101297488 SASKATCHEWAN LTD., Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File No. 212-16; May 24, 2017

Chairperson, Kenneth G. Love, Q.C.; Members: Laura Sommervill and Kent Kornelsen

For the Applicant: Meghan R. McCreary
For the Respondent: Gary Bainbridge

Successorship – Disposal of Business – Applicant company took operational control from Sobey's of a grocery store formerly operated as a Safeway store by way of a franchising arrangement – Applicant company sought declaration that it was the successor to Sobey's – Union opposed the application – Board reviews its previous jurisprudence and summarizes relevant factors to be considered on such applications – Board concludes successorship occurred and issues a declaratory order to that effect.

Successorship – Disposal of Business – Board considers for first time whether a franchising arrangement constituted a "disposal" of a business under section 6-18 of *The Saskatchewan Employment Act* – Board acknowledges arrangement in this case was somewhat complex but determines the issue must be decided on the particular facts of the case.

Successorship – Disposal of Business – Board reviews the Franchise Agreement and Operating Agreement between Sobey's and the Applicant company – Board finds these agreements provide for a phased in transfer of assets and goodwill – Board concludes Sobey's transferred to the Applicant company the grocery store business as an operating entity – This arrangement was not a simple grant of a franchise which is more analogous to contracting out.

Successorship – Appropriate Bargaining Unit – No evidence from Applicant company respecting the description of an appropriate unit for collective bargaining purposes – Board retains jurisdiction to decide the issue should the parties be unable to agree on the description of an appropriate bargaining unit.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an application for a declaration pursuant to section 6-18 of *The Saskatchewan Employment Act,* SS 2013, c S-15.1 (the "*SEA*") made by 101297488 Saskatchewan Ltd. (the "Company") in respect of its operational take over from Sobeys West Inc. ("Sobeys") of a grocery store formerly operated under the "Safeway" banner at 2995 2nd Avenue, Prince Albert, Saskatchewan.

[2] Sobeys was the purchaser, in May, 2012 of 213 retail grocery stores operated under the "Safeway" banner in Canada.[1] The Safeway store at 2995 2nd Avenue W. in Prince Albert, Saskatchewan was one of those stores acquired by Sobeys in that transaction.

[3] There is no argument between the parties that Sobeys is the successor to Safeway Canada Limited ('Safeway") with respect to this location. The Board amended[2] its certification Order in relation to this location on November 6, 2014 to recognize that successorship. By that Order, Sobeys was required to bargain collectively with the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU") in respect of those employees covered by the Board's Order.

[4] This application is unusual in that the application is brought by the Company to have itself declared to be the successor to Sobeys with respect to this location. RWDSU resists this application.

Facts:

[5] The facts in this case are largely uncontested. The Board heard from only one witness, Mr. Wesley Erlendson, ("Erlendson") the President and CEO of the Company. The Board also received redacted copies of an Agreement titled "*Safeway Franchise Agreement*" and an Agreement titled "*Safeway Operating Agreement*". The Board agreed that these documents would be treated as confidential documents which would be returned to counsel for the Applicant at the time these reasons for decision are issued by the Board.

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[1] Details of the purchase of these stores was outlined by the Board in its decision in LRB File No. 081-14, 2014 CanLII 63997 (SKLRB)
[2] LRB File No. 182-14c

[6] The Company is a Saskatchewan corporation. Erlendson is both the President and Chief Financial Officer of the Company. Erlendson holds 100% of the voting shares of the Company.

[7] The Company and Sobeys entered into a Franchise Agreement which permitted the Company to operate a franchised grocery store "under the Franchise Program from the Premises[3] only, on the terms and conditions set forth[4]" in that agreement. The Company also entered into a "Safeway Operating Agreement" as a part of the Franchise Program.

Issues:

[8] In its submission to the Board, both the Company and the Union identified the principal issue to be determined as being whether or not there has been a sufficient transfer of a business as between the Company and Sobeys such that the Company is the successor to Sobeys? The Union also identified a secondary issue as to what should be the appropriate bargaining unit in the event a successorship was found by the Board.

Relevant statutory provision:

[9] Relevant statutory provisions are as follows:

> ***Transfer of obligations***
>
> ***6-18****(1) In this Division,* ***"disposal"*** *means a sale, lease, transfer or other disposition.*
>
> *(2) Unless the board orders otherwise, if a business or part of a business is disposed of:*
>
> *(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*
>
> *(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.*
>
> *(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:*
>
> *(a) if before the disposal a union was determined by a board order to be 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; and*
>
> *(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 employee directly affected by a*

[3] Defined as 2995 2nd Avenue West, Prince Albert, Saskatchewan
[4] See Article 2.1 of The Franchise Agreement.

> *disposal, the board may make orders doing any of the following:*
>
> > *(a) determining whether the disposal or proposed 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; 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.*
>
> *(5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4)(e).*

Company's arguments:

[10] The Company argued that by virtue of the Franchise Agreement and the Operating Agreement, there had been a transfer of sufficient control of the business to trigger a successorship.

[11] The Company argued that the purpose for successorship provisions in labour relations legislation such as the *SEA* is to protect existing bargaining rights when there is a transfer or disposal of a business. This, the Company argued, was based upon collective bargaining rights being attached to a business, not to a particular employer. As a result, collective bargaining rights cannot be defeated by a change in ownership and will flow through to the new owner[5].

[12] The Company argued that there are no enumerated factors that define what constitutes a "discernible continuity" in the business so as to attract a successorship Order. The question, it argued,[6] should be determined based upon an examination of the facts in each case.

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[5] See SJBRWDSU v. Broadway Lodge Ltd. [2017] CanLII 6029 (SKLRB); SJBRWDSU v. Charnjit Singh and 1492559 Alberta Ltd. [2013] CanLII 3584 (SKLRB)

[6] See *United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 v. Monad Industrial Contractors Inc. [2013] CanLII 83710* (SKLRB)

[13] The Company argued that the Franchise Agreement and the act of franchising a business triggers a successorship. In support of its position, the Company relied upon *Sobeys Capital Inc.*[7], a decision of the Ontario Labour Relations Board. The Company also relied upon three B.C. Labour Relations Board decisions in *Interior Diesel & Equipment Ltd. et al.*[8] ; *British Columbia Institute for Technology*[9]; and *KFCC/Pepsico Holdings Ltd.*[10]

[14] The Company also argued that the franchise agreement constitutes a transfer of the right to operate a business in a certain location as was described by the Canada Labour Relations Board in *CUPW v. Canada Post Corp.*[11]

[15] The Company argued that the Franchise Agreement and the Operation Agreement effectively transferred the "beating heart of the business" to the Company. The Company pointed to numerous provisions in the Agreements which had this effect. It argued that the agreements created a three phase ownership structure which passed increasing control and assets of the business to the operator as the various phases were implemented.

[16] The Company argued that a single store certification was a viable unit for collective bargaining, saying that there would be no erosion of bargaining rights if the successorship Order were made.

Union's arguments:

[17] The Union argued that a successorship had not occurred as a result of the franchising arrangement between the Company and Sobeys. The Union argued that the business had not been transferred, and that the Company had acquired only the right to operate the business. It relied upon Article 2.1 of the Franchise Agreement in support of this position. The Union further argued that the Franchise Agreement and Operating Agreement kept control of the business in the hands of Sobeys. It argued that the Company was on "an extremely short leash" in respect of the operation of the business. The Union also argued that the Company owned essentially nothing, and is "subject to extensive control, obligations, and supervision by" Sobeys.

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[7] [2001] OLRD No. 3920, 77 CLRBR (2[d]) 180
[8] [1980] 3 CLRBR No. 563
[9] [1987] BCLRBD No. 193
[10] [1997] BCLRBD No. 233
[11] [1989] 1 CLRBR (2d) 218 at paras 76 & 78

[18] The Union argued that the burden of proving that a successorship had occurred was on the Company and that the Company did not meet this burden. It argued that there had been no "disposal" of a business in that a disposal of a business necessarily required that there be a relinquishment of that business. In that respect, the Union relied upon the Alberta Labour Relations decision in *Communications, Energy and Paperworkers Union of Canada, Local 255G v. Central Web Offset Ltd.*[12].

[19] The Union also argued that in looking at whether or not the business was being relinquished, the Board should look to see if the entity relinquishing the business remained in the same business. In that regard, the Union relied upon comments contained in the B.C. Labour Relations Board decision in *Cypress Bowl Recreations Limited Partnership*[13].

[20] The Union also relied upon two other B.C. Labour Relations Board decisions in *Weyerhauser Co. Re:*[14] and *Prince George Wood Preserving*[15]. It argued that here, as in the Weyerhauser case, no part of the business had been transferred in that all the Company got was the right to perform certain functions related to the business.

[21] The Union also argued, relying upon this Board's decision in *Re: EllisDon Corp*[16], that in order for there to have been a successorship, the transferee must have been put into possession of the essential elements of a business. It argued that the contractual arrangements between the parties here did not have that effect.

[22] The Union argued that the Board should look beyond the legal form or technical description of a transaction and consider the practical effects of the alleged transaction. Most critically, the Union argued, the Board must consider the extent of the control yielded, if any. The Union provided a listing of aspects of the agreements which detailed elements of the control still exerted by Sobeys over the operation of the business, which it argued showed that there was not a sufficient relinquishment of the business.

[23] The Union also argued that no business or part thereof had been disposed of. It also argued that there was a "discernible continuity" of the business before and after the alleged disposition.

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[12] [2008] CanLII 46476 (AB LRB)
[13] [1996] BCLRBD No. 24, BCLRB No. 24/86 at pp. 21 & 22
[14] [2006] BCLRBD No. 108, 124 CLRBR (2d) 1
[15] IRC No. C276/88
[16] [2014] SLRBD No. 41, 254 CLRBR (2d) 22, CanLII 42398 (SKLRB)

Analysis:

The Board's Jurisprudence

[24] The Board's jurisprudence with respect to successorship is well established. The body of jurisprudence established by the Board under the former *Trade Union Act*[17] was declared by Vice-Chairperson Mitchell in the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Broadway Lodge Ltd. and 101239903 Saskatchewan Ltd.*[18]. In that decision, the Board also reviewed that previous jurisprudence. At paragraphs 26 to 31, the Board provided the following summary:

> ***[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:*
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> > *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.*
> >
> > *. . . . .*
> >
> > *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*

[17] R.S.S 1978 c. T-17
[18] *Supra* Note 5 at para 25

> *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.*
>
> *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 (CanLII) ["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:*

> *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}*
>
> *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*

[25] From this analysis, we can distill some principles that will assist us to answer the questions posed in this case. Firstly, the purpose behind the successorship provisions represent an effort on the part of the Legislature to safeguard the protection that 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.

[26] Secondly, the protection provided by these provisions does not apply to all cases where an employer disposes of a 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 the successorship provisions is often a matter of some complexity.

[27] Thirdly, the application of the successorship provisions is not a "one size fits all" proposition. There is no factor or single set of criteria which defines whether or not a successorship has occurred. It may be obscured by a dizzying variety of technical legal or commercial forms.

[28] Fourthly, in order for there to be a successorship determined, 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. As was noted by the Board in *SJBRWDSU, Local 544 v. Pauline Hnatiw,*[19] the Board must look to determine if the new business "drew its life" from that of the predecessor or, as described by the Board in other cases[20], whether the "beating heart" of the business had been transferred.

[29] Fifthly, the determination of the question is fact-driven. This fact-driven approach has been commented on and approved by the Saskatchewan Court of Queen's Bench in *SJBRWDSU v. K-Bro Linens System Inc.*[21]. However, there is no list of significant considerations which could ever be complete. The number of variables with potential relevance is endless.

The Purpose of the Legislation

[30] In this case, the Board is asked to continue collective bargaining for employees of the former Safeway grocery store in Prince Albert which was operated by Safeway Canada and was then purchased by Sobeys as a part of the purchase of all of the retail grocery stores operated in Canada by Safeway. The Union, however, seeks to preserve its "province wide" bargaining structure whereby it bargains only one collective agreement for all employees at

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[19] LRB File No. 190-80
[20] See *United Steel Workers Union, Local 1-184 v. Edgewood Forest Products,* [2012] CanLII 51715 (Sask LRB); *Applicant v. Charnjit Singh,* [2012] CanLII 51715 (Sask LRB); United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v. Monad Industrial Contractors Inc., [2013] CanLII 83710 (SK LRB); *C.U.P.E. v. Athabasca Health Authority Inc.,* [2007] CanLII 68933 (SK LRB).
[21] [2015] SKQB 300 (CanLII) per Barrington-Foote J. at para 38

numerous locations across the Province. In its decision in *Sobeys Capital*[22], the Ontario Board was dealing with an application by the United Food and Commercial Workers Union to have 8 retail grocery stores formerly operated by Sobeys, but sold as franchised locations, declared to be successors to Sobeys. UFCW wished to have all 8 franchised locations declared to be related employers.

[31] In its decision, at paragraphs 132 to 136, the Ontario Board determined that the purpose for successorship provisions was to protect the bargaining relationship not the bargaining structure which pertained prior to the establishment of the franchised stores. It noted in its decision at para 135, that the union "would prefer the centralized corporate bargaining structure and the benefits it brings…". But the Ontario Board does not suggest that that if the Union is required to bargain at the individual store level that renders its bargaining rights meaningless.

[32] That is also the case here. We are faced with a choice of finding, as the Union argues, that the successorship should not be found and the current province-wide bargaining structure thereby continued, or, if a successorship is found, that the Union will then be required to negotiate with the franchise location individually.

[33] A successorship declaration, as sought by the Employer, will have the effect of continuing the collective bargaining relationship of its employees. The only difference will be the structure of the negotiations for a collective agreement for the affected employees.

[34] There is no effective difference in the representation of the employees in either event. The purpose of the statutory provision is not offended in either result. Employee representation is continued albeit in a differing form under each option.

Complexity of the Transaction:

[35] While lengthy in their nature, the agreements are not overly complex. They provide for the operation of the business under the Terms of the Franchise Agreement and the Operating Agreement provides for the phasing of the overall purchase and the operating parameters for the business. In addition, there are other agreements referenced in the Operating Agreement which are not exhibits in this proceeding which include a Retailer Security Agreement, a Retailer Accounting Services Agreement, a Payroll Agreement and Electronic

[22] Supra Note 7.

Funds Transfer Direction, a Sublease, an Equipment Lease and an Inventory Loan Agreement and Promissory Note. In addition, there is a Program Manual referenced which also is not a part of these proceedings.

[36] Whether a transaction is complex or not complex is not the determining factor with respect to whether or not a successorship should be declared. That can only be determined from an analysis of the facts in each case. As noted above, the transaction may be obscured by a dizzying variety of technical legal or commercial forms. In each case, the Board must determine from the facts provided whether or not there has been a transfer or disposition of the business as contemplated by the successorship provisions of the *SEA*.

Jurisprudence from other Jurisdictions in respect of Franchising

Cases from other Jurisdictions cited by the parties:

[37] Whether a "disposition" has occurred as that term is utilized in section 6-18 includes, "a sale, lease, transfer or other disposition". The Union argues that for a disposition to occur, there must be a "relinquishment" of the business. It relied upon the Alberta Labour Relations Board decision in *Energy and Paperworkers Union of Canada, Local 255G v. Central Web Offset Ltd.*[23].

[38] In that case, Ed Webb Printers had been in business for many years and its employees were represented for collective bargaining by the Energy and Paperworkers Union of Canada, Local 255G. The owner of Ed Webb Printers, Central Web Offset Ltd. closed Ed Webb Printers on short notice and terminated 21 employees. Some of the assets of Ed Webb Printers and most of its work, but only two or three of its employees ended up at Central Web Offset Ltd. The Union applied to the Alberta Board for a successorship order in respect of Central Web Offset Ltd.

[39] At paragraph [104] of its decision, the Board, relying upon its earlier decision in *IAMAW, Local 99 v. Finning International Inc. et al.*[24] made the following remarks:

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[23] [2008] CanLII 46476 (AB LRB)
[24] Alberta Labour Relations Board File No. GE-04759 (June 7th, 2005)

> *[104] Section 46 is the successor employer provision of the Labour Relations Code. It says that a trade union's bargaining rights and collective agreement continue in force and bind the successor employer when a "business, undertaking or part of it" is "sold, leased, transferred or merged with another business or undertaking…" so that "control, management or supervision of it passes to the … person acquiring it". The mode of disposition is not especially important in view of the statute's use of the broad word "transferred". The key concept is that there must be a transfer – **an acquisition coupled with a relinquishment – of a "business**". This Board summarized the enquiry in a successorship case this way in IAMAW, Loc. 99 v. Finning International Inc. et al. [2005] 79 at 118:* [Emphasis Added]
>
> > *[62] (…) The case law firmly differentiates a "business" from the economic opportunities that a business pursues; and also from the work that employees of the business perform. A business, the cases tell us, is something more: a "going concern", a "functional economic vehicle", a "delivery system", an "organizational means of getting something done". As amorphous as these terms are, they convey the idea that labour relations boards must look at the total economic organizations involved in a business transaction. They must examine all the tangible and intangible elements that operate to make an organization capable of pursuing business opportunities: land, buildings, equipment, inventory, access to capital, intellectual property, business "know how", the intangible assets known as "goodwill", regulatory permissions, managerial systems, work in progress, contractual rights, non-competition covenants, managers, and employees, to name only the most common. Labour boards must reach a conclusion whether enough of these elements have been relinquished by one entity and acquired by another that the essence of the "business", or a coherent and severable part of it, has been transferred. This judgment should be a practical evaluation of the business realities of the transaction; and again, the judgment should be driven by the facts and not by the legal or organizational forms by which the business result is accomplished.*

[40] After some analysis of the structure of the business transfer, at paragraph [134], the Alberta Board concluded that there had been a transfer of a business. It said:

> *[134] Taking all elements of Ed Web's sale to Central Web and eventual closure into consideration, we conclude that the overall result was to, over a year and a half, transfer the "life blood" of Ed Web to Central Web's other operations. Though hardly any "hard" assets went to Central Web in the closure, this was not fatal to the successorship claim because of the non-arm's length nature of the transactions, the surplus capacity that Central Web had at the time, and the fact that Central Web appropriated the money from the sale of those assets. Almost all of the "soft" assets of Ed Web, however – accounts receivable, sales staff, managers, customers, and the all-important benefit of Black's ten-year Traders contracts – were transferred seamlessly to Central Web. There was complete continuity of Ed Web's work in the hands of Central Web. Again because of the non-arm's length nature of these dealings, these aspects of the Ed Web sale and closure are sufficient to constitute a transfer of Ed Web's "business" to Central Web and to justify calling Central Web Offset Ltd. a successor employer. Central Web was bound by the Union's certificate and by the collective agreements with the Union from the date of Ed Web's closure, February 21, 2006….*

[41] The Union also argued that the B.C. Labour Relations Board ruled in *Cypress Bowl Recreations Limited Partnership*[25], *Weyerhauser Co. Re:*[26] and *Prince George Wood Preserving*[27] had determined that the Board should consider things other than the form of a transaction, but consider; (1) if the vendor remained in the same business, that the business had not been transferred (Cypress Bowl), (2) if the primary employer had delegated a work function rather than truly disposing of a business (B.C. Ferry) or (3) whether only a contractual right to perform certain functions had been delegated (Weyerhauser).

[42] In the *Sobeys Capital*[28] decision of the Ontario Labour Relations Board, the question for that Board to determine was whether or not the eight (8) franchise locations were common employers. There was no issue as to whether or not the successorship provisions of the Ontario statute were invoked. Again, the parties presumed or agreed that the franchise stores were the successor to Sobeys. As such, that decision is of limited value to our analysis.

[43] The Canada Labour Relations Board dealt with the issue of the closure of a postal outlet operated by Canada Post and the opening of a franchise outlet operated in a Shoppers Drug Mart in CUPW v. Canada Post[29]. The Canada Board determined that the franchise agreement constituted a sale of the business in accordance with the successorship provisions of the Canada Labour Code.

[44] As interesting and instructive as these cases are, they arise out of different legislative provisions than section 6-18 of the *SEA* and are often directed to a different question than is being dealt with here, that is whether or not the two entities were common or related employers, not if a successorship had occurred. They cannot, therefore, be cited as being other than directory to this Board and to inform the Board as to thinking of Boards in other jurisdictions. This Board has a considerable body of jurisprudence in respect of its approach to section 6-18 of the *SEA*, which jurisprudence must guide its decision in this case.

[45] There is no significant difference between the approach taken by the other Labour Relations Boards in Canada to the problem before us in this case. What this Board

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[25] [1996] BCLRBD No. 24, BCLRB No. 24/86 at pp. 21 & 22
[26] [2006] BCLRBD No 108, 124 CLRBR (2d) 1
[27] IRC No. C276/88
[28] *Supra* Note 7
[29] *Supra* Note 11

must determine is whether or not there has been a sufficient "disposal" of a business to warrant the Board making a declaration of successorship. As noted above, that determination is best made from a determination of the facts in each case.

[46] The Board's jurisprudence also contains cases which reference franchise operations. This Board has issued certificates for several franchise operations, including, but not limited to Treats Café, and Comfort Cabs (franchise owners). The Board has also dealt with franchise delivery routes in its decision in *SJBRWDSU v. McGavin Foods Limited*[30] and *Teamsters Union, Local 395 v. Regina Leader Post Group Inc.*[31] in the context of determining if contract drivers who were formerly employees should be considered to be employees or independent contractors.

[47] The Board is also aware that most of the hotels certified by this Board are certified as franchise hotels. These hotels, whether branded as Holiday Inn, Howard Johnson, or Sheraton, to name a few, are run by an owner pursuant to a franchise agreement with a particular hotel chain. This has never been an impediment to either a certification nor to a successorship declaration when those hotels change hands.[32]

[48] However, this case is the first opportunity for the Board to consider the precise nature of the franchise or legal relationship between the parties to determine if that relationship is sufficient to constitute a "disposal" of the business pursuant to section 6-18. In cases, such as the Charnjit Singh decision, no-one argued that the franchise relationship was not sufficient to constitute a "disposal".

[49] As noted in paragraph [30] above, and by this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Broadway Lodge Ltd. and 101239903 Saskatchewan Ltd.*[33], we have been directed by the Saskatchewan Court of Queen's Bench in *K-Bro Linens*[34], that our "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".

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[30] [1997] Sask. L.R.B.R. 210, LRB File No. 173-96
[31] [2007] CanLII 68773 (SKLRB)
[32] See *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)
[33] *Supra* Note 5 at para 25
[34] *Supra* Note 21

[50] In overview, the Franchise Agreement and the Operating Agreement provide for the transfer of assets of the business to the Company in a phased fashion. It also establishes control by Sobeys of certain operational aspects of the business.

[51] The nature of franchise arrangements was considered by the B.C. Labour Relations Board first in *White Spot Limited*[35], *KFCC Pepsico Holdings Ltd*.[36] and *Tober Enterprises Ltd.*[37]. Tober Enterprises dealt with franchised grocery store operations. In that decision, at paragraph 41, the Board made the following comments on a franchise operation:

> *The Board extensively reviewed the literature on franchising and recognized that there are several types of franchising arrangements. From "product distribution" at one end to "business format franchising" at the other. In that form of franchising, the franchisor usually provides the franchisee with a total package including training, trademarks, logos, standard design for buildings, standard furnishings, colour schemes and uniforms for employees, marketing plans, operating systems, formulas and continuous advice. The franchisor dictates how the business will be operated by the franchisee including pricing policy, standards of cleanliness, hours of operation, sources of supply, hiring and training practices, quality of service, and so on. In return, the franchisee must usually pay an initial franchise fee and continuing fees on a royalty basis to the franchisor, as well as adhere strictly to the format set out by the franchisor. For the franchise concept to be successful, all franchises must project the same image and maintain the same standards of quality and service. See: White Spot p. 54 quoting from (Gilbert et al., Franchising in Canada, 3d ed., (North York: CCH Canadian Ltd., 1995):*

[52] The nature of the franchise relationship was also described by the Ontario Board in the Sobeys Capital case. At paragraphs 22- 26, the Ontario Board described the relationship as follows:

> *22. Sobeys sees itself primarily as a wholesaler. Its principal revenue sources are from the sale of wholesale merchandise to its franchisees and from the franchise royalty fees it receives. That is the nature of its business. When it acquired a number of retail outlets in Ontario its aim was to convert those outlets into relatively independent customers of its wholesale business.*
>
> *23. When selecting franchisees Sobeys looks for retail experience, commitment and passion. It is less interested in the financial resources of the prospective franchisee than in their experience and sense of responsibility towards the enterprise. It wants individuals who are prepared to put their hearts into their business, work hard and frugally, and build their stores into successful operations. Sobeys looks for individuals who*

[35] BCLRB No. B352/98
[36] BCLRB N.o B225/98
[37] [2005] B.C.R.B.D. No. 2, 109 C.L.R.B.R. (2d) 220, BCLRB Decision No. B2?2005

> *will be able to stand on their own feet, make decisions on their own and withstand the pressures of the risks and uncertainties which go with starting a new business, under conditions of substantial initial debt.*
>
> *24. Once Sobeys made the decision to franchise the various IGA and Price Chopper stores which are affected by this application, it looked to find suitable franchisees. It spoke first to those store managers it thought might make a success of their own business. It also advised its district managers that stores would become available for acquisition by a franchisee. The process was primarily internal, among members of Sobeys' district and store management.*
>
> *25. Sobeys prefers to select those from inside its company because they tend to know the stores, the business, Sobeys' way of doing business, the customers, the contacts a franchisee will need. Store managers are ideal candidates because they know the business of running a store. Past performance is a significant factor in the selection of franchisees. Sobeys' management will take account of the financial results of the candidate: his/her labour management skills; control of costs and expenses; store administration; etc.*
>
> *26. There is no shortage of individuals who would like to get a franchise from Sobeys. Mr. Armstrong is a typical example. He is the franchise of the Britannia IGA, a responding party. He testified. He has been in the grocery industry for 26 years, becoming a store manager some 13 years ago. He was a store manager at the Britannia IGA for about 6 years before he acquired the franchise. Before being offered the franchise he had made clear to his District Manager that he was interested in acquiring his own store if a franchise became available. He had explained this desire to members of corporate management for a period of about 12 years before the opportunity presented itself to him. A franchise represents the opportunity of acquiring equity and moving from being a managerial employee to being one's own boss with one's own business and assets.*

[53] The Ontario Board went on at paragraphs 28 to 30 to further describe the nature of the relationship between Sobeys and the franchise operator. It said:

> *28. Sobeys effects the transfer of a store to a franchisee by transferring ownership of the inventory to the franchisee and having the franchisee sign a sublease agreement in respect of the store premises and a lease for the equipment in the store. Sobeys transfers ownership of substantial assets (chiefly the inventory) by providing a loan to make that possible, on the understanding that the franchisee will repay the loan over a fixed period. The other agreements concluded are to protect Sobeys' interest in the unwished-for event that the franchisee defaults in the payment of the inventory loan. The franchise agreement itself is to ensure that the franchisee acts as a franchisee in relation to Sobeys, viz. he/she acquires his/her product and replacement inventory chiefly from Sobeys, he/she maintains the standards associated with Sobeys' stores, etc.*

> *29. Although Sobeys gives its franchises to individuals, the individual acquires the franchise through a numbered company, which becomes the owner of the franchise. The individual franchisee (and his/her spouse) sign personal guarantees for the numbered company's liability.*
>
> *30. As time passes, and with due compliance by the franchisee with the various agreements concluded with Sobeys, particularly payment of the debt for the initial inventory acquired, the franchisee will become less indebted to Sobeys and more independent financially. The franchisee will eventually pay off the inventory loan and the inventory will become wholly its property. That task will take between five and ten years. On average, a Category 3 franchisee – (the categories are explained below) – pays off its inventory debt within about 7 years of becoming a franchisee. The franchisee may purchase its own equipment and stop leasing from Sobeys. The franchisee may eventually acquire the head lease to the property in which the store is situated, and so cease being a sub-tenant of Sobeys. Sobeys' aim is that each franchisee moves through these various stages until its relationship with the franchisee is that of wholesaler to retailer (with the franchisee being obliged to acquire most of its product from Sobeys and to maintain the standards which apply to Sobeys-franchised stores). Sobeys categorizes the different stages of franchisee on the spectrum from substantially indebted to substantially independent.*

[54] In broad terms, this analysis is applicable to the franchise arrangement in this case. We do not have the extensive evidence which was available to the Ontario Board, but our review of the Franchise Agreement and the Safeway Operating Agreement show a similar contractual arrangement between Sobeys and the Company as is described in the Ontario decision. However, the *Sobeys Capital* decision by the Ontario Board was directed to the question of common or related employer as were the decisions in *KFC/Pepsico, Tober* and *White Spot* by the BC Board.

Does the Franchising Arrangement with Sobeys West Inc. dispose of a business?

[55] Prior to the franchising arrangement being entered into, the grocery store at 2995 2nd Avenue, Prince Albert, Saskatchewan was owned and operated by Safeway Canada Limited and purchased from Safeway by Sobeys. On or about June 12, 2016, Sobeys entered into a series of agreements with the Company for the operation of this location pursuant to those agreements.

[56] Under the terms of the Operating Agreement, the Company and Mr. Erlendson agree to operate the business "in accordance with the Program". The "Program" was defined in the agreement to be "the franchise program together with all other arrangements between the parties whereby the Retailer receives knowledge, assistance and financial support to establish

and operate the business and Safeway[38] receives remuneration, directly or indirectly, from the Business as set out in this Agreement, the Program Agreements and of the Program Manual". As noted above, the Board was provided only the Operating Agreement and the Franchise Agreement. None of the other Program Agreements or the Program Manual were provided to us.

[57] Upon signing the agreement, Mr. Erlendson was required to contribute equity capital[39] to the Corporation as partial payment for the inventory. As such, upon signing of the franchising deal, Mr. Erlendson had "skin in the game" as a partial purchase of the inventory of the business. While we were not made aware of the sum to be invested, it is clear that from the outset, Mr. Erlendson and the Company had acquired some of the inventory to be sold from the franchised location.

[58] The Operation Agreement also notes that the Agreements had been entered into by the parties based upon Proforma Financial Statements prepared by Sobeys and reviewed by Erlendson and the Company along with its advisors. Those financial projections were subject to review by the parties on a go forward basis. However, the agreements made it clear that Sobeys made no representations to Erlendson and the Company as to the "likelihood of success" for the business and that Erlenson and the Company accepted the risk of making a profit or taking a loss[40].

[59] The Agreements also provided for a conditional subsidy to the Company in the event that the actual earnings of the business did not reach the projected earnings for the business. The agreement also provided for a franchise fee when actual earnings exceeded the projected earnings targets. Additionally, the Company was also required to pay to Sobeys a share of profits of the business based upon what phase of the business purchase the Company was in.

[60] The three phases of "progressive" ownership of the business is described in the Operating Agreements as being; First Phase: When the Inventory Loan is outstanding or has been repaid, but the Equipment utilized in the business is not been purchased or the goodwill has not been purchased. Second Phase: When the Inventory Loan has been repaid and the

[38] Under the terms of the Agreement, Sobeys West Inc. was referred to as "Safeway" throughout the Agreement
[39] See Article 3.1 of the Operating Agreement
[40] See Article 3.2

equipment has been purchased, but the goodwill had not been purchased. Third Phase: When all of the inventory, equipment and goodwill has been purchased.

[61] The Agreement then goes on to describe[41] how the Subsidy referred to previously and the franchise fees is impacted during the various phases of the purchase. Clearly, the Agreement contemplates a stepped approach to ownership of the assets of the business. First, inventory sold in the business is to be purchased, secondly, the equipment utilized by the business is to be purchased and finally, the goodwill associated with the business is to be purchased. In addition, the premises from which the grocery store is operated is leased or sublet to the Company by Sobeys.

[62] We presume that from the nature of the transactions that the sums required to buy the various assets are considerable. It is not unusual, then to find covenants in the agreement which provide security to Sobeys in respect of the amounts due to them, including rights to audit the business, requirements for financial reporting and accounting and strict observance of the various agreements. The Operating Agreement also includes other prudent security provisions such as a Non-competition provision in respect of both the Company and Mr. Erlendson.

[63] The Agreement also provides for default events which may lead to the termination of the Agreement. However, in the event of default, Sobeys is required to "purchase from the [Company] all of the assets owned by the [Company] located on, in or at the Premises".[42]

[64] The Franchise Agreement grants the Company the right to operate a "Safeway" grocery store under the terms of the Franchise Agreement in accordance with the terms of that agreement. In the operation of that "Safeway" grocery store, the Company would utilize the assets purchased from Sobeys under the terms of the Operating Agreement. The Franchise Agreement provides for control by Sobeys of the operations of the grocery store to insure conformity between this location and the other locations where Safeway bannered stores were operated either by other franchise owners or by Sobeys.

[65] The relationship described in the agreements is similar to that described by the Ontario Board and the BC Board above.

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[41] Article 3.8 & 3.9
[42] See Article 7.4 & 7.5

[66] While Sobeys retains firm control over the operation of the business for both security for monies owed to it, and with respect to insuring quality and consistency of its franchised and non-franchised locations, it is clear that the business has been transferred from Sobeys to the Company as an operating entity. The business is clearly in the hands of the Company to earn a profit or loss and to utilize profits to further purchase the assets utilized in the business. While there is a stepped approach to the transfer of the assets, there is a clear path whereby the Company can purchase those assets for the operation of its business. That includes the inventory, equipment and goodwill of the business. Once the purchase of those assets has been completed, then those assets would be utilized by the Company in the operation of the business in accordance with the franchise agreement.

[67] There is little doubt that a "beating heart" has been transferred by Sobeys to the Company under the terms of the Operating Agreement. As the business operates and continues to purchase more inventory and equipment the heart of that business will beat more strongly. The transfer of the assets of the business, along with the right to operate the business, including goodwill of that business, is affected by the agreements. In the context of the successorship provisions, it matters little if the acquisition of the assets is funded by and secured by Sobeys or if the assets were purchased utilizing financing from other sources such as a bank. Erlendson was required to contribute equity capital to the Company to begin the process of acquisition of the assets which were to be transferred under the Operating Agreement. That contribution started the ball rolling towards the acquisition of further assets by the Company in accordance with the Agreement.

[68] The Franchise Agreement, in and of itself, does not transfer any business to the Company. It merely grants the Company the right to operate a business in accordance with the Agreement. However, the Company also acquired assets, including goodwill under the Operating Agreement.

[69] The distinction between rights granted under a Franchise Agreement and rights granted under the Operating Agreement are important in a successorship. The granting of a franchise by a franchisee to a franchisor does not, *ipso facto*, effect a transfer of a business such that a successorship would automatically follow. Granting of a franchise is somewhat similar to a contracting out situation and hence the usual analysis of that relationship under the common/related employer provisions.

[70] This case is not a simple grant of a franchise. What occurred here was the transfer of the grocery store business through the transfer of the assets (inventory, equipment and goodwill) by Sobeys to the Corporation. While those assets could have been used to continue the business under say the name "Erlendson's Gourmet Foods", the transfer of those assets was limited to their use by the Company to operate as franchise location for a Safeway store.

Appropriate Unit of Employees:

[71] In its submission to the Board, the Company set out a description of what the employer thought would be an appropriate unit of employees for the purposes of collective bargaining. However, the Board heard no evidence to support this bargaining unit description and cannot therefore, determine if the proposed unit is appropriate for collective bargaining purposes. The Board will retain jurisdiction to determine the appropriateness of the bargaining unit should the parties be unable to agree as to what unit would be appropriate for collective bargaining. We will permit the parties to negotiate the description of the appropriate unit. If they are able to reach an agreement, the appropriateness of that unit will be considered by an *in camera* panel of the Board and the issuance of a formal successorship order. Should the parties be unable to agree, this panel of the Board will remain seized with that issue. The issue of appropriate unit will be placed on the agenda for Motions Day in July at which time a further hearing of this panel will be set unless the parties have previously advised the Registrar, in writing, that they have agreed to a description of the bargaining unit.

Decision and Order:

[72] No arguments were made by either party that the making a successorship declaration should not occur[43]. Accordingly, we make the following declaratory Order under section 6-18 of the *SEA*:

1. That 101297488 Saskatchewan Ltd. is the successor to Sobeys West Inc., as to the 2995 2nd Avenue W., the Prince Albert location.

[43] Section 6-18(2)

2. That the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, a union within the meaning of *The Saskatchewan Employment Act* is declared to represent all employees within an appropriate unit of employees as determined by this Board.

3. That 101297488 Saskatchewan Ltd. shall bargain collectively with the Union set out in 2 above with respect to the appropriate unit of employees as determined by this Board.

DATED at Regina, Saskatchewan, this **24th** day of **May, 2017.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson