

CONSTRUCTION WORKERS UNION, CLAC LOCAL 151, Applicant v TECHNICAL WORKFORCE INC. and WOODLAND CONSTRUCTORS LTD., Respondents, and SASKATCHEWAN BUILDING TRADES COUNCIL, Intervenor

LRB File No. 015-23; October 25, 2023

Chairperson, Michael J. Morris, K.C.; Board Members: Aina Kagis and Grant Douziech

Counsel for Construction Workers Union, CLAC Local 151: Richard F. Steele and Carly M. Baker

For Technical Workforce Inc.: No one appearing

Counsel for Woodland Constructors Ltd.: Michael Vos

Counsel for Saskatchewan Building Trades Council: Greg D. Fingas

Successorship – Section 6-18 of *The Saskatchewan Employment Act* – First employer’s key management personnel and skilled workforce laid off and hired on by second employer – Plan contemplating first employer ceasing to do certain work and second employer picking up this work.

Circumstances amounting to disposal of part of a business from first employer to second employer – Successorship established – Appropriate to issue a certification order pursuant to clause 6-18(4)(e).

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board’s reasons regarding a successorship application brought by Construction Workers Union, CLAC Local 151 [Local 151] with respect to Woodland Constructors Ltd. [Woodland].

[2] Local 151 alleges the transfer of a business, or part of a business, from Technical Workforce Inc. [TWI] to Woodland, pursuant to s. 6-18 of *The Saskatchewan Employment Act* [Act].¹ TWI has not appeared or made submissions with respect to the successorship application. For its part, Woodland supports the application.

[3] The Saskatchewan Building Trades Council [Council] is a public law intervenor in the successorship application pursuant to an order of the Board dated May 31, 2023. The following

¹ *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act], s 6-18.

circumstances led up to the Council being granted standing and the Board hearing the successorship application on September 13 and 14, 2023:

- a. On January 10, 2022, Local 151 filed a certification application with respect to Woodland.² At the time, Woodland's employees were working at the Cargill Seed Crushing Plant in Regina and the Great Plains Power Station in Moose Jaw [collectively, the Sites].
- b. Shortly thereafter, the Council contacted Woodland about being granted access to the Sites in order to provide information to Woodland's employees about the Council's affiliated unions, including the International Brotherhood of Electrical Workers, Local 2038 [IBEW Local 2038] and the Construction and General Workers Union, LIUNA Local 180 [LIUNA Local 180]. Neither the Council nor its affiliates were granted access to the Sites.
- c. On January 18, 2022, the Board directed a mail-in vote for Local 151's certification application.
- d. On January 25, 2022, Local 151 filed the successorship application which is the subject of these reasons.³
- e. On February 8, 2023, the Council filed an unfair labour practice application against Woodland on the basis that it and its affiliates were denied access to the Sites, unlike Local 151.⁴
- f. On February 10, 2023, IBEW Local 2038 and LIUNA Local 180 filed similar unfair labour practice applications to that filed by the Council on February 8th.⁵
- g. On February 28, 2023, the Council applied to intervene in Local 151's successorship application.
- h. On March 14, 2023, Woodland applied to summarily dismiss the Council's unfair labour practice application.

² LRB File No. 005-23.

³ LRB File No. 015-23.

⁴ LRB File No. 025-23.

⁵ IBEW Local 2038's application is LRB File No. 027-23 and LIUNA Local 180's application is LRB File No. 028-23.

- i. On May 31, 2023, the Board granted Woodland’s application to summarily dismiss the Council’s unfair labour practice application and granted the Council limited standing as a public law intervenor in Local 151’s successorship application [Intervention Decision].⁶
- j. On June 20, 2023, the Board’s executive officer determined that the successorship application would be heard before the related applications.⁷
- k. On September 8, 2023, the Board provided its reasons for ordering that certain documents be produced to the Council.⁸

[4] Having set out the above chronology, the Board notes that the Intervention Decision was based on the facts as understood from Woodland’s pleading in the successorship application (emphasis added):

[34] The Board is satisfied that there is a sufficient public law aspect to the successorship application to give it significance beyond the immediate parties. Based on Woodland’s pleading, its acquisition of its contracts for the Sites appears to have been via an award from Graham, based on its reputation and expertise, and not via a direct transfer from TWI. This indicates that Woodland’s acquisition of its work may have been through a form of contract retendering. Determining whether a successorship occurs in a retendering can present unique challenges. The Board has previously noted that “[t]he mere replacement of one contractor with another does not provide the necessary nexus between the two to constitute the transfer of a “business”...” and that “[t]here must be something disposed of which is a “going concern...”.[28] For this reason, legislators have in the past included “deemed successorship” provisions for circumstances involving retendering of certain contracts (e.g., s. 37.1 of The Trade Union Act (repealed)). The Act contains no such provision. While each case must be decided on its own facts, the Board’s decision on whether a successorship has occurred in this case may be persuasive in other circumstances involving other parties, and a perspective other than that of the immediate parties (who appear substantially aligned) may assist the Board in examining the relevant considerations.⁹

[5] Woodland’s pleading, referenced above, is (emphasis added):

(a) At paragraph of [Local 151’s] application, it comments on TWI’s change in market focus to the commercial, water and transportation/road building sectors in Saskatchewan on the direction of Graham. Woodland cannot comment on what work TWI is pursuing or its market focus.

⁶ *Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 151, Woodland Constructors Ltd.*, 2023 CanLII 46607 (SK LRB) [Intervention Decision]. The Intervention Decision granted the Council standing to cross-examine witnesses and make argument regarding whether a disposal of a business or part of a business occurred from TWI to Woodland, pursuant to s. 6-18 of the Act.

⁷ *Construction Workers Union, CLAC Local 151 v Woodland Constructors Ltd.*, 2023 CanLII 58549 (SK LRB).

⁸ *Saskatchewan Building Trades Council v Woodland Constructors Ltd.*, 2023 CanLII 82026 (SK LRB).

⁹ Intervention Decision, para 34.

- (b) Woodland operates as an independent construction management services firm that supplies skilled labour to construction companies, including Graham, and was awarded the contracts on certain industrial projects in Saskatchewan, based on its reputation and expertise and not based on the direction of Graham.
- (c) Further, at paragraphs 6 and 7 it states that the work was “transferred” to Woodland. Woodland was awarded the industrial construction projects by Graham, and it was not a transfer of any commercial contract arrangements, nor was there any financial consideration provided by Woodland to TWI when it took on the new contracts with Graham.¹⁰

[6] As will become apparent during the Board’s recitation of the facts, below, Woodland was not awarded contracts for work at the Sites by Graham. In fact, Woodland’s work at the Sites did not rely on any contracts between it and Graham. The TWI workforce that was working at the Sites in December 2022 became Woodland employees for the purposes of continuing the work after December 25, 2022. This was facilitated by Robert Manuel [Mr. Manuel], an individual who has been and continues to be intrinsically involved with both TWI and Woodland.

Evidence and Findings of Fact:

[7] Mr. Manuel was the sole witness the Board heard from. He wears many hats.

[8] Mr. Manuel is:

- a. The President of TWI;
- b. The Vice-President of Woodland, with which he has a consulting agreement through which he provides Woodland with management and labour relations services; and
- c. The Senior Director of Labour Relations for Heritage Constructors Inc. [Heritage], in relation to which more will be said below.

[9] Mr. Manuel’s evidence conformed with an agreed statement of facts that was signed on behalf of Local 151, TWI and Woodland.¹¹ During the course of his evidence he discussed documents in an exhibit book that was jointly filed by Local 151 and Woodland.¹²

[10] Based on the evidence it heard and received, the Board finds the following facts.

¹⁰ Woodland’s reply, para 3.

¹¹ Exhibit 1.

¹² Exhibit 2.

[11] The Graham Group of Companies is an Alberta-based group of companies [Graham] which executes construction contracts through various corporate entities and contractual agreements, including in association with its “Allied Partners” and “Preferred Labour Suppliers”.

[12] Jardeg Construction Services Ltd. [Jardeg] is one of Graham’s Allied Partners. Jardeg is a construction management company that provides services to Graham such as labour supply, human resources management and corporate or back-office support, including IT services and transportation. Graham contracts with Jardeg to provide these services, and Jardeg subcontracts with Graham’s Preferred Labour Suppliers, who provide a workforce that actually completes the on-site work. In practice, Jardeg will facilitate recruitment for Graham’s Preferred Labour Suppliers, in addition to providing them with other support (e.g., IT support, equipment leasing).

[13] TWI is one of Graham’s Preferred Labour Suppliers that works on Graham’s projects in Saskatchewan, Alberta and British Columbia. Local 151 obtained a certification order with respect to TWI’s Saskatchewan workforce on October 7, 2016. Their collective agreement expires on April 16, 2025.

[14] The following describes how TWI came to be working at the Sites until December 24, 2022, and how Woodland came to be working at the Sites thereafter.

[15] With respect to construction of the Cargill Seed Crushing Plant in Regina, Graham Infrastructure LP [Graham Infrastructure] entered into successive prime contracts with its client, Cargill Ltd. [Cargill], and entered into successive subcontracts with Jardeg for various services, including labour supply and field labour management.¹³ Jardeg entered into successive subcontracts with TWI to supply a workforce for its subcontracts with Graham Infrastructure.

[16] With respect to construction of the Great Plains Power Station in Moose Jaw, Great Plains Contracting LP [Great Plains], a limited partnership in which Graham is a partner,¹⁴ entered into successive prime contracts with its client, SaskPower, and entered into successive subcontracts with Jardeg for various services, including labour supply and field labour management.¹⁵ Jardeg entered into successive subcontracts with TWI to supply a workforce for its subcontracts with Great Plains.

¹³ Jardeg’s subcontracts with Graham Infrastructure contemplate either Jardeg or a third party subcontractor’s workforce providing employees for the projects.

¹⁴ The other partners are FHQ Developments and Points Athabasca.

¹⁵ Jardeg’s subcontracts with Great Plains contemplate either Jardeg or a third party subcontractor’s workforce providing employees for the projects.

[17] Patrick Schmitz [Mr. Schmitz] is the President of Jardeg. He is also the beneficial owner of Woodland, via a trust, since February of 2022. Mr. Schmitz played a pivotal role in TWI ceasing work at the Sites, and Woodland picking up the work.

[18] In August of 2022, Mr. Schmitz met with Mr. Manuel and advised him that Jardeg wanted TWI to focus on civil construction work, which had been TWI's focus historically, and to cease doing industrial construction work as a Preferred Labour Supplier. Mr. Schmitz indicated that he wanted Woodland to take over the industrial construction work that was being done at the Sites. Woodland was not otherwise working in Saskatchewan at the time, but had been working as a Preferred Labour Supplier extra-provincially.

[19] TWI is effectively dependent on Jardeg for its work. That being the case, Mr. Manuel, on behalf of TWI, agreed with Mr. Schmitz's proposal.

[20] As the proposal came into being, along with TWI ceasing work at the Sites, Heritage took over Jardeg's role as the Allied Partner with respect to the Sites. As mentioned earlier, Mr. Manuel is currently the Senior Director of Labour Relations for Heritage, as well as the Vice-President of Woodland.

[21] In November of 2022, Mr. Manuel and his colleague Gerald Barry, TWI's Senior Labour Relations Advisor, met with representatives of Local 151 to discuss the work at the Sites being taken over by Woodland. Mr. Manuel also had discussions with Jardeg about transitioning from subcontracts between Jardeg and TWI to subcontracts between Heritage and Woodland. This would involve laying off TWI personnel and rehiring them as Woodland personnel, amongst other things. It was decided that the optimal time to cancel the Jardeg-TWI subcontracts was December 24th, with the Heritage-Woodland subcontracts becoming effective on December 25th. Layoffs and rehiring were planned with these dates in mind.

[22] On December 8th, Mr. Manuel attended meetings at the Sites where the employees were advised that TWI would no longer be operating at the Sites as of December 24th, but that Woodland would be taking over the work and rehiring them. Local 151 representatives were in attendance to speak to employees afterward, outside the presence of Mr. Manuel and other management personnel. Based on his communications with employees, Mr. Manuel understood that their concerns centered on whether they'd be rehired at the same pay rates and with the same working conditions. This was the plan, and this is what eventually occurred.

[23] The Jardeg-TWI subcontracts with respect to the Sites were cancelled on December 24th and the Heritage-Woodland subcontracts entered into effect on December 25th. The associated subcontracts between Graham Infrastructure-Jardeg and Great Plains-Jardeg and Graham Infrastructure-Heritage and Great Plains-Heritage similarly ended and entered into effect on those dates, respectively.

[24] Since December 24, 2022, TWI has done civil construction work in Saskatchewan as a Preferred Labour Supplier, including on a school in Moose Jaw, for example, but not industrial construction work.

[25] Since December 25, 2022, Woodland has done industrial construction work in Saskatchewan as a Preferred Labour Supplier. In addition to the work at the Sites, it has worked on other smaller industrial construction projects.

[26] The following occurred as a result of TWI ceasing to do industrial construction work as a Preferred Labour Supplier, and Woodland commencing to do the work formerly done by TWI as a Preferred Labour Supplier:

- a. TWI's key management personnel were hired on as Woodland's key management personnel, effective December 25th.¹⁶
- b. TWI's in-scope employees were hired on as Woodland's employees. The same employees who worked at the Sites for TWI in December worked at the Sites for Woodland in January, with the exception of one employee.
- c. Work at the Sites continued without any interruption.
- d. TWI's collective agreement was honoured by Woodland.
- e. Employees' identification numbers (used for payroll, etc.) remained the same.
- f. Woodland began renting the office and storage space formerly used by TWI. Woodland employees used the same offices and storage space they'd used as TWI employees.

¹⁶ Per Tabs 17 and 18 of Exhibit 2.

- g. TWI's telephone numbers in Saskatchewan were transferred to Woodland. Employees used the same phones and telephone numbers they'd used as TWI employees.¹⁷
- h. Vehicle leases were transferred from TWI to Woodland. Employees used the same vehicles they'd used as TWI employees.¹⁸
- i. Computer equipment was transferred from TWI to Woodland. Employees used the same equipment they'd used as TWI employees.¹⁹
- j. Employees' email addresses were changed from TWI addresses to Woodland addresses.
- k. Employees were issued Woodland business cards and stickers for hard hats to replace their TWI cards and stickers.

[27] The effect of TWI ceasing to do industrial construction work as a Preferred Labour Supplier in Saskatchewan is that Woodland has obtained work that TWI would have otherwise done for Graham projects, particularly the work at the Sites.

[28] In addition to the above findings, the Board finds, on the basis of Mr. Manuel's evidence, that Graham's clients may stipulate that they require a particular type of workforce for a project.²⁰ More particularly, they may stipulate that the project must be an "open site", which means that no union affiliation is needed for employees to work on the site, or alternatively, that the project must be a "closed site" with a particular type of unionized workforce (e.g., a workforce represented by the Council's affiliates, or by Local 151). In the case of a closed site, the client's stipulation limits which Preferred Labour Suppliers an Allied Partner is able to select to work on the project.²¹ For

¹⁷ Per Tabs 32(c) and 33(c) of Exhibit 2.

¹⁸ Per Tabs 32(a) and 33(a) of Exhibit 2.

¹⁹ Per Tabs 32(b) and 33(b) of Exhibit 2.

²⁰ While not stated by Mr. Manuel, the Board surmises that such a stipulation might be found in the client's tender documents.

²¹ Such stipulations may generate some controversy. See *Christian Labour Association of Canada v Toronto (City)*, 2021 ONSC 8571, at para 7: "I understand the applicant's argument that the city has discriminated against it and other unions and favoured LIUNA for reasons the applicant believes are unreasonable and illegitimate. The city has chosen to fetter its discretion in face of its purchasing policy and a recent change in the *Ontario Labour Relations Act* both of which are aimed at increased competition in the construction market. ..." See also *Independent Contractors and Businesses Association v British Columbia (Transportation and Infrastructure)*, 2019 BCSC 1201, at paras 72 and 74: "*Columbia Hydro...* and *JJM Construction Ltd.* ...are two decisions by the LRB that concerned large construction projects arranged using a model similar to the one with which I am concerned. More specifically, for the projects under consideration in those cases a single employer was designated and workers were required to join particular unions. These arrangements were unsuccessfully challenged before the LRB, including by some of the petitioners in this matter... in *Columbia Hydro*, one of the complaints was that the agreements forced workers to join the designated unions and that this was an unfair labour practice, a complaint which was rejected by the LRB."

example, at present TWI could not provide labour for a closed site required to be a building trades site (i.e., a site with a workforce represented by the Council's affiliates).

[29] Further, the Board notes, as highlighted during the cross-examination of Mr. Manuel by the Council, that the standard form construction services agreements between Allied Partners and Preferred Labour Suppliers have the following provision in favour of the Allied Partner:

Notwithstanding anything contained in this Agreement, if [the Preferred Labour Supplier's] Workforce affiliation changes in a manner that increases the base wages payable by [the Allied Partner], then [the Allied Partner] has the right to terminate this Agreement to be effective immediately as of the date of that change.²²

[30] In effect, this provision allows an Allied Partner to terminate a subcontract with a Preferred Labour Supplier if the latter becomes certified with a (different) union and as a consequence the labour costs payable by the Allied Partner increase. As such, it is a potential cost control mechanism available to an Allied Partner. Also, the provision could potentially dissuade employees of Preferred Labour Suppliers from organizing or changing their bargaining agent for the purpose of increasing their base wages. At the same time, a client's stipulation regarding workforce affiliation at their site may be determinative of the union affiliation required for a workforce to remain on site.

Argument on behalf of Local 151:

[31] Local 151 notes that a successorship pursuant to s. 6-18 of the Act occurs by operation of law. It submits that the purpose of the hearing before the Board is to confirm that (part of) a business was disposed of from TWI to Woodland in December of 2022.

[32] Local 151 submits that the purpose of s. 6-18 is to preserve and safeguard employees' collective bargaining rights in the event of a transfer of a business, or part of a business. A transfer of a business does not require a particular technical or legal form.

[33] Relying on *Singh*,²³ Local 151 submits that section 6-18 must be liberally interpreted, with the focus being on whether the new employer acquired the essential elements of a business, or part thereof, being something of a sufficiently dynamic and coherent quality to be considered a

²² Construction Services Agreement between Heritage and Woodland for Project # R21019 – Terms and Conditions, clause 4(b): Exhibit 2, Tab 11(b).

²³ *RWDSU v Charnjit Singh and 1492559 Alberta Inc*, 2013 CanLII 3584 (SK LRB) [*Singh*].

going concern, and whether the business can be traced back to the activities of the previous certified employer.²⁴

[34] Local 151 notes that TWI relinquished its industrial construction work in Saskatchewan, at Jardeg's request. That work, along with TWI's key management personnel and its in-scope employees who were doing the work, transferred to Woodland. Local 151 submits that the movement of TWI's key management personnel to Woodland (and along with them, TWI's goodwill in the form of their experience, knowledge, reputation and personal qualities) and the seamless transition from TWI to Woodland, with no hiatus in operations at the Sites, should be determinative of a successorship having occurred in December of 2022.

[35] In addition to the transfer of key management personnel and in-scope employees from TWI to Woodland, Local 151 emphasizes other indicia of a successorship having occurred. These include the transfer of office space, equipment and vehicles from TWI to Woodland, with employees maintaining their existing office space, equipment and vehicles as part of the transfer. Local 151 emphasizes that after December 25, 2022 Woodland employees continued to do the exact same work at the Sites that they had done before December 25, 2022 (as TWI employees). They continued to abide by the same Graham-approved safety program. What changed was the sticker on their hard hats and the employer's name on their pay stub. Woodland honoured Local 151's collective agreement, and acknowledged Local 151 as the bargaining agent for its employees in Saskatchewan.

[36] In Local 151's submission, it is clear that Woodland's business activities in Saskatchewan can be traced directly back to TWI's business, and that a certification order under clause 6-18(4)(e) should be issued. Local 151 asks that the existing certification order with respect to TWI be maintained, since TWI continues to do work in Saskatchewan (though not industrial construction work). The order with respect to Woodland should mirror the scope of the existing order with respect to TWI, namely "all employees of [Woodland] in Saskatchewan except the General Manager, Office Manager, Office and Sales Staff and Management Personnel".²⁵

Argument on behalf of Woodland:

[37] Woodland consents to the relief requested by Local 151 and acknowledges that it became a successor employer to TWI on December 25, 2022.

²⁴ *Singh*, at para 46.

²⁵ Exhibit 2, Tab 1.

[38] Apart from the work Woodland acquired at the Sites, the other work it has acquired in Saskatchewan since December 25, 2022 is the result of it having acquired the capacity from TWI to take on such work. The fact that Jardeg caused TWI to cease doing industrial construction work as a Preferred Labour Supplier in Saskatchewan and caused Woodland to commence doing such work should not be considered as a factor that weighs against granting Local 151's requested relief.

Argument on behalf of the Council:

[39] The Council makes three primary arguments.

[40] First, the Council submits that there was no transfer of a functional economic vehicle from TWI to Woodland because of the involvement of Jardeg. TWI was reliant on Jardeg for its work, and it simply ceased operating in the industrial construction sector in Saskatchewan upon Jardeg's direction. Simply put, the Council's submission is that TWI had no business of its own that could be transferred or otherwise disposed of to Woodland.

[41] Second, the Council submits that the termination of one set of contracts (the Jardeg-TWI contracts) and the execution of a second set of contracts (the Heritage-Woodland contracts) does not constitute the transfer of a business.

[42] Third, the Council submits that the "key man" principle in construction industry successorship cases is inapplicable, because here transfer of the key personnel occurred after the decision was made for Woodland to begin work at the Sites. Simply put, Woodland's work at the Sites didn't arise because of the departure of the key personnel from TWI to Woodland; the key personnel departed for Woodland because the decision for the work to leave TWI and be picked up by Woodland had been made.

[43] Underlying all of the Council's submissions is the assertion that the aim of the successorship application is simply to install Local 151 as the certified bargaining agent for an employer (Woodland) that has recently entered Saskatchewan, without a representation vote.

Applicable statutory provisions:

[44] Section 6-18 of the Act is relevant:

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 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).

Analysis and Decision:

[45] The primary issue before the Board is whether Woodland acquired (part of) a business from TWI, so as to engage s. 6-18 of the Act.

[46] Section 6-18 is engaged when there has been a “disposal” of a business, or part of a business, from a unionized employer to another employer. Its public policy objective is to preserve collective bargaining rights when the business to which they are attached is passed on due to negotiations or transactions in which affected employees have no opportunity to participate.²⁶

[47] Subsection 6-18(1) defines a disposal as a “sale, lease, transfer or other disposition”. Where such a disposal has occurred, the employer acquiring a business (or part of a business) also acquires the collective bargaining obligations of the previous employer.

[48] Determining whether a disposal of (part of) a business has occurred requires a contextual analysis. Numerous factors can be examined, and the list of relevant factors is not closed.

[49] In *Singh*, the Board identified some of the relevant factors as: 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.²⁷

[50] The presence of any of the abovementioned factors can be indicative of a successorship, but their absence is often considered inconclusive.²⁸

[51] Continuity of work without hiatus by the new employer is an important factor that can indicate that the new employer has acquired “a going concern” from the previous employer.²⁹ Similarly, the transfer of key management personnel and employees from the previous employer to the new employer can indicate the transfer of a business, especially where they are doing substantially the same work.³⁰

²⁶ *Saskatchewan Joint Board, Retail, Wholesale v Broadway Lodge Ltd.*, 2017 CanLII 6029 (SK LRB), at para 26, quoting the Board’s decision in *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd.* (1995), 25 CLRBD (2d) 137.

²⁷ *Singh*, at para 45.

²⁸ *Singh*, at para 45.

²⁹ *Singh*, at paras 45-46.

³⁰ *Singh*, at para 45.

[52] With respect to the construction industry in particular, the Board has recognized that the primary attributes of a construction business may lie in its personnel. In *North American Construction Group*, the Board stated (emphasis added):

[47] While the concept of successorship for employers operating in the construction sector is the same as in any other industries, the indicia of successorship in the construction industry can be very different; that's because there are certain features of companies operating in the construction sector that are unique to that industry. For example, some employers carry on business with very few tangible assets. In the construction sector, the key asset of an employer may simply be the skill, knowledge and expertise of its principals or its key personnel, together with that employer's reputation and credibility. As a consequence, labour boards have recognized that the movement of these key personnel from one employer to another in the construction sector can be indicative of the transfer of a business or part thereof, particularly so where one business is wound down and a new employer established to carry on that same work. ...³¹

[53] In *EllisDon*, another construction industry case, the Board stated that the fundamental question is whether there is evidence of a discernable continuity of the subject business (or part thereof) from the previous employer to the new employer.³²

[54] In the circumstances which are before the Board, it has no difficulty in concluding that Woodland is a successor employer to TWI for the purposes of s. 6-18 of the Act.

[55] TWI's work as a Preferred Labour Supplier for Graham's industrial construction work in Saskatchewan [Subject Business] constituted part of TWI's business. The Subject Business was acquired by Woodland and was the entire reason for Woodland commencing to do business in Saskatchewan.

[56] Until December 24, 2022, when its subcontracts for the Sites were cancelled, TWI was a Preferred Labour Supplier for Graham's industrial construction projects in Saskatchewan.

[57] TWI's status as a Preferred Labour Supplier for Graham's industrial construction projects and its work at the Sites were in place because of TWI's key management personnel and skilled workforce. Simply put, they were the reason why TWI was a Preferred Labour Supplier with respect to Graham's industrial construction projects in Saskatchewan, and relatedly, why TWI had subcontracts with respect to the Sites.³³

³¹ *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v North American Construction Group Inc*, 2013 CanLII 60719 (SK LRB) [*North American Construction Group*], at para 47.

³² *Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights v EllisDon Corporation*, 2014 CanLII 100507 (SK LRB) [*EllisDon*], at para 66.

³³ TWI had been working in Saskatchewan for several years before the projects at the Sites were awarded to Graham and Great Plains LP. For example, it worked on the Regina Bypass.

[58] The fact that Jardeg caused TWI to cede the Subject Business to Woodland does not affect the Board's conclusion that Woodland acquired the Subject Business from TWI.

[59] The Board's successorship jurisprudence does not focus on the reasons for the disposal of (part of) a business. The focus of the required analysis is on whether a disposal of (part of) a business occurred from one employer to another.

[60] The Board accepts that it took significant planning to execute the transfer of the Subject Business from TWI to Woodland.

[61] In large part, this focused on the laying off of TWI's key management personnel and skilled workforce, and the rehiring of these individuals by Woodland. Related planning and execution had to be done with respect to the transfer of office space, storage space, equipment and vehicles, all with a goal of achieving a seamless transition of the Subject Business from TWI to Woodland, as of December 25, 2022, so that work at the Sites could continue uninterrupted.

[62] The Board accepts that work at the Sites was continuous. The evidence before the Board was that the only thing that changed at the Sites "were the stickers on the hard hats", meaning that these were changed from TWI to Woodland. Woodland effectively stepped into the shoes of TWI as the Preferred Labour Supplier for the Sites, and thereafter carried on the Subject Business transferred to it from TWI.

[63] Mr. Manuel was heavily involved in planning and executing the transfer of the Subject Business for both TWI and Woodland. Others were involved as well, including Gerald Barry, who became President of Woodland on December 23, 2022, the same day he ceased sitting on TWI's board of directors.³⁴

[64] The disposition of the Subject Business cannot be reasonably characterized the way the Council suggests, as simply the termination of one set of contracts with a supplier and the execution of a second set of contracts with a new supplier. The disposal of the Subject Business relied upon the effective transfer of the highly skilled workforce, including key management personnel, which could sustain it. Put another way, this highly skilled workforce constituted the "beating heart" of the Subject Business which transferred from TWI to Woodland, and enabled Woodland to continue work at the Sites without "skipping a beat".

³⁴ Exhibit 2, Tabs 3 and 4.

[65] Contrary to the Council's submission, the fact that the workforce was intended to be transferred along with the work at the Sites (as opposed to only a "key man" transferring to Woodland) strengthens rather than diminishes the indicia of a successorship between TWI and Woodland.

[66] During oral argument, the Council suggested that the fact that Woodland was honouring Local 151's collective agreement meant that a certification order pursuant to clause 6-18(4)(e) was unnecessary. The Board disagrees. While a new employer's voluntary recognition of a successorship can be an indicator of a successorship having occurred,³⁵ it should not be a reason to refuse to preserve employees' collective bargaining rights via a new certification order with respect to that employer.

[67] The Board concludes that Woodland became a successor employer to TWI on December 25, 2022.

[68] Once it is established that there has been a disposal of (part of) a business to a new employer, the Board will only order a representational vote in limited circumstances. As noted in *Big Sky Rail*, these include: (1) where two bargaining agents would represent the same classifications or positions with respect to the new employer and it is not possible or appropriate to maintain separate bargaining units; (2) where the applicant union is seeking to add positions to its bargaining unit that were not previously included before the disposal; and (3) where the transferred bargaining unit would be inappropriately underinclusive with respect to the new employer.³⁶

[69] None of these circumstances exist here. A representational vote is not required.

[70] Local 151 has requested a certification order to preserve employees' collective bargaining rights with respect to Woodland. This is an appropriate request which accords with the purpose of s. 6-18.

[71] The fact that Local 151 initially filed a certification application rather than a successorship application should not be, and is not, consequential with respect to the outcome of the successorship application. A bargaining agent is not prohibited from filing applications which

³⁵ *United Steelworkers v Varsteel Ltd.*, 2021 CanLII 108434 (SK LRB) [*Varsteel*], at paras 36(a) and 37.

³⁶ *Teamsters Canada Rail Conference v Big Sky Rail Corp.*, 2015 CanLII 19985 (SK LRB) [*Big Sky Rail*], at para 22. See also *Varsteel*, at para 48. In *Varsteel*, the fact that bargaining unit positions had sat vacant for over six years since the successorship occurred did not mean that a representational vote was required.

pursue alternate paths to the same end. After filing an application which pursues one path, it may acquire information and/or advice, including legal advice, which suggests that a second path is appropriate.³⁷

[72] Taking into account all of the foregoing, the Board will certify Local 151 as the bargaining agent for the following bargaining unit:

All employees of Woodland Constructors Ltd. in Saskatchewan except the General Manager, Office Manager, Office and Sales Staff and Management Personnel.

[73] An appropriate order will be issued pursuant to s. 6-18.

DATED at Regina, Saskatchewan, this **25th** day of **October, 2023**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

DISSENT

[74] With the greatest respect to my colleagues on this Labour Relations Board panel, I cannot support the majority's decision.

[75] The decision identifies that Woodland Constructors Ltd. (Woodland) is the successor employer to Technical Workforce Inc. (TWI) and that Construction Workers Union, CLAC Local 151 (CLAC) is the union certified to represent the workers there, as it was with the predecessor employer.

³⁷ As an observation, the Board notes that Local 151's certification application, filed on January 10, 2023, does not identify it as being represented by legal counsel. In contrast, its successorship application, filed on January 25, 2023, identifies it as being represented by Mr. Steele and Ms. Fader of Burnet, Duckworth & Palmer LLP.

[76] The majority decision says at paragraph 59 of the decision that “[t]he Board’s successorship jurisprudence does not focus on the reasons for the disposal of (part of) a business. The focus of the required analysis is on whether a disposal of (part of) a business occurred from one employer to another.”

[77] However, in my view, not pulling back the curtain on the underpinnings of the successorship and focussing simply on whether the requisite “disposal” occurred leaves significant questions unanswered.

[78] I would have questioned several features of the relationship between the parties to the successorship application, including questions to determine whether they might be considered contraventions of Section 6-62(1)(c) of *The Saskatchewan Employment Act* (SEA) which says:

6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following: (c) to engage in collective bargaining with a labour organization that the employer or a person acting on behalf of an employer has formed or whose administration has been dominated by the employer or a person acting on behalf of an employer[.]

[79] These are questions to which I would want answers:

- a. Why did CLAC Local 151 file a certification application on January 10, 2023, and then, on January 25, 2023, one week after the Board ordered a mail in vote, file a successorship application that included a request for a new certification order for the workers from TWI who continued work with Woodland (all except 1)?

The answer to this question may have ended up being irrelevant. However, understanding what changed and why in that brief period would have been helpful.

- b. During the period between CLAC 151’s certification application and its successorship application, why did Woodland deny access to its worksites by affiliates of the Building Trade Council?

This question will presumably be answered in a hearing of the affiliates’ unfair labour practice applications filed with respect to being denied access. It would have been useful to have the answer during the hearing of the successorship application; the answer might have illuminated the labour relations environment in which these events occurred.

- c. Why did Woodland accept the application for successorship so readily?

In fact, “accept” is understating Woodland’s response by a wide margin. Notwithstanding that CLAC was the Applicant, Woodland’s counsel led virtually all the evidence to establish successorship.

This is not to say that employers and unions will always disagree in applications before the Board. But here, the ‘substantial alignment’ between Woodland and CLAC warrants a closer look, if only because it was so obviously substantial.

- d. Why did Woodland, in its original, sworn Reply to the successorship application, say they acquired the former TWI contracts “based on its reputation and expertise and not based on the direction of Graham” and not through any “transfer” when evidence at the hearing indicates that a seamless transfer from TWI to Woodland of the work and the workforce did occur (discussed at paragraphs 5 and 6 of the majority decision)?

Again, understanding this contradiction may have proved irrelevant to the successorship issue, but may have spoken to the credibility of other statements made by the Applicant and Respondent.

- e. Does this decision, granting successorship as it does, effectively perpetuate arrangements that are contrary to s. 6-62(1)(c) of the SEA?

The majority decision describes at paragraph 28 how Graham’s clients can stipulate what kind of workforce they want for a project, i.e., unionized, non-unionized, or workers represented by a particular union (or, by extension, **not** a particular union).

Additionally, as described in more detail at paragraphs 29 and 30 of the majority decision, Graham’s “Allied Partners” can terminate contracts should the workforce provided by the “Preferred Labour Supplier” change unions and cause wage costs to rise.

In my view, contractual arrangements like this create fertile ground for the growth of company dominated unions, contrary to s. 6-62(1)(c) of the SEA.

[80] I cannot agree with sanctioning a result that leaves important questions unanswered.

[81] I would have dismissed the successorship application filed by CLAC 151.

Aina Kagis
Board member representing employees