority to reconsider its own decisions and the general importance of finality in its decision-making in promoting

stability in labour relations. To which end, the Board has resolved to sparingly exercise its jurisdiction to review its decisions under ss. 5(i) of the *Act*. This view was expressed by the Board in *Remai Investment Corporation v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union* [1993], 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93 at 107:

> *Though the Board has the power under Section 5(i) to reopen its decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster.*

[13] For example, the Board has clarified that a request for reconsideration is neither an appeal nor an opportunity to re-argue or re-litigate an unsuccessful application before the Board. See: *Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc.*, [2003] Sask. L.R.B.R. 454, LRB File No. 003-02 and *United Food and Commercial Workers, 1400 v. Sobey's Capital Inc., et al.*, [2005] Sask. L.R.B.R. 358, LRB File Nos. 181-04 & 227-04.

[14] As to the circumstances under which the Board will examine its prior decisions, the Board has adopted the reasoning in *Overwaitea Foods v. United Food and Commercial Workers No. C86/90,* a decision of the British Columbia Industrial Relations Council. In that case, the British Columbia Industrial Relations Council identified six (6) criteria (or grounds) in which it would give favourable consideration to an application for reconsideration. The criteria were set out as follows:

> *In Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532, the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRD No. 61/79, [1979] 3 Can LRBR 153), added a fifth and a sixth ground:*
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> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
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> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*

> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
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> 4. *if the original decision turned on a conclusion of law of [sic] general policy under the code which law or policy was not properly interpreted by the original panel; or,*
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> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[15] Of particular significant to the present applications, this Board, in *United Food and Commercial Workers, Local No. 1400 v. Wal-mart Canada Corp.*, 2009 CanLII 11242 (SK L.R.B.), LRB File No. 038-05, concluded that it should be reluctant to entertain reconsideration applications of its preliminary determinations in proceedings before the Board except in the clearest and most compelling of cases.

[16] Finally, although this Board normally utilizes a two (2) step approach for reconsideration applications (with the applicant to first establish solid grounds for reconsideration before a decision is made as to what disposition of the matter is appropriate), in the present applications, the parties agreed that both phases of all three (3) applications could be heard concurrently, with all parties advancing argument on both the grounds for reconsideration and the proper disposition of the matters flowing from the Board's findings.

[17] With these cautions in mind, the Board will deal with each of the arguments advanced in the three (3) applications for reconsiderations.

Arguments and Decisions:

(a) <u>The Status of Wal-Mart US as a Respondent to the Union's application</u>

[18] As indicated, Wal-Mart US argued that the original panel erred in law and/or exceeded its jurisdiction in allowing the Union's application to continue against it on the grounds that Wal-Mart US was a foreigner to the Province of Saskatchewan, who did not conduct business in the Province of Saskatchewan, and who was not a company incorporated under, or subject to, the laws of the Dominion of Canada.

[19] By way of background, the original panel dismissed that aspect of the Union's allegations related to a conspiracy on the part of the Respondents to commit an unfair labour practice. The original panel then went on to remove the Foot Locker Group of Companies as a Respondent to the balance of the Union's application (*i.e.* in successorship). However, with respect to Wal-Mart US's status as a Respondent to the Union's application in successorship, the original panel came to the following conclusions:

> ***[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.*

[20] Wal-Mart US objected to the conclusion of the original panel that the Board had jurisdiction over a non-resident, foreign corporation and argued that the original panel erred in failing to dismiss the Union's application against it. Counsel on behalf of Wal-Mart US argued that the evidence before the original panel clearly established that Wal-Mart US was (at all times material to the application) a corporation incorporated pursuant to the laws of one or more of the United States of America, with its head office in Bentonville, Arkansas; that Wal-Mart US did not conduct business in the Province of Saskatchewan (nor elsewhere in the Dominion of Canada) and was not registered to do so; that Wal-Mart Canada is (and was at all material times) a wholly-owned subsidiary of Wal-Mart US; and that all business activities conducted by Wal-Mart US in Canada was conducted through Wal-Mart Canada and not by Wal-Mart US.

[21] Wal-Mart US argued that the Board exceeded its jurisdiction by concluding that it had authority over a non-resident, foreign corporation in the absence of evidence that it was itself conducting business in Saskatchewan (*i.e.* as opposed to conducting business through its Canadian subsidiary). Wal-Mart US took the position that the Board was both statutorily and constitutionally limited in the exercise of its jurisdiction to labour relations matters arising within the Province of Saskatchewan and that it has no jurisdiction over a non-resident, foreign corporation absent evidence that corporation was itself conducting business in the Province of Saskatchewan. Counsel for Wal-Mart US pointed to ss. 24 and 25 of the *Act* as indicative of the Legislature's intent to confine the Board's jurisdiction to the territorial limits of the Province of Saskatchewan, together with the general principle of constitutional law that a provincial legislature has no authority to legislate extra-provincially, let alone internationally. Wal-Mart US argued that the original panel's decision to allow the Union's application to continue against it was contrary to basic principles of both statutory and constitutional law and, in so doing, exceeded its jurisdiction and, thus, must be set aside.

[22] Furthermore, Wal-Mart US argued that the evidence before the original panel was that 1994 purchase/transfer of business interests occurred between 056217 New Brunswick Inc (which later became Wal-Mart Canada) and a member of the Foot Locker Group of Companies (as it was then) and, therefore, any statutory or other obligations in successorship under the *Act* arising out of the subsequent closure of the Woolco Department Store in Moose Jaw, Saskatchewan in 1994, and the subsequent opening of a store by Wal-Mart Canada (the events forming the basis of the Union's Application in successorship) can only be the responsibility of Wal-Mart Canada. Therefore, Wal-Mart US argued that the original panel also erred in the application of general principle in allowing the Union's application in successorship to be continued against its.

[23] In advancing its arguments, Wal-Mart US relied on the decisions of the Supreme Court of Canada in *New Brunswick (Labour Relations Board) v. Eastern Bakeries Ltd.*, [1961] S.C.R. 72; in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63; and in *R. v. Hape*, [2007] 2 S.C.R. 292; the decision of the British Columbia Court of Appeal in *Ewachniuk v. Law Society (British Columbia)*

(1998), 156 D.L.R. (4th) 1; and the decision of the Alberta Court of Appeal in *Cunningham v. Hamilton* (1995), 29 Alta. L.R. (3d) 380.

[24] The Union took the position that Wal-Mart US's application for reconsideration ought to be dismissed for a variety of reasons. Firstly, counsel for the Union argued that, as Mr. Seibel was no longer a member of the Board when Wal-Mart US filed its application for reconsideration, Wal-Mart US should be seen by the Board as forum shopping, with Wal-Mart US seeking to obtain the remedy that it was unable to obtain in its original preliminary application from a new panel of the Board. To which end, counsel for the Union reminded the Board that a request for reconsideration should not be viewed, and the Board should not permit a party to use an application for reconsideration, as an appeal or an opportunity to re-argue or re-litigate an unsuccessful application before the Board for the reasons stated by the Board in *United Food and Commercial Workers, 1400 v. Sobey's Capital Inc., et al.*, [2005] Sask. L.R.B.R. 358, LRB File Nos. 181-04 & 227-04.

[25] Secondly, the Union argued that there was nothing in the *Act* that limited its application to resident corporations. Counsel argued the *Act* applies to companies (*i.e.* employers) who employ employees in the province of Saskatchewan. To which end, the Union argued that the test for the application of the *Act* is not the *situs* of a company's incorporation or location of its head office, it is whether or not there exists a sufficient nexus between the company, irrespective of its origin, and employees in the Province of Saskatchewan. In this regard, the Union relied on the decisions the Court of Queen's Bench in *International Brotherhood of Electrical Workers, Local 529* v. *Pyramid Electric Corp.* [1999] Sask. L.R.B.R. c-93, Q.B.G. No. 3437 of 1997; wherein the Saskatchewan Court of Queen's Bench concluded that the Board had jurisdiction to examine extra-territorial transactions (*i.e.* the sale of business) involving an Alberta-based company for the purposes of determining the application of the *Act* to that company in Saskatchewan.

[26] The Union asserted that Wal-Mart US, Wal-Mart Canada, and the Foot Locker Group of Companies, or some combination thereof, conspired to conceal the true nature of the transaction that occurred between these parties in 1994 and did so for the purpose of avoiding collective bargaining rights in Saskatchewan; specifically, the

Union's certification Order in Moose Jaw. To which end, counsel for the Union took the position that Wal-Mart US was merely hiding behind its Canadian subsidiary and that documents relevant to the Union's alleged successorship have been removed to the United States and, thus, Wal-Mart US is appropriately a Respondent to the Union's allegations.

[27] Thirdly, the Union took the position that Wal-Mart US and Wal-Mart Canada were related or common employers with Wal-Mart US exercising direct and substantial control over Wal-Mart Canada and, as such, Wal-Mart US should be seen by the Board as doing business in Saskatchewan (*i.e.* through the conduct and actions of its wholly-owned and controlled subsidiary). The Union alleged that Wal-Mart US put the 1994 deal together and asserted that Wal-Mart Canada was merely a nominal purchaser. The Union argued that the *Act* allows the Board to pierce the corporate veil and ensure direct dealings between the bargaining agent and the entity with real economic power over the employees in a workplace (*i.e.* the "true" employer). To which end, the Union argued that the original panel did not err in its finding that the Union's application in successorship could continue against Wall-Mart US; and certainly it was not a "clear and compelling" case of an error on the part of the original panel.

[28] There appears to be little authority directly on point of whether or not this Board had jurisdiction over a non-resident, foreign corporation. In *Pyramid Electric Corp, supra*, a case involving the extra-territorial application of the *Act* on an Alberta based company, the conclusions of Dawson J. on behalf of the Court at pp. 36 are instructive:

> *It is clear that the Board does not have jurisdiction over employees residing and working outside Saskatchewan. The Act is not intended to have application beyond Saskatchewan. However, s. 37 is concerned with continuing the bargaining rights applicable to a particular Saskatchewan business onto a person who has acquired that business or part thereof. Although Pyramid is an Alberta based company it could have employee relations which fall under the jurisdiction of the Board. Further, a certification order will apply to an employer based in another jurisdiction when it carries on business in Saskatchewan. Whether those relationships bring them within the bargaining obligations which were imposed on a predecessor business is within the Board's jurisdiction to decide. The Board must decide whether there is a sufficient nexus between Sparrow and Pyramid, as the putative successor, so as to determine whether Pyramid is the heir to the obligation to bargain collectively. As stated by McLachlin J. in the case of Lester (W.W.)*

(1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644 at 676-77:

> *To determine whether or not the business or part of the business has been disposed of, most boards examine the nature of the predecessor business, and the nature of the successor business determines if the business of the predecessor is being performed by the successor. Most boards approach the issue by examining factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is a continuity of management, and whether there is continuity of work performed...*

Pyramid argues that its possible acquisition of some of Sparrow's inventory in Alberta cannot make it the successor of Sparrow's business. But that is the very determination that the Board must make: what is the nature and extent of the disposition from Sparrow to Pyramid? Pyramid argues Sparrow is not the successor and therefore the evidence sought is not relevant. Without examination of the relevant facts and documentation the board will be unable to perform its function. Pyramid may have entered into arrangements or contracts with Sparrow or its trustee, which arrangements or contracts occurred outside the territorial jurisdiction of Saskatchewan, but which nevertheless govern the employees, contracts or assets of Sparrow in Saskatchewan. The mere fact that such arrangements, if they exist, took place between Pyramid and Sparrow outside Saskatchewan or the mere fact that Pyramid alleges they do not apply to Sparrow is not determinative. The Board must determine whether such arrangements, if they exist, are sufficient to classify Pyramid as the successor to Sparrow in Saskatchewan in accordance with the legislation and the parameters outlined in Lester, supra.

[29] The Canadian Labour Relations Board dealt with a comparable fact situation in *Servall Transport Limited et al. and Teamsters, General Truck Drivers and Helpers, Local No. 31, et al.* (1991), 16 C.L.R.B.R. (2d) 303. In that case, the applicant union alleged that Servall Transport Limited, a Canadian based company had sold or transferred its business to Servall America Inc., an affiliated American-based company. In concluding that the provisions of the *Canadian Labour Code*, R.S.C. 1985, c.L-2, did not have application to the American based company, the Canadian Labour Relations Board came to the following conclusions with respect to its jurisdiction over non-resident, foreign corporations at p. 308-310:

> *Here, we have some of the ingredients for a s. 35 declaration, but there is a crucial one missing. The prerequisite of federal works, undertakings*

> *or businesses that are operated by two or more employers having common control or direction cannot be met. There is only one employer here, Servall Transport. No matter how high the corporate veil is lifted or how many elements, such as corporate association, common directors, shared administrative services, operational integration vis-à-vis sales, dispatch or terminals in both Canada and the United States are argued about, one cannot escape the reality that the Teamsters want us to ignore. Servall America is simply not an employer within the meaning of the Code. As it is presently structured, its employees do not fall within the jurisdiction of this Board.*
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> . . .
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> *We are not saying, of course, that in other circumstances Servall America could not be considered to be a federal work, undertaking or business for the purposes of Part I of the Code. This Board has granted applications for certifications by trade unions seeking bargaining agent status for employees of American corporations working in Canada. An example that readily comes to mind is in the airline industry, where entities such as American Airlines, United Airlines and Delta Airlines employ Canadian residents to work at their operations at Canadian airports. The Board has, in those circumstances, certified bargaining units of reservations clerks, ramp attendants and other employees performing ground crew functions. The difference there, of course, is that those American corporations have brought themselves within the scope of the Code by employing resident Canadians to work in Canada in the field of aeronautics which is a matter of federal jurisdiction. Servall America, on the other hand, while it may be in the business of international truck transportation which also falls within the federal domain, has no Canadian resident employees; therefore, it cannot be considered to be an employer for the purposes of s. 4 of the Code.*

[30] After carefully considering the argument of the parties, and the limited authority on point, we are satisfied that in some instances, the Board can have jurisdiction over a non-resident, foreign corporation, such as Wal-Mart US. There is authority for the proposition that this Board's jurisdiction over a corporation is not determined by the origin of a company, the location of its head office, or whether or not it attorns to the jurisdiction. In this regard, the Board agrees with counsel for the Union that the Board's jurisdiction over a company arises on the basis of a sufficient nexus between that company and employees in the Province of Saskatchewan. See: *Pyramid Electric Corp, supra*, and *Servall Transport Limited, supra*.

[31] On the other hand and with all due respect, the Board has concluded that the original panel's decision was precedential and amounted to a significant policy adjudication which the Board wishes to clarify and change. Specifically, the original panel erred in allowing the Union's application in successorship to continue against Wal-

Mart US in the absence of an allegation (or any evidence) that it was the employer of any of the employees in Moose Jaw, Saskatchewan. While the *Act* permits the Board to pierce the corporate veil (for example, to make determinations as to whether or not corporations are related or common employers and as to who is the "true" employer in the case of a principal and contractor), with the original panel's decision to dismiss the Union's allegations related to conspiracy, there was no longer a basis or requirement for the Board to look behind the corporate veil of the Respondents. The Union was not alleging that Wal-Mart US was the employer of any of the employees in Moose Jaw; rather, the Union was alleging that Wal-Mart US was a party to transactions that resulted in Wal-Mart Canada becoming the successor to the Union's collective bargaining rights in Moose Jaw. Of particular significant, the Board notes that the Union's security demand (served June 29, 2004) was not made on Wal-Mart US; it was made upon Wal-Mart Canada.

[32] Even if it could be argued that the Union was, in effect, asking the Board to determine, as between the two (2) corporations, which was the successor, as a matter of general policy (and to a certain degree common sense), in determining the appropriate employer as between an international corporation (a corporation owning and operating discount retail department stores throughout the world) and that corporation's Canadian subsidiary (a corporation created for the purpose of conducting that corporation's affairs in Canada), this Board will prefer the Canadian subsidiary, who is the actual employer. There are a number of practical and obvious reasons for doing so, including service of documents, availability and compellability of witness, and enforceability of judgments, together with the avoidance of language and conflict of law issues.

[33] It appears that both the Union and the original panel confused the potential that Wal-Mart US could provide relevant and probative evidence related to the Union's application in making its decision to continue the Union's application against it. However, there is no limitation in the *Act* that prevents the Board from summoning the attendance of witnesses of non-parties to proceedings before the Board provided that the Board is satisfied that such persons can provide relevant and probative evidence. To which end, Wal-Mart US need not be continued as a Respondent to be compelled to give oral or written evidence in the within proceedings.

[34] As a Respondent in these proceeding, the Board would expect Wal-Mart Canada to have the capacity to tender evidence as to the history of that company's formation, those aspects of the 1994 transaction relevant to the proceedings before this Board, and the circumstances and transactions related to the opening of its store in Moose Jaw, Saskatchewan. In this regard, the original panel correctly noted that Wal-Mart Canada can not escape its responsibilities under the *Act* by storing its documents in another jurisdiction and the Board would anticipate that Wal-Mart Canada will obtain control over such documents as may be necessary and relevant to the conduct of these proceedings.

[35] For the foregoing reasons, the Board is satisfied that continuing the Union's application against Wal-Mart US would unnecessarily complicate proceedings before the Board without any reasonable probability of assisting in resolving the real issues in dispute relevant to the Union's application in successorship; namely, whether or not the collective bargaining obligations arising out of the Union's certification Order survived the closure agreement negotiated between the then employer (Woolworth Canada Inc.) and the Union; and whether or not those collective bargaining obligations were transferred to Wal-Mart Canada when its purchase business interests from the former employer in 1994, obligations which attached to the store it opened in Moose Jaw in 1999; and (for reasons discussed later in these Reasons for Decision) whether or not the Union failed to actively carry out its duties to bargain collectively and represent the interests of its membership for a long period without satisfactory explanation.

[36] As indicated, we find that Wal-Mart US's application for reconsideration must be granted on the basis that the original panel's decision was precedential and amounted to a significant policy adjudication which the Board felt compelled to clarify and change. For the foregoing reasons, Wal-Mart US shall be removed as a Respondent to the Union's application.

(b) Status of Subpoenas against Wal-Mart US and the Woolworth Group of Companies

[37] By way of background, at the request of the Union, on January 26, 2005, the Board issued subpoenas directed to the Foot Locker Group of Companies, to Wal-

Mart Canada and to Wal-Mart US. In its Reasons for Decision dated January 19, 2009, the original panel made the following conclusions with respect the subpoenas which had been issued by the Board:

> ***[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.*

[38] Counsel for Wal-Mart US argued that the Board does not have jurisdiction to issue a *subpoena duces tecum* to a non-resident, foreign corporation that does not conduct business in the Province of Saskatchewan. Wal-Mart US argued that the original panel erroneously concluded that the Union could serve and enforce a *subpoena* against Wal-Mart US through the mechanisms provided in *The Interprovincial Subpoena*

Act, R.S.S. 1978, c.I-12.1. Counsel for Wal-Mart US observed that, while *the Interprovincial Subpoena Act* provided a mechanism for the interprovincial enforcement of subpoenas, it did not permit or authorize the issuance, service, or enforcement of a subpoena internationally. As a consequence, Wal-Mart US argued that the original panel's decision turned on an erroneous conclusion or interpretation of law in finding that the Union could use the mechanisms of this *Act* to serve and enforce its *subpoena duces tecum* against Wal-Mart US. Counsel argued that the Board should simply quash or vacate the *subpoena duces tecum* directed to his client.

[39] The Union argued that the original panel's conclusion that the Union could utilize the mechanisms of *The Interprovincial Subpoena Act* was based on its finding that Wal-Mart Canada and Wal-Mart US were related or common employers within the meaning of s. 37.3 of the *Act*. To which end, counsel for the Union argued that the original panel correctly concluded that service upon Wal-Mart Canada (*i.e.* pursuant to the provisions of *The Interprovincial Subpoena Act*) was sufficient to service Wal-Mart US.

[40] In the alternative, counsel for the Union argued that the Board should not confuse difficulties the Union may experience in serving or enforcing a subpoena, with the Board's lack of authority to issue same. The Union argued that it has various options at it disposal regarding the service of the subpoenas issued by the Board, including Rule 29 of the *Queen's Bench Rules of Saskatchewan*, which provides for services of documents in foreign countries in accordance with the "Hague Convention" (defined therein).

[41] Finally, the Union sought clarification from the Board as to whether or not the Union was entitled to seek and obtain a new subpoena or subpoenas directed to the Woolworth Group of Companies following the original panel's decision to vacate the subpoena previously issued by the Board. The Union argued that quashing the subpoena directed to the Foot Locker Group of Companies was an error of law if the Union was now prevented from seeking a new subpoena and, through its application for reconsideration, was seeking to overturn that finding, if such was the case.

[42] The Foot Locker Group of Companies objected to the Union's application for reconsideration of the Board's decision to vacate the subpoena directed to it on the basis that the Union had unreasonably delayed in bringing its application for reconsideration and/or that the Union had not met the threshold to obtain reconsideration of the Board's Order. In addition, the Foot Locker Group of Companies argued that the Board also did not have authority to "clarify" a prior order in the manner requested by the Union.

[43] Having considered both the original panel's Reasons for Decision and the arguments advanced by the parties, the Board is not satisfied that the original panel came to an erroneous conclusion of law or that it erred in the application of the Board's jurisprudence in vacating the subpoenas directed to the Foot Locker Group of Companies. In light of the original panel's finding (including the dismissal of the Union's allegations related to conspiracy), the original panel may have had a variety of reasons for doing so. Certainly, it is not clear to the Board that the original panel erred in doing so; nor was their compelling argument to reconsider this aspect of the original panel's decision for the simple reason that it remains open to the Union to seek the issuance of a new subpoena if necessary for the proper conduct of the within proceedings. The original panel's decision to vacate one subpoena neither limits the Union's right to seek, nor the Board's discretion to issue, another; provided however and subject to the caution, that the Foot Locker Group of Companies is no longer a party to these proceedings.

[44] With respect to the subpoena directed to Wal-Mart US, we find it appropriate to follow the practice established by the original panel and vacate the subpoena directed to Wal-Mart US. Again, this Board's decision to vacate this subpoena does not fetter the Board's discretion to issue another, if necessary. To which end, we assume (without limiting the Board's discretion to find otherwise) that Wal-Mart Canada will be the primary vehicle through which production of relevant documents will take place and will have, through its witness, either direct or corporate knowledge as to the event and circumstances relevant to these proceedings. However, if such is not the case, the Union has the right to request a subpoena directed to such person or persons (including representatives of third-parties) that are capable of providing relevant and probative evidence in these proceedings.

(c) Application of the *Limitation of Actions Act*

[45] In its application, Wal-Mart Canada argued that the original panel's decision turned on an erroneous conclusion or interpretation of law or general policy in finding that *The Limitation of Actions Act* did not apply to proceedings before the Board. Specifically, Wal-Mart Canada alleged that the Union's allegations against it were barred by the provisions of *The Limitation of Actions Act.* The original panel came to the following conclusions with respect to the application of this Act to the Union's application:

> ***[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.*

[46] Simply put, we were not satisfied that, under the circumstances, it was appropriate to reconsider the original panel's conclusion that *The Limitation of Actions Act* was either inapplicable or did not bar the Union's application against Wal-Mart Canada. Wal-Mart Canada's arguments in its application for reconsideration on this point were essentially the same as the arguments it advanced before the original panel and we saw no clear and compelling evidence or argument that the original panel erred in its preliminary determination on this point.

(d) Abandonment, Laches and/or Inexcusable Delay

[47] In its application, Wal-Mart Canada also alleged that the original panel's decision turned on an erroneous conclusion or interpretation of law or general policy in not dismissing the Union's application in successorship against it on the basis of

abandonment, laches and/or inexcusable delay on the part of the Union. The original panel came to the following conclusions with respect the affect of delay on the Union's application:

> ***[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.*

[48] Wal-Mart Canada asserted that the original panel should have dismissed the Union's application in successorship against it on the basis that the Union abandoned any alleged bargaining rights it may have previously held under its certification Order and/or that it unreasonably delayed in exercising its rights such that they should be deemed by the Board to have been abandoned. For example, Wal-Mart Canada alleged that the Union and Woolworth Canada Inc. entered into a termination/closure agreement and that, through this document, which was ratified by the membership, the Union voluntarily terminated its bargaining rights. Furthermore, Wal-Mart Canada argued that the original panel erred in failing to apply this Board's jurisprudence on the issue of abandonment of bargaining rights or, alternatively, it adopted a new policy that requires reconsideration by the Board; a new policy that states that no delay or lapse of time will prevent any application to the Board for relief no matter how tenuous, questionable or unsubstantiated that claim may be. Wal-Mart Canada submitted that, under the circumstances, it was an abuse of process for the original panel to allow the Union's application to continue against it.

[49] In support of its position, counsel for Wal-Mart Canada argued that the events related to the purchase/transfer of business interests occurred in 1994, as did the closure of the Woolworth store in Moose Jaw and noted for the Board that these events occurred ten (10) years before the Union's application in successorship was filed.

Furthermore, counsel argued that the Union took no measures to enforce or exercise its collective bargaining rights between September of 1999, when Wal-Mart Canada opened its new store in Moose Jaw, Saskatchewan, until June 29, 2004, when the Union served a security request upon it. Wal-Mart Canada argued that the recent amendments to the *Act* have signaled the clear desire on the part of the Legislature to have labour relations matters before this Board resolved in a timely and expedient manner and that the original panel's decision in this regard was inconsistent with both the Board's jurisprudence and the overarching goal of timely resolution of outstanding claims and allegations pursuant to the *Act*.

[50] In particular, counsel for Wal-Mart Canada found two (2) comments of the original panel objectionable; namely, that if Wal-Mart Canada was prejudiced by delay, "*they were the authors of their own misfortune*"; and that the "*passage of time does not undo*" the legal status of a successor. While these statements may have been unfortunate (in the case of the former) and imprecise (in the case of the later), the Board was not satisfied that the original panel erred in allowing the Union's application in successorship to continue against Wal-Mart Canada.

[51] In its Reasons for Decision, the original panel correctly noted that the doctrine of delay (or laches) does not apply to an applicant seeking to enforce collective bargaining rights (through successorship or otherwise) arising out of an existing Order of the Board for the reasons stated therein. However, the original panel's decision may not have adequately addressed the issue of abandonment. In applications seeking to enforce existing collective bargaining rights, the doctrine of delay has been subsumed by the Board's jurisprudence in the application of the doctrine of abandonment. The original panel correctly noted that delay alone does not "*undue*" (rescind) an existing certification Order. However, a delay or failure on the part of a trade union to represent its members or to enforce or exercise collective bargaining rights are factors to be taking into consideration by the Board in exercising its discretion in a finding of abandonment.

[52] To which end, did the original panel err in failing to dismiss the Union's application in successorship against Wal-Mart Canada on the basis of abandonment?

[53] This Board's jurisprudence with respect to the doctrine of abandonment and its application in this province was well canvassed by this Board in the case of *Cineplex Galaxy Limited Partnership v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 295*, [2006] Sask. L.R.B.R. 135, LRB File No. 132-05. From this decision, a number of principles related to the Board's jurisprudence on the doctrine of abandonment (in the non-construction sector) can be drawn:

1. That, although not flowing from express statutory authority, the Board has the jurisdiction to consider and apply the doctrine of abandonment to collective bargaining rights arising out of existing certification Orders of the Board.

2. That, because the doctrine of abandonment is not prescribed by statute, it is an equitable remedy and thus may only be used as a defense to the assertion of a right or a claim but not as the basis for the making a claim. For example, the doctrine of abandonment may not be used by an employer to seek the rescission of an existing certification Order but may be used as a shield to a claim of an unfair labour practice by a trade union.

3. That the doctrine of abandonment may only be advanced by a party in circumstances where there has been a lengthy period of inactivity on the part of a trade union in representing the members of a bargaining unit. In such circumstances, a trade union that fails to actively carry out its duties to bargain collectively and represent the interests of its membership for a long period, without satisfactory explanation, may be found by the Board to have abandoned its bargaining rights.

4. That the doctrine of abandonment may not be advanced by a party with respect to any period during which there are/were no employees in the bargaining unit.

5. That the existence of an agreement between an employer and a trade union purporting to terminate their collective bargaining relationship will

not necessarily be determinative of a finding of abandonment on the part of the Board.

[54] Another principle that can be drawn, by necessary inference from an analysis of this Board's jurisprudence, is that the doctrine of abandonment is a discretionary remedy that is predicated on a series of factual determinations by the Board. For this reason and because one of the potential remedies that could arise upon a finding of abandonment is a determination that an existing certification Order is effete and/or otherwise ought to be rescinded, it is not surprising that the original panel was unwilling to making a finding of abandonment based on a preliminary application.

[55] Having considered both the original panel's Reasons for Decision and the arguments advanced by the parties, we are not satisfied that the original panel erred in failing to dismiss the Union's application in successorship against Wal-Mart Canada on the basis of abandonment. Whether or not the collective bargaining obligations arising out of the Union's certification Order have survived and were transferred to Wal-Mart Canada are matters to be determined by the Board following a full hearing on the merits, as are any determinations with respect to whether or not the Union failed to actively carry out its duties to bargain collectively and represent the interests of its membership for a long period without satisfactory explanation. These are not the type of determinations that lend themselves to disposition on the basis of affidavit evidence during preliminary proceedings before the Board. In this regard, the original panel did not err in either law or policy.

(e) Related Employer Determination:

[56] Wal-Mart Canada objected to the comments of the original panel contained in para. 24, *supra*, in their Reasons for Decision and expressed the concern that the original panel appeared to have determined that Wal-Mart Canada and Wal-Mart US were related employers within the meaning of s. 37.3 of the *Act*. Wal-Mart Canada argued that, as it came into existence in January of 1994 (albeit as 056217 New Brunswick Inc.), it was impossible for s. 37.3 of the *Act* to apply because of the limitation provided for in ss. 37.3(2).

[57] In light of the Board determination to discontinue the Union's application in successorhsip against Wal-Mart US, we decline to rule on this aspect of Wal-Mart Canada's application for reconsideration.

Summary of Findings:

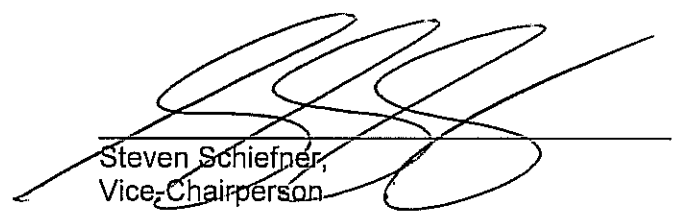
[58] Wal-Mart US shall be removed as a respondent to the Union's application in successorship, but such application remains extant as against Wal-Mart Canada.

[59] The subpoena against Wal-Mart US is vacated.

[60] We are not further seized with this matter.

DATED at Regina, Saskatchewan this **3rd** day of **November, 2009.**

LABOUR RELATIONS BOARD



Steven Schiefner,
Vice-Chairperson