**Les Cahiers de droit**

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Volume 9, numéro 3, septembre 1968

URI : https://id.erudit.org/iderudit/1004510ar
DOI : https://doi.org/10.7202/1004510ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Hickling, M. A. (1968). An Employer's Inheritance in Labour Law. *Les Cahiers de droit*, *9*(3), 461–526. https://doi.org/10.7202/1004510ar

# An Employer's Inheritance in Labour Law

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# An Employer Inheritance in Labour Law

## Introduction

One of the least satisfactory and ill considered aspects of collective bargaining law today it that relating to the succession of an employer to the rights and obligations of his predecessor. Statute law across the country reflects no coherent policy. Some jurisdictions have made no provision at all upon the matter [1], and in those provinces which have no two rules are alike [2]. There is no agreement either as to who succeeds or as to the nature and scope of their inheritance.

The same lack of a coherent policy is reflected in the broad divergencies of approach between the various Labour Relations Boards [3], between the Boards and the courts, and between the various courts in the hierarchy [4]. In this state of affairs legislative attempts to define the public interest in this area were probably inevitable. But were they *really* necessary ? Under the stimulus of Supreme Court decisions sympathetic to the requirements of a sound labour policy some Boards at least might have been persuaded to work out satisfactory solutions to successor problems by using their statutory powers to identify an

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1 Canada, New Brunswick (where legislation was proposed and withdrawn in 1964), and Prince Edward Island.

2 Compare *Alberta Labour Act*, R.S.A. 1955, c. 167, s. 74 ; *British Columbia Labour Relations Act*, R.S.B.C. 1960, c. 205, s. 12(11) ; *Manitoba Labour Relations Act*, R.S.M. 1954, c. 132, ss. 10(1)(d), (3) and (4), 18(2) and (3) ; *Newfoundland Labour Relations Act*, R.S.N. 1952, c. 258, s. 21A ; *Nova Scotia Trade Union Act*, R.S.N.S. 1967, c. 311, s. 21 — there is no corresponding provision in the *Fishermen's Federation Act*, R.S.N.S. 1967, c. 110 ; *Ontario Labour Relations Act*, R.S.O. 1960, c. 202, s. 47A ; *Quebec Labour Code*, R.S.Q., 1964, c. 141, s. 36 ; *Saskatchewan Trade Union Act*, R.S.S. 1965, c. 287, s. 33.

3 Compare the narrow legalism of the Ontario decisions dealing with legal personality and the corporate veil, *infra*, p. 467, with the decision of the B.C. Board which led to the *White Lunch* Case, *infra* p. 475.

4 See and compare the opinions expressed in *White Lunch Ltd.* v. *Nielsen*, (1962) 63 C.L.L.C. 15,453 (Lord J.) ; *R.* v. *Labour Relations Board, ex. p. White Lunch Ltd.*, (1963) 42 D.L.R. (2d) 364 (Sullivan J.), affirmed (1965) 51 D.L.R. (2d) 72, reversed *sub nom Bakery and Confectionary Workers International Union of America, Local 468* v. *White Lunch Ltd.*, [1966] S.C.R. 282, 55 W.W.R. 129. Some arbitrators, too, have privately indicated to the author that they would have been prepared to develop successor rights without legislation.

employer or the parties to a collective agreement and to vary certificates and other orders. The decision of the Supreme Court in the *White Lunch* case shook the assumptions on which the successor legislation is based. It came too late.

It is not without interest to note that in the United States the National Labour Relations Board and the courts and arbitrators have managed to cope with most successor problems without the need for legislative intervention. The case law and practices developed by them are even now undergoing a process of re-evaluation as they seek solutions which will best effectuate the purposes and policies of the labour legislation. The philosophy underlying these developments has recently found expression in the United States Supreme Court in the following words [5] :

> "The objectives of national labour policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship".

There are, of course, differences between United States and Canadian labour law, but they are sufficiently akin to suggest that we might draw profitably upon American experience in testing the validity of our own position. We ought to ask ourselves whether the differences are such as to warrant a different solution to successor problems. Should we be less solicitous than the U.S.A. in protecting the union, the employees or the employer for that matter upon the transfer of an operation ?

It is easy to point out the deficiencies of the successor legislation [6], but the success or failure of the Boards to cope in practice with successor problems is more difficult to assess in view of the paucity of published material available. There have been a handful of court cases in which the issues have been raised directly or indirectly and most of these have been published in one set of reports or another. In Quebec at least seven decisions of the Labour Relations Board [7] and a couple of arbitrations have been reported [8], and over fifty decisions of the Ontario Labour

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[5] *John Wiley & Sons Inc.* v. *Livingston*, 376 U.S. 543, 549, 84 S.C. 909, 11 L. ed. 2d. 898 (1964).

[6] The Deputy Minister of Labour in B.C. confessed in 1962 that the legislation was causing some difficulty — see McKINNON, *Report of Fact Finding Body on Labour Legislation*, Nova Scotia, 1962, at p. 118. Reference was made in particular to problems of sub-contracting, and to transfers of equipment by small logging operators.

[7] Commission des relations de travail (C.R.T.).

[8] Published under the auspices of the Minister of Labour in the 4 volume series, *Décisions sur des conflits de droit dans les relations de travail*, the *Journal du Travail* or *Quebec/Travail*, or in *La Revue de Droit du Travail*.

Relations Board are recorded in its monthly reports [9]. Apart from this there is little concrete evidence to go on. The British Columbia Labour Relations Board in its weekly summary of activities gives out its decisions but without reasons. Upon the basis of that information it is impossible to ascertain how the provisions of section 12(11) of the British Columbia Labour Relations Act are applied in practice. Of the variances of certificate granted in 1967, some 72 involved changes in the employer's name alone, 75 changes of address, 35 changes of both name and address, and 10 other changes in the description of the unit (of which there also involved changes of address). Very few applications were rejected. In addition, 9 certificates were cancelled on the application of the employer on the ground that he had ceased to be the employer of the employees in the unit [10], and 2 on the basis that the unit had ceased to exist. In 2 instances where unions claimed to succeed to bargaining rights exercised by their predecessors it was found that the employer had ceased to exist or to operate in the Province. In one case a union successfully sought a declaration that the respondent was an employer within the Act and bound by a collective agreement.

It may be that some of the changes of name or of name and address could be accounted for by errors in the employer's description in the application for certification or mere changes in the employer's name without more. How many involved the application of the successor provision of s. 12(11) is not known and cannot be ascertained without reference to the facts and these are not readily available since the Board is under a statutory prohibition against disclosing any information contained in its files [11]. The experience of those practising before the Board suggest that it takes a broad view of its powers, and if a case does not fall within s. 12(11), utilises its powers to reconsider and vary decisions under s. 65(3).

## The Nature of the Problem

There are many possible circumstances under which an entreprise may survive a change of employer without there being from a social or economic standpoint any substantial alteration in the real nature of

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[9] Some of these also appear in the *C.C.H. Canadian Labour Law Reporter.*

[10] See *B.C.L.R. Act, supra*, n. 2, s. 12(10)(a).

[11] *B.C.L.R. Act, supra*, n. 2, s. 71(1). The prohibition is not restricted to information which might otherwise be classified as confidential. The only other sources of information are the unions and employers directly concerned. Time did not permit any exhaustive fact finding expedition.

the undertaking. A company may bring about its own elimination by merger, consolidation or other form of corporate reorganization ; an individual or partnership may create a company to take over the operation ; an employer may divest himself of his undertaking by selling, by leasing or assigning the lease of his premises and renting out or selling his equipment [12], or by contracting out the actual operation of his business [13] or the performance of contracts he has obtained [14], or he may dismiss all his employees and contract with another employer, to whom the employees concerned are transferred [15], for the supply of labour. An operation may pass out of the employer's hands without any sale or other disposition by him personally — into the hands of his personal representative or a legatee, or to a trustee in bankruptcy or to a receiver appointed by debenture holders [16]. The employer may choose, upon the termination of the lease of his premises, to retire, his place being taken by a new tenant who takes up the operation where the old one left off [17]. Again, he may be eliminated and replaced by a competitor : an employer with a contact for the cleaning and maintenance of a plant may upon its termination be outbid for its renewal by a competitor who takes over the operation, employees and all [18].

The result in all these situations may be that the employee finds himself still working at the same plant, at the same machine, under the same working conditions, under the same supervision, doing exactly the same job as before, but for a different employer. He may not even be aware of the change. The bargaining unit of employees may be substantially intact, their allegiance to their union unchanged.

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12 See *Kem's Masonry* case, (1964) O.L.R.B. Mon. Rep. Nov. 1964, p. 352 and subsequent proceedings (1964) O.L.R.B. Mon. Rep. Dec. 1964, p. 470 (renting out equipment) ; *Canada Machinery Corporation*, 61 C.L.L.C. 18,005 (1961) (lease of plant and equipment) ; *Coulter Manufacturing Co. Ltd.*, (1964) 14 Lab. Arb. Cas. 325 — rental of space and equipment ; and see *infra*, p. 482.

13 See *Goloff* v. *Local 1-405, I.W.A.*, (1959) 59 C.L.L.C. 15, 436, 15, 437 ; *Rock Water Iron Products*, O.L.R.B. Mon. Rep. Sept. 1964, p. 293 ; *Sherritt Gordon Mines*, (1955) 55 C.L.L.C. 18,005.

14 *E.g., Canadian Ironworkers* case (1964) — an unreported decision of Sullivan J. in B.C. Supreme Court, cited by J. N. LAXTON, *Some Problems arising out of the Transfer of a Business*, unpublished paper given to the B.C. Labour Law Subsection, 27 Jan. 1966.

15 *E.g., Retail, Wholesale and Dept. Store Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589 ; *I.W.A., Local 1-217* v. *Monocrest Kitchens Ltd.*, (1967) 63 D.L.R. (2d) 546 ; and see *Gibsco Transport Ltd.*, (1965) O.L.R.B. Mon. Rep. May 1965, p. 141, review refused July 1965, p. 280 (subcontract of labour and auxiliary services).

16 *Infra*, pp. 509 et seq.

17 See *Bandey* v. *Penn*, (1968) 1 W.L.R. 670 ; *Lloyd* v. *Brassey*, The Times, June 27th, 1968 — decisions on the U.K. Redundancy Payments Act.

18 See the U.S. cases, *infra*, p. 482.

The basic issue to be faced in all these situations is whether it is sound policy from the point of view of stable and peaceful industrial relations to permit a union's bargaining status, or the rights and obligations embodied in collective agreements, to be set at naught by decisions on business reorganization on which the union and the employees are unlikely to have been consulted and in which their interests have been only of peripheral concern if they have figured at all in the decision making process. Is there any essential difference inherent in any of those situations which dictate that it should be handled differently from the rest ? Should a distinction be drawn, for example, between the sale of an undertaking and a disposition by way of subcontract or one resulting from the insolvency of the employer ? What test should be applied to determine if bargaining rights or collective agreements should survive a change of employer ? Should succession be limited to circumstances where the employer is motivated by a desire to rid himself of a union or an agreement and thus avoid his statutory obligations ? Should an employer inherit not only the obligation to bargain but also the collective agreement entered into by his predecessor ? What machinery is required to deal with conflicts over bargaining rights or the application of different agreements when two or more units are merged and the work-forces intermingled ? Which tribunal should decide the issues of succession ? There are some of the issues with which any coherent policy on succession must deal.

## The Situation Prior to Successor Legislation

Any examination of the successor provisions themselves must be preceded by an analysis of the state of the law which rendered them necessary. Not only is this of historical interest, but it has an immediate importance because it may indicate the options which are available in those jurisdictions which have not yet adopted legislative provisions on succession. It may also indicate a number of ways in which defective legislation that does exist may be supplemented.

It is clear that not every change of circumstances affecting the description of the unit will operate to destroy a union, bargaining rights, or for that matter a collective agreement entered into by it. It would be intolerable if following a mere change in the employer's business name or location a union were compelled to apply for a new certificate or renegotiate a collective agreement. In those circumstances the Board may regularise the position by varying the description of

the unit but its intervention is not, it is submitted, a prerequisite to the continued validity of the certification [19]. Different considerations may apply where relocation is accompanied by a merger of two or more undertakings formerly operated by different employers so that the unit is materially altered, especially when those employers were bound to negotiate with different unions [20].

The possibility of developing succession principles without the aid of the legislature received an early setback when the Ontario Labour Relations Board, in a series of decisions impressive if only for its length and consistency, combined the common law notions of separate corporate personality and privity of contract to create an almost insuperable barrier. The experience and example of the United States was rejected and traditional concepts, developed in other areas of law, allowed to thwart the development of principles more in tune with the requirements of modern labour policy. In the majority's view a notice to bargain could only be given to the employer who had been party to the certification proceedings and the ordinary law of contract dictated that a person was not bound by an agreement into which he had not entered. The only circumstance in which the corporate veil would be pierced was when it was clear that a deliberate attempt was being made to frustrate the intent of the legislature by using separate legal personality as a screen or sham for an improper purpose, i.e. as a sham or subterfuge to circumvent a collective agreement or the obligation to bargain.

It mattered not to the Board that the plant, equipment, workforce, products, supervisors and management remained the same, and that the new employer was a company closely associated with its predecessor, a member of the same closely knit corporate family with the same shareholders, directors, sharing the same accommodation and centralized services. Until the union had gone through the process of acquiring certification or negotiating a collective agreement the new employer was

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19 *Cobra Industries Inc.*, (1953) Que. S.C. 298, 53 C.L.L.C. 15,075 (change of name) ; *Edmonton Cooperative Assn. Ltd.*, 61 C.L.L.C. 16,219 (1961) — change of location. The *Companies Acts* provide that change in name shall not affect the obligations of the company — see, for example, *B.C. Companies Act*, s. 48(3). Certain observations in *Mountain View Dairy Ltd.*, O.L.R.B. Mon. Rep. Feb. 1967, pp. 911, 912, suggest that bargaining rights do not continue on a change of location. It is submitted that in so far as they do so those observations are wrong.

20 As in *Syndicat national des employés du Corduroy de la région de Saint-Hyacinthe (C.S.N.)* v. *Union des ouvriers du textile d'Amérique, Local 1562, Décisions sur des conflits de droit dans les relations de travail*, vol. 4, nº· 1562-11 (1965). The observations of Munroe J. in *Retail, Wholesale, etc., Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589, 595, may also be explained on the basis that more than a simple relocation was involved.

under no legal obligation to bargain. The incorporation of a company to take over a firm's business, or a switch of operations from one company to another within a corporate maze put the union and the employees back to square one [21]. The only concession made to unions was to allow them to produce evidence of membership gathered prior to the advent of the new employer [22].

Although the relevance of the traditional dogma was vigorously challenged by the dissenting minority of the Ontario Labour Relations Board, and in Quebec the possibility of the survival of the rights of a union and employees upon the sale of a business was left open in 1958 [23], the majority view appears to have attracted general support elsewhere [24].

Two limitations of the virtual ban on succession merit mention. First, only a change in the legal entity of the employer would seem to work the destruction of certification. Since a partnership is not at common law a legal entity distinct from the aggregate of members, a change in the constitution of a partnership would not have that effect [25]. Nor, for that matter, would a change in ownership of a company brought about by the sale of shares [26].

In the case of an amalgamation of companies the normal rule is that the merger transfers to the amalgamated company all debts, liabilities and obligations of each amalgamating company [27]. This rule would

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21 See *Gordon Wright Electric Ltd.*, (1957) 57 C.L.L.C. 16,058 ; *New Method Laundry and Dry Cleaners*, (1957) 57 C.L.L.C. 16,059 ; *Drake Hotel*, (1957) 57 C.L.L.C. 16,060 ; *Windsor Mattress and Equipment Co.*, O.L.R.B. Mon. Rep., 1959, p. 30 ; *Kemball, Bishop Co. Ltd.*, O.L.R.B. Mon. Rep. Dec. 1960, p. 343 ; *Brantford Produce Co. Ltd.*, (1961) 61 C.L.L.C. 16,193 ; *Dare Foods*, (1961) 61 C.L.L.C. 16,199 ; *Newland-Harding Yarns Ltd.*, (1962) 62 C.L.L.C. 16,229 ; *Loblaw Groceterias Co.*, (1965) 65 C.L.L.C. 16,078 ; *Harding Brantford Ltd.*, O.L.R.B. Mon. Rep. July 1966, p. 245.

22 See *Hamilton Cotton Co.*, March 1962, File n° 18950-59.

23 See *Syndicat National des travailleurs de la pulpe et du papier de La Tuque Inc.* v. *C.R.T.*, [1958] B.R. 1 : Rinfret and Choquette, J. J. at pp. 11 and 38 were in favour of succession, with Saint-Jacques, J., at p. 8, with whom Casey, J., at p. 10 agreed, against.

24 See, for example, *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Co. Ltd.*, (1964) 48 W.W.R. 547 ; *Retail, Wholesale, etc., Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. 589.

25 This was the view of the O.L.R.B. in the *New Method Laundry and Dry Cleaners* case, (1957) 57 C.L.L.C. 16,059 ; a different view was expressed by Mr. Goldenberg, *Royal Commission on Labour-Management Relations in the Construction Industry*, (1962), at p. 44.

26 See *Harvey Gavin* case, (1960) 61 C.L.L.C. 16,183.

27 See, for example, *B.C. Companies Act*, s. 179(11). In the *Loblaw Groceterias* case, (1966) 66 C.L.L.C. 16,078, the parties accepted the proposition that a collective agreement binding on 1 of the former companies was binding upon the amalgamated successor. The Board therefore declined to pronounce upon the effect of an amalgamation.

seem to be applicable to a collective agreement, and possibly also to the statutory obligation to bargain. But where the amalgamation is followed by a fusion of operations and the intermingling of employees the effect may be to destroy the integrity of the unit in respect of which the union was certified, and the problems would be compounded if a multiplicity of unions and agreements were involved [28]. In such situations it is impracticable to apply the ordinary rules of contract and company law.

**Attempts to avoid traditional dogma**

The same traditional concepts which banned the introduction of succession principles by the front door have also served to obstruct their admission by the back.

(a) *Agency*

Thus it has proved impossible so far to establish any agency relationship between affiliated companies so as to render one liable upon a collective agreement entered into by the other [29]. The extent to which the traditional thinking has been carried is well illustrated by the *Harding Brantford* case [30]. In 1964 Harding Carpets Ltd. decided to take advantage of federal legislation providing tax incentives and to expand its tufted carpeting operations. In order to gain the tax benefits it was necessary to bring into existence a new employer and install it in separate premises. A wholly owned subsidiary of Harding Carpets was therefore incorporated under the name of Harding Brantford Ltd., and a plywood partition erected between the existing plant of Harding Carpets and space to be occupied by the new company. Employees of Harding Carpets carried on the manufacture of tufted carpeting on one side of the partition and employees of the subsidiary company carried on the same manufacturing operation on the other. The two companies had a common management, the same person being industrial relations manager for both companies, and a common labour policy. There was a substantial interchange of employees, this being facilitated by a common seniority roll. Each company kept separate records, the employees

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[28] See the *Sully Foundry* case cited in *Newland-Harding Yarns*, (1962) 62 C.L.L.C. 16,229.

[29] See *Amalgamated Lithographer's of America, Local 440* v. *National Paper Box Ltd.*, (1964) 48 W.W.R. 547 — this point was apparently argued though no reference is made to it in the reports — see J. N. LAXTON, *loc. cit. supra*, n. 14. Mr. Laxton was counsel for the union ; *Retail, Wholesale, etc., Union, Local 580*, (1966) 57 D.L.R. (2d) 529 ; and see also *Loblaw Groceterias Co.*, (1965) 66 C.L.L.C. 16,078.

[30] O.L.R.B. Mon. Rep. July 1966, p. 245.

being paid in any particular week by the company for whom they worked in that week.

In October 1964, after the incorporation of the new employer, but before it had hired any employees, representatives of Harding Carpets and of the Canadian Textile Council which represented the employees in the original plant, executed a document purporting to amend the collective agreement between them in order to extend its coverage to employees of the new company and protect the seniority and other contractual rights of employees who might be transferred to the new operation. No one purported formally to execute the document on behalf of the new company.

In 1966 management decided to establish an automotive division of Harding Brantford, and owing to shortage of space on the old site, a new plant was constructed to house it at a different location. Before actual production had commenced there the Textile Workers' Union applied for certification as bargaining agent at the new plant. The Canadian Textile Council intervened and raised the agreement of October 1964 as a bar to certification. The Board rejected its plea on four grounds. First, despite the close relationship between the two companies they were at law separate and distinct legal entities. Secondly, by the general principles of contract a person was not bound by an agreement entered into by two others. The subsidiary company had not been party to the amended agreement of 1964. Thirdly, there was no evidence that Harding Carpets had purported to or did in fact execute the amendment to the collective agreement as agent for Harding Brantford, and hence the intervener did not acquire by it any bargaining rights in respect of the new company's employees. Fourthly, even if Harding Brantford had been party to the purported amendment, the union could not have acquired bargaining rights thereby since at that time Harding Brantford had no employees. An attempt to remedy the situation subsequent to the Textile Workers' Union application by a new collective agreement covering the employees of both companies could not operate as a bar. The Board further pointed out that the two companies being separate employers, their employees were not eligible in Ontario for inclusion in the same bargaining unit as the Board had jurisdiction only to certify for units of a single employer.

One can understand the sense of frustration felt by both employers and management on hearing a pronouncement such as this ! [31]

[31] The Board found the Harding Brantford employees to constitute an appropriate unit but postponed any final determination on the application in view of a planned programme for expansion of the workforce.

**(b) *The functional control theory***

Taking another tack, it has been argued that, whatever solution the traditional dogma might dictate in other contexts, in determining for the purposes of the Labour Relations Acts the identity of the true employer of a group of employees the separate corporate existence of parent and subsidiary companies or of companies engaged with others on a joint commercial enterprise should be disregarded and that the associated employers be treated as a single commercial and legal unit. If such a concept were adopted an employer would not be able to escape his obligations by corporate juggling.

This approach, which involves looking at the underlying economic facts rather than technical legal classifications established in the past for other purposes, is not new. It was adopted in the United States in order to confer jurisdiction upon federal tribunals and enable effective remedial action to be taken against unfair labour practices and give efficacy to the obligation to bargain in good faith. It was achieved by giving the definition of employer in the National Labour Relations Act [32] a wide connotation — ". . . any person acting as the agent of an employer directly or indirectly . . ." The basic test in determining whether a company other than the immediate employer can be fixed with responsibility is whether there is the same control over labour policies.

This type of argument seems to have made its first tentative appearance in Canada in 1962 when the Ontario Labour Relations Board declined to consider it on the merits on the ground that the evidence did not establish that the companies concerned were engaged in a joint enterprise so as to constitute a single commercial entity. It did not decide in what circumstances they might have constituted a single legal entity for the purposes of the Act [33]. The argument was broached again in the *Amalgamated Lithographers'* case [34] and summarily rejected. After full consideration in 1965 it was dismissed by the Ontario Labour Relations Board as forming no part either of the common law or of the Labour Relations Act [35]. The case in question involved an attempt by

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[32] 49 Stat. 449 as subsequently amended, s. 2(2). The definition formerly spoke of "... any person acting in the interest of the employer ..."

[33] *Newland-Harding Yarns Ltd.*, (1962) 62 C.L.L.C. 16,229, at p. 1019.

[34] *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Ltd.*, (1964) 48 W.W.R. 547 (Branca, J.) ; and see J. N. LAXTON, *loc cit. supra*, n. 14.

[35] *Loblaw Groceterias Case*, (1965) 66 C.L.L.C. 16,078 ; cited in *Goldlist Construction Case*, O.L.R.B. Mon. Rep. March 1967, p. 1016, and in *Retail, Wholesale, etc., Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589.

a union certified in respect of the employees of a parent company to assert a claim to bargaining rights in respect of employees on the payroll of a subsidiary company over whom another union also claimed jurisdiction. The applicant union sought a declaration that the parent was the real employer of the subsidiary's workforce and founded its case on the ground, *inter alia,* of the "close corporate and functional control" exercised by the parent company. The operations of the corporate family were closely integrated and the parent had complete dominion over the labour relations of its subsidiaries.

The refusal to pierce the corporate veil, the absence of a broad enough definition of employer and provisions which make the inclusion within the same unit of the employees of more than one employer dependent upon the consent of all employers concerned [36] render impracticable the introduction of this concept on the basis of present legislation and practice in Canada. This does not mean that it might not have a beneficial effect if appropriate legislative changes were made.

From a union standpoint it may be argued that it would make for more realistic bargaining. At the moment an employer can limit the range and effectiveness of the economic sanctions a union can bring to bear by a proliferation of companies or by sub-contracting the substance of his enterprise to a so-called independent contractor [37]. The creation of a direct bargaining relationship with a parent company for employees of a subsidiary would enable the union to bargain with and use its economic strength against the parent, and presumably against all other subsidiaries. It would not be possible for those in control to shed their responsibilities by switching an operation from one employer to another within the same corporate complex. Further the functional control theory might make for more effective remedial action against unfair labour practices.

On the debit side the Board foresaw the opening of a Pandora's box of problems. The main difficulty, in its opinion was in the application of the 'functional control' test. For example, it might create an employer-employee relationship between an employee and a corporation far removed from the immediate employer ; problems would arise when a company with an agreement was taken over by another with functional control ; the test would necessitate an exhaustive analysis of the entire corporate complex to ferret out the right degree of 'function-

[36] See *Canada Industrial Relations and Disputes Investigation Act,* R.S.C. 1952, c. 152, s. 9(3) ; *B.C.L.R. Act,* s. 10(2), (3) ; *Manitoba L.R. Act,* s. 10(3) ; *N.B.L.R. Act,* s. 8(3) ; *N.S.T.U. Act,* s. 9(3).

[37] *E.g., Goloff* v. *Local 1-405 I.W.A.,* (1959) 59 C.L.L.C. 15,436, 15,437 ; *White Lunch Ltd.* v. *Nielsen,* (1962) 63 C.L.L.C. 15,453.

al control'. It may be that the problems were overstated and the test of functional control too loosely interpreted. At any rate the concept was rejected. Its application on the facts of the particular case would have served only to exacerbate relations between employer or employers, their employees and the union claiming to represent them. But on the view taken by the Board, the same decision would have been reached had no union other than the applicant been involved.

The Board indicated that its stance on lifting the corporate veil was unchanged [38]. Only when satisfied that the device of separate corporate personality is being used as a screen for an improper purpose will it be prepared to designate one company as the real employer of employees engaged by another affiliate. The same approach has been adopted in determining the identity of the employer where a business operation has been let out to a subcontractor. The absence of any legitimate business excuse for subcontracting, the degree of control retained by the contractor, the timing of events are evidence of improper purpose, but no more [39]. In this respect the attitude of the Board is consistent with that displayed by the courts in similar cases, though an examination of the decisions of both leaves one with the impression that the courts require somewhat stricter proof of improper purpose than would satisfy the Board [40]. Cases in which a union's claim has succeeded are few and far between. A recent illustration is to be found in *International Woodworkers of America, Local 1-217* v. *Monocrest Kitchens Ltd.* [41], a case in which the employer, trapped between warring unions was not entirely undeserving of sympathy. The facts were as follows :

H. & M. Cabinets Ltd. was a corporate company owned and controlled by two families, the Harrises and Myseks, and engaged in the manufacture and installation of household cabinets. It had a collective agreement with the Carpenters' Union covering both inside and outside workers. In 1966 it fell upon hard times and a new company, Monocrest Kitchens Ltd. was incorporated to take over its business. Although the shares of this company were held by nominees of a lumber company

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38 *Supra*, p. 467.

39 See *Rock Water Iron Products*, O.L.R.B. Sept. 1964, p. 793, where the Board found the union's claim established : *compare Goloff* v. *I.W.A., Local 1-405*, (1959) 59 C.L.L.C. 15,436, 15,437.

40 See *Goloff* v. *I.W.A., Local 1-405*, *supra* n. 39 ; *Retail, Wholesale, etc., Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589, at 594. *Compare Rock Water Iron Products*, *supra* n. 39.

41 *International Woodworkers of America, Local 1-217* v. *Monocrest Kitchens Ltd.*, (1967) 63 D.L.R. (2d) 546 (a decision of Judge K. Smith acting as Local Judge of the B.C. Supreme Court) ; for further proceedings see *Monocrest Kitchens Ltd.* v. *Evans*, (1967) 63 D.L.R. (2d) 553.

which had provided the necessary capital to bail out the operation, the Harrises and Myseks retained a major interest in its success. Both families were represented on the board of directors, Harris being the general manager and the 'guiding force' and Mysek the production and shop manager for both companies. H. & M. still owned the machinery used on the plant, and the premises on which it stood were owned by yet another company controlled by the two families. Monocrest Kitchens paid H. & M. a nominal rental for the premises, but there was no formal assignment of the lease.

In May 1967 the I.W.A. was certified in respect of the inside workers and gave notice to bargain. Under strong pressure from the Carpenters' Union the directors decided to reactivate the dormant H. & M. company and to contract out to it the job of furnishing the inside labour force required by Monocrest. 15 of the 45 inside staff were persuaded to resign their jobs with Monocrest and were immediately hired by H. & M. They continued to work at the same plant on the same job. On payday Monocrest gave H. & M. a cheque for the exact amount due to the latter's employees. Ultimately, on the day the I.W.A. presented its bargaining demands, the remaining I.W.A. workers were laid off.

The effect of this devious manoeuvre was that the establishment continued to operate in the same plant, using the same machinery, producing the same products for use on the same jobs on the same basis, but with the interposition between Monocrest and the employees of a new employer. Because of the degree and nature of the control exercised by Monocrest over H. & M. the latter could hardly be regarded as an independent trading unit, or the transaction one entered into at arm's length. The court tore down the corporate veil separating the two companies and branded the transaction between them a direct and deliberate effort to circumvent the I.W.A. certification entitling it to an injunction to restrain breaches of the Labour Relations Act. That was the true reason for and effect of the arrangement and the court refused to allow it to be concealed by a legal fiction [42].

### (c) *The power to vary order*

The various boards have conferred upon them powers, expressed in the broadest terms, to identify the employer, the parties to a collective

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[42] The learned judge also held that having regard to its purpose the release of the I.W.A. staff constituted a lockout and was not protected by the *B.C.L.R. Act*, s. 53 which permits suspension or discontinuance of operations in an employer's establishment for a cause not constituting a lockout.

agreement and to reconsider and vary any decision or order made by them [43]. The potentialities of these powers in the field of employer succession are obvious. If the board can substitute in the certificate or other order the name of a new employer for that of his predecessor then a ready made instrument exists for effecting practical solutions to successor problems.

There is little or no evidence in the legislative debates as to what was intended. No one would dispute the use of the power to vary decisions and orders in the case of a mere change of name or of address. But could the Board substitute one legal entity for another ? If the traditional emphasis were placed upon the fiction of separate corporate personality the answer would surely be negative unless there were evidence of bad faith [44]. The scope of the Board's power to vary a certificate had been the subject of one decision of the Supreme Court in 1963 [45] when it was held that upon a merger of nine local unions the Board could substitute in the certificate the name of the amalgamated union for that of its predecessors. As Judson J. pointed out the essential problem was one of the representation of a group of employees and concepts concerning a change of identity derived from the law of companies afforded no assistance in its solution. The new union was a different association of employees from its predecessors but it was a successor to them : there was a continuity of interest, property, management, representation and personnel. The Supreme Court asked if the purposes of the Act would be served by compelling the amalgamated union to apply for a new certification. It concluded that they would not and s. 65 of the Act authorised the action of the Board. A similar question may be posed in relation to employer succession. Would the purposes and policies of the Act be best served by upsetting decisions of the Boards which recognized that an enterprise had passed into new hands substantially intact and which rendered it unnecessary for a union to re-establish its bargaining status or to re-negotiate a collective bargain ? No clear, conclusive answer has yet been given by the Supreme Court

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[43] See *I.R.D.I. Act*, s. 61 ; *Alta. Labour Act*, s. 70 ; *B.C.L.R. Act*, s. 65 ; *Man. L.R. Act*, s. 59 ; *N.B. L.R. Act*, s. 55 ; *N.S.T.U. Act*, ss. 7A, 58 ; *Ont. L.R. Act*, s. 79 ; *P.E.I. I.R. Act*, s. 12 ; *Quebec Labour Code*, s. 117 ; *Cp. Sask. T.U. Act*, s. 5.

[44] The view expressed in *Windsor Mattress and Equipment Co.*, O.L.R.B. Mon. Rep. 1959, p. 30.

[45] Re *Okanagan Federated Shippers' Assn.*, (1961) 27 D.L.R. (2d) 655 (Brown, J.), reversed (1962) 32 D.L.R. (2d) 440 (C.A.), reversed *sub nom Labour Relations Board of B.C.* v. *Oliver Co-op. Growers' Exchange*, [1963] S.C.R. 7, 35 D.L.R. (2d) 694. The Supreme Court of Canada approved the opinion of Brown, J. at first instance and of Davey, J. A., dissenting, in the B.C. Court of Appeal.

of Canada, but the *White Lunch* case [46] is an indication of the direction in which the court is moving. It refused to disturb the decision of the B.C. Labour Relations Board to substitute in a bargaining certificate and in orders designed to remedy unfair labour practices the name of a parent company for that of a defunct affiliate.

White Lunch Ltd. carried on an extensive restaurant business and by itself and through subsidiaries also operated bakeries and a number of retail outlets. Clancy's Pastries Ltd. was one of those subsidiaries. Although it was separately incorporated, held the lease of its premises in its own name and (on the insistence of White Lunch) had been treated as a separate employer for the purposes of certification, the two companies had much in common. They had the same shareholders, general manager and president, and their operations were closely interrelated. The same group insurance covered both. Books of account for all the subsidiaries were kept by White Lunch. The companies were linked by advertising, and White Lunch appeared as the employer on T4 slips for income tax purposes.

The Union's certification in respect of Clancy's employees dated from 14th October 1962. Notice to bargain was given shortly thereafter. When managements final offer was declined by the union, certain pastry items were discontinued and a number of employees laid off. On November 8th 1962, the Board found Clancy's guilty of unfair labour practices in relation to the dismissal and directed that the company cease and desist coercion and intimidation intended to discourage union membership and reinstate two employees without loss of wages. On November 24th a meeting of Clancy's shareholders decided that the company should go into voluntary liquidation. On February 13th 1963 the Board deleted the name Clancy from the certificate and other orders made and substituted that of White Lunch.

On February 18th it required the latter to commence bargaining. The orders were duly filed with the Registrar of the Supreme Court and by virtue of s. 7(5) of the B.C. Labour Relations Act took effect as if they were orders of the court.

The action of the Board was especially noteworthy for it had in effect overruled, upon the same evidence, the opinions expressed the previous December by two members of the British Columbia Supreme Court. Following the demise of Clancy's Pastries the premises of White Lunch were picketed. The company sued for a declaration that it was

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[46] *Bakery and Confectionery Workers' International Union of America, Local 468* v. *White Lunch Ltd.*, [1966] S.C.R. 282 ; 55 W.W.R. 129 — decided January 25th, 1966.

not the employer of workers engaged by Clancy's Pastries and for an injunction. An interim injunction was granted by Sullivan J. and continued until trial by Lord J., both holding that White Lunch was not the employer [47].

When the validity of the Board's action was duly challenged by White Lunch, Sullivan J. granted certiorari [48], and his opinion was upheld by the B.C. Court of Appeal [49]. The situation did not fall within the successor provision, s. 12(11), and in their opinion there was no continuity as there had been in the earlier decision of the final appellate tribunal. The Board could not substitute one entity for another. They were in turn reversed by the Supreme Court of Canada [50]. In deciding to refuse to interfere with the Board's decision the Supreme Court was not deterred by the spectre of separate corporate personality : it simply ignored it. No reference is made in the judgment to the 'corporate veil'. Nor was there any express finding that the winding up of Clancy's was prompted by bad faith or an improper purpose on the part of its proprietors. Sullivan J. at first instance thought that they were motivated solely by sound economic reasoning [51]. The Supreme Court of Canada did, however, draw attention to the cogent evidence on which the Board had acted : the facts that the original application had named White Lunch as employer, that rumors became rife at the time the union began organising that the company would go out of business ; that nothing was said to the Board about the winding up at the November hearing although it was in the air, and that at the time of liquidation the company's officers were even then purporting to bargain.

The court emphasised once again the plenary nature of the Board's powers. It was reluctant to interfere with the Board's assessment of the evidence and was prepared to allow it to administer the Act in a manner most conductive to industrial peace. To have refused to allow variance in the circumstances of this case would have rendered ineffectual the remedial orders of the Board. Had this spirit of interpretation prevailed earlier then further legislation on succession might have been unnecessary. As it is the Board's powers could operate as a substitute where no successor provision exists or as a supplementary device where

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47 See *White Lunch* v. *Nielsen*, (1962) 63 C.L.L.C. 15,453.

48 *R.* v. *Labour Relations Board, ex. p. White Lunch*, (1963) 42 D.L.R. (2d) 364 (decided Oct. 8th, 1963).

49 (1965) 51 D.L.R. (2d) 72 (decided March 23rd, 1965).

50 *Bakery and Confectionery Workers International Union of America, Local 468* v. *White Lunch Ltd.*, [1966] S.C.R. 282 (decided Jan. 25, 1966).

51 See *R.* v. *Labour Relations Board, ex. p. White Lunch Ltd.*, (1963) 42 D.L.R. (2d) 364.

its scope is limited. It must be confessed that there is little concrete evidence that this new spirit has rubbed off on the courts or the other boards [52].

### (d) *Imposition of liability by contract*

Some collective agreements in Canada have sought by their terms to impose liability upon employers taking over an operation [53]. The possibility of such a provision being effective is remote. The doctrines of privity of contract, separate legal personality and the statutory definitions of collective agreement would probably operate to defeat such a clause. There is, however, a death of authority on this matter. Apart from a rather cryptic statement in a briefly quoted arbitration case to the effect that a successor entity, though controlled by the same individuals as the employer who executed the agreement, is not bound by the collective agreement *unless the agreement in question so provides*, there is nothing in the recorded decisions to hold out any hope of successfully pleading such a clause [54]. A term in a contract, under which a lessee took over a business, requiring the transferee to observe the terms of the contract with the union has been held not to impose any obligation which the union could enforce [55]. Further, an informal undertaking by the new employer to abide by the terms of the bargain would not constitute a collective agreement within the statutory definition so as to entitle the union to conciliation services [56].

### Effect on Certification of a Transfer of Operations

If the employer ceases to exist on or after the transfer of his operations all rights under a certificate naturally lapse. But if the employer

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52 It does seem to have influenced the Canadian Labour Relations Board in the *Arrow Transit Lines* case, decided 30 August 1967, C.R.L.B. Reasons for Judgment n°· 7, 1967, *Labour Gaz.*, Supp. 19.

53 For an example, see *Retail, Wholesale, etc., Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589. No argument appears to have been based upon this as distinct from s. 12(11) of the *B.C.L.R. Act.*

54 *Wainfleet Plumbing* case, (1962) 13 Labour Arbitration Cases 95, Reville, C.C.J.

55 *Canada Machinery Corporation*, (1961) 61 C.L.L.C. 16,196.

56 *Id.* The statutory definitions speak of an agreement in writing between an employer and trade union, and provision is made for execution, etc. *Compare* the position in the U.S.A. where an assumption of a collective agreement binds an employer, though a clause in the agreement purporting to do so will not do so per se : see *C.F.M. Co.*, (1962) 37 Labor Arb. Cas. 980 ; and see PATRICK, "Implications of the John Wiley case for Business Transfers Collective Agreements and Arbitrations", (1965) 18 *S.C.L. Rev.* 413, at 416 ; SHAW and CARTER, "Sales, Mergers and Union Contract Relations", N.Y.U. *Conference on Labor*, 357, (1966) 19th Annual, at 372, 373.

continues to exist as a legal entity the certificate does not die but continues in a dormant state and may be revitalized upon the employer resuming the activities concerned [57]. A dormant certification is usually an empty right and the bare possibility of revival of little protection when the employer has permanently disposed of his operations to another [58].

Where a transfer of employees has resulted in no substantial impairment of the identity of the unit a union formerly certified in respect of them may be able to persuade the board upon a new application for certification that it still represents a majority in a unit appropriate for bargaining purposes [59]. But where a different union is certified in respect of the employees of the new employer or has entered into a collective agreement with him, the certification or agreement may be raised by the employer or the other union as a bar to the application.

Now it is a well established rule that where new employees fall within the description of an existing unit they become subject to the collective agreement applying to that unit and the incumbent union becomes their bargaining representative. They are bound to accept the conditions of employment at the time they are engaged. This accretion rule is clearly appropriate in the ordinary case of an increase in the size of a unit by the hiring of new employees. It has also been applied where the acquisition of new employers has been brought about by the take over of a business operation. The test applied in determining whether new employees are covered is whether they fall within the scope of the unit described in the certificate or collective agreement [60]. Thus when company A takes over the operations of company B and transfers all that company's employees to its own payroll, the claim of a union certified in respect of "all employees of company A" to represent the former employees of company B is automatically established.

If the employees of company B were not represented, or were represented by a body which is not a trade union within the statutory

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57 See *Burns & Co. Ltd.*, (1961) 61 C.L.L.C. 16,213 ; *Brantford Produce Co.*, (1961) 61 C.L.L.C. 16,193 ; *Newland-Harding Yarns*, (1962) 62 C.L.L.C. 16,229 ; *J. Blum Sheet Metal*, O.L.R.B. Mon. Rep. July 1962, p. 144 ; *Retail, Wholesale, etc., Union, Local 580* v. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589.

58 It might be of some value in the case of a revival of a dormant company — see *I.W.A.* v. *Monocrest Kitchens Ltd.*, (1967) 63 D.L.R. (2d) 546.

59 See, for example, the order of the Board in the case of *R.* v. *B.I.R. (Alta.), ex. p. Westeel-Rosco Ltd.*, (1967) 67 C.L.L.C. 14,018. Which was overruled on an application for certiorari by the employer. *Compare* the Board's decision in *Attridge & Miller Machine Works*, (1961) 61 C.L.L.C. 16,196, where the identity of the unit was impaired.

60 See *Polymer Corporation*, (1951) 3 Labour Arbitration Cases, 970 ; *Newlands-Harding Yarns Ltd.*, (1962) 62 C.L.L.C. 16,229, cited in *R.* v. *B.I.R. (Alta.), ex. p. Westeel-Rosco Ltd.*, (1967) 67 C.L.L.C. 14,018 ; and see also *Kelvin-Thompson Co. Ltd.*, O.L.R.B. Mon. Rep. Feb. 1966, p. 822.

definition and therefore incapable of being certified [61], no contest will arise. But should the rule be applied arbitrarily where a conflict between unions does arise ? It may preclude the board from reaching what it regards as a common sense solution in keeping with the wishes of the employees concerned [62]. Must the interests of the new employer in having one union represent all employees under his flag or of the incumbent union always outweigh the interest of the employees in self determination ?

The effect of rigid application of the accretion rule is that if company A gains control of company B the effect upon the bargaining unit and the rights of the union representing the latter's employees depends upon whether company A decides to leave company B as employer of employees within the unit, or to close it down and transfer its employees to the company A payroll. The new employer, by prior arrangement with its incumbent union, amending if necessary the collective agreement and description of the unit, can deprive the employees of freedom of choice. If the rule is strictly applied it does not matter if the unit is still identifiable or if its identity has been lost or substantially impaired by the merger of plants or intermingling of employees.

Only occasionally have the boards been able to avoid the contract or certification bar : the *Halifax Corduroy* [63] case is one example. The Textile Workers' Union was certified for employees of Halifax Corduroy Ltd. at Lachine, and the C.S.N. for employees of Canadian Corduroy Ltd. at St. Hyacinthe. Halifax Corduroy purchased the assets of Canadian Corduroy on the latter's bankruptcy and decided to transfer its own operations, including machinery, equipment and personnel to St. Hyacinthe. It agreed with the Textile Workers' Union to apply the collective agreement to the St. Hyacinthe plant. This extension had not been deposited and under the Quebec Labour Code did not take effect. The certification in respect of employees at Lachine did not follow the removal to St. Hyacinthe so as to bar the C.S.N. from applying for certification. By the date of the hearing it represented a majority of the combined employees.

The present rules on certification or contract bar seem too rigid to deal satisfactorily with successor situations.

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61 See *Canadian Valves Ltd.*, O.L.R.B. Mon. Rep. June 1967, p. 297.

62 In the case of *R.* v. *B.I.R. (Alta.), Westeel-Rosco Ltd.*, (1967) 67 C.L.L.C. 14,018, the learned judge thought the Board had ignored the common-sense of the matter. Are the courts the sole repositories of common sense, or the best arbiters of the public interest in the field of labour relations ?

63 *Décisions sur des conflits de droit dans les relations de travail*, (1965) vol. 4, nos 1592-11.

## Successor Legislation

It is proposed to examine now the solution to the various problems posed earlier, comparing the position in the various provinces of Canada with that in the U.S.A. We shall see that there is in Canada a considerable discrepancy in the scope and contents of the various sections. It may be observed, with some justification, that in varying degrees all are ill-drafted and obscure, and that insufficient attention has been paid by the legislator to the relationship between these and other provisions of the same legislation. It will be submitted that none of them deal satisfactorily with all the substantive problems of succession.

Only in Manitoba was an attempt made to integrate the successor provisions with the remainder of the Act by embodying them in the context of general sections setting forth the effect of a change of employer upon certification and collective agreements [64]. In other provinces legislative policy was to introduce a single separate section dealing with the problem of succession, leaving the remainder of the statute intact. The relationship between the successor provisions and the remainder of the statute is not always a model of clarity. In Manitoba, Newfoundland and Nova Scotia collective agreements are declared to be binding upon the new employer but he is not made a party to the agreement [65]. Since the object of the successor provisions is manifestly to procure bargaining rights whether stemming from certification or a prior collective agreement between the union and the predecessor employer, the courts will no doubt manage to gloss over the fact that only *a party* to a collective agreement can give notice to an employer to bargain with a view to the renewal or revision of a collective agreement or the negotiation of a new one [66]. There is a difference between being bound by an agreement and being a party to it. Even the Ontario legislation has not been free from difficulty despite the most elaborate attempt to relate bargaining rights acquired by succession to the provisions of the statute in general [67].

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[64] *Man. L.R. Act*, sections 10(1)(d) and 18(1)(c) respectively.

[65] *Man. L.R. Act*, s. 18(1)(c) ; *Newfoundland L.R. Act*, s. 21A(2) ; *N.S. Trade Union Act*, s. 21. *Compare B.C.L.R. Act*, s. 12(11) ; *Alta. Labour Act*, s. 74 — where the agreement is declared to be binding to the same extent as if signed by the successor ; *Que. Labour Code*, s. 36(2) — new employer bound as if named in the agreement ; *Sask. T.U. Act*, s. 33 — as if signed by the successor. The position is made quite clear in *Ont. L.R. Act*, s. 47(2).

[66] *Man. L.R. Act*, s. 13 ; *Newfoundland L.R. Act*, s. 13 ; *N.S. Trade Union Act*, s. 13.

[67] The gap exposed by *William Gunter*, (1964) 64 (3) C.L.L.C. 16,010, has now been plugged. Subsection 9 of s. 47a originally contained no reference to s. 45.

### 1. The Test

Who is a successor for the purposes of the law on labour relations ?

In the U.S.A. an employer succeeds to the rights and obligations of his predecessor when it can be shown that there is a substantial continuity in the employing industry. This involves a comparison of the undertaking before and after the change of employer. The location of the new business [68], its name, the use of the same premises and equipment [69], similarity in the size and nature of the work force [70], supervisory personnel and management, in the mode of operations, the nature and extent of the business [71], the finished products [72] — all those may be taken into account, but no one factor is of controlling significance. If, for example, physical location or continuity of the work force were decisive the new employer could avoid succession simply by a change of address, or by refusing to hire employees who had been displaced [73]. Different cases have attached different weight to the same factors, so that in the last analysis each case must be regarded as depending on its own facts.

The nature of the transaction by which the new employer acquires an operation is not the controlling test. The principle is the same whether it takes the form of a sale [74], merger of companies [75], or lease [76], and succession is not precluded by the fact that the consent of some third party was essential before the new employer could take over [77]. It may

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68 See, for example, *Piano Musical Instrument Workers' Union, Local 2549* v. *W. W. Kimball Co.*, 221 F. Supp. 461 (N.D. Ill. 1963), revd. 333 F. 2d 761 (7th Cir. 1964), revd. *per curiam*. 379 U.S. 357, 85 S Ct. 441, 13 L. ed. 2d 541 (1964).

69 See *Local Executive Board Hotel and Restaurant Employees International Union* v. *Joden Inc.*, 262 F. Supp. 390 (D.C. Mass. 1966).

70 See *John Wiley & Sons Inc.* v. *Livingston*, 376 U.S. 548, 84 S. Ct. 909, 11 L. ed. 2d 898 (1964) — a wholesale transfer of employees ; *K.B. & J. J. Young's Supermarkets*, 377 F. 2d 463 (9th Cir. 1967) ; *Cp. N.L.R.B.* v. *John Stepp's Friendly Ford Inc.*, 338 F. 2d 833 (1964).

71 See *N.L.R.B.* v. *Alamo White Truck Service Inc.*, 373 F. 2d 238 (5th Cir. 1959).

72 See *Union Texas Petroleum*, (1965) 153 N.L.R.B. 849.

73 See *Monroe Sander Corporation* v. *Livingston*, 262 F. Supp. 129, (S.D.N.Y. 1966) 129, 136 ; varied on other grounds, 377 F. 2d 6 (2d Cir. 1967).

74 See *McGuire* v. *Flumble Ail and Refining Co.*, 247 F. Supp. 113 (S.D.N.Y. 1965), rev'd. 355 F. 2d 352 (2d Cir. 1966) ; *Wackenhut Corporation* v. *International Union, United Plant Guard Workers*, 332 F. 2d 954 (9th Cir. 1964).

75 See *John Wiley & Sons Inc.* v. *Livingston*, 376 U.S. 543, 11 L. ed. 898, 84 S. Ct. 909 (1964)

76 See *Quaker Tool and Die Inc.*, (1967) 162 N.L.R.B. n° 124 ; *South Carolina Granite Co.*, (1944) 58 N.L.R.B. 1,448.

77 See *West Suburban Transit Lines*, (1966) 158 N.L.R.B. 794 ; *Overnite Transportation Co.* v. *N.L.R.B.*, 372 F. 2d 765 (4th Cir. 1967) — approval of Interstate Commerce Commission ; *Witham Buick Inc.*, (1962) 139 N.L.R.B. 1,209 — predecessor could pass title to real estate but had no control over grant of automobile franchise.

take place even where there is no legal relationship between the predecessor and successor. Thus in *Maintenance Incorporated* [78] the union was certified in respect of employees of White Castle which was engaged upon a one year contract for the supply of custodial and janitorial services for N.A.S.A. In due course Maintenance Incorporated put in a successful bid for the supply of custodial services only and upon the expiration of White Castle's contract, took over. The advent of the new employer brought no substantial change in the employing industry. It performed substantially the same operations for the same customer, in substantially the same manner, in the same place and 90% of its work force consisted of former White Castle employees who performed for the most part the same functions, using the same skills as before. The National Labour Relations Board held that the respondent was under a duty to bargain with the union. The critical test was not whether it had succeeded to the corporate identity of White Castle or its physical assets but whether it conducted substantially the same operation. It was pointed out that it would be virtually impossible for employees to achieve bargaining units in an employing industry subject periodically to possible changes in employer if the union had to resort to the Board each time.

Further, it should be noted that succession does not depend upon any assumption of obligations by the employer [79]. It cannot be excluded by contract between the successor and his predecessor since it rests upon requirements of national labour law and policy and not upon contract principles [80]. It applies to the disposition of part as well as of the whole of an operation [81]. Finally it is not restricted to a transfer made in bad faith to avoid obligations, or to situations in which the new employer is merely the *alter ego* or a disguised continuance of the old [82].

As we have seen above the test applied in the U.S.A. emphasises the end result and poses the question whether substantially the same operation is being carried on after as before. In comparison all the succession provisions — even the broadest, in Ontario and Quebec — suffer from one serious shortcoming. All are so drafted as to place the emphasis on the form and subject matter of the transaction. The obvious defect of this approach is that it may tend to induce the transferor and transferee where possible to tailor their transaction in such a way

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78 (1964) 148 N.L.R.B. 1,299 ; see also *Consolidated American Services Inc.*, (1964) 148 N.L.R.B. 1,521.

79 See *Chemrock Corporation*, (1965) 151 N.L.R.B. 1,074.

80 See *Colony Materials*, (1961) 130 N.L.R.B. 105.

81 See *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (2d Cir. 1966).

82 *Johnson Ready-Mix Co.*, (1963) 142 N.L.R.B. 437 ; *Polygon Displays Inc.*, (1960) 160 N.L.R.B. no. 100.

as to fall outside the successor provisions without there being any practical difference in result. This does not mean that the end result is entirely irrelevant. In Nova Scotia it is a specific condition of the application of the successor provision that the sale or transfer has not resulted in a substantial change in the plant, equipment, products, working force or employment relations of the business [83]. Ontario reaches the same position less directly by providing that upon an application made within thirty days of the union having given notice to bargain to the transferee of a business, the board may terminate the bargaining rights of the union if the transferee has so changed the character of the business that it is substantially different from that of the predecessor employer [84]. Whilst no such conditions are spelled out in the other provincial legislation, it is submited that the same result would be achieved by finding that the new employer had started up an entirely different operation and was not the transferee of his predecessor's business as distinct from his assets.

In Nova Scotia the wording of the condition mentioned above [85] could have been clearer. Presumably it was not intended that a substantial difference in any one of the elements mentioned would preclude the possibility of succession, otherwise the act could be avoided by the simple expedient of the transferee refusing to hire all or most of the transferor's employees. All are factors which ought to be taken into account in determining whether there is a continuity of business enterprise, but no one ought to be conclusive. The framing of the Ontario provision [86] seems to suggest that if no application is made for termination of bargaining rights within the specified time limit, a new employer may be a successor despite substantial alterations in the essential attributes of the enterprise. Surely in that situation it will be found that there was no transfer of the employer's business ? The intent is clear enough but the draftsman has hardly excelled himself.

**Transactions covered in the common law provinces**

In Ontario and Saskatchewan the successor provisions apply to sales, leases, transfers and other forms of disposition [87], in Alberta and

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[83] *N.S. Trade Union Act*, s. 21(2)(c) ; see also McKinnon, *Report of Fact Finding Body on Labour Legislation*, (1962 Nova Scotia) at p. 38.

[84] *Ont. L.R. Act*, s. 47a(4). The original Ontario provision, introduced in 1962 but never proclaimed, contained a similar condition — see *Ont. Statutes*, 1961-62, c. 68, s. 4(a), introducing s. 47a(c) ; see also *Ontario Select Committee on Labour Relations*, 1958, para. 45, p. 41.

[85] *I.e.*, *N.S. Trade Union Act*, s. 21(2)(c).

[86] *Ont. L.R. Act*, s. 47a(4).

[87] *Ont. L.R. Act*, s. 47a(1)(b) — the section refers to sales but defines this to include the other forms of transaction ; *Sask. T.U. Act*, s. 33.

British Columbia to sales, leases and transfers [88], in Nova Scotia to sales and transfers [89], and in Newfoundland to transfers of ownership [90]. In each case the subject matter of the transaction is an employer's business. In Manitoba a certificate is declared binding upon a new employer to whom the ownership of a business has passed [91], and originally similar wording appeared in that provision of the act dealing with the binding effect of collective agreements [92]. However an amendment introduced a new formula couched in much broader terms. A collective agreement is declared to be binding upon "any new employer who acquires or operates the undertaking or business . . ." This is noteworthy for two reasons. First, on the face it is not restricted to the acquisition of ownership, but covers other forms of transaction, such as a lease or even possibly a sub-contract. Secondly, it introduces the word 'undertaking'. The precise difference between an 'undertaking' and a 'business' is not clear : the former usually bears a broader meaning.

There is no published evidence to suggest that this different form of words was intended to give the section a different scope. It would be strange if the effect of the act were to render a collective agreement but not the certification binding upon an employer. Bargaining rights may stem from the existence of a collective agreement. If the change in wording heralded no change in the scope of the section, the alteration was as mischievous as it was unnecessary.

Clearly those provisions restricted to a transfer of ownership are more restricted than the others. But is a 'sale or transfer' more limited that a "sale, lease or transfer", or that in turn more restricted than "any other form of disposition" ?

In ordinary legal parlance a sale usually signifies a transaction under which the seller transfers property to a buyer in return for a money consideration. It does not cover a lease, exchange or a gift. A lease is a contract by which the lessor confers upon the lessee exclusive possession of property for a time, and is distinguishable from a licence or franchise. Transfer on the other hand, has no technical meaning, and, depending upon the context is capable of being used to describe any form of

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88 *Alta. Labour Act*, s. 74 ; *B.C.L.R. Act*, s. 12(1).

89 *N.S. T.U. Act*, s. 21.

90 *Newfoundland L.R. Act*, s. 21A.

91 *Man. L.R. Act*, s. 10(1)(d).

92 91 s. 18(1)(c). Originally "any new employer to whom passes the ownership of the business . . ." This was the verbal formula considered in *Re Parkhill Furniture and Bedding Ltd.*, (1960) 33 W.W.R. 176, *aff'd sub nom Parkhill Bedding and Furniture Ltd.* v. *International Molders & Foundry Workers', etc., Local 174*, (1961) 26 D.L.R. (2d) 589.

transaction including a sale, lease, exchange, gift or trust under which property rights or interests are transmitted by operation of law or otherwise, from one person to another. If transfer is capable in the context of those sections of covering any form of disposition other than sale, the omission from the Alberta and British Columbia acts of any reference to "other forms of disposition", and in Nova Scotia to leases is immaterial [93].

The Ontario Labour Relations Board has not restricted the operation of s. 47a to situations where the transaction is fully recorded in documents possessing all the legal accoutrements of a conveyance. They have not felt hampered by technical legal rules on the admission of external evidence to explain written contracts or on the joinder of documents. They are prepared to look behind the formal documentary evidence and read it against the backdrop of the surrounding circumstances. To have done otherwise would have permitted the parties to a transaction, but not committing themselves to writing, or by series of separate contracts transferring different elements of an operation, to have circumvented the provisions of the act [94].

The early case of *Kem's Masonry* [95] is typical of its approach. It involved the alleged disposition of its non-union business by a small brick laying firm operating under the name of Able Construction to Kem's Masonry which was a one man business operating on a non-union basis in the same field. Able consisted of three partners, and the proprietor of Kem's was their father-in-law. The timing of events was significant. Kem's came into existence shortly after the union representing Able's employees had informed the firm that it would in future insist on compliance with the collective agreement. Able contended that it was

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93 The O.L.R.B. has held that the *eiusdem generis* rule does not apply to restrict the generality of "any other form of disposition" ; *Thorco Manufacturing Co.*, (1965) 65 C.L.L.C. 16,052 ; and see *Russ Construction (London) Ltd.*, O.L.R.B. Mon. Rep. Sept. 1961, p. 601 at p. 604 — 'gift'.

94 The onus of proving that the case falls within section 47a is still upon the person alleging it — see *Super City Ltd.*, O.L.R.B. Mon. Rep. May 1964, p. 93 ; *B.P. Marketing Canada Ltd.*, O.L.R.B. Mon. Rep. Oct. 1966, p. 527. Perhaps on fair solution would be to impose the burden upon the employer of excluding the section.

95 O.L.R.B. Mon. Rep. Nov. 1964, p. 382 ; Dec. 1964, p. 470. For a similar liberal approach see *Thorco Manufacturing Co.*, (1965) 65 C.L.L.C. 16,052, and the series of four cases arising out of the shedding by Steinbergs Ltd. of a number of its supermarkets — See *Dutch Boy Food Markets*, (1965) 65 C.L.L.C. 16,051, *rev'd sub nom. R. ex. rel. Amalgamated Meatcutters, etc., Local 633* v. *Kitchener Food Market Ltd.*, (1966) 57 D.L.R. (2d) 521 ; *L. & M. Food Market (Ont.) Ltd.*, O.L.R.B. Mon. Rep. Sept. 1965, p. 440 ; *Sunnybrook Food Markets*, O.L.R.B. Mon. Rep. Oct. 1966, p. 531 ; *Leaders Clover Food Market*, O.L.R.B. Mon. Rep. Nov. 1966, p. 636.

unable to compete with non-union firms. After further union representations a sub-contract obtained by Able was taken over by Kem's along with five non-union men. Able's business was allowed to run down, and as it declined that of Kem's blossomed. Able rented to Kem's, which had no machinery of its own, some up to 65% of its equipment and machinery on the understanding that it would be returned on 48 hours' notice. Clearly Able could not operate at the same capacity as before with such a high proportion of its equipment hired out. The father-in-law was not a member of the Able firm but he had, before going into business on his own, backed their notes, allowed them free use of office space, and acted as adviser. The two firms operated from the same address, sharing a telephone, an office girl, and employing the same part time estimator. Reliance was placed by the union upon the broad definition of sale in the Act and in particular on the phrase 'any other form of disposition'. It pointed out that if what had transpired was not within the section it would be a simple matter to avoid its application by setting up two firms and both bidding on a job, one on a union and the other on a non-union basis. If the non-union basis firm received the contract the union firm would supply equipment, knowhow and perhaps men too. The respondent argued that there was no lease because lease involved exclusive possession for a definite period. The Board considered that even if the transaction did not constitute a lease it did fall within the catch-all phrase, and had no difficulty in finding that it was within 'any other form of disposition' for the purposes of the Act [96].

Again, in the case of the Roman Catholic separate schools in Windsor, there was no formal transfer of authority and operations from one employer to another [97]. A private bill had been introduced into the legislature to effect a transfer of the property and operations of the boards of trustees of Roman Catholic separate schools in Riverside and Sandwich West following the incorporation of those areas into the City

[96] The Act does not prevent the practice adopted in the construction industry of the same person incorporating separate companies for each successive project : see *Russ Construction (London) Ltd.*, O.L.R.B. Mon. Rep. Sept. 1967, p. 601.

[97] *Board of Trustees of R.C. Separate Schools for City of Windsor*, O.L.R.B. Mon. Rep. March 1966, p. 920 and subsequent proceedings in April 1966, p. 62. Documentary evidence is often scant before the courts : see *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Ltd.*, (1964) 64 C.L.L.C. 14,002, 48 W.W.R. 547 ; and see also *I.W.A., Local 1-217* v. *Monocrest Kitchens Ltd.*, (1967) 63 D.L.R. (2d) 546. The nature of the transaction is often veiled in secrecy and its terms not fully committed to writing : the courts in general have been reluctant to infer succession from the surrounding facts.

of Windsor. Whilst the bill was still pending the board of trustees for the city of Windsor in fact assumed authority and control and the separate boards of trustees for the two suburbs had ceased to operate. This *de facto* transfer of operations was held to be a disposition within the meaning of the act.

**Transactions covered in Quebec**

Article 36 of the Quebec Labour Code is brought into operation by "l'aliénation ou la concession . . . d'une entreprise". Some indication of the possible scope of this phrase can be obtained from the English version — "alienation or operation by another of . . . an undertaking", and also from the second paragraph of the article which provides that the new employer shall be bound by the certification or collective agreement notwithstanding "the division amalgamation or changed legal structure" of the undertaking [98]. However, there are no statutory definitions of the key words "alienation" and "concession", and their interpretation has been the subject of acute controversy. Divers dictionary definitions have been cited to support both liberal and restrictive outlooks, but in the last resort the context must govern and the view which prevailed has accorded to the article a range for beyond that of corresponding provisions in the common law provinces.

Alienation in ordinary parlance denotes a transfer of ownership or property whether by sale or otherwise [99], but it is capable of bearing a wider meaning [100]. "Concession" is not a mere synonym of "alienation" and in ordinary usage embraces any transaction which involves the grant of a right or privilege, franchise or licence, not usually of an absolute character [101]. It covers a multitude of forms in which an enterprise can be restructured. But at the root of both "alienation" and "concession" is the idea that the employer has the intention of disposing of his under-

98 *Le Syndicat national des employés de l'aluminium d'Arvida Inc.* v. *J.-R. Théberge Ltée*, [1965] R.D.T. 449, 462. Compare the minority view on the utility of using the English translation as a guide, *id.* at 482.

99 See the definitions cited by the minority in *Le Syndicat national des employés de l'aluminium d'Arvida Inc.* v. *J.-R. Théberge Ltée*, [1965] R.D.T. 449, 475-476 ; and *Syndicat national des camionneurs de Victoriaville* v. *Routexpress Inc., Décisions sur des conflits de Droit dans les relations de travail*, (1965) vol. 4, 1250-10, at p. 4.

100 See the comments of M. Roy in the *J.-R. Théberge* case, [1965] R.D.T. 449, 487-488.

101 See the majority in the *J.-R. Théberge* case, [1965] R.D.T. 449, 461-462 and M. Roy, *id.* at 488 ; *United Steelworkers of America* v. *Rouyn-Noranda Offset Ltée*, [1967] R.D.T. 129, 141 ; *Syndicat national des concierges d'écoles de Pont-Viau* v. *Commission scolaire de Pont-Viau, Québec/Travail*, Oct. 1966, 12, 15.

taking to another. Thus Article 36 was held not to apply to a situation in which a new employer stepped into the field of operations left vacant when a company operating a public transport service under licence from the Transportation Board became insolvent and went out of business [102]. Although the entry of the new company was facilitated to some extent by a temporary verbal hiring, from the trustee in possession, of premises formerly possessed and used by the first company, a *sine qua non* of the new company's operations was the receipt of a temporary permit from the public authority whose decision was dictated by the public interest in restoring a transport service. The Quebec Labour Relations Board concluded that the new operation was not a continuation of the former employer's undertaking. It also rejected the suggestion that a trust deed entered into some years earlier and giving a right of possession in default of repayment of a loan involved an alienation or concession for the purposes of Article 36. Otherwise a simple mortgage coupled with a power of entry would fall within it. The loan arrangement had not restricted but facilitated the conduct of his business by the employer. No causal link existed between the trust deed and the exploitation of the transport service by the new employer.

The situation in the case outlined above is rather different from that presented when two affiliated companies work out a plan for the transfer of a road transport undertaking from one to the other. The fact that the successful implementation of the plan is dependent upon the consent of the transportation board to the transfer of route franchise licences ought not to preclude the application of article 36 [103].

**Subcontracting**

The difference between the provisions in Quebec and elsewhere is perhaps best illustrated by reference to subcontracting or contracting out.

It is obvious that, whether or not an improper purpose can be proved, the effect of subcontracting may be to subvert a union's bargaining status as the terms of a collective agreement. The problems created by the practice can be tackled and the worst features mitigated in a number of ways. The undercutting of labour standards — one of the chief complaints — can be prevented by statutory machinery providing

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102 *Syndicat national des camionneurs de Victoriaville* v. *Routexpress Inc.*, *Décisions sur des conflits de Droit dans les relations de travail*, (1965) vol. 4, 1250-10.

103 *I.a.*, in the kind of situation in the *Arrow Transit Lines* case, C.L.R.B. Reasons for Judgment, n°· 7 dated 30 Aug. 1967, Labour Gazette Supplement, p. 19. See *supra*, p. 478.

for the industry-wide extension of the term of collective agreements or by a more general fair wages clause requiring employers to pay wages and observe conditions of employment not less favourable than those current in industry or settled by the process of collective bargaining. Indirectly these may help to strengthen a union's position. Alternatively, the regulation of sub-contracting practices can be left to collective bargaining, coupled possibly with the imposition of a continuing obligation to bargain on matters not covered by an existing agreement and making the contracting out of work a compulsory bargaining topic [104]. In most parts of Canada the only protection is that obtained by the process of collective bargaining [105]. There may be some advantages in leaving the problem to negotiation, but the results generally are to give uneven protection, and to lead to a great proliferation of different formulae even where the nature of the employment is the same. In British Columbia, for example, there are over a dozen widely differing formulae in use in contracts between unions and municipal authorities.

We have seen that the courts and the boards have been prepared to intervene where it is clearly established that the device of sub-contracting is being used with the deliberate intent of circumventing a certificate or a collective agreement, by declaring that the contractor is still the employer of employees who have transferred to the sub-contractor. Where proceedings have been brought in the courts the difficulty of proving an improper purpose has proved an almost insuperable barrier to relief [106].

In the absence of relief on this basis, can the successor provisions be utilised ? The mischief against which they are directed is not confined to circumstances in which bad faith can be proved [107]. The contracting out of part of its operations by an employer does not involve a sale

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104 As in the U.S.A. Apart from Saskatchewan there is no continuing obligation in Canadian jurisdictions. See, generally, YOUNG, *The Contracting Out of Work*.

105 According to the majority view there is no restriction on the management power to subcontract in the absence of a clear provision in the collective agreement.

106 See *I.W.A., Local 1-217* v. *Monocrest Kitchens Ltd.*, (1967) 63 D.L.R. (2d) 546 — a sub-contract of labour only ; and *Rockwater Iron Products Ltd.*, O.L.R.B. Mon. Rep. Sept. 1964, p. 243, where the applications succeeded ; compare *Goloff* v. *Local 1-405, I.W.A.*, (1959) 59 C.L.L.C. 15,436, 15,437 ; and *Retail, Wholesale, etc., Local 580* v. *Reitmier Truck Lines Ltd.*, (1965) 66 C.L.L.C. 14,141, (1966) 57 D.L.R. (2d) 589 (Munroe, J.) and earlier proceedings before MacDonald, J., in (1965) 66 C.L.L.C. 14,112 — where the courts waivered but finally held the sub-contract to be *bona fide*. See also *Canadian Ironworkers'* case, cited by J. W. LAXTON, *loc. cit. supra*, n. 14.

107 With the possible exception of Nova Scotia, see *infra*, p. 497.

or change of ownership of the business [108]. But may it not constitute a 'transfer' or 'other form of disposition' ? May not a subcontractor be described, in some circumstances at least, as a "new employer who acquires or operates the undertaking or business . . ." [109] Although there has been at least one case in which the court may have been prepared to apply the successor provision to a sub-contract [110] and one decision of the Ontario Labour Relations Board where its application was not ruled out [111], and although it is recognised that a sub-contract may form part of a series of transactions which together amount to a transfer of a business [112] the general feeling is that the successor provisions do not apply.

In *Goloff* v. *Local 1-405, I.W.A.* [113] the plaintiff operated a small logging camp. He failed to reach an agreement with the union representing his employees, and rejected the report of a conciliation board. His employees voted in favour of a strike. He decided to divest himself of the responsibilities of an employer by ridding himself of his employees. This he did by contracting out to one Tomilin as an independent contractor, the operation of his logging business. Thus Tomilin became an employer. Under the terms of the contract Tomilin submitted his payroll to the plaintiff, who made deductions in respect of workmen's compensation and unemployment insurance in calculating the amount due. The plaintiff then put Tomilin in funds to enable him to pay the workmen. There was also evidence that the plaintiff had signed cheques paid to the workers. The union picketed the plaintiff's premises, and in reply to an application for an injunction argued *inter alia,* that the sub-contract fell within s. 12(11) of the British Columbia Labour Relations Act so as to entitle it to picket the Tomilin operation. It was held by the learned county court judge that Tomilin was not a purchaser, lessee or transferee of the plaintiff's business but an independent contractor who took over the operation in good faith.

Clearly if this kind of situation is not within the act it is easy for an employer to arrange his affairs in such a way as to avoid the unwelcome instrusion of a labour union. He can contract out the operation of his

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108 See *Canada Catering Company Ltd.*, (1955) 55 C.L.L.C. 16,005 — application of s. 10(1)(d) of the Manitoba Act rejected.

109 See *Man. L.R. Act*, s. 18(1)(c); *supra*, p. 485.

110 See J. W. LAXTON, *loc. cit. supra*, n. 14.

111 See *Rock Water Iron Products* case, O.L.R.B. Mon. Rep. Sept. 1964, p. 293 — the Board decided on another ground and found it unnecessary to consider the point.

112 See *Kem's Masonry*, O.L.R.B. Mon. Rep. Nov. 1964, p. 382, and Dec. 1964, p. 470.

113 (1959) 59 C.L.L.C. 15,436, 15,437.

entire undertaking to an employer who will take free of any collective agreement or obligation to bargain.

A somewhat more complex problem is presented when an employer continues in business, with the pace of his operations unabated, but contracts with another employer for the supply of labour to enable him to carry on his undertaking. One would have thought that a good case could be made out for the union representing the transferor's employees retaining its bargaining rights *vis-à-vis* the sub-contractor particularly where the arrangement results in a wholesale transfer of the employees to him. Difficulties may arise if the subcontractor has other employees who are represented by another union. But this problem, and that of the destruction of the unit by the intermingling of employees, is no different in nature and no more serious than that which may arise upon the sale or lease of a business.

A subcontract of this nature came before the Ontario Labour Relations Board in the *Gibsco Transport* case [114]. On 1st February 1965, John Grant Haulage Ltd. entered into an agreement with Gibsco Transport Ltd. under which the latter undertook to maintain and service Grant's vehicles, to supply drivers, and be responsible for the despatch of vehicles and for payment of day to day operating expenses, formerly carried by Grant's. Payment for these services was calculated on a percentage of Grant's gross revenue. The agreement was terminable on thirty days' notice. The effect was that Grant parted with none of its property. It still owned the trucks which were despatched in accordance with its instructions. It continued to control the operation of its business and to obtain orders from customers. The volume of its business was unrestricted. Four days after making the sub-contract, Grant's dismissed all its employees. They were all offered, and most accepted, employment with Gibsco. They were intermingled with Gibsco's other employees and could be called upon to drive either Grant or Gibsco vehicles.

The union relied upon s. 47a of the Ontario Labour Relations Act in support of its claim to represent the employees in respect of whom it had been certified. The board held that Grant's had simply changed the method of carrying out its business and utilizing its assets. It had not disposed of either, but simply entrusted an agent with the per-

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[114] O.L.R.B. Mon. Rep. May 1965, p. 141, review denied, July 1965, p. 280. In British Columbia some types of clause containing union security provisions are currently under judicial attack — see *Victoria Paving Company Ltd.* v. *Building Material, Construction and Fuel Truck Drivers Union, Local 213, etc.*, a decision of Gregory, J., 30 July 1968. This is at present under appeal.

formance of tasks which formerly it had performed by its own employees [115].

If this kind of situation is not covered, then it is submitted that it ought to be and that legislation ought to be passed to plug this loophole in the acts [116].

The practice of subcontracting or contracting out is ripe for statutory regulation. No adequate solution has yet been reached in Canada. It is not proposed at this juncture to speculate upon all the forms it might take. It is to be hoped that any legislative efforts in this direction be comprehensive, consistent and coordinated.

Quite a different approach has been adopted in Quebec towards contracting out. The leading decision is *Le syndicat national des employés de l'aluminium d'Arvida Inc.* v. *J.-R. Théberge Ltée* [117], where by a 4:3 majority the board held a sub-contract to be a "concession" within Article 36. The aluminum company had sufficient men and equipment to cope with the recovery of cryolite from pot linings and the transport of materials between different sections of its Arvida plant under normal circumstances. It coped with extraordinary demands which arose from time to time by arrangements with J.-R. Théberge Ltée under which the latter was to supply on demand sufficient mechanical cranes and trucks together with their operators and drivers. Payment was made to the sub-contractor on the basis of the cost per working hour

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115 In *Retail, Wholesale, etc., Local 580*, (1966) 66 C.L.L.C. 14,112, 14,141, 57 D.L.R. (2d) 589, the B.C. courts rejected the application of s. 12(11) to this kind of sub-contract for the supply of labour only. The report is not very satisfactory. Munroe, J.'s sole recorded comment on s. 12(11) was to observe that the sale of shares in a company was not a sale or transfer of its business. That in itself would result in no change of employer in the eye of the law. But the judgment contains no discussion at all on the real problem, namely, whether the contracting out of labour could constitute a transfer of a business. The learned judge must have considered that it did not. 26 employees transferred, and of the ultimate 200 employed by the new employer 125 belonged to a different union, the Teamsters. The *B.C. Act* contains no provision dealing with intermingling of employees, and there was also a problem of federal-provincial jurisdiction involved.
Scott Transport took over the shares of Reitmier. The latter dismissed its employees and advised them to take employment with Scott which thereafter supplied the drivers Reitmier required for its vehicles. Whereas previously Reitmier's business consisted of obtaining orders and executing them, it now consisted only of the former.

116 A measure designed to deal with subcontracting was introduced by an opposition member (Mr. R. Eddie) in 1964 (Bill 83), and similar proposals have been put forward by the B.C. Federation of Labour — see, *Memorandum in Support of Proposed Legislation submitted to the B.C. Cabinet* on 8th February, 1967. See also the remarks of Mr. W. SANDS, B.C. Deputy Minister of Labour, recorded in *The Report of the Fact Finding Body on Labour Legislation*, (Nova Scotia, 1962), p. 118.

117 [1965] R.D.T. 449.

including the wages of the men supplied. Their work was performed under the immediate and constant supervision of Alco foremen and was of the same nature as that ordinarily done by Alco with its employees and equipment. In the majority's view it did not matter how the contract was categorised — as one for the hire of machinery of for personal services — or that it involved no transfer of employees to a new employer. In their opinion the work done fell within the purview of the collective agreement and involved a transmission of rights and obligations within the meaning of article 36. They were not deterred by the prospect of problems in applying the collective agreement to the sub-contractor's employees because article 37 provided machinery for their resolution by application to the Labour Relations Board. According to one member of the majority, the application of article 36 to sub-contracting involved no new principle. It was already common practice for collective agreements to prohibit or control sub-contracting, and viewed in this light the article simply gave a statutory sanction to a practice already hallowed in the field of industrial relations [118].

The same stance was adopted — this time by a 2:1 majority — in the case of *United Steelworkers of America* v. *Rouyn-Noranda Offset Ltée* [119]. The fact pattern was somewhat different from that of the earlier case, but bears a striking resemblance to those in some of the decisions in the common law provinces. It involved three separate legal entities linked by a common management. Originally there were only two companies, La Frontière and Rouyn-Noranda Press, operating from different addresses. The former's business consisted of printing newspapers, and the latter's was in two parts, one being commercial printing and the other newspapers. The union was certified in respect of the employees of both.

It was decided to update Rouyn-Noranda Press machinery. but in order to take advantage of federal legislation offering tax advantages to new employers setting up operations in distressed areas, a new company was incorporated under the name of Rouyn-Noranda Offset Ltée. It set up operations in the La Frontière building. Since with more modern machinery it could do a better job at a better price, Rouyn-Noranda Press entrusted the execution of printing contracts to it. Press's printing operations accordingly declined until eventually it ceased printing operations, terminated the contracts of its employees and suggested they present themselves at the La Frontière building where they were duly engaged by Offset under the same conditions of employment as before.

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[118] *Id.* at p. 489 *per* Mr. Roy.

[119] [1967] R.D.T. 129.

Part of its equipment was sold by Press to Offset and moved to the latter's premises. Press itself then terminated the lease of its own premises and moved to the La Frontière building. Thereafter its operations were restricted to the work required to obtain contracts, the actual printing job being done by its sister company. Some of the workers who moved found themselves doing the same job at the same equipment, under the same supervisor as before. The majority held that to entrust to another the execution of part of the work formerly done by the employer's own employees was a "concession" within the article.

It must not be assumed that the application of article 36 to subcontracts has gone unchallenged. In each of these cases there was a vigorous dissent, and between the two a differently constituted board held that the contracting out to a specialist firm of the task of cleaning schools was not covered by it [120]. The cleaning was held to be only an auxiliary function of the school commission and the board considered that a state of anarchy would prevail if the contractor were placed in the position of having to apply different and conflicting agreements. M. Roy dissented, pointing out that the alleged difficulties had not been proved to exist, and that in any case Article 37 provided a remedy for them [121].

**Amalgamations and mergers**

It has been pointed out above that one would expect a new employer introduced by the amalgamation or merger of two or more operations to be bound by agreements entered into by his or its predecessors, and possibly also by certifications granted in respect of units of their employees [122]. But the matter cannot be regarded as finally settled and there are circumstances in which the ordinary principles of law might be inapplicable. Few of the successor provisions do much to resolve any doubts, although it is suggested that all are wide enough to cover amalgamations or mergers.

In Manitoba it is provided that the several certificates or agreements remain in force until duly terminated in accordance with the

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120 *Syndicat national des concierges d'écoles de Pont-Viau* v. *Commission scolaire de Pont-Viau, Québec/Travail*, October 1966, p. 12. See also the arbitration board's opinion in *Copper Rand Chibougamau Mines Ltd.* v. *United Steelworkers of America, Local 5914, Décisions sur des conflits de Droit dans les relations de travail*, vol. 1, 362-2, at p. 4.

121 Employees displaced had been found jobs with the regional commission. The legislative debates give no guidance as to legislative intention — see, for example, *Débats de l'Assemblée législative*, Quebec, 20 July 1964, at 4,865, 4,866.

122 See *infra*, p. 482.

Act [123]. The terms "alienation" or "concession" in the Quebec Act seem wide enough to cover amalgamations and this view is reinforced by the second paragraph of article 36 which declares the new employer to be bound by the certificate or collective agreement notwithstanding the division, amalgamation or changed legal structure of the undertaking [124]. A reference to merger has also crept into the Alberta statute [125].

In Ontario the effect of amalgamations has been referred to upon a number of occasions before the Labour Relations Board without any conclusive opinion being expressed. Thus in August 1965 the Board ordered a vote under s. 47a(5) in order to determine which of two competing unions should be bargaining agent but all parties agreed that there had been a disposition within s. 47(2) [126]. Apparently the Board did not regard the matter as finally settled. It was mentioned in the *Loblaw Groceterias* case [127], where a parent company brought about the amalgamation of two subsidiary companies. There was no suggestion that the collective agreement between one of the subsidiaries and the intervening union was not binding on the amalgamated company. The Board did not have to decide the point, the main issue being whether the parent company could be regarded as the employer of employees engaged by the subsidiaries. Again in December 1966 where the application of the section to amalgamations was contested, the Board assumed for the purpose of the argument that it did apply but was able to find other grounds for refusing the relief claimed [128]. The section would apply to situation in which two or more employer companies created a separate company which then acquired their business by purchase [129]. It would be strange if the section did not apply where the same result was achieved by amalgamation of two companies. It is submitted that it can be construed in such a way as to avoid such an anomaly, and that the introduction in 1966 of a specific provision deal-

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123 *Man. L.R. Act*, ss. 10(3), 18(3).

124 Reference might be made to *Syndicat national des camionneurs de Victoriaville* v. *Routexpress Inc.*, *Décisions sur des conflits de droit dans les relations de travail*, vol. 4, 1250-10, at p. 4 ; and *Canadian Ingersoll-Rand Co. Ltd.* v. *Assn. internationale des machinistes*, vol. 1, 330-2.

125 *Alta. Labour Act*, s. 74(2) ; note s. 74(1) refers to sales, leases and transfers. 74(2) deals with the effect of intermingling of employees and refers to sales, leases, transfers and mergers. The inclusion of mergers cannot be taken as indicative that mergers would otherwise be excluded, or that they fall outside 74(1).

126 *Belton-Quinn Lumber Ltd.*, O.L.R.B. Mon. Rep. Aug. 1965, p. 373.

127 (1965) 65 C.L.L.C. 16,078 — decided Dec. 1965, *infra*, p. 471.

128 *Westeel-Rosco Ltd.*, O.L.R.B. Mon. Rep. p. 718 at pp. 720-721.

129 See, for example, *Nasco Products Ltd.*, O.L.R.B. Mon. Rep. Dec. 1965, p. 625 ; *Lawson - McMullen - Victoria Ltd.*, O.L.R.B. Mon. Rep. Nov. 1965, p. 551.

ing with the amalgamation or merger of municipal authorities should not preclude this approach.

**Motive**

With the one exception of Nova Scotia none of the provinces limit succession to circumstances in which a transfer of an undertaking was effected to circumvent a collective agreement or certification. Of all the successor rights provisions that of s. 21 Nova Scotia Trade Union Act is the most obscure, and the draftmanship most inept. If the intention was to restrict succession to situations involving an improper motive, the wording of the section is ill devised to give effect to it. It starts by defining sale or transfer as including a sale or transfer of part of a business for the purpose of avoiding certification or an existing collective agreement. Presumably it also includes the transfer of the whole of a business for that purpose. But does it apply to sales or transfers which are prompted by legitimate motives ? Had the intention been to exclude them one would have expected the definition to read "sale or transfer means a sale or transfer of a business or part thereof for the purpose of avoiding certification . . ."

Subsection 2 lends force to the argument that the section is of general application for in providing for succession on a sale or transfer there is no reference to motive. It would also seem, viewing this subsection alone that succession would take effect immediately upon the transfer.

Subsection 3 provides for an application to the board for a determination whether or not the sale or transfer was made with an improper purpose. Subsection 4 creates a presumption of improper purpose where the employer and transferee were not dealing at arms' length, and if the board finds an improper purpose the certification or agreement continues in effect. The relationship between this provision and subsection 2 is far from clear. It seems to suggest that where an application is made to the Board succession awaits its decision. Perhaps the intention was that the Board alone should have jurisdiction to determine whether a new employer succeeded to the rights and obligations of the old, but it is impossible upon any rational basis to unravel the tangled, inconsistent policies apparently embodied in this section [130].

[130] The section has already been the subject of trenchant criticism by A. W. R. CARROTHERS, in *Collective Bargaining Law in Canada*, 266–268. Despite this, the *Report of the Select Committee of the Legislature established to Study the Labour Relations Act*, N.B. 1967, at 42 recommended adoption of an identical provision. The *Report of the Fact Finding Committee on Labour Legislation*, N.S. 1962, at 38 had suggested a successor provision in no way encumbered by references to motive.

Any protection of bargaining status which is based upon proof of an employer's bad faith is likely to create more problems than it solves and do little for labour relations. A business reorganisation may be sparked by an anti-union animus. It may be prompted by a genuine desire to promote business efficiency or to gain some tax advantage, with the elimination of a union or an agreement a welcome but unlooked for bonus. Or motives may be mixed, the prospect of ridding himself of the union dictating the employer's choice of methods himself of the union dictating the employer's choice of methods of reorganization. The slide into the guagmire of mixed motives is short and slippery. The decisions of the boards and of the courts on whether or not to lift the corporate veil are replete with disagreements on the purity of the employer's motives. Labour policy should be designed to kill suspicion, not breed it.

In the other provinces, motive is irrelevant [131].

**Identity of the transferor**

Before turning to an examination of the subject matter of the transaction, on minor point deserves mention. In Ontario and Nova Scotia the transfer must be effected by the employer to fall within the successor provision [132]. In all other jurisdictions the provisions are couched in the passive tense [133]. The precise significance of this distinction has yet to be exposed by decisions of the boards or the courts. It would seem clear that in those two jurisdictions a disposition by a third party would fall outside the act, though the Ontario Board seems to have had no hesitation in applying s. 47a to dispositions by a trustee or receiver in possession [134]. Similarly they could not apply where an unconsenting employer is replaced by a competitor who takes over his employees [135].

**The Subject Matter of the Transaction in the common law provinces**

In order to fall within the successor provisions in the common law

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131 See *Le Syndicat national des employés de l'aluminium d'Arvida Inc.* v. *J.-R. Théberge Ltée*, [1965] R.D.T. 449, 461.

132 *Ontario L.R. Act*, s. 47(a)(2) ; *N.S. T.U. Act*, s. 21(2)(b).

133 As was the original provision in Ontario — see 1961-2, chap. 68, s. 4 : "where the employer ceases to be..."

134 See *infra*, p. 510.

135 See *supra*, p. 483 ; and see *Canteen of Canada Ltd.* v. *Walfoods Ltd.*, O.L.R.B. Mon. Rep. April 1967, p. 94, decided on other grounds.

provinces the transaction must relate to the business [136], or part of the business, of the transferor [137]. What does business mean in the context of the Labour Relations Acts ? Dictionary definitions and quotations from cases decided in different contexts are of limited value : they were only to emphasize the fact that the term is capable of bearing many interpretations. It is commonly used to designate a commercial activity [138]. But it is not confined to the pursuit of profit : charitable, religious, educational and social organizations, hospitals, municipal authorities [139], and even the legislature may, for some purposes at least, be regarded as carrying on business. Again, a distinction is sometimes drawn between business and profession, but even professional groups can form trade unions. In its broadest sense business denotes any human activity. In the context of collective bargaining legislation, business (though undefined) must clearly extend to any activity or undertaking the employees of which fall within the scope of the various statutes [140].

The totality of a business enterprise may comprise many elements : not only the physical plant, land, buildings, fixtures, machinery and equipment stock in trade, but also intangible elements such as goodwill, accounts receivable and payable, manufacturing and sales techniques ; the human element, employees and management personnel ; and finally the purpose or objective of the enterprise — the end or finished product. A transfer of the totality of these elements presents no problem. But how many of the elements have to be transferred to constitute a sale or transfer of a business ?

Even allowing for the fact that there is room for a difference of opinion within and between tribunals in the application of any test to a particular set of facts, one can detect in reading the decisions a broad divergence of paths in answering this question between most judicial tribunals on the one hand and the labour relations boards on the other. To lawyers and the courts the phrase "sale of a business" usually signifies a transfer of the total operation as a going concern, with good-

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136 In Manitoba, s. 18(1)(c) refers also to "undertaking". Compare s. 10(1)(d). See *supra*, p. 485.

137 In Manitoba and Newfoundland there is no reference to part though presumably the provisions could be construed to cover it, at any rate where the part is separate and self contained — see *G.D. Ault (Isle of Wight) Ltd.* v. *Gregory*, (1967) 3 Knight's Industrial Reports 590 where transfer of a business was held applicable to transfer of a part of an employer's operations.

138 See, for example, the remarks of Sir G. Jessel M.R. in *Smith* v. *Anderson*, (1880) 15 Ch.D. at 258.

139 S. 47(a)(10) of the *Ont. L.R. Act* makes specific provision on the merger of municipal authorities.

140 See *Board of Trustees of R.C. Separate Schools for the City of Windsor*, O.L.R.B. Mon. Rep. March 1966, at 920 — merger of 2 private schools.

will as a critical element [141]. Faced with a transfer of the ownership or control of the assets of an employer they are reluctant to find in it anything more than a bare disposition of assets in the absence of a formal assignment of goodwill or a covenant against competition. This is so even when the parties to the transaction are associated companies under a common management, the timing of the transfer is closely linked with the stirrings of labour activity, the subject matter involves the whole of the assets required to carry on the operation as before, and the transferor does not remain upon the scene to compete [142].

The mere fact that a purchaser does not acquire all the assets or adopt all the liabilities of a business ought not to preclude a finding that a transfer of a business has taken place. After all, all elements do not possess the same degree of importance in different businesses. The purchaser of a retail food store for example, may wish to restock the premises with his own products and deliberately exclude the vendor's own named brand products whilst acquiring the remainder of the stock-in-trade. Fixtures and store equipment may be bought only to be torn out and traded in when the store is remodelled [143]. To insist on the transfer of all elements would act as a positive invitation to fire some or all employees [144].

Again, whilst an assignment of goodwill — a nebulous commodity — is strongly indicative of a transfer of a business, the absence of it ought not to be conclusive the other way. The nature and value of goodwill depends upon the type of business involved. It may consist of business location, customer allegiance or the personal characteristics of the owner or manager, or a combination of all three. In the case of a gas station or of a retail food store the location may be of primary

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141 See the opinions of HAY, Q. C., dissenting in the *Dutch Boy Food Markets* case, (1965) 65 C.L.L.C. 16,051 ; Grant, J., upon application for certiorari in the same case *sub nom. R.* v. *Labour Relations Board (Ontario) ex. p. Kitchener Food Market Ltd.*, (1966) 66 C.L.L.C. 14,100, rev'd. on other grounds, *sub nom R. ex. rel. Amalgamated Meatcutters, etc., Local 633* v. *Kitchener Food Market Ltd.*, (1966) 57 D.L.R. (2d) 521 ; (1966) 66 C.L.L.C. 14,136 ; and also *R.* v. *Soon*, an unreported decision of Magistrate Bewlay, March 5th, 1963, cited by J. N. LAXTON, *loc. cit. supra*, n. 14 at p. 2.

142 In *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Co.*, (1964) 64 C.L.L.C. 14,002, the court apparently considered that this last factor strengthened the argument against there being a transfer of a business. One would have thought the opposite inference should be drawn. See also *Gulf Islands Navigation Co.* v. *Seamen's International Union*, (1959) 18 D.L.R. (2d) 216 ; and *Re Parkhill Furniture and Bedding Co. Ltd.*, (1960) 26 D.L.R. (2d) 589, (1960) 33 W.W.R. 176.

143 See the decisions of the Ontario Labour Relations Board discussed, *infra*, p. 502.

144 A factor influencing the majority of the Board in *Dutch Boy Food Markets*, (1965) 65 C.L.L.C. 16,051.

significance [145], and the name relatively unimportant [146]. A service operation may possess no substantial assets and be entirely depending for its success on the ability of the owner to convince prospective customers that he has the knowledge, ability and skill to perform the work involved [147].

In some situations there may be no goodwill to transfer : for example, if a business is insolvent or at a low ebb, or, if it sells its whole production to an associated company [148] or works solely for it [149]. It may be impossible to sell some types of business as going concerns [150]. But the fact that goodwill is non-existent or insignificant does not prevent a person from disposing of his premises and all his business activities without any interruption in the operation of the undertaking.

One would have thought that in determining the subject matter of a transaction for the purpose of assessing its impact upon the accrued rights of a union or of employees it would be legitimate to look beyond the terms of a contract to which they were not parties. Otherwise it is a simple operation to disguise the transfer of a business as a disposition of its assets, and the parties to the transaction may be led to avoid any formal documentation except in so far as is necessary to effect a transfer of the essential plant and equipment.

Traditionally the courts refuse to go outside a contract to determine its purpose and effect. They may go behind a statement that no business is transferred if at the same time provision is made for the assignment of goodwill [151]. The absence of an express covenant assigning goodwill is of no significance if the transferee is protected by a covenant against competition [152], and the absence of a formal and empty phrase purporting to assign goodwill is of no weight when there is no goodwill to be transferred [153]. Similarly a statement that no goodwill is included may

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145 See cases discussed, *infra*, p. 502.

146 In *H.A. Rencoule (Joiners and Shopfitters) Ltd.* v. *Hunt*, [1967] I.T.R. 475, a decision on the *U.K. Redundancy Payments Act*, the use of the old name was forbidden. This did not prevent there being a transfer of a business.

147 See *Kem's Masonry*, O.L.R.B. Mon. Rep. Nov. 1964, p. 382, Dec. 1964, p. 470.

148 See *Kenmir Ltd.* v. *Frizzell*, [1968] 1 All E.R. 414. *(U.K. Redundancy Payments Act)*.

149 See *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Co.*, (1964) 64 C.L.L.C. 14,002.

150 See *Kem's Masonry, supra*, n. 147.

151 See *H.A. Hencoule (Joiners and Shopfitters) Ltd.* v. *Hunt*, [1967] I.T.R. 475 (on *U.K. Redundancy Payments Act*).

152 See *G.D. Ault (Isle of Wight) Ltd.* v. *Gregory*, (1967) 3 Knight's Industrial Reports 590 — on the *U.K. Redundancy Payments Act*.

153 See *Kenmir* v. *Frizzell*, [1968] 1 All E.R. 411, [1968] 1 W.L.R. 329 — on the *U.K. Redundancy Payments Act*.

be rendered meaningless by the transferor undertaking to introduce the transferee to the former's customers. These propositions amount to no more than saying that individual terms will be construed in the general context of the agreement. Even if a transfer of existing goodwill is regarded as a vital element in the sale of a business as compared with the sale of assets of a business, should the distinction rest upon the existence or non-existence of a binding contractual obligation to transfer it ? A moral obligation may be just as effective as one embodied in a contract, and no formal undertaking may be necessary where there is a close family or corporate link between the parties [154]. In practice the absence of an assignment of goodwill or a covenant against competition may not be felt if the transferor has in fact gone out of business and transferred all the assets of the business or such as are necessary to carry on the business associated with their use and operation. If the transferor does not intend to remain an assignment of goodwill may add nothing in fact to what the transferee has already acquired.

The Labour Relations Act require a broader approach in defining the sale or transfer of a business than the stance traditionally adopted by the courts. This has been recognized by the Ontario Labour Relations Board. The breadth of its vision is well exemplified by the series of four cases which followed upon the withdrawal of Steinbergs Ltd. from a number of supermarket operations in Kitchener, Fergus, Whitby and Guelph [155]. The facts followed the same general pattern in each of the four cases. By various forms of transaction Steinbergs placed a new operator in possession of its store premises, fixtures, equipment and merchandise with the exception of its own brand-name products and certain other items. In two of the cases the documentary evidence took the form of an assignment of the lease of retail premises and a sale of merchandise and equipment [156] ; in another a lease of premises and of equipment and a sale of merchandise [157] ; and in the fourth a sale of premises, equipment and stock-in-trade [158].

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154 See *Kem's Masonry*, O.L.R.B. Mon. Rep. Nov. 1964, p. 382, and Dec. 1964, p. 470 ; *Thorco Manufacturing Ltd*, (1965) 65 C.L.L.C. 16,052.

155 *Dutch Boy Food Markets*, (1965) 65 C.L.L.C. 16,051, *cert.* granted *R.* v. *Labour Relations Board (Ont.) ex. p. Kitchener Food Market Ltd.*, 66 C.L.L.C. 14,100 (Grant, J.), *rev'd R.* v. *Ontario Labour Relations Board*, (1966) 57 D.L.R. (2d) 521. The dates on the decisions were July 1965, November 1965 and May 1966 respectively ; *L & M Foodmarkets (Ontario) Ltd.*, O.L.R.B. Mon. Rep. Sept. 1965, p. 440 ; *Sunnybrook Food Market*, O.L.R.B. Mon. Rep. Oct. 1966, p. 531 ; *Leaders Clover Farm Food Market*, Nov. 1966, p. 636.

156 *Dutch Boy Food Market* and *Sunnybrook Food Market* cases, *supra*, n. 155.

157 *L & M Food Market (Ont.) Ltd.* case, *supra*, n. 155.

158 *Leaders Clover Farm Food Market* case, *supra*, n. 155.

In the *Dutch Boy Food Market* [159] case the terms of the contract specifically provided that no allowance was made in the purchase price for goodwill. In the other cases the agreements made no mention of goodwill, but no allowance was intended to be made. There was no covenant against competition in any of the transactions.

In each case there was a lapse of time between the purchaser entering into possession and the re-opening of the store [160]. Remodelling and redecorating was carried out at all four sites and in the case of *Leaders Clover Farm Food Market* this appears to have been very extensive. The stores re-opened under the names of the new operators, carrying on the same type of business as before, namely retail food merchandising.

The human element in the operations changed considerably. In the *Dutch Boy and Sunnybrook* cases none of Steinberg employees were engaged, and in the two other cases only one employee was retained. In the *L and M Food Market* case the employees were transferred to Steinberg stores in other locations, but in the other cases there was no evidence what happened to them. In the *Dutch Boy* and *Sunnybrook* cases the number of employees at the two locations increased considerably [161].

In the *Dutch Boy* case the agreement referred to the transfer giving transferee "possession of the business and premises".

Steinbergs ceased operations entirely in three of the locations, but in the *Sunnybrook* case they still had two stores situated in other towns four or five miles east and west and were found by the majority of the Board to compete with the new owner by advertising and other means.

Upon those facts the Board held that there had been a transfer of a business in all except the *Sunnybrook* case. The employers argued in each that there had been nothing more than a transfer of some of the assets but not of the business and that what the legislature intended was the transfer of a going concern. They made much play with the absence of any provision effective to transfer goodwill. There was in each case no express assignment, no restrictive covenant, and the stores on re-opening operated under new names.

In the Board's view a transfer of goodwill would have been clearly indicative of a transfer of a business but its absence was not conclusive.

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159 *Supra*, n. 155.

160 In the *Dutch Boy* and *Sunnybrook Food Market* cases about 6 weeks ; *Leaders Clover Farm Food Market* two weeks, and *L & M Foodmarkets (Ont.) Ltd.*, 3 days.

161 In the former the increase was from 10 to 35 ; and in the latter from 8 full-time and 15 to 20 part-time to 30 full-time and 11 or 12 part-time employees.

It pointed out that there were no customer lists to transfer, and suggested that if there were any goodwill in the case of a retail food business it consisted (apart from the name) in the habit of customers patronising the market at a particular location. The omission of goodwill was therefore meaningless. Since each supermarket chain features its own named brand products and was not interested in those of another chain no significance could be attached to the failure to purchase foodstuffs in determining whether or not a business had been sold.

The lapse of time between entering into possession and re-opening constituted no bar to this conclusion. In the case of a retail business a closure was necessary for renovations and restocking [162]. The fact that the agreement in the *Dutch Boy* case referred to vacant possession of the business and the others did not was not considered sufficiently significant to warrant a different conclusion. Nor was the change in work force conclusive for to hold otherwise would invite an employer to dismiss his employees. In the Board's opinion whilst its decision meant that the wishes of the employees were disregarded for the moment in the long term to deny the union's claim would defeat their interests. Whilst there is force in the Board's argument one might expect more weight to be attached to the human element [163]. As already noted above in the *L. & M.* case at least the original employees did not lose their jobs as a result of the transfer.

Viewing the situation overall, the Board concluded that there had been more than a mere transfer of assets in the *Dutch Boy, L. & M.* and *Leaders* cases. At law there may have been nothing to prevent Steinbergs from opening up again in premises adjacent to those sold. In practice there was no intention to return, the operations at those locations having proved unprofitable. They had disposed of the business associated with the use and operations of the assets in question. The Board did not deny that a distinction could be drawn between the transfer of a business and one of its assets alone. It pointed out in the *Dutch Boy* case that had the transferee purchased the contents of the business and moved them to another location there would have been only a transfer of assets. The key factor was the acquisition of the

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162 In the *Dutch Foy Foodmarkets* case, *supra*, n. 155, it thought a distinction could be drawn between a retail food business and a manufacturing operation : in the latter a shutdown would result in loss of production and financial loss.

163 Compare the decision in *Retail Store Employees' Union, Local 954* v. *Lane's of Findlay, Inc.*, 260 F. Supp. 655 (N.D. Ohio, 1966) where on similar facts the court held that the new employer was carrying on a new business and not simply an emanation of the old.

interest in the premises, and the absence of any provision on goodwill made no tangible difference.

The situation in the *Sunnybrook* case was different because the vendor continued in business in the same general market area and in competition with the purchaser. Steinbergs had simply changed its location within the market area and disposed of unwanted assets and premises.

No one could reasonably object to a liberal interpretation of the Labour Relations Act. If any legitimate criticism can be leveled at these decisions it is that too much emphasis is placed upon the material elements of an operation and too little on the human relationships involved. Labour relations, after all, is primarily concerned with the relationship between management and labour, with human relationships and not physical plant. Of course, the way the Act is framed encourages any tribunal to fall into this error.

The same recognition that traditional lines of reasoning on meaning of transfer of a business are inappropriate for the purposes of the Labour Relations Acts can be found in other decisions of the Board. In the *Thorco Manufacturing Limited* case [164], the employer was a newly incorporated company which acquired by purchase machinery and equipment belonging to Thor Industries and used in the metal fabrications side of the latter's business. When the union which had represented Thor Industries' employees sought to assert its bargaining position against Thorco and applied for conciliation services, the new company contended that it had acquired from Thor Industries part of its assets but none of its business. It argued that its success in garnering the business formerly done by that company was due to a series of unsolicited and fortuitous windfalls unconnected with and independent of the sale of chattels. There was no documentation of the transaction apart from that relating to the sale of equipment, but the Board had no difficulty in inferring from the timing of events and surrounding circumstances that what had occurred was not simply a sale of machinery but a disposition of an operation as a going concern. Certainly Thor Industries could not have been more helpful in ensuring that the takeover was smooth and continuity of the operation uninterrupted. This was, perhaps, to be expected since the new employer company was sponsored by executive officers of Thor Industries, the two companies shared the same President and General Manager and the remaining officers of the new company were Thor supervisors. The backing of Thor Industries was influential

[164] (1965) 65 C.L.L.C. 16,052 ; see also *Kem's Masonry*, O.L.R.B. Mon. Rep. Nov. 1964, p. 382, and Dec. 1964, p. 470.

in securing for the new company the loan necessary to finance the purchase of machinery. Thorco leased part of the Thor plant for its operations, and was allowed the use of further space without payment. There was a common office staff and telephone. Workers of the two companies used the same time clock. Employees who had worked at the machinery for Thor Industries were engaged by Thorco without any interruption of employment. Three former supervisors of Thor, now officers of the new company, performed the same job as before. Thor notified customers of the change, in fact inviting them to give business to the new company, and freely consented to the adoption of the Thorco name. There was no payment for goodwill but it was not by chance that the new company acquired the lease of the Thor plant and by its very presence there received business from Thor's customers. Against the background of these circumstances, the acquisition of the assets was merely part of an integrated plan to bring about a successful take over of part of the Thor enterprise. Had that prospect not been held out it was unlikely that Thorco would ever have been incorporated. The fact that the only documentary evidence of the transaction was a contract for the sale of assets and contained no reference to goodwill or business did not prevent it being a disposition of a going concern. The name of the company, the composition of its board, and the assistance of Thor made it a virtual certainty that the business would follow the acquisition of the assets.

Is there any justification or explanation for the different approaches in Ontario and elsewhere ? After referring to the restrictive interpretation given by the courts in British Columbia and Manitoba to successor provisions [165], the Board in *Kem's Masonry* [166] suggested three points of distinction. First, the nature of the business with which it was dealing was quite different from those in the cases. Its nature may be a factor in determining what may constitute a sale. Secondly, s. 47a of the Ontario statute was much broader in scope than those in Manitoba ("passing ownership") and British Columbia which made no mention of "other forms of disposition". Thirdly, in the other jurisdictions the collective agreement was binding, but in Ontario only the certification. Whilst those factors may explain the difference in approach they cannot be said to justify it. In all three jurisdictions what has to be disposed of is the business, not merely the assets. The word is the same and so

165 In *Gulf Islands Navigation Ltd.* v. *Seamen's International Union*, (1959) 18 D.L.R. (2d) 216. Re : *Parkhill Furniture and Bedding Ltd.*, (1960) 26 D.L.R. (2d) 289. *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Ltd.*, (1964) 64 C.L.L.C. 14,002.

166 O.L.R.B. Mon. Rep. Nov. 1964, at pp. 386-7.

is the general intent of the legislation. Further, if a wide interpretation is given to the word transfer then there may be no difference in the nature of the transactions to which the Ontario and British Columbia Acts apply.

The scope of the Ontario act is very broad, but the board still has to operate within the confines of a sale of a business. There are situations in which employees may find themselves doing the same job, at the same place and under the same conditions without there being any transfer of business as distinct from one of assets. For example, upon the termination of the lease of his premises an employer may decide to retire. The owner of the premises grants a new lease to a third party who proceeds to buy most if not all of the former employer's equipment and stock at a public auction. Apart from selling his assets the former employer has done nothing to facilitate the newcomers' entry. The employers may be re-engaged by him. There is continuity of employment on the same premises and the business activity is the same. But, there has been no disposition of a business [167]. It is a situation which would fall within the successor rules in the U.S.A.

**Subject matter in Quebec**

Article 36 of the Quebec Labour Code refers to *"enterprise"*, which in the English version is translated not as "business" but as "undertaking". The term is undefined and is capable of bearing many meanings depending upon the context. It is frequently used to mean an "economic unit of production", or an "industrial or commercial establishment", but, like business, is not confined to profit-making operations [168].

The Quebec Labour Relations Board, like its counterpart in Ontario has been faced with the question whether a transfer of some but not all the elements of an undertaking falls within the article. The elements of "l'enterprise" have been expressed in the following terms :

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167 This kind of situation arose in *Lloyd* v. *Brassey, The Times*, June 27th, 1968, a case on the *U.K. Redundancy Payments Act*. The result was that despite continuity of employment a farm labourer was entitled to compensation for loss of his job. See also *Bandey* v. *Penn*, [1968] 1 W.L.R. 670.

168 See *Syndicat national des concierges d'écoles de Pont-Viau* v. *Commission scolaire de Pont-Viau, Québec/Travail*, Oct. 1966, p. 12. For definitions of "enterprise" see *Syndicat national des camionneurs de Victoriaville* v. *Routexpress Inc., Décisions sur des conflits de droit dans les relations de travail*, (1965) vol. 4, 1250-10, at p. 4 ; *Syndicat national des employés de l'aluminium d'Arvida Inc.* v. *J.-R. Théberge Ltée*, [1965] R.D.T. 449, 468, 477, 485-6 ; *United Steelworkers of America* v. *Rouyn-Noranda Offset Ltée, Décisions sur des conflits de droit dans les relations de travail*, (1967) vol. 4, 1592-12 ; and the *Pont-Viau* case, *supra*, at p. 14 of the report.

> "L'entreprise et l'établissement comprennent plusieurs éléments : des éléments humains représentés par le chef de l'entreprise (ou le chef de l'établissement) et par le personnel ; les moyens utilisés par la communauté ; un élément intellectuel : la fin recherchée par l'entrepreneur. Dans l'ensemble formé par l'entreprise, individus et biens ne sont pas considérés isolément mais comme partie d'une universalité. Aussi l'entreprise pourra-t-elle demeurer identique, malgré les changements survenus dans les éléments constitutifs" [169].

The notion of the transfer of an undertaking does not seem to evoke quite the same confusion as the transfer of a business in the common law provinces, but there have been differences of opinion on the effect of a change in one or more elements of the undertaking. The Board have emphasised above all that "enterprise" must be read in the context of the legislative provisions on certification and in the light of the purpose of the article which is to protect rights acquired by virtue of certification and collective bargaining. Since certification is primarily concerned with the human element it has emphasised this aspect of the entreprise above all else [170] — the alteration of the relationship between the two principal elements, employer and employees. Discussion of the meaning of "enterprise" has not been hung upon the nature of goodwill [171], or whether what was transferred was assets or something more.

There is no alienation or concession of an entreprise when the undertaking of the new employer is substantially different from that of the transferor. Thus in one case a cartage company operating a public transport service under a general licence from the Transportation Board to transport other people's goods for reward, sold eight delivery trucks to a wholesale fruit and vegetable merchant who used them to make deliveries to his own customers. A number of drivers laid off by the cartage company were taken on by the merchant. The Board unanimously rejected the suggestion that this fell within the article. The cartage company had not transferred any part of its public transport undertaking and the two undertakings were quite different in character [172].

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169 ROUAST et DURAND, *Précis de législation industrielle*, 4e ed., p. 87, cited in the *J.-R. Théberge Ltée* case, *supra*, n. 165, at p. 468 ; and in the *Pont-Viau* case, *supra*, n. 165.

170 See *Syndicat national des employés de l'aluminium d'Arvida Inc.* v. *J.-R. Théberge Ltée*, *supra*, n. 168, at 467, 368 ; *United Steelworkers of America* v. *Rouyn-Noranda Offset Ltée*, *supra*, n. 468, at p. 13.

171 Goodwill was mentioned by the minority in *United Steelworkers of America* v. *Rouyn-Noranda Offset Ltée*, *supra*, n. 168 ; and its absence commented upon briefly in *Syndicat national des camionneurs de Victoriaville* v. *Routexpress Inc.*, *supra*, n. 168.

172 *Cartage and Miscellaneous Employees' Union, Local 931* v. *Crelinsten Fruit Co.*, *Journal du Travail*, Sept. 1965, p. 43.

**Bankruptcy, etc.**

Should special provision be made in successor legislation for the bankruptcy of an employer ? There may be some force in the argument that the prospect of being saddled with a bargaining agent and a burdensome agreement may deter a prospective purchaser and thus operate to the detriment not only of the creditors, but also of the employees and the general public who may be anxious that the undertaking be reopened or replaced with the minimum of delay. Does this justify a different rule ? It is suggested that it does not, but that in any event the interposition of a bankruptcy between the change of employers will be a cogent factor in determining whether the new regime is in substance a continuation of the old operation.

With the exception of the Quebec Labour Code, section 36 of which excludes from its operation alienation by judicial sale [173], none of the successor provisions make specific reference to dispositions by the trustee in bankruptcy, or by a receiver appointed by a debenture holder. An amendment to the Trade Union Act in Nova Scotia proposed in 1962 would have relieved a new employer of the burden of a collective agreement where he could show to the satisfaction of the Board that his predecessor had been driven into bankruptcy by it [174]. Apparently he would still have been obliged to recognize the bargaining agent certified in respect of his predecessor's employees but would be free to negotiate a new agreement. This never reached the statute book.

In practice it is much more difficult to prove a continuity of the business enterprise where bankruptcy has intervened even when the plant is reopened and produces the same product, with the same machinery and some if not all, of the old staff [175]. The argument against succession is strengthened when there has been some interruption in the operation of the plant. A closure for a period has not in other contexts

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173 See *Syndicat national des employés du Corduroy de Saint-Hyacinthe* v. *Union des ouvriers du textile d'Amérique, Décisions sur des conflits de droit dans les relations de travail*, (1965) vol. 4, 1292-11 ; *cp. Syndicat national des camionneurs de Victoriaville* v. *Routexpress Inc., Décisions sur des conflits*, etc., (1965) 1250-10.

174 See McKINNON, *Report of the Fact-Finding Body on Labour Legislation*, (1962), p. 38.

175 See *Parkhill Furniture and Bedding Ltd.* v. *International Molders and Foundry Workers, etc., Union, Local 174*, (1961) 26 D.L.R. (2d) 589, aff'g. (1960) 33 W.W.R. 176. Some of the judicial observations in (1961) 26 D.L.R. (2d) 589, 596, 599 seem virtually to rule out succession in fact if not in law. A similar disinclination to find succession marks the U.S. cases — see, for example, *Glenn Goulding*, (1967) 165 N.L.R.B. n°. 22 ; *Maintenance Incorporated*, (1964) 148 N.L.R.B. 1,299 — a ten month closure occurred.

proved a bar to succession [176], but in a bankruptcy situation it is likely to be accepted as strong evidence that what occurred was a transfer of assets but not of a business. The courts are reluctant to impose the burden of an agreement upon the new employer [177].

Succession must not be ruled out entirely. The making of a receiving order *per se* is no bar to an application for certification [178] and it has been held that a certification which becomes dormant upon a bankrupt employer going out of business may revive if he receives his discharge from bankruptcy and restarts operations [179]. Thus bankruptcy in itself does not terminate rights or obligations under the Labour Relations Acts, and there seems no reason why a transfer of a bankrupt business as a going concern should not attract the same consequences as any other. There have been suggestions in Ontario that a more liberal approach may be adopted where only a duty to bargain and the collective agreement survives the advent of the new employer [180]. But even in that province it is possible to detect in cases dealing with foreclosures by debenture-holders the application of more stringent standards of proof than applied in other contexts. There is less readiness to infer that a transfer of a business followed one of its physical assets, more emphasis in the board's discussions on the transfer of the business or operation in its entirety, and upon the continuation of the operation without interruption [181]. All jurisdictions except Quebec have accepted the view that succession rules should apply to transfers following bankruptcy or insolvency as well as in other situations.

In the U.S.A. similar results have been obtained. If an insolvent operation is taken over as a going concern no difficulty is experienced in finding succession [182], but when a plant is taken over in a shut down

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176 See *Dutch Boy Food Markets* case, (1965) 65 C.L.L.C. 16,051, discussed above, p. 503, where a supermarket closed for 6 weeks following sale.

177 See *Parkhill Furniture and Bedding Ltd.* case, *supra*, n. 175.

178 See *Guaranty Trust Co.*, (1947) 47 C.L.L.C. 16,500 ; *Gravell Brick Co.*, O.L.R.B. Mon. Rep. April 1955, p. 50.

179 See *Dick Vandenbelt*, O.L.R.B. Mon. Rep. Oct. 1966, p. 536.

180 See *Kem's Masonry*, O.L.R.B. Mon. Rep. Nov. 1964, at 386, 387 ; *D.H.I. Ltd.*, O.L.R.B. Mon. Rep. Aug. 1964, 237 at 239.

181 See *D.H.I. Ltd.*, O.L.R.B. Mon. Rep. Aug. 1964, p. 237 where the board found that the business was taken over as a going concern. *Compare Brantford Concrete Pipe Co. Ltd.*, O.L.R.B. Mon. Rep. Dec. 1966, p. 73 — where the plant had been in receivership for 6 months and idle during this time. One member dissented from the conclusion that there was no sale within s. 47a.

182 See *West Suburban Transit Lines Inc.*, (1966) 158 N.L.R.B. 794 ; *Johnson Ready-Mix Co.*, (1963) 142 N.L.R.B. 437.

condition, this in combination with other factors may compel the conclusion that the new operation is not a continuation of the old [183].

## 2. The extent of the inheritance

The notion of succession to rights and obligations in labour law is easy to accept in principle. It is much more difficult to determine precisely what should be preserved.

### (a) *The duty to bargain*

In both Canada and the U.S.A. the imposition of a continuing obligation to bargain is a key feature of succession rules.

In the U.S.A. the duty to bargain [184] rests upon the provisions of the National Labour Relations Act [185] which make it an unfair labour practice for an employer to refuse to bargain collectively with the representatives designated or selected for the purpose by the majority of his employees. Whilst provision is made for the holding of representation elections and the certification of results by the Board this step is not a prerequisite to the legal obligation to bargain. The certificate is, in effect, an official pronouncement that the union has the support of a majority of employees in a given work unit [186]. It is valid for a reasonable period, and in practice is regarded as raising an irrebuttable presumption of majority status for one year, and thereafter a rebuttable presumption which can be challenged only if the employer can show a reasonable belief supported by objective evidence of a loss of majority support [187].

It follows from the nature of the certificate that a mere change in ownership of an undertaking or in the identity of the operator ought

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183 See *Alabama Precast Product Co. Inc.*, (1967) 163 N.L.R.B. n° 99 — foreclosure sale ; *Max Leventhal*, (1957) 119 N.L.R.B. 575 — assignment for creditors ; and also *Tensco Corporation*, (1967) 141 N.L.R.B. 296 ; *Union Texas Petroleum*, (1965) 153 N.L.R.B. 849 ; *Triumph Sales*, (1965) 154 N.L.R.B. 916. In *International Brotherhood of Pulp, Sulphite and Paper Mill Workers* v. *Great N.W. Fibre Co.*, 263 F. Supp. 167 (E.D. Wash., 1965) at 169 it was stated that a forced liquidation excluded succession. In *Cliquot Club Bottling Co.*, (1950) 14 L.A. 260, the arbitrator held that a person acquiring on a bankruptcy sale was not a successor for the purposes of the successor provision in a collective agreement.

184 Discussion will be confined to the federal level.

185 49 Stat. 449, as amended 61 Stat. 136, and 73 Stat. 519 ; 29 U.S.C.A., s. 141 et seq. ss. 8(a)(5) and 9(a).

186 See *N.L.R.B.* v. *Armato*, 199 F. 2d 800 (7th Cir., 1952).

187 See *U.S. Gypsum*, (1966) 157 N.L.R.B. 652.

not to destroy the union's bargaining status so as to compel it to re-establish its position by new election proceedings with their accompanying expense, propaganda and disruption. The fact that the employer has changed is no reason to believe that the employees have changed their minds [188].

Although expressed in a variety of legal formulae, the intent of all the successor provisions is to preserve the union's bargaining status [189]. In Ontario, for example, a notice given under section 47a(2) of the Labour Relations Act by a union to a successor employer is declared to have the same effect as one given following certification. The notice can be given by a certified union or one which is entitled to give notice to bargain with a view to the renewal of an agreement. On giving notice the union is entitled to conciliation services [190].

**(b) *The collective agreement***

In the U.S.A. it was generally accepted until 1964 that a person acquiring an operation in good faith was not bound by a collective agreement entered into by his predecessor unless he had expressly assumed the obligations under it. A collective agreement ran with the business only when the new operator was the *alter ego*, a disguised continuance, of the old, or the transaction was entered into for the purpose of evading the obligations under the labour contract [191]. Then came the landmark case of *John Wiley and Sons Inc.* v. *Livington* [192] in which the United States Supreme Court, rejecting the application of ordinary contract rules to collective agreements, held that upon the merger of two companies, the succeeding company was bound to arbitrate grievances arising before the termination of the agreement. The union alleged that the company was bound by provisions relating to seniority rights, job security, grievances, and severance and vacation pay. The full implications of this decision have yet to be worked out. Although the court held only that the obligation to arbitrate survived,

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188 See *N.L.R.B.* v. *Armato*, *supra*, n. 186, at 807.

189 The drafting of some of them is open to criticism : see *supra*, p. 485.

190 See s. 47a(2), and also *Gilbert Foley*, O.L.R.B. Mon. Rep. Feb. 1965, p. 589 ; *R. ex. rel. Kitchener Food Market Ltd.*, (1966) 57 D.L.R. (2d) 521, at 527-528. A notice also has the same effect as certification for the purpose of certain other sections dealing with bars to applications by other unions, the termination of bargaining rights, etc., see s. 47(a)(9) referring to the effect for the purposes of sections 5, 43, 45, 46, and 96, and also *Irving Charles Supermarkets*, O.L.R.B. Mon. Rep. Sept. 1965, p. 406 (on s. 43).

191 See, for example, *Herman Loewenstein Inc.*, (1947) 75 N.L.R.B. 377 ; *American Concrete Pipe of Hawaii Inc.*, (1960) 128 N.L.R.B. 720.

192 376 U.S. 543, 11 L. ed. 898, 84, S.C. 909 (1966).

the case was soon being relied upon to support the proposition that the successor employer was obligated to honour the substantive terms of the agreement except possibly where the new circumstances made it unreasonable or inequitable [193].

The National Labour Relations Board has avoided having to make any clear cut pronouncement on the question [194]. Upon a number of occasions it has been invited to reconsider in the light of the *Wiley* case the rule that the existence of a collective agreement bars a petition for an election. The pre-*Wiley* position was that the successor was not bound by the agreements unless he had assumed it, and hence in other circumstances it did not operate as a bar [195]. So far it has side stepped the issue [196].

With the exception of Ontario the Canadian provinces dealing with succession have provided for the collective agreement to continue in force and bind the new employer. It is of some interest to note that the original successor provision in Ontario would have given the Board power to declare both the certificate and the collective bargain covering his predecessor to be binding upon the new employer. Passed in 1962 [197], this was never proclaimed in force, the original reason being that time was necessary to permit the drafting of rules and forms [198]. After further consideration had been given to the problems, but apparently without

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193 See *Wackenhut Corporation* v. *International Union, United Plant Guard Workers of America*, 332 F. 2d 954 (9th Cir., 1964), at 958 ; *United Steelworkers of America* v. *Reliance Universal Inc. of Ohio*, 335 F. 2d 891 (3d Cir., 1964) ; *International Brotherhood of Pulp, Sulphite and Paper Mill Workers* v. *Great N.W. Fibre Co.*, 263 F. Supp. 167 (E.D. Wash, 1965). Also *In re : Lake States Leasing Corporation*, (1966) 46 L.A. 93.

194 See *Rinker Materials*, (1967) 162 N.L.R.B. 157 ; *Glenn Goulding*, (1967) 165 N.L.R.B. nº. 22.

195 *General Extrusion Co.*, (1958) 121 N.L.R.B. 1,165.

196 See *Triumph Sales Inc.*, (1965) 154 N.L.R.B. 916 — no succession ; *U.S. Gypsum*, (1966) 157 N.L.R.B. 652. In the last mentioned case it did modify its previous position by removing an anomalous conflict of policy between unfair labor practice and election petition cases. Now an employer must justify his petition by showing reasonable grounds for his belief that the union has majority status. Previously an election had been granted automatically upon the employer's petition.

197 Ont. Stat. 1961-2, c. 68, s. 4.

198 See *Ontario Legislative Debates* for 18 April 1962, p. 2525. The original provision was in keeping with the recommendations of the Select Committee on Labour Relations of the Ontario Legislature which reported 10 July 1958, at 41-42, and also of the (Goldenberg) Royal Commission on Labour-Management Relations in the Construction Industry, 1962, at 46, 73. Note also the *Report of the Fact Finding Body on Labour Legislation*, (1962 N.S.), p. 38, which would have given the right to negotiate a new agreement where the predecessor had been forced into bankruptcy by the old agreement.

further recorded debate on them, the Ontario legislature passed section 47a in substantially its current form in 1963.

A case can be made out for protecting the vested rights of employees acquired by dint of hard bargaining and long service, especially in such matters as pensions, welfare and seniority. To re-open old issues and compel a union to resort afresh to the frustrating process of negotiation is not conductive to the maintenance of industrial peace. Further, the imposition of obligations stemming from a collective agreement may be the only effective way of implementing an order for the reinstatement of an employee who was improperly discharged. The fact that the new employer was not a party to the previous negotiations is no bar to the continued validity of the agreement. After all, an employee joining a unit is bound by the existing agreement, and when one union upon certification displaces another it is bound by the existing agreement for a time at least.

### (c) *Other proceedings*

In the U.S.A. orders made by the National Labour Relations Board to remedy such unfair labour practices as dismissal of employees for union activity are usually expressed to be binding upon the employer, his "successors and assigns". In the past a restricted view was taken by the Board of the scope of its remedial powers. It showed no hesitation in enforcing orders against a successor who was the *alter ego* of the guilty party, or when the transfer of an operation was made to evade liability [199]. Similarly, a purchaser who participated in the wrong act was liable. This caught the purchaser who instructed the seller to dismiss union members before the sale was consumated [200]. But until recently enforcement had been refused against the *bona fide* purchaser [201], and the fact that he had notice of the unfair labour practice was immaterial.

In the light of current thinking on labour policy, the Board has revised its position. In appropriate circumstances it will order enforcement against a *bona fide* purchaser with notice. The justification given for this step is that the successor is usually in the best position to remedy the wrong. The most effective remedy is reinstatement without loss of pay, seniority or other benefits. The imposition of this obligation need work no injustice since the successor will have had the benefit (if any)

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199 *Ozark Hardwood Co.*, (1957) 119 N.L.R.B. 1,130.

200 See *K. B. & J. Young's Supermarkets Inc.*, (1966) 157 N.L.R.B. 271, review refused 377 F. 2d 463 (9th Cir., 1967) ; *Mole Oldsmobile Inc.*, (1965) 152 N.L.R.B. n°. 36.

201 See *S. Carolina Granite Co.*, (1944) 58 N.L.R.B. 1,448.

of the unfair labour practice, and potential liability may be reflected in the purchase price or obviated by an indemnity in the sales contract [202].

In Canada no specific reference is made in the successor sections to deal with unfair labour practices but several of the provinces have provisions which might be of some utility [203]. In Alberta, British Columbia and Saskatchewan [204] the acts preserve all proceedings taken under them prior to the transaction triggering the succession. This could cover not only unfair labour practice proceedings but also applications for certification, notice to bargain, an application for conciliation services, applications to the board for amendment of certificate, to identify the employer, or to determine who is covered by an agreement. It might also apply to the arbitration of disputes arising under the agreement, and to proceedings involving a reference of such a dispute to the board under s. 22 (4) of the British Columbia Labour Relations Act. Clearly a person acquiring a business in those provinces must tread with care or run the risk of being taken by surprise by proceedings of which he had no knowledge prior to his acquisition. A good deal more thought needs to be given to this aspect of succession.

In Quebec the provision is more limited, but on succession the new employer becomes *ipso facto* party to any proceedings for securing a certificate or for making or carrying out a collective agreement [205]. The Trade Union Act of Nova Scotia preserves only applications for certification [206]. The act in Ontario does not go beyond succession to the obligation to bargain, and those in Manitoba and Newfoundland cover that and the obligation to observe the terms of a collective agreement [207] without touching any other proceedings which may have been taken.

If the integrity of the bargaining unit is preserved upon a takeover by one employer of another's undertaking no great difficulty need arise in applying sections which provide for the inheritance of the obligation to bargain, or the burdens of collective agreement, or both. The union

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202 See *Makela Welding Inc.*, (1966) 159 N.L.R.B. n°· 93 ; *Perma Vinyl Corp.*, (1967) 164 N.L.R.B. n°· 119. *Compare : George W. Ball*, (1966) 159 N.L.R.B. n°· 140, aff'd. in *Wheeler* v. *N.L.R.B.*, 382 F. 2d 172 (D.C. 1967) where enforcement was refused against a person who purchased after a lapse of four years.

203 Apart from these the Boards might be prepared in some cases to vary an order to substitute in it the name of the new employer for that of the old : see *supra*, p. 474.

204 *Alta. Labour Act*, s. 74(1) ; *B.C.L.R. Act*, s. 12(11) : *Sask. T.U. Act*, s. 33.

205 *Que. Labour Code*, article 36.

206 *N.S. T.U. Act*, s. 21(2).

207 *Ont. L.R. Act*, s. 47a ; *Man. L.R. Act*, ss. 10, 18 ; *Newfoundland L.R. Act*, s. 21A.

representing employees of the transferred business will continue to represent employees in that unit. Its bargaining rights will not be affected by the mere fact of the transfer. The policy of the act in maintaining stability in bargaining relationships will be implemented by protecting the union's rights against any other union representing other employees of the transferee even though the description of the latter union's bargaining preserve in its certificate or collective agreement is wide enough to cover the incoming employers if literally applied. The interest of the employees in choosing their own bargaining representative will override that of the employer in reducing the number of union's with which he has to deal.

Where the identity of the unit is seriously impaired [208] or the intermingling of employees results in an employer being faced with the duty of applying conflicting collective agreements or negotiating with two or more unions, each certified and competing for jurisdiction, serious difficulties may arise. The employer may find his plant the site for a jurisdictional battle which was not of his seeking. This prospect may deter the rationalisation of industry and perpetuate inefficient operations. It also leads the courts and the boards to adopt a restrictive interpretation of the successor provisions [209], and employers to adopt forms of transaction falling outside them.

These problems are not insuperable. They do not necessarily call for the exclusion of a collective agreement from an employer's inheritance — the solution adopted in Ontario. They call for a flexible response. It is possible to resolve the difficulties by conferring power on the boards to deal with conflicts of bargaining rights, or by reference to the boards or arbitration to find a *modus vivendi* between conflicting contractual rights and obligations [210]. This would involve conferring upon arbitrators a function rather different from that in which they normally engage when in interpreting agreements, but special problems call for special solutions.

In the U.S.A. no completely satisfactory solution has yet been worked out to the possibility of inter-union conflict and to the difficulties

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208 There may be impairment of the unit without any intermingling, e.g., if a business is sold to a number of independent purchasers.

209 See *Kem's Masonry*, O.L.R.B. Mon. Rep. Nov. 1964, p. 368 ; and the *Pont-Viau* case.

210 Arbitrators have been asked occasionally to resolve such conflicts — see *Pacific Coast Pipe Ltd.* v. *I.W.A., Local 1252*, an unreported decision of A. W. R. CARROTHERS dated 17th October 1961, and *Canadian Ingersoll-Rand Co. Ltd.* v. *Association internationale des machinistes, Décisions sur des conflits de droit dans les relations de travail*, (1965) vol. 1, 330-2.

inherent in the imposition of a collective agreement upon the new employer. If the unit is clearly identifiable and not integrated with the new employer's other operations, he is subjected to the duty to bargain [211]. The possibility of conflict may be avoided by unit clarification proceedings [212]. The employer will not be forced to bargain with a union representing a minority of an integrated operation and an election may be ordered [213].

So far as the inheritance of the bargain is concerned, the difficulties were soon made clear in *McGuire* v. *Humble Oil and Refining Co.* [214] In none of the previous cases had the courts been faced with a situation presenting the possibility of conflict, for the new employer's other enterprises were not unionised. In the *McGuire* case, employees of the purchasing company were represented by a different union, and in unit clarification proceedings the National Labour Relations Board had held that the new employees had been effectively merged into the unit represented by that other union and no longer constituted a separate unit for bargaining purposes. In these circumstances it was impracticable to require the new employer to arbitrate grievances, for that course would be likely to lead to unrest and dissatisfaction amongst the employees covered by a different agreement. It might also constitute an unfair labour practice where, as here, the incoming employees represented only a small proportion of the total number of employees in the merged unit [215]. Other courts have been reluctant to extend the *Wiley* case beyond an obligation to arbitrate grievances arising out of the old agreement [216]. Those which have supported its extension would accord to the arbitrator power to relieve the employer where the new circumstances would make it unreasonable or inequitable to require his adherence to the agreement [217].

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211 See *Rinker Materials Corporation*, (1967) 162 N.L.R.B. 157 ; *Compare : N.L.R.B.* v. *Aluminium Tubular Corporation*, 299 F. 2d 595 (2d Cir., 1962) — unit no longer in identifiable form.

212 *McGuire* v. *Humble Oil & Refining Co.*, 247 F. Supp. 113 (S.D. N.Y., 1965), rev'd 355 F 2d 352 (2d Cir., 1966). This step may be taken even where the union was not certified.

213 *Southern Conference of Teamsters* v. *Redball Motor Freight Inc.*, 374 F. 2d 932 (5th Cir., 1967). *John Wiley & Sons Inc.* v. *Livingston*, 376 U.S. 543, 11 L. ed. 898, 84 S.Ct. 909 (1964) did not decide the question of succession to bargaining status.

214 *Supra*, n. 212.

215 See also *Southern Conference of Teamsters* v. *Redball Motor Freight Inc.*, *supra*, n. 213.

216 See *Monroe Sander Corp.* v. *Livingston*, 262 F. Supp. 66, 377 F. 2d 6 (2d Cir., 1967) ; *Retail Store Employees, Local 954* v. *Lane's of Findlay Inc.*, 260 F. Supp. 655 (N.D. Ohio, 1966) — the courts found no succession anyway.

217 *Supra*, p. 513.

**The Board's powers in Canada**

In British Columbia and in Newfoundland no attempt has been made at all to deal with these problems. In Saskatchewan the response to them is purely negative : a representation order or a collective agreement affecting the employees concerned continues in effect ". . . unless the Board otherwise orders . . ." without further elaboration [218].

Of the remainder the broadest and least elaborate is that in Quebec which gives the board power to "settle any difficulty arising out of the application of . . ." article 36 [219]. No procedure is laid down and there are neither restrictions on the board's power nor guidelines as to the manner in which it should be exercised. This provision has the advantage of flexibility : the board has ample power to adopt whatever solution it considers appropriate. It may, for example, redefine the jurisdictional limits of a certificate [220], order representational votes, and resolve in an equitable manner any conflict in the application of the collective agreements involved [221]. The development of guidelines for the exercise of its powers rests solely with the board and the exposition of them must await the development of *la jurisprudence.* Clearly this kind of provision would be of limited value in jurisdictions which do not publish at all the reasons for decisions.

The apparent inadequacy of the Nova Scotia act to deal with those special problems is partly due to a legislative oversight. Section 21 (6) gives the board power, on the application of any person, to determine which collective agreement and certificate shall cover the employees affected when a business is sold to a purchased who already has an existing collective agreement with another union or whose employees are represented by another bargaining agent. Although the section in general applies to both sales and transfers, section 21 (6) mentions only sales. On its face, the board is helpless where the problems arise out of some other form of disposition. In any event the options open to the board are limited : it is a case of all or nothing, with no intermediate position being available. There is no provision for varying the certificate or agreement or for joint certification. Having regard to the limited application of the section anyway the practical difficulties arising out

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218 *Sask. T.U. Act*, s. 33.

219 *Que. Labour Code*, Art. 37.

220 See *Commission des relations de travail du Québec* v. *Canadian Ingersoll-Rand Company Ltd.*, [1968].

221 *Syndicat national des concierges d'écoles de Pont-Viau* v. *Commission scolaire de Pont-Viau, Québec/Travail*, Oct. 1966, p. 12, at 19 (M. Roy).

of the wording of section 21 (6) may not be as serious as might otherwise appear [222].

The Alberta provision [223] is somewhat fuller. Where a business is sold, leased or transferred or merged [224] with another business and the employees covered by the certificate or collective agreement are intermingled with other employees the board may hold such inquiry as it considers adequate and take the following steps. In relation to the certification, it may determine whether the employees constitute one or more appropriate units for collective bargaining purposes, declare which union or unions, if any, shall be the bargaining agent or agents in such unit or units, and amend any certificate or bargaining unit defined in it. It could thus merge the units, redefine their scope or create different units. In relation to the collective agreements involved, it may declare which agreement, if any, should continue in force and to what extent, and which agreement if any shall terminate. Presumably it may reject both or continue both in force, but is not clear how far, if at all, it may rewrite an agreement for the merged unit, picking and choosing between the terms of different agreements in order to find clauses which in combination produce a fair and equitable solution to conflicts on pay, seniority, fringe benefits and the like. Does it give power to modify agreements to avoid inconsistencies ?

In Manitoba where businesses are amalgamated, the several certificates continue in force until duly terminated. The board may merge the bargaining units if satisfied that this would produce a single unit appropriate for bargaining purposes, specify the time at which the merger shall take effect, impose such terms as in the opinion of the board will serve the interests of the employer and the employees, and certify a bargaining agent for the merged unit [225]. Under section 18 of the Manitoba Labour Relations Act, dealing with the effect on the collective agreement, it is provided that if one or more collective agreements exist each continues in force upon the merger. Where the board orders a merger of units the several agreements, with such modifications as may be necessary to remove any inconsistencies between them, become binding upon the newly certified agent and upon the employer until the agreement terminated or a new agreement is negotiated.

The provisions of the Ontario Act are somewhat long-winded and clumsily phrased but the intention is reasonably clear. A union's

222 For further criticism of the drafting of the section, see *supra*, p. 497.

223 *Alta. Labour Act*, s. 74(2).

224 A word which does not appear in s. 74(1).

225 *Man. L.R. Act*, s. 10(3), (4).

bargaining rights in respect of the employees of the business sold continue in force in respect of the "like bargaining unit" in that business [226]. Any trade union or person concerned may apply to the board to have resolved any question as to what constitutes the "like bargaining unit" and any alleged conflict between the bargaining rights of the union representing employees in the business transferred and that catering for employees of the purchaser [227]. In practice the application will be made usually by the former, but the latter union, the employer, and presumably any individual employee could invoke the jurisdiction of the board.

The board can define the composition of the like bargaining unit with such modifications as it considers necessary. It may in the case of a conflict of rights amend the definition of any bargaining unit described in any collective agreement and amend any certificate issued to "any other union". Presumably this is a reference to any union other than that claiming to represent the former employees of the business transferred and not any union other than the applicant.

Thus under this power the board could modify the description of a unit embracing all employees of the purchaser by excluding those transferring to him with the vendor's business.

Where the employees of two or more businesses are intermingled following a sale the board has powers similar to those of its counterpart in Alberta [228]. Thus it may determine whether the employees concerned constitute one or more appropriate units for bargaining purposes. In defining 'appropriate' for this purpose the board has indicated upon a number of occasions that it will not necessarily apply the same criteria as it would in determining the appropriateness of a unit upon an initial application for certification [229]. Thus an appropriate unit in the use of an employer owning several retail stores or service operation is normally all employees of that employer within a given municipality or geographical area. But if the employer acquires by purchase another store, the employees of which are represented by a different union, then that union

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226 *Ont. L.R. Act*, s. 47a(2).

227 Section 47a(3).

228 *Ont. L.R. Act*, s. 47a(5)(6) ; see *Alta. L. Act*, s. 74(2). In Ontario there is, of course, no reference to the continued validity of the collective agreement. *Cp. Alta. L. Act*, s. 74(2)(d). The powers of the board under s. 47a(5) and (7) of the Ontario Act were applied to mergers of municipalities by s. 47a(10).

229 See *Oshawa Wholesale Ltd.*, O.L.R.B. Mon. Rep. Feb. 1965, p. 584 ; *Board of Trustees of R.C. Separate Schools for the City of Windsor*, O.L.R.B. Mon. Rep. March 1966, p. 921, April 1966, p. 62, June 1966, pp. 166, 203. *Etobicoke* case, O.L.R.B. Mon Rep. Harch 1967, p. 1001 at 1005 (on s. 47a(10) ). *Cp. Mountain View Dairy*, O.L.R.B. Mon. Rep. Feb. 1967, p. 911, at 914.

may be allowed to retain its bargaining rights at that location notwithstanding any intermingling of employees [230].

Having determined the appropriate unit the board may declare which union shall be bargaining agent, and in order to reach a decision on this, may if necessary hold a vote [231]. In most cases no vote has been necessary, and where the board has considered it appropriate the parties have generally agreed [232].

As a general rule no vote is ordered when there is a large disparity between the size of the two groups being intermingled and it is clear that one union has the support of a majority. No criteria has been laid down for determining what degree of employee support is necessary before a union can persuade the board to order a vote. It may be done where the number of employees in the two businesses is fairly evenly balanced [233], and in two cases votes were taken where the applicant was able to show that it represented a third of the amalgamated work force [234].

Two further points are worthy of note. The first is that before the board can act under section 47a(5) it must be shown that the intermingling of employees took place after the sale of the business. Thus when a movement of employees took place between associated companies prior to their amalgamation the board considered it has no jurisdiction to deal with the problem [235]. The second is that the board has declined to

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230 See the cases mentioned in note 229. In the *Mountain View* case the *Oshawa Wholesale Ltd.* case was distinguished on the ground that in the latter there was little or no intermingling and the location of the enterprise had not changed. In the *Oshawa Wholesale* case, too, there was no existing unit of employees of the successor. In the *Mountain View* case, 2 businesses, only 1 of which was unionized, were acquired and their operations switched to 1 of 2 plants of the new employer, combining there with his original employees. One union was certified in respect of both plants and the Board refused to disturb the unit. However, the principle of treating this situation on a different basis from an initial certification was affirmed in the Etobicoke case. See also *Board of Trustees of R.C. Separate Schools for the City of Windsor*, O.L.R.B. Mon. Rep. March 1966, p. 921, at 923.

231 For examples of cases where a vote was ordered, see *Nasco Industries Ltd.*, O.L.R.B. Mon. Rep. Dec. 1965, p. 625 ; *Grenville Aggregate Specialities Ltd.*, O.L.R.B. Mon. Rep. July 1965, p. 304 ; *Findlay Kemp Dairies Ltd.*, O.L.R.B. Mon. Rep. March 1966, p. 919.

232 See *Alliance Dairy Ltd.*, O.L.R.B. Mon. Rep. Aug. 1966, p. 336.

233 40 : 48 in *Borden Co. Ltd.*, O.L.R.B. Mon. Rep. Jan. 1966, p. 753.

234 *Belton-Quinn Lumber Co.*, O.L.R.B. Mon. Rep. Aug. 1965, p. 375 ; and see *Board of Trustees of R.C. Separate Schools for City of Windsor*, O.L.R.B. Mon. Rep. March 1966, p. 921, April 1966, p. 62 ; June 1966, pp. 166, 203. No vote was ordered, where the applicant represented only 63 out of a combined total of 499 (i.e., 14%) — *Alliance Dairy Ltd.*, O.L.R.B. Mon. Rep. Aug. 1966, p. 336 ; 1 out of 13 in *Westeel-Rosco*, O.L.R.B. Mon. Rep. Dec. 1966, p. 712 ; 8 out of 60 in *Mountain View Dairy*, O.L.R.B. Mon. Rep. Feb. 1967, p. 911 — In the last case it was said that 8 out of 24 would have been sufficient to justify the expense and disruption of a vote.

235 *Westeel-Rosco Ltd.*, O.L.R.B. Mon. Rep. Dec. 1966, p. 718.

deal with issues arising under s. 47a(5) upon a ministerial reference under s. 79A of the act. Apparently there has to be an application under the former section. It remains to be seen whether the Minister is a 'person . . . concerned' for this purpose [236].

A union which is declared by the board to be the bargaining agent under this provision may give notice to the employer to commence bargaining [237] and for certain purposes the board's declaration has the same effect as certification [238].

Looking at the overall position we see that in the U.S.A. the courts are still groping their way towards a satisfactory method of dealing with conflicts between unions and between collective agreements which may arise when one employer takes over the operation of another. In Canada no uniform or consistent approach has been adopted in the various provinces.

## A Troop of Tribunals

Finally, we turn to the problem of ensuring a consistent interpretation and application of the successor provisions. How can the possibility of conflicting decisions by different tribunals be reduced or eliminated ? Should the transfer of rights and obligations be automatic or dependent upon the decision of a labour relations board ? Should the boards be given exclusive jurisdiction ?

In the U.S.A. the issues have come before the courts, and arbitrators as well as the National Labor Relations Board. Succession is automatic where there is a substantial continuity in the employing industry.

Similarly in Canada none of the provincial statutes render a determination of the board a *sine qua non* of the application of the successor provisions. In Quebec the board is given power to make any order it deems necessary to record the transfer of rights and obligations under Article 36 of the Labour Code, but such an order is not a condition precedent to the transfer and no other provision is made for ensuring publicity so far as third parties are concerned [239]. In Nova Scotia provi-

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[236] See *Lawson-McMullen Victoria Ltd.*, O.L.R.B. Nov. 1965, p. 551 ; *Board of Trustees of R.C. Separate Schools for the City of Windsor, supra*, n. 230.

[237] Section 47a(6).

[238] Section 47a(9).

[239] *Quebec Labour Code*, article 37 ; and see *La fraternité internationale des ouvriers en électricité* v. *National Cablevision Ltd.*, [1967] R.D.T. 314 (a decision of the C.R.T.).

sion is made for an application to determine the purpose of a sale or transfer and to make a binding order but the remainder of the section suggests that succession is automatic and the board's order declaratory [240].

It may be that the Ontario legislature intended to give the board exclusive jurisdiction and to postpone the employer's obligation to bargain until it had brought down a decision. This certainly appears to have been the intent and effect of the original successor provision, but under section 47a(2) of the current statute a union continues to be the bargaining agent "until the Board otherwise directs". This suggests that succession is automatic [241]. Applications may be made to the board to determine the like bargain unit and resolve any conflict of bargaining rights (under s. 47a(3) ), to terminate bargaining rights where the purchaser has brought about a substantial change in the character of the business acquired (under s. 47a(4) ), and to deal with problems created by the intermingling of the employees of two or more businesses (under s. 47a(5) ). When an application has been made the employer is not required to bargain until the board has disposed of the issues and declared which union, if any, has the right to bargain on behalf of the employees concerned [242]. But the procedure laid down for asserting bargaining rights permits the board to be bypassed and the issue to be presented to the Minister of Labour or the courts. The restriction on the obligation to bargain where an application has been made to the board does not affect an advisory opinion given by it on a reference by the Minister under s. 79A of the question whether a union is entitled to give notice to bargain and hence entitled to conciliation services [243].

In the other provinces the automatic transmission of rights and obligations is the rule implicit in all the decisions of the courts [244].

This rule does have one advantage. The fact that a business has passed through a number of hands by sale or some other form of disposition within the successor provisions does not defeat their operation. Thus is has been held in Ontario that a union is entitled to give notice

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240 *Compare : N.S. T.U. Act*, s. 21(2), (3), (5) and (6). See *supra*, p. 497.

241 See also the remarks of the Deputy Vice-Chairman (Mr. Maclean) in his minority opinion delivered in the *Nasco Industries* case, dated Dec. 7th, 1965, File nº 10656-65-M. The reasons for judgment are not printed in the O.L.R.B. Monthly Report — December 1965, p. 625. Compare Ont. Stat. 1961-2, Ch. 68, s. 4, which was never proclaimed in force.

242 Section 47a(8).

243 See *R.* v. *Ont. L.R.B., ex. p. Kitchener Food Market Ltd.*, (1966) 57 D.L.R. (2d) 521, at pp. 529, 531.

244 In addition to the cases cited earlier in this paper, see *Crestbrook Forest Industries Ltd.* v. *I.W.A., Local 1-1405*, (1965), unreported decision of Judge Gansner (Nov. 14th, 1967).

to the employer who emerges after a series of intermediate dispositions as the person in control of the business [245].

To some extent the possibility of conflicting interpretations may be reduced in practice by having the board pronounce upon the issue before it gets before the courts. The procedure adopted depends on provincial legislation and practice : it may take the form of an application by a union for variance of a certificate, or in Ontario a reference by the Minister under s. 79A. But past experience has shown that the boards and other tribunals are not always prepared to defer to the decisions of another [246]. There is no guarantee that different interpretations will not be placed upon the same facts by different adjudicating bodies.

At present the issue may come before the courts in a variety of ways. For example, an application may be made to quash the decision of an arbitrator, for certiorari to set aside the decision of a labour relations board [247], or for an injunction to forestall a strike or picketing [248] or to prevent a breach of a collective agreement [249]. Likewise it may be presented to a labour relations board upon an application for certification [250], or for decertification [251], for consent to prosecute [252], or in unfair labour practice proceedings [253], or in an application to identify the

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245 See *D.H.I. Ltd.*, O.L.R.B. Mon Rep. Aug. 1964, p. 237 — a sale by a receiver through trustees for another company and thereafter to D.H.I. Ltd.; *William Gunter*, O.L.R.B. Mon. Rep. May 1964, p. 72, (1964) 64(3) C.L.L.C. 16,010 — one intermediate sale ; *Grenville Aggregate Specialties*, O.L.R.B. Mon. Rep. July 1965, p. 304 — sale to a company, thence to a partnership and finally to the respondent. Each transaction was a sale within s. 47(a).

246 See the *White Lunch* case, *supra*, p. 476, where the board ignored the opinion of two members of the B.C. Supreme Court.

247 *R.* v. *Ont. L.R.B., ex. p. Kitchener Food Market Ltd.*, (1966) 57 D.L.R. (2d) 621 ; see also *United Steelworkers of America* v. *B.C. Labour Relations Board*, (1953) 53 C.L.L.C. 15,077.

248 *Goloff* v. *I.W.A., Local 1-405*, (1959) 59 C.L.L.C. 15,436, 15,437 ; *Crestbrook Forest Industries Ltd.* v. *I.W.A., Local 1-405*, unreported decision of Judge Gansner, Nov. 14, 1967.

249 *Gulf Islands Navigation Ltd.* v. *Seamen's International Union*, (1959) 18 D.L.R. (2d) 216 ; *Amalgamated Lithographers of America, Local 44* v. *National Paper Box Ltd.*, (1964) 48 W.W.R. 547 ; *Retail, Wholesale, etc., Union, Local 580* c. *Reitmier Truck Lines Ltd.*, (1966) 57 D.L.R. (2d) 589 ; *I.W.A., Local 1-217* v. *Monocrest Kitchens Ltd.*, (1967) 63 D.L.R. (2d) 546 — a claim for damages and an injunction.

250 *National Seal Division of Oil Seals Ltd.*, (1963) 63 C.L.L.C. 16,296 ; *Newland-Harding Yarns Ltd.*, (1962) 62 C.L.L.C. 16,229 ; *Harding Brantford Ltd.*, O.L.R.B. Mon. Rep. July 1966, p. 245.

251 *Harvey Gavin*, (1960) 61 C.L.L.C. 16,183 ; *William Gunter*, (1964) 64 C.L.L.C. 16,010.

252 *New Method Laundry and Dry Cleaners*, (1957) 57 C.L.L.C. 16,059 ; *Hamilton Cotton Co. Ltd.*, O.L.R.B. Mon. Rep. July 1964, p. 190.

253 *Canadian Gypsum Co. Ltd.*, O.L.R.B. Jan. 1967, p. 819.

employer [254], or upon a reference from the Minister of Labour to determine whether a union is entitled to give notice to bargain and to conciliation services [255], as well as upon applications under section 47a [256].

An arbitrator may also find himself having to deal with succession problems in the course of grievance proceedings under the terms of a collective agreement [257].

Perhaps the solution to the threat of inconsistent applications of successor provisions would be to give the board exclusive jusrisdiction requiring any succession issue arising before any other tribunal to be referred to it.

## Conclusions

It is suggested that none of the successor provisions in Canada are adequate to achieve their purpose. What, then, are the criteria of adequacy ?

First, it is submitted that any coherent policy requires that the protection afforded to unions and employees ought not to be dependent upon the form a business reorganisation might take. It may be material for the purpose of tax and company law, or for determining liability for unemployment insurance or Canada Pension Plan contributions, or workmen's compensation assessments. For the purpose of collective bargaining legislation, it is submitted, that it is not. The test which ought to be applied in determining when a new employer should inherit the rights and obligations of his predecessor, is whether he is carrying on substantially the same undertaking. It is suggested that the successor

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254 *Dare Food Ltd.*, (1961) 61 C.L.L.C. 16,199 ; *Rock Water Iron Products*, O.L.R.B. Mon. Rep. Sept. 1964, p. 293 ; *Loblaw Groceterias Co. Ltd.*, (1965) 65 C.L.L.C. 16,078.

255 Pre 1963, *Drake Hotel*, (1957) 57 C.L.L.C. 16,060 ; *Gordon Wright Electric Ltd.*, (1967) 57 C.L.L.C. 16,058 ; *Canada Machinery Corporation Ltd.*, (1961) 61 C.L.L.C. 16,194. Under s. 79A of *Ont. L.R. Act* and s. 47a see *D.H.I. Ltd.*, O.L.R.B. Mon. Rep. Aug. 1964, p. 237 ; *Thorco Manufacturing Ltd.*, (1965) 65 C.L.L.C. 16,052 ; *Gilbert Foley*, O.L.R.B. Mon. Rep. Feb. 1965, p. 589 ; *L & M Food Market (Ontario) Ltd.*, O.L.R.B. Mon. Rep. Sept. 1965, p. 440 ; *Russ Construction (London) Ltd.*, O.L.R.B. Mon. Rep. Sept. 1967, p. 601.

256 E.g., *Belton-Quinn Lumber Ltd.*, O.L.R.B. Mon. Rep. Aug. 1965, p. 373.

257 For example, *Re : Polymer Corporation Ltd.*, [1951] L.A.C. 970 — seniority ; *Pacific Coast Pipe Ltd.* v. *I.W.A., Local 1-252*, unreported decision of A. W. R. CARROTHERS, dated 17th Oct. 1961 — seniority ; *Canadian Ingersoll-Rand Co. Ltd.* v. *Association internationale des machinistes, Décisions sur des conflits de droit dans les relations de travail*, (1965) vol. I, 330-2 — effect of fusion of companies on rights of employees ; *Copper Rand Chibougamau Mines Ltd.* v. *United Steelworkers, Local 5914, Décisions sur des conflits de droit, etc.*, (1966) vol. I, 362-2 — sub-contracting.

provisions ought to be redrafted so as to embody this test, and eliminate references to particular forms of transaction or to the word 'business'. They have served only to provoke litigation and encourage the adoption of a narrow technical approach [258].

The fiction of separate corporate personality and the doctrine of privity of contract were developed at other times and for different purposes. They should not be allowed to hamper the adoption of realistic solutions to modern labour problems by permitting the frustration or extinction of bargaining rights or obligations.

Secondly, succession should not be dependent upon proof of an improper purpose in the disposition of an operation. This needs no further elaboration.

Thirdly, it is suggested that on balance it is preferable to preserve collective agreements as well as bargaining rights. Situations may arise in which no conflict between agreements flows from the disposition of a business. Further, it may be useful for the purpose of enabling effective remedial action to be taken against improper dismissal. I am not convinced that the only feasible response to problems arising from a conflict of agreements is to exclude every agreement from the new employer's inheritance.

Fourthly, flexible machinery must be provided for dealing with conflicts between bargaining rights and collective agreements. Provided that the guidelines on which a tribunal will act in resolving such conflicts are clear, it does not matter whether they are embedded in the act itself or established by decisions of a judicial nature in the common law tradition.

Finally, we ought to look again at the present overlap of jurisdiction between the boards, the courts and other tribunals. It is not necessary to repeat here the solution suggested above. It is felt that the boards rather than the courts are the appropriate bodies for deciding on successorship. Their decisions are less likely to be swayed by traditional line of legal reasoning, and more likely to represent the fulfilment of a sound labour policy.

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[258] The alternative to redrafting might be to scrap the successor legislation and leave the board to work out a pragmatic solution to succession problems. In view of the past record of some of the boards, some legislative guidance is probably necessary.