SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. BROADWAY LODGE LTD. and 101239903 SASKATCHEWAN LTD., Respondents

LRB File Nos. 017-16 & 018-16; January 27, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Jim Holmes and Allan Parenteau

For the Applicant:	Larry Kowalchuk and Micah Kowalchuk
For the Respondent, Broadway Lodge Ltd.:	Andrea Johnson
For the Respondent, 101239903 Sask. Ltd.:	John Kim as agent

Successorship – Disposal of Business – New owner purchased hotel business from previous owner – New owner re-opened the hotel after a few weeks – New owner rented portion of hotel building from previous owner and reimbursed previous owner for monthly utility payments – New owner used same or similar contact information as previous owner – Board reviews factors for successorship identified in previous jurisprudence – Board concludes successorship occurred and issues a certification order.

Successorship – Disposal of Business – Previous owner had a number of arbitration awards outstanding from its ownership of hotel business, as well as outstanding grievances – Previous owner displayed anti-union animus when it operated the hotel – Board concludes a valid labour relations goal warranted finding a successorship and issues a certification order.

***The Saskatchewan Employment Act*, section 6-18**

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ["Union"] seeks an Order from this Board that Broadway Lodge Ltd., which carries on business at 207 Broadway Street East, Yorkton, Saskatchewan ["Broadway Lodge"] and 101239903 Saskatchewan Ltd. ["Numbered Company"] are either successor employers as defined in section 6-18 of *The Saskatchewan Employment*

Act, SS 2013, c S-15.1 [the "*SEA*"] or common or related employers as defined in section 6-20 of the *SEA*.

[2] By virtue of the Order of this Board dated November 1, 1991 the Union was certified as the collective bargaining agent for "all employees employed by Remai Investment Co. Ltd, a body corporate operating a motel under the firm name and style of Imperial 400 Motel, in or in connection with the Imperial 400 Motel, Yorkton, Saskatchewan, except the General Manager, Assistant Manager, Maintenance Supervisor, Housekeeping Supervisor, and Kitchen Supervisor[.]"[1]

[3] Subsequently in 2007, the Imperial 400 Motel was sold to 101109823 Saskatchewan Ltd. which continued to operate the hotel business at 207 Broadway Street East as the Howard Johnson Inn – Yorkton. It does not appear, however, that the original certification Order was amended to reflect this change in ownership.

[4] On or about, October 16, 2013 this numbered company sold the hotel to 101239903 Saskatchewan Ltd. referred to as the Numbered Company in these Reasons for Decision. The Numbered Company continued to operate the business as the Howard Johnson Inn – Yorkton. During this period, the Numbered Company's employees were covered by a collective agreement negotiated with the Union. This collective agreement expired on August 31, 2015.

[5] By a notice dated September 8, 2015, the Respondent, John Kim, owner of the Numbered Company and manager of the Howard Johnson Inn, notified all employees that the hotel would be closing in December 2015.

[6] On or about December 8, 2015, the Howard Johnson Inn – Yorkton closed.

[7] Subsequently on or about December 29, 2015, Broadway Lodge incorporated in Saskatchewan and began operations at 207 Broadway Street East in Yorkton as a long term residential hotel. The Numbered Company continues to own part of the hotel located at that address.

[1] LRB File No. 143-91

[8] The Union now seeks to have Broadway Lodge recognized as a successor employer and the original certification Order amended to reflect this change. In addition, the Union also seeks a certification order to continue as the collective bargaining agent for the Numbered Company.

FACTUAL BACKGROUND

1. Objection to Numbered Company's Reply

[9] At the outset of the first day of this hearing, the Respondent, John Kim appeared on behalf of the Numbered Company. Counsel for the Union, Mr. Larry Kowalchuk applied to have the Reply that Mr. Kim had filed on behalf of the Numbered Company struck on the basis that it failed to comply with Rule 20 of *The Saskatchewan Employment (Labour Relations Board) Regulations* [the "*Regulations*"]. Rule 20(4), in particular, stipulates that a formal Reply must be filed with the Board no later than "10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar." Mr. Kowalchuk objected to the Board allowing the Numbered Company's Reply to be admitted because not only was it filed out of time, it also lacked sufficient particulars for purposes of these applications.

[10] The Board determined that although the Numbered Company was a party having "a direct interest in the application" *per* Rule 19 of the *Regulations*, it had failed to file its Reply in accordance with the *Regulations*. In *United Food and Commercial Workers, Local 1400 v Wal-Mart Canada Corp. o/a Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada*, LRB File No. 172-04, 2004 CanLII 65601 (SK LRB) the Board described what transpired from a failure to comply with section 18 of Saskatchewan Regulations 163/72 ["*Regulations 163/72*"], the precursor to Rule 20 of the *Regulations*. At paragraphs 16 and 17, the Board stated:

> *[16] While s. 18 of [Regulations 163/72] is permissive, the consequences to a person directly affected by an application that is entitled to file a reply but elects not to do so, lies within the discretion of the Board. Such person is not entitled to any further notice of the proceedings and the Board may dispose of the application notwithstanding such failure to reply. However, in its discretion [under section 22 of Regulations 163/72], which is unfettered, the Board may allow such person to submit evidence and make representations.*
>
> *[17] The purpose of [Regulations 163/72] in this regard is clear: while the Board's process is to allow for the expeditious disposition of disputes, it does not countenance "trial by ambush". The filing of an application and reply in the forms*

> *mandated by [Regulations 163/72] ensures that each party must state the basis of its application or defence thereto. As both the application and reply are in the form of a statutory declaration, they form the basis for the entitlement by the party opposite to cross-examine the declarant in a process that does not allow for pre-hearing examinations or interrogatories.*

[11] After deliberating, the Board agreed with the Union that the Numbered Company's Reply must be struck. However, because neither of the other parties objected to Mr. Kim's continued participation in the hearing, the Board exercised its discretion under Rule 24(2) of the *Regulations* and allowed him to testify at the hearing with the assistance of a Chinese interpreter.

2. Testimony at the Hearing

[12] Three (3) witnesses testified at the hearing. Mr. Corey Jorgenson, a staff representative for the Union testified on behalf of the Union. Mr. John Kim, principal shareholder of the Numbered Company testified on its behalf. Mr. Ian Song, General Manager of Broadway Lodge Ltd. testified on behalf of the Respondent, Broadway Lodge.

2.1 Testimony of Corey Jorgenson

[13] Respecting the Union's application against the Respondent, Broadway Lodge, Mr. Jorgenson testified to the following:

- He is a staff representative with the Union and has held this position for approximately two (2) years since July 2014.
- One of his responsibilities was to enforce the rights of the Union's members employed at the Howard Johnson Inn – Yorkton.
- The collective bargaining agreement between the Union and the Numbered Company operating as the Howard Johnson Inn – Yorkton expired on August 31, 2015.
- In spite of his numerous requests to meet with Mr. Kim to commence collective bargaining, Mr. Kim never responded.
- The Union received notice from Mr. Kim that the Howard Johnson Inn would be closing permanently. Howard Johnson Inn closed on December 8, 2015.

- At that time employees who had worked at the hotel's Front Desk as well as the personnel responsible for the night audit were terminated.
- On November 30, 2015 approximately one (1) week prior to the closure of Howard Johnson Inn, an advertisement appeared on the Sask Jobs website for two (2) full-time and permanent positions described as Room Attendants. The job description was for housekeeping staff.
- He was disturbed by this advertisement as Howard Johnson Inn employed sufficient housekeepers at that time. He feared that this indicated a new approach to hiring by the Numbered Company in a manner that conflicted with the collective agreement.
- He spoke to Mr. Ian Song, who at that time was managing Howard Johnson Inn on behalf of the Numbered Company. Mr. Song stated that he knew nothing about this advertisement or of any intention to hire further housekeeping staff.
- Approximately one (1) week later, he re-checked the Sask Jobs website and discovered the advertisement had been removed. These positions were never filled because of the hotel's pending closure.
- On December 29, 2015, Broadway Lodge Ltd. was incorporated in Saskatchewan. The ISC Corporate Registry Profile Report dated January 18, 2016[2] revealed the following:
  - Nature of Business is described as "Residential Rentals, Long Term Rentals in Hotel";
  - Corporate Address is 207 Broadway Street East, Yorkton Saskatchewan, the same address as the former Howard Johnson Inn.
  - President and Secretary of Broadway Lodge Ltd. is Grace Kim whose address is listed as 315-3132 Dayanne Springs Boulevard, Coquitlam, British Columbia.
- In January 2016, Mr. Ian Song, General Manager of Broadway Lodge, approached a local union steward about housekeeping positions. It would be as an independent contractor and not subject to the collective agreement.
- Mr. Song never consulted with the Union about this proposition.

[2] See: Exhibit U-4.

- When Mr. Jorgenson learned of this proposal from members of the Union's local, he contacted Mr. Song. He told Mr. Song that the Union would file an unfair labour practice application if Broadway Lodge proceeded with this plan. Mr. Song told him that he would close the establishment if the Union filed such an application with the Board.
- He later learned that Broadway Lodge did hire some housekeeping staff on piece work. A number of former union members were now working at Broadway Lodge.
- He learned that early in 2016 Broadway Lodge Ltd. was advertising on *Sask Jobs* website for a person to fill the Front Desk – Night Audit position.[3] The closing date for this position which posted on April 6, 2016 was May 31, 2016. This position had formerly been held by Ms. Elizabeth A. Woloschuk, an active Union member who had not been rehired after Howard Johnson Inn shut its doors.
- Subsequently, Broadway Lodge Ltd. advertised on the Jobs on Monster website for self-employed housekeepers.[4] This advertisement was first posted on May 3, 2016. It stated that Broadway Lodge Ltd. was seeking self-employed housekeepers who would earn "$8.00 for each checkout room and $4.00 for each stay-over room."
- On the Realtors.ca website, Mr. Jorgenson discovered that Broadway Lodge is listed by RE/MAX Blue Chip Realty in Yorkton for sale with an asking price of $6,499,000.[5] The listing describes the property in part as follows:

> *"The Broadway Lodge, formally [sic] known as Howard Johnson, has seen an emergence as a favorite of contractors and trades people doing work in the surrounding area. The motel has established itself a cost effective weekly and long term say option for workers and vacations. With the re-branding beginning Jan. 1, 2016 revenues have increased substantially year over year. The motel comes with 7000 square foot restaurant space that is currently only being use for continental breakfast, this would be great opportunity for a new owner to open or lease out restaurant and bar combination for additional revenue stream. The motel is located on the busiest corner in Yorkton[.]"*

[3] See: Exhibit U-8.
[4] See: Exhibit U-9.
[5] See: Exhibit U-7.

[14] Respecting the Union's application against the Respondent, Numbered Company, Mr. Jorgenson testified to the following:

- On October 16, 2013, the Numbered Company became the registered owner of Howard Johnson Inn – Yorkton.
- The ISC Corporate Registry Profile Report for the Numbered Company[6] revealed the following:
  - It is principal business is described as a holding company;
  - Its officer is registered at 207 Broadway Street East, Yorkton, Saskatchewan, the same address at Broadway Lodge.
  - Its principal shareholder and President is Mr. John Kim who resides at 8615 – 109 Street, Grande Prairie, Alberta. The other named shareholders are Mr. James Kim who resides at 7734 – 106 Street, Grand Prairie, Alberta, and Mr. William Kim who resides at 315 – 3132 Dayanee Springs Boulevard, Coquitlam, British Columbia.
- The Numbered Company announced on September 8, 2015 that it would be closing Howard Johnson Inn – Yorkton on December 8, 2015.
- The Union had a difficult relationship with the Numbered Company. It had refused to collectively bargain a renewal of the collective agreement after the current one expired at the end of August 2015.
- The Union took a number of grievance arbitrations against the Numbered Company. Some these grievance arbitrations were adjudicated by Arbitratror William Vancise, Q.C. who issued awards in favour of the Union in excess of $30,000.
- The Union has at least three (3) outstanding grievances against the Numbered Company in respect of the termination of Ms. Eva Oakes.[7]

2.2 Testimony of John Kim

[15] As Mr. Kim's ability to communicate in English is limited, he requested that he be assisted by a Chinese interpreter when giving his evidence. The interpreter he presented was the wife of Mr. Ian Song, the witness called to testify on behalf of Broadway Lodge. While the Board had some reservations about the impartiality of Mr. Song's wife in these proceedings, as

[6] See: Exhibit U-3.
[7] See: Exhibit U-12.

no objection was raised by either of the other parties, the Board permitted her to serve as the interpreter.

[16] On Examination-in-Chief, Mr. Kim testified to the following:

- He is the owner and principal shareholder of the Numbered Company. He holds 80% of the shares of this company.
- He wanted to start a business in Canada so the Numbered Company purchased Howard Johnson-Inn in Yorkton in 2013. He sold the hotel in October 2015.
- He stated he tried his best to make the business a success. However, he lost over $200,000.00 in the first year of its operation.
- He sold his house in Korea to raise money to continue the business.
- The collective bargaining agreement which was in place provides for wage increases and benefits.
- He believed the increases provided for in the collective agreement were too high and the Numbered Company continued to lose money.
- These financial benefits for the employees were too high compared to other hotels in the region.
- He considered closing the hotel in 2014. His son, Mr. William Kim who was also a shareholder in the Numbered Company, persuaded him not to close it at that time.
- He wanted to negotiate a new collective agreement with the Union but Mr. Ian Song told him the Union did not want to meet with management. He asked Mr. Song about this a second time and received the same response.

[17] On cross-examination by Mr. Micah Kowalchuk, co-counsel for the Union, Mr. Kim testified to the following:

- When he closed the business in 2015, the contract with Mr. Ian Song ended. He did not know who paid Mr. Song's salary in December 2015 or January 2016.
- He hired the real estate agent and signed the contract with RE/MAX to sell the hotel. He did not tell the Union that the hotel was being listed for sale.

- He currently holds a 80% interest in the Numbered Company. His two (2) sons each hold 10% of the remaining shares.
- He relinquished ownership of Howard Johnson Inn – Yorkton because running it was too stressful. The Union caused him “too much stress”.
- His former wife, Grace Kim, is now the owner of Broadway Lodge Ltd. He has been separated from her for approximately the last eight (8) years.

[18] On cross-examination by Ms. Johnson, counsel for Broadway Lodge, Mr. Kim testified to the following:

- When he owned Howard Johnson Inn, Mr. Song was the General Manager and reported to him.
- Mr. Kim directed Mr. Song on how to manage the hotel.
- Around the end of November 2015, he told Mr. Song his services would no longer be required after the hotel close early in December 2015.
- Following the closure of the hotel, Mr. Song assisted him in wrapping things up.
- He did not know that Mr. Song had a job with Ms. Grace Kim at that time.
- Currently, Broadway Lodge operates approximately one half (½) of the hotel previously occupied by Howard Johnson Inn.
- Mr. Kim would like to re-open a Howard Johnson hotel in the east wing of the hotel premises, the wing not currently occupied by Broadway Lodge.
- The Numbered Company owns the building and Broadway Lodge pays rent (approximately $25,000.00 a month) for use of one-half of the building, as well as utilities.
- The Numbered Company has a contract with Ms. Grace Kim for north side of the building.

2.3 Testimony of Ian Song

[19] On Examination-in-Chief, Mr. Song testified to the following:

- He is General Manager of Broadway Lodge. In this position, he makes most of the business decisions respecting the hotel’s operations for Mrs. Kim. The sons play no role in the business decisions.

- He was employed by Mr. Kim as General Manager of Howard Johnson Inn – Yorkton. When he served in that capacity, Mr. Kim made most of the important business decisions.
- Mr. John Kim has no involvement in the operations of Broadway Lodge. All the monies to operate the business come from Mrs. Grace Kim.
- Currently, Broadway Lodge has eight (8) employees. Four (4) employees worked for the Numbered Company when it ran Howard Johnson Inn. Four (4) employees are recent hires and did not work for the Numbered Company.
- Broadway Lodge wanted to change the nature of the business. It seeks to attract more long term stays.
- The Howard Johnson logo was removed from the building on or about January 1, 2016.
- On February 1, 2016, Broadway Lodge set up its own website. It also sent out e-mails or faxes to many companies advertising it as a hotel geared to long time stays.
- He estimated that 80% of the customers are business related.
- If a customer chooses to clean the room themselves they are given a $10.00 decrease in the room rate. This is a saving to Broadway Lodge which it passes on to the customer.
- Broadway Lodge has set up its own computerized reservation system.
- Broadway Lodge pays utility costs and rental fees to the Numbered Company.
- Broadway Lodge uses the same equipment, room furniture, laundry, restaurant and office previously utilized by Howard Johnson.

[20] On cross-examination, Mr. Song testified to the following:

- He came to Yorkton in July 2015.
- Mr. John Kim had a business plan of breaking up the hotel to take advantage of long term rentals. Mr. Song did not think this was a good idea, as the hotel is a commercial enterprise and is not zoned for residential use.

- Broadway Lodge is only interested in commercial hotel business. It is only booking now with Expedia.com. The hotel takes a commission with the reservation made on this website.
- While Broadway Lodge is interested in long term rental, it also takes reservations for one (1) night stays.
- For the past four (4) months, *i.e.* April – July 2016, Broadway Lodge has had an average occupancy rate of 33% for 71 rooms. He stated that this was not too bad for Yorkton.
- The same jobs are done at Broadway Lodge as were done at Howard Johnson Inn – Yorkton. The front desk job is the same as are the housekeeping positions. The only difference is how much the employees are earning. The nature of the work remains the same.
- Broadway Lodge currently pays its staff on a scale different from that reflected in the current collective agreement. This scale had been proposed to the Union by Mr. Kim when he owned Howard Johnson Inn – Yorkton. However, it was not implemented at that time because the Union had objected.
- When the Numbered Company gave notice that it intended to close the hotel, it came as a surprise to Mr. Song. He had no input into the decision and was worried about his own job at the hotel.
- Currently, the Numbered Company cannot utilize the front of the hotel. However, the Numbered Company can use the laundry facilities and has a subtenant for the restaurant.
- He would welcome the opportunity to negotiate a new collective bargaining agreement with the Union. Although Mr. Kim and the Union had a fractious relationship, he has had no problem with union members.

ISSUES

[21] The Union's Written Argument proposes that these applications raise three (3) issues:

- Is Broadway Lodge Ltd. a successor to the Numbered Company for purposes of section 6-18 of the *SEA*? ["The Successorship Issue"]

- Are Broadway Lodge Ltd. and the Numbered Company common or related employers for purposes of section 6-20 of the *SEA*? ["The Common or Related Employer Issue"]

- Did Broadway Lodge Ltd. or the Numbered Company or both commit unfair labour practices under subsections 6-62(1)(a); 6-62(1)(d); 6-62(1)(g); 6-62(1)(h), and 6-62(1)(i) of the *SEA*? ["The Unfair Labour Practices Issue"]

[22] During his oral submissions, Mr. Larry Kowalchuk advised the Board that the Union was not pursuing its allegations of unfair labour practices. In any event, the Board would not have addressed the Unfair Labour Practices Issue identified by the Union. Rule 14(1) of the *Regulations* requires any "employer, union or other person" seeking a remedy from this Board for alleged unfair labour practices to file a formal application in Form 11. Form 11 not only provides notice to respondents of any allegations against them but also includes a sworn statement particularizing those allegations. The Union failed to comply with Rule 14 in this matter. It would deny due process to the other parties were the Board to proceed to adjudicate the Union's unfair labour practice arguments, absent the filing of a formal application which provides full and sufficient notice to those respondents of the allegations.

RELEVANT STATUTORY PROVISIONS

[23] The provisions of the *SEA* most relevant to this matter are found in Division 4 of Part VI under the heading "Successor Rights and Obligations". They read as follows:

> ***6-18****(1) In this Division,* ***"disposal"*** *means a sale, lease, transfer or other disposition.*
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> *(2) Unless the board orders otherwise, if a business or part of a business is disposed of:*
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> *(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and*
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> *(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.*
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> *(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:*
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> *(a) if before the disposal a union was determined by a board order to e the bargaining agent of any of the employees affected by the*

disposal, the board order is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person;

(b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.

(4) On the application of any union, employer or employees directly affected by a disposal, the board may make orders doing any of the following:

(a) determining whether the disposal or prosed disposal relates to a business or part of a business;

(b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;

(c) determining what union, if any, represents the employees in the bargaining unit;

(d) directing that a vote be taken of all employees eligible to vote;

(e) issuing a certification order;

(f) amending, to the extent that the board considers necessary or advisable:

(i) a certification order or a collective bargaining order;

(ii) the description of a bargaining unit contained in a collective agreement;

(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.

(5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4)(e).

. . . . . .

6-20*(1) On the application of any union or employer affected, the board may, by order, declare more than one corporation, partnership, individual or association to be one employer for the purposes of this Part if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common, control or direction by one person through the different 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.

ANALYSIS

A. The Successorship Issue

[24] The Successorship Issue in this matter requires the Board to apply section 6-18 of the *SEA* to the sale of the Howard Johnson Inn – Yorkton to Broadway Lodge by the Numbered Company. When the *SEA* came into force, section 6-18 superseded section 37(1) of *The Trade Union Act*, RSS 1978, cT-17 ["*TUA*"] which, along with all other provisions of that statute, was repealed. See: section 10-11 of the *SEA*.

1. Relevance of Section 37 Jurisprudence to Section 6-18 of the *SEA*

[25] Since 1972, when section 37 was first enacted, a large body of jurisprudence has evolved respecting its interpretation and application. The threshold question to the Successorship Issue in this matter is whether this jurisprudence remains applicable for purposes of interpreting section 6-18 of the *SEA*. The answer to this question is "yes". The language of section 6-18 is for all intents and purposes virtually identical to the former section 37 of the *TUA*. To be sure, the text of section 6-18 has been modernized and organized in a way that comports with contemporary plain language drafting protocols. Apart from that, however, when the two provisions are scrutinized carefully there is no discernible substantive difference between them. As a result, the previous jurisprudence developed under section 37 of the *TUA*, is very relevant to the interpretation of section 6-18 of the *SEA*.

2. Overview of Relevant Legal Principles

[26] In *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd.* (1995), 25 CLRBD (2d) 137, LRB File Nos. 125-94, 130-94 & 131-94 ["*Regina Victoria Inn*"], the Board offered this helpful description of the public policy objective that animated the former section 37. Former Chairperson Bilson stated at page 140:

> *Section 37 of the Trade Union Act provides for a transfer of collective bargaining obligations when a business or part of a business changes hands. It represents an effort on the part of the Legislature to safeguard the protection which employees have achieved through the exercise of their rights under the Act, when the enterprise in which they are employed is passed on as a result of negotiations or transactions in which they have no opportunity to participate. The protection provided by s. 37, however, does not apply to all cases where an employer disposes of his business, and the determination as to whether the means by*

> *which a business has changed hands brings the new entity under the obligations which flow from s. 37 is often a matter of some complexity. [Emphasis added.]*

[27] While the public policy objective of a successorship provision like the former section 37 may be easily identified, its proper application to a particular transaction or fact situation is far more elusive. As the Board acknowledged in *Canadian Union of Public Employees, Local 1975-01 v Versa Services Ltd., College West Building, University of Regina*, [1993] 1st Quarter Sask. Lab. Rep. 174, LRB File No. 170-92 ["*Versa Services Ltd.*"] at pages 176 and 178:

> *If it is a fairly straightforward task to state a reason for the recognition of a continuing obligation on the part of the successor employer, it is much more difficult to articulate exact criteria for determining that a transfer has taken place within the meaning of Section 37. Time after time, labour relations boards faced with this task have fallen back defeated from the effort of arriving at a comprehensive portrait of a succession or a successor employer, deciding instead that the determination must be made in the context of the facts peculiar to the case before them.*
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> *. . . . .*
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> *What comes through clearly from the attempts by labour relations boards to arrive at a uniform definition of successorship is that there is no factor or single set of criteria which is a sine qua non for the transfer of collective bargaining obligations to occur. It may be obscured by a dizzying variety of technical legal or commercial forms, it may display puzzling or conflicting features, it may have quite a different character than the entity which was previously in existence, but a successor may still be identified because of the transmission of some imponderable and organic essential qualify from the previous employer. This transmission is not tied to specific work, individual employees, or, naturally, the employment relationship which was already in existence.*
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> *The putative successor must draw from the transaction which produces the new entity some viable, independent "business" which can be the basis of a collective bargaining relationship; it must, in some sense, to quote this Board in [Retail Wholesale and Department Store Union, Local 544 v Pauline Hnatiw, LRB File No. 190-80] "draw its life" from the predecessor employer. [Emphasis added.]*

[28] As *Versa Services Ltd.*, *supra*, expressly acknowledges a determination of a successorship application is very much fact-driven. Recently, the Saskatchewan Court of Queen's Bench also commended a contextual approach to deciding applications under the former section 37 of the *TUA*, now section 6-18 of the *SEA*. In *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v K-Bro Linens System, Inc., The Saskatchewan Association of Health Organizations, Health Shared Services Saskatchewan and Regina-Qu'Appelle Health Region*, 2015 SKQB 300 ["*K-Bro (QB)*"], Barrington-Foote J. citing prior decisions of this Board stated at paragraph 38:

> *Any acceptable and defensible interpretation of s. 37 must adequately reflect the purpose of that section, which relates to the protection of collective bargaining rights. It must focus on substance rather than form and thus calls for a broader "contextual" or fact-based analysis[.] Such an approach recognizes that there are myriad fact situations which may call for a successorship analysis. [Citations omitted.]*

[29] In *RWDSU v Hnatiw*, *supra*, the Board first adopted the approach of the Ontario Labour Relations Board to the concept of successorship set out in its seminal decision in *Canadian Union of Public Employees v Metropolitan Parking Ltd.*, [1980] 1 CLRBR 197 ["*Metropolitan Parking*"]. The *Metropolitan Parking* decision has been regularly relied upon by this Board in many of its successorship decisions. It is especially instructive on the question of what constitutes a "business" for the purpose of the successorship provisions of the labour relations statute at issue – in *Metropolitan Parking*, that was section 55 of the 1970 Ontario statute. The Ontario Board stated at pages 208-9 and 211:

> *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. This notion is implicit in the remarks of Widjery J. in Kenmir v Frizzel et al. (1968) 1 All E.R. 414 – a case arising out of legislation similar to section 55. At page 418 the learned judge commented:*
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> > *In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another.* ***In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption.*** *Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the right which he acquires thereunder. Similarly, an express assignment of good will is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before. [Emphasis in original}*
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> *Widjery J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery J and the Board is whether the transferee has acquired from the transferrer [sic] a functional economic vehicle.*

> . . . . . .
> *The distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business" or "a part of a business" and transfer of "incidental" assets or items. In case after case the line has been drawn but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. [Emphasis added.]*

[30] More recently, in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v Charnjit Singh and 1492559 Alberta Inc.*, LRB File No. 196-10, 2013 CanLII 3584 (SK LRB) ["*Singh*"] – a decision heavily relied upon by the Union in this matter – the Board attempted to itemize the various indicia employed in earlier decisions to determine whether or not a successorship had occurred. At paragraphs 45 and 46, former Vice-Chairperson Schiefner stated:

> *Numerous successorship cases have demonstrated a number of factors that have been considered by various labour boards to help in making this determination, including: the presence of any legal or familial relationship between the predecessor and the new owner; the acquisition by the new owner of managerial knowledge and expertise through the transaction; the transfer of equipment, inventory, accounts receivable, customer lists and existing contracts; the transfer of goodwill, logos and trademarks; and the imposition of covenants not to compete or to maintain the good name of the business until closing. While the presence of any of these factors can be indicative of successorship, their absence is often considered inconclusive. Labour boards have also considered factors such as the perception of continuity of an enterprise; whether or not the employees have continued to work for the purchase; whether or not these employees are performing the same work; and whether or not the previous management structure has been maintained or if there has been a commonality of directors and other officers. If the work performed by the employees after the transfer is substantially similar to the work performed prior to the transfer, an inference of continuity can be drawn. Similarly, Labour boards have also considered whether or not there has been a hiatus in production or a shutdown of operations. Depending upon the industry, the longer a property lays dormant, the more difficult it is to draw an inference of continuity. Of course, this list is not exhaustive of the factors that may be considered, and, depending upon the situation, certain factors will be given more import than others……*
>
> *In the end, the vital consideration for the Board is whether or not the effect of the transaction was to put the transferee into possession of something that could be considered a "going concern"; something distinguishable from an idle collection of surplus assets from which the new owner has organized a new business. To make a finding of successorship, the Board must be satisfied that the new owner acquired the essential elements of a business or part thereof; something of a sufficiently dynamic and coherent quality to be consider a going concern; and that the said business interest can be traced back to the business activities of the previous certified owner. In making this determination, this Board has cautioned that the test is not whether the business activities of the new owner resemble the previous certified business; but whether or not the business carried on after the transaction was acquired from the certified employer. [Emphasis in original]*

[31] In the end, like the Board in *Versa Services*, *supra*, at page 177, the Board in *Singh*, *supra*, at paragraph 45 endorsed the view expressed by the Ontario Labour Relations Board in the following passage from its decision in *Culverhouse Foods Ltd.*, [1976] OLRB Rep November 691:

> *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 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.*

[32] It is with these principles and considerations in mind that we turn to consider the successorship issues raised in the Union's application.

3. Positions of the Parties

3.1 Position of the Union

[33] In its Written Argument, the Union relied upon the following previous decisions of the Board: *Singh*, *supra*; *Re Monad Industrial Constructors Inc.*, LRB File Nos. 132-12, 160-12 & 161-12, 223 CLRBR (2d) 1, 2013 CanLII 83710 ["*Monad*"]; *Re Big Sky Rail Corporation*, LRB File No. 223-12, 241 CLRBR (2d) 77, and *Saskatchewan Joint Board Retail Wholesale and Department Store Union v Saskatoon Co-operative Association Limited and United Food and Commerical Workers' Union, Local 1400*, LRB File No. 081-14, 2014 CanLII 63997 (SK LRB).

[34] Applying the principles, which it submitted emerges from these authorities, the Union argued that a successorship has occurred for the following reasons:

- Broadway Lodge operates essentially the same business as the hotel business operated by Howard Johnson Inn – Yorkton.
- The employee positions remain the same although Broadway Lodge is attempting to remove housekeeping staff from the current collective bargaining unit and making them self-employed.
- There is a familial connection between the ownership of the Numbered Company and Broadway Lodge.

- Broadway Lodge continues to use the hotel facilities, equipment and inventory of the Numbered Company as well as the previous telephone and fax numbers.
- Broadway Lodge has retained the same manager – Mr. Ian Song, formerly the General Manager of the former Howard Johnson Inn – Yorkton owned by the Numbered Company.

3.2 Position of Broadway Lodge

[35] In its Brief of Law, Broadway Lodge relies on the following authorities: *Lyric Theater Ltd. v International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. 328*, BCLRB No. B38/80, [1980] 2 CLRBR 331 ["*Lyric Theater*"]; *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v K-Bro Linens System, Inc., The Saskatchewan Association of Health Organizations, Health Shared Services Saskatchewan and Regina-Qu'Appelle Health Region*, LRB File No. 350-13, 2014 CanLII 63989 (SK LRB) ["*K-Bro (No. 1)*"]; *K-BRO (QB)*, *supra*, and *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v K-Bro Linens System, Inc., The Saskatchewan Association of Health Organizations, Health Shared Services Saskatchewan and Regina-Qu'Appelle Health Region*, LRB File No. 350-13, 2016 CanLII 31171 (SK LRB) ["*K-Bro (No. 2)*"]. Of these authorities, Broadway Lodge relied principally on *Lyric Theatre*, *supra*, a decision of the British Columbia Labour Relations Board [the "BC Board"].

[36] Applying the principles which it submits emerges from these authorities, Broadway Lodge argued that no successorship took place when it purchased Howard Johnson Inn – Yorkton from the Numbered Company for the following reasons:

- No transfer of goodwill from the Numbered Company to Broadway Lodge occurred. The "Howard Johnson brand" is well known and attracts individual travelers while Broadway Lodge is an independent business operating under its own name and from one location.
- Broadway Lodge has its own logo and does not rely on the Howard Johnson brand to attract clientele.
- Broadway Lodge does not provide services to the same clientele as the Numbered Company when it operated Howard Johnson Inn – Yorkton. If there is any over-lap, it is clearly coincidental.

- While Broadway Lodge leases its locations and assets from the Numbered Company, it did not lease the business as a going concern and does not lease the entire property.
- No covenants or agreements regarding goodwill or non-competition were entered into between Broadway Lodge and the Numbered Company.
- Some of Howard Johnson Inn's former employees were hired by Broadway Lodge; however, this occurred independently and during the hiatus between the closing of Howard Johnson Inn and the opening of Broadway Lodge.
- Broadway Lodges caters to a different clientele than Howard Johnson Inn – Yorkton. Its client basis is generally corporate and long stay accommodation.
- While there is some familial connection between the ownership of the Numbered Company that ran Howard Johnson Inn – Yorkton and Broadway Lodge, it is at arms' length. The owners of these enterprises respectively are former spouses who have been divorced for a number of years.

4. Analysis and Decision

4.1 Introduction

[37] In undertaking the relevant analysis under section 6-18 of the *SEA,* the Board will heed the Queen's Bench's direction in *K-Bro (QB)*, *supra*, at paragraph 38, that its approach must be "contextual" and "fact-based", focused on "substance rather than form", and reflective of the purpose of that provision, namely "the protection of collective bargaining rights". While the Board is mindful of the right of an employer to freely dispose of its business, it is also important for us to ensure that hard-won rights of employees set out in the collective agreement are not sacrificed on the altar of commercial expediency.

[38] It is precisely for these reasons that the Board found decisions relating to the successorship issues in the hotel and restaurant industry – the type of business at issue here – to be the most helpful for purposes of deciding this case. In particular, the Board considered the following four (4) of its prior decisions to be most helpful: *Singh*, *supra* and two decisions

referred to in that Decision, namely *Regina Victoria Inn*, *supra*, and *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v Marriott Canadian Management Services Limited* (1988), Sask. Labour Report, Fall 1988, 69, LRB File No. 029-88 ["*Marriott Canadian*"] and *Retail Wholesale and Department Store Union, Local 544 v Pauline Hnatiw,* LRB File No. 190-80 ["*Hnatiw*"].

[39] However, prior to turning to a consideration of these authorities, the Board believes it is important to explain why it concluded that *Lyric Theater*, *supra* – the case relied upon most heavily by Broadway Lodge in both its counsel's oral and written submissions – to be distinguishable, and of little assistance in resolving the Successorship Issue in this matter.

4.2 Analysis of *Lyric Theater*

[40] Decided in 1980, *Lyric Theater*, *supra*, is an important case in British Columbia on the thorny issue of successorship. It involved the acquisition by Lyric Theater of a first-run motion picture house in Vancouver, British Columbia owned partly by Famous Players. Prior to Lyric Theater acquiring the building in summer 1979, it had been shuttered for approximately 14 months and had fallen into disrepair. Lyric Theater entered into a "lease to purchase" arrangement assuming possession of both the building and its contents. The theatre formally reopened in December 1979 as a second-run movie theatre offering commercially produced movies at reduced rates, rather than the first-run theatre which Famous Players had operated for a number of years. Famous Player's employees had unionized but the last collective agreement expired in 1978 and lacked a "continuation" clause. All of its employees, however, lost their jobs when the theatre closed its doors.

[41] When the theatre re-opened, IATSE, the Union which had previously negotiated a collective agreement with Famous Players, sought an order from the BC Board that Lyric Theater was a successor employer to Famous Players. Initially, that Board determined that a successorship had taken place. On an application for reconsideration by the Employer, the BC Board reversed its earlier determination.

[42] In coming to this conclusion, the BC Board determined that no successorship occurred in the transfer of this business because there was no transfer of goodwill or customer lists, no continuity of employees whether they were management or members of the bargaining unit, and an exceptionally long hiatus – approximately 18 months – occurred between when

Famous Players closed the theatre and Lyric Theatre reopened. The BC Board concluded at pages 337 and 339:

> *Unless we are prepared to take the view that "once a theater, always a theater", and hence that the certification of a theater in the hands of one employer is certification for that building forever so long as it is a theater – i.e. location certification – then the hiatus in the present case, being three times that of these two cases, certainly tends against successorship, and not in its favour.*
> . . . . . .
> *Nothing of the business organization, or the "going" concern of the former owner is left. All that has been transferred is a building, with some interior fixtures in a commercial location suited to its former and present use as a theater, but not restricted to that use.*

[43] The Board acknowledges it has utilized certain of the indicia identified by the BC Board in *Lyric Theater* in some of its prior decisions. However, as Chairperson Love observed in *Monad Industrial*, *supra*, at paragraph 81, neither the factors the BC Board employs in any particular case nor its determinations are binding on this Board. That said, because the factual matrix at play in *Lyric Theater* is so starkly different from that before us in this matter; the statutory regime relevant to the analysis in that case dated, and, for the most part, the considerations employed by the BC Board not applicable here, this case is of marginal relevance, at best. Accordingly, while the Board took this case into account during our deliberations, we determined ultimately that it brought little, if any, value to them.

4.3 Most Relevant Decisions of this Board

[44] The Board will review and analyze the four (4) decisions it identified earlier to be the most helpful in chronological order.

4.3.1 *Hnatiw*

[45] *Hnatiw*, *supra*, involved the leasing of the coffee shop at the Humboldt Co-operative Centre. The company advertised for an outside party to operate its coffee shop because it continuously failed to break even. Ms. Hnatiw took over this lease and operated the shop "using her own services and those of two employees, one of them her twelve year old daughter": *Hnatiw*, *supra*, at page 2. She did not hire any of the employees whom the company had discharged upon her assuming the lease.

[46] The Union, RWDSU, who represented the terminated employees, brought an application to this Board for successorship under section 37 of the *TUA*, seeking immediate reinstatement of the employees who had been terminated. The Board concluded a successorship had, indeed, taken place, even though Ms. Hnatiw only leased rather than purchased the business. It directed that she was bound by both the certification Order and the collective agreement. Former Chairperson Sherstobitoff reasoned as follows:

> *According to the evidence before the Board, the only difference between the coffee shop business before the transaction in question and after was that the business was operated by the Respondent rather than the Association. The business continued essentially unchanged except for a new operator and new employees. The employer, in entering into the lease disposed fo the entire business. Nothing was left to dispose of. The Respondent's business "drew it's life" from that of the predecessor. [Emphasis added.]*

4.3.2 ***Marriott Canadian***

[47] The context of *Marriott Canadian* is somewhat similar to that of *Hnatiw* as it involved the change of management of an institutional cafeteria, this one located in the City of Regina's City Hall. The City of Regina retained ownership of the cafeteria and its chattels, however, it contracted with outside providers to deliver the cafeteria services. Canway Food Services ["Canway"] had operated the cafeteria for approximately 11 years. During that time, RWDSU obtained a certification order for all employees of Canway. A collective agreement was subsequently negotiated and in place for the remaining tenure of Canway's contract.

[48] When Canway's contract expired, Marriott Canadian answered the call for tenders and was successful. At the time it negotiated the contract with the City to operate the cafeteria, Marriott Canadian did not agree to be bound by the collective bargaining agreement or to negotiate a new agreement with RWDSU identical to the expired Canway collective agreement.

[49] Shortly after Marriott Canadian assumed control of the cafeteria's operations, RWDSU brought an application under section 37 of the TUA seeking an order of successorship from this Board. The Board declined to grant such an order. Former Chairperson Ball identified the following reasons for dismissing RWDSU's application at pages 73 and 74:

> 1. *That there has been no sale, lease, transfer or other disposition, directly or indirectly, from the certified employer, Canway Food Services Ltd., to Marriott.*

> 2. *That there was no consideration passing directly or indirectly between Marriott and Canway and nothing was transmitted from one to the other.*
>
> 3. *That neither the shareholders nor the creditors or Canway received any benefit or advantage, directly or indirectly, from the arrangement between Marriott and the City of Regina.*
>
> 4. *That there is no hint of a pre-existing corporate or management connection between Canway and Marriott which could cause the Board to infer a "disposition" from one to the other, or a scheme to circumvent the effect of the certification order.*
>
> *……..*
> *In the circumstances, the Board finds that there was no sale, lease, transfer or other disposition of a business from Canway to Marriott, either directly or indirectly, and that Section 37 has no application Marriott's agreement with the City of Regina.*

4.3.3 ***Regina Victoria Inn***

[50] In *Regina Victoria Inn*, *supra*, a Saskatchewan numbered company obtained ownership of a hotel in the City of Regina following protracted foreclosure proceedings. The previous owner of the hotel – Fairway Hotels Ltd *c.o.b.* as the Victoria Inn – had been subject to a certification order naming the Hotel Employees and Restaurant Employees International Union ["H.E.R.E."] as the bargaining agent for its employees.

[51] As the hotel had fallen into disrepair, the numbered company embarked upon some renovations of the building. It reopened the hotel and rebranded it "The International Inn". The numbered company did not employ any of the unionized employees of the former Victoria Inn; however, it did retain the services of Victoria Inn's managerial personnel and hired only one additional manager.

[52] Shortly after the hotel re-opened, representatives of H.E.R.E. approached the International Inn's management seeking to discuss with them its continued representation of the new hotel's employees. Management rebuffed H.E.R.E.'s invitation to negotiate stating that the International Inn was an entirely new business from that previously operated in the same building. They also asserted that because the numbered company had not acquired the property from the previous owner it was not bound by either the certification order in favour of H.E.R.E. or the collective agreement the union had negotiated on behalf of the former employees of Victoria Inn.

[53] H.E.R.E. applied to the Board for an order pursuant to section 37 of the *TUA* that the International Inn was a successor employer and, accordingly bound by the certification Order and collective agreement that had been in place with Victoria Inn. The numbered company opposed this application arguing that when it took possession of the property following the foreclosure proceeding, no business was transferred. It alleged it "did not have access to the customer lists or completed reservations of the former owners, notional "goodwill" of that enterprise was of questionable, or perhaps negative, value, and the building itself had no noteworthy or unique qualities" (*Victoria Inn*, *supra*, at page 145).

[54] Writing for the Board, former Chairperson Bilson rejected these arguments and allowed H.E.R.E.'s application. At page 146, she stated:

> *In spite of the admitted difficulties which lay in their path, 603195 Saskatchewan ltd. was able to put into operation, within a period of 24 hours, a business which was a hotel, as the previous business occupying the premises had been. All of the elements of the hotel business now in place under the International Inn name are drawn from the previous business which operated as the Victoria Inn, with the exception of the expertise of Mr. Pritchard. There is no evidence that 603195 Saskatchewan Ltd. brought any of the tangible or intangible components of a hotel with it, or that it acquired these elements from anywhere else. Without such evidence, the only reasonable conclusion which can be drawn is that all of the essential elements of the current hotel business have been acquired from the certified predecessor. The numbered company was able to rely on the knowledge of the pubic and of previous customers of the operation for a hotel of a particular kind that particular location to engender what business they have been able to cultivate. The numbered company may have entered the picture merely as an investor, at several removes from the actual operation of the business. Through the foreclosure proceedings, however, it is our view that they did acquire a business, which they decided to keep in operation, and that they are a successor within the meaning of s. 37 of the Trade Union Act.*
>
> *The fact that the business is in a slightly bruised and battered state does not, in our opinion, alter that conclusion. The Board has in the past held, for example, that insolvency or the interposition of a received do not prevent a finding that a later enterprise is a successor[.]*

[55] H.E.R.E. had also commenced a separate application alleging that the failure of International Inn to negotiate with it amounted to an unfair labour practice violating various provisions of section 11(1) of the *TUA*. The Board ruled that in light of its holding on the successorship question, International Inn was subject to the collective agreement with H.E.R.E. and its refusal to engage with the union amounted to an unfair labour practice.

4.3.4 ***Singh***

[56] The factual circumstances of *Singh* are strikingly similar to those of *Regina Victoria Inn*, *supra*. There an Alberta numbered company took possession of a hotel complex in Swift Current, Saskatchewan through the vehicle of a judicial sale. It had previously operated as a hotel under the banner of "Howard Johnson" and before that as "Imperial 400". A certification order had been issued by the Board in 1997 when the hotel had been operating as an Imperial 400 naming RWDSU as the certified bargaining agent for the employees of the hotel. See: LRB File No. 014-97.

[57] After the numbered company acquired the hotel buildings, it applied for and obtained franchise approval from Howard Johnson Canada to operate under its banner. After a short hiatus of approximately two (2) weeks, the hotel re-opened. Later that same year, however, the hotel was compelled to close because of damage resulting from heavy rains. Significant repair work was needed and the hotel finally recommenced business approximately one (1) year later in June 2011.

[58] Throughout this time, however, the Alberta numbered company refused to recognize RWDSU as the exclusive bargaining agent of its employers or comply with the collective agreement which that union had negotiated. As a consequence, RWDSU commenced a successorship application under section 37 of the *TUA*.

[59] Relying principally on the Board's earlier Decision in *Regina Victoria Inn*, *supra*, former Vice-Chairperson Schiefner explained at paragraph 54 that because "the facts of the present case are sufficiently similar to the facts before this Board in the [*Regina Victoria Inn*] case", the Board should "be guided by the findings therein." Applying those findings the Board concluded that a successorship had, indeed, taken place.

[60] The Board acknowledged the following factors that would tend to militate against a finding of successorship: (1) no legal or familial relationship existed between the current and previous owners (paragraph 49); (2) the new owners had no previous hotel experience (paragraph 49); (3) the previous owner had no managerial knowledge or expertise to transfer to the new owner (paragraph 49); (4) the hotel had been closed for several months when the new owner took possession of the property (paragraph 50); (5) there were no guests booked to stay

at the hotel at the time the new owner took possession (paragraph 50), and (6) no customer lists or accounts receivable were transferred to the new owner by the previous owner (paragraph 50).

[61] In spite of these realities, however, the Board determined that on balance a successorship had occurred. The Board stated at paragraphs 51 – 52, and 57:

> *[51] However, notwithstanding the poor physical condition of the hotel, we have concluded that the Owner acquired more than an idle collection of surplus assets. In our opinion, the Owner acquired the essential elements of a business when it acquired the hotel. While undoubtedly the facility was in need of major refurbishment when it was transferred, it nonetheless continued to be the vessel for the essential elements of a viable business. We take notice of the fact that it is not uncommon for some businesses to close while the assets that support that business undergo a major refurbishment. We are satisfied that a hotel is that kind of business.*
>
> *[52] In coming to this conclusion, we noted that the business activities carried on at this workplace are essentially the same as that carried on by the previous owner; it is a hotel bearing the Howard Johnson flag. Other than a substantial improvement in quality, the change in ownership would have been largely imperceptible to customers once the hotel reopened. The employees were performing the same work after the transfer and the business is providing essentially the same services as that of the previous owner. In this respect, it may well be that the goodwill of the business was rooted, not in the economic sate of the business or in the condition of the assets, but rather in the fact that it was a hotel at a particular location and thus the Owner tended to inherit the hotel's old customers once it reopened.*
>
> *. . . . . .*
>
> *[57] Simply put, we are satisfied that, notwithstanding the distressed state of the business and the depreciated state of the assets, the hotel continued to be a functional vessel for the economic activities of a hotel business when it was transferred to the Owner. Notwithstanding its bruised and battered state, the business of the hotel continued to have a beating heart when it was acquired by the Owner and it is from this source that the Owner drew the economic life for its business venture.*

4.4. Conclusion on Review of Relevant Cases

[62] The four (4) cases reviewed in the previous section demonstrate that in the context of the hotel or restaurant industry when the generally accepted indicia of successorship are reviewed, more often than not they point to a successorship having occurred even in circumstances where there has been a considerable hiatus in the operation of the business. In three (3) of them – *Hnatiw*, *supra*; *Regina Victoria Inn*, *supra*, and *Singh*, *supra* – the Board found successor employers. At first blush, *Marriott Canadian*, *supra*, appears an outlier. Upon closer review, however, its result turns on the fact that this was a contracting out of the

operation of a business rather than a “disposal” of that business as this term was defined by the *TUA*, and now by the *SEA*. Yet in all of these cases the final determination of the successorship issue turned on the question of whether a viable business had been transferred to a new employer from the previous employer. As formulated by the Board in *Hnatiw*, *supra*, the central question essentially is: did the new business draw its life from its predecessor?

5. Decision on the Successorship Issue

[63] In its formal application, the Union seeks two (2) successorship orders: one (1) naming Broadway Lodge as a successor employer and the other naming the Numbered Company as a successor employer. As each of these requests engage somewhat different considerations the Board will deal with each one in turn, commencing with the Union’s application against Broadway Lodge.

5.1 Is Broadway Lodge a Successor Employer?

[64] The Board has concluded that when the various factors identified in the jurisprudence are applied to the transfer of the hotel from the Numbered Company to Broadway Lodge it is clear that a successorship had occurred under section 6-18 of the *SEA*.

[65] To begin, the evidence presented at the hearing demonstrates convincingly that the hotel operation owned and managed by Broadway Lodge drew its life from its predecessor the Howard Johnson Inn – Yorkton owned by the Numbered Company. Much was made by Broadway Lodge about a change in focus of its business. Broadway Lodge, we were told, wanted to concentrate on long term rentals from corporate customers rather than short stays by itinerant members of the travelling public. However, we heard testimony from Mr. Song that Broadway Lodge would not turn away a customer who wished to rent a room for only a day or two.

[66] In our view, this attempt to cultivate a somewhat more stable clientele does not transform its business in any way. Simply put, this is a distinction without a difference. The business remains a hotel business. As Mr. Song candidly acknowledged in his testimony, it would be difficult for Broadway Lodge to become a long-term residential building because of municipal zoning and other legal limitations. This meant in order to continue to operate, Broadway Lodge had to remain a hotel.

[67] This view is bolstered by the presence of a number of additional factors identified in the jurisprudence. First, there was also a transfer of managerial experience and expertise by the Numbered Company to Broadway Lodge at the time the business was sold. In his evidence, Mr. Song testified that he continued to work for the Numbered Company for a few weeks following the sale in order to conclude some of its outstanding business matters. He then assumed general managerial responsibilities for Broadway Lodge with Mrs. Grace Kim, the new owner. The expertise he had gained as general manager of the Howard Johnson Inn was plainly transferred to Broadway Lodge for its benefit.

[68] Second, there was also a transfer of the Numbered Company's assets upon the sale of the business to Broadway Lodge. In his evidence, Mr. Song testified that Broadway Lodge currently rents the portion of the premises it utilizes from the Numbered Company for which it pays a monthly rental fee and all expenses. As well, certain of the documents entered into evidence reveal that after the business had been sold, the contact information for Broadway Lodge remained the same as that of Howard Johnson Inn – Yorkton for a significant period of time.

[69] Third, while it appears that Broadway Lodge does not have an individualized logo of its own, photographic evidence introduced at the hearing showed the Howard Johnson signage and logo remained visible in the lobby for a period of time after Broadway Lodge opened its doors. This fact would lead a reasonable person to believe that Broadway Lodge had assumed the business previously operated by Howard Johnson and some goodwill passed to the new owner from its predecessor.

[70] Fourth, Broadway Lodge hired some, but not all, of the former employees of Howard Johnson Inn. Mr. Song testified, for example, that Broadway Lodge had eight (8) employees, four (4) of whom had previously been employed at Howard Johnson Inn. Although, Broadway Lodge did not pay these individuals in accordance with the collective agreement, there was no indication that the work which they performed differed in any way from the work they had performed for the Numbered Company when it owned Howard Johnson Inn. This factor, too, points to a successorship occurring when the business was purchased by Broadway Lodge.

[71] Fifth, the MLS real estate listing entered into evidence as Exhibit U-7 advertises Broadway Lodge as being "formally known as Howard Johnson" which had emerged "as a

favorite of contractors and trades people doing work in the surrounding area". This real estate listing clearly promotes Broadway Lodge as a successor to Howard Johnson Inn in Yorkton. It is reasonable then to assume it is intended to play on the goodwill and reputation Howard Johnson Inn had managed to build up in Yorkton and its environs while it was in operation.

[72] Sixth and finally, there is a familial connection present in this case between Broadway Lodge and Howard Johnson Inn – Yorkton, albeit a tenuous one. Often evidence of a familial or other legal connection between a previous and new owner is a helpful criterion for determining successorship as it suggests that the relationship existing between the two enterprises is closer than might ordinarily be the case, and not one considered to be at "arms' length".

[73] Here, the principal shareholder and owner of the Numbered Company was John Kim. The principal shareholder and owner of Broadway Lodge is Mrs. Grace Kim, Mr. Kim's former wife. The evidence disclosed that these two (2) individuals had been separated for approximately eight (8) years, and are now divorced. However, Mr. Kim testified that Mrs. Kim was interested in purchasing the business operated by Howard Johnson Inn and she used the proceeds she obtained from the matrimonial property distribution to purchase it.

[74] In addition, the ISC Profile Reports for both the Numbered Company and Broadway Lodge that were entered into evidence showed that James and William Kim, the sons of John and Grace Kim, were also directors of the Numbered Company. Mrs. Kim is listed as the only principal and of Broadway Lodge. Yet these reports revealed that Mrs. Grace Kim and Mr. William Kim share the same mailing address. Furthermore, this documentation also disclosed that the registered office and mailing addresses of these two entities are the same: 207 Broadway Street E., Yorkton, Saskatchewan.

[75] In the Board's view, these facts highlight a closer relationship between the Numbered Company and Broadway Lodge than would be expected if these corporations were wholly independent legal entities. While this connection alone is not sufficient to sustain a finding of successorship, taken together with the other indicia identified above it points to a successorship having occurred when Broadway Lodge purchased Howard Johnson Inn – Yorkton from the Numbered Company.

[76] Accordingly, for all of these reasons, the Board concludes that for purposes of section 6-18 of the *SEA*, a successorship has been established. Broadway Lodge is a

successor employer to the Numbered Company and – to invoke the language of *Regina Victoria Inn*, *supra*, at p. 149 – "fell heir to the obligations as an employer" which are in place under the *SEA* and "inherited the obligation of the predecessor employer under the collective agreement".

5.2 Is the Numbered Company a Successor Employer?

[77] As noted previously, the formal reply filed by the Numbered Company to this application was struck for failing to comply with Rule 20 of the *Regulations*. However, the Board permitted Mr. Kim to present evidence during the hearing and he was cross-examined by Mr. Micah Kowalchuk on behalf of the Union. Some of Mr. Kim's testimony touched tangentially on the question of successorship. As a result, the Union's factual assertions against the Numbered Company are largely uncontroverted.

[78] The Union takes the position that the Numbered Company should be found to be a successor employer because it had purchased the hotel from a previous owner and has already been found by the Board to be a successor employer and owner of the hotel business purchased by Broadway Lodge. The Union maintains that there exist valid and sufficient labour relations goals in this matter that warrant the issuance of a certification order against the Numbered Company, notably the fact there are a number of arbitration awards made against the Numbered Company when it owned Howard Johnson Inn – Yorkton that remain unsatisfied.

[79] The Board concludes that on a balance of probabilities, the Numbered Company is a successor company for purposes of section 6-18 of the *SEA*.

[80] To begin, it is beyond dispute that the Numbered Company was a successor employer when it owned Howard Johnson Inn – Yorkton, even though at the time no amendment to the original certification order was made. Indeed, this Board concluded as much in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v 10109823 Saskatchewan Ltd. (o/a The Howard Johnson Inn – Yorkton)*, LRB File Nos. 256-13, 317-13, 318-13 & 044-14 to 059-14; 2014 CanLII 64280 (SK LRB). In that matter the Union had filed 19 applications with the Board on behalf of its members working at the hotel. The nature of these various and varied applications, however, is not germane to the application before us. In the opening paragraph of the Board's Decision former Vice-Chairperson Schiefner wrote:

> *These proceedings involve the employees working at a hotel in Yorkton, Saskatchewan, commonly known as the "Howard Johnson Inn" (the "Hotel"). The current owner of this facility is the respondent corporation, 101109823 Saskatchewan Ltd. (the "Employer"). The respondent corporation is owned by Mr. John Kim. The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was certified by the Saskatchewan Labour Relations Board (the "Board") to represent the employees working at the Hotel when this property was owned by another party. <u>There was no dispute that the Employer is the successor to those obligations</u>. [Emphasis added.]*

[81] Respecting its application for a successorship order against the Numbered Company, the Union points explicitly to the anti-union animus displayed by Mr. Kim throughout the time he owned Howard Johnson Inn – Yorkton and the fact that the Numbered Company as owner of Howard Johnson Inn – Yorkton is still liable for various arbitration awards issued against it.

[82] The Board finds there is evidence of significant anti-union animus on Mr. Kim's part. This animus was on full display during his oral testimony. He repeated often that it was the Union and its high wage demands that caused him great stress and led to the business losing money. He had threatened to close the hotel because of this situation; however, his son, William Kim, dissuaded him from doing so at the time. His dissatisfaction with having to work with the Union was a motivating reason for him to divest the Numbered Company of its ownership of Howard Johnson Inn – Yorkton.

[83] The Board heard evidence that the Numbered Company remained in default of financial awards made against it by a labour arbitrator. In the course of the hearing, testimony revealed the Numbered Company had paid certain damage awards but others were still outstanding. The quantum of these outstanding debts was not clearly established; however, it was demonstrated to the Board's satisfaction that a number of the arbitration awards against the Numbered Company remain unpaid.

[84] Furthermore, a number of other grievances against the Numbered Company have yet to be resolved.

[85] It is well-settled that a fundamental objective of a successorship order is to guarantee that collective bargaining rights are not defeated when an employer disposes of its business to another employer. As the Board observed in *Teamsters Canada Rail Conference v Big Sky Rail Corporation, Mobil Grain Ltd. and 1011115529 Saskatchewan Ltd. o/a Last*

Mountain Railway and CN Rail, LRB File No. 223-12; (2014), 241 CLRBR (2d) 77 ["*Big Sky Rail*"] at paragraph 71: "Successorship under s. 37 is intended to ensure that collective bargaining rights are not eroded by changes in the ownership of a business." This objective becomes more critical when, at the time of the transfer the former employer has outstanding liabilities owing to its employees or former employees under the collective agreement. It would defeat the objective of a successorship order were an employer able to evade legal obligations to its employees simply by disposing of its business to a successor employer.

[86] Section 6-18 clothes the Board with considerable remedial powers on such applications. On this aspect of the Union's successorship application, subsections 6-18(4)(f) and (g) are the most pertinent. These provisions read as follows:

> *(f) amending, to the extent that the board considers necessary or advisable:*
>
> *(i) a certification order or a collective bargaining order; or*
>
> *(ii) the description of a bargaining unit contained in a collective agreement;*
>
> *(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.*

[87] The remedial authority granted in these subsections authorizes the Board to direct that the Numbered Company is also successor employer. In our view, a valid labour relations goal would be achieved by such an order, namely ensuring that the Numbered Company does not avoid liabilities imposed upon it under the collective agreement. In these circumstances, it would be prudent to issue such an order for the reasons identified by Member Holmes in *Big Sky Rail*, *supra*, at page 105, paragraph 46. While Member Holmes dissented in part from the majority Decision in *Big Sky Rail*, the Board finds his reasoning compelling in the circumstances of this particular case.

[88] Accordingly, for all of these reasons, an Order will issue finding the Numbered Company to be a successor employee for purposes of section 6-18 of the *SEA*.

B. <u>The Common/Related Employer Issue</u>

[89] The Union also commenced a separate application under section 6-20 of the *SEA* seeking from an order declaring that Broadway Lodge and the Numbered Company are

common or related employers. As the Board has already found Broadway Lodge and the Numbered Company to be successor employers, it is not necessary to decide whether an order under section 6-20 should also be issued against them.

ORDERS

[90] The Board hereby makes the following Orders:

- THAT Broadway Lodge is a successor employer for purposes of section 6-18 of the *SEA* and a certification order will issue accordingly; and

- THAT the Numbered Company is a successor employer for purposes of section 6-18 of the *SEA*, and a certification order will be issue accordingly.

[91] The Board extends its appreciation to counsel for their helpful oral submissions and written legal memoranda.

[92] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **27th** day of **January, 2017**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson