Saskatchewan
Labour Relations Board

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 882, Applicant v PRINCE ALBERT GOLF AND CURLING CENTRE INC., Respondent and CITY OF PRINCE ALBERT, Respondent

LRB File No. 192-22; August 15, 2023
Chairperson, Michael J. Morris, K.C.; Board Members: Shawna Colpitts and Don Ewart

For Canadian Union of Public Employees, Local 882:	Natalie Laing
Counsel for the Prince Albert Golf and Curling Centre Inc.:	Robert Affleck
Counsel for the City of Prince Albert:	Mitchell Holash, K.C.

Successorship – Section 6-18 of *The Saskatchewan Employment Act* – Disposal of a business or part of a business – Sale of concession shack on municipal golf course to non-profit corporation – Shack had been idle for five years – Sale not a disposal of a business or part of a business – Successorship application dismissed.

Unfair labour practice allegations – Allegations reliant on non-profit corporation being a successor employer to unionized municipal employer – allegations not established.

Procedure – Ability of co-respondent to cross-examine witness of other co-respondent – Board declines to order blanket prohibition sought by union – Dangerous to make such an order on the basis of pleadings alone – Board endorses principles stated in *Trizec Equities*.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons regarding a successorship application brought by the Canadian Union of Public Employees, Local 882 [Union] pursuant to s. 6-18 of *The Saskatchewan Employment Act* [Act].[1]

[2] The successorship application arises from the sale of a building, referred to by all parties as a shack [Shack], from the City of Prince Albert [City] to the Prince Albert Golf and Curling Centre Inc. [Non-Profit] in 2022.

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

[3] The Shack is located near the 8th hole of the Cooke Municipal Golf Course and is described as being approximately 400 square feet in area. It contains an area from which food and beverages can be sold, as well as an area containing washrooms.

[4] The City employed the Union's members to sell food and beverages from the Shack until the City made a decision to not re-open the Shack for the 2017 golf season, except for its washrooms. The washrooms were maintained by employees represented by a different union. The City stopped operating the Shack because it was losing money doing so.

[5] The Non-Profit bought the Shack from the City in 2022 and operated it for part of the 2022 golf season. The Union alleges that the Non-Profit is a successor employer to the City, and it seeks an order certifying itself as the bargaining agent for employees working at the Shack. Relatedly, the Union alleges that the Non-Profit has committed unfair labour practices by failing to implement the collective agreement with respect to employees working at the Shack, failing to deduct and remit dues to the Union for these employees, and threatening to close the Shack in response to the Union's successorship allegation and application.[2]

[6] The Non-Profit takes the position that it is not a successor employer to the City and denies having committed any unfair labour practice.

[7] While the City participated in the proceedings before the Board, no relief has been sought against it in these proceedings.

Evidence and Procedural Issue:

[8] The Union, the City and the Non-Profit each called one witness. In addition to oral evidence, various documents were entered into evidence by the parties.

[9] A procedural ruling was made by the Board during the hearing, with reasons to follow. Those reasons follow the description of the evidence on behalf of the Union.

Evidence on behalf of the Union

[10] Craig Thebaud [Mr. Thebaud] gave evidence on behalf of the Union. Mr. Thebaud is the CUPE National Servicing Representative assigned to the Union.

[2] The Non-Profit's conduct is alleged to violate ss. 6-41, 6-43 and 6-62(1)(k) of the Act.

[11] Mr. Thebaud did not have any personal involvement with material matters until the spring of 2022, when the Non-Profit's proposed purchase of the Shack was brought to the Union's attention. Much of the Union's evidence regarding the history of the Shack and the Union's involvement with same, as well as the City's operations more generally at the Cooke Municipal Golf Course, was based on documents which were entered into evidence by the Union.

[12] The Union's evidence confirmed that it received notice that the City would not be operating the Shack for food and beverage sales in 2017, and that the City did not operate the Shack for such purposes at any time from 2017 onward. No Union members lost their jobs as a result of this decision. Members could no longer be scheduled for shifts at the Shack, but they remained eligible to work at other concession locations operated by the City. The Union did not file any grievances in relation to the City's decision to cease operating the Shack for food and beverage sales.

[13] The Non-Profit expressed interest in selling food and beverages out of the Shack on multiple occasions, from 2017 onward.

[14] In 2017, the Non-Profit directly asked the Union about its position if the Non-Profit were to rent the Shack from the City to sell food and beverages. The Union's email reply through its president, Tammy Vermette [Ms. Vermette], included the following:

> *The Golf and Curling club cannot take over the 7th Hole concession. The option for this was presented and it has been concluded that the jobs at the 7th hole are protected by our union agreement. So any worker at the 7th hole would be a city of Prince Albert concession worker. This was based on what happened with he AHC back in 2006 when the AHC was leased out.*[3]

[15] In 2020, the City approached the Union about selling or leasing the Shack to the Non-Profit. Ms. Vermette documented the Union's position in an email to Jody Boulet, Director of Community Services for the City. Ms. Vermette's email included the following:

> *Hi Jody,*
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> *Further to our meeting on Wednesday, June 3rd regarding the 7th hole concession at the Golf & Curling Club, please be advised that I have discussed this with the Union Executive as well as our CUPE rep and the union is not in favour of losing this concession to the Golf & Curling Club. We do understand that the City was not making any money operating this concession under the current arrangement; however, the union would prefer than an amendment to the agreement/new agreement for the operation of the concession be done to include a share of the profits from the liquor sales or allow for us to sell alcohol from this concession with all sales from this concession kept by the City.*

[3] Exhibit U-7, email from Tammy Vermette to Elaine McCloy, dated August 29, 2017.

I would appreciate being kept up-to-date on this matter.

Thank you again for taking the time to meet with Cara and I to discuss this matter. …[4]

[16] Ms. Vermette's reference to "the current arrangement" in the abovementioned email references the fact that prior to its closure following the 2016 golf season, the City sold alcohol from the Shack under the Non-Profit's liquor license, but did not retain any of the profit from the alcohol sales; it went to the Non-Profit. In the Union's view, this was a cause of the Shack's unprofitability. Following the closure of the Shack at the end of the 2016 season the City permitted the Non-Profit to sell food and beverages (including alcohol) in the area formerly served by the Shack, being the 7th and 8th holes, through the Non-Profit's mobile food and beverage carts.[5] The Non-Profit was required to pay the City $2,000 per year to operate its mobile food and beverage carts throughout the entire golf course,[6] but the City paid for the fuel for the carts.[7] The Union did not file any grievances with respect to this arrangement.

[17] Mr. Thebaud testified that he spoke with Ms. Vermette in late April or early May 2022 about a proposed sale of the Shack to the Non-Profit.

[18] The Union entered into evidence an April 7, 2022 email from Jody Boulet, of the City, to Ms. Vermette, advising Ms. Vermette about the Non-Profit's proposal to purchase the Shack.[8] The email attached the Non-Profit's proposal to conduct food and beverage sales out of the Shack, which was to be presented to the City's Executive Committee on April 11th, and stated:

Hi Tammy,

It has been brought to my attention following the Agenda Review meeting this morning that the PA Golf & Curling Centre has submitted the attached request for presentation at the April 11th Executive Committee meeting.

You previously communicated that you would like to stay informed on this topic therefore I wanted to ensure you were advised of the correspondence in advance of the public agenda being distributed later today.

Thank you

Jody Boulet

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[4] Exhibit U-8, email from Tammy Vermette to Jody Boulet et al, dated June 8, 2020.
[5] Exhibit U-4, Memorandum of Understanding dated May 2, 2017 between the City and the Non-Profit.
[6] Exhibit U-5, Food and Beverage Cart – Service Agreement dated April 3, 2018, clause 2(a); Exhibit U-6, Food and Beverage Cart – Service Agreement dated May 4, 2021, clause 2(a).
[7] Exhibit U-5, Food and Beverage Cart – Service Agreement dated April 3, 2018, clause 3(b); Exhibit U-6, Food and Beverage Cart – Service Agreement dated May 4, 2021, clause 3(b).
[8] Exhibit U-9.

Director of Community Services
City of Prince Albert …[9]

[19] The Non-Profit's proposal indicated projecting staffing costs of $13 per hour,[10] which was less than Union members would be entitled to under their collective agreement ($13.28 per hour),[11] and indicated that the Shack would be staffed by Non-Profit employees.[12]

[20] The Union entered into evidence Ms. Vermette's May 5, 2022 reply to the abovementioned email. Ms. Vermette's reply was sent to Jody Boulet but also copied to Mr. Thebaud and others, including Kerri Kristian of the City, but no one from the Non-Profit. Ms. Vermette's reply stated:

Hi Jody,

Further to our meeting this morning, we have no concerns.[13]

[21] Mr. Thebaud was questioned extensively on what the Union was intending to convey in Ms. Vermette's May 5th email, particularly since it had clearly stated its opposition to the Non-Profit taking over the Shack for food and beverage sales in previous years (i.e., 2017 and 2020).

[22] Mr. Thebaud maintained that the Union's indication of having "no concerns" with respect to the sale of the Shack only meant that the Union would not object to the sale of the Shack by the City.[14] According to Mr. Thebaud, the email was not meant to convey that the Union would not pursue successorship rights with respect to the Non-Profit. Further, Mr. Thebaud indicated that he did not understand the City to be asking about the Union's position with respect to the Non-Profit's proposal on the Non-Profit's behalf.

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[9] Exhibit U-9, p 1.
[10] Exhibit U-9, p 3.
[11] Exhibit U-2, p 41 (Schedule "C", Rates of Pay – Recreation, Effective January 1, 2021). The start rate for a concession worker is listed as $13.28/hr.
[12] Exhibit U-9, p 3.
[13] Exhibit U-10.
[14] During Mr. Thebaud's evidence he suggested that Article 12.07 of the collective agreement (Exhibit U-2) could have been relied upon by the Union to attempt to stymy a sale of the Shack, if such a sale were characterized as a "contracting out". Article 12.07 states: "Having regard to the desirability of maintaining a stable work force and having regard to periodic peaks in work load dictating the necessity of contracting work out, the City agrees to notify and consult with the Union prior to making any final decision to contract out work presently being performed by City employees. The Union will be a participant in studying any contracting out plans and will be supplied with all information and research done prior to the final decision being made." Mr. Thebaud noted that Article 12.07 was interpreted in *Canadian Union of Public Employees, Local 882 v Art Hauser Centre Board Inc.*, 2006 CanLII 80569 (SK LA) [*Art Hauser Centre*]. In *Art Hauser Centre*, the majority of the arbitration panel concluded at para 157 that, properly interpreted, Article 12.07 meant that bargaining unit work could only be contracted out if periodic peaks in work load dictated that necessity.

[23] Mr. Thebaud indicated that the wage rate in the Non-Profit's proposal was not concerning because it was similar (though less) to the rate prescribed by the collective agreement. He went on to say that if the Non-Profit had reached out to the Union about its proposal, the Union would have told them their wage rate was wrong. According to Mr. Thebaud, the Union was intent on bringing a successorship application when Ms. Vermette sent the May 5th email, and the Union assumed there would be no opposition to such an application.

[24] The Non-Profit's proposal was considered at the May 16th City Council meeting and approved.[15] Council approved selling the Shack to the Non-Profit for $1.00 with an option for the City to repurchase it for $1.00 if the Non-Profit at any time changed the intended use of the Shack.

[25] According to Mr. Thebaud, by mid-August the Union became aware that the Shack was open and being operated by the Non-Profit.

[26] On August 18, 2022, Mr. Thebaud emailed the Non-Profit, attaching the Union's collective agreement, and requested compliance with it. Mr. Thebaud indicated that the Union would be filing a successorship application with the Board, and asked whether the Non-Profit would be opposing its application.

[27] At some point after this email, Mr. Thebaud spoke with Darcy Myers, the General Manager of the Non-Profit. Mr. Myers indicated that he'd need to discuss Mr. Thebaud's email with the Non-Profit's board of directors. According to Mr. Thebaud, it did not seem like the Non-Profit was expecting any communication from the Union with respect to the Shack.

[28] The Union filed a letter received by the Office of the City Clerk from the Non-Profit on September 27, 2022.[16] In the letter the Non-Profit expressed its surprise regarding the Union's position that it was a successor employer. The Non-Profit indicated that it had purchased the Shack in reliance on the City's consultation with the Union, and the City advising it that the Union had no concerns with the Non-Profit's proposal. The Non-Profit also stated that it was faced with the prospect of possible legal proceedings or closure of the Shack. Its letter closed with a request to be put on a City Council agenda so that a delegation representing the Non-Profit could address the matter with Council.

[15] Exhibit U-12, Minutes of May 16, 2022 City Council meeting, p 6.
[16] Exhibit U-17, Letter to City Council c/o City Clerk from the Non-Profit.

[29] The Union played a video recording of part of the October 24, 2022 City Council meeting.[17] A delegation from the Non-Profit was in attendance to address the issues raised in its aforementioned letter. Mel Kelly, president of the Non-Profit, stated that the Non-Profit had no intent to challenge the Union or be unionized. He mentioned that the Shack had closed at some point after the Non-Profit received correspondence from the Union, partly because of the correspondence and partly because the Non-Profit's seasonal staff were returning to school.

[30] Mayor Dionne expressed dismay at what had occurred, stating that the City couldn't control the Union and that it was unfortunate that the Non-Profit had been put in the position it was in because of the Union's representations to the City. Some councilors asked the City Solicitor questions about whether the Non-Profit could be viewed as a successor employer to the City. Another councilor expressed dismay at what had occurred, saying the Non-Profit "shouldn't have had to deal with this". At the end of the discussion the Non-Profit's September 27, 2022 letter was referred to the City's Community Services Division for a response. Whatever the response was, it was not entered into evidence.

[31] On November 27, 2022, Mr. Thebaud received an email stating the following from Mr. Myers:

> *Craig,*
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> *When the PAGCC approached City Council with a proposal to purchase the 8th hole concession from the City of PA earlier this spring, the intent was to use our non-unionized staff from the PAGCC to operate the concession as laid out in our proposal. As we understand, your union was notified regarding the proposal and there were no concerns from your union representatives before PAGCC entered into the agreement with the City. We have been transparent throughout this process and we do not intend to work out a joint application and oppose the successorship application.*
>
> *Regards,*
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> *Darcy Myers*
> *General Manager*
> *Prince Albert Golf & Curling Centre …*[18]

[32] The Union closed its case following Mr. Thebaud's evidence. The Board noted that Ms. Vermette was present throughout the hearing as the instructing client for the Union, but she was not asked to give evidence. Accordingly, her explanation of what she meant in her May 5, 2022 email when she advised that the Union had "no concerns" with the Non-Profit's proposal is not available to the Board.

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[17] Exhibit U-23.
[18] Exhibit U-21.

Procedural ruling

[33] After the City opened its case, the Union objected to counsel for the Non-Profit being permitted to cross-examine any witnesses called by the City, and indicated that it would take the same position with respect to any witnesses called by the Non-Profit (i.e., that the City should not be permitted to cross-examine them).

[34] The Union's objection was based on the City and the Non-Profit having similar interests based on their pleadings and both "acting on the same side" as co-respondents. In the Union's view, permitting them to cross-examine each other's witnesses would be akin to permitting the Non-Profit and City to cross-examine their own witnesses.

[35] The Union took the position that the Court of Appeal's decision *Frobisher Ltd. v Canadian Pipelines & Petroleum Ltd.*,[19] particularly the reasons of Chief Justice Martin,[20] supported its request for a peremptory order prohibiting the City and Non-Profit from cross-examining each other's witnesses.

[36] A close read of *Frobisher* establishes that the trial judge refused to allow co-defendants to cross-examine witnesses called by other co-defendants on material matters because all of the co-defendants had pled similarly to the plaintiff's claim. However, four of the five appeal justices ruled that this was in error, including because the witnesses sought to be cross-examined had given evidence that was adverse to the interests of the co-defendants who were seeking to cross-examine them.[21]

[37] In the Board's view, *Frobisher* demonstrates the danger in relying solely on the pleadings to order a blanket prohibition on the ability to cross-examine. The pleadings do not necessarily foretell all the evidence that will be elicited through a party's witness, and whether that evidence may be perceived as adverse to the interests of a co-defendant or co-respondent.

[38] Both the Non-Profit and the City opposed a blanket prohibition on their ability to cross-examine each other's witnesses. The Non-Profit noted that its interests were not the same as the City's. For example, only the Non-Profit had relief sought against it in the application, and therefore only the Non-Profit was at risk of direct legal consequences through the proceeding. For

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[19] *Frobisher Ltd. v Canadian Pipelines & Petroleum Ltd.* (1957), 10 DLR (2d) 338, 1957 CanLII 163 (SK CA) [*Frobisher*].
[20] *Frobisher*, at paras 9-11 (Martin, CJS).
[21] *Frobisher*, at paras 36-44 (Gordon, JA), 107-108 (McNiven, JA), 136-139 (Proctor, JA), 230-231 (Culliton, JA).

its part, the City stressed that its interests were primarily in ensuring that the facts were accurate. But the City also noted that it could have exposure to a potential claim by the Non-Profit (in a different forum) based on its representations to the Non-Profit regarding the Union's position on the sale of the Shack and the Non-Profit's reliance on same. The Board noted that to the extent either the Non-Profit or City intended to call a witness to contradict the other's witness, the rule in *Browne v Dunn*[22] would presumably require the contradiction to be put to the other's witness.

[39] The Board declined to make the order sought by the Union, noting the Non-Profit and the City had different interests in the proceeding. In the Board's view, a peremptory ruling preventing any cross-examination would unfairly prejudice the Non-Profit and the City. Instead, it determined that it would deal with any objections to questions or lines of questioning as they arose, in the course of any cross-examination. The Board also determined that questioning by the Non-Profit and the City of each other's witness(es) would occur before cross-examination of the witness(es) by the Union.

[40] As it happened, the Non-Profit's questioning of the City's witness, Ms. Kristian, was brief, and the City's questioning of the Non-Profit's witness, Mr. Myers, was very brief. Further, the nature of the questioning was generally as would be conducted in examination-in-chief (i.e., non-leading), and the Union raised no objections during the course of it. Similarly, the Board had no concerns with improper "spoon feeding" or "sweetheart cross-examination". The Board notes that the type of questioning conducted (effectively, supplemental examination-in-chief by a co-respondent) has been determined to be presumptively appropriate by the Alberta Court of King's Bench in *Trizec Equities*, following a review of different authorities:

> *[14] These cases review the English authorities and grapple with the differences in the English Rules which refer to the "opposite party" as opposed to the Canadian Rules based on "parties adverse in interest". Without entering into that debate what is certain from these authorities is that in civil actions (1) as between defendants there is a right to examine in chief a co-defendant's witness by way of supplementary questions; (2) there is a right to cross-examine a co-defendant's witness on points where the other defendant is a party adverse in interest or, where a codefendant's witness has by his or her evidence adversely affected the other defendant's position in the case. Adverse in interest is to be interpreted broadly to include rights to be adjudicated upon or a pecuniary or other substantial legal interest or conflict in the action.*[23]

[41] The Board endorses the above principles from *Trizec Equities* as generally applicable to proceedings before it. In terms of the order of questioning, the Board may consider the

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[22] *Browne v Dunn*, 1893 CanLII 65 (FOREP).
[23] *Trizec Equities Ltd. v Ellis-Don Management Services Ltd.*, 1996 CanLII 10350 (AB KB) [*Trizec Equities*], at para 14.

appropriateness of the procedure used in *Trizec Equities*, depending on the particular circumstances before it:

> *[17] Based on these authorities, I have decided, first, that the Defendants may examine the witnesses of other co-Defendants by way of examination-in-chief, to elicit supplementary evidence in support of their position on matters common between them. Second, that the Defendants may cross-examine witnesses of a co-Defendant where either upon the record or on the issues raised in the case, there are adversities of interest or rights to be adjudicated or conflicts on the evidence between them. The subject area of this cross-examination should be conducted only with the prior approval of the Court to guard against procedural or substantive abuses. Third, that having regard to the circumstances of this case, the examination by one Defendant of a co-Defendant should proceed prior to the cross-examination by the Plaintiff Trizec. Fourth, that following cross-examination by Trizec of a Defendant's witness, a co-Defendant may apply to deal with a matter by way of further cross-examination in the event that the Plaintiff's cross-examination has raised a new adverse point in issue.*[24]

[42] Ultimately, the extent of permissible cross-examination by co-respondents of each other's witnesses will depend on the circumstances in any given proceeding. However, as indicated above, due to the dynamic nature of the giving of evidence, parties should generally not expect the Board to make a blanket order prohibiting co-respondents from cross-examining each other's witnesses solely on the basis of their pleadings.

Evidence on behalf of the City

[43] Kerri Kristian [Ms. Kristian] gave evidence on behalf of the City. Ms. Kristian has worked in the City's human resources department since 2005. In her role she regularly works with the Union, on behalf of the City. She was involved in matters relating to the City's decision to cease operating a food and beverage service out of the Shack, and communications with the Union about the Non-Profit's potential acquisition of the Shack.

[44] Ms. Kristian noted that the City's 2017 decision to cease operating a food and beverage service out of the Shack came after consultations with the Union. The City entered into evidence Ms. Kristian's notes which were taken during these consultations.[25]

[45] The City provided Ms. Vermette a letter dated April 11, 2017, in which it indicated the rationale for closing the Shack.[26] The letter noted the Shack was the only concession that continually operated in a deficit position, and that it would be closed to prevent further subsidization by the City. However, the letter indicated that permanent employees working at the

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[24] *Trizec Equities*, at para 17.
[25] Exhibits PA-1, PA-2, PA-3.
[26] Exhibit PA-4, p 2.

Shack would continue their primary duties at other concession locations, as would non-permanent employees.

[46] Ultimately, the Union did not file any grievances arising from the City's decision to cease operating a food and beverage service out of the Shack, or its decision to allow the Non-Profit to sell food and beverages from its mobile food and beverage carts on the 7th and 8th holes, being areas which were previously exclusively served by the Shack.

[47] Ms. Kristian discussed the Non-Profit expressing interest in acquiring the Shack in May of 2020. Jody Boulet mentioned he had received an informal inquiry from the Non-Profit and wanted to check what the Union's position might be with respect to this. On June 8, 2020, Ms. Kristian was forwarded the June 8, 2020 email Ms. Vermette wrote to Mr. Boulet in this regard (quoted at paragraph 15 of these reasons).[27]

[48] On June 9, 2020, Mr. Boulet and Ms. Kristian met with Ms. Vermette and the Union's vice-president. Ms. Kristian made notes of what was discussed, including Ms. Vermette indicating that the City could expect a challenge from the Union if it intended to transfer the Shack to the Non-Profit.[28] According to Ms. Kristian, after this meeting Mr. Boulet advised the Non-Profit that the City was not considering a transfer of the Shack due to the Union's position.

[49] On April 7, 2022, Ms. Kristian was copied on the email from Jody Boulet to Mr. Vermette (quoted at paragraph 18 of these reasons), indicating the Non-Profit's interest in acquiring the Shack, and attaching the Non-Profit's proposal.[29] A meeting was scheduled for May 5th to discuss the matter.

[50] On May 5, 2022, Mr. Boulet and Ms. Kristian met with Ms. Vermette and the Union's vice-president. Ms. Kristian took notes regarding what was discussed.[30] Ms. Vermette indicated that she would discuss the proposal with Mr. Thebaud that afternoon. Mr. Boulet indicated that there was some urgency as the Non-Profit wanted to get the operation set up. Ms. Kristian left the meeting under the impression that Ms. Vermette would advise if the Union had any concerns with the Non-Profit's proposal.

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[27] Exhibit PA-6.
[28] Exhibit PA-7.
[29] Exhibit PA-8.
[30] Exhibit PA-10.

[51] Later that day, at 3:43 p.m., Ms. Kristian was copied on the email from Ms. Vermette to Mr. Boulet indicating "Further to our meeting this morning, we have no concerns."[31] Ms. Kristian understood this to mean the Union had no concerns with the Non-Profit's proposal, in general. She expected Jody Boulet to communicate this to the Non-Profit, and she understood that he did so.

[52] In cross-examination, Ms. Kristian agreed that she didn't know if the Non-Profit's acquisition of the Shack was conditional on the Union waiving any successorship rights that might exist, and that the City had never asked the Union to waive such rights. She also agreed that the City had not filed an unfair labour practice application against the Union with respect to the Union's representations and conduct concerning the Shack.

[53] City Council approved the sale of the Shack to the Non-Profit at its May 16, 2022 meeting.[32] Ms. Kristian indicated that the City heard nothing from the Union with respect to the Shack after the City Council meeting, and that no grievances have been filed because of its sale.

[54] Ms. Kristian identified a copy of the bill of sale for the Shack.[33] The bill of sale was signed on September 6, 2022, though it appears the drafter's intent was to have it signed and effective as of some point in May 2022.

[55] Ms. Kristian's evidence concluded the case for the City.

Evidence on behalf of the Non-Profit

[56] Darcy Myers [Mr. Myers] gave evidence on behalf of the Non-Profit. Mr. Myers has been the General Manager of the Non-Profit since April 1, 2022. He is not an employee of the Non-Profit. He provides his services to the Non-Profit as an independent contractor through his corporation, Darcy's Golf Shop Ltd. He provides services to the City as a golf professional through the same corporation, also as an independent contractor.

[57] Mr. Myers explained that the City owns the golf course and the land it is situated on. The Non-Profit owns the course's pro shop, which is situated on land owned by the Non-Profit. Aside from the pro shop, the Non-Profit owns the Rock and Iron, a restaurant which is situated on the Non-Profit's land, and the Shack, which is located on the golf course near the 8th hole.

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[31] Exhibit PA-11.
[32] Exhibit PA-14.
[33] Exhibit PA-16.

[58] Mr. Myers explained that the Non-Profit operates a food and beverage service from its mobile carts, pursuant to its Food and Beverage Cart Service Agreement with the City.[34] The food and beverages for the carts are sourced from the Rock and Iron. The Rock and Iron also supplied the food and beverages for the Shack in 2022.

[59] Mr. Myers thought the Shack was built in the 1980's. The City used it to provide food and beverage service until 2017, in addition to washroom facilities. From 2017 until 2022, the City used the Shack as a storage facility only, though it kept the washrooms open. According to Mr. Myers, the City employees who maintained the washrooms from 2017 to 2022 were members of CUPE Local 160, the same union that the golf course groundskeepers belonged to.

[60] Mr. Myers explained that the Non-Profit's motivation for acquiring the Shack was to provide an additional facility to enhance golfers' experiences. Staff who worked at the Rock and Iron were used to staff the Shack, and the Rock and Iron's kitchen was used to prepare food.

[61] As aforementioned, the Shack was used as a storage facility from 2017 until 2022. Before it was opened by the Non-Profit, it needed to be emptied. Aside from a large double-door Coca-Cola branded cooler, the Club needed to supply its own equipment to operate the Shack.

[62] The Shack had no employee contracts or management expertise attached to it when acquired by the Non-Profit. It also had no signage or branding associated with it. When asked what the Non-Profit acquired from the City, Mr. Myers replied "a building".

[63] The Non-Profit opened the Shack on June 2, 2022. Mr. Myers didn't know when the bill of sale for the Shack was actually signed, but he was notified on May 17, 2022 that City Council had approved the sale.

[64] Mr. Myers was directed to Ms. Vermette's May 5, 2022 email in which she indicated the Union had no concerns with the Non-Profit's proposal to acquire the Shack.[35] He didn't think he received a copy of this email, but he was advised by Jody Boulet that the Union had no concerns with the Non-Profit buying the Shack. Mr. Myers stated that as far as he was aware, the Union had no concerns with what the Non-Profit was planning on doing. He contrasted the Union's representations in May of 2022 with its clearly stated opposition in 2020 to the Non-Profit acquiring the Shack.

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[34] Exhibit U-6.
[35] Exhibit PA-11.

[65] Mr. Myers was surprised when he received Mr. Thebaud's August 17, 2022 email, which demanded that the Non-Profit abide by the Union's collective agreement.[36] He did not expect to be hearing from the Union at all.

[66] The Non-Profit ceased its food and beverage service out of the Shack in late August 2022. Mr. Myers explained that the Shack was almost breaking even at that point (i.e., it was operating at a slight loss). The Non-Profit didn't think it could reasonably continue to operate the Shack after it received Mr. Thebaud's email, and many of its seasonal employees were due to return to school in September, in any event.

[67] In cross-examination, Mr. Myers said that he had not asked the City to inquire about the Union's position regarding the Non-Profit's proposal to purchase the Shack. As well, the following exchange occurred:

> *Q* *Was your proposal conditional on the Union waiving any rights to the employees of the concession stand?*
>
> *A* *No.*

[68] Mr. Myers' evidence concluded the case for the Non-Profit.

Argument on behalf of the Union:

[69] The Union argues that the Shack was a "going concern" when acquired by the Non-Profit, and that it did not intend to waive any successorship rights arising from the Shack's acquisition by the Non-Profit or to convey such a position to the City or the Non-Profit.

[70] In the Union's brief of law, it states "[t]he Union believed it was an obvious successorship and therefore assumed that the City would have also recognized that."[37] The Union relies on Mr. Myers' answer during cross-examination that the Non-Profit's proposal to acquire the Shack was not conditional on the Union "waiving any rights to the employees". At the same time, the Union suggests that the City and the Non-Profit were engaged in a concerted effort to subvert the Union's bargaining rights relating to operation of the Shack.

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[36] Exhibit PA-15.
[37] Union's brief, p 18.

[71] The Union highlights that if the City had reopened the Shack in 2022, the Union's collective agreement would have applied to City employees working at the Shack. During oral argument, the Union submitted that it "owned" the positions at the Shack.[38]

[72] The Union emphasizes that the Non-Profit operated the same type of business from the Shack as the City had. It submits that the City, as owner of the golf course, stood to benefit from the Shack reopening. It points to the Shack being sold at a nominal value, and being subject to return to the City if not operated for the purpose for which it was sold. It also points to the fact that Mr. Myers, through his corporation, provides services to both the City and the Non-Profit, and suggests this supports a successorship finding.

[73] The Union suggests that the City's participation in proceedings before the Board and its receptiveness to the Non-Profit's concerns after the Shack was sold support the conclusion that it sold a "going concern" to the Non-Profit.

[74] The Union submits that the Shack's closure for five years is immaterial. In its brief, it states "When the same business reopens in the same location, length of time does not extinguish successorship rights."[39] The Union emphasizes the Non-Profit using the same building in the same location serving the same clientele, while benefiting both the seller (City) and the buyer (Non-Profit).

[75] The Union submits that, although it would be a small bargaining unit, a bargaining unit composed of employees of the Shack would be viable.

[76] The Union concedes that its unfair labour practice allegations cannot succeed without the Non-Profit being determined to be a successor employer. If the Non-Profit is determined to be a successor employer, the Union submits that its conduct has amounted to unfair labour practices contrary to ss. 6-41, 6-43 and 6-62(1)(k) of the Act.

Argument on behalf of the City:

[77] The City's position is that it has at all times been open and transparent with respect to circumstances involving the Shack.

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[38] This terminology – of "owning" positions – accords with how the Union posed the question to Mr. Myers which is quoted at paragraph 67 of these reasons. In the Board's view, unions are properly characterized as having obligations to employees, as opposed to owning positions or having rights to employees.
[39] Union's brief, p 13.

[78] The City denies engaging in any kind of plot to subvert bargaining rights held by the Union. The City submits that no successorship rights could attach to the sale of the Shack, particularly given the effluxion of time since it was last operated. The Shack was an idle asset that had been used for storage for five years.

[79] In the City's view, the Union gave a deliberately cryptic response of "no concerns" when asked for its position on the Non-Profit's proposal in May of 2022. Accepting Mr. Thebaud's evidence – that the Union had at the time of the response decided that it would file a successorship application – the response was not forthright. The response either knowingly or recklessly created potential liability for the City to the Non-Profit. The Union ought to have expected its response would be conveyed by the City to the Non-Profit, and understood by the Non-Profit to mean that the Union would not be asserting any rights arising from the proposed sale. The Union not raising the issue of successorship until August of 2022 was unfair to both the City and the Non-Profit. The Union encouraged the sale to go through so that it could bring an unanticipated successorship application.

[80] The City asks that the Board consider awarding costs on the basis of the Union's conduct prior to and in bringing the within application.

Argument on behalf of the Non-Profit:

[81] The Non-Profit argues that it did not acquire any form of business from the City. Rather, it acquired an idle asset. It points to the five year period during which the Shack was not used for food and beverage sales, but simply as a storage facility (apart from its washrooms). It emphasizes that the Non-Profit acquired no management expertise, branding, signage or goodwill when it acquired the Shack, and that the only equipment that came with it was a Coca-Cola branded cooler. The Shack was a long-idle asset that was incorporated into the Non-Profit's existing business, the Rock and Iron. The equipment, staff and expertise necessary to operate the Shack came from the Rock and Iron.

[82] Apart from arguing that no successorship occurred, the Non-Profit also argues that the doctrines of waiver and promissory estoppel should be applied to prevent the Union from asserting any successorship rights against it.

[83] The Non-Profit highlights that Ms. Vermette was present throughout the hearing as the Union's instructing client but was not called by it. The Non-Profit asks the Board to draw an adverse inference from the Union's failure to call Ms. Vermette, the best source of evidence

regarding what she meant when she wrote that the Union had "no concerns" with the Non-Profit's proposal, in her May 5th email.

[84] The Non-Profit submits that Ms. Vermette's statement that the Union had "no concerns" with the Non-Profit's proposal is most reasonably interpreted as an unequivocal representation that the Union would not be advancing a successorship application. The proposal showed that employees at the Shack would be paid at a lower rate than in the Union's collective agreement. If the Union intended to try to enforce the collective agreement with respect to the Shack (as testified by Mr. Thebaud), it would have raised this, and not indicated that it had "no concerns" with the proposal. Alternatively, the Union's representation of "no concerns" was not forthright and was meant to be relied upon by the Non-Profit, to its detriment.

[85] The Non-Profit denies that it committed any unfair labour practice. Further, it submits that even if a successorship occurred, which it vehemently denies, the Union's ambushing it with the successorship issue in late August unfairly prejudiced it by preventing it from collecting dues from employees' wages throughout the summer months.

Relevant Statutory Provisions:

[86] The following provisions of the Act are relevant:

> ***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)

. . .

6-41*(1) A collective agreement is binding on:*

(a) a union that:

(i) has entered into it; or

(ii) becomes subject to it in accordance with this Part;

(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and

(c) an employer who has entered into it.

(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:

(a) do everything the person is required to do; and

(b) refrain from doing anything the person is required to refrain from doing.

(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.

(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

. . .

6-43*(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.*

(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.

(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.

(4) Failure to make payments or provide information required by this section is an unfair labour practice.

. . .

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:*

. . .

(k) to threaten to shut down or move a plant, business or enterprise or any part of a plant, business or enterprise in the course of a labour-management dispute;

Analysis and Decision:

[87] The primary issue before the Board is whether the Non-Profit's acquisition of the Shack engages s. 6-18 of the Act. If does not, none of the relief sought by the Union is available. Accordingly, this issue will be dealt with first.

[88] 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.[40] Subsection 6-18(1) defines a disposal as a "sale, lease, transfer or other disposition". Where such a disposal has occurred, the employer acquiring the business (or part of the business) also acquires the collective bargaining obligations of the previous employer.

[89] Determining whether a disposition of (part of) a business has occurred requires a contextual analysis. In *Singh*,[41] the Board described this as follows (emphasis added):

[40] The term "unionized employer" is used here to refer to an employer subject to a certification order under the Act. For clarity, in this context it is more expansive than the definition of "unionized employer" in s. 6-65(h), which is specific to Division 13 (Construction Industry) of Part VI.
[41] *SJBRWDSU v Charnjit Singh and 1492559 Alberta Inc*., 2013 CanLII 3584 (SK LRB) [*Singh*].

> *[45] 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 purchaser; 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. This concept was stated by the Board in Versa Services Ltd. v. C.U.P.E., supra, as follows:*
>
> > *No list of significance, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.*
>
> *[46] 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 considered 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. See: JKT Holdings Ltd. v. Hotel Employees and Restaurant Employees, Local 767, [1990] 5 C.L.R.B.R. (2d) 316, LRB File No. 149-89. Tracing the business interest back to the previous owner is essential to a finding of successorship as this Board has rejected the proposition that, once a trade union becomes certified at a particular location for a particular type of work, anyone who subsequently opens a similar business at those premises is automatically a successor within the meaning of s. 37 of the Act. See: United Steelworkers of America v. A-1 Steel & Iron Foundry Ltd., et. al., [1985] Oct Sask. Labour Rep. 42, LRB File No. 001-85.*

[90] Though described in the context of s. 37 of *The Trade Union Act*, the considerations mentioned above are equally relevant to s. 6-18 of the Act.[42]

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[42] *Saskatchewan Joint Board, Retail, Wholesale v Broadway Lodge Ltd.*, 2017 CanLII 6029 (SK LRB), at para 25.

[91] As is obvious from the above-quoted passage from *Singh*, the mere fact that the Non-Profit operated a similar business at the Shack (in 2022) to that which had been operated by the City (until some point in 2016) is insufficient to ground a finding of a successorship.

[92] Further, the fact that the Union's collective agreement would have bound the City if the City had reopened the Shack for food and beverage service in 2022 is of very limited significance. Simply put, if that were not the case, the Union's application for the collective agreement to bind the Non-Profit would automatically fail.

[93] Ultimately, the issue boils down to whether the Non-Profit acquired (part of) a business when it acquired the Shack, a "going concern", as opposed to an idle asset. The onus is on the Union to establish this on a balance of probabilities, through sufficiently clear, convincing and cogent evidence.

[94] The Board concludes that the Union has not met its onus.

[95] The length of time the Shack remained idle was lengthy. The Union could not point to an analogous case where an asset had sat idle for five years and a successorship had been found. The City did not use the Shack for food and beverage sales from 2017 onward; it was used for storage. Importantly, none of the Union's members had any responsibilities with respect to the Shack from 2017 onward. The Shack's washrooms were maintained by a different union (CUPE Local 160) until the Non-Profit acquired it.

[96] Apart from the Shack itself, the only thing the Non-Profit acquired from the City through its sale was a Coca-Cola branded cooler. The Non-Profit relied on its own business, the Rock and Iron, and particularly its staff, equipment and other arrangements (e.g., its liquor license, its food and ingredient acquisition arrangements) to make the Shack operational. It did not acquire a business with a "beating heart"[43] when it acquired the Shack.

[97] The Union's suggestion that Mr. Myers' provision of services (through his corporation) to both the City and the Non-Profit assists its position is not accepted by the Board. The Board notes that the Union did not bring a common employer application with respect to the Shack pursuant to s. 6-20. Further, the Board heard no evidence that Mr. Myers had any particular expertise relevant to operating the Shack, or that such expertise (if any) was acquired by the Non-Profit as

[43] *Singh*, para 57.

a result of the Shack's sale. As aforementioned, the Non-Profit already had what it needed to make effective use of the Shack through the Rock and Iron.

[98] The Board accepts that the Non-Profit's operation of the Shack enhanced golfers' experiences and provided an indirect benefit to the City-owned golf course. However, the fact that the City stood to benefit from the Shack being operated, and had an option to repurchase it for a nominal sum if it was not being so operated, does not mean that the City sold the Non-Profit a business, as opposed to an idle asset. The Non-Profit was already servicing the area in the vicinity of the Shack through its mobile carts (see paragraph 16 of these reasons). The City's option to repurchase the Shack was effectively a restrictive covenant on its use, which is understandable from a public policy perspective.

[99] The Board rejects the Union's submission that the City's participation in these proceedings suggests that it sold the Non-Profit "a going concern". The City was named as a respondent to the Union's application and had standing as of right to participate in the proceedings. The Board has found the City's participation helpful. The fact that it participated in the proceedings does not lead to the conclusion the Union asks the Board to draw.

[100] The Board similarly rejects the Union's contention that the Council's receptiveness to the Non-Profit's concerns during the fall of 2022 indicates collusion or is supportive of the Union's application. Council, as one might expect, wanted to understand whether the City had misrepresented matters in the spring of 2022 to the Non-Profit's detriment. Misrepresentation claims are actionable and can result in civil liability.

[101] Because the Board concludes that s. 6-18 does not apply to the acquisition of the Shack by the Non-Profit, it does not need to consider whether the doctrines of waiver or promissory estoppel prevent the Union from relying on the section.

[102] As conceded by the Union, its unfair labour practice allegations fail because the Board has concluded that the Non-Profit was not a successor employer to the City. By way of brief explanation, the Non-Profit had no obligations under the collective agreement with respect to the employees at the Shack. Further, the Union did not represent employees at the Shack after it was acquired by the Non-Profit.

[103] The City requested costs, but did not strenuously argue for same. The Board appreciates that the City was required to deal with allegations of inappropriate conduct and collusion, which the Board has rejected. On balance, the Board considers the City's communications in May of

2022 to have been more transparent than the Union's. However, it bears reminding that costs are not awarded by the Board in the same way as by the Court of King's Bench.[44] The City has not pointed to any provision of the Act upon which it relies for costs, and the Board declines the City's request.

[104] The result of these reasons is that the Union's application is dismissed. An appropriate order will issue.

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

DATED at Regina, Saskatchewan, this **15th** day of **August, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

[44] *Andritz Hydro Canada Inc. v Timothy John Lalonde and Director of Occupational Health and Safety*, 2021 CanLII 61031 (SK LRB), at paras 29-33.