> independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before ...

58. If many of the elements that made up the predecessor's business organization can be found in the hands of the successor, and are used for the same business purposes, there is an inference that there has been a transfer of a business to which section 64 applies. The more the transferee's ability to carry on his business is derived from or dependent upon things acquired from the proprietor of the predecessor business, the stronger the inference will be - particularly if the predecessor has ceased to carry on its business or has withdrawn from the relevant market. Continuity of the economic mechanism or vehicle points towards a "successorship" within the meaning of the Act - which is to say the application of a provision that results in a continuation of the institutionalized collective bargaining relationship. The issue before the Board, of course, remains whether there has been a transfer of a "business" or "part" of a business within the meaning of section 64; but it is much easier to make that finding, with the result that the collective bargaining relationship will be continued, if there is a substantial continuity of the other elements of the predecessor's business organization.

59. As might be expected in a labour relations statute, the Board pays particular attention to the "character" of the business (a matter referred to in section 64(5)) and the characteristics of the employer/employee relationship, because, from a labour relations point of view, the importance of the business is that it generates work opportunities for employees. The activities of the business require it to enter the labour market as an employer, and this, in turn, can give rise to the employment or collective bargaining relationships with which the Act is concerned, and which section 64 is designed to preserve. Accordingly, in determining whether there has been a "sale" within the meaning of the Act, the Board attaches particular significance to the nature of the work performed in, and by, the business, before and after the alleged transfer. If the nature of the work performed subsequent to the transfer is substantially similar to the work performed prior to that transaction (and if the employees, or types of employees, are the same) this would normally support an inference that there has been a transfer of a business or part of a business within the meaning of section 64. This approach with its focus on jobs is one that seems to have been taken by the B.C. Court in *R v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.* (1969) 3 D.L.R. (3d) 41. At page 52, Dryer, J. commented:

> The importance of the 'business' in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors, such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.

60. Unless there is a continuation of work and jobs, it would make little sense to preserve the collective bargaining relationship or collective agreement. Conversely, if the work, jobs, or employees are the same or substantially similar, it is easier to conclude that the transaction is one to which section 64 was intended to imply - and that is especially so if the work is being performed in the same context, at the same location, with the same equipment, or in respect of the same clientele.

61. However, a successorship finding does not depend upon a continuation of the very employees who worked in the predecessor's business before, any more than bargaining rights or the continuing operation of the business depend upon maintaining the employment of particular individuals. Employee turnover does not erase bargaining rights, just as the departure of employees does not automatically mean that bargaining rights travel with them - even though the employ-

ees are "part" of the business. Moreover, to emphasize the transfer of identifiable workers would invite the new owner not to continue their employment, lest their previous union affiliation influence the Board's successorship conclusion. (This is not a hypothetical problem - see the comments of the panel in *Gordon's Markets*, [1978] OLRB Rep. July 630 at paragraph 24; and note the unusual (and illegal) scheme by which the employer in *Metropolitan Parking* sought to avoid hiring former union members who had worked for the predecessor before.)

62. None of the parties referred us to any previous Board cases involving a hotel, but most of the tavern cases which were referred to in argument were analyzed by the Board on what we have described as the "operational" approach to section 64. For example, in *Katrina's Tavern*, [1978] OLRB Rep. Sept. 838, the predecessor's establishment was described by the Board as a bleak and rather shabby undertaking, with loud music, mediocre food, and a rough clientele, which eventually closed because of its financial difficulties. It was sold to a new owner who sought to renovate the premises to establish an elite, gay club. The goodwill of the former bar was of no value (or even negative value); nevertheless, the Board concluded:

> 18. The Board has in the past determined that the absence of goodwill in a transaction is not of itself determinative in deciding whether there has been the sale of a business within section 55 of the Act. (See, for example, *Winiker Industrial Auctioneers Ltd.* [1978] OLRB Rep. Jan. 15 and *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691.) The Board is interested in whether there has been a continuation of the business. Here there was a transfer of the liquor licence, a leasehold interest, various tangible assets, and interests in contracts virtually all of which could and would be used to carry on the business of the sale of food and drink. Therefore, it would seem that there was a continuation of the business in which The Forge was engaged and, unless section 55(5) operates, a sale of a business within the meaning of section 55. The fact that the business was closed for approximately eight months does not affect the conclusion in this case. The Employer here was closed to affect repairs and renovations and was prepared to open whenever these were completed. There was still a transfer of assets and most importantly, after this transfer the same sort of business continued to operate from the premises.

63. Similarly, in *Krush*, [1987] OLRB Rep. June 859, the successor acquired a tavern formerly known as "The Benny" which was renovated and reopened four months later as the Krush. The Board concluded that the essential elements of the business - the premises and liquor licences - had been acquired and were being continued by the new owner, so that there was a successorship under section 64 of the Act - even though the new owner proposed to change the ambience and clientele, and had bought what was admittedly a deteriorating business. The Board noted that types of entertainment, themes, and patrons come and go, with or without a change of ownership; however, the essential elements of the drinking establishment remained and had, in this case, been acquired and continued in the hands of the successor. The Board was not persuaded that there had been any change in the nature of the work or "character" of the business within the meaning of, section 64(5) of the *Labour Relations Act*. (See also *Vivace Tavern Inc.*, [1982] OLRB Rep. Aug. 1224, *Blondie's Entertainment Limited*, [unreported] Board File 2073-83-R, *Cabbagetown Inn Limited*, [unreported] Board File 2780-80-R, *The Last Resort Hotel Inc.*, [1984] OLRB Rep. Dec. 1700, *Jimmyz II*, [1977] OLRB Rep. Sept. 572, and *Horseshoe Tavern*, [1981] OLRB Rep. Sept. 1237. For a recent British Columbia decision to the same effect, see: *Three B's Enterprises* 90 CLLC ¶16,022), and ¶16,050.)

64. Most of the cases under section 64 involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words "part of a business". Yet those words pose much more difficulty than the term "business" itself. Almost anything actually traceable to the predecessor could be considered "part" of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept that view, would make section 64 the vehicle for extending rather than preserving bargaining rights. That is

why the Board has not accepted a literal or dictionary definition of the words "part of a business" and has been much less inclined to find a successorship where the transferee already has its own existing undertaking or capacity.

65. The content of the term "part" of a "business" must be considered in the particular factual context; however, a few cases may illustrate the way in which the Board has interpreted those terms. The Board has found a transfer of "part of a business" where one of a chain of retail stores has been sold to a competitor (*Loblaws Groceterias*, [1973] OLRB Rep. Jan. 72, *More Groceterias Limited*, *supra*); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244); where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Limited*, [1972] OLRB Rep. May 515); where a slaughterhouse which was formerly part of a much larger integrated meat-packing company was transferred to a new owner (*Beef Terminal*, [1980] OLRB Rep. Aug. 1167); where the shock-absorber portion of a much larger business was transferred to a firm which leased the machinery equipment, tools and a portion of the premises used by the predecessor (*Canack Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where a firm acquired the premises and some of the equipment used by the predecessor to produce two products which had accounted for only a small portion of the predecessor's total production (*Alcan Building Products Limited*, [1968] OLRB Rep. May 212); and where a firm took over some of the functions of a larger enterprise using some of the equipment, employees or a portion of the premises formerly used by the larger business to serve at least some of the same customers (*Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, involving respectively a meat purveyor and a clothing manufacturer). (c.f.: *Central Native Fisherman's Co-operative et al*, [1977] 1 Can. LRBR 329, the British Columbia Relations Board found that there had been a transfer of a "part of a business" when a cannery which was formerly part of a much larger business organization was sold to a fisherman's co-operative.)

66. In each of these cases, the Labour Relations Board found that the predecessor had transferred a coherent and severable "part" of its economic organization - managerial, or employee skills, plant, equipment, know-how, or goodwill - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This "new" economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them were preserved. The "part" of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage.

67. In all of these cases, there was a transfer of a distinct part of the predecessor's configuration of assets or capacity to carry on business, and no material change in the character of the work performed by the employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, and the skills of the employees; and, but for section 64, the established bargaining and collective bargaining rights would have been lost. This was the mischief to which section 64 is directed, and the Board was satisfied on the evidence in each of these cases that it should be applied.

68. All of the cases to which we have referred recognize that there are no easily administered, mechanical tests which permit the Board to distinguish between a "mere sale of assets" and a sale of "part of a business". As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec. 1193 at paragraph 34:

> This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or 'a part of a business' and the transfer of 'incidental' assets

> or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.

69. The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Indeed, much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; and, quite frankly, the results in some of the cases are difficult to reconcile -reflecting, among other things: the quality of the evidence before the Board in particular cases (especially before and after the passage of what is now section 64(13)); the quality of the argument; and the evolution of the Board's jurisprudence as various panels, over the years, have assessed in new factual settings, the "mischief" to which section 64 was directed.

70. But to dismiss the difficulty so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of a business" finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities, and in each of these sectors the nature of the business organization is little different. Yet in each case section 64 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish. To cite but one unusual example: in *Riverview Manor*, [1983] OLRB Rep. Sept. 1564 (application for judicial review dismissed February 5, 1985), the Board found that a licence to run a nursing home business was a critical part of that business, to which bargaining rights could attach, even though the purchaser of the licence later invested a substantial sum to build its own nursing home across town. In that highly-regulated business, the licence was viewed by the Board in that case as the key asset - as evidenced by the substantial sum that had been paid for it.

71. Finally, it is important to recognize that not only do the cases arise in a variety of different contexts so that direct comparisons are difficult, but the law itself has not been static. Although the Board strives for consistency, the statute has been amended on several occasions, and with increasing experience, the Board has developed a more coherent theory of successorship. Indeed, from time to time, the Board revises its approach in accordance with its accumulating experience. (See, for example: *St. Leonard's Society*, [1993] OLRB Rep. Jan. 56, *Parnell Foods Limited*, [1992] OLRB Rep. Dec. 1164 and *Mil-Dom-Ex Packaging*, [1992] OLRB Rep. Dec. 1155). As with the common law, the utility of a particular approach to interpreting the *Labour Relations Act*, or the significance of a particular "test", only emerges with experience, and an evaluation of alternatives which may not be considered until a concrete case presents them.

72. In cases which arose when the economy was buoyant, or transactions involved a whole, ongoing business, the Board once tended to focus on the dynamic quality of a business or its operation as a "going concern". If that dynamic quality was lacking, the Board was inclined to hold that there had been no transfer of a business but merely a disposition of assets. In more recent years

and more troubled economic times, the absence of this dynamic quality has been accorded less significance.

73. Quite apart from questions of successorship, it has become much more common in recent years for businesses (or parts of them) to shut down for periods of time and lay off employees, then reopen again when the market improves - without anyone suggesting that the union's bargaining rights or the employees' recall rights, for that matter, have disappeared. In this era of corporate "restructuring", it has also become much more common for businesses to discontinue or hive off portions of their operation or undertaking, which then become the nucleus or even the entire undertaking of the "new" business organization. If instead of reopening on its own, or reviving this commercially-moribund portion of the operation, it was transferred to someone else - as increasingly happened through receivers - it was much less clear than it once might have been, that bargaining rights should disappear merely because that portion of the idle undertaking was now owned by someone else - especially since the purpose of section 64 is to eliminate the significance of the fact that a new legal entity owns the "things" that have been transferred. Clearly there is a potential tension between commercial law considerations, a layman's view of the "business", and the objectives reflected in the *Labour Relations Act*, but it has become much less evident in recent years that this tension should be resolved by the Board "reading into" the statute the words "as a going concern", after the word "business" in section 64(2). The concept of a "going concern" and the words "as a going concern" are not unknown in law, but in drafting section 64, the Legislature has not injected that phrase and it is not intuitively obvious that the Board should be doing so as a matter of interpretation. This is not to say that the absence of ongoing activity is irrelevant; merely that it may not be determinative.

74. If a new investor bought the controlling shares in a dormant company with idle assets and brought them to life with an injection of capital, there is little doubt that the union's bargaining rights would continue in respect of that company now that it had become active. A union would not need to invoke section 64 because, although there had to be a "sale of a business" in common parlance and commercial law terms, the legal entity with which it has bargaining rights - the "owner" of the assets - would be unchanged. Bargaining and collective agreement rights would continue. Should the result be different from a collective bargaining point of view, if the same investor used the same funds to purchase the assets themselves rather than controlling shares in the corporate envelope, but, as before, revived the business as a going concern under new ownership?

75. With the experience of two recent recessions and a considerable amount of corporate restructuring, the Board is less inclined than it once might have been, to give overriding significance to the absence of ongoing business activity at or before the point of alleged "sale". A business shut-down or closure remains significant, but it is not always determinative. As the Board noted recently in *New Dominion Stores*, [1989] OLRB Rep. May 473:

> Similarly, hiatus between closure and opening [of a business] is not determinative, but only one factor. The fact that the hiatus between the closure of Dominion Store #986 and the opening of the A & P Store was quite long, twenty-two months, does not itself mean that the business of the former has not been transferred to the successor. There is no temporal bright line beyond which bargaining rights will not transfer. If all the circumstances yield a conclusion that a business, or part thereof, has been transferred, then the appropriate declaration will issue, whether the interval be twelve months or twenty-two months".

Thus, in *Hughes Boat Works Inc.*, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed: (1979) 26 O.R. (2d) 420 (Div. Ct.)), the predecessor "North Star" encountered economic difficulties, ceased operations ("went out of business" in layman's terms) and closed its plant which was transferred after several months by a receiver to "Hughes" which began to build boats again. Hughes claimed that the predecessor's business had failed - as demonstrated by the plant closure -

and that it had merely purchased the asset shell. But the Board found that Hughes was a successor employer within the meaning of section 55 [now 64] of the Act.

76. Finally, for the purpose of completeness, we should note that just as we have no details of the financial problems which the Triumph experienced, neither were we told about the particular legal proceedings in which it was engaged prior to its commercial demise (but which would appear to involve a court-appointed receiver and/or a receiver in bankruptcy). No one argued that the federal or provincial bankruptcy/insolvency law governed the way in which the Board could or should interpret section 64 of the *Labour Relations Act*, and the relief sought before us, does not involve any claim against Accomodex/Kelloryn in respect of the period that the hotel was operated by its previous owners.

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77. The evidence in the present case indicates that Kelloryn/Accomodex has acquired ownership and control, *en bloc*, of virtually all (or at least a very substantial portion) of the tangible assets of the Triumph, formerly used by the previous owners in their hotel business at Keele and Highway 401. Those assets are now being used by the new owner, in much the same way as before, to supply the same general services, to much the same general market, and at least some of the same customers. We do not know the value of this asset configuration in relation to the renovation and refurbishing program which is now underweight in the "Howard Johnson" Hotel, but we do know that without what the respondents acquired from the Triumph, they could not engage in the economic activity from which they derive most of their revenue: the rental of rooms and the provision of subsidiary services. It is perhaps trite to say so, but without a hotel (with its restaurants, parking lot, ballrooms, meeting rooms, swimming pool and so on), one could not be in the "hotel business" at all, or at that location; and as Mr. Phillips stressed in his evidence, location is a critical element of that kind of business.

78. The respondents did not assemble these elements themselves or put the package together - they bought them largely intact. This was no acquisition of incidental or surplus assets. Accomodex/Kelloryn acquired the asset core of the Triumph. And while the Triumph Hotel was closed for some time, the "new" hotel was opened within three months of its purchase by Kelloryn, which then entered into the operating and Howard Johnson's franchise arrangements with Accomodex. No doubt Kelloryn hopes that these connections will enhance its profitability and efficiency, but it could still be in the hotel business without them. If Kelloryn decided to operate the hotel itself, hiring more outside managers (like the general manager), or if it were "de-franchised" (like the Delta Hotel that Mr. Phillips mentioned), the core of the hotel business - the hotel, its location, and the consequent relationship with its local market - would remain. That unionized core would continue to be unionized - whether that union was Local 75 or the UFCW; and, it is interesting to note, that the UFCW saw nothing incongruous about signing its collective agreement with the *asset owner* before its "business" actually opened "for business".

79. It is also clear that substantially the same jobs are being performed in substantially the same place in respect of substantially the same services for a similar market. There has been no qualitative transformation of the business or the work or the kinds or classifications of employees working in the hotel. There has been no change in the "character" of the business, and the actual job classifications in the UFCW agreement are virtually identical to those in the Local 75 agreement. There would be no operating incompatibility if the Local 75 agreement were applied to the hotel operation until September 30, 1993 when its terms may be re-negotiated (and, incidentally, the workers then employed will have an opportunity to oust Local 75 and choose another union to represent them if that is their wish). There is no anomaly in applying a "hotel collective agree-

ment" to a hotel. The employees themselves are not the same; but that is so, at least in part, because Kelloryn/Accomodex made no specific effort to recruit the former employees or approach Local 75.

80. It is true that certain elements mentioned by the Board in *Culverhouse*, *supra*, were not transferred, but these are either of little significance in the hotel business, or are irrelevant on the facts of this case. There is no "inventory" or "stock-in-trade" or "machinery" of the kind that a manufacturing concern might have, and, on the evidence, we are not persuaded that what was owned by the Triumph but not acquired was very significant to the new owner's ability to operate - at least in comparison with what was acquired. Of course, the new owners had to arrange their own financing to purchase this essential "part" of the Triumph organization, and, having done so, undertook some new initiatives, and hoped to acquire customers not previously served by the Triumph. This is not insignificant, but section 64 is triggered by a change of ownership, and it would be a most unusual "sale of a business" transaction, in which the new owner did not put his own imprint on the organization by undertaking new business initiatives, or introducing at least some new directions in management. More important, in the present case, is the fact that there has been no significant change in the "character" of the business from the way in which it operated as the Triumph.

81. We have not ignored the fact that the new owners of the hotel may not have considered themselves to be "purchasing" the Triumph's "business" when they bought the bulk of its assets and continued to carry on the same kind of business from the same location. No doubt from a commercial or layman's perspective, the Triumph's "business" was "dead" as of the date it closed in July 1991. However, we do not think that hiatus is conclusive where, as here, the asset configuration has remained substantially intact and continues (albeit with renovations) at the core of the "new" business organization. Our decision has the effect of affixing bargaining rights to an asset configuration, but in all the circumstances, we do not think that this is inappropriate when this "part" of the predecessor's organization is so integral or essential to its operating capacity.

82. For the foregoing reasons, we concluded that the transaction by which Kelloryn/Accomodex acquired the land, premises, trade fixtures, etc. formerly used by the Triumph, was a "sale" of a "business" for the purposes of section 64 of the *Labour Relations Act*. It follows that Local 75 continues to have bargaining rights for the employees working in the hotel, and the Local 75 collective agreement determines what their terms and conditions of employment will be.

83. In accordance with the agreement of the parties, that was the only issue which we were asked to determine, so we make no finding on the precise legal identity of the "successor employer", nor do we need to address any other portion of section 64.