



**SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE and DEPARTMENT STORE UNION, LOCAL 568, Applicant v. K-BRO LINENS SYSTEMS INC., Respondent and THE SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS INC., HEALTH SHARED SERVICES SASKATCHEWAN and REGINA QU'APPELLE HEALTH REGION, Respondent Employers**

LRB File No. 350-13; August 26, 2014

Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Joan White

For the Applicant: Larry Kowalchuk  
For the Respondent: Larry Seiferling, Q.C.  
For the Respondent Employers: Leah Schatz

**Successorship or Contracting Out – Union alleges that agreement for provision of laundry services by K-Bro Linen Systems Inc. gives rise to a successorship. K-Bro Linen Systems Ltd. and Respondent Employers contend that laundry services contract is not a successorship, but is a contracting out of that work to third party. Board reviews jurisprudence and determines that agreement to provide laundry service amounts to a contracting out and does not give rise to a successorship.**

**Anti-union animus – Union alleges that Respondent Employer and Contractor had anti-union animus in the creation of a contract to provide linen services to hospitals and other health care organizations in Saskatchewan. Board finds no anti-union animus.**

**Related Employer – Union alleges that Respondent Employers are related employers pursuant to Section 37.3 of *The Trade Union Act* – Board reviews evidence and finds that while 3sHealth and SAHO may be related Employers, RQHR is not a related employer.**

**Common or True Employer – Union alleges that 3sHealth, SAHO and RQHR should be named as the true employer of the employees to be engaged by K-Bro Linen Systems Inc. in the provision of laundry services to hospitals and other organizations in Saskatchewan – Board reviews evidence and finds that 3sHealth, SAHO and RQHR are not the true employer of employees of K-Bro Linen Systems Inc.**

## REASONS FOR DECISION

### Background and Facts:

[1] **Kenneth G. Love, Q.C., Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568, (the “Union”) is certified as the bargaining agent for a unit of employees of the Regina Qu’Appelle Health Region (“RQHR”) at RQHR’s laundry facility in Regina, Saskatchewan.

[2] Prior to April, 2012, the various Health Regions in Saskatchewan formed an organization to centralize Labour Relations and Human Relations operations of the various Health Regions. This organization, named the Saskatchewan Association of Health Organizations, was responsible for *inter alia*, collective bargaining, payroll administration, group benefit plan administration and job classification, including the joint job classification program.

[3] On April 17, 2012, Saskatchewan Association of Health Organizations, which was incorporated under *An Act to Incorporate Saskatchewan Health-Care Association*,<sup>1</sup> made changes to its organizational structure. This involved establishment of a new mandate for the provision of shared services to the Saskatchewan health sector and changing its name to Health Shared Services Saskatchewan or 3sHealth (“3sHealth”). In addition, it transferred its responsibilities for health sector collective bargaining as well as the old name Saskatchewan Association of Health Organizations to a new organization. Thus, the Saskatchewan Association of Health Organizations morphed into 3sHealth, as the continuing organization, and a new organization bearing the old name, Saskatchewan Association of Health Organizations (“SAHO”).

[4] 3sHealth and SAHO, are governed by a governing counsel comprised of the Chair of the Board of Directors of each regional health authority, some Affiliate Representatives who are non-voting, as well as some additional non-voting appointees or designated officials. This governing council appoints a Board of Directors for 3sHealth and SAHO.

[5] Approximately ten (10) years or more prior to these events, the Government of Saskatchewan and the health regions began to explore options for the renewal of laundry

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<sup>1</sup> S.S. 1959 C. 117

services throughout the Province. This process gained momentum under the newly created 3sHealth organization.

**[6]** On June 27, 2012, 3sHealth issued a Request for Strategic Partner for the operation of laundry facilities for the Health Regions with a submission date of August 22, 2012. 3sHealth also continued to review options for delivery of laundry services. Options explored, included:

- (1) rebuilding five (5) of the six (6) current laundry facilities in their current locations;
- (2) consolidating the laundries into fewer locations and shipping more linens;
- (3) outsourcing linen services to a third party; and
- (4) some combination of the other three (3) options.

**[7]** On August 2, 2013, counsel for K-Bro Linen Systems Inc. ("K-Bro") wrote to Mr. Garry Whalen of Unite Here, Local 41 proposing that K-Bro and Unite Here, Local 41 enter into a ten (10) year collective bargaining agreement with respect to provision of laundry services. Unite Here, Local 41 declined the offer.

**[8]** A business case developed in the fall of 2012 recommended a two (2) plant scenario with laundry plants located in Regina and Saskatoon. The business case did not make any recommendation as to whether these facilities should be owned and operated by 3sHealth or by a third party contractor.

**[9]** In November, 2012, 3sHealth evaluated other laundry service delivery options. This evaluation recommended a single laundry plant located in Regina, built, owned and operated by K-Bro. Included in the analysis was the option of having two plants (Regina and Saskatoon) operated by K-Bro and two plants operated through a public delivery system. On November 15, 2012, 3sHealth recommended to its Board of Directors that the single plant option operated by K-Bro be approved. The Board agreed.

**[10]** In March of 2013, 3sHealth met with the trade unions affected to explain the options which were being explored regarding laundry services. 220 Full Time Equivalent Positions could be impacted.

**[11]** An announcement was made on May 29, 2013 that a new laundry plant would be built and operated in Regina by K-Bro. The Union (Brian Haughey) was included in a conference call related to the announcement. Following the announcement, Mr. Haughey made a request of Andrew Will, the CEO of 3sHealth for contact information for K-Bro, which he provided at a later date.

**[12]** On June 3, 2013, Mr. Haughey also requested, pursuant to Section 43(8) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "Act") that 3sHealth enter into collective bargaining negotiations to develop a workplace adjustment plan related to the May 29, 2013 announcement.

**[13]** On July 2, 2013, Mr. Will wrote to the Union, and other trade unions that represented laundry workers, sending them a redacted copy of the November 15, 2012 submission to the Board of Directors of 3sHealth, and requesting a meeting with the unions to discuss "how we can work together with you and the health regions/regional laundry operations to ensure a successful transition and to develop strategies to mitigate the impact on staff affected by this decision". On August 1, 2013, Mr. Haughey requested an un-redacted copy of the submission to the Board of Directors.

**[14]** On July 29, 2013, a first meeting of the "Hospital Laundry Labour Relations sub Committee" was held. The minutes of that meeting identify that the purpose of the committee was to provide a provincial steering committee input on local issues. Brian Haughey and Mr. Derek Fuchs of the Union attended this first meeting of the committee.

**[15]** On August 1, 2013, a meeting was held of the Laundry Transition Steering Committee (this committee was distinct from the Hospital Laundry Labour Relations sub Committee). Mr. Haughey was to have been invited to this meeting, but was missed on the invitation list.

**[16]** Mr. Will responded to Mr. Haughey's letter of June 3, 2013 and his email of August 1, 2013 on August 14, 2013. In that letter, he provided a copy of the Request for Strategic Partner issued in 2012 as well as questions and responses related to the tendering

process. He did not provide an un-redacted copy of the business case previously provided to the unions of July 2, 2013.

**[17]** A second meeting of the Hospital Laundry Labour Relations sub Committee occurred on October 11, 2013. Mr. Haughey and four (4) other Union representatives attended the meeting. Another meeting was scheduled for January 22, 2014, but was later cancelled.

**[18]** During this period, the Employer and the Union were engaged in negotiations for a renewal of their collective agreement which had expired on March 31, 2012. During those negotiations, the Union made a proposal on October 28, 2013, regarding a workplace adjustment plan.

**[19]** On December 12, 2013, it was announced that K-Bro had been awarded a ten (10) year contract for laundry and linen services for the Province of Saskatchewan. The formal agreement was executed between the parties on December 16, 2013. Mr. Haughey emailed Mr. Will, on December 13, 2013, to request a clean, un-redacted copy of the final agreement.

**[20]** On December 20, 2013, the Union filed (1) an application to amend under Section 5(j), (2) an order under s. 2(g)(iii) and declarations under ss. 37 & 37.3, seeking the following relief:<sup>2</sup>

1. A declaration that K-Bro and/or 3sHealth and/or Regina Qu'Appelle Health Region ("RQHR") is a successor and/or common and/or related employer within the meaning of Sections 2(g)(iii), 37 and 37 of *The Trade Union Act*.
2. A declaration that there has been a disposition between K-Bro and 3sHealth/RQHR within the meaning of Section 37 of *The Trade Union Act*.
3. A declaration that K-Bro is bound to the collective agreement between the Union and SAHO representing RQHR.
4. An order that K-Bro is jointly and severally obligated to offer employment to all members of the Union and to provide the requisite

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<sup>2</sup> I have made adjustments to the actual wording of the relief requested to correspond with the terms utilized in this decision

training for all work being performed at the proposed new Regina Hospital laundry facility.

5. An order for the production of an un-redacted copy of the partnership agreement between K-Bro and 3sHealth.
6. An order for copies of all correspondence between the Government of Saskatchewan and its agents (3sHealth, SAHO, and RQHR) and K-Bro.
7. An order to produce to the Union a copy of the draft year (10) year collective agreement offered to Unite Here by K-Bro.
8. Such further and other relief as the applicant may request and the Board Permit.

[21] Replies were filed by K-Bro on January 17, 2014, and by SAHO, 3sHealth and RQHR on February 3, 2014.

**Witness Testimony:<sup>3</sup>**

**Linda McCurdy**

[22] K-Bro agreed to have its witness, Ms. Linda McCurdy, testify first. Ms. McCurdy has been the President and CEO of K-Bro since 2000. K-Bro is a publicly traded company trading on the Toronto Stock Exchange. The Company started in 1954 and went public in 2005. K-Bro processes laundry at 8 plants in Canada. 80% of their business is with health care organizations. Their plants are located in British Columbia, Alberta, Ontario, and Quebec. The company operates its laundry facilities in both a unionized and non-unionized environment.

[23] Ms. McCurdy testified that K-Bro responded to the Request for Strategic Partner issued by 3sHealth. It was the successful bidder and was ultimately awarded the contract to provide linen services. She provided a redacted copy of the Master Services Agreement (the "Agreement") which the Board reviewed and ordered that several other provisions be un-redacted.

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<sup>3</sup> During the evidence portion of the hearing there were numerous objections from counsel regarding production of documents requested by the Union. These production requests were objected to on the basis of relevance as well as,

[24] The original proposal by K-Bro called for the laundry facility to be located in a facility rented by K-Bro for that purpose. However, suitable arrangements could not be made for rental of a facility and the Company determined to purchase land and build its own plant. The laundry facility is expected to be processing laundry in mid 2015.

[25] Ms. McCurdy testified that the Company acquired no assets from 3sHealth, SAHO or RQHR. She acknowledged in cross-examination that K-Bro will utilize laundry carts owned by RQHR to receive soiled laundry and deliver clean laundry to the various hospitals which it services pursuant to the Agreement. She disagreed with counsel for the Union that K-Bro obtained any customers from 3sHealth pursuant to the Agreement. Rather, she testified that K-Bro obtained the right to service customers under the Agreement.

[26] In response to questions concerning the offer of a ten (10) year collective agreement to Unite Here, Ms. McCurdy testified that they had become aware of possible layoffs among employees represented by the Union and wanted to see if they could be available to work at their new facility.

[27] Ms. McCurdy was recalled to give evidence with respect to an undertaking given during her testimony with respect to the operation of a compensation formula found in Article 2.7 of the Agreement.<sup>4</sup>

### **Derek Fuchs**

[28] Mr. Fuchs is the weekend supervisor at the laundry facility in Regina operated by RQHR. As the weekend supervisor, he oversees the shipping of linens from the facility to the hospitals in Regina. He is the chief shop steward for the Union and participates on the bargaining committee.

[29] Mr. Fuchs attended the October 11, 2013 Hospital Laundry Labour Relations sub Committee meeting. He testified that at that meeting, RQHR agreed to make training available to current employees to assist them to transition to other jobs within the Hospital Region. He

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in one case, solicitor-client privilege. The arguments over these requests were often lengthy. The majority of the production requests were denied for the reason that the production was irrelevant to the current proceedings.

also testified that he understood that laundry workers would be provided preference over “off the street” applicants for jobs advertised by RQHR. In cross-examination, he was unable to identify any portion of the minutes which stated this understanding.

**[30]** He testified that he did take a FoodSafe Level 1 course with the hope to obtain a job within the food service sector of the Hospital Region. However, he found when he applied for positions advertised by RQHR that he was not afforded any priority.<sup>5</sup>

### **Pam Russell**

**[31]** Ms. Russell is the Linen Service Supervisor for the Regina Qu’Appelle Health Region, a position which she has held for 20 years. She has been employed in the laundry since beginning there as a student in high school. She testified that she had been chief shop steward for the union in the past, but hadn’t been active as a steward for the last 15 to 20 years. She is a member of the bargaining committee for the Union.

**[32]** Ms. Russell provided a partial listing of customers served by the Regina laundry which included the General, Pasqua and Wascana Hospitals in Regina, the Regina Community Clinic, the Saskatchewan Institute of Applied Science and Technology, Regina Home Care, University of Saskatchewan Sports Teams, City of Regina Police Service and Emergency Services, the Regina Correction Centre and some customers outside Regina. She also testified that the Regina laundry also did emergency work for Yorkton and Prince Albert Hospitals.

**[33]** Ms. Russell testified that the Regina laundry, while operating at near capacity, can do more if shifts were extended and/or the facility “staffs up”. She noted that employees have recommended ways to improve laundry services, but all of them had been rejected. She testified that the Regina laundry currently handled 9.6 million pounds of laundry a year.

**[34]** Ms. Russell testified that RQHR has advised that current employees can apply for K-Bro jobs, but K-Bro hasn’t made any offers to hire any current employees. She also testified that she also understood that laundry employees would have priority over “off the street” hires by RQHR. She testified that she had applied for an out-of-scope position as a linen co-coordinator.

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<sup>4</sup> See also, paragraph 45 hereof

<sup>5</sup> It should be noted that the applications to which he refers were made after the date of the application in this matter.



She testified that she was qualified for the job as it was essentially the job she did in the laundry. However, she was not even interviewed for the position.

[35] Ms. Russell testified that RQHR had recently purchased twelve (12) new laundry carts at a cost of about \$2,500.00 each. She testified that it was her understanding that these laundry carts would be utilized by K-Bro after the Regina laundry closes. In cross-examination she acknowledged that these carts would be utilized for clean linens in the hospitals. She also testified that RQHR had ordered new uniforms which she initially testified were K-Bro standard issue. On cross-examination she confirmed that they were a standard type of hospital scrub supplied by M.I.P. and that they would be worn by Regina Health Region employees after the Regina laundry closes. She also testified that linens had been standardized five (5) years ago. She agreed in cross-examination this was to insure that everyone in the Health Region used the same linens.

[36] Ms. Russell acknowledged in cross-examination that she was not aware of any jobs having been posted by K-Bro in Regina. Nor was she aware of any jobs posted in Saskatoon. She had not applied for any of the jobs posted in Saskatoon. She also acknowledged that RQHR had sponsored educational sessions by Service Canada re benefits that would be available to former employees and well as a discussion on Employee benefits and staffing options. Ms. Russell also noted that of the 120 employees at the Regina laundry only two (2) had obtained new jobs.

### **Brian Haughey**

[37] Mr. Haughey has been a full time bargaining representative for the Retail, Wholesale and Department Store Union for 24 years. He was engaged in servicing and contract administration for the Union and participated in collective bargaining. He testified that he was involved in the bargaining for a renewal collective bargaining agreement. He testified that a renewal agreement was achieved having a four (4) year term expiring on March 31, 2016. He testified that RQHR initially offered a five (5) year agreement, but they felt four (4) years would be sufficient if the laundry was closing.

[38] He testified that RQHR and SAHO were involved in bargaining for the renewal agreement. K-Bro was not involved in the negotiations and, he testified that RQHR and SAHO were not bargaining on behalf of K-Bro.

[39] He testified that he had had one conversation with Ms. McCurdy after her contact information had been provided to him by Mr. Will. During that conversation, he testified that he asked if K-Bro would agree that it was the successor to RQHR. He testified that he was advised by Ms. McCurdy that she viewed the laundry service arrangement as a “contracting out” and wasn’t prepared to discuss the matter further. In cross-examination, he testified that he did not pursue this further with Ms McCurdy and offered no compromise.

[40] He also testified in cross-examination that he didn’t contact Ms. McCurdy over the Unite Here contract offer. He testified that the Union was “not interested in that contract”. He also testified in cross-examination that during the negotiations for the renewal collective agreement that the Union had made no proposal to include “contracting out” language in the collective agreement and there was no change to the language in the renewal agreement with respect to “contracting out”. He testified that during negotiations, the focus was on workplace adjustment and more money.

**Andrew Will:**

[41] Mr. Will is the CEO of 3sHealth. He testified about the organizational structure of 3sHealth, SAHO and RQHR. He testified concerning the creation of 3sHealth from the former Saskatchewan Association of Health Organizations and the new mandate given to the newly created SAHO. He also described the governance model for 3sHealth and SAHO. He testified that 3sHealth has no involvement in collective bargaining. That, he testified, is the responsibility of SAHO.

[42] Mr. Will testified that he had been aware of the laundry issues facing the health sector in Saskatchewan prior to his becoming CEO of 3sHealth in March of 2012. He testified concerning the process which 3sHealth utilized to reach the decision to enter into the agreement with K-Bro for provision of laundry services.

[43] Mr. Will testified that he had had a telephone conversation with Mr. Haughey concerning the employees at the Regina laundry. He testified that Mr. Haughey had wanted to see the Regina laundry employees transferred to the K-Bro laundry facility. He testified that his response was that hiring of new employees was the responsibility of K-Bro.

[44] Mr. Will testified that all linen carts which are owned by the Health regions at the commencement of the Agreement will remain owned by the Health regions<sup>6</sup>. He also testified that 3sHealth will have no involvement in the management of the K-Bro laundry, will not be involved in employee hiring, and will not be involved in the provision of laundry services. He testified that ownership and provision of linens was also provided for in the Agreement.

[45] Mr. Will also testified concerning clause 2.7 of the Agreement which was un-redacted by Order of the Board at the hearing. That article, he explained, was inserted to provide protection in the event that the Board determined that there was a successorship in this case. He acknowledged in cross-examination that he was not present during the negotiation of this particular clause of the Agreement.

[46] In cross-examination, Mr. Will testified that a consultant, (V.F.A.) had reviewed all of the laundries in Saskatchewan and had determined that the total cost to upgrade all of those sites would be in excess of \$30 million. He also testified that the Agreement contains quality control and infection control standards. He testified that if those standards were not met that the contract could, as a final resort, be terminated.

### **Kathie Coles**

[47] Ms. Coles was a Labour Relations Consultant with RQHR. She testified that the Regina laundry was one of her responsibilities. She testified that she attended the meetings of the Hospital Laundry Labour Relations sub Committees and the Laundry Transition Steering Committee meetings. She testified that no commitment had been made during these meetings regarding re-employment of former hospital workers in priority to “off the street” applicants. She testified that she did send a memo to managers responsible for hiring decisions to advise them that former laundry workers had organizational experience, which the managers may see

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<sup>6</sup> See Article 16.2 of Schedule “C” of the Agreement.

applications from them, and they could look to those employees before going to an external candidate.

**Bernie Young**

[48] Mr. Young was produced as a witness to be cross-examined by the Union on the reply which he swore in these proceedings. Mr. Young was the former CEO of SAHO. He was currently under contract to SAHO. He identified the Workplace Adjustment Plan as having been tendered by the Union on the first day of collective bargaining for the renewal of the collective agreement between the Union and RQHR. He also testified that the Laundry Transition Steering Committee was an Employer committee and SAHO had membership, but was not responsible for the committee's direction.

**Mike Higgins**

[49] Mr. Higgins is the Vice-President, Human Resources & Communication for RQHR. He was also produced for cross-examination on the reply which he swore in these proceedings. In his testimony, he acknowledged that "if there is no other legal obligation to the contrary, that RQHR will give priority to a "qualified" Union applicant over an applicant "off the street".

**Relevant statutory provision:**

[50] Relevant statutory provisions are as follows:

2 *In this Act:*

(g) *"employer" means:*

*(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;*

...

5 *The board may make orders:*

(a) *determining whether the appropriate unit of employees for the purpose of*

*bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*

...

*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.*

*37.3(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:**

**[51]** The Union provided a written argument and authorities which we have reviewed and found helpful. The Union's argument was lengthy and detailed. We have attempted to summarize the major points of their argument only.

**[52]** The Union argued:

1. that RQHR/SAHO/3sHealth are common employers pursuant to Section 37.3 of the *Act*.
2. that 3sHealth/RQHR/SAHO should be named RQHR under Section 2(g(iii)) of the *Act*.
3. In the alternative, K-Bro Linens is a successor to RQHR/SAHO/3sHealth and should be ordered to recognize the existing certification order and existing collective agreement pursuant to Section 37 of the *Act*.

Common Employer argument:

**[53]** The Union argued that 3sHealth, RQHR and SAHO were all partners in providing laundry services to the Province. They argued that the reorganization undertaken to redefine the roles for 3sHealth and SAHO evidenced a close connection between them. They argued that RQHR was heavily and directly involved in the evaluation and choice of the laundry provider. They also noted that the decision to contract with K-Bro was a joint decision.

**[54]** The Union argued that RQHR was entitled pursuant to clause 2.5 of the Agreement to enforce all of the rights and remedies set forth in the agreement as if it was a party

thereto. Similarly, the Union argued, the Agreement is assignable to the Government of Saskatchewan or a regional health authority pursuant to clause 18.1(b) of the Agreement.

**[55]** The Union relied upon the Board's decisions in *Big Sky Rail Corp.*,<sup>7</sup> *Re: Cabtec Manufacturing Inc.*,<sup>8</sup> *Re: Canadian Salt Co.*,<sup>9</sup> *Re: Edgewood Forest Products Inc.*,<sup>10</sup> *Re: KBR Wabi Ltd.*<sup>11</sup> and *Re: Lutheran Sunset Home of Saskatoon.*<sup>12</sup>

**[56]** At one point in its argument, the Union included K-Bro within the group that it suggested were jointly engaged in the operation of the laundry to be opened in mid 2015. It argued that all four (4) parties should be determined to be engaged in this common activity. It pointed as well to the Agreement requirements that K-Bro was required to comply with such as the power to control Key personnel, all 3sHealth security, safety, administrative and operational rules and policies that are applicable to the provision of the laundry services, implementation of a safety program, and retention of data, files, business records upon completion of the Agreement.

**[57]** The Union argued that there was anti-union animus demonstrated which was required to be taken into account as a motivation when interpreting the *Act*. In support it cited *Hotel Employees and Restaurant Employees, Local 767 and 603195 Saskatchewan Ltd. and Western Automatic Sprinklers.*<sup>13</sup>

**[58]** The Union also argued that the primary purpose of Section 37.3 was to prevent erosion of bargaining rights. It argued that the transfer of laundry work to K-Bro through the Agreement did just that.

**[59]** The Union also argued that the purpose behind the agreement was to circumvent the collective bargaining relationship and the current certification orders. Most of this argument relied upon the offered contract to Unite Here by K-Bro.

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<sup>7</sup> [2014] S.L.R.B.D. No. 5

<sup>8</sup> [2008] S.L.R.B.D. No. 7

<sup>9</sup> [2010] S.L.R.B.D. No. 25

<sup>10</sup> [2013] S.L.R.B.D. No. 2

<sup>11</sup> [2013] S.L.R.B.D. No. 14

<sup>12</sup> [2009] S.L.R.B.D. No. 33

<sup>13</sup> [1988] S.L.R.B.D. No. 21

[60] The Union argued that this was a case where the Board should exercise its discretion under Section 37.3.

*True Employer:*

[61] The Union argued that 3sHealth, RQHR and SAHO should be named as the employer pursuant to Section 2(g)(iii) of the *Act*. It relied upon the Board's decision in *Re: Saskatchewan Gaming Corp.*<sup>14</sup> The Union contented that 3sHealth acts as more than an invisible hand because they act in concert with K-Bro to determine wage rates, quality control, safety as examples of matters normally the subject of collective bargaining.

*Successorship:*

[62] The Union argued, in the alternative, that K-Bro is a successor pursuant to Section 37 of the *Act*. It argued that the "beating heart" of the laundry had been transferred to K-Bro under the Agreement. It argued that the customer lists were being provided to K-Bro as a part of the transfer and that vital assets had also been transferred, such as laundry carts and uniforms. It relied upon the Board's decision in *Big Sky (supra)* and *SJBRWDSU v. Charnjit Singh and 1492559 Alberta Inc.*<sup>15</sup>

[63] The Union argued that the Agreement was not a "contracting out" but was a successorship. In support it cited *Re: Smiley Buffet*<sup>16</sup> and *Re: Saskatoon City*.<sup>17</sup>

**Respondent's arguments:**

[64] The Respondent, also addressed the three (3) issues articulated by the Union.<sup>18</sup> However, they took a different view. The Respondent also provided written brief and case authorities which we have reviewed and found helpful. Again, we have attempted to summarize the major points of their argument only.

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<sup>14</sup> [1996] S.L.R.B.D. No. 36

<sup>15</sup> [2013] CanLII 3584 (SKLRB)

<sup>16</sup> [2008] S.L.R.B.D. No. 40

<sup>17</sup> [1998] S.L.R.B.D. No. 32

<sup>18</sup> See paragraph 52 *supra*



*Successorship:*

**[65]** The Respondent argued that the Agreement amounted to a “contracting out” of the laundry service not a successorship. It argued in only rare cases would a “contracting out” also attract successorship. In support they cited *Kenneth Wilson and Richard Fefchuk and Access Transit Ltd.*,<sup>19</sup> *K-Bro Linen Systems Inc. and HEU, Local 180*,<sup>20</sup> *K-Bro Linen Systems and Hospital Employees’ Union, Local 180*,<sup>21</sup> *SJBRWDSU, Local 454 v. Westfair Foods Ltd.*, and *UFCW, Local 1400*,<sup>22</sup> *Re: Smiley’s Buffet*,<sup>23</sup> *Sherwood Co-operative Association Limited*,<sup>24</sup> *CUPE v. Metropolitan Parking Inc.*<sup>25</sup> and *SJBRWDSU, Diogenes Investments Ltd.*<sup>26</sup> and *The Charming Hostess Inc.*<sup>27</sup>

**[66]** It argued that there was no disposition of a business which is necessary to bring the issue of successorship into play. It argued that this case was similar to the facts situation in *Re: Smiley’s Buffet*.

**[67]** The Respondent also argued that there is no prohibition against “contracting out” unless that right is prohibited in the collective bargaining agreement. They argued that there was no such language in the collective agreement here. They argued that contracting out, unless prescribed by the clearest of language in the collective agreement, is a fundamental right of the employer. Furthermore, it argued that a “contracting out” is not a successorship unless there is a business disposed of to the contracting party independent of the contracting out.

*Common Employer – Section 37.3:*

**[68]** The Respondent argued that there was no evidence upon which a declaration of common employer could be founded. It argued that the case law is clear that both employers must be involved in the day to day labour relations of the workers involved.

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<sup>19</sup> (December 1992) Sask. L.R.B. Rep. 4<sup>th</sup> Quarter Vol 5 No. 3

<sup>20</sup> [1993] CarswellBC 3829

<sup>21</sup> [1992] B.C.L.R.B.D. No. 45

<sup>22</sup> [2011] CanLII 75843 (SKLRB)

<sup>23</sup> Supra Note 16

<sup>24</sup> LRB File No. 194-87

<sup>25</sup> [1980] C.L.R.B.R. 197

<sup>26</sup> [1983] July Sask. Labour Rep. 072-83

<sup>27</sup> [1982] C.L.R.B.R. 409

[69] The Respondent argued that the analysis required for a declaration under Section 37.3 (and under Section 2(g)(iii) was set out in *Wayne Bus*<sup>28</sup>. The Respondent further argued that K-Bro was responsible for all aspects of the employment relationship and there could, therefore, be no common employer designation.

*True Employer – Section 2(g)(iii):*

[70] The Respondent argued that it was clear from *Wayne Bus* that the considerations under Section 2(g)(iii) are similar to those for common employer. The Respondent argued that it was necessary for the Applicant to establish that the contracting party controls the most fundamental aspects of the employment relationship such that they should be designated as the employer. It relied upon the Board's decision in *SJBRWDSU, Local 454 v. Westfair Foods Ltd, and UFCW, Local 1400*.<sup>29</sup> It argued that the only employer involved with the workers at the new laundry facility will be K-Bro.

**Respondent Employers' arguments:**

[71] The Respondent Employers also addressed the three (3) issues articulated by the Union<sup>30</sup> with one additional argument with respect to the Onus of Proof. The Respondent Employers also provided written brief and case authorities which we have reviewed and found helpful. Again, we have attempted to summarize the major points of their argument only.

[72] 3sHealth, SAHO, and RQHR argued that the Union bore the onus of proof in this case and had failed to satisfy that onus.

Successorship:

[73] The Respondent Employers relief upon *CUPE v. Metropolitan Parking Inc.*<sup>31</sup> and *UBCJA, Locals 1805 and 1990 v. Cana Construction Co. Ltd.*<sup>32</sup> in support of its argument that

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<sup>28</sup> [1999] CLB 15572, 54 C.L.R.B.R. (2d) 161, LRB File No. 363-97 at page 18

<sup>29</sup> [2011] CanLII 75843 (SKLRB)

<sup>30</sup> See paragraph 52 supra

<sup>31</sup> *Supra* Note 25

<sup>32</sup> LRB File Nos. 199-84, 201-84, 202-84 & 204-84

there had been no disposition of a business in this case. It also cited *Kenneth Wilson and Richard Fefchuk and Access Transit Ltd.*<sup>33</sup> in support.

[74] The Respondent Employers also relied upon *Re: Smiley Buffet*<sup>34</sup> and *Re: Saskatoon City*.<sup>35</sup> It argued that the Agreement amounted to a “contracting out” which did not give rise to a successorship.

#### Common Employer – Section 37.3

[75] The Respondent Employer relied upon *Re: Beaver Foods*<sup>36</sup> for the test to be applied with respect to common employer under Section 37.3. That test involved the satisfaction of 3 criteria which it argued were not met in this case.

#### True Employer – Section 2(g)(iii)

[76] The Respondent Employer also took the view that the test for true employer was also similar to that for a common employer. Again, it relied upon *Re: Beaver Foods* as outlining the criteria to be met. It argued that the Union had failed to satisfy these criteria and/or had not provided any evidence to justify a declaration under Section 2(g)(iii).

### **Analysis and Majority Decision:**

#### **The Nature of the Relationship between 3sHealth, SAHO and RQHR**

[77] We are satisfied from the evidence presented that the Employer of the employees at the Regina laundry facility is RQHR. RQHR is the successor Employer to Regina District Health Board which this Board designated as the Employer in its Order dated March 14, 1997. That Order should be updated to reflect the changes in how health care is organized in the Province.

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<sup>33</sup> (December 1992) Sask. L.R.B. Rep. 4<sup>th</sup> Quarter Vol 5 No. 3

<sup>34</sup> [2008] S.L.R.B.D. No. 40

<sup>35</sup> [1998] S.L.R.B.D. No. 32

<sup>36</sup> [2009] S.L.R.B.D. No. 33, CanLII 54774

**[78]** The evidence is clear that prior to the reorganization to create 3sHealth and the new SAHO, that the Saskatchewan Association of Health Organizations were established by the various health regions in the Province to provide centralized services to all of the health regions. As early as 1959, a health care corporation (called at that time, the Saskatchewan Health-Care Association) was formed pursuant to a private bill known as *An Act to Incorporate Saskatchewan Hospital Association*.<sup>37</sup> The objects for which that corporation was incorporated were numerous, but included “(g) to subscribe to and become a member of or incorporate with any other society or association...whose objects in whole or in part are similar to the objects of the corporation”, and “(l) to establish, operate and manage employee benefit schemes for its officers and employees and for the officers and members of its members”.

**[79]** Over time, we understand that the organization became the Saskatchewan Association of Health Organizations which was re-organized as noted above. 3sHealth took over the majority of the functions of the Saskatchewan Association of Health Organizations with SAHO being mandated to look after labour relations matters.

**[80]** While RQHR has an involvement in both 3sHealth and SAHO through its chairperson being a member of the governing council, RQHR does not control either 3sHealth or SAHO as that direction is taken from the governing council which is comprised of:

- (i) the Chair of the Board of Directors of each regional health authority established pursuant to *The Regional Health Services Act (Saskatchewan)* (“RHA”) and the Saskatchewan Cancer Agency (“SCA”);
- (ii) the Affiliate Representatives (non-voting) appointed pursuant to the process in Section 5.6 below.

**[81]** *The Regional Health Services Act*<sup>38</sup> establishes twelve (12) health regions in the Province. Accordingly, RQHR has only a one (1) in twelve (12) say in the governance of 3sHealth and SAHO. No health region controls 3sHealth and SAHO. A majority (7) of the health

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<sup>37</sup> *Supra* Note 1

<sup>38</sup> S.S. 2002 c. R-8.2

regions provide the direction to these entities and make appointments to the board of directors of 3sHealth and SAHO.

**[82]** In keeping with its mandate, 3sHealth (see paragraph 6.2 of the restated Bylaw) intends to provide services to its customers (as defined therein) “under formal service agreements”. Accordingly, 3sHealth is a contractor to, *inter alia* the various health regions providing ongoing and new services, such as the study of and delivery of a new laundry system for the province under its mandate to provide “shared services to the Saskatchewan Health sector and to certain healthcare organizations outside of Saskatchewan”.

**[83]** SAHO, as well, provides services and acts as bargaining agent for, *inter alia* the various Health regions and provides other Labour Relations services, in accordance with its mandate.

**[84]** In *Wayne Bus*<sup>39</sup> the Board outlined the inquiry that was necessary under both Sections 37.3 and 2(g)(iii). At paragraph 128, the Board said:

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

**[85]** The criteria adopted by the Board were taken from the Ontario Labour Relations Board’s decision in *Labourers’ International Union of North America v. York Condominium Corporation et al.*<sup>40</sup> The criteria adopted with respect to Section 2(g)(iii) were as follows:

- (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.*

<sup>39</sup> *Supra* Note 28

<sup>40</sup> [1977] OLRB Rep. October 645

- (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.*

**[86]** In respect of Section 37.3, the criteria to be examined were:

- (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.*

**[87]** By virtue of the amendment to *The Trade Union Act* in 2005, a fourth criteria was added by virtue of ss. 37.3(2) which is that the provision of ss 37.3(1) applies only to a corporation, partnerships, individuals, or association that has common control or direction on or after October 28, 1994.

**[88]** The Board determined in *Re: Edgewood Forest Products*,<sup>41</sup> at paragraph [52] that an analysis of the threshold requirements of s. 37.3 is required to be conducted before turning to an analysis of the factors from *York Condominiums (supra)*.

**[89]** Clearly, the first criteria that there be more than one corporation, partnership or association involved is met with respect to the 3sHealth, SAHO, and RQHR scenario. The second criteria would also be satisfied in that they are clearly engaged in associated or related businesses, undertakings or other activities that is the provision of services (laundry) in the Health care sector.

**[90]** The third criteria is not, however, satisfied insofar as 3sHealth, SAHO and RQHR is concerned. They are not under common control or direction. That may be true insofar as 3sHealth and SAHO are concerned, but they are not under common control with RQHR. RQHR has its own control and direction through its Board established under *The Regional Health Services Act*<sup>42</sup>. Nor, as noted above, does RQHR control or direct either 3sHealth or SAHO.

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<sup>41</sup> *Supra* Note 10.

<sup>42</sup> S.S. 2002 c. R-8.2

[91] It is equally clear from the evidence that 3sHealth and SAHO have no ability to direct or control the laundry service at RQHR. While 3sHealth and SAHO may assist RQHR in respect of central services and Labour Relations matters that relationship does not amount to control or direction over the laundry services operated by RQHR.

[92] There is a clear disconnect between RQHR and both of 3sHealth and SAHO. Both 3sHealth and SAHO provide services to RQHR, but neither is controlled or directed by RQHR.

[93] This result also pertains in the analysis of the *York Condominium* factors. In that respect, it is RQHR who exercises direction and control over the employees performing the work. It is not 3sHealth or SAHO. RQHR bears the burden of remuneration, not 3sHealth or SAHO. RQHR is responsible for discipline, hiring and dismissal of employees not 3sHealth or SAHO. RQHR is not only perceived as being the employer of the laundry employees, but, by this analysis, is the employer. Finally, there is no intention to create a relationship of employer and employee as between laundry workers and 3sHealth or SAHO.

[94] Based on this analysis, 3sHealth and SAHO are not a related employer, nor are they the true employer of the employees of the laundry service at RQHR.

**Is K-bro a successor to RQHR with respect to the laundry service?**

[95] The Union in this case argues that the Agreement between 3sHealth and K-bro is a disposition of business to which Section 37 of the *Act* applies. 3sHealth, SAHO, RQHR and K-Bro say that it is a “contracting out” and not a disposition of a business.

[96] An Employer is entitled, in the absence of language restricting that right, to contract out work that is normally performed by the Union’s members (and in this case other unions’ members).<sup>43</sup> It is not the jurisdiction of this Board to interpret the collective agreement between the parties. We would defer to an arbitrator appointed pursuant to the collective agreement for that purpose. Nevertheless, we note that the collective agreement does not restrict contracting out. Nor, based upon the evidence of Mr. Haughey, was any restrictive language agreed to during the negotiations for the renewal collective agreement.

**[97]** Even if there is an unrestricted right to contract out, that determination does not, in and of itself, answer the more fundamental question which is whether the Agreement implements a “contracting out” or is a sale, leasing, transfer or other disposition of a business which would make the disposition subject to Section 37 of the *Act*.

**[98]** There are two aspects of this question. When one deals with “contracting out”, it is in relation to work that was previously performed (or work which could be performed) by bargaining unit members. When dealing with a successorship, the Board must identify a business which is being transferred. In this context, a “contracting out” would generally entail provision of services (work) by the contractor in place of services (work) provided by bargaining unit members. In the case of a transfer of a business, the Board usually looks to some form of physical transfer of assets from one party to another such that the “beating heart” of an enterprise is transferred from one entity to another. In the case of “contracting out”, there can be disruption in the work available to be performed by bargaining unit member resultant from the “contracting out”, whereas in a successorship, one of the aspects of the transaction which the Board will review is whether or not there was continuity of employment of some or all of the employees of the previous employer.

**[99]** There was some evidence of a business being engaged in by RQHR with respect to its laundry facility. The facility serviced not just the hospitals in the Regina area, but also provided linen services to other third parties such as the Regina Police Service, the Regina Emergency Medical Technicians, and the Regina Community Clinic. None of these customer accounts were, however, transferred to K-Bro under the Agreement. Presumably, RQHR is entitled to continue to service them at its laundry facility, or K-Bro may be able to offer them competitive service.

**[100]** The Request for Strategic Partner issued by 3sHealth proposed in clause 1.3 that “[T]he selected Proponent(s) will have an opportunity to conclude an arrangement with 3sHealth...for the provision of Services...”. The Agreement under Article 2 requires K-Bro to provide “Services” as set forth in that Article as well as in Schedule “C”. The Agreement calls for these services to be provided to, not only RQHR, but to all of the Participating Health Organizations. It is clear from these provisions that the parties intended that K-Bro was to

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<sup>43</sup> See *Art Hauser Centre Board Inc. (City of Prince Albert) and C.U.P.E., Local 882* [2008] SKCA 121 (CanLII)



provide laundry services which was previously the work of members of the Union and other unions' members performing similar work at the other Participating Health Organizations.

[101] The Union argues, however, that more than services were involved in the transaction. In particular, it points to the provisions of the Agreement whereby K-Bro is afforded the use of laundry carts owned by RQHR (and other Participating Health Organizations, we presume) for the provision of the laundry services. In addition, the Union points to the fact that uniforms and linens owned by RQHR would be intermingled with similar items owned by K-Bro.

[102] In *Re: Saskatoon City*,<sup>44</sup> the Board said at paragraph 21:

*In this instance, the Board does not find that SREDA is a successor employer within the meaning of s 37 of the Act. In our view, the cases establish that the successorship provision does not apply to a situation where a unionized employer alters the manner in which it performs work by paying a contractor to perform a portion of its work for a fee. [emphasis added]*

[103] In support for this proposition, the Board cited *R.W.D.S.U. v. Crescent Heights Janitorial Service*,<sup>45</sup> *S.G.E.U. v. Chatterson Building Cleaning Inc.*,<sup>46</sup> *S.G.E.U. v. Tourism Industry Assn of Saskatchewan*<sup>47</sup> and *S.G.E.U. v. Saskatchewan Brewers Assn.*<sup>48</sup>

[104] In that case, the Board also went on to say in paragraph 26, “[G]enerally, in the absence of anti-union animus, such contracting out does not fall within the successorship provisions contained in s. 37 of the Act...”. And, at paragraphs 27 & 28, the Board referred to other cases which were more than a mere contracting out, such as *C.U.P.E., Local 1975-01 v. Versa Services Ltd.* where the University of Regina transferred a profit centre and *S.G.E.U. v. Headway Ski Corp* where assets were leased by the Government of Saskatchewan to Headway to allow it to operate a ski business at Mt. Blackstrap. In addition, in *Headway*, Headway purchase \$40,000 in assets from the Government.

[105] The Union argued that there was anti-union animus in play in this case. However, there was no evidence provided to demonstrate any anti-union animus in this transaction.

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<sup>44</sup> [1998] S.L.R.B.D. No. 32

<sup>45</sup> [1985] Sask. Lab. Rep 50

<sup>46</sup> [1986] Sask. Lab. Rep. 42

<sup>47</sup> [1989] Sask. Lab. Rep. 63

**[106]** The Board most recently dealt with the issues surrounding “contracting out” versus a successorship in *Re: Lutheran Sunset Home of Saskatoon*.<sup>49</sup> That case involved the transfer of a contract for the management of Broadway Terrace retirement home in Regina. In that case, the Board found that the provisions of Section 37 did not apply. The Board commented at paragraph 115 as follows:

*To establish that an employer is a successor in the sense envisioned by s. 37 of the Act, the Board must find that a “business” (or part thereof) has passed from one employer to another; something which a variety of cases have proven is no easy task. Many labour boards across Canada have struggled with the distinction between the transfer of a business (i.e. a successorship situation) and a mere “contracting out” of services. Unlike a successorship situation, mere contractual relationship do not include the passing of a recognizable and distinct business (or part thereof) from one employer to the next. Without the passing of a recognizable and distinct business (or part thereof), no obligations in successorship arise. Typically, such subcontracting situations arise when an employer decides that certain services or functions, which are currently being performed by staff, could be more efficiently or economically done by an outside contractor. While subcontracting arrangements always involve the transfer of work, the transfer of work does not necessarily amount to the transfer of all or a part of a business within the meaning of s. 37 of the Act.*

**[107]** The Union argues that the business which was transferred pursuant to the Agreement was the laundry business operated by RQHR. RQHR, 3sHealth, SAHO and K-Bro argue that no business was transferred, only the work of processing the laundry was transferred through contracting out. We agree with RQHR, 3sHealth, SAHO and K-Bro that no business was transferred to K-Bro from RQHR.

**[108]** In a case involving K-Bro in British Columbia, the British Columbia Labour Relations Board also concluded that similar facts did not give rise to a transfer of a business under the B.C. legislation. In *Re: K-Bro Linen Systems Inc.*<sup>50</sup>, the B.C. Board found that on the facts in that case, no business had been transferred to K-Bro. At page 13, the B.C. Board says:

*...The business of hospitals is to provide health care to patients who need hospital beds and hospital care on either an acute or long term basis. An integral, essential and functionally related aspect of the provision of hospital care is the provision of clean hospital linens – bed linens, bath linens, operating room linens, patient gowns, nursery linens, staff uniforms and a host of other types of linens for other hospital purposes. The provision of a supply of clean linens in reasonable state – to put it in its most basic and simplistic form – is laundry work.*

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<sup>48</sup> [1985] Sask. Lab. Rep. 41

<sup>49</sup> [2009] S.L.R.B.D. No. 33

<sup>50</sup> [1992] B.C.L.R.B.D. No. 45

*Until late 1989, the laundry work was done by the hospitals' own employees on the hospitals' own premises using the hospital's own equipment and supplies. The administrative structure in place at each hospital assumed responsibility for the purchase of linen supplies, the laundering process itself, the quality of the product that resulted and any problems associated with these function. We find that this laundry work as it was performed by the hospitals cannot be described as a viable laundry business, a "dynamic activity", a "going concern", "something which is carried on" by the hospitals (see Metropolitan Parking, above). Perhaps more to the point, although the laundry work is being done by K-Bro now instead of by the hospitals themselves, the hospitals have continued to provide clean linens to their patients.*

**[109]** This description of the laundry work being transferred by RQHR (and the other health regions) to K-Bro is as described above. We agree with the B.C. Board and in this case agree that there is no business being transferred by RQHR (and the other health regions) to K-Bro. All that is being provided by K-Bro, as was the case in B.C., is a laundry service. The business of providing clean laundry to patients remains with RQHR (and the other health regions). They continue, through the Agreement to provide the linens necessary to their business to their patients.

**[110]** In the alternative, even if there is a business which could have been transferred, has there been a transfer of that business?

**[111]** The factors which the Board routinely examines to determine if there has been a transfer of a business derive from the Ontario Labour Relations Board decision in *Re: Metropolitan Parking*<sup>51</sup>. At paragraph [57], the Ontario Board says:

*For a transaction to be considered a "sale of a business" there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a "going concern". A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. ...*

**[112]** In *UBCJA, Locals 1805 and 1990 v. Cana Construction*<sup>52</sup>, the Board quoted from *Metropolitan parking* as follows:

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<sup>51</sup> *Supra* Note 25.

<sup>52</sup> *Supra* Note 32.

*In determining whether a “business” has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessors business can be traced into the hands of the alleged successor, that is, whether there has been an apparent continuation of the business—albeit with a change in the nominal owner...*

**[113]** The Ontario Board then went on to review a number of indicia of a business as earlier described by it in *Culverhouse Foods Ltd.*<sup>53</sup>. In that case, the Ontario Board said:

*In each case the decisive question is whether or not there is a continuation of the business...the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service of lack of service of the customers of the predecessor have also been given some weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.*

**[114]** In the BC case involving K-Bro, the BC Board also adopted the approach of using a “list” of attributes of a continuation of a business. That list parroted the factors set out above. No other factors were identified by the Union in its evidence.

**[115]** The factors outlined in *Culverhouse Foods* can be analyzed as follows:

|                                            |                                                        |
|--------------------------------------------|--------------------------------------------------------|
| Is goodwill being transferred?             | No goodwill is being transferred to K-Bro.             |
| Are Logos or trademarks being transferred? | No Logos or trademarks are being transferred to K-Bro. |

<sup>53</sup> [1976] OLRB Rep. Nov. 691

|                                                                                           |                                                                                                                                                                                                                      |
|-------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Are customer lists, accounts receivable, or existing contracts being transferred?         | No customer lists, accounts receivable, or existing contracts are being transferred to K-Bro.                                                                                                                        |
| Is inventory being transferred to K-Bro?                                                  | No inventory is being transferred. RQHR retains ownership of the laundry carts and linens which will be utilized after the transition.                                                                               |
| Are non-compete covenants or covenants to maintain a good name until closing being given? | No non-compete or covenants to maintain a good name are being given.                                                                                                                                                 |
| Is there any other assistance being given to assist K-Bro in its operations?              | K-Bro has been given a long term contract with renewals which provide stability and allow it to make the necessary capital investment.                                                                               |
| Are former employees continuing to work for the successor?                                | K-Bro has not hired any of the former employees of the RQHR laundry. In her testimony, Ms. McCurdy testified that K-Bro would be pleased to accept applications from qualified workers at the RQHR laundry facility. |
| Will those employees perform their jobs using the same skills?                            | In her evidence Ms. McCurdy testified that the new plant would be highly mechanized and that most of the jobs would be low skilled jobs.                                                                             |
| Will there be a hiatus in production?                                                     | There will not be a hiatus in production. The RQHR plant will operate until the new K-Bro plant is up and running in mid 2015.                                                                                       |

**[116]** Based on this analysis, it is difficult to say that any business is being transferred or disposed of to K-Bro. That is consistent with our determination that this is a “contracting out”, not a disposition of a business to which Section 37 of the *Act* applies. The jurisprudence concerning “contracting out” and when it amounts to a successorship presumes that if the work contracted out remains a part of the primary employer’s business, and most of the indicators of successorship as set out above are absent, no successorship will be found. Here, we have laundry service continuing to be an integral part of the business of hospital care provided by RQHR. Secondly, most of the factors described in *Culverhouse Foods* are absent.

**[117]** No business has been transferred from RQHR to K-Bro. What has occurred is that RQHR, with the assistance of 3sHealth, has contracted with K-Bro for the service of cleaning dirty laundry and returning clean laundry for a fee, subject to the contractual specifications in the Agreement. RQHR continues to require laundry service, but has chosen to have that service performed by a contractor rather than its own staff.

[118] For these reasons, the applications made by the Union are denied. An appropriate order will accompany these reasons.

**DATED** at Regina, Saskatchewan, this **26<sup>th</sup>** day of **August, 2014**.

**LABOUR RELATIONS BOARD**

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Kenneth G. Love, Q.C.  
Chairperson

**Dissent of Member, John McCormick**

[119] I am unable to agree with the majority decision for the following reasons. I do not disagree with the facts as found by the majority, but rather the interpretation placed upon those facts by the majority. My disagreement is on three principle points, being:

1. The control of the Work transferred to K-Bro; and
2. My opinion that a contracting out should not avoid a transfer of obligations; and
3. A determination that there was anti-union animus in this case.

**Control of the work transferred to K-Bro**

[120] Since the motion picture *All the President's Men* was screened in 1976, the term "follow the money" has come into popular usage. It is, I believe, apt in this case as well. Funding for health care begins with the senior (Federal and Provincial) governments and flows from there to the various health agencies, including RQHR, SAHO and 3sHealth. From there, it flows, under the terms of the Agreement to K-Bro.

[121] The Agreement, in its barest form, provides for K-Bro to be paid a fee for doing work previously done by, amongst others, employees at RQHR. All that changes is the location at which the work is done, and, in this case, apparently, the employees who will perform the work since K-Bro seems to be unwilling to hire any of the existing laundry workers at RQHR. New laundry machines, which are more "high tech", will also be utilized. Apart from that, the linens

remain the same, the carts used to transport the laundry remains the same and the personnel at RQHR who dispatch dirty laundry and receive clean laundry remain the same.

**[122]** The Agreement provides RQHR and the other health organizations, through 3sHealth, may “rely on and enforce any rights and remedies of 3sHealth under this agreement as if each Participating Health Organization was a party” to the agreement.<sup>54</sup> Furthermore, under Article 18.1B, 3sHealth can rescind the agreement and hand it back to the Government of Saskatchewan, with 3sHealth becoming responsible to perform the services under the Agreement.

**[123]** 3sHealth, and by extension, RQHR and the Participating Health Organizations maintains, under the Agreement, full control over the quantity and quality of the services to be provided by K-Bro. 3sHealth, RQHR and the Participating Health Organizations set the quality standards for the services and provide the quantities of laundry to be processed. K-Bro’s participation is limited to being responsible for cleaning, to the standards specified, laundry presented to it. 3sHealth also maintains economic control insofar as wages of K-Bro employees is concerned and over key personnel of K-Bro.

**[124]** Full control over the laundry process remains with 3sHealth, RQHR and the Participating Health Organizations. All that has changed, as noted above is that the laundry will be processed at a centralized plant owned and operated by K-Bro. Furthermore, under the terms of the Agreement, K-Bro must accept additional laundry from any new participating healthcare organization. Additionally, K-Bro is not permitted to sub-contract any of the laundry work without prior approval from 3sHealth.

**[125]** I disagree with the functional approach taken by the majority in its listing of attributes of the continuation of a business. In my view, the business has been transferred when the function being performed is the same, i.e. the same work is being performed by a third party and where control of that work remains with the original employer. I would have found a successorship in this case.

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<sup>54</sup> See Article 25 of the Agreement

### **Contracting Out should not Avoid the Transfer of Collective Bargaining Obligations**

**[126]** In my opinion, the transfer of work to a third party, as set out above, should not result in the loss of collective bargaining rights. A contracting out, is, in my opinion, no different from a transfer of obligations under a successorship. The argument made by the BC Labour Relations Board, in *Re: K-Bro Linen Systems Inc.*<sup>55</sup> is erroneous in that there was a transfer of the work, subject to strict control by the contractor, which should give rise to a successorship.

**[127]** There is a clear connection between the Health agencies. All of them are interrelated and connected back to the Government of Saskatchewan. The Agreement, and its negotiation, was ultimately required to be approved by the Government of Saskatchewan and may, at the Governments behest, be returned to it. In my view, these entities are engaged in a related or associated business pursuant to Section 37.3 of the *Act*. In my opinion, the parties are not independent of one another.

### **Anti-Union Animus**

**[128]** Contrary to the majority view, I am of the opinion that the evidence clearly established that one of the principle motivations for 3sHealth entering into the Agreement with K-Bro was due to an anti-union animus. While K-Bro operates in a unionize environment in some locations, it stated in its annual information form<sup>56</sup> that it would “continue to oppose any unionization campaigns”.

**[129]** The structure of the Agreement, in my opinion, clearly seeks to avoid any collective bargaining rights attaching to the operations of K-Bro. However, to cover its bets, K-Bro and 3sHealth inserted provisions in the Agreement<sup>57</sup> to insure that if a successorship were found, that there would be an adjustment to the fees paid to K-Bro to compensate it for any increase in wages which might result.

**[130]** It was clear that the parties contemplated a scenario in which a successorship was found by the Board. 3sHealth obtained advice from SAHO regarding the possible labour relations impact of entering into the Agreement. That also led to K-Bro contacting an alternate

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<sup>55</sup> [1992] B.C.L.R.B.D. No. 45

<sup>56</sup> Annual Information Form, March 13, 2013 at page 21

<sup>57</sup> Section 2.7, which was only discovered by the Union upon the Board ordering that it be un-redacted



union, Unite Here, in an attempt to secure a “sweetheart” collective agreement, on a voluntary recognition, rather than attempting to deal with the Union. By making this approach, K-Bro was clearly demonstrating an anti-union animus.

**[131]** For these reasons, I would have found that the parties were related, that a successorship occurred and the unions application granted.

John McCormick, Board Member