The Labour Relations Board
Saskatchewan

UNITED STEEL WORKERS UNION, LOCAL 1-184, Applicant v. EDGEWOOD FOREST PRODUCTS INC. AND C & C WOOD PRODUCTS LTD., Respondents

LRB File No. 011-12; March 15, 2013
Chairperson, Kenneth G. Love Q.C.; Members: Duane Siemens and Joan White

For the Applicant: Peter Barnacle
For the Respondents: Laurie Robson

Common Employer Declaration – Section 37.3 – Union requests Board to declare two employers to be the common Employer in respect of a single enterprise – Board reviews facts of situation and statutory provisions – Board determines that provision inapplicable to current situation.

Common Employer Declaration – Section 37.3 – Union requests Board to declare two employers to be the common Employer in respect of a single enterprise – Board reviews fact and statutory provisions – Determines that business enterprise not operated jointly by two corporations involved.

Common Employer Declaration – Section 37.3 – Union requests Board to declare two employers to be the common Employer in respect of a single enterprise – Board reviews factors related to the exercise of its discretion under section – Determines that even if section 37.3 were applicable in this fact situation, the Board would not exercise its discretion to declare the two corporations to be common employers.

Successorship – Section 37 – Board reviews facts of transfer of Assets between former business operator and Purchaser of Assets – Finds that Purchaser purchased all of the land and equipment necessary to carry on former business – Board finds that Purchaser also rehired many of the former employees into their former role with Vendor – Board finds that Purchaser is successor to Vendor of Assets.

Successorship – Section 37(2) – Board determines appropriate unit of employees, amends order to reflect proper name of Employer – Original certification standing in name of predecessor – not amended when earlier successorships occurred. Board finds that previous owners of business accepted obligations under certificate and were successors under section 37.

Transfer of Obligations – Section 39 – Board finds that applicant is the successor to original Union named in certification Order.

REASONS FOR DECISION

Background & Facts:

[1] **Kenneth G. Love, Q.C., Chairperson:** The International Woodworkers of America, Local 1-184, (the "IWA") was certified by the Board as the bargaining agent for a unit of employees of Saskatchewan Forest Products Corporation ("SFPC") by an Order of the Board dated May 2, 1977.

[2] IWA, through its parent organization, merged with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy and Allied Industrial and Service Workers International Union in 2004. This amalgamated Union then changed its name to United Steel Workers Union and the IWA Local 1-184 became United Steel Workers Union, Local 1-184.

[3] On or about May 1, 1995, SFPC entered into an agreement with MacMillan Bloedel Ltd. This joint venture operated under the name Saskfor Products Limited Partnership. Prior to November 1, 1999, the Saskfor Products Limited Partnership was dissolved and some of the assets which are the subject of this application, being the assets of the Carrot River Saw Mill and the Hudson's Bay Plywood Mill, became solely owned and operated by MacMillan Bloedel Ltd.

[4] On or about November 1, 1999, Weyerhaeuser Company Limited ("Weyerhaeuser") purchased the assets of the Carrot River Saw Mill and the Hudson's Bay Plywood Mill, which it continued to operate as a going concern.

[5] In February of 2004, Weyerhaeuser advised its employees that it intended to offer both the Carrot River Saw Mill and the Hudson's Bay Plywood Mill for sale. All of the employees of both mills were laid off. Some employees were laid off later than the others. Those employees were retained on staff to shut down the mills. Weyerhaeuser provided laid off employees with benefits in accordance with a Workforce Adjustment Plan negotiated with the Union.

[6] In November of 2006, some of the principals of C & C Wood Products Ltd. visited the Carrot River Saw Mill. During that visit, they attended at the offices of the Union in Prince

Albert, Saskatchewan. The group visiting the Union consisted of Mr. Cerasa, Mr. Michael Hayman, Mr. Ron Dunn, and an unidentified lady. During that visit, there was discussion concerning the Union's representation of the employees at the Carrot River Saw Mill and the Hudson's Bay Plywood Mill.

[7] There was evidence that, in November of 2006, a Letter of Intention was signed by C & C Wood Products Ltd., the Crown Investments Corporation of Saskatchewan and Weyerhaeuser for the acquisition of the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. That proposed transaction was never completed for two reasons. Firstly, Mr. Joe Cerasa suffered a heart attack while on vacation in Italy and passed away. Secondly, there was a change of Government in Saskatchewan in November of 2007, which resulted in any assistance or involvement of the Crown Investments Corporation of Saskatchewan being withdrawn.

[8] The situation of the two plants remained in limbo after the proposed transaction did not proceed. In mid to late 2008, Weyerhaeuser contacted Mr. Ron Dunn, who remained a principal in C & C Wood Products Ltd., to see if there was any opportunity to fashion a new sale agreement. Mr. Dunn took the proposal to his other principal shareholders who determined to proceed to negotiate with Weyerhaeuser. Mr. Dunn and Mr. Kris Hayman, the son of Mr. Michael Hayman, pursued negotiations with Weyerhaeuser, which negotiations were successful.

[9] On April 30, 2009, Weyerhaeuser entered into an Asset Purchase Agreement (the "APA") with 101143257 Saskatchewan Ltd. The Purchaser Company was a newly incorporated company which was incorporated for the sole purpose of purchasing the assets from Weyerhaeuser and operating the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. That company later changed its name to Edgewood Forest Products Inc. ("Edgewood").

[10] C & C Wood Products Ltd. & and Foothills Forest Products Inc. provided guarantees to Weyerhaeuser in respect of the financial obligations of Edgewood. C & C Wood Products Ltd. and Foothills Forest Products Inc. also provided a security interest in "all present and after acquired personal property of whatever nature and the proceeds thereof" to Weyerhaeuser.

[11] The APA contained several conditions precedent to the sale. Two of these were:

> *(d) there shall have been obtained from all appropriate Governmental Authorities such Approvals as are required for the Seller and the Buyer to execute an assignment of the Weyerhaeuser Pasquia-Porcupine Forest Management Agreement whereby the Seller assigns the Weyerhaeuser Pasquia-Porcupine Forest Management Agreement to the Seller and the Buyer on a joint basis to create a joint forest management agreement (the "Joint Pasquia-Porcupine Forest Management Agreement").*
>
> *(e) the Buyer and the Seller shall have executed an agreement between themselves dealing with forest management, road development, documentation access and other matters related to the operation of the Joint Pasquia-Porcupine Forest Management Agreement.*

[12] On October 21, 2009, Weyerhaeuser, in accordance with the condition contained in the APA, assigned the rights to harvest softwood lumber (Weyerhaeuser retained the right to harvest the hardwood lumber) from the Pasquia-Porcupine Forest Management Agreement area to Edgewood. In that agreement, Edgewood was described as "a wholly owned subsidiary of C & C Wood Products Ltd."

[13] As a result of the conclusion of this agreement, and presumably the agreement referenced as paragraph (e) above, the transaction contemplated by the APA closed shortly after the execution of the assignment agreement. However, notwithstanding that the sale of the assets had closed, Edgewood did not begin re-commissioning the Carrot River Sawmill until the first week of November, 2011. The first finished product was produced in early February, 2012, which consisted of manufactured stud lumber (2 x 4) in 8 and 9 foot lengths.

[14] The first step in the re-commissioning was to engage Weyerhaeuser's former saw mill Manager, Andy Borsa, as Edgewood's saw mill Manager. Mr. Borsa called back some of the former employees of the saw mill to help re-commission the mill. Additionally, Edgewood arranged for contractors to cut and transport logs to the saw mill for conversion into dimensional lumber. When the saw mill was operational, Mr. Borsa hired a large number of the former Weyerhaeuser employees to return to their former positions at the mill.

Prior Operations by Weyerhaeuser and Renewed Operations by Edgewood:

[15] Prior to Weyerhaeuser closing the saw mill and plywood plant, the saw mill was utilized for the production of dimensional lumber (2 x 4's and 2 x 6's). Logs were harvested by contractors and delivered to the log yard at the saw mill. In the log yard, the logs were weighed,

unloaded, and stacked in rows. Wagons were loaded in the yard where the logs were taken to the debarker where the bark was removed from the logs.

[16] Once debarked, the logs were then taken for processing by a computerized saw which determined the maximum yield that can be obtained from each log. The log was then cut into rough size by the cantor operator. A determination was then made as to whether each board which is cut is suitable for dimensional lumber or must be chipped. If the determination is that the board is suitable for dimensional lumber it goes to be trimmed to length and stacked according to length. It was then stacked in piles outside to wait to be transported through a kiln that would dry the green lumber. Cut boards that are not suitable to be dimensional lumber were chipped up. These chips were sold for use as pulp.

[17] After the saw mill was re-commissioned by Edgewood, the same equipment as was used by Weyerhaeuser was used by Edgewood to produce similar products. For a time, the mill experimented with production of 2 x 3 dimensional lumber for the Chinese market.

[18] It was clear from the testimony of the Union witnesses, and Mr. Kris Hayman who testified for Edgewood, that while there were some differences, the goods produced were essentially the same dimensional lumber produced by Weyerhaeuser. The lumber was sold to customers that Edgewood had sourced, not to customers of Weyerhaeuser, as Weyerhaeuser had not sold or provided any customer lists. Packaging was different insofar as Edgewood used its own packaging, not Weyerhaeuser's packaging for its products as Weyerhaeuser had not transferred any rights to do so to Edgewood. Also, the testimony was that Weyerhaeuser had shipped its products by rail and truck, whereas Edgewood shipped only by truck. However, it should be noted that one of the contracts assigned to Edgewood from Weyerhaeuser was a railway siding agreement.

[19] It is also clear that the production of products by Edgewood is being done utilizing the same equipment that was utilized by Weyerhaeuser. There was no evidence that any new or improved equipment had been installed or added at the saw mill.

[20] Similarly, it is clear that a large number of the former Weyerhaeuser employees were re-employed by Edgewood at the saw mill.

Corporate Structure of C & C Wood Products Ltd. and Edgewood Forest Products Inc.[1]

[21] Edgewood is a Saskatchewan Corporation which was incorporated on April 30, 2009 as 101143257 Saskatchewan Ltd. Its shareholders and directors are as follows:

Shareholders	**Number of Shares Held**
Michael Hayman	300 Class A1
0832515 B.C. Ltd.	500 Class A2
0865033 B.C. Ltd.	200 Class A3

Directors	**Officer Position**
Ron Dunn	Corporate Secretary
Kristian Hayman	President
Michael Hayman	

[22] 0832515 B.C. Ltd. is a British Columbia Corporation incorporated on August 13, 2008. Mr. Kristian Hayman testified that this corporation was his personal holding company. The shareholders and directors were shown on a BC Registry Services search as of February 20, 2012 are as follows:

Shareholders	**Number of Shares Held**
Not Stated	Not Stated

Directors	**Officer Position**
Kristian Hayman	President

[23] 0865033 B.C. Ltd. is a British Columbia Corporation incorporated on October 29, 2009. Mr. Kristian Hayman testified that this corporation was Mr. Dunn's personal holding company. The shareholders and directors were shown on a BC Registry Services search as of June 18, 2012 are as follows:

Shareholders	**Number of Shares Held**
Not Stated	Not Stated

[1] Both parties submitted searches related to the various corporations, bearing different currency dates. For the

Directors	**Officer Position**
Ron Harold Dunn	President & Secretary

[24] C & C Wood Products Ltd. is a British Columbia Corporation incorporated on April 12, 1977. Mr. Kristian Hayman testified that this corporation operated in British Columbia and was not registered to carry on business in Saskatchewan. The shareholders and directors were shown on a BC Registry Services search as of December 19, 2011 and on the Central Securities Registrar are as follows:

Shareholders	**Number of Shares Held**
465630 B.C. Ltd.	100 Common

Directors	**Officer Position**
Miliana Celli	Secretary
Michael Hayman	President

[25] 465630 B.C. Ltd. is a British Columbia Corporation incorporated on February 15, 1994. The shareholders and directors were shown on a BC Registry Services search as of December 19, 2011 and on the Central Securities Registrar are as follows:

Shareholders	**Number of Shares Held**
Miliana Celli	32 Common B
Michael Hayman	18 Common C
0832515 B.C. Ltd.	32 Common A
C & C Wood Products Ltd.	18 Common D

Directors	**Officer Position**
Miliana Celli	Secretary
Michael Hayman	President

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purposes of this analysis we have relied upon the most recent of those searches.

Union Activity Before and After Sale:

[26] When Mr. Cerasa, Mr. Michael Hayman, Mr. Ron Dunn, and an unidentified lady visited the Union's office in Prince Albert, Saskatchewan in November of 2006, the Union and these individuals discussed the Union's representation of workers at both the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. When the execution of the APA was announced publicly, the Union wrote to C & C Wood Products Ltd. on May 14, 2009 again advising that it was the bargaining agent for the employees at the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. They also offered to work co-operatively with the purchasers to achieve a safe, efficient start up of operations.

[27] The Union wrote again on November 25, 2009 following the official announcement of the purchase of the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. Again they offered to work co-operatively with the purchasers. They also reiterated that they were the bargaining agent for the employees at the Carrot River Saw Mill and the Hudson's Bay Plywood Mill.

[28] The first two letters were sent to Mr. Kris Hayman. He acknowledged in his evidence that he had received them, but had disregarded them because they were addressed to C & C Wood Products Ltd. not Edgewood, who was the purchaser of the assets of the Carrot River Saw Mill and the Hudson's Bay Plywood Mill.

[29] The Union again wrote to C & C Wood Products Ltd. on March 31, 2011 at the time they had been made aware that production from the mills was to recommence. This time the letter was addressed to Mr. Dunn, who had been present at the meeting in November, 2006 at the Union's office. This letter repeated the Union's claim to hold certification rights for employees at the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. It also noted that they had been trying to contact the company without avail.

[30] The APA also showed that the Union was the bargaining agent for employees at the Carrot River Saw Mill and the Hudson's Bay Plywood Mill. Article 6.21 of the APA provides, in part, as follows:

6.21 Collective Agreements

Except as set out in Schedule 6.21, the Seller is not required to recognize and has not made any contracts with any labour union or employees association or any agent having bargaining rights for the employees of the Purchased Business nor made commitments to or conducted negotiations with any labour union or employee association with respect to any future agreements. …

[31] Schedule 6.21 identifies the following Collective Agreements:

(a) *Collective Agreement between Weyerhaeuser Saskatchewan Ltd. and United Steelworkers Local 1-184 effective April 1, 1999 to March 31, 2004.*

(b) *Memorandum of Agreement between Weyerhaeuser Saskatchewan Ltd, and United Steelworkers Local 1-184 effective April 1, 2004 to March 31, 2008.*

(c) *Letter of Understanding with United Steelworkers Local 1-184 re: Daily Overtime Procedure for Carrot River.*

Relevant statutory provision:

[32] Relevant statutory provisions are as follows:

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

37(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

(a) determining whether the disposition or proposed disposition relates to a business or part of it;

(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:

(i) an employee unit;
(ii) a craft unit;
(iii) a plant unit;

> *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> *(v) some other unit;*
>
> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*
>
> . . .
>
> *37.3(1) On the application of an employer affected or a trade union affected, the board may declare more than one corporation , partnership, individual or association to be one employer for the purposes of this Act if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations,* partnerships, individuals or associations.
>
> *(2) Subsection (1) applies only to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.*

Union's arguments:

[33] The Union provided the Board with a book of authorities which we have reviewed and found helpful.

[34] The Union argued that Edgewood should be found to be the successor to Weyerhaeuser in accordance with s. 37 of the *Act*. Furthermore, it argued that C & C Wood Products Ltd. and Edgewood should be declared to be one employer pursuant to s. 37.3 of the *Act*.

[35] The Union took the position that C & C Wood Products Ltd. was the principal behind the purchase of the assets from Weyerhaeuser, notwithstanding that Edgewood was ultimately set up to be the purchaser in 2009. They argued that there had been continuity in the acquisition plan from the time of initial contact by C & C Wood Products Ltd. in 2006 through to the ultimate consummation of the purchase by Edgewood in 2009.

[36] The Union argued that the wording in the Assignment of the Pasquia-Porcupine Forest Management Agreement describing Edgewood as a wholly owned subsidiary of C & C Wood Products Ltd. was demonstrative of the relationship between the two corporations.

[37] The Union also argued that at no time did C & C Wood Products Ltd. seek to disabuse anyone of its relationship to the transaction and Edgewood. Numerous press articles had occurred naming C & C Wood Products Ltd. as the purchaser and operator of the mill, which C & C Wood Products Ltd. had done nothing to contradict or deny.

[38] The Union pointed to a similar situation which occurred when C & C Wood Products Ltd./Foothills Forest Products Inc. acquired assets utilized by Weyerhaeuser at Grande Cache, Alberta. There, as here, a newly incorporated company (Foothills Forest Products Inc.) was incorporated to act as the purchaser of the assets from Weyerhaeuser.

[39] The Union argued that the Union had taken prudent steps to protect its bargaining rights with respect to its correspondence with C & C Wood Products Ltd. and its meeting with Mr. Cerasa, Mr. Michael Hayman, Mr. Ron Dunn, and the unidentified lady in 2006. It also noted that the APA included recognition of the Union's bargaining rights.

[40] The Union also argued that successorship under s. 37 is automatic and provides for the rollover of bargaining rights to a new employer. A declaration from the Board, they argued, is only required when an employer resists. They argued that the Respondents had acquired the assets of Weyerhaeuser which gave them the means to produce stud lumber as was done previously by Weyerhaeuser. That, it argued was the "beating heart" of the enterprise which had been acquired and was now being utilized by the Respondents to operate their business.

Respondent's Arguments:

[41] The Respondents provided a written argument and a book of authorities which we have reviewed and found helpful.

[42] The Respondent, Edgewood argued that Edgewood did not acquire a business from Weyerhaeuser. All that it purchased was land, buildings, machinery, and an opportunity to

obtain access to a log supply. It noted that it had not obtained any goodwill, customer lists, trademarks, or business records.

[43] The Respondent, Edgewood also argued that what they had acquired was nothing more than a collection of idle assets which had been out of production since 2006. They argued that with such a long hiatus, it was unreasonable to suggest that there was a business to which they could be successors.

[44] The Respondent, Edgewood also argued that the Board should not, without further evidence, accept the Union's submissions regarding the transfer of bargaining obligations from Union to Union and from Employer to Employer which had occurred in the past.

[45] The Respondent, Edgewood, also argued that with the long hiatus between Weyerhaeuser shutting down its operation to the re-commissioning of the mill and the re-start of operations by Edgewood was too long a period for the "heart" of the operation to continue to beat. It argued that by the time that Edgewood took over and commenced operations, that there was no life left to continue.

[46] The Respondent, C & C Wood Products Ltd. argued that other than acting as guarantor of the obligations of Edgewood, it had no involvement in the purchase of the assets from Weyerhaeuser. Nor, it argued, does it have any involvement in the operation of the assets purchased by Edgewood. Furthermore, it argued, C & C Wood Products Ltd. is not registered to, nor does it, conduct business in Saskatchewan. It also argued that there was no labour relations purpose in a related employer finding by the Board.

[47] The Respondent, C & C Wood Products Ltd. argued that any involvement of C & C Wood Products Ltd. in the transaction with Weyerhaeuser ended upon the untimely death of Joe Cerasa in 2007. It further argued that C & C Wood Products Ltd. has not acted in any fashion with respect either the Weyerhaeuser or Edgewood operations that could be interpreted so as to determine C & C Wood Products Ltd. to be a related or common employer.

Analysis & Decision:

Common or Related Employer

[48] The Union asks that the Board determine that Edgewood and C & C Wood Products Ltd. should be considered to be one employer for the purposes of section 37.3 of the *Act*. For the reasons which follow, we decline to make such a declaration.

[49] In *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*[2] ('*Wayne Bus*") the Board noted that the analysis of the requirements of section 37.3 required the Board to engage in an extensive analysis of whether activities were carried on by "associated or related businesses" and under "common control or direction". The Board reviewed its own cases dealing with the issue as well as cases from other jurisdictions which had considered the issue.

[50] The Ontario Board in *Labourers' International Union of North America, Local 183 v. York Condominium Corporation, et al*[3] set out seven (7) criteria it used to determine which of two or more parties should be considered to be the employer of certain employees. They are:

> *(a) The party exercising direction and control over the employees performing the work.*
> *(b) The party bearing the burden of remuneration.*
> *(c) The party imposing discipline.*
> *(d) The party hiring the employees.*
> *(e) The party with the authority to dismiss the employees.*
> *(f) The party who is perceived to be the employer of the employees.*
> *(g) The existence of an intention to create the relationship of employer and employee.*

[51] At paragraph 128 of the *Wayne Bus* decision, the Board outlined the general nature of the inquiry under s. 37.3 as follows:

> *The inquiry under each of ss. 2(g)(iii) and 37.3 of the Act is directed to determining the "true employer(s)" for labour relations purposes of the employees in question. A functional analysis to identify the actual seat of fundamental control or direction of the activities that determine employment and working conditions of the employees must be undertaken in both instances using similar criteria. The results of the exercise may identify more than one "common" employer exercising fundamental control or direction. A detailed examination of*

[2] [1999] Sask. L.R.B.R. 238, LRB File No. 363-97
[3] [1977] OLRB Rep. October 645; See also the reference to this case in the *Wayne Bus* decision at para. 129

> *the relationship between the entities involved and their relationship to the work place must be undertaken using various criteria outlined below.*

[52] Before turning to an analysis of the factors set out by the Ontario Board in *Labourers' International Union of North America, Local 183 v. York Condominium Corporation, et al*[4] an analysis of the threshold requirements of s. 37.3 is required to be conducted to determine if the section is properly engaged.

[53] In *Canadian Wire Service Guild, Local 213 of Newspaper Guild and Canadian Press News Limited and Broadcast News Limited, Toronto, Ontario and Messrs. Ferris, Williams et al*[5] at page 359, the Canada Board, in analyzing its related employer provisions says:

> *There are thus 5 primary criteria to be met. First, that the enterprise(s) constitute a federal work, undertaking, or business. Second, that there be more than one such work, undertaking or business. Third, that they be "associated" or "related". Fourth, that they be under common control or direction. Fifth, that among the various enterprises under consideration there be "two or more" that are employers as defined by the Code in s. 107.*

[54] Section 37.3 was added into the *Act* by amendment in 1994. The mischief to which the amendment was directed was a practice (then common in the construction industry particularly) of owners creating one business which was unionized and one business which was not unionized. This practice, commonly called "double breasting" was sought to be arrested by the amendment to the *Act in 1994.*

[55] The original provision as passed in 1994 was somewhat different from the provision which is currently in the *Act.* At that time, and at the time the *Wayne Bus* decision was made by the Board, Section 37.3(1) read as follows:

> *If, in the board's opinion, associated or related businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate.*

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[4] [1977] OLRB Rep. October 645; See also the reference to this case in the Wayne Bus decision at para. 129
[5] [1976] C.L.R.B.R. Volume 1 354

[56] The amendment made a number of changes to the section. Firstly, it inserted a requirement that the section could be invoked only "[O]n the application of an employer affected or a trade union affected". Secondly, it provided that rather than treat the common employers as "constituting one employer for the purposes" of the *Act*, the Board was authorized to "declare" such employers "to be one employer for the purposes" of the *Act*.

[57] In *Wayne Bus, supra,* at paragraph [145], the Board parsed the requirements for the application of what was then section 37.3 as follows:

> *(a) There must be more than one corporation, partnership or association involved;*
>
> *(b) These entities must be engaged in associated or related businesses, undertakings or other activities; and*
>
> *(c) These entities must be under common control or direction.*

[58] The new provision added to the *Act* in 2005, in substitution for the original section 37.3, added the requirement that the application must be made by "an employer affected or a trade union affected". For ease of reference, that provision now reads as follows:

> *37.3(1) On the application of an employer affected or a trade union affected, the board may declare more than one corporation , partnership, individual or association to be one employer for the purposes of this Act if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations,* partnerships, individuals or associations.
>
> *(2) Subsection (1) applies only to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.*

[59] No argument or evidence was presented by either party in respect of the requirement that the application must be made by "an employer affected or a trade union affected". However, without significant analysis, we believe that it can be taken as established, but without making any precedential determination as to how the term "affected", as used in section 37.3 should be interpreted, that the Union is "affected" by virtue of its claim that one or both of the entities involved in its successorship application is the employer of the employees they claim to represent.

[60] It is also clear that there is more than one entity involved here, that is C & C Wood Products Ltd. and Edgewood. However, C & C Wood Products Ltd.'s operations are restricted to its operations in British Columbia. It is not registered to conduct business in Saskatchewan and according to Mr. Kris Hayman, does not carry on business in Saskatchewan.

[61] The third point above requires, like the Federal Code requirement dealt with in *Canadian Wire Service Guild, Local 213 of Newspaper Guild and Canadian Press News Limited and Broadcast News Limited, Toronto, Ontario and Messrs. Ferris, Williams et al*[6], that not only must there be more than one corporation, partnership, or association involved, there must also be more than one "businesses, undertakings, or other activities" involved as well. This is made clear from the legislature's use of the words "…if, in the opinion of the board, associated or related **businesses, undertakings, or other activities** are carried on…". [Emphasis added], all of which words are specifically plural.

[62] The Board dealt with a more typical situation in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc, 101103492 Saskatchewan Ltd., O/A Precision Wood Products*[7]. In this case, Cabtec Manufacturing was in the business of manufacturing custom kitchen cabinets in Regina, Saskatchewan. This business was certified by the Union.

[63] The owners of Cabtec opened another business, owned by 101103492 Saskatchewan Ltd., which was engaged in providing custom spray on finishes for *inter alia* kitchen cabinets. Specialized equipment, to be utilized in this business was purchased and installed in close proximity to the existing business, and some of the finishing work performed by Cabtec was performed utilizing the new equipment owned by 101103492 Saskatchewan Ltd.

[64] Given the fact situation, counsel for Cabtec acknowledged that section 37.3 applied in that case.

[65] Here, however, there is only one business, which the Union says is operated by either or both of C & C Wood Products Ltd. and Edgewood. There is not, as one would expect, two business operations (which is the norm in cases of this nature) which are run co-operatively

[6] [1976] C.L.R.B.R. Volume 1 354
[7] [2008] CanLII 47035 (SK LRB), LRB File No. 153-07

or in a related fashion, such as would be the case in the “double-breasted” situation described above.

[66] The requirement for more than one business operation is key to the operation of section 37.3. That is, there must be one or more operations run by ostensibly the same persons who are seeking to avoid the representational requirements of the *Act* by setting up a parallel or similar business.[8] In these cases, there were two or more distinct business activities which were the subject of the application to the Board.

[67] In *Wayne Bus,*[9] at paragraph [124], the Board discussed the purpose for section 37.3 of the *Act*. It said:

> *[124] One of the primary purposes of common employer legislation is to prevent the erosion or undermining of existing bargaining rights, as may occur, for example, when work is diverted from a unionized employer to an associated non-union entity. Historically, the most common example of this erosion has been the creation by unionized contractors of non-unionized "spin-offs" in the construction industry. In Saskatchewan The Construction Industry Labour Relations Act, 1992, c. C-29.11, contains specific provisions applicable to the construction industry; s. 37.3 of the Act applies to all other sectors.*

[68] The Board in *Wayne Bus*[10], also quoted from *Lumber and Sawmill Workers Union, Local 2995 v. J.H. Normick Inc.,*[1979] OLRB Rep. Dec. 1176, where the Ontario Labour Relations Board discussed the purpose of s. 1(4) of the *Ontario Labour Relations Act*, which is analogous to s. 37.3 of the *Act*, at 1184-1185:

> *Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for*

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[8] See *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc* [2008] CanLII 47035 (SK LRB), LRB File No. 153-07.*; Canadian Union of Public Employees, Local 4836 v. Lutheran Sunset Home of Saskatoon* [2009] CanLII 54774 (SK LRB), LRB File No. 043-09

[9] *Supra* Note 2

[10] *Supra* Note 2

> *some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See Zaph Construction Ltd. [1976] OLRB Rep. Nov. 741 and Ellwall and Sons Construction Limited [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of The Labour Relations Act.*

[69] Because there is only one business activity being carried on here, i.e.: the Carrot River Sawmill, section 37.3 cannot apply. There is, however, an alternative view which must be considered, which is that the operation is a joint activity of the two corporations.

[70] However, there was no evidence presented to support that the Carrot River Sawmill operation is in any way a joint operation of the two corporations. The Union offers somewhat anecdotal evidence to suggest such a relationship in its arguments; that C & C Wood Products Ltd. never took the opportunity to correct who was publicly stated to be the owner of the operation. Secondly, they point to the fact that Edgewood is described on the assignment of the Pasquia-Porcupine Forest Management Agreement as a "wholly owned subsidiary of C & C Wood Products Ltd." as evidence of the joint nature of the ownership.

[71] With respect, we do not agree with the Union's interpretation of these facts. While the interconnected ownership of the two corporations is somewhat persuasive insofar as the Haymans, (father and son), own 80% of the shares of Edgewood (Mr. Dunn holds the other 20%) and the Haymans, (father and son) through 465630 B.C. Ltd. own approximately 61% of C & C Wood Products Ltd. and Mr. Kris Hayman's aunt, Miliana Celli owns the remainder.[11]

[72] Notwithstanding this ownership in common, which may have satisfied the 4th requirement for the application of s. 37.3, it is not, in our opinion, sufficient to show that the two companies operate the mill jointly. The ownership structure here is similar to the ownership

[11] These calculations disregard the 18 shares owned by C & C Wood Products Ltd. in its parent, 465630 B.C. Ltd.

structure of Foothills Forest Products Ltd. which was the subject of an application for successorship in Alberta,[12] which decision also involved some of the parties here.

[73] We are in agreement that the evidence put forward by Edgewood clearly shows that it, and it alone, operates the Carrot River Sawmill. Edgewood demonstrates all of the indicia which are normally looked for determination of who is the employer of employees. They are completely in charge of hiring, firing, and discipline of employees. They are able to negotiate collective agreements without any assistance or input from C & C Wood Products Ltd. They have full control over the assets utilized in the business and their organization insofar as production of products is concerned. They produce and market their own production independently.

[74] For these reasons, we would dismiss the Union's application under s. 37.3 of the *Act.*

[75] Notwithstanding our determination above, section 37.3 also provides the Board with discretion not to exercise is authority to treat entities as one employer for the purposes of the *Act*. In the *Wayne Bus* case, *supra,* at paragraph 146 the Board describes its discretion under s. 37.3 as follows:

> *However, once these requirements have been fulfilled the Board must decide whether to exercise its discretion to treat the entities as one employer for the purposes of the Act. This discretion will be exercised where there is a valid and sufficient labour relations value, interest or goal contemplated by the Act which will be served by making a single employer declaration. Absent such a purpose, the discretion to make the declaration will not be exercised.*

[76] Notwithstanding our determination above, even if we had found that the factual situation here satisfied the requirements of section 37.3 we would decline to exercise our discretion to make a declaration that the two entities, C & C Wood Products Ltd. and Edgewood, should be treated as one entity for the purposes of the *Act* because there is no valid and sufficient labour relations value, interest or goal contemplated by the *Act* which will be served by making such a declaration.

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[12] See *United Steelworkers of America, Local 1-207 v. Foothills Forest Products Inc. and C & C Wood Products Ltd.* [2007] Alta. L.R.B.R. LD-043 ALRB File No. GE-04659

[77] The Union did not provide any evidence to support any labour relations value, interest or goal contemplated by the *Act* which will be served by a declaration in this case. In argument, the only comment on this aspect was that the significance of a common employer declaration is that the employer denied that there was any such connection and that the connection would somehow explain the gap between the tentative transaction entered into in 2006 and the APA which was concluded in 2009.

[78] On the contrary, the evidence was that C & C Wood Products Ltd. was not registered to conduct business in Saskatchewan and was incorporated in and operated in British Columbia. It did not operate in Saskatchewan.

[79] We think that we can take notice that it is not unusual in business to incorporate separate corporations to operate in different jurisdictions. That this was done in this case is not unusual, nor suspicious. The situation in Alberta was the same, where a separate corporation, Foothills Forest Products Ltd. was established to operate the assets purchased in Alberta.

[80] To suggest that because of the financial assistance provided by C & C Wood Products Ltd. by way of guarantee of the obligations of Edgewood somehow makes them a joint operator should be the rationale for a declaration under section 37.3 is not tenable. If that were the case, then a similar declaration (which was not sought by the Union) should be made with respect to Foothills Forest Products Ltd., who also guaranteed the obligations of Edgewood.

[81] As noted above, we can see no valid and sufficient labour relations value, interest or goal contemplated by the *Act* which will be served by making such a declaration. This is not a situation where an employer is seeking to circumvent the *Act* by the establishment of a subsidiary or other corporate entity to pursue business interests such as is the case in a double breasting situation. Edgewood solely operated the Carrot River sawmill and its assets apart from C & C Wood Products Ltd. This was not a “double breasted” operation.

[82] In *Wayne Bus, supra,* the Board also considered under what circumstances it would be appropriate not to exercise its discretion and not to make a declaration under s. 37.3. In that case, the Board declined to make a declaration. In the *Cabtec* decision, *supra,* the Board

reviewed what had been said in *Wayne Bus* and other Canadian jurisdictions concerning the exercise of the Board's discretion.[13] At paragraph 36, the Board concluded:

> *The question that the Board must therefore determine is whether or not the opening of Precision Wood Products was a legitimate entrepreneurial activity on the part of the Kowalchuks or whether it represented a colourable attempt to circumvent the bargaining rights of the Union.*

[83] As noted above, we have concluded that the incorporation of Edgewood to act as the purchaser of the assets from Weyerhaeuser was not suspicious and was a common business practice, which had also been utilized when Foothills Forest Products Inc. purchased assets from Weyerhaeuser in Alberta. There was a legitimate business purpose for the creation of Edgewood as purchaser and operator of the assets which were purchased. It was not, in our opinion, a "colourable attempt to circumvent the bargaining rights of the Union."

[84] Furthermore, any declaration under section 37.3 would be ineffective insofar as C & C Wood Products Ltd. is concerned. They are not registered to conduct business in Saskatchewan, nor do they carry on business here. For a declaration to be effective, C & C Wood Products Ltd. would have to attorn to this jurisdiction and register as an extra-provincial corporation for any declaration to be binding upon them.

[85] For these reasons, we would also decline to exercise our discretion to make a declaration pursuant to s. 37.3.

Successorship

[86] The Board considered successorship in two recent decisions[14]. After consideration of the facts in this matter, the arguments of counsel, and the jurisprudence of the Board, we are satisfied that the APA between Edgewood and Weyerhaeuser constituted a transfer of a business or a part of a business within the meaning of section 37 of the *Act*.

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[13] See *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc.,* [2008] CanLII 47035 (SK LRB), LRB File No. 153-07 at paras. 30 - 35

[14] See *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179, v. Monad Industrial Constructors Inc. and Construction Workers Union (CLAC), Local No. 151* LRB File Nos. 132-12, 16-12 and 161-12; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh and 1492559 Alberta Inc*. 2013 CanLII 3584 (SK LRB) LRB File No. 196-10

[87] In the *Singh* case, *supra*, Vice-Chairperson Schiefner says at paragraph [41] that "[I]n determining whether or not a new owner is a successor within the meaning of s. 37 of the *Act*, it is not necessary that we find there has been a transfer of a business in the strict legal sense." He points to *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction et al*[15] in support of his comments that the legislature intended the Board to look at the practical effect of a transaction, rather than its technical or legal form. That quote from *Cana Construction* is as follows:

> *In order to determine whether there has been a sale, lease, transfer or other disposition of a business or part thereof, the Board will not be concerned with the technical legal form of the transaction but instead will look to see whether there is a discernable continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer.*

[88] There is no checklist or precise criteria that Labour Relations Boards have used to determine whether or not a successorship has occurred. Rather, those Boards have made their determinations "in the context of the facts of each particular case"[16]

[89] The exercise of determination of whether or not a sucessorship has occurred has been described as whether the "beating heart"[17] of the enterprise has been transferred. Here we have differing views of whether or not such a transfer has occurred. The Union says that the beating heart was indeed transferred through the APA. Edgewood says that the beating heart had stopped by virtue of the lengthy delays between the time the sawmill assets were decommissioned and those assets acquired by Edgewood.

[90] Notwithstanding the effluxion of time in this case, we are satisfied, on the evidence, that the operations continued and that the sawmill operated in the same fashion under Edgewood's ownership as it did when the assets were owned and operated by Weyerhaeuser. The Union's evidence, particularly that of Mike Schmidt, a cantor operator for both Edgewood and Weyerhaeuser, and Alexander Hrychuk, who also worked for both Edgewood and Weyerhaeuser.

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[15] [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84 – 204-84
[16] See *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh and 1492559 Alberta Inc. 2013 CanLII 3584 (SK LRB) LRB File No. 196-10 at para. 43*
[17] 1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92

[91] Both of these witnesses described the former operation of the sawmill by Weyerhaeuser and the operation of the sawmill by Edgewood. Their evidence was uncontradicted and showed that apart from having fewer employees, the sawmill operation did not change when Edgewood operated the mill from how it was operated under Weyerhaeuser.

[92] Some things did change. There was an attempt to introduce new products for the Chinese market, new packaging was introduced, and new markets found for production. However, the basic processes for converting round logs into square boards continued as before utilizing the same equipment and in many cases, the same employees to perform the work.

[93] Clearly, from the evidence, Edgewood was aware that it was purchasing assets to which collective bargaining rights might be attached. Weyerhaeuser made it clear that that was the case in the APA. Similarly, the Union on numerous occasions made it clear to the Edgewood (when there was an Edgewood to communicate with) or C & C Wood Products Ltd. that they expected their bargaining rights to be respected.

[94] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh* and *1492559 Alberta Inc*.[18] was similar to the present case under consideration. In that case, a hotel in Swift Current, Saskatchewan was purchased out of foreclosure and was in a "*extreme state of disrepair*". So much so, that the hotel had to be closed by the new owners and renovations conducted before it could be reopened in stages.

[95] At paragraph 48, the Board stated the question facing the Board as being:

> *The question we face in the present application is whether or not there continued to be a viable business interest associated with the hotel (a "beating heart", if you will) when that facility was transferred to the Owner. Or put another way, is it reasonable to conclude that the business now conducted by the Owner at the hotel resulted from the rehabilitation and resurrection of the previous owner's business or did the Owner organize a new, parallel business out of the ashes of the previous owner's surplus assets?*

[96] A similar question is apropos in this case. That is, is it reasonable to conclude that the business now conducted by Edgewood with the assets purchased from Weyerhaeuser

[18] *Supra* Note 14

resulted from the business previously conducted by Weyerhaeuser? We have no difficulty in concluding that it did.

[97] The situation here is similar to the purchase of assets in Alberta described by the Alberta Board in *United Steelworkers of America, Local 1-207 and Foothills Forest Products Inc. and C & C Wood Products Ltd.*[19] In that case, on facts similar to this case, the Alberta Board found that a successorship had occurred.

[98] Here, as in Alberta, Edgewood purchased lands, buildings and the equipment necessary to operate the sawmill. It also obtained, by assignment, the right to acquire softwood timber under the Pasquia-Porcupine Forest Management Agreement. Weyerhaeuser operated a dimensional lumber sawmill utilizing the assets as did Edgewood.

[99] Edgewood makes much of the fact that it obtained no goodwill, logos, accounts receivable, customer lists, or existing contracts (apart from computer licenses and the assignment of the softwood timber rights). This, however, is not conclusive as it goes merely to the form of the transaction, not the substantive effect of it for labour relations purposes. Edgewood purchased and acquired the capacity to carry on the same business carried on by Weyerhaeuser, and, in fact, did continue to carry on that business.

[100] For these reasons, we find that Edgewood is a successor to Weyerhaeuser. That having been determined, we must then consider the impact of that determination pursuant to section 37.2 of the *Act*.

[101] The certification Order relied upon by the Union provides that "all employees…in the Province of Saskatchewan…"are an appropriate unit of employees for the purposes of the *Act.* This application refers only to the production facility situated in Carrot River, Saskatchewan, even though the APA related to the assets at Carrot River and at Hudson Bay, Saskatchewan. The facility at Hudson Bay has not re-opened, and we were not provided any evidence with respect to that operation. Accordingly, we do not feel it to be appropriate that the declaration of successorship apply to the whole of the Province of Saskatchewan.

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[19] *Supra* Note 12

[102] The certification Order relied upon by the Union is dated February 13, 1978 (LRB File No. 025-78) and references prior employers and prior unions. As acknowledged by the Union, it has failed to keep its certificate up to date and has applied to have its changes of bargaining rights recognized under section 39 of the *Act.* There is no reason why the Board should otherwise order that the changes in bargaining rights not be recognized.

[103] Similarly, we have no evidence that the prior successors, up to and including Weyerhaeuser took exception to the fact that a successorship occurred and that they were bound by the certification Order. Accordingly, we believe that it is appropriate to recognize that chain of successorship up to and including Weyerhaeuser and from them to Edgewood.

[104] The last collective bargaining agreement covered the period April 1, 2004 to March 31, 2008. By virtue of section 33 of the *Act,* on expiry of the agreement, it continued to "remain in force … from year to year. Section 33(4) provides for notice to the other party to negotiate a revision of the collective agreement. To do so requires that notice be given not more than 60 days nor less than 30 days prior to the expiry date of the agreement. Given the timing of this decision, if the collective bargaining agreement were continued under section 37(2)(f), there would be no period for the notice to renegotiate the agreement until February/March, 2014. This, in our opinion, would constitute a continuing hardship as the Union would be unable to renegotiate terms of the agreement, and, in particular new wage rates to replace the currently outdated rates, for an additional year.

[105] Accordingly, under section 37(2)(f), the Board will order that the collective agreement between Weyerhaeuser and the Union for the period April 1, 2004 to March 31, 2008 shall remain in force with the following modification. The effective date of that collective agreement, for the purposes of section 33(4) only shall be that day which is 65 days from the date of this decision. That will allow both parties time to serve notices, if they wish, under section 33(4) to renegotiate the terms of the collective agreement.

Board Orders:

[106] Pursuant to section 37(2) of the *Act*, the Board hereby orders:

(a) That all employees employed by Edgewood Forest Products Inc. at its sawmill situated in or near Carrot River, Saskatchewan except the General Manager, Plant Supervisors, Superintendents, and Foremen are an appropriate unit of employees for the purposes of bargaining collectively;

(b) That The United Steelworkers Union. Local 1-184 , a trade union within the meaning of *The Trade Union Act* represents a majority of the employees in the appropriate unit of employees set out in (a);

(c) Requiring that Edgewood Forest Products Inc., the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).

[107] Pursuant to Section 37(2)(f) of the *Act*, the Board hereby orders that that the collective agreement between Weyerhaeuser and the Union for the period April 1, 2004 to March 31, 2008 shall remain in force, but that the effective date of that collective agreement, for the purposes of section 33(4) only shall be that day which is 65 days from the date of this decision.

DATED at Regina, Saskatchewan, this **15th** day of **March, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson