

Northwestern Journal of International Law & Business

Volume 12

Issue 3 *Winter*

Winter 1992

Potential Liability of New Employers to Pre-Existing Collective Bargaining Agreements and Pre-Existing Unions: A Comparison of Labor Law Successorship Doctrines in the United States and Canada

Phillip M. Schreiber

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [International Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Phillip M. Schreiber, Potential Liability of New Employers to Pre-Existing Collective Bargaining Agreements and Pre-Existing Unions: A Comparison of Labor Law Successorship Doctrines in the United States and Canada, 12 Nw. J. Int'l L. & Bus. 571 (1991-1992)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

COMMENT

Potential Liability of New Employers to Pre-Existing Collective Bargaining Agreements and Pre-Existing Unions: A Comparison of Labor Law Successorship Doctrines in the United States and Canada

Phillip M. Schreiber

I. INTRODUCTION

Successorship questions arise in many areas of corporate law when one business entity takes over another business entity. In labor law, successorship issues can arise whenever one business entity takes over another business entity which has employees that are collectively organized. Similar successorship issues in labor law exist in both the United States and Canada. However, both the determination of successor status and the consequences of this determination differ in the United States and Canada. In addition, differences exist within the various Canadian provinces and federal territories. This comment will explore and analyze these differences.

Beyond a simple comparison, this comment will take the perspective of the management of a foreign multinational corporation (MNC) seeking access to North America by taking over a pre-existing entity.¹ The

¹ Instead of the massive capital and time expenditure needed for the MNC to build its own

foreign MNC would be likely to consider its obligations to honor any pre-existing collective bargaining agreements, to bargain with the pre-existing union, and to abide by an arbitration clause in a pre-existing collective bargaining agreement. Such information would be important to MNCs desiring to take over an ailing company with the idea of making major structural and/or personnel changes. If the MNC is bound to honor the previous agreement, it will be restrained from making these needed changes and the transaction would be futile. The relevant jurisdiction's successorship doctrine determines the extent of these obligations and, therefore, the ability of the MNC to make these necessary changes. Analysis of the labor law successorship doctrines of the United States and Canada indicates that U.S. successorship doctrine is more flexible than Canadian successorship doctrine and thus more advantageous to foreign MNCs. Foreign MNCs would therefore be well advised to seek takeover opportunities in the United States rather than in Canada.

Part II of this comment will provide a brief overview of the Canadian labor law system. Part III will analyze the common law development of labor law successorship doctrine in the United States. Part IV will discuss Canadian labor law successorship doctrine in general. Part V will analyze in detail the tests for successorship in the United States. Part VI will discuss the successorship tests used by the various Canadian provinces and territories. Part VII will compare these tests to those used in the United States, and will make a normative judgment as to which system is more advantageous to the management of foreign MNCs. Finally, part VIII will provide an illustration of why the U.S. system is superior.

II. THE CANADIAN LABOR LAW SYSTEM: A GENERAL OVERVIEW²

The Canadian labor law system draws heavily upon the labor law system of the United States. Like workers in the United States, Canadian workers possess a "statutorily protected right to organize for collective bargaining."³ Once workers organize, the employer has to "bargain in good faith" with the aim of obtaining a collective bargaining agree-

plant, the MNC might choose to take over an existing plant through an asset purchase or stock transfer.

² It is assumed that most readers are not familiar with the Canadian labor law system but are familiar with the U.S. labor law system. This section is meant to provide the reader with a brief overview of the Canadian system in order to provide a better understanding of the more detailed discussion of Canadian labor law successorship doctrine in Parts III and V.

³ H.W. ARTHURS, D.D. CARTER, J. FUDGE, & H.J. GLASBEEK, *LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA* 33 (3d ed. 1988) [hereinafter H.W. ARTHURS].

ment. If no agreement can be reached through negotiation, the represented workers can strike to press their position. Likewise, the employer may initiate a lockout to press its position.⁴

Two aspects of Canadian labor statutes differ from their U.S. counterparts. First, workers cannot strike while a collective bargaining agreement is in force. Instead, arbitration resolves disputes and grievances. Furthermore, strikes can occur when no collective bargaining agreement exists only after alternative paths to resolution have been exhausted. These unique aspects of the Canadian system are designed to minimize industrial conflict.⁵

About thirty-three percent of non-agricultural workers in Canada belong to a union.⁶ Union membership is concentrated in specific industries. Traditionally, unionized industries include "mining, construction, petro-chemical, transport and communications, steel, and manufacturing. . . ."⁷ With the exception of governmental employees, unions enjoy little success in organizing the service-oriented, white-collar sector of the labor market.⁸

The Canadian Constitution has an impact on Canadian labor law. Specifically, the *Canadian Charter of Rights and Freedoms*⁹ affects many areas of Canadian labor law. Some areas potentially affected include exclusive representation, various union security agreements (i.e., union-shop agreements), regulation of strike activity, and regulation of both employer and employee free speech.¹⁰ Successorship issues, however, do not appear to be an area subject to constitutional scrutiny.

In contrast to the United States, where labor statutes are almost exclusively at the federal level, in Canada, each province has its own labor statute. The federal statutes in Canada affect only the territories, not the provinces.¹¹ Nevertheless, because each of the statutes, excluding

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 31.

⁷ *Id.*

⁸ *Id.*

⁹ Part I of the *Constitution Act*, included as Schedule B to the *Canada Act*, 1982 (U.K.).

¹⁰ G. ADAMS, *CANADIAN LABOUR LAW* 144 (1985).

¹¹ H.W. ARTHURS, *supra* note 3, at 28. The following is a complete list of the Canadian labor statutes:

Canada Labour Code, R.S.C. 1970, ch. L-1, as amended R.S.C. 1970 (1st Supp.) ch. 22; R.S.C. 1970 (2nd Supp.) ch. 17.

Alberta Labour Relations Act, Alta. Rev. Stat. 1980, ch. L-1.

British Columbia Industrial Relations Act, B.C. Rev. Stat. 1979, ch. 212.

Manitoba Labour Relations Act, C.C.S.M., ch. L-10.

New Brunswick Industrial Relations, N.B. Rev. Stat. 1973, ch. 1-4.

Newfoundland Labour Relations Act, Nfld. Stat. 1977. ch. 64.

Saskatchewan's, were "founded upon the Dominion wartime regulations, P.C. 1003, . . . labour legislation across the country is . . . broadly similar."¹²

With respect to private-sector collective bargaining, there is a great deal of similarity in Canada's labor statutes. First, every statute provides for a "process of certification, a duty to bargain in good faith, procedures for dispute resolution and for termination of bargaining rights."¹³ Furthermore, every statute contains "provisions dealing with successor rights" and successor unfair labor practices.¹⁴ Although the statutes in each jurisdiction are not identical, they do reflect a common tendency to favor employees of the predecessor business and their unions.¹⁵

Each province as well as the federal government has a special adjudicatory body to administer their respective labor statutes. Except for Quebec, each jurisdiction has a labor board established by statute to enforce and administer that jurisdiction's labor laws. Quebec has a Labour Court which performs these functions. The labor board in British Columbia enjoys the broadest range of powers. These powers include authority over "conciliation, strikes, picketing and grievance arbitration, *inter alia*." Labor boards in other jurisdictions possess only some of these powers.¹⁶

Beyond regulatory authority, Canadian labor boards also possess similar remedial powers. Boards can order an employer to remedy its unfair labor practices by reinstating employees, paying compensation, setting aside any disciplinary action taken, and issuing orders to cease and desist from the unlawful action. In addition, boards can order unions to take similar corrective action.¹⁷

Labor boards in Canada are subject to judicial review in only limited circumstances. Generally, the only grounds for seeking judicial review of a board's final decision are a "[d]efect of jurisdiction; [a] [d]enial of natural justice; [an] [e]rror of law on the face of the record; and [f]raud or collusion."¹⁸ These four grounds notwithstanding, a board's findings of

Nova Scotia Trade Union Act, N.S. Stat. 1972, ch. 19.

Ontario Labour Relations Act, Ont. Rev. Stat. 1980, ch. 228.

Prince Edward Island Labour Act, P.E.I. Rev. Stat. 1974, ch. L-1.

Quebec Labour Code, Que. Rev. Stat. 1977, ch. C-27.

Saskatchewan Trade Union Act, Sask. Rev. Stat. 1978, ch. T-17.

¹² G. ADAMS, *supra* note 10, at 91.

¹³ *Id.* at 99.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ H.W. ARTHURS, *supra* note 3, at 57.

¹⁷ G. ADAMS, *supra* note 10, at 99.

¹⁸ *Id.* at 159.

fact and law are “final and binding on the parties.”¹⁹

III. LABOR LAW SUCCESSORSHIP DOCTRINE IN THE UNITED STATES

A. General Overview

It is difficult to determine a precise definition of the term “successorship.”²⁰ Generally, the concept of successorship involves the situation where an employer acquiring a business inherits certain labor obligations from the predecessor. The problem in forming a more concise definition of “successorship” results from the multitude of different business transactions from which successorship issues can arise. Such transactions can range from stock transfers to asset purchases to the assumption of a service contract, in addition to many other types of transactions.²¹

The range of successor obligations is as broad as the types of business transactions that give rise to the issue in the first place. Being labeled a successor can obligate an employer to bargain with the pre-existing union, abide by the predecessor’s collective bargaining agreement, arbitrate, and remedy the predecessor’s unfair labor practices.²² As will become apparent, an employer may be labeled a successor for certain purposes and not for others.²³

In the United States, labor law successorship doctrine has developed through judge-made common law. Consequently, the labor statutes themselves fail to provide a test to determine whether a new employer is a successor and, if so, the effect of that label. However, successorship issues do arise in light of two major labor statutes. Successor questions arise under § 301 of the Labor Management Relations Act (LMRA)²⁴ if the union or individual employees seek to compel the new employer to arbitrate. In addition, successor questions arise under § 8(a) of the National Labor Relations Act (NLRA)²⁵ if the pre-existing union seeks to compel the employer to bargain with that union. The precise role of these statutes in successorship doctrine will be discussed in Part V.

It should be noted that many employment contracts contain boilerplate “successor and assigns” clauses. Despite their intent, such clauses

¹⁹ *Id.*

²⁰ George, *Successorship and the Duty to Bargain*, 63 Notre Dame L. Rev. 277 (1988).

²¹ *Id.* at 277-78.

²² *Id.* at 278.

²³ *Id.* Thus, an employer may be forced to bargain with the pre-existing union but will not be required to adhere to the previous collective bargaining agreement.

²⁴ 29 U.S.C. §§ 141 *et seq.* (1982).

²⁵ 29 U.S.C. §§ 151 *et seq.* (1982).

alone do not bind a new employer to the previous collective agreement.²⁶ Thus, such clauses have no effect on the resolution of successorship questions. Instead, such questions have been resolved by a series of Supreme Court cases.

B. Major Supreme Court Successorship Cases

The following discussion of the key Supreme Court cases dealing with successorship illustrates that this entire area of labor law is derived from judge-made common law. Furthermore, this survey will provide a historical context to the general development of U.S. labor law successorship doctrine. The detailed rules on successorship will be discussed in Part V of this comment.

*John Wiley & Sons v. Livingston*²⁷ (Wiley) was the first successorship case decided by the Supreme Court that focused on the issue of successorship and not the remedial powers of the National Labor Relations Board (NLRB).²⁸ Wiley involved a suit under § 301 of the LMRA²⁹ to arbitrate under the terms of the predecessor's collective bargaining agreement.

In Wiley, the predecessor employer, Interscience Publishers, had a collective bargaining agreement with a union. The agreement contained a clause that called for arbitration of any grievances or disputes arising out of, or in the course of, the agreement. There was no "successor and assigns" clause in the agreement. Eventually, Interscience merged with Wiley during the lifetime of the Interscience collective bargaining agreement. Wiley refused to recognize the Interscience union. The union then filed suit under § 301 to compel Wiley to arbitrate five issues which arose under the Interscience agreement. The union was seeking to arbitrate only on behalf of the employees who originally worked for Interscience.³⁰

The Supreme Court ruled unanimously that despite the merger, Wiley had an obligation to arbitrate grievances and disputes which arose

²⁶ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, GOVERNMENT PROTECTION OF EMPLOYEES INVOLVED IN MERGERS AND ACQUISITIONS 341-42 (1989); *Howard Johnson Co. v. Detroit Joint Exec. Bd.*, 417 U.S. 249, 258 n.3 (1974) (If the new employer clearly refused to assume any obligations that arose under the old CBA, the existence of a successorship clause in the old CBA imposes no binding effect on the new employer).

²⁷ 376 U.S. 543 (1964).

²⁸ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 201. The Board's remedial powers include the power to force an employer or a union to pay compensation for the damage it unlawfully caused.

²⁹ § 301 of the LMRA provides, *inter alia*, a means for individual employees to enforce their collective bargaining contract rights (including the right to arbitration) by bringing suit in federal or state court.

³⁰ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 202.

under the Interscience collective bargaining agreement.³¹ The Court stated that "the disappearance by merger of a corporate employer which had entered into a collective bargaining agreement with the union does not automatically terminate all rights of the employees covered by the agreement, and . . . in appropriate circumstances, present here, the successor employer may be required to arbitrate under the agreement."³² In other words, an arbitration clause contained in a predecessor's collective bargaining agreement may still have effect even though the business entity was taken over by another business entity.

*NLRB v. Burns Int'l Security Services, Inc.*³³ (*Burns*) was the second major Supreme Court successorship case and is "the most important case for corporate planners."³⁴ Here the Supreme Court undertook a successorship case that did not involve a transfer of assets or capital.³⁵ In this case the predecessor employer (Wackenhut) provided plant security services for a third party (Lockheed). The predecessor employer's workers were represented by the United Plant Guard Workers of America. After the predecessor and the union executed a collective bargaining agreement, the new employer (Burns) replaced the predecessor. The new employer retained twenty-seven of the predecessor employer's workers and brought in fifteen of its own workers.³⁶ Shortly before the new employer took over, it recognized a rival union as the representative of all employees in the work unit.³⁷

Soon after the new employer (Burns) took over, it rejected a demand for recognition from the predecessor's union (under Wackenhut). In addition, Burns rejected the Wackenhut union's demand that Burns honor the Wackenhut collective bargaining agreement. The Supreme Court held that Burns was a successor and, therefore, obligated to bargain with the union. However, Burns had no obligation to adopt the previous collective bargaining agreement.³⁸ Thus, in contrast to the holding of the NLRB, the Court chose not to require the successor employer to auto-

³¹ *Id.* at 203.

³² 376 U.S. at 548.

³³ 406 U.S. 272 (1972).

³⁴ Fasman & Fischler, *Labor Relations Consequences of Mergers and Acquisitions*, 13 Employee Rel. L.J. 14, 16 (1986). *Burns* provides the basic test for successorship in § 8(a) duty to bargain suits. This will determine if the new employer has to recognize and bargain with the pre-existing union.

³⁵ George, *supra* note 20, at 282. Rather than involving an asset or capital transfer, *Burns* involved the assumption of a service contract.

³⁶ Thus a majority of the new work unit came from the predecessor employer.

³⁷ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 205.

³⁸ *Id.* at 205-06.

matically adopt the terms of the previous collective bargaining agreement.

The Court upheld the finding that Burns was a successor for two reasons. First, there was little structural change in the operations or practices of Burns as compared to Wackenhut. Second, and more importantly, a majority of the employees in the new work unit were from the predecessor employer.³⁹

Although the Court ruled that a successor employer may be bound to bargain with the predecessor's union, it flatly rejected any notion that the new employer was strictly bound by the previous collective bargaining agreement.⁴⁰ First, the Court held that binding a successor to a previous agreement runs counter to "the 'fundamental' policy of freedom of contract."⁴¹ The Court offered a second and more compelling reason from a public policy perspective. This reason concerned the mobility of capital. The Court stated:

A potential employer may be willing to take over a moribund business only if [it] can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.⁴²

Thus, the Court exhibited concern that a troubled business entity might fail due to the unwillingness of potential purchasers to take it over because they would be unable to make the necessary structural changes.

The *Burns* and *Wiley* holdings appear to be in conflict.⁴³ The apparent incompatibility of *Burns* and *Wiley* resulted from the Court proceeding from "antithetical premises."⁴⁴ In *Wiley*, the Court was concerned with protecting the "rights of employees who might have lost benefits through no fault of their own."⁴⁵ In *Burns*, the Court was concerned with "preserving the employer's right to restructure a business, thus enhancing the attractiveness of a transfer of ownership."⁴⁶ The latter concern is the motivating force behind recent NLRB and court decisions.⁴⁷

³⁹ 406 U.S. at 280-81.

⁴⁰ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 207 (citing *Burns*, 406 U.S. at 284).

⁴¹ *Id.*

⁴² 406 U.S. at 287-88.

⁴³ *Wiley* required the honoring of an arbitration clause in the previous agreement while *Burns* did not require the adoption of any of the previous agreements provisions.

⁴⁴ Fasman & Fischler, *supra* note 34, at 18.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 19. Thus, the *Wiley* decision is no longer considered good law.

*Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*⁴⁸ (*Howard Johnson*) was the fourth⁴⁹ major Supreme Court case dealing with successorship. Like *Wiley*, this case involved a § 301 suit to compel arbitration. In this case, the predecessor employer was a party to a collective bargaining agreement containing a "successor and assigns" clause. Howard Johnson agreed to take over the business but explicitly stated that it would not assume any prior collective bargaining agreements. When Howard Johnson took over the business it operated with fifty-five employees. However, only nine of those employees worked under the previous employer.⁵⁰ The predecessor's union filed suit seeking to compel arbitration and to force Howard Johnson to rehire the predecessor's employees.⁵¹

The Supreme Court ruled that Howard Johnson was not a successor and therefore had no obligation to arbitrate under the prior collective bargaining agreement.⁵² The significance of *Howard Johnson* lies in the Court's discussion of the continuity of the workforce requirement. The Court viewed the continuity of the workforce as vital to the continuity of identity in the business enterprise. Howard Johnson (and any other new employer) is free to hire or not hire anybody it wants. Thus, a new employer can escape successor status under § 301 cases by not hiring a majority of the predecessor's workforce.⁵³

In *Fall River Dyeing & Finishing Corp. v. NLRB*⁵⁴ (*Fall River Dyeing*), the Supreme Court took up the successorship issue for the first time in thirteen years. In this case the union-organized predecessor employer closed down after almost thirty years of operation. Seven months after purchasing most of the predecessor's assets, Fall River Dyeing initiated start-up procedures. During the first two months of operation, Fall River Dyeing hired one shift of fifty-five employees.⁵⁵ During the next three months of operation a second shift was added for a total of 107

⁴⁸ 417 U.S. 249 (1974).

⁴⁹ Prior to *Howard Johnson*, the Court decided *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), *affirming* 467 F.2d 164 (9th Cir. 1972), *enforcing* 187 NLRB 1017 (1971). This case dealt with whether a NLRB remedial order could be applied to a successor. The Court held that it was permissible for the NLRB to impose its remedial order on a successor employer.

⁵⁰ 417 U.S. at 252. Thus, a majority of the predecessor's employees were not employed by the new employer. Furthermore, a majority of the employees from the new work unit did not come from the predecessor employer.

⁵¹ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 209.

⁵² *Id.* at 210.

⁵³ George, *supra* note 20, at 286. However, a new employer can not discriminate in its hiring decisions on the basis of whether an individual worked for the predecessor or not. *Id.*

⁵⁴ 482 U.S. 27 (1987).

⁵⁵ *Id.* at 33.

employees.⁵⁶ Although the predecessor's employees made up only a minority of the expanded 107 person unit, they constituted a majority of the initial fifty-five person unit.⁵⁷ The main issue in this case concerned the appropriate time to measure for majority status - after the initial shift was hired or after the second shift was added.⁵⁸

The Supreme Court affirmed the "substantial and representative complement" rule established by the NLRB to determine when to measure for majority status.⁵⁹ Under this rule, the appropriate time to determine if the majority requirement has been met is when a substantial and representative complement of the employees has been hired, not when the full complement of employees has been hired.⁶⁰ Furthermore, the Court also clarified its requirement that there be a continuity in the character of the enterprise. The Court stated that in making a determination of whether such continuity exists, the question must be viewed from the perspective of the employees.⁶¹ Thus, if a new employer makes changes only in areas that do not affect the unionized employees, continuity in the character of the enterprise still exists. As far as the unionized employees are concerned, nothing has changed from their perspective.⁶²

The preceding paragraphs trace the major developments of successorship doctrine in the United States. The above cases developed the rules used by the NLRB and appellate courts for determining successorship status under suits to compel bargaining (§ 8(a) of the NLRA) and suits to compel arbitration (§ 301 of the LMRA). It is apparent that successorship doctrine in the United States is a product of judge-made common law.

IV. CANADIAN LABOR LAW SUCCESSORSHIP DOCTRINE

In contrast to the common law development of successorship doctrine in the United States, the Canadian law of successorship is statutory in nature. The various Canadian statutes are constantly changing to "dress up the law of succession" and refine legal problems such as the "distinction between the sale of a business as a going concern and the sale of the assets of a business"⁶³

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ George, *supra* note 20, at 280.

⁵⁹ Fasman & Fischler, *supra* note 34, at 31-32.

⁶⁰ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 219.

⁶¹ Fasman & Fischler, *supra* note 34, at 22.

⁶² Contrast this with changes in production or supervision where the unionized employees would be affected by the change.

⁶³ A.W.R. CARROTHERS, *COLLECTIVE BARGAINING LAW IN CANADA* 74-75 (2d ed. 1986).

A. Transfer Types and Successorship

A variety of transfers can lead to labeling a new employer as a successor. For example, multiparty transactions that involve agents or intermediary purchasers do not prevent the final new employer from being labeled a successor. If such transactions could circumvent successor status, most transactions would be framed in such a manner. This would be contrary to the intent of the legislatures.⁶⁴

Mergers, however, may be a different story. British Columbia, for example, differentiates between mergers and sales. In that jurisdiction, when two companies merge into a partnership, neither company is bound to any pre-existing collective bargaining agreements. Other jurisdictions do not make such a distinction and hold that mergers are to be treated like any other sale.⁶⁵

Nevertheless, there must be a new owner regardless of the transaction type (merger or sale). "A mere change in name of an employer without a change in ownership or the nature of the operation does not affect the bargaining relationship."⁶⁶ Thus, sham transactions executed merely to eliminate any obligations to the union or employees will fail.

B. Successor Obligations When A Collective Bargaining Agreement Does and Does Not Exist

When a new employer is labeled a successor, its obligations will depend on whether a collective bargaining agreement is in effect. When a collective bargaining agreement is in effect, the new employer must honor that agreement until the appropriate labor board decides otherwise. On the other hand, when no collective bargaining agreement is operating at the time of the transfer, the new employer is only obligated to bargain with the pre-existing union. However, the union must request the new employer to bargain, and the two parties bargain from a clean slate. In other words, during the bargaining process, the new employer is not bound to anything agreed to by the predecessor.⁶⁷

V. TESTS FOR SUCCESSOR STATUS IN THE UNITED STATES

This section will discuss the tests used by the NLRB and the federal

This implies that the various labor tribunals do not take it upon themselves to make necessary interpretations of the labor statutes. This is an example of how the provincial and national legislatures dominate the realm of labor relations in Canada.

⁶⁴ *Id.* at 420-21.

⁶⁵ *Id.* at 420.

⁶⁶ *Id.* at 418.

⁶⁷ G. ADAMS, *supra* note 10, at 399.

courts in the United States to determine successor status. In the United States, the type of transaction used to transfer a business or its assets is significant in determining the type of test applied to determine successor status. In addition, the type of suit brought (§ 8(a) of the NLRA or § 301 of the LMRA) will also affect the type of test used to determine successor status.

A. Tests For Successorship: The Asset Purchase

The tests for successorship following an asset purchase, under both § 8(a) suits to compel bargaining and § 301 suits to compel arbitration, can be divided into two prongs. The first prong is the test for continuity of the workforce. The second prong is the test for continuity in the identity of the character of the enterprise.

1. *Continuity of the Workforce*

a. Majority Required Under § 8(a) Suits to Compel Bargaining With the Pre-existing Union

The workforce continuity test for cases arising under § 8(a) originated in *Burns*.⁶⁸ Although the Court's ruling in *Burns* was ambiguous, succeeding tribunals (the NLRB and the appellate courts) interpreted the rule to mean that where a majority of the *new* employer's workforce was employed by the predecessor employer, there would be continuity of the workforce for the purpose of § 8(a) duty-to-bargain cases.⁶⁹ Thus, if more than fifty-percent of the *new* employer's workforce came from the predecessor employer, the majority test is met.

b. Majority Required Under § 301 Suits to Compel Arbitration Under the Prior Collective Bargaining Agreement

The Court in *Howard Johnson* approved lower court interpretations of *Wiley* which required a majority of the *predecessor's* employees to be hired by the new employer in order to establish the needed majority.⁷⁰ "The focus on the proportion of predecessor employees that have been retained . . . bears a reasonable relation to the workforce whose rights the union, by requesting arbitration, seeks to protect in *Wiley* arbitration

⁶⁸ 406 U.S. 272 (1972).

⁶⁹ *Spruce-Up Corp.*, 209 NLRB 194 (1974), *enf'd*, 529 F.2d 516 (4th Cir. 1975); *Contract Carrier, Inc.*, 258 NLRB 353 (1981); *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976), *cert. denied*, 419 U.S. 921 (1976); and *Saks and Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980).

⁷⁰ 417 U.S. at 264. Contrast this with the § 8(a) majority of requiring more than fifty-percent of the new employer's employees to be from the old employer.

cases.”⁷¹ Thus, the Court’s endorsement of lower court decisions focusing on whether a new employer hires a majority of the predecessor’s employees leads to a “threshold requirement that a ‘majority’ of the predecessor’s workforce be retained before a duty to arbitrate will be imposed on the [new employer].”⁷²

The Court in *Howard Johnson* did not explicitly rule that a new employer must hire a majority of the predecessor’s workforce for there to be continuity of the workforce.⁷³ Nevertheless, courts uniformly reject requests for *Wiley* arbitration where the new employer hires less than a majority of the predecessor’s workforce.⁷⁴ Thus, if more than fifty-percent of the predecessor’s workforce is employed by the new employer, the new employer has a duty to arbitrate.⁷⁵

c. When to Measure For the Required Majority: The “Substantial and Representative Complement” Test and the “Continuing Demand” Rule

The Supreme Court endorsed the “substantial and representative complement” rule established by the NLRB in *Fall River Dyeing*.⁷⁶ This rule sets forth five factors to be considered in determining the appropriate time to determine whether the required majority exists. First, the Board must determine “whether the job classifications designated for the operation were filled or substantially filled.”⁷⁷ Second, the Board must determine if “the operation was in normal or substantially normal production.”⁷⁸ Third, the Board must consider “the size of the complement on” the date in question.⁷⁹ Fourth, the Board must weigh “the time expected to elapse before a substantially larger complement would be at

⁷¹ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 252-53.

⁷² *Id.* at 253.

⁷³ The Court merely gave approval of lower court decisions. *Id.*

⁷⁴ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 255.

⁷⁵ Because the distinction between the majority tests for § 8(a) and § 301 is subtle, an example may be helpful. First, assume that a predecessor employer had a 100 person workforce and the new employer has a 30 person workforce. If 25 of the 30 employees came from the predecessor, then the majority test for § 8(a) is met because more than fifty-percent of the new employer’s workforce came from the predecessor. However, the majority test for § 301 is not met because a majority of the predecessor’s workforce is not employed by the new employer. Now assume that the predecessor employer again had a 100 person workforce but the new employer had a 250 person workforce. If 90 of the 250 employees came from the predecessor, the majority test for § 301 is met because more than fifty-percent of the predecessor’s workforce is employed by the new employer. However, the majority test for § 8(a) is not met because a majority of the new employer’s employees did not come from the predecessor.

⁷⁶ 482 U.S. 27.

⁷⁷ 482 U.S. at 49, *quoting* Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983).

⁷⁸ *Id.*

⁷⁹ *Id.*

work.”⁸⁰ Finally, the Board must consider “the relative certainty of the employer’s expected expansion.”⁸¹

In addition to the “substantial and representative complement” rule, the Court in *Fall River Dyeing* upheld the NLRB’s “continuing demand” rule. According to the Court, a successor’s duty to bargain at the “substantial and representative complement” date is triggered only when the union demands to bargain. However, under the “continuing demand” rule, a union’s premature bargaining demand (i.e., made before the substantial and representative complement date) remains in effect until the appropriate date is reached.⁸²

d. Prohibition Against Discriminatory Practices to Avoid the
Required Majority

Although a new enterprise is under no obligation to hire employees from the predecessor, a new employer cannot deny employment to an individual because they worked for the predecessor.⁸³ A bargaining order will be issued and enforced where, “but for the successor’s discriminatory refusal to hire the predecessor’s employees, the union would have represented a majority of the successor’s workforce.”⁸⁴ Thus, a new employer cannot escape successor obligations through discriminatory methods.

e. Primary Importance of the “Continuity of the Workforce” Test

The workforce majority requirement is the most important determinant of whether a new employer will be labeled a successor. In essence, “the majority requirement acts as a ‘threshold’ factor” since the NLRB will refuse to label a new employer a successor without it.⁸⁵ This is true even where virtually every other aspect of the new employer’s business is identical to the predecessor’s business.⁸⁶ In short, the workforce majority requirement is the “prime determinant” of whether a new employer will be considered a successor.⁸⁷ In fact, where the required workforce

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 482 U.S. at 52.

⁸³ See *Fall River Dyeing*, 482 U.S. 27 (1987).

⁸⁴ A.B.A. Sec. Lab. & Employ. L., *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* 366 n.2 (2d ed. Fifth Supp. 1989) [hereinafter *The Developing Labor Law*] (citing *Hubacher Cadillac*, 276 NLRB 1062 (1983), *aff’d mem.*, 760 F.2d 275 (9th Cir. 1985)); *American Press, Inc.*, 280 NLRB 937 (1986), *enf’d*, 833 F.2d 621 (6th Cir. 1987). Similar orders would be issued and enforced in duty-to-arbitrate cases.

⁸⁵ George, *supra* note 20, at 287.

⁸⁶ *Id.*

⁸⁷ Fasman & Fischler, *supra* note 34, at 30.

majority exists, the NLRB almost always labels the new employer a successor.⁸⁸

2. *Continuity in the Identity of the Character of the Enterprise*

The second prong of the successorship test for both § 301 and § 8(a) claims is whether there have been any substantial changes in the character of the business enterprise since the asset purchase. If it is found that no substantial changes exist, there is continuity in the character of the enterprise and this prong of the successorship test has been met.⁸⁹

There are seven general factors which determine whether there is continuity of the enterprise. These factors are whether:

- (1) there has been a substantial continuity of the same business operations;
- (2) the new employer uses the same plant;
- (3) the same or substantially the same workforce is employed;⁹⁰
- (4) the same jobs exist under the same working conditions;
- (5) the same supervisors are employed;
- (6) the same machinery, equipment and methods of production are used; and
- (7) the same product is manufactured or the same services offered.⁹¹

Compared to the rigidity of the "continuity of the workforce" test, the "continuity of the character of the business enterprise" test is very flexible.⁹² Analysis of the various factors under this prong should be based on the totality of the circumstances and should be done on a case-by-case basis.⁹³ Furthermore, not all of the factors need to be met, nor is one factor always controlling.⁹⁴

B. Tests for Successorship: The Stock Transfer

The asset purchase transaction is different from the stock transfer situation. In *TKB Int'l Corp.*⁹⁵ the NLRB discussed these differences. Where there is an asset purchase situation or a taking over of services

⁸⁸ George, *supra* note 20, at 287 n.86.

⁸⁹ *The Developing Labor Law*, *supra* note 84, at 367; H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 256-57; see *Fall River Dyeing*, 482 U.S. at 43.

⁹⁰ This is the continuity of the workforce prong. It is given special status and is often the controlling factor. *The Developing Labor Law*, *supra* note 84, at 369.

⁹¹ *Id.* at 368-369 n.65.

⁹² George, *supra* note 20, at 292-93.

⁹³ *Fall River Dyeing*, 482 U.S. at 43.

⁹⁴ *The Developing Labor Law*, *supra* note 84, at 369 (citing *Premium Foods*, 260 NLRB 708 (1982), *enfd.*, 709 F.2d 623 (9th Cir. 1983)). However, recall that the continuity of the workforce is a separate test that also must be met for a new employer to be labeled a successor.

⁹⁵ 240 NLRB 1082 (1979).

provided to a third party (like in *Burns*), one employing entity is substituted by another employing entity and the old entity either "terminates its existence or otherwise ceases to have any relationship to the ongoing operations of the [new entity]." ⁹⁶ The stock transfer, on the other hand, "involves no break or hiatus between two legal entities, but is, rather, the continuing existence of . . . [the same] legal entity, albeit under new ownership." ⁹⁷

1. General Rule⁹⁸

In general, the purchasing enterprise must honor the collective bargaining agreement. ⁹⁹ Furthermore, the corporation will not be equated with the identity of its shareholders. Therefore, there will be no successorship analysis. ¹⁰⁰ The stock purchaser not only will be bound to bargain with the union, but must also honor the previous collective bargaining agreement.

2. Two Exceptions

Like many rules of law, there are usually exceptions to the general rule. In this case there are two. The first exception occurs when the stock purchaser makes significant structural changes in the enterprise after the stock transfer takes place. ¹⁰¹ Such a change might involve complete reallocation of the use of the enterprise's resources. ¹⁰² When this occurs, successorship-like principles take over. ¹⁰³ As is the case under successorship doctrine, the structural change may be so great that there no longer exists any continuity of the enterprise; therefore, the purchaser is not even a successor. ¹⁰⁴

The second exception occurs when the seller misleads the stock purchaser with regard to the existence of a collective bargaining agreement. In such a case, even though no structural change occurred, the purchaser

⁹⁶ *Id.* at 1083 n. 4.

⁹⁷ *Id.*

⁹⁸ The Supreme Court has yet to adopt a rule for these types of cases. See *EPE, Inc. v. NLRB*, 845 F.2d 483, 489 (4th Cir. 1988). Therefore, any rules stated must be understood with the knowledge that there may be some variance from circuit to circuit.

⁹⁹ *Esmark, Inc. v. NLRB*, 887 F.2d 739, 751 (7th Cir. 1989).

¹⁰⁰ *Id.*

¹⁰¹ *EPE Inc.*, 845 F.2d at 490.

¹⁰² *Id.*

¹⁰³ *Id.* Thus, a stock purchaser may be forced to bargain with the union instead of adopting the previous collective bargaining agreement.

¹⁰⁴ *Id.* (citing *Laurer's Furniture Stores, Inc.*, 246 NLRB 360 (1979)). In this case the stock purchaser will not even be required to bargain with the pre-existing union.

will not be bound to the original collective bargaining agreement.¹⁰⁵

C. New Employer's Obligation to the Pre-existing Collective Bargaining Agreement in the Context of an Asset Purchase

Any new employer will have some concern as to whether it will be obligated under the pre-existing collective bargaining agreement. As explained above, the Supreme Court in *Burns* rejected the idea that a duty to bargain automatically imposes a requirement to adopt the pre-existing collective bargaining agreement.¹⁰⁶ The Court based this rule on § 8(d) of the NLRA¹⁰⁷ and its holding in *H. K. Porter Co. v. NLRB*.¹⁰⁸

There are times, however, when the successor employer does assume the pre-existing agreement. Assumption of the pre-existing agreement can be voluntary or implicit. The NLRB, along with the courts, has articulated a number of factors that should be analyzed in determining whether a successor adopted the pre-existing agreement.¹⁰⁹

The strongest case for countering a suggestion of employment contract adoption occurs where the successor explicitly "disavows any assumption of the predecessor's . . . agreement *and* where its actions are consistent with the disclaimers."¹¹⁰ A number of cases show "that a failure to disavow adherence to the predecessor's contract, or a successor's disclaimer of adoption accompanied or followed by inconsistent conduct, can result in a finding that" the successor assumed the pre-existing agreement.¹¹¹

Another factor that can lead to an inference of voluntary assumption is where the successor adheres to the pre-existing contract terms for a period of time and then changes the terms and conditions of employment.¹¹² Although this behavior by itself is not sufficient to establish voluntary adoption of the contract, such a delay can give an inference of adoption, especially "absent a disclaimer of any intention of honoring the

¹⁰⁵ MPE, Inc., 226 NLRB 519 (1976); *Esmark, Inc.*, 887 F.2d at 751 n.20.

¹⁰⁶ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 335.

¹⁰⁷ 29 U.S.C. § 158(d) (1982). Section 8(d) states that a duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." *Id.*

¹⁰⁸ 397 U.S. 99 (1970). The Court ruled that the NLRB could force parties to bargain but could not require either party to agree to any substantive employment contract provision. *Id.*

¹⁰⁹ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 338. Neither the NLRB nor the courts have been uniform in stating what should be considered in determining whether a successor adopted the pre-existing agreement. However, it is possible to identify a number of recurring factors. *Id.*

¹¹⁰ *Id.* at 338-339 (emphasis in the original).

¹¹¹ *Id.* at 339.

¹¹² *Id.* at 340.

predecessor's" collective bargaining agreement.¹¹³ Furthermore, a successor which continues to abide by a few specific terms of the pre-existing agreement may be found to have voluntarily adopted the entire agreement.¹¹⁴

Additionally, "collateral indications that the predecessor's labor agreement *is* being assumed may be accorded significant weight by the [NLRB] and the courts."¹¹⁵ In other words, the NLRB accords great weight to indirect indications of assumption in determining whether the successor employer adopted the pre-existing agreement. Furthermore, considerable weight will be given to any proven statements made by the successor to the union or representatives of the union indicating that the successor will adopt the pre-existing agreement.¹¹⁶

D. Summary of Labor Law Successorship Doctrine in the United States From a New Employer's Perspective

When one business entity takes over another, the buyer's concerns are substantially more complex than the seller's concerns. This is because the buyer wants to continue to operate the business. It is imperative that the buyer approach the transaction with a "clear and detailed understanding of how it will operate after the sale."¹¹⁷ If the buyer fails to do this, it will not be able to make crucially important decisions during the negotiating process. Furthermore, poor decision-making in the negotiating phase (as well as once the new employer takes over) may limit the buyer's ability to "restructure the business to conform to its needs and desires."¹¹⁸

The Supreme Court cases dealing with this area of law establish some important guiding principles for new employers. First, a new employer found to be a successor normally is not bound to adopt the predecessor's collective bargaining agreement when an asset purchase has occurred.¹¹⁹ Second, a new employer is not obligated to hire its predecessor's employees.¹²⁰ Finally, "[i]f the majority of a new employer's work force is composed of previously represented employees, and the

¹¹³ *Id.*

¹¹⁴ *Id.* Such specific terms may include "union dues deductions or pension or health and welfare contributions." *Id.*

¹¹⁵ *Id.* at 341 (emphasis in the original).

¹¹⁶ *Id.*

¹¹⁷ Fasman & Fischler, *supra* note 34, at 28.

¹¹⁸ *Id.*

¹¹⁹ A successor employer is only bound when it is found that it assumed the prior agreement.

¹²⁰ This is true so long as there is no discrimination for the purpose of avoiding meeting the "continuity of the work force" test.

new employer does not make structural changes that alter the basic nature of the business, the new employer will be" forced to bargain with the pre-existing union.¹²¹

VI. TESTS FOR SUCCESSOR STATUS IN CANADA

A. Sale of a Business

The key questions Canadian labor boards ask to determine successor status are "whether there has been a 'sale' within the extended statutory definition of the term, and whether what has been sold constitutes a 'business' or 'part of a business'."¹²² In order to provide maximum effect to the statutes' remedial intentions, both the provincial and federal labor boards adopt a "broad and liberal interpretation of these" statutory provisions.¹²³ Accordingly, "[i]t is the substance rather than the form of the transaction which is determinative of whether or not the business has been transferred."¹²⁴

Sham transfers conducted for the purpose of evading collective bargaining obligations are likely to fail. In order to negate this practice, labor boards will "lift the corporate veil and look at the parties' relationship and intentions."¹²⁵ Thus, it is irrelevant how the new employer assumes control of the business enterprise's operations. If the employing entity remains intrinsically the same,¹²⁶ there is substantial continuity of the business and, therefore, a successor obligation.¹²⁷

B. Specific Elements in the Test for a Sale, By Jurisdiction

Although the determination of whether a sale of a business occurred is key to deciding successorship issues, the means of determining whether such a sale occurred vary by jurisdiction. Because the provinces of British Columbia, Ontario and Quebec contain the vast majority of the Canadian population, special attention will be given to these provinces. In addition, attention will be given to the federal (or territorial) law.

1. *British Columbia*

In British Columbia, the labor board surveys and weighs a broad

¹²¹ Fasman & Fischler, *supra* note 34, at 24.

¹²² G. ADAMS, *supra* note 10, at 401-402.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ This is a vague concept but seems to imply that qualitative factors that make up a business entity are important. These qualitative factors will be discussed in detail later.

¹²⁷ G. ADAMS, *supra* note 10, at 401-02.

variety of relevant factors in order to determine whether the sale of a business occurred. Such factors include "transfers of goodwill, trademarks, customer lists and accounts receivable; a covenant not to compete; the presence of the same employees and the same work; a hiatus in production; similar clientele; direct contact between vendor and purchaser; and whether the vendor and purchaser have dealt with one another at arm's length."¹²⁸ This is not a complete list and no one factor is controlling. In essence, the Board must determine "whether enough significant components of the business have passed from the predecessor to the successor, and whether there has been some continuity of the work operations normally associated with that business."¹²⁹

Although the British Columbia Board weighs all the factors listed above (and more), it does place "more emphasis on the transfer of assets and employees than on continuity of the work performed"¹³⁰ This is in direct contrast to the Quebec Labor Court and the Canada Labor Board.¹³¹ Nevertheless, whether or not employees transfer with the business is not always an important factor. Each case must be decided upon its own facts and circumstances. If the new business is qualitatively different to such a degree that it would not make sense to preserve the pre-existing collective bargaining relationship, the Board will not find that a sale of a business occurred.¹³²

2. Ontario

The Ontario Labor Board defines a business as the following:

A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a 'going concern,' something which is 'carried on.' A business is an organization about which one has a sense of life, movement, vigor. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a 'business' from an idle collection of assets.¹³³

In determining whether a sale of a business occurred, the Ontario

¹²⁸ *Id.* at 404.

¹²⁹ *Id.* at 404-05.

¹³⁰ *Id.* at 405. However, a transfer of assets alone is not sufficient to establish a sale. An asset transfer must be accompanied by some continuity of the business. Thus, a transfer of assets coupled with a "qualitative transformation" of the business enterprise will not establish a sale and, therefore, no successorship will arise from the transfer. *Id.* at 434-35.

¹³¹ *Id.* at 405.

¹³² *Id.* It must be remembered that the term "sale" as used in this context takes on a special legal meaning. Whenever a "sale" occurs by the general use of the term, the business will be different. However, as used in this context, there are specific factors that are used to determine if a "sale" of a business occurred. *Id.*

¹³³ *Id.* at 408. Other provinces do not articulate such a definition.

Labor Board uses a balancing test similar to that used by the British Columbia Board.¹³⁴ However, the Ontario Board adds another factor to the analysis. In Ontario, a sale of a business must include a transfer of a "functional economic vehicle."¹³⁵ In other words, it is insufficient that similar job functions are performed unless there is also a "transfer from the predecessor of the essential elements of the business as a block' or the 'transfer of a coherent and severable part of the predecessor's economic organization'."¹³⁶ This requirement indicates that the Ontario Board may place greater weight on the "commercial nature of the transaction in the context of the Board's over-all balancing of factors" in determining whether a sale of a business occurred.¹³⁷

The Ontario Board retains a unique power. At its discretion, the Board can refuse to hold a new employer to its collective bargaining obligations even if successorship is found. The Board, however, may only exercise this discretion if a "substantial change in the nature of the business [occurs] within sixty days of the sale."¹³⁸ To determine whether a substantial change occurred, "the Board looks for a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation becomes inadequate, inappropriate, unreasonable, or unconstitutional."¹³⁹ A mere decrease in output, however, is not sufficient to constitute a change in the characteristic of the business so long as the same product is produced with the same skills required of employees.¹⁴⁰

3. *Quebec*

The Quebec Labor Court appears to take a very broad and liberal approach to the concept of a sale of a business. The Court looks to see if "there has been continuity in the framework of operations carried out or functions exercised."¹⁴¹ The Court views these operations and functions as the true constituents of a business. Furthermore, it is "their transfer [that] constitutes an 'alienation of an undertaking' under s. 45 of the Quebec *Labour Code*, regardless of whether there exists a civil contract or legal relationship between the predecessor and successor companies or whether different employees are engaged in performing the same func-

¹³⁴ *Id.* at 405.

¹³⁵ *Id.* at 408.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 435.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 402.

tions.”¹⁴² Thus, in Quebec a new employer can become a successor by merely carrying on the same activities as the predecessor employer.

4. *Canada (Federal)*¹⁴³

The Canada Labor Relations Board extends the “Quebec test” for sale of a business one step further. In addition to requiring a “continuity in the work and activities carried out by the employees, . . . the business sold had to be operated for the same purpose by the purchaser.”¹⁴⁴ In order to give the pertinent labor statute the “dynamic interpretation” required to achieve the intent of the legislature, “the Board applie[s] this test on a case-by-case basis to allow for consideration of the individual and particular characteristics of each separate business.”¹⁴⁵

Recently, however, the Board has required a “greater nexus between the predecessor and successor employers.”¹⁴⁶ In requiring a greater nexus, the Board reasoned that “bargaining rights are not proprietary rights over work functions.”¹⁴⁷ Thus, in the Board’s view, “successor rights were never intended ‘to apply to genuine circumstances of subcontracting, a loss of business to a competitor or where there is a corporate dissolution’.”¹⁴⁸ If this mode of analysis is adopted in general, the Canada Labor Board “approach will come to follow more closely that of [the] Ontario and British Columbia” labor boards.¹⁴⁹ This would indicate a convergence of individual jurisdictional law in this particular area.

5. *Other Jurisdictions*

Other jurisdictions¹⁵⁰ generally favor the balancing mode of analysis used by the Ontario and British Columbia boards.¹⁵¹ Thus, assuming the Canada (federal) Board adopts its new approach, with the exception of Quebec, the balancing mode of analysis appears to be the “all-Canadian” test.¹⁵²

¹⁴² *Id.*

¹⁴³ The Canadian Labor Board has jurisdiction over the Canadian territories as well.

¹⁴⁴ G. ADAMS, *supra* note 10, at 403.

¹⁴⁵ *Id.* at 404.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Saskatchewan.

¹⁵¹ G. ADAMS, *supra* note 10, at 460.

¹⁵² Recall, however, that the emphasized elements can vary by jurisdiction.

C. Miscellaneous Successorship Issues

1. *Partial Sale of a Business*

In all Canadian provinces, it is possible for successor obligations to exist when only part of a business is sold. In order for the sale of a part of a business to occur such that successor obligations attach to the new employer, the portion of the business transferred must be "capable of being defined and identified as a functioning entity that is viable in itself or sufficiently distinguishable to be severable from the whole."¹⁵³ Thus, a mere transfer of a group of assets is insufficient to establish a successor obligation in the purchaser. Furthermore, if the purchaser merely incorporates the ancillary elements of the purchased business "into its own economic organization," then there is no sale of a part of a business.¹⁵⁴

2. *Hiatuses in Operations*

As in the United States, often there is a gap in time between when the predecessor ceases operations and when the new employer takes over. To deal with this situation, Canadian labor tribunals "have adopted the position that they are looking for a continuum in operations rather than in time."¹⁵⁵ The focus is on whether the new employer "acquired an existing business and operating concern—something entirely capable of surviving a temporary shutdown."¹⁵⁶ The key appears to be the purchase of an *existing* business. Thus, questions such as "Did the purchaser buy an already closed [entity]?" and "Did the purchaser shutdown the [entity] to make renovations?" remain important.¹⁵⁷

There is no preset time limit for which a hiatus must last to conclude that there is no continuum of the business. Nevertheless, as a general matter, a "fourteen- to fifteen-month hiatus in production normally provides a strong inference that no sale of a business" has occurred.¹⁵⁸ Furthermore, the length of a hiatus needed to break the successorship obligation will depend upon the type of business involved.¹⁵⁹ Thus, to determine whether a hiatus is of sufficient length will require a case-by-case analysis.

¹⁵³ G. ADAMS, *supra* note 10, at 415.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 412.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 412-13.

¹⁵⁹ *Id.* at 413.

VII. THE SUPERIORITY OF THE UNITED STATES' SYSTEM FROM
THE PERSPECTIVE OF THE MANAGEMENT OF FOREIGN
MNCs

A. A Comparison of Canadian Successorship Doctrine to the
Successorship Doctrine in the United States

1. *In General*

A general comparison of the successorship doctrines of the United States and Canada yields both similarities and differences. Beginning with the similarities, under both doctrines successorship can be found even where there are no contractual dealings between the predecessor and the successor. Furthermore, both Quebec and the United States focus on "job transfer rather than the legal method of disposition."¹⁶⁰ However, where the key factor in the United States is whether a majority of the new employer's workforce is comprised of the predecessor's former employees (for an action brought under § 8(a) of the NLRA) or whether a majority of the predecessor's employees are employed by the new employer (for an action brought under § 301 of the LMRA), this is not the case in any of the Canadian jurisdictions.¹⁶¹

This difference in emphasis springs from the difference in focus between the United States doctrine and the Canadian doctrine. This difference can be established by analyzing the successorship tests used by each jurisdiction. The United States appears to be more concerned with the concept of majority rule than does Canada. If the majority of the employees in the new work unit were organized workers under the predecessor, then it follows that a majority of the new workforce supports a union.¹⁶² The "continuity in the character of the business enterprise" test exists because when major structural changes occur, the inference that the predecessor's employees still favor union membership breaks down. Thus, because a majority may not exist, it would be improper to grant the prior union exclusive representation for workers under the new employer.

Unlike the United States, Canadian jurisdictions focus on the business itself. Most Canadian jurisdictions are more concerned with whether a business entity or part of a business transfers to a new employer as opposed to mere asset transferring. The concept of majority rule appears to be lacking under the various Canadian tests. The provin-

¹⁶⁰ *Id.* at 434.

¹⁶¹ *Id.*

¹⁶² It must be assumed that the predecessor workers favored union membership while working under the predecessor.

cial and federal labor tribunals do not direct their primary attention to the workforce composition of the new employer.

2. By Province

a. British Columbia

The British Columbia test for successorship exhibits some vague similarities to the successorship test used in the United States. This similarity is found in the British Columbia Labor Board's emphasis on the transfer of workers from one entity to another. This emphasis is analogous to the "continuity of the workforce" test used by the NLRB and U.S. courts. However, because the British Columbia test does not focus on specific majorities¹⁶³ like the test used in the United States, the similarity is limited.

b. Ontario

The power retained by the Ontario Labor Board bears a resemblance to the "continuity in the character of the enterprise" test used in the United States. However, the resemblance is only superficial. In the United States, the "continuity in the character of the enterprise" test is used to decide if successorship exists. In Ontario, the "substantial change" test is applied *after* successorship is found. It is used to nullify the effects of successorship status and not to determine if successorship exists. Furthermore, unlike in the United States, in Ontario the test is discretionary.

c. Quebec

The Quebec test for successorship bears no similarity to the test used in the United States. First, there are no specific standards on workforce transfers. Second, although the Quebec test can be loosely analogized to the "continuity in the character of the enterprise" test used in the United States, the Quebec test is so broad that it can mean almost anything. Unlike Quebec, the U.S. test offers specific factors for the NLRB and the courts to follow.

B. Superiority of the U.S. System

1. Predictability

A new employer in Canada does not have to meet the "continuity of

¹⁶³ The term "specific majorities" is defined as the majority of the predecessor's workforce working for the new employer for § 8(a) suits and the majority of the new employer's workforce from the predecessor for § 301 suits.

the workforce" test, nor does it have to meet the continuity of the business enterprise test. The employer merely has to accept a broad abstract notion of the predecessor's business. Thus, it appears that it is much easier to be labeled a successor in Canada. In order to find successorship, the Canadian labor tribunals have broad discretion to emphasize a variety of factors.

Under the law of the United States, the threshold test of workforce composition can create a rebuttable presumption of successorship. In other words, if a majority of the new employer's workforce is composed of the predecessor's employees, successorship will be found unless a significant structural change in the enterprise occurs from the employees' perspective.¹⁶⁴ Although the "continuity in the character of the business" test is somewhat vague because it allows the NLRB to pick and choose which factors to emphasize, the threshold test is exact. A new employer can determine for itself whether it meets the continuity of the workforce test. Thus, the U.S. system offers a major advantage to purchasers. A purchaser is better able to predict whether they will be labeled a successor in the United States rather than in Canada.

2. *Consequences of Successor Status*

Potential purchasers must also concern themselves with the consequences of being labeled a successor. Once again, from the point of view of potential purchasers, the U.S. system proves superior to the Canadian system. Under the Canadian doctrine, once an employer becomes a successor it is obligated to accept the pre-existing collective bargaining agreement.¹⁶⁵ Only in Ontario can a successor avoid the obligations of the agreement by making substantial structural changes in the work place.¹⁶⁶ However, the new employer is still a successor and the Ontario Labor Board has no duty to excuse the new employer from its obligations under the agreement.¹⁶⁷

In the United States, a successor employer is less restricted. Unless the new employer indicates that it will abide by the prior collective bargaining agreement, it is free to bargain for a new agreement.¹⁶⁸ Normally, the successor employer's only obligation is to bargain with the pre-existing union.¹⁶⁹ Thus, successorship consequences in the United States are more flexible than in Canada.

¹⁶⁴ See *supra* notes 66, 89-94 and accompanying text.

¹⁶⁵ See *supra* note 67 and accompanying text.

¹⁶⁶ See *supra* notes 138-140 and accompanying text.

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* notes 106-108 and accompanying text.

¹⁶⁹ *Id.*

3. *Flexibility*

Finally, the U.S. system offers much more flexibility. Because successor enterprises in the United States are not bound to the agreement, they are free to restructure the purchased entity, free to hire a new workforce, and free "from contractual restrictions that may have played a large part in the conditions leading to the sale of the business in question."¹⁷⁰

On the other hand, under some circumstances, a successor employer might like to adopt the pre-existing collective agreement. A no-strike clause or "union concessions made in an attempt to save a previously unprofitable enterprise" might make the existing collective agreement attractive to the new employer.¹⁷¹ This would be especially true where the successor has no desire to make any major structural changes.¹⁷² In the United States, a successor is free to decide for itself whether to abide by the pre-existing collective bargaining agreement or not. In Canada, no such freedom exists.

VIII. A HYPOTHETICAL ILLUSTRATION

The following hypothetical provides an examination of how the successorship labor law doctrines of the United States and Canada work in application. For the purposes of this hypothetical, first assume the London-based multinational corporation, Eurocom Ltd., decides that it wants to access the North American market. Furthermore, it wishes to accomplish this by producing its products for North American distribution in North America. Also, assume that the Eurocom board of directors has determined that the best means of achieving this objective is by taking over the production facilities (through an asset purchase) of a pre-existing company based in either the United States or Ontario, Canada. In addition, assume that the plants in both the United States and Canada each employ two hundred unionized workers. However, Eurocom plans to introduce significant automation and thereby operate the plant with only seventy-five employees, fifty of which were brought over from London or hired from companies other than the predecessor. Finally, assume that extensive studies have determined that the only significant difference between taking over a plant in the United States versus a plant in Canada is Eurocom's potential obligations to these pre-existing collective bargaining agreements and the pre-existing unions. Thus, Eurocom's

¹⁷⁰ Fasman & Fischler, *supra* note 34, at 29.

¹⁷¹ *Id.*

¹⁷² *Id.*

decision on where to locate will likely turn on its obligations to these pre-existing collective bargaining agreements and the pre-existing unions.

If Eurocom purchased a plant in the United States, it would not be labeled a successor employer. Therefore, it would have no obligation to honor the terms of the pre-existing collective bargaining agreement.¹⁷³ Furthermore, it would not even be obligated to bargain with the pre-existing union. Recall that in the United States, even a successor employer is not ordinarily obligated under the pre-existing collective bargaining agreement.¹⁷⁴

More specifically, there is no obligation to bargain with the union under § 8(a) of the NLRA or to arbitrate under § 301 of the LMRA because neither the "continuity in the workforce" tests nor the "continuity in the character of the enterprise" test is met. Starting with the workforce continuity tests, the test under § 8(a) would require more than fifty-percent (one-half) of the Eurocom workforce¹⁷⁵ to have worked for the predecessor.¹⁷⁶ Since at least fifty of the seventy-five employees (two-thirds) will not have worked for the predecessor company, this test is not met. The § 301 test would require that more than fifty-percent of the predecessor's employees work for Eurocom.¹⁷⁷ Because the predecessor employed two-hundred people and at most only twenty-five of those people (one-eighth) will be working for Eurocom, this test also is not met.

Even if Eurocom's hiring scheme called for the proportions required to satisfy the workforce continuity tests, the "continuity in the character of the enterprise" test would not likely be satisfied. One of the factors used in determining if this test is met is whether there is a change in the production process.¹⁷⁸ A very good argument can be made that the addition of automation to the production process sufficient to cut the number of jobs by more than sixty-percent constitutes a break in continuity.¹⁷⁹ Thus, because Eurocom is free from any obligations under the pre-existing employment setting, Eurocom can make the necessary production and labor force changes¹⁸⁰ which will enable it to make a successful entry into the North American market.

¹⁷³ This assumes that Eurocom gave no indication that it would continue to abide by the agreement.

¹⁷⁴ See *supra* notes 106-116 and accompanying text.

¹⁷⁵ The fifty-percent requirement refers to the workforce in place at the North American facility only, not the entire Eurocom workforce.

¹⁷⁶ See *supra* notes 68-69 and accompanying text.

¹⁷⁷ See *supra* notes 70-75 and accompanying text.

¹⁷⁸ See *supra* notes 89-94 and accompanying text.

¹⁷⁹ This argument should prevail. However, no argument is guaranteed to succeed.

¹⁸⁰ That is, Eurocom can more effectively implement its automation processes.

If Eurocom purchased a plant in Ontario, Canada, however, it is more likely that it will be labeled a successor. The test for successorship in all Canadian jurisdictions is whether a "sale" of a business has occurred.¹⁸¹ In Ontario, that question is answered by focusing on whether an "economic vehicle" has been transferred.¹⁸² This notion, combined with the Ontario Labor Board's definition of the term "business,"¹⁸³ makes it very likely that Eurocom would be labeled a successor.¹⁸⁴ Eurocom is purchasing a complete production facility, something that can be classified as a " 'going concern' . . . which is 'carried on'." ¹⁸⁵ If Eurocom is labeled a successor, and there is an existing collective bargaining agreement at the time of the transfer, Eurocom will be bound to that agreement unless the Labor Board exercises its *discretionary* power to nullify the agreement.¹⁸⁶ Thus, Eurocom may be hampered in making necessary adjustments to the production process and its labor force. Therefore, Eurocom should choose to purchase the plant located in the United States.

IX. CONCLUSION

This comment sought to explore and analyze the differences between labor law successorship doctrine in the United States and the various Canadian jurisdictions. In doing so, this comment took the perspective of a foreign MNC seeking access to the North American continent by taking over a pre-existing entity. Knowledge of potential liability under pre-existing collective bargaining agreements and to pre-existing unions is an important factor in deciding where to take over another business entity.

This comment concluded that a foreign multinational corporation seeking access to the North American market by taking over a pre-existing business is better off choosing a site in the United States rather than Canada. The United States offers more flexibility to foreign MNCs regarding production and labor force changes. Being labeled a successor in Canada saddles the purchaser with a collective bargaining agreement

¹⁸¹ See *supra* notes 122-127 and accompanying text.

¹⁸² See *supra* note 135 and accompanying text.

¹⁸³ See *supra* note 133 and accompanying text.

¹⁸⁴ It is possible that the Labor Board will find that the workforce and production changes will be significant enough not to label Eurocom a successor. However, given the Board's discretionary power to nullify an employment agreement when structural changes occur, this is the more likely outcome.

¹⁸⁵ See *supra* note 135 and accompanying text.

¹⁸⁶ See *supra* notes 138-140 and accompanying text. If there was no agreement at the time of the transfer, Eurocom would still be obligated to bargain with the union. *Id.*

already in existence. Thus, production and labor force changes will be far more restricted.

The successorship issue is becoming one of increasing importance. Because we are in an era of "heightened global competition" and of an increasing number of mergers and acquisitions, successorship issues will become even more common in the future.¹⁸⁷ Therefore, a better understanding of successorship issues by all parties will greatly facilitate these types of transactions and minimize monetary and time expenditures on legal confrontations over such issues.¹⁸⁸

¹⁸⁷ H. NORTHRUP, P. MISCRIMARRA, & R. TURNER, *supra* note 26, at 352.

¹⁸⁸ *Id.*