2022 BCLRB 14
(Leave for Reconsideration of 2021 BCLRB 143)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

EVERCLEAN FACILITY SERVICES LTD.

("Everclean")

-and-

DEXTERRA GROUP INC. DOING BUSINESS AS DEXTERRA

("Dexterra")

-and-

SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 2, BREWERY, GENERAL & PROFESSIONAL WORKERS' UNION

(the "Union")

PANEL: Jacquie de Aguayo, Chair
Jennifer Glougie, Associate Chair
J. Najeeb Hassan, Vice-Chair and Registrar

APPEARANCES: Charles Gordon, Q.C., for the Union
Randal J. Kardaal, Q.C., for Everclean

CASE NO.: 2021-001077

DATE OF DECISION: February 1, 2022

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union applies pursuant to Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of 2021 BCLRB 143 (the "Original Decision"). The Original Decision dismisses the Union's application alleging Everclean, as a successor contractor, breached Sections 35(2.2) and 32 of the Code when it did not offer employment to three of the employees of the predecessor contractor, Dexterra, who provided cleaning services at the Sevenoaks Shopping Centre ("Sevenoaks").

2 The Union submits the Original Decision errs in interpreting and applying Sections 35(2.2) and 32 and is, therefore, inconsistent with principles expressed or implied in the Code. Everclean submits the original panel did not err and the application for leave and reconsideration should be dismissed.

II. BACKGROUND

3 As set out in the Original Decision (paras. 6-15), Dexterra had a contract to provide building cleaning services at Sevenoaks. On October 22, 2020, Dexterra advised its employees that its contract was up for re-tender and that, if it was not the successful bidder, their employment would be terminated, without cause, effective the end date of the contract (January 14, 2021). In January 2021, Dexterra's contract at Sevenoaks was extended to February 15, 2021. On February 1, 2021, Dexterra gave notice to its employees that it was not the successful bidder and, while its contract had been extended again to February 28, 2021, their employment would be terminated without cause on that date.

4 On February 4, 2021, Everclean entered into a building cleaning contract with the owners of Sevenoaks with a one-year term, beginning on March 1, 2021. Everclean interviewed employees of Dexterra who worked at Sevenoaks between February 9-23, 2021 and hired all but three of them. It also hired other individuals. Everclean began providing cleaning services at Sevenoaks under the contract on March 1, 2021.

5 On February 22, 2021, the Union applied under Section 18(1) of the Code to be certified to represent employees of Dexterra at Sevenoaks. An electronic vote was conducted from February 25-26, 2021; however, the ballots cast were sealed pending the adjudication of an objection raised by Dexterra. After the objection was dismissed in *10647802 Canada Limited (Dexterra),* 2021 BCLRB 45, the ballots were counted, and the Union was certified on March 23, 2021.

6 Everclean subsequently agreed it was the successor contractor to Dexterra at Sevenoaks, but it did not agree with the Union that it was required to offer employment

to all the former employees of Dexterra at Sevenoaks as a result. In response, the Union filed the application addressed in the Original Decision.

III. THE ORIGINAL DECISION

7 The Union argued that Section 35(2.2) entitled the employees of Dexterra to continue their employment at Sevenoaks with Everclean when Everclean became the successor employer to Dexterra. It further argued that their employment was improperly terminated on February 28, 2021, which was during the Section 32 freeze period that came into effect upon the Union's February 22, 2021 application for certification.

8 The original panel noted that Dexterra "gave its employees notice of [termination] before the Union's application for certification was filed, due to lack of work" (para. 45). The original panel found that, as the terminations were effective February 28, 2021, the day before Dexterra took over the cleaning contract, there were "no employees in the bargaining unit" when Dexterra became the successor employer on March 1, 2021 (para. 39). Consequently, while Everclean "inherited the pending application for certification of Dexterra as a result of the successorship", it did not inherent "obligations to any of Dexterra's employees in the circumstances of this case" (para. 39).

9 The original panel further noted that Section 32 does not preclude an employer from terminating the employment of employees during the statutory freeze period if the employer's decision to terminate was made for legitimate business reasons and communicated to the employees before the application for certification was filed (para. 44). As Dexterra gave its employees notice of the February 28, 2021 termination before the Union's application for certification was filed, the original panel found the terminations were not in breach of Section 32 (para. 45).

10 Accordingly, the Original Decision finds Everclean did not breach Sections 35(2.2) or 32 when it did not offer employment to all of Dexterra's former employees at Sevenoaks.

IV. PARTIES' POSITIONS

The Union

11 The Union submits the original panel erred in finding the employees of Dexterra were terminated due to loss of work. It submits the building cleaning work at Sevenoaks they performed did not come to an end but rather continued to be performed by Everclean when it took over the contract for that work from Dexterra. The Union submits this is the very circumstance that Section 35(2.2) is intended to address. It submits the Original Decision misinterprets and misapplies that provision when it finds the employment of the Dexterra employees terminated before the successorship took effect and therefore Everclean inherited no obligations to Dexterra's employees. The Union submits that successorship occurs "automatically as a matter of law, and without interruption of the employment relationship when a successor employer replaces the predecessor employer".

12 The Union notes there was no dispute that, under Section 35(2.2), Everclean became the successor employer to Dexterra on March 1, 2021. It says the Board has repeatedly held that the concept of successorship under the Code must be given full and liberal interpretation. The Board has also said that the successor employer "steps into the shoes" of the predecessor employer, inheriting its Code obligations, including those that arose prior to the occurrence of the successorship. Finally, successorship happens automatically, as a matter of law. The Union submits that the principles established under Section 35(1) of the Code apply equally under Section 35(2.2), the new successorship provision which applies to certain contracted services, including building cleaning services.

13 The Union notes that Section 35(2.2) was added to the Code in light of the 2018 report of the Labour Code Review Panel (the "Panel"), "Recommendations for Amendments to the Labour Relations Code" (the "Report"). The Union submits the new provision was intended to extend successorship protection to include contract re-tendering in specified sectors, including building cleaning services, and thereby to address the issue of employment precarity in those sectors identified by the Panel. The Union notes that in *Supra Property Services Ltd.*, BCLRB No. B140/2019 (Leave for reconsideration denied, 2020 BCLRB 62) ("*Supra*"), the Board stated that the purpose of the amendment to the successorship provision of the Code "included addressing the employment precarity of certain workers and maintaining collective bargaining and collective agreement rights when contracts for certain services are re-tendered to a new employer" (para. 42).

14 The Union submits that, under Section 35(1) Code, when a business or part of it is transferred, the successor employer inherits the Code rights and obligations which attached to the transferred business of the predecessor employer. Under Section 35(2.2), it is not a business but rather a contract for services which transfers from the predecessor contractor to the successor contractor. Therefore, it says, in the present case, the collective bargaining rights held by the employees of Dexterra were inherited by Everclean when the contract transferred from Dexterra to Everclean. The Union says the transfer of the contract for building cleaning services at Sevenoaks did not interrupt the employment of the employees who did the work; rather, "their employment continued, but the identity of the employer changed".

15 The Union submits this interpretation and application of Section 35(2.2) is consistent with the full and liberal interpretation which the Board gives to the concept of successorship under the Code. It says this interpretation is also consistent with the intent of the new successorship provisions that the Board has already acknowledged are intended to address the employment precarity of certain workers and maintain their collective bargaining rights when contracts are re-tendered: *Supra* at para. 42.

16 The Union submits the Original Decision errs in finding that Dexterra's employees had no right to continue their employment, even though Everclean became the successor employer to Dexterra with respect to the work performed under the contract for services at Sevenoaks. The Union submits this outcome "allows for a successorship but denies the benefit of that successorship to the very employees the

new successorship provisions are intended to benefit" and that rather than "ameliorating their employment precarity, it perpetuates it".

17 The Union says the Original Decision also errs in framing the issue under Section 32 as whether Everclean was required to re-hire the employees whose employment had been properly terminated by Dexterra for lack of work. The Union submits Dexterra terminated its employees due to the loss of the contract to Everclean, not due to any lack or shortage of work. It says the work "remained and is the reason there was a successorship", which had the effect of obliging Everclean to step into the shoes of Dexterra as the successor employer of the employees. At the time of the successorship, there was a pending application for certification and concomitant Section 32 freeze period which Everclean inherited as the successor employer.

18 The Union submits Dexterra's notice of termination effective February 28, 2021 had not been implemented on February 22, 2021, when the Union applied for certification and the Section 32 freeze began. Dexterra's employees continued to be employed at Sevenoaks, and the Union submits that had Dexterra's contract for Sevenoaks been renewed, Dexterra could not have relied on its earlier notices of termination to terminate its employees during the freeze period (absent permission from the Board). The Union submits the same restriction therefore transferred to Everclean when it became Dexterra's successor. It further argues there was no gap or "interval" during which the terminations could have taken effect between when the work was performed by Dexterra and when it was performed by Everclean. It says this is because successorship operates as a matter of law and "took effect concurrently with the passing of the work at Sevenoaks from Dexterra to Everclean".

Everclean

19 Everclean accepts that it became the successor employer to Dexterra on March 1, 2021, the date it "took over directing the performance of the cleaning services contract" at Sevenoaks. It further accepts that on March 1, 2021, "by operation of s. 35(2.2) of the Code, Everclean became bound by all proceedings under the Code, and was required to continue as if no change had occurred". It submits, however, that Dexterra had given its employees "fair notice of termination as a result of Dexterra's upcoming loss of the contract for services at Sevenoaks", and that as the Union's application for certification occurred after this notice was given, "the statutory freeze in s. 32 has no application in these circumstances". It says that, following the application for certification on February 22, 2021, Dexterra's employees continued to work through their notice period and their terminations took effect on February 28, 2021. It submits the Original Decision therefore correctly finds the *status quo* inherited by Everclean on March 1, 2021 "was a certified bargaining unit that continued no active employees".

20 Everclean says the original panel correctly noted that Section 35(2.2) ensures that existing Code and collective agreement rights are not lost "simply because work changes hands as a result of a contract flip". However, it says, in the present case "there was no collective agreement obligations for Everclean to assume, and there were no employees in the bargaining unit at the time Everclean took over the cleaning

contract at Sevenoaks". Everclean submits the original panel was correct to note that Dexterra gave notice of termination due to lack of work to its employees before the Union's application for certification was filed, and to find the decision to issue the notices was not in breach of Section 32. It submits the Original Decision correctly finds the *status quo* Everclean inherited was that the Dexterra employees had been terminated for *bona fide* reasons, and correctly applied the Code in dismissing the Union's application under Sections 35(2.2) and 32.

21 Everclean objects to an affidavit the Union filed with its Section 141 application, but submits that if the purpose of the affidavit was merely to confirm that the majority of employees presently working at Sevenoaks for Everclean are former Dexterra employees who were hired when the contract was re-tendered, and that the former Dexterra employees are doing the same work, at the same location, but for a different employer, those facts were already before, and accepted by, the original panel. Everclean says it never disputed that it was the successor to Dexterra at Sevenoaks as of March 1, 2021, "which by way of s. 35(2.2) necessarily meant that it was accepted that 'substantially similar services continue to be performed'".

22 Everclean submits the original panel did not err in finding that Dexterra's notice of termination was given for a *bona fide* reason, namely lack of work as a result of the loss of Dexterra's contract, and therefore the terminations did not contravene Section 32 of the Code. The notice was given before the Union filed its application for certification, and was unrelated to union activity. Everclean submits the Union presented no evidence the terminations were for any reason other than a lack of work, and "the impending end of a contract for services of a non-unionized employer is *prima facie* evidence of an impending lack of work for those employees of the employer".

23 Everclean submits that if an employer in Dexterra's position did not give notice of termination to its employees, it would be liable at common law to those employees for failing to give reasonable notice of termination. It submits there was no evidentiary basis for the original panel to conclude other than that Dexterra was simply meeting this legal notice obligation. Everclean submits the terminations took effect on February 28, 2021, when Dexterra's contract ended, and the successorship occurred by operation of law on March 1, 2021, the date Everclean's contract for cleaning services took effect. Everclean submits that, in these circumstances, the original panel correctly found that since Dexterra had validly terminated its employees due to lack of work on February 28, 2021, there were no employees in the bargaining unit at the time Everclean became the successor employer on March 1, 2021.

24 Everclean submits the Original Decision does not err when it finds, in paragraphs 49-50, that while Everclean became bound by Section 32 as the successor employer to Dexterra, it did not change any terms or conditions of employment when it did not offer employment to all of Dexterra's employees. Dexterra did not breach Section 32 when it gave notice of termination due to shortage of work prior to the Union's application for certification and when it implemented that previously-made decision during the freeze period. The result was that the employees had already been laid off for *bona fide* reasons when Everclean became the successor employer.

25 Everclean submits Section 35(2.2) does not alter the Board's established law relied on by the original panel in reaching these conclusions, and it submits the Union is asking the Board to turn this law "on its head by effectively finding that even where a non-union employer has given notice of a *bona fide* termination, a subsequent application for certification should retroactively invalidate that notice in the context of a successorship". Everclean submits that an employer cannot be found in breach of Section 32 when it has issued valid notices of termination free of anti-union animus, simply because subsequently an application for certification is filed.

Union Reply

26 The Union acknowledges that in the present case there is no allegation that Dexterra laid off its employees for anti-union reasons. However, it submits that there was nonetheless no "shortage of work" to justify terminating their employment. Accordingly, it submits, there was no proper cause for terminating their employment, and in the absence of such proper cause, the prohibition on against altering their terms and conditions during the Section 32 freeze period applied. It submits that Dexterra was "therefore prohibited from proceeding with the [termination] of employees working at Sevenoaks".

27 The Union disputes that the termination of the Dexterra employees was "effectively implemented" at the time the Section 32 freeze came into effect. It submits that at that time they were still working and were not actually terminated until February 28, 2021. The Union submits that had Dexterra actually laid off its employees before the Union's certification application, they would not have been employed on the date of the Union's application for certification and Section 32 would not have applied. However, the termination did not occur until after the certification application, and therefore Section 32 did apply.

28 The Union submits the only change that occurred was that the contract changed hands from Dexterra to Everclean. The cleaning work under it continued to be performed without interruption. The Union submits to find otherwise is to disregard the entire thrust of the new successorship provisions, which, as the Panel indicated, were intended to provide successorship protections in the event of contract re-tendering, as occurred here.

V. ANALYSIS AND DECISION

29 Under Section 141 of the Code, an applicant must establish a good, arguable case of sufficient merit such that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44 ("*Brinco*"). For leave to be granted, an application for reconsideration must raise a serious question as to the correctness or fairness of an original decision: *Brinco*. Leave for reconsideration may also be granted where the matter addressed in an original decision is one of first impression: *Brinco*.

MAJORITY REASONS

30 We find the Original Decision addresses a matter of first impression involving the interpretation and application of Sections 35(2.2) and 32 in the context of a pending application for certification. We further find the Union has raised a serious question as to the correctness of the Original Decision. Accordingly, leave is granted.

31 It is unnecessary for us to rely on the Union's statutory declaration, given Everclean's position that certain facts were before the original panel and undisputed. As stated in Everclean's response submission, those undisputed facts were that the majority of employees presently working at Sevenoaks for Everclean are former Dexterra employees who were hired when the contract was re-tendered, and the former Dexterra employees are doing the same work, at the same location, but for a different employer. As Everclean further states in its submission, it never disputed that it was the successor employer to Dexterra at Sevenoaks as of March 1, 2021, "which by way of s. 35(2.2) necessarily meant that it was accepted that 'substantially similar services continue to be performed'".

32 In our view, Everclean was correct to acknowledge that it became the successor employer to Dexterra under Section 35(2.2) when it took over the building cleaning services contract at Sevenoaks from Dexterra. There is no dispute that substantially similar services continued to be performed after the Sevenoaks building cleaning contract for services was re-tendered. The cleaning services continued to be performed "under the direction of another contractor", namely, Everclean. In these circumstances, as Section 35(2.2)(a) states, Everclean became bound by the Code proceedings which bound Dexterra at the time of the successorship:

> (2.2) If a contract for services is retendered and substantially similar services continue to be performed, in whole or in part, under the direction of another contractor,
>
> (a) the contractor is bound by all proceedings under this Code before the date of the contract for services entered into by the contractor and the proceedings must continue as if no change had occurred, and
>
> (b) any collective agreement in force continues to bind the contractor to the same extent as if it had been signed by the contractor.

33 As Everclean further acknowledges, in *Supra* the Board interpreted the phrase "the date of the contract for services entered into by the contractor" in Section 35(2.2)(a) to mean the start date of the new contract, when the new contractor begins directing the performance of the contracted services, which in this case was March 1, 2021.

34 Thus, Everclean rightly does not dispute that on March 1, 2021, it became bound, as the successor contractor to Dexterra under Section 35(2.2), by the Union's February 22, 2021 application for certification. It "stepped into the shoes" of Dexterra on that date, and that Board proceeding, including the Section 32 freeze period which the

certification application triggered, continued to apply as if no change in contractor had occurred. Everclean was thus bound by the outcome of the February 25-26, 2021 representation vote on the Union's application and, while that matter remained outstanding, it was subject to the Section 32 freeze on changes to employees' terms and conditions of employment. Section 32 provides:

> 32 (1) If an application for certification is pending, a trade union or person affected by the application must not declare or engage in a strike, an employer must not declare a lockout, and an employer must not increase or decrease rates of pay or alter a term or condition of employment of the employees affected by the application, without the board's written permission.
>
> (2) This section must not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for proper cause.

35 None of this was in dispute before the original panel, as is reflected in the Original Decision. The issue in contention between Everclean and the Union was whether, as a result of the Section 35(2.2) successorship, Everclean was obliged to continue the employment of Dexterra's employees at Sevenoaks when it took over the contract from Dexterra. The Union argued Dexterra's employees were working under the building cleaning services contract at Sevenoaks for Dexterra up to the moment the successorship occurred, and they were therefore entitled to continue their employment at Sevenoaks with Everclean when it became the successor employer to Dexterra. However, the Employer argued, and the original panel accepted, that Everclean was not obliged to continue their employment when it became the successor employer to Dexterra, because Dexterra had given its employees valid notice of termination effective the end of its contract, February 28, 2021.

36 Dexterra terminated the employment of its employees effective February 28, 2021, the last day of its contract to provide building cleaning services at Sevenoaks. Everclean took over the contract on March 1, 2021. There was no evidence of a gap or interval in the provision of the contracted building cleaning services at Sevenoaks. Work under the building cleaning contract continued to be performed as before, uninterrupted by the re-tendering of the contract from Dexterra to Everclean. As a result of the re-tendering of the contract, there was simply a change in the identity of the contractor directing the performance of the work.

37 In these circumstances, we find that Dexterra was entitled to give notice of termination to its employees on February 1, 2021 for purposes unrelated to the Code (which did not apply to it at that time). It had lost the contract, and accordingly it had no ability to continue to employ the employees working under that contract after February 28, 2021. However, that did not mean there were no employees working on the date of successorship when Everclean took over the contract. There were employees, who had notice that their employment relationship with Dexterra terminated because Dexterra had lost the contract. However, we find that Everclean, as the successor employer to Dexterra, could not rely on Dexterra's notice to its employees. This is because, unlike

Dexterra, Everclean had the ability to continue the employment of the employees working under the contract after February 28, 2021. The question raised in the present case is whether it was required to do so under Sections 32 and 35(2.2) of the Code.

38 Before the enactment of Section 35(2.2), the transfer of the Sevenoaks contract from Dexterra to Everclean would not have given rise to a successorship under the Code. This is because the Board has consistently held that the re-tendering of a contract from one contractor to another is merely the transfer of work, not the transfer of "a business or part of it" within the meaning of Section 35(1) of the Code: The *Governing Council of the Salvation Army/Canada West*, BCLRB No. 56/86, *D.A. Pogson & Associates Ltd.*, BCLRB No. B141/95. As the Original Decision states: "Prior to the 2019 amendments to the successorship provisions of the Code, successorship did not apply to contracting out or the retendering of contracts" (para. 34).

39 The Original Decision goes on to note that, in its Report, the Panel which had been appointed to make recommendations on amendments to the Code "recommended a change to Section 35 to extend successorship protection to contract retendering in certain industries, including building cleaning services" (para. 34). The Original Decision further notes that the Report stated that the lack of successorship protection in these industries mean that "contract re-tendering has caused a significant erosion of earnings, benefits and job security", and "has resulted in employment precarity" for employees in those industries (para, 34, quoting the Report at p. 19). The Original Decision notes the Report further states that, "[w]hen the contracts are re-tendered, the collective agreement ends, employees are invited to a job fair to re-apply for their jobs and are often hired at lower wages. The Union is required to re-organize and attempt to negotiate a new collective agreement" (para. 34, quoting the Report at pp. 19-20).

40 The Original Decision then states, correctly in our view, that "a lack of job security and employment precarity in the industries in question were some of the problems that led the Code Review Panel to suggest changes to the successorship provisions" (para. 35). We agree with the original panel's further statement that "Section 35(2.2) ensures that existing Code and collective bargaining rights are not lost, simply because the work changes hands as a result of a contract flip, rather than disposition of a business" (para. 36). The Original Decision adds that, because there was no collective agreement in force between the Union and Dexterra at the time of the successorship, there were "no collective agreement obligations for Everclean to assume" (para. 37).

41 While there were no collective agreement obligations for Everclean to assume, as the language of Section 35(2.2) makes clear, successorship protection is not limited to collective agreement rights and obligations. Those are protected under Section 35(2.2)(b), which states that "any collective agreement in force continues to bind the contractor to the same extent as if it had been signed by the contractor". Separately, Section 35(2.2)(a) additionally protects collective bargaining and Code rights even where there is no collective agreement in place, by stating that "the contractor is bound by all proceedings under this Code before the date of the contract for services entered into by the contractor and the proceedings must continue as if no change had occurred".

42 In light of this language, there is no dispute in the present case that Everclean became bound by the Union's application for certification filed on February 22, 2021, a Code proceeding which bound Dexterra before the successorship occurred. Further, there is no dispute the Union's certification application triggered the Section 32 freeze period, and Everclean acknowledges the Section 32 freeze period continued through the successorship and bound Everclean as the successor employer. That is, as a result of Section 35(2.2), Everclean stepped into the shoes of Dexterra with respect to the Section 32 obligation not to alter terms and conditions of employment, absent proper cause, pending the outcome of the Union's certification application.

43 We do not accept there were no employees in the proposed bargaining unit when Everclean became the successor employer, merely because Dexterra had notified its employees that their employment with it would end with the transfer of the contract. We find that at the time Everclean became the successor employer to Dexterra, Dexterra's employees were performing the work under the contract, and the only change was the identity of the contractor directing the performance of this work. For the reasons which follow, we find that in these circumstances, Everclean was presumptively obliged to continue the employment of the employees who were performing the work under the contract, subject to the proper cause exception in Section 32(2) of the Code.

44 We reach this conclusion based on the language of Section 35(2.2), as well as the recommendations of the Report which led to its enactment. In our view, it is clear the legislative intent was to extend the same kind of successorship protections provided under Section 35(1) to transfers of contracts for services in specified industries.

45 Under Section 35(1), any collective agreement and Code obligations of the predecessor employer transfer to the successor employer on successorship. Typically, the successor becomes the employer of the employees of the predecessor who were employed in the business when the successorship occurs. However, it is well-established that the employees of the predecessor employer are not required to continue their employment with the successor employer: *BCGEU v. Government of British Columbia* (1988), 33 BCLR (2d) 1 (C.A.) ("*Verrin*"). As found in *Verrin*, employees have the right to choose either to continue their employment with the successor employer or to exercise whatever rights they may have with the predecessor employer. As stated in *Granville Island Brewing Co.*, BCLRB No. B322/96 ("*Granville Island*"), *Verrin* established that employees "cannot be forced" to become employees of a successor employer (para. 12).

46 In *Granville Island*, the question before the Board was different from that in *Verrin*. It was the question that arises in the present case: "whether the successor is obliged to offer continued employment to the predecessor's employees" (para. 13). The panel noted that the Court of Appeal "was not required to address this question in *Verrin*", but that the Board's jurisprudence provided guidance (para. 13). After reviewing the Board's jurisprudence, the panel concluded the "upshot" is that the successor employer cannot refuse to extend continued employment to the employees of the predecessor "for improper reasons" (para. 16).

47 The panel in *Granville Island* further stated:

> In the result, the successor inherits all of the predecessor's obligations, including the obligation to continue to employ subject to the collective agreement, and it is the employees only who have an option of not continuing employment with the successor and taking whatever rights they can against the predecessor. Thus, if as a result of successorship, the predecessor's employees wish to continue their employment with the successor, the successor employer must extend to them continued employment, subject to what is said below. (para. 19)

48 The panel added:

> While the successorship provisions may also benefit a union *qua* union, it would be little comfort for employees if they, for whom the benefits of collective bargaining are intended, were to be deprived of protection in a successorship through the simple expedient of the successor not extending continued employment to employees of the predecessor who wish it. (para. 21)

49 The panel further stated that the requirement to extend continued employment to employees of the predecessor is subject to the successor having work available for them (para. 22). The successor employer is not obliged "to create work to accommodate the total employee complement which may result from a successorship", and "[n]othing precludes the successor from not continuing the employment of employees in the total employee complement resulting from the successorship for *bona fide* reasons such as lack of qualifications" (para. 24). However, the successor employer "may not use the process of successorship to weed out what it perceives to be undesirable employees, thereby circumventing the just cause provision of the collective agreement to which it becomes bound" (para. 24).

50 *Granville Island* was addressing a situation where the predecessor employer was bound by a collective agreement, and accordingly it makes many references to the transfer of collective agreement rights and the protections such rights provide. This is also true of other Board decisions addressing successorship under Section 35(1), including *Verrin*. Accordingly, the Board's jurisprudence under that provision addresses successorship protections in contexts where collective agreement rights and obligations transfer to the successor employer.

51 However, as noted earlier, successorship protection under Section 35(2.2) is expressly not limited to collective agreement obligations. Bearing this in mind, we find the principles stated in *Granville Island* with respect to the right of employees to continued employment through successorship apply in this context regardless of whether there was a collective agreement in place prior to the successorship. We find they apply where the successor is only bound by certain Code proceedings, such as an application for certification. While the protection of employee rights may be less without a collective agreement – for example, "proper cause" under the Section 32 freeze

period rather than the more robust “just cause” protection under a collective agreement – we find such protection nonetheless arises on a successorship under Section 35(2.2).

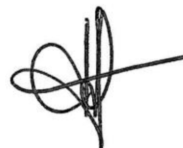
52 Thus, we find the employees of Dexterra who were working at the time of the successorship were presumptively entitled to continue their employment under the contract with Everclean, the successor employer to Dexterra. They were not disentitled merely because Dexterra provided them with notice that their employment with Dexterra would terminate on February 28, 2021, due to Dexterra’s loss of the contract. There was no gap in the performance of the contracted building cleaning services work at Sevenoaks arising from the transfer of the contract from Dexterra to Everclean, which thereby became the successor employer to Dexterra with respect to the employees working under the contract at the time of the successorship. As such, we find Everclean was required by Sections 32 and 35(2.2) of the Code to continue their employment, unless it had proper cause for declining to do so.

53 As noted earlier, this case is one of first impression under a new provision of the Code and raises questions which have not previously been addressed in the context of Section 35(2.2). While we have clarified the Board’s interpretation of that provision, it is not possible for us to determine whether Everclean had proper cause for not continuing the employment of the three former Dexterra employees at issue in this case. In these circumstances, we find it is appropriate to set aside the Original Decision and remit that matter to the original panel for determination under Section 35(3) of the Code. The original panel may hear from the parties and issue a decision on that issue in light of this decision, unless the parties are able to resolve it themselves without the need for further adjudication.

VI. CONCLUSION

54 For the reasons given, the Union’s application for reconsideration is granted. The Original Decision is set aside and the matter is remitted to the original panel for a fresh determination in light of this decision, unless the parties are able to resolve the matter themselves without further adjudication.

LABOUR RELATIONS BOARD



JACQUIE DE AGUAYO
CHAIR

JENNIFER GLOUGIE
ASSOCIATE CHAIR

DISSENTING REASONS

55 For the reasons which follow, I respectfully disagree that the Original Decision should be set aside. I would have upheld the Original Decision, as the intent of the legislature introducing Section 35(2.2) was to provide the same rights and obligations, regardless of whether a successorship arises under Section 35(1) or Section 35(2.2) of the Code. In my respectful view, the decision of the Majority imposes obligations and grants rights in the context of a re-tendering successorship that go beyond those that exist in the circumstances of a successorship arising from a disposition of a business under Section 35(1).

56 Moreover, I do not agree that Section 32 of the Code prospectively applies to a successor employer, i.e. prior to a successorship occurring. In my respectful opinion, a successor employer in Everclean's circumstances is bound by the statutory freeze provisions after the date that it becomes the successor employer in respect of its employees, not in respect of the predecessor's employees whom the predecessor terminated before the successorship took effect.

57 The Majority has thoroughly set out the material facts and findings of the original panel and I adopt them. One additional point, however, is that Everclean was neither given notice of, nor did it participate in the certification hearing that resulted in *10647802 Canada Limited (Dexterra),* 2021 BCLRB 45.

58 It is also unnecessary to review the parties' arguments on reconsideration, as they have been extensively summarized by the Majority. I agree with my colleagues that the Original Decision addresses a matter that the Board has not had occasion to consider; one that requires the Board to interpret and apply a relatively new section of the Code (Section 35(2.2)) and its interplay with Section 32. Consequently, although I respectfully have come to a different conclusion on the merits of the reconsideration application, I agree that this is an appropriate case to grant leave for reconsideration.

59 I have considered the disputed content of the Union's statutory declaration in consideration of the issues.

VII. ANALYSIS

60 The Union relies on the Board's seminal case regarding successorship, *Kelly Douglas & Company Ltd.,* [1974] Can LRBR 77 *("Kelly Douglas").* I agree that is an appropriate starting place to consider the issues raised by this case, given that the intended purpose of introducing Section 35(2.2) in the Code was to grant the same rights and impose the same obligations in the context of a retendered contract, as exist where there has been a disposition of a business under Section 35(1).

61 *Kelly Douglas*, a decision of the Chair Weiler, was the first time the Board considered the Code's then new successorship provisions [then Section 53]. Despite this, it remains an important decision, establishing the underlying principles that apply under Section 35(1). The Union referred to a short excerpt from the decision in its submissions; however, to gain a full understanding of the Board's policy objectives and the underlying principles, a more full review of the decision is necessary:

> Section 53(1) establishes the basic rule in the successorship area. Where a business is disposed of, the transferee receives it subject to all proceedings under the Code, especially certification of a trade union. It is also bound by the collective agreement negotiated with that trade union. Most successor cases are clear and this legal standard can be applied by the parties to their own situation. No investigation or decision by the Board is required for the section to operate and to permit the union to serve valid notices to bargain or to lodge grievances. (pp 4-5)
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> These legal prescriptions reflect several important labour relations policies adopted by the legislature as the framework within which the Board must apply the statute to marginal cases. First of all, the legislature has not purported to interfere with the property right of the employer to dispose of its business or assets. The existence of a certification or a collective agreement does not give the Board under Section 53 any power to restrict or delay the transfer of the enterprise (by contrast with the case of technological changes under Sections 76 and 77).
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> When an employer exercises this legal freedom to dispose of its business, this can have serious consequences for the situation of its employees. They may have struggled to become organized and achieve collective bargaining and then to arrive at a collective agreement. Once that agreement is finally settled, the employees naturally expect that its terms will be fulfilled in the conduct of the enterprise. The trouble is that these expectations could be set at naught by a simple change in corporate ownership. The employees may find themselves 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. The result of the sale of a business of which the employees may not even be aware is that the collective bargaining rights of the employees may have disappeared. (p. 5)
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> … Accordingly, the legislature adopted a very straightforward protection. Certification and other orders under the Code follow the business into the hands of the transferee. The

> legislature went even further to impose the collective agreement on a person who didn't sign it. …. (pp. 5-6)

62 *Kelly Douglas* involved a situation where the predecessor's (Malkin's) business was merged with Kelly Douglas. Both had unionized workforces and collective agreements. Malkin's operation was fully integrated into Kelly Douglas.

63 The panel determined that there had been a transfer of Malkin's business to Kelly Douglas; however, Kelly Douglas did not offer employment to all of the predecessor's employees. The Board was required to determine the appropriate bargaining unit post-merger and what rights the predecessor's employees held given the successorship.

64 The union that represented the predecessor's employees took the position that "the absolute minimum claim that it makes is that no Malkin employee shall lose his or her job as the result of this reorganization and that no such employee shall lose any rights created by the Retail Wholesale agreement." (p. 9). In response to that proposition, Chair Weiler said the following:

> There is no warrant in the Code for a requirement that all of the previous jobs in these two warehouses be preserved. Even if there had only been one legal entity involved in this case, and the one employer had chosen to integrate two separate operations to achieve greater efficiency and economy, there is nothing in the Act which prohibits it from laying off employees as a result. Any such restrictions must be imposed as a result of collective bargaining (aided perhaps by the new "technological change" provision in the Code). There are no such restrictions in the Retail Wholesale - Malkin agreement now and Section 53 does not impose any greater restrictions in this regard. (p. 10, emphasis added)

65 As can be seen, from the outset of the establishment of successorship rights and obligations in the Code the predecessor's employees' right to continued employment flowed from the terms of their collective agreement.

66 In *Ridge Theatre Ltd., [1978] B.C.L.R.B.D. No. 61, [1979] 1 Can. L.R.B.R. 229 ("Ridge Theatre"),* the panel noted that in determining whether there had been a successorship, it was not relevant that the successor had not hired the predecessor's employees. This implies no obligation to do so. That panel accepted the following comments from the Canada Labour Relations Board in *National Association of Broadcasting Employees and Technicians - and - Radio CJYQ Ltd., [1978]* 1 Canadian LRBR 565*:*

> The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. Bargaining rights do not attach to certain specific employees as individuals. Therefore, in

> defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it. (at p.574)
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> (p. 5, emphasis added)

67 In *Ridge Theatre*, *supra*, there was no collective agreement yet in place, but the Board did not direct that the successor employer must hire the predecessor's employees when it was declared to be a successor employer. Instead, the Board directed the parties (the Union and the successor employer) to engage in good faith collective bargaining. By doing so, the union's collective bargaining rights were protected.

68 The Union argues that Everclean was obliged to offer employment to Dexterra's employees, even though Dexterra had given them termination notice and their employment came to an end before the successorship occurred. The Majority accepted this proposition, relying on *BCGEU v. Government of British Columbia* (1988), 33 BCLR (2d) 1 (C.A.) and *Granville Island Brewing, supra.* It referred to comments in those cases related to the options available to employees who had the benefit of a collective agreement when the successorship occurred.

69 In *Granville Island Brewing, supra,* the Board was faced with circumstances in which two bargaining units were brought together because of the acquisition of one business by another. A merger agreement with the Union had been reached dealing with, among other things, how the incoming employees' seniority would be addressed. The successor employer did not offer employment to all of the predecessor employer's employees even though there was some work available.

70 There was no dispute regarding the existence of a successorship. However, the panel concluded that if an employee wished to move over to the successor employer (assuming there were available jobs) "the terms and conditions of employment" for those employees would continue. This comment must, however, be understood in context. There the predecessor was governed by a collective agreement. The prospect of continued employment with the successor and the impact of the collective agreement is clear from the following comments of the panel:

> The successor steps into the predecessor's shoes and is bound by the collective agreement and the predecessor's obligations under it. The predecessor's obligations are, inter alia, to its employees. The predecessor is bound to continue to employ its employees subject to the terms of the collective agreement. Any individual contract of employment between employees and the predecessor merged into the collective agreement (and the rights and obligations thereunder) when employment initially commenced with the predecessor. Once a collective agreement is in place,

> there is no further room for individual contracts of employment: *Paccar of Canada Ltd. (Canadian Kenworth Company Division)*, *[1989] 2 S.C.R. 983*, at p. 1007 (citing *McGavin Toastmaster Ltd.*, *[1976] 1 S.C.R. 718*). A successor employer assumes those collective agreement obligations. It is obliged to continue to employ those employees whom the predecessor was obliged to continue to employ. The successor can no more decline to continue to employ the predecessor's employees than could the predecessor when it was still in business (except as provided for in the collective agreement or for just cause). Nothing in the Court of Appeal's reasons suggests that the purchaser's obligations under the collective agreement, which it inherited, were in any way diminished through the successorship. (para. 18, emphasis added)
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> The policy reason underlying the approach to successorship set out in these reasons has long been recognized: *Kelly Douglas*. It is tied directly to the primary purpose of the Code which is to encourage and provide access to collective bargaining and, further, to preserve collective bargaining rights through business transfers or dispositions. This primary purpose would have little significance if employers could through a simple business transaction "deep six" hard-won collective bargaining rights. Moreover, the preservation of collective bargaining rights is intended to benefit both the union and the employees who organized and who achieved a collective agreement: *Concerned Contractors Action Group*, BCLRB No. 32/86, (1987), 13 CLRBR (NS) 121, at p. 156. While the successorship provisions may also benefit a union qua union, it would be little comfort for employees if they, for whom the benefits of collective bargaining are intended, were to be deprived of protection in a successorship through the simple expedient of the successor not extending continued employment to employees of the predecessor who wish it. (para. 21, emphasis added)

71 Continuity of employment in those cases was a derivative of the existence of the employment security protections that the union had negotiated (and the just cause protection deemed to be included in every collective agreement by Section 84 of the Code). It is only because the predecessor employer was subject to a collective agreement and could not itself terminate its employees (except in accordance with terms of the collective agreement or for just cause) that the employees in question had the protection of continuous employment with the successor.

72 The panel in *Granville Island Brewing, supra* recognized and expressly stated that the predecessor could terminate the employment of its employees prior to the disposition of its business, if it was done in accordance with the terms of the collective agreement:

> - When a business or part of it is sold, leased, transferred or otherwise disposed of, the predecessor employer's employees may be terminated or laid off by the predecessor employer as a result and may choose to exercise whatever rights they have against the predecessor employer under the collective agreement in force at the time of sale, lease, transfer or other disposition: ibid. (para. 24, emphasis added)

73 In *British Columbia (Ministry of Health),* BCLRB No. 117/87 (the Board's original *Verrin* decision), the Board expressly recognized and adopted the following proposition:

> We adopt the analysis given by the Board in the *Crown Zellerbach* cases that where a vendor sells a portion of its business, certain employees who used to work in the transferred portion of the business may cease to be employed by the vendor. These persons' employment with the vendor may be severed, notwithstanding the transfer of the business within the meaning of Section 53.
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> (p. 10, emphasis added)

74 The panel described the issue that was before it as follows:

> In our view, the issue raised by these cases is not whether Section 53 of the Code protects employees' rights under a collective agreement where a business is sold. Neither is the issue whether a collective agreement continues to bind the purchaser, lessee or transferee by operation of Section 53 of the Code. The jurisprudence is clear that on a Section 53 event, the employees' rights under a collective agreement are protected at least to the extent that a collective agreement continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by him or her. The real question which is before us on these proceedings, is whether or not, having regard to the terms of the relative collective agreement in force between the trade union and the original employer, the disposition, sale, or transfer of the original employer's business, or a part thereof, amounts to a severance of the employment of certain employees vis-a-vis the original employer. (p. 6, emphasis added)

75 This was important to the panel because it acknowledged that:

> While it may be that a successorship transfer may not give employees an exercisable right vis-a-vis their original employer by the simple operation of Section 53, the termination of employment by the original employer may, under the terms of the collective agreement, constitute a layoff or severance which vests in the employees certain rights against the original employer. (p. 7, emphasis added)

76 Although the existence of a collective agreement may not be required for a successorship to be found, it is the existence of a collective agreement and the attendant protections set out in it that provides the benefit of potential continued employment with the successor for the predecessor's employees.

77 It has long been acknowledged that seniority, layoff notice and recall rights are critically important and hard-won rights negotiated by trade unions for their members. If a predecessor intends to terminate its employees in the context of successorship, it must do so lawfully, and the employees may have residual rights as against the predecessor or the successor employer (such as the right to be recalled before hiring additional employees off the street or liability for grievances if the predecessor fails to provide the required severance under the collective agreement or otherwise violates the collective agreement).

78 In the context of a successorship where there is no collective agreement, the employees of a non-union employer, not surprisingly have lesser job security. They may be terminated in accordance with their common law or contractual rights and do not have the benefit of collective agreement employment security provisions described above. The promise to negotiate such protections is a powerful organizing tool for unions. Absent the existence of such protections however, there is no obligation on a successor employer to offer employment to the predecessor's employees.

79 That said, the practical reality is that a future successor employer will almost invariably need to hire some of the predecessor's employees to continue to operate the business that it has just purchased. Similarly, in a contract retendering situation, as occurred in this case, an incoming contractor will need a ready and experienced workforce to fulfill its contractual obligations to its customer. From a practical labour relations perspective, the potential of a future successor not hiring any of the predecessors' employees is illusory. Here, Evergreen hired all but three.

80 As noted above, it is only because a successor employer is required to abide by collective agreement employment security protections that it must continue to offer the predecessor's employees continued employment (provided there are jobs available).

81 In the present circumstances, prior to the successorship occurring (i.e. prior to March 1, 2021) Dexterra terminated the employment of all of its employees. The original panel concluded (and the Majority accepts) that Dexterra was entitled to give notice of termination to its employees on February 1, 2021. The filing of the certification application by the Union on February 22, 2021 did not invalidate Dexterra's termination notices, nor did it invalidate the terminations that occurred February 28, 2021.

82 Nothing that Dexterra did regarding the termination of its employees was unlawful. In the absence of collective agreement protections, in my view, the Original Decision correctly finds that the terminations took effect on February 28, 2021, i.e. prior to the successorship occurring.

83 Consequently, on March 1, 2021, when Evergreen became the successor employer, it was bound by the pending application for certification in respect of the employees it hired. Everclean inherited the prospect of a collective bargaining relationship with the Union because of the pending application for certification. The Union's right to bargain collectively would be with Everclean, not Dexterra (who was the named employer in its application). The Union, by virtue of Section 35(2.2)(a) could not be deprived of that right simply because there had been a retendering of the contract. As the Board accepted, in *Ridge Theatre, supra,* bargaining rights attach to the bargaining agent.

84 This is no different than if the successorship had occurred under Section 35(1) with the disposition of a business. I am unaware of any decision of the Board that imposed an obligation on an employer who has yet to become the successor in the disposition of a business. Employees without the benefit of collective agreement protections are left only with their common law or contractual rights should their employer decide to end the employment relationship. It is not uncommon, in the context of a purchase and sale of a business for the vendor to reduce its workforce in advance of the transaction closing. Vendors and purchasers negotiate who will bear the cost of such workforce reductions (often in the negotiation of the purchase price). As discussed above, in a unionized business vendors/predecessors must ensure that they comply with the collective agreement. In non-union transactions the vendor must comply with other legal obligations.

85 Respectfully, I cannot agree with the suggestion that Section 35(2.2) effectively invalidated the terminations by Dexterra of its employees. Dexterra provided lawful notices of termination and those notices resulted in the termination of the employees' employment before the successorship occurred. At the time that Everclean became the successor employer, Dexterra's employees could not be said to be performing work under the contract (as their employment had been terminated the day prior). The suggestion that Everclean was obliged "presumptively" (i.e. before it was the successor) to offer to continue the employment of Dexterra's employees is not, in my respectful view, consistent with the obligations of a potential future successor employer in the context of the disposition of a business.

86 I accept the proposition that the addition of Section 35(2.2) was intended to address the lack of job security that existed in the service sector, where contract retendering was prevalent and successorship protections were not available because of decisions such as *Governing Council of the Salvation Army/Canada West*, *supra,* BCLRB No.56/86, *D.A. Pogson & Associates Ltd.*, *supra,* BCLRB No. B141/95 and *Greater Vancouver Community Services Society,* BCLRB No. B357/99. This problem was particularly acute in highly unionized workforces such as those in healthcare, especially in seniors long term care facilities. The employees working there had legitimate expectations that the job security protections in their collective agreements would have real meaning, but instead, because of the above caselaw, they proved to be of little value when the service contract was retendered. The challenges for unions and their members is well described in the 2018 Report to the Minister of Labour by a

Labour Relations Code Review Panel, which provided recommendations on amendments to the Code (the "Report").

87 A review of the Report indicates that providing the same successor rights as exist under Section 35(1) and (2) would remove the incentive of using labour cost reduction as a reason to retender service contracts, and thus reduce the incidence of retendering. Moreover, it would protect the collective bargaining rights of unions who had negotiated hard won wages, benefits and employment security protections for their members:

> When successorship legislation was originally enacted in B.C., contract re-tendering was not as prevalent as it is today. When contracts are re-tendered, often the same workforce continues to provide the same services to the same customers or clients, with the same working conditions, at the same location, using the same equipment. The existing collective agreement ends, the employees are required to re-apply for their jobs, the union is required to organize the workforce and a new collective agreement must be negotiated.
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> The existing service delivery model in health care is premised on contracting and subcontracting of food services, housekeeping, building services, security and non-clinical health services. In 2002, the government enacted the *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2 which expressly excludes service providers contracting with a health care employer from the *Code's* successorship provisions (Section 6(5)). The *Health Sector Partnerships Agreement Act,* SBC 2003, c. 93 was enacted around the same time. The combined effect of those acts excludes both the *Code's* successorship provisions and collective agreement restrictions on contracting out. In 2007 the Supreme Court of Canada found portions of the *Health and Social Services Improvement Delivery Act* to be unconstitutional: *Health Services – Facilities Subsector Bargaining Association v. British Columbia* 2007, SCC 7. However, Section 6 (5) remains in effect.
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> We heard similar stories of the effects of re-tendering on workers in other contracted services including building cleaning, security, food, and bus services. In many cities and municipalities, bus services are provided by contractors through a Request for Proposal (RFP). When the contracts are re-tendered, the collective agreement ends, employees are invited to a job fair to re-apply for their jobs and are often hired at lower wages. The Union is required to re-organize and attempt to negotiate a new collective agreement.
>
> The cost of labour is one of the most important competitive factors in all of these circumstances. The contract re-tendering issue is most pronounced in sectors with the greatest precarity. In our view it is no more socially desirable to allow cost savings through

> reducing labour costs and eliminating established collective bargaining rights by the re-tendering of contracts than it is in the sale or transfer of a business. Both require the protection of the successorship protections of the Code.
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> (emphasis added)

88 What is apparent from the forgoing excerpts of the Report is the overriding concern that unions and their members were unable to depend on the collective bargaining protections that would otherwise have been available if the retendering of a contract was treated the same as the disposition of a business. Section 35(2.2) is intended to achieve that objective by providing the same rights and imposing the same obligations in the contract service sector as exist under Section 35(1) and (2), not additional rights and obligations.

89 For the reasons above, in my view, Section 35(2.2) did not impose an obligation on Everclean to hire Dexterra's terminated employees, just as Section 35(1) would not have required a successor on a disposition to rehire similarly situated terminated employees of a predecessor on the disposition of a business.

90 The Union also relies on the freeze period under Section 32 of the Code to impose an obligation on Everclean to rehire all of Dexterra's employees. It says that Dexterra did not have proper cause to terminate their employment because there would be work for them to perform with Everclean once the successorship occurred and therefore Everclean was required to also maintain the employment of Dexterra's employees.

91 However, the original panel correctly found that the Union's position regarding Section 32 was not consistent with the law and policy of the Code. It noted that the purpose of Section 32 is to "provide a period of calm and stability and avoid the chilling effect that unregulated employer action could have on the representation of employees by a union", citing *Viva Pharmaceutical Inc.*, BCLRB No. B167/2002 and *Ventur Steel* (1990) Ltd., BCLRB No. B310/96. Applying this to Dexterra's notice of termination the original panel stated:

> Where an employer has decided to lay off employees for business reasons before an application for certification is filed, the Board has concluded that Section 32 does not apply to the layoff decision because it was effectively made prior to any union activity. That is the case even if the layoff is slated to occur after a union files an application seeking to represent employees who are subject to the layoff notices. The rationale for this approach is that the employer has made and communicated the decision to employees prior to any union activity and, therefore, the layoffs could not be interpreted as a punishment imposed on employees for making a choice to unionize: *KFCC/Pepsico Holdings Ltd.*, BCLRB No. B342/97 ("*KFCC*"), paras. 63-64. (para. 44)

92 That correct articulation of the law and policy supported the original panel's conclusion that Dexterra did not breach Section 32 when it ceased employing its employees at Sevenoaks on February 28, 2021. The termination of employment was done for legitimate business reasons (Dexterra had lost the contract to perform the work) and there was no tainted of anti-union animus to its decision. It is not disputed (and the Majority accepts) that it was not a breach of Section 32 for Dexterra to have given its employees termination notice. However, the Majority then imposed a prospective obligation on Everclean to conduct itself as if it were the successor employer before the successorship occurred on March 1, 2021. It says that Everclean was "presumptively obliged to continue the employment of the employees who were performing the work under the contract, subject to the proper cause exception in Section 32(2) of the Code".

93 However, on February 28, 2021, Everclean was not the employer of Dexterra's employees and had no legal authority to rescind Dexterra's termination notices. It could not "continue" their employment. Moreover, Everclean did not rely on Dexterra's notices of termination. Dexterra relied on the notices and its employees' employment came to an end before the successorship occurred. Everclean did not terminate Dexterra's employees' employment. Only Dexterra could do so and only Dexterra could rescind their termination notices.

94 The Union argues that because the same work was continuing to be performed and there was no gap in that occurring, this imposed an obligation on Everclean to hire Dexterra's employees. However, Section 35(2.2) simply uses the continuation of contracted work as a proxy for the disposition of a business in Section 35(1). In determining whether a successorship occurs under Section 35(2.2) the Board must determine whether "substantially similar services continue to be performed, in whole or in part, under the direction of another contractor". If so, a successorship occurs. That is no different than under Section 35(1) where the Board must determine if there has been a "disposition of the business". These phrases are the triggers for determining whether the rights and obligations articulated elsewhere in the sections are applicable. They do not themselves grant those rights or impose obligations. More importantly, they do not impose an obligation on a putative successor employer prior to it becoming the successor.

95 In addition, neither Section 35(2.2) nor Section 35(1) required that there be a temporal connection between the continuation of substantially similar contracted services or the discernable continuity of a disposed of business for a successorship to occur and rights and obligations to flow from those sections. A gap in the contracted services would have changed nothing in the case at hand. Regardless of whether Everclean had started the contract a week after Dexterra's contract ended, the fundamental facts would have remained the same; namely, Dexterra had terminated its employees before the successorship and the successorship arose because substantially similar contracted services were performed by Everclean.

96 While I do not agree with the Union's assertion that Everclean had obligations under Section 32 prior to becoming the successor employer, even if it did, Everclean did

nothing to alter Dexterra's employees' terms and conditions of employment. As noted above, it was Dexterra that terminated their employment, not Everclean. Consequently, Section 32 could not have been breached by Everclean. Moreover, there was no action by Everclean against which the question of whether it had proper cause could be measured. The Union's argument imposes a positive obligation on Everclean to do something, notwithstanding that Section 32 imposes an obligation not to do something, i.e. not to alter the terms and conditions of employment.

97 In any event, in my respectful view, Everclean's obligations under Section 32 arose when it became the successor employer pursuant to Section 35(2.2) because it was bound by the certification application that was pending at that time. Consequently, it would have been unlawful, subject to having proper cause, for Everclean to alter the terms and conditions of employment of its employees, not prospectively in respect of Dexterra's.

98 I note there is no suggestion that Everclean did anything that would engage the policy objectives of Section 32 set out in the cases relied on by the original panel, *KFCC/Pepsico Holdings Ltd.*, BCLRB No. B342/97. Everclean hired virtually all of Dexterra's former employees. This is not surprising. As invariably occurs, an incoming contractor is likely to hire a substantial number of the employees of the prior contractor. The Report noted this in the background discussion of this issue. That is what occurred in this case; all but three (3) of Dexterra's former employees were hired by Everclean. It has committed to bargaining a collective agreement with the Union. Such actions do not prejudice the Union's collective bargaining rights; nor could Everclean's action be interpreted as punishment imposed on Dexterra's former employees for making a choice to unionize when they were previously employed by Dexterra.

99 I pause to note that although an incoming contractor is entitled to hire a qualified work force, in so doing, is not permitted to exclude workers for anti-union reasons. There is no allegation that Everclean's hiring decisions were motivated by anti-union animus. Moreover, it did not avoid hiring individuals with experience with Dexterra or rescinded their employment offers after the Union applied to be certified. By acknowledging that it is a successor employer, Everclean effectively recognized that the individuals it hired would become members of the bargaining unit, represented by the Union and that it was obliged to engage in good faith collective bargaining with the Union.

100 Had Everclean engaged in anti-union conduct in its hiring practices, the Code offers considerable protection, through the unfair labour practice provisions, for the Union and its members' collective bargaining rights. Those Code protections are broad enough to address nefarious conduct by an incoming contractor aware of the prospect of becoming successor employer, for example, who engages in an irrational selection process of prospective employees, such as refusing to hire individuals because of prior union affiliation or flatly rejecting any of the previous contractor's employees, who apply for future employment on the assumption that they sought union representation.

101 For all of the foregoing reasons, I would have upheld the Original Decision.

J. NAJEEB HASSAN
VICE-CHAIR AND REGISTRAR