Case In Point

Sale of Assets and Hiring of Former Employees of Defunct Business not Sale of Business within LRA: OLRB

Date: March 8, 2013

In a recent case, the Ontario Labour Relations Board ("OLRB") helped clarify what situations will trigger the operation of the sale of business provisions of the *Labour Relations Act* ("Act") particularly when a business purchases the assets and premises of an organization which is unionized. This case may provide guidance for an organization which is looking to expand its business but is worried that purchasing or moving into the premises could force it to acquire bargaining rights without the employees going through the normal certification process.

Woodland was a store fixture business which ceased operating in May 2011 ("Ceased Operation"). Woodbench was also a store fixture operation, incorporated in 2011 by Moniz, a former competitor of the Ceased Operation. Woodbench grew rapidly and Moniz acquired the rights to the Cease Operation's former premises, which included not only the building but also certain machinery, assorted materials and vehicles. Among other things, the acquisition did not include any customers lists, trademarks or accounts receivable. Many former employees of the Ceased Operation also went to work for Woodbench.

The applicant union asserted that Woodbench had acquired enough of the assets and employee experience from the Ceased Operation that it constituted a sale of business under the *Labour Relations Act*. Woodbench asserted it purchased the "idle assets of a defunct" operation and not a "business".

Vice-Chair Slaughter affirmed the principles in *Metropolitan Parking* and found that the sale by a moribund business of its assets to a pre-existing business was not a sale of a business for the purposes of section 69 of the Act. He reviewed the framework for determining a sale of business within that section (per the OLRB in *Metropolitan Parking*): "the Board must examine whether a "dynamic activity", "going concern" or "functional economic vehicle" has been transferred from Woodland to Woodbench." The Vice-Chair found that none of those factors existed. The Ceased Operation was a moribund business, it had shut down its operations, most employees had been laid off and there were no clients transferred. Woodbench was a new business which had acquired the premises, not the business, of the Ceased Operation. Acquiring valuable assets and hiring skilled employees from a pool of unemployed workers was not the same as acquiring a business.

With respect to the former employees of the Ceased Operation, the OLRB noted that there was no

mention of employees in the Agreement of Purchase and Sale, there was no realistic prospect for the Ceased Operations to resume in the near future and the employees who were hired by Woodland were out of work and seeking employment. The employees were not acquired "*en bloc*" but by "accessing a pool of skilled but unemployed workers." None of the employees who were hired were "key" persons nor did they provide services "essential to the successor employer's ability to undertake a new area of business" (per *Philbrick*). One important consideration is Woodbench operates in an industry which does not rely on location to generate business.

On the facts of this case, there was no continuation of a business. Therefore no sale of a business within section 69 of the Act had occurred.

Carpenters (United Brotherhood of Carpenters and Joiners of America, Local 1072) v. Woodland Store Fixtures Incorporated, 2012 CanLII 67907 (ON LRB)