Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1298-20-R**

Canadian Airport Workers Union, Applicant v **Goodwill Industries, Ontario Great Lakes**, Responding Party

BEFORE: Derek L. Rogers, Vice-Chair

APPEARANCES: Raymond Seelen and Artan Milaj appearing for the applicant; Christopher A. Sinal, Jennifer J. Herpers, and Michelle Quintyn appearing for the responding party

DECISION OF THE BOARD: March 4, 2022

1. This is an application pursuant to section 69 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in which the applicant trade union, the Canadian Airport Workers Union ("the applicant" or "the Union"), asserts that Goodwill Industries, Ontario Great Lakes ("the responding party" or "OGL") is a successor employer to Goodwill Industries of Toronto, Eastern, Central and Northern Ontario ("TECNO") and bound to its collective agreement.

2. In the application, the Union alleged that "Goodwill TECNO has sold or transferred all or part of its business to the Responding Party and/or there has been an amalgamation of the Responding Party with Goodwill TECNO".

3. OGL contended that no sale of business within the meaning of section 69 of the Act took place between it and the "now defunct" TECNO and that the applicant's seeking to apply section 69 amounts to an attempt to expand its bargaining rights. The remedies requested in the application were described differently in that the Union sought a finding that OGL "is bound to the Collective Agreement between the Applicant and Goodwill TECNO with respect to its operations in any of the areas where Goodwill TECNO once operated" and a declaration that OGL is required to bargain with the applicant for the purpose of negotiating a

new collective agreement. That is to say, the application did not suggest that the Union sought to extend its bargaining rights beyond the area for which it had been recognized by TECNO.

4. The parties submitted a joint book of documents and agreed about many of the material facts. The responding party's Chief Executive Officer, Ms. Michelle Quintyn, was the only person called to testify.

5. The parties concluded their cases with written submissions delivered in December 2021 and in January 2022.

Background

6. The applicant was certified to represent the employees of Goodwill Industries of Toronto[1] in December 2012. Those parties entered into a collective agreement for a term that ran from March 2013 to March 2016. While TECNO anticipated bargaining with the Union, no renewal agreement was concluded after TECNO's disaffiliation as a Goodwill operation on February 3, 2016 and its filing an assignment in bankruptcy on February 8, 2016.

7. The disaffiliation resulted in TENCO's Goodwill territory becoming unassigned and available.

8. The recognition clause in the collective agreement was quoted as follows by the responding party:

> 2.01 Goodwill recognizes the Union as the sole and exclusive bargaining agent for all employees of Goodwill Industries of Toronto, Eastern, Central & Northern Ontario including REACH employees, save and except assistant store managers and those above the rank of assistant stores managers, team leads and those above the rank of team leads, office, clerical, security and professional staff, supported employees on the roles of the Ministry of Community and Social Services, persons employed in the Creative Services Division and students employed during the school vacation period.

[1] The parties did not explain the migration from "Goodwill Industries of Toronto" to "Goodwill Industries of Toronto, Eastern, Central and Northern Ontario" or whether the change as solely in the name and not in the Union's jurisdiction.

9. The applicant indicated in its pleading that TECNO's operations had included sixteen stores and ten donation centres in Toronto, Mississauga, Brampton, Newmarket, Barrie, Orillia and Brockville.

10. TECNO was, and OGL continues to be, one of more than one hundred fifty entities (sometimes "Goodwills" or "a Goodwill" if a single entity) in Canada and the United States that, together with member agencies in other countries, comprise Goodwill Industries International ("GII"), described by the responding party as a network of "autonomous community-based non-profit charities . . . striving toward achieving a mission . . . most often centred on serving people who face disability or who are marginalized and shut out of full participation in society".

11. OGL described itself as having online services and forty-two locations through which it "provides work opportunities, skills development, and employee and family strengthening." More particularly, OGL added:

> Its mission services and operations are multi-faceted and include: life stabilization, soft and technical skills training; career advancement services; donation centres; community (thrift) stores; boutique stores; bookstores; café and banquet services; manufacturing wheel chairs; de-manufacturing computer parts; assembling and packaging medical supplies; apparel manufacturing; and recycling. Social enterprises, such as thrift stores, offer opportunities for people shut out of work to gain skills, experience, work readiness, and the dignity and purpose that comes with work.

12. The applicant characterized the responding party more prosaically as "a not-for-profit business which collects, repairs and sells used goods and clothing". The Union did allow that OGL "also engages in certain charitable activities". Both descriptions were borne out on the evidence.

13. The applicant expanded on its description in its submissions:

> Goodwills . . . view themselves as movement oriented. The central philosophy underlying the movement is the provision of work to those who face barriers in entering the workforce, such as persons with disabilities or recent immigrants. Goodwills believe that by providing these persons with work in Goodwill facilities and by providing job training or other services, they are giving their employees the skills that they need to enter the workforce elsewhere. This development

> is both funded by and facilitated through the Goodwills' commercial operations. These commercial operations consist of the collection, repair and resale of used goods. Resale typically occurs in thrift stores, but some Goodwills (including the Responding Party) also sell goods online. Some Goodwills engage in other activities in addition to their thrift stores, such as the operation of cafes or of catering services.

14. For the purposes of this matter, it is sufficient to accept that GII provides services to member agencies such as TECNO and OGL, authorizes members to operate under the Goodwill brand, regulates the use of Goodwill's names, trademarks, and logos, including the name "Goodwill" and what is referred to as the "smiling G" logo, enforces prescribed membership standards, sets quality standards for goods and services offered by members, polices accreditation, affiliation and disaffiliation, and determines applications for membership, including applications of subsisting member agencies to acquire an unassigned territory such as that created by the disaffiliation of TENCO.

15. GII was not a party to this application.

16. While it subsequently disputed the applicant's characterization of GII's grant of territorial authority to a Goodwill as a licence, OGL did state in its submissions that GII grants members "a license . . . to operate under the Goodwill brand" including "the right to use the Goodwill names, trademarks, service marks and logos".

17. Goodwills pay dues to GII in accordance with their revenues.

18. Each Goodwill is allocated a specific geographic territory within which it will have the exclusive rights to the services associated with the Goodwill name and undertaking, and to carry on business as a Goodwill. Each member agency is at liberty to select the services it will offer in its assigned territory.

19. Goodwills do not compete with each other. As noted by the applicant in its closing submissions, GII's territory policy "protects Goodwills on multiple fronts, including competition for customers, financial donors, grants, donated goods and real estate." Rather than compete, the Goodwills are expected to and do engage in the sharing of advice and expertise in order to facilitate the advancement of the "movement's" objectives. In that vein, Ms. Quintyn, as an experienced CEO for OGL, mentored TECNO's CEO for several years following her

appointment and through to TECNO's eventual disaffiliation and bankruptcy.

20. The GII Territory Policy includes the following provision:

> Each Member is assigned a territory by the GII Board of Directors with precise boundaries upon its recognition as an Organizational Member. The territory given to a Member shall be an asset of that Member and not subject to violation by another Member (or the other Member's affiliates, subsidiaries, or other related organizations) or GII. Any Member that accepts an assignment of territory acknowledges that at such time as a local Goodwill ceases to be a member of GII, whether through resignation or termination of membership, that member's geographic territory (but not its real or personal property) will revert to unassigned status until the Board of GII reassigns that territory.

21. OGL has been in place for more than seventy-five years, and recently expanded its historically settled territory in two steps: first, its successful application in 2016 to be granted what had been TECNO's territory[2] and, secondly, its acquisition, by merger, of the locations of another Goodwill agency, Goodwill Industries Essex Kent Lambton Inc. ("EKL"), in 2019.

22. In its 2016 application to GII, the responding party described the TECNO territory as follows: "The TECNO Goodwill is the 4th largest territory in the Goodwill International movement with 9.6 million people equivalent to 30% of the Goodwill market share in Canada."

23. TECNO's territory comprised much of Central, Eastern and Northern Ontario to Thunder Bay and beyond; however, its operations had consisted principally of community thrift stores and donation centres in Toronto, Ottawa, Brockville, Kingston, Brampton, Richmond Hill, Newmarket, York, Peel, Barrie, and Orillia. TECNO employed approximately six hundred workers immediately prior to its shutdown.

24. The responding party's territory, before the expansions in 2016 and 2019, included the counties of Middlesex, Elgin, Norfolk, Oxford, Perth, Waterloo, Wellington, Huron, Bruce and Grey. OGL has

[2] The applicant referred throughout its submissions and reply to this as the "TECNO Territory" while the responding party favoured identifying it as the "Unassigned Territory". I have most often referred to the "TECNO territory" solely as a matter of convenience.

approximately nine hundred employees. In addition to other endeavours, OGL now manages donation centres, thrift stores, and boutiques for used personal, household and other goods in forty-two locations in London, Strathroy, St. Thomas, Tillsonburg, Ingersoll, Woodstock, Wallaceburg, Chatham, Windsor, Essex, Kingsville, Goderich, Stratford, Cambridge, Kitchener-Waterloo, Guelph, Mississauga, Toronto, and Newmarket.

The Demise of TECNO

25. Late in the day on January 15, 2016 the board of directors of TECNO approved resolutions authorizing its CEO, Ms. Keiko Nakamura, to layoff all employees effective at the end of the following day, to terminate operations and close all stores effective at the same time, and to file appropriate documents in connection with the termination of all employees. The members of the TECNO board resigned *en masse* that evening.

26. Consistent with those resolutions, TECNO employees, including the applicant's members, attending work on January 17, 2016 found locked doors and posted signs indicating that TECNO had ceased all operations effective immediately.

27. Ms. Quintyn had been mentoring Ms. Nakamura, in accordance with a formal GII mentorship programme. Nevertheless, and while she was aware of difficulties that confronted TECNO and Ms. Nakamura, Ms. Quintyn testified that the demise of the neighbouring Goodwill shocked her. She and OGL's chief financial officer attempted to assist in restoring TECNO's operations; however, GII's board of directors voted on February 3, 2016 to disaffiliate TECNO with immediate effect.

28. The disaffiliation required TECNO to cease representing itself as a Goodwill, to cease using the Goodwill trademarks and logos, and to destroy all signs identifying it as a Goodwill entity. That ended TECNO's right to carry on as a Goodwill in its assigned territory and rendered ineffective its attempt at resuscitation; however, Ms. Nakamura, with assistance from Ms. Quintyn and OGL, did pursue an attempt to restructure TECNO for a period after GII's notice of its disaffiliation.

29. On February 8, 2016, TECNO filed an assignment in bankruptcy. The statement of affairs in the bankruptcy indicated TECNO's total liabilities to have been in excess of six million dollars against assets valued at less than one million dollars. Those assets included inventory and accounts receivable, but no real estate and no trade fixtures.

30. The trustee in bankruptcy liquidated TECNO's assets for the benefit of creditors. OGL acquired none of those assets.

31. TECNO's landlords assumed their respective properties and all Goodwill signage was removed from their sites.

32. In the result, following the liquidation processes, nothing remained of TECNO's stores, donation centres, or other assets as elements associated with a Goodwill or GII.

OGL Obtains the Former TECNO Territory

33. On March 8, 2016, Ms. Quintyn proposed to her board of directors that OGL should apply to GII for the open territory made available by the disaffiliation of TECNO. The application was made to GII on March 24, 2016 and granted on June 12, 2016.

34. In its submissions to the Board, OGL made the following points regarding its application to GII:

> - OGL's application "addressed the risks the organization would face if it was granted the Unassigned Territory, including the likelihood of unionization".
>
> - OGL's business plan for the Unassigned Territory presented a very different business model to TECNO. OGL's approach was focused on lean processes with rigorous operating procedures, driven by data and science.
>
> - No staff of the former TECNO . . . assisted in drafting OGL's Application.
>
> - OGL's Application did not involve leveraging TECNO's assets as there were no assets to leverage. TECNO's real estate had been assumed by the landlords, the donations and equipment were liquidated, and the senior management team was not interested in coming over to OGL.

35. The decision of the GII board of directors to award the former TECNO territory was stated in the responding party's pleading as "thereby expanding OGL's territory to include: Toronto, York, Peel, Durham, Dufferin, Simcoe, Kawartha Lakes, Northumberland, Peterborough, Prince Edward, Hastings, Lennox & Addington, Frontenac,

Leeds & Grenville, Lanark, Ottawa, Stormont Dundas and Glengarry, Prescott & Russell, Renfrew, Halliburton, Muskoka, Nipissing, Parry Sound, Manitoulin, Greater Sudbury Area, Sudbury, Algoma, Cochrane, Thunder Bay, Rainy River and Kenora."

OGL's Conduct after Obtaining the Territory

36. OGL noted in its pleading that it "did not expand its operations into the unassigned territory . . . for over three years." Ms. Quintyn explained the delay as a function of financial concerns, the restricted availability of suitable properties in the areas it wished to serve, and the merger with EKL that had not been a factor at the time of OGL's application to GII for the former TECNO territory. The documentation supporting the responding party's application for the territory also indicated that the planned development of the territory was to be staged.

37. On June 28, 2019, OGL opened a boutique Goodwill store in Newmarket.

38. Almost one year later, on June 16, 2020, the responding party opened a thrift store and donation centre on Dundas Street East in Mississauga, in connection with which it pleaded:

> Although TECNO once operated a donation centre/thrift store at the same premises in which the Mississauga boutique store[3] [*sic*] now operates, OGL did not assume TECNO's lease. Rather, there were four tenants who leased the premises between TECNO and OGL. Moreover, the building is now owned and managed by a different organization.

39. In its application, the Union pleaded: "In June 2020, the Applicant became aware that certain stores which had been operated by Goodwill TECNO had reopened and were now being operated by the Responding Party". The applicant did not address the extent of its knowledge or ignorance about OGL's being granted the territory in 2016 or its opening a location in Newmarket in June 2019.

40. OGL acknowledged that both it and TECNO sold donated goods — clothing, shoes, household items, games, recreational equipment,

[3] This is a misdescription; the Mississauga location is a thrift store/donation centre and not a boutique operation.

books, etc. — at the Mississauga location and that its locations dealt with items of the same sorts TECNO had received and sold. Regardless of OGL's "lean processes" and "rigorous operating procedures, driven by data and science", there was no evidence of any changes in the functioning of OGL's donation centres and thrift stores in Newmarket and Mississauga that were material in the context of labour relations generally and section 69 of the Act in particular.

41. The responding party also opened a facility on Dufferin Street in Toronto. Ms. Quintyn was unsure whether it opened in 2020 or 2021; however, as neither party referred to that location in their pleadings filed in or about September 2020, one would assume that the third location was opened after September 2020.

42. Leaving aside the disputed significance of OGL's successful application for the former TECNO territory, the parties agreed that the responding party did not purchase or otherwise acquire any of the assets, inventory, equipment or supplies that had been used or in the possession of TECNO prior to its demise.

43. OGL had not taken the place of TECNO on any leases or contracts. It did not employ any former employees of TECNO, and it maintained that there had never been "any transfer of expertise, knowledge and/or skill of key personnel from TECNO to OGL". The responding party also pleaded:

> There has never been the purchase or transfer of goodwill, actual or otherwise, from TECNO to OGL. To the extent that TECNO possessed any goodwill based on locality, this goodwill has long since dissipated in the three/four years between TECNO's cessation of operations and OGL's opening of the Newmarket boutique store and the Mississauga thrift store/donation centre, respectively.

OGL's Expansion into Essex Kent Lambton

44. OGL took over operational control of the Essex Kent Lambton Goodwill by a merger of their two organizations in 2019. OGL acquired the locations previously operated by EKL. GII was not required to be involved in vetting or approving the merger as it was not controlled by GII's regulations or operating requirements.

45. The responding party noted that, in merging with EKL, it had recognized Unifor Local 200 as the bargaining agent of certain EKL

employees and had bargained a renewal of the Unifor collective agreement for those employees in 2019.

Evidence of Alleged Anti-Union Animus

46. The Union's application made no reference to any history of its having concerns about OGL or GII harbouring anti-union animus; however, in the documents OGL produced, there was evidence of their having shared a keen and continuing concern to assure union avoidance.

47. In applying to GII for the then unassigned territory that had been TECNO's, OGL identified the threat of unionization as the most significant issue it confronted with respect to what would be its new operations, if not its entire undertaking.

48. Moreover, Ms. Quintyn had engaged in email (and perhaps other) discussions with Ms. Nakamura about decertifying or otherwise displacing the applicant prior to the collapse of TECNO. Included in the joint book of documents produced for this matter were emails exchanged by the two CEOs in which, by way of summary, Ms. Nakamura indicated TECNO's perceived difficulties in dealing with the Union and Ms. Quintyn identified means by which those concerns might be addressed. Ms. Quintyn's suggestions counselled conduct contrary to the Act such as seeking the Union's decertification and the possible introduction of another union to displace it as the bargaining agent. Ms. Quintyn maintained in her evidence that she was unaware at the time that she was suggesting unlawful conduct; however, the advice she proffered was patently inappropriate.

49. As noted by the Union in its closing submissions, the evidence also established that GII was mindful of the effect the Union was thought to have had on the history and prospects of TECNO. In a January 16, 2021 email reporting on the sudden closing of TECNO, GII's president, Jim Gibbons, stated:

> You are likely aware that the Toronto Goodwill has been struggling financially over the course of the last decade. It is a Goodwill that has a very strong union. This past year they have been executing on a restructuring plan which included some downsizing. They were not garnering the cooperation they needed, and union grievances and Labour Board directives prevailed.

50. Ms. Quintyn forwarded that email to her board of directors and added these comments:

> Many of you are aware that the Toronto Goodwill has been struggling financially over the course of the last dozen years. It is a Goodwill that has a strong union in a very pro-union environment, and for a variety of reasons they have struggled to pull themselves out of financial distress. Keiko Nakamura, the CEO, contacted me earlier this week, informing me that due to some union demands they may be placed in an untenable position and may need to move down a dissolution path. Events that took place later this week accelerated that untenable position, and last night the board of directors of the Goodwill of Toronto resigned in its entirety.

51. The minutes of the OGL's board meeting on March 8, 2018, prior to the submission of the responding party's application to GII, noted that "the issue of union succession rights" was addressed, that a legal opinion was being prepared, and the preliminary advice suggested "that the plan as proposed should carry no more additional risk of being unionized than would exist in any workplace in Ontario". The comment continued with:

> The likelihood of the union claiming succession is high however improbable that the Labour Board would automatically certify. Having a single Goodwill be the sole territory owner will be a shield for other Canadian Goodwills and will keep union monitoring and avoidance centred.

Other recorded comments and discussion confirmed the concern about union avoidance, the union of immediate concern obviously being the applicant.

52. The responding party's March 8th document entitled "Board Recommendation/Decision Overview" dealing with the proposed application to GII included the following comment under the caption "Labour/Union Considerations": "Clearly the union issue is the most pressing due diligence concern and perhaps one of the biggest risks for Goodwill Industries Ontario Great Lakes moving forward". The document noted that OGL's "attorney has provided a thorough opinion (appended), taking into consideration the Collective Bargaining Agreement, The Ontario Labour Relations Act, and relevant case law" and added: "A second review by another arms-length attorney is now under development as an extra precaution".

53. After a redacted portion, the document continued:

> Further . . . it is important that Goodwill Great Lakes and its 600 employees are not organized, and the company has never in its decades long history had a brush with a union. . .
>
> The company has been diligent about practicing union avoidance under professional guidance. An attempt to unionize a single new territory site would hopefully not succeed but in any event, could be overpowered by tactics that require consideration of all Great Lakes employees and its long history of no union.
>
> None-the-less [*sic*], the union concern will be the focus of significant effort to build culture, expand into the territory in a careful and timely manner and monitor the issue as in the past.

54. The responding party's concern about the applicant and unionization was not merely academic. In a November 26, 2015 email to Ms. Quintyn and other Goodwill executives in Ontario, Ms. Nakamura warned:

> I had spoken with Michelle [Quintyn] that I heard from my union that they were going after London. My union agreement expires in March 2016 and I have another union that has appeared since the summer trying to take over. Union activity is VERY active right now. Their focus is on Toronto since our agreement expiry is time sensitive e.g., another union can take over from the existing within 60 days of contract expiry. The current union, CAWU's wish is to unionize Goodwill's retail operations in Canada.

55. In making its application to GII on March 23, 2016, OGL repeated much of the above, adding: "Recommendations to protect the reality of an unrelated company have been made by the attorney and will be followed in the entry and long-term development strategy".

56. Under the caption "Phasing Development to Monitor Risk", OGL's application to GII stated:

> The entry strategy to the expanded market will be deliberately phased and monitored to assess risk particularly pertaining to labour organizing activity and donor contribution. Early markets targeted (first 12 months) will be those that have no history of Goodwill on the assumption that union activity will be unlikely. However, a site in or near where Goodwill TECNO has a history of operating will

> be opened as part of the first 18-month entry phase to monitor these same issues.

57. The "Territory Application Analysis by GII's Member Services Team" identified as one of the "Strengths of the Proposal" OGL's "ability to mount a successful response to potential labour issues", a comment that was carried through to the minutes of the GII's board meeting at which OGL's application was approved on June 12, 2016.

58. Those minutes also recorded the GII board's interest in having Goodwill return to the Toronto area "to reestablish the brand and blunt competition".

Statutory Provisions

59. The immediately relevant statutory provisions are as follows:

> **69.** (1) In this section,
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> "business" includes a part or parts thereof;
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.
>
> **Successor employer**
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.
>
> **Same**
>
> (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her

> or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.
>
> . . .
>
> **Power of Board to determine whether sale**
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> (12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.
>
> **Duty of respondents**
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> (13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

The Applicant's Submissions

60. The applicant referred to the following authorities in making its submissions or in replying to those of the responding party:

- *United Food & Commercial Workers, Local 175 v Pavao Meats Wholesale & Retail Ltd*, 2016 CanLII 45355 (ON LRB) ("*Pavao Meats*")
- *Service Employees Union, Local 268 v. Thunder Bay Ambulance Services Inc.*, 1978 CanLII 569 (ON LRB) ("*Thunder Bay Ambulance*")
- *Service Employees International Union, Local 183 v. Daynes Health Care Limited*, 1984 CanLII 1003 (ON LRB)

- *Hotel Employees Restaurant Employees Union, Local 75 v. Accomodex Franchise Management Inc*., 1993 CanLII 8023 (ON LRB) ("*Accomodex*")4

- *Canadian Union of Public Employees v. Metropolitan Parking Inc*., 1979 CanLII 815 (ON LRB) ("*Metropolitan Parking*")

- *International Beverage Dispensers' and Bartenders' Union, Local 280, v. Vivace Tavern Inc*., 1982 CanLII 962 (ON LRB) ("*Vivace Tavern*")

- *Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, v. John Katsuras, c.o.b. as Krush*, 1986 CanLII 1671 (ON LRB) ("*Krush*")

- *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. The Goldman Group*, 2001 CanLII 5945 (ON LRB) ("*Goldman Group*")

- *Service Employees' Union, Local 183, v. Riverview Manor, operated by Daynes Health Care Ltd*., 1983 CanLII 979 (ON LRB) ("*Riverview Manor*")

- *London & District Service Workers' Union, Local 220 v. Caressant Care Nursing Home of Canada Limited*, 1984 CanLII 1006 (ON LRB) ("*Caressant Care*")

- *Service Employees' International Union, Local 532 v. Saint Elizabeth Home Society, Ontario Ministry of Health and Hamilton Jewish Home for the Aged Charitable Foundation operating as Shalom Village South*, 1992 CanLII 6339 (ON LRB) ("*Shalom Village South*")

- *United Food and Commercial Workers International Union, Local 175 v. 1390386 Ontario Limited c.o.b. as Ingersoll Knechtel Foodland*, 2002 CanLII 22867 (ON LRB) ("*Knechtel Foodland*")

- *Ontario Council of The International Union of Painters and Allied Trades International Union of Painters and Allied Trades, Local 1891, v The Builders Warehouse Inc.*, 2017 CanLII 28688 (ON LRB)

[4] I note that the applicant referred to this decision as "*Accommodex"* throughout its submissions and reply. I have not corrected that error in what follows.

- *Canadian Union of Public Employees and its Local 1521-03 v Ottawa-Carleton Lifeskills Inc*., 2014 CanLII 75042 (ON LRB) ("*Ottawa-Carleton Lifeskills*")

- *IWA-Canada, Local 2693 v. Long Lake Forest Products Inc.*, 1994 CarswellOnt 1526 (ON LRB) ("Long Lake Forest Products")

- *United Food & Commercial Workers, Local 175, v Sofina Foods Inc*., 2018 CanLII 99023 (ON LRB) ("*Sofina Foods*")

- *The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of Local 1072 v. Woodland Store Fixtures Incorporated and Woodbench Incorporated*, 2012 CanLII 67907 (ON LRB) ("*Woodland Store Fixtures*")

- *Labourers' International Union of North America, Local 183 v Germag Construction Limited, and Drain Bros. Excavating Limited*, 2021 CanLII 868 (ON LRB) ("*Germag Construction*")

- *Labourers' International Union of North America, Local 506 v Northern Precast*, 2018 CanLII 71350 (ON LRB) ("*Northern Precast*")

- *UNIFOR Local 975 v. Enercare Home & Commercial Services Limited Partnership*, 2017 CanLII 36002 (ON LRB) ("*Enercare Home*")

61. The essence of the applicant's position is captured in the following introductory submission:

> 29. The Union asserts that the following factors are relevant and must be considered by the Board:
>
> a. The Responding Party's exclusive right to operate as "Goodwill" within the TECNO Territory;
>
> b. The continuation of TECNO's business;
>
> c. The Responding Party, GII and TECNO each had pre-existing relationships;
>
> d. The acquisition of goodwill following the TECNO bankruptcy; and,

e. Policy concerns with respect to the ability of GII to frustrate a trade union's bargaining rights.

62. The applicant characterized the assignment of territory as "a substantial component of the Responding Party's operations within the TECNO Territory", adding: "It is a prerequisite to operating the business — without the territory, the Responding Party would be prohibited from operating in the territory under the Goodwill name" and "the assignment of the TECNO Territory represents the essence of the Responding Party's operations within that territory".

63. The applicant noted that the assignment of the territory conferred rights of "significant financial value" associated with the "exclusive right to operate as a 'Goodwill' within the territory" without competition from other Goodwills, in contrast to the circumstances of "traditional franchisors" that "can and do create 'cannibal' franchises".

64. The applicant's argument was as follows:

> 33. The assignment of the TECNO Territory confers upon the Responding Party certain rights. These rights are of significant financial value. The Responding Party has an exclusive right to operate as "Goodwill" within the territory and to use the trademarks associated with the Goodwill brand within the territory. Goodwill is one of the largest and most recognizable thrift store brands worldwide. The use of the Goodwill brand in the association with GII provides a competitive advantage to the Responding Party as against other thrift brands in the area. As Ms. Quintyn noted during her testimony, the Responding Party competes with other thrift retailers for more than just customers. They also compete for grants, for real estate and for donations. Ms. Quintyn also agreed that the responding party faces a degree of competition from other retailers like Wal-Mart.
>
> 34. Moreover, the territory permits the Responding Party to operate without competition from other Goodwills. This is a significant distinction between GII and more traditional franchise operations. GII protects the territory for each of its members and as such members do not compete with each other. This includes competition for funding, for employees, for real estate and for sales. Instead, Goodwills operate solely within their territories and cooperate with other members with respect to advice, technology and best practices.

. . .

> 37. This protection is significant. The Responding Party cannot accurately assert it is operating a separate and unrelated business in the territory. Because of GII's policy, there can be only one Goodwill in a territory. The naming conventions used by the various member Goodwills reflect this fact. Each organization is named after the region that they operate in.
>
> 38. The Responding Party could not operate a business in the territory while it was occupied by TECNO. Cannibalism is prohibited by GII's policy and those policies leave no room for a separate operation. There is one Goodwill for each territory. In the past, the Goodwill for the TECNO Territory was TECNO. At present, the Goodwill for the TECNO Territory is the Responding Party.

65. The Union referred to the Board's jurisprudence in that connection:

> 40. In the past, the Board has considered the transfer of a licence to operate in a number of contexts. The TECNO Territory, in effect, is a licence to operate within the territory issued by GII or is extremely similar to one. The parallels are clear and the cases are instructive.

66. The first decision the Union referred to was *Thunder Bay Ambulance, supra*. The applicant cited the following holding of the Board in paragraph 18 of the decision:

> In the view of the Board, the two essential elements of the predecessors' businesses were transferred to the alleged successor. Firstly, the exclusive use of the assets owned by the Ministry of Health was transferred. Although the same licence or piece of paper was not transferred between the two, the Board has no hesitation in finding that the exclusive entitlement, as embodied in a Ministry of Health Licence, was transferred.

67. The applicant's argument went as follows:

> 42. The Board should take two cogent facts from this decision. First, the transfer of the licence is a "sale" under the *Act* notwithstanding the fact that the specific piece of paper was not transferred and notwithstanding the involvement of the Ministry of Health. As such, the Board

> should have no difficulty concluding that GII served as a necessary "link" in the transfer, notwithstanding the fact that it is a third-party actor.
>
> 43. Secondly, the Board characterized access to the Ministry's assets through its licence as an "essential element" of the business. Presumably, the transfer of the licence alone would have been sufficient to protect the applicant's bargaining rights.

68. The second case relied on in this context was *Vivace Tavern, supra*, about which the Union submitted:

> 44. In *Vivace Tavern*, the responding party purchased the Hollywood Tavern, with the intention of shutting it down and using the real estate and chattels to reopen another business, the House of Lancaster. The Board nonetheless found that a sale of business had occurred. At paragraph 13, the Board placed significant weight on the acquisition of the Hollywood tavern's liquor licenses by the responding party:
>
> > While the respondent may choose to disavow any interest in or attach any importance to the chattels which had been made part of the sale, and to characterize the entire transaction as merely the acquisition of a real property and location for his existing business, the conveyance documents and other facts purport the transfer to be more than a sale of assets. Whether or not the respondent acquired clear title to the chattels, their acquisition and use allowed the uninterrupted operation of the business from the time he acquired it on February 12th until closed as aforesaid. Of even greater significance, the Agreement of Purchase and Sale purports to convey to the respondent "Any right the vendor may have to the use of the name Hollywood Tavern" and "Any right and interest the Vendor has or may have in the existing liquor licenses of the Hollywood Tavern." The respondent attached great importance to the licenses, particularly to the adult entertainment license, since no new entertainment licenses are being issued in Metropolitan Toronto and the respondent was dependent upon the predecessor's previously acquired rights in having an application for such a license accepted. The transfer of the two liquor licenses avoided the delay of the normal waiting period for new licenses and allowed continuity of the business without interruption. [emphasis added by the Union]

> 45. Once again, the rights associated with the licence (in this case, the ability to serve liquor) are treated as fundamental to the business and assigned significant weight by the Board.

69. The Union commented that the Board in *Krush, supra*, "placed significant weight on the transfer of a liquor licence", quoting as follows from paragraph 17 of the decision:

> Moreover, the most critical elements of the business in this case were the premises and the liquor licence, both of which passed to Mr. Katsuras either directly or indirectly as a result of the sale. Mr. Katsuras suggested that the licence was unimportant to him since he could simply have applied for a new licence. However, he conceded that transferring the licence previously issued for the same location was faster, and it is apparent from the sequence of events, including the amendment to the purchase and sale agreement and the dispatch with which he applied for the liquor licence transfer after the sale closing, that the licence played a significant role in the transaction.

70. The Union linked the "tavern cases" and the instant matter with reference to *Goldman Group, supra*, and the Board's observation at paragraph 14 of that decision that it

> . . . will focus on the essential common components in the operation of both businesses. In the tavern cases, that common component was the licenses. Without those licenses, the new businesses could simply not operate as intended, notwithstanding all the other changes effected by the purchasers.

71. The applicant concluded:

> The licenses are significant factors in the tavern cases because the taverns simply cannot operate as intended without being properly licensed. By a similar measure, the Responding Party cannot operate within the TECNO Territory at all without first being assigned that territory by GII.

72. The Union then drew on cases in the long-term care industry, first citing *Riverview Manor, supra*, as a case in which the Board dealt with the sale of a nursing home property which was contingent on the Ministry of Health's approval of a transfer of the long-term care licence.

The Board found that a sale of business had occurred. The Union relied on the following comments at paragraph 38 of the decision:

> Riverview obtained two major assets from Balmoral, the licence and the land. The transfer of the licence is particularly significant, because it led most Balmoral residents to move to Riverview Manor. (Both parties to the transaction contemplated residents would move from one home to the other, as evidenced by the contract that ties the date from which interest runs to the transfer of patients.) In this sense, the license is the essence of the businesses.

The applicant added:

> 51. It is also significant that the Board placed weight on the fact that the assignment of the license provided the purchaser with a shield from competition with unlicensed care homes. In a similar way, the assignment of the TECNO Territory (indeed, of any Goodwill territory) provides the Responding Party with protection from competition against [*sic*] other Goodwills.

73. The applicant put forward the following about *Caressant Care, supra*:

> 52. In *Caressant Care,* the Board considered another case where a purchaser received a licence to operate a nursing home from a defunct company. The Board in *Caressant Care* relied heavily on the decision in *Riverview Manor*. In that decision, Vice-Chair Mitchnick observed that "The Board [in *Riverview Manor*], in finding a "sale of a business" in that decision appears to have focussed on the importance of the licence, owing to the limited availability of such licences in a given geographic area, and the evidence before the Board in this case only tends to confirm that thinking." The Vice-Chair went on to note that "There was not in the present case, the transfer of any land by the insolvent company Caressant Care, but as . . . *Riverview* makes clear, it is the licence that is the essence of the Nursing Home business."

74. The applicant referred to *Shalom Village South, supra*, a case that concerned the reassignment of a licence following the closing of a nursing home that had been taken over by the Ministry of Health. Shalom Village South was one of three successful applicants for licensing for the home's former beds. The Union noted that Shalom Village South received nothing more than the licence to operate a portion of the beds

formerly in the original, defunct business and quoted the following from the Board's decision finding a sale of business for the purposes of the Act:

> However, the only physical asset that passed between the Ministry and Shalom Village was the sixty licensed beds. There was no dispute that although Shalom Village contemplated the possibility of purchasing some of the equipment the Ministry had acquired during its tenure, it decided not to do so. Nevertheless, the Board has found a sale of a business under the *Labour Relations Act* where a license was the only asset transferred, because the license is the essence of the business in the nursing home industry and because it tends to bring with it a captive market of residents *(Caressant Care, supra, Riverview Manor, supra).*

The Board noted that "a significant number of residents did transfer with the license".

75. In summary on the point, the applicant submitted:

> 55. These cases set out clear principles which readily apply to the present matter. To summarize, where a license to operate is core to the operation of a business, the Board will assign significant weight to its transfer. It is not required that the same "license" be transferred and it is sufficient for the Board's purposes to have a similar license issued. Where there is explicit discussion of a continuity of the license, as was the case in *Shalom Village South*, the Board will place weight on those discussions. Moreover, the involvement of a third party does not reduce the weight placed on such a transfer. In certain circumstances, where the license is the essence of the business, the transfer of the license alone constitutes a sale of business for the purposes of section 69 of the *Act*.
>
> 56. In the present matter, the Responding Party has received the right to operate within the TECNO Territory from a third party. The Responding Party's rights within the territory are identical to those previously held by TECNO. The Responding Party would be unable to conduct business in the territory without the license and, therefore, it is essential to their business. Ultimately, each of these factors demonstrate a sale of business and, in the submission of the Applicant, the transfer of the license alone is sufficient to constitute a sale of business for the purposes of the *Act*.

76. The applicant then turned to its submission that the responding party's operations in the territory were a continuation of TECNO's business as, it maintained, OGL's "businesses in the TECNO Territory were virtually identical to those operated by TECNO".

77. In that context, the applicant made the observation: "Because of these [GII-prescribed] signing practices, any passerby would not realize that the Goodwills in the TECNO territory are no longer operated by TECNO". The Union argued: "In essence, the public reasonably would view both TECNO and the Responding Party as a single entity (i.e. "Goodwill") and the signage and branding used by the Responding Party does nothing to dispel this conception".

78. The Union also pointed out that OGL had acquired the lease of the property at 1224 Dundas Street East in Mississauga at which TECNO had a store until 2016 or thereabouts.

79. The applicant submitted: "By operating in the TECNO Territory, the Responding Party is serving the same customers that TECNO would have served. They are also receiving donations from the same market".

80. The Union concluded its submissions on this point as follows:

> 67. The facts set out above plainly demonstrate a continuation of TECNO's business. The cores of both TECNO's business and charitable activities remain unchanged and, to the eyes of the Responding Party's customers and donors, the ownership of the business does not appear to have change [*sic*] either. The Applicant reiterates that this continuation of business was only possible due to the transfer of the TECNO Territory. In effect, the Responding Party is now doing exactly what TECNO did when TECNO held control of the territory.

81. The applicant then addressed the proposition that both OGL and GII had a pre-existing relationship with TECNO. In particular, the Union noted the evidence that Ms. Quintyn "was intimately involved in the operation of TECNO both leading up to and after its collapse" and that her "objective following the collapse of TECNO had been to see Goodwill's operations in the TECNO Territory continue."

82. From that, the applicant posited:

> 74. In these circumstances, the considerations set out in *Metropolitan Parking Inc.* apply. The pre-existing

> connection between the two Goodwills must colour the Board's consideration of the facts before it. In these circumstances, the pre-existing connection between TECNO and the Responding Party renders it unlikely that the intention here was to create or expand a separate company that merely happens to perform the same work as TECNO. Ms. Quintyn knew what TECNO did and was dead set on its business continuing.

83. Next, the Union submitted that OGL had received substantial goodwill related to the TECNO territory because it "is the sole entity entitled to use the 'Goodwill' name within the TECNO Territory" and it continued:

> 75. This goodwill is transferred through two specific mechanisms. First, there is the goodwill associated with the "Goodwill" brand generally and, second, there is the goodwill associated with the TECNO in light of its bankruptcy.
>
> 76. Goodwill is one of the largest thrift store brands in the world. It is also one of the most recognizable charities which accept donations of clothing and other goods. Like Q-Tip is to cotton swabs or Kleenex is to tissues, "giving to Goodwill" is a short hand in the province of Ontario and elsewhere for donating used items to charity.
>
> 77. The use of the Goodwill brand, as discussed above, provides GII members, including the Responding Party, with significant benefits when they compete with other thrift retailers for both sales and donations.
>
> 78. While the Responding Party had access to such benefits prior to its acquisition of the TECNO Territory, its ability to leverage those benefits was constrained by GII's bylaws. It had free reign to benefit from the goodwill associated with the Goodwill brand but only within its own territory. It had no ability to benefit from that goodwill within the TECNO Territory because it had no ability to actually do business within the TECNO Territory. As such, the acquisition of the TECNO Territory also constitutes the acquisition of additional goodwill associated with the Goodwill brand generally.
>
> 79. Moreover, the documentary evidence demonstrates that the public supported the return of Goodwill to the TECNO Territory.
>
> . . .

> 89. The way in which the Responding Party has sold itself to the public in the TECNO Territory is significant. The Responding Party intentionally made use of the bankruptcy of TECNO and its subsequent acquisition of the TECNO Territory to tell a story that paints itself in a positive light. Moreover, this is a story that plays upon opinions already present in the community and compels members of the community to both donate to and shop at the new stores. The fact that the media has covered the story demonstrates continued interest in seeing Goodwill return to the TECNO Territory.
>
> 90. This specific type of goodwill is specific to the TECNO Territory. It is rooted in the good that TECNO did for the community and a desire to see that good work return. By acquiring the TECNO Territory and making itself the face of TECNO's return, the Responding Party has benefited in both financial terms and in terms of its charitable activities in the community.

84. Finally, the applicant turned to its argument that the structure of GII would permit it to frustrate a union's bargaining rights by reassigning territory. The thrust of the submission was as follows:

> If the Board finds that a unilateral revocation and subsequent reassignment of territory is not a sale of business for the purposes of the Act, the Board will have handed GII the ability to unilaterally frustrate the bargaining rights of any Goodwill employees in the province of Ontario. This cannot be the intention of the *Act* and as such, the Union asserts that these public policy concerns must be considered in disposing of this application.

85. The following paragraph appears to have been key to the applicant's submission:

> 94. The evidence shows that one purpose which the GII Board considered in disaffiliating TECNO is the applicant's rights to represent its employees. Ms. Nakamura made numerous comments behind closed doors blaming the applicant for TECNO's failure. While Ms. Nakamura's opinion is entirely counterfactual, it took root with Ms. Quintyn and with GII.

86. The applicant proceeded with an analysis of the various email communications and documents that supported the proposition that OGL prepared its application for the TECNO territory identifying union

avoidance as "the most pressing due diligence concerns and perhaps one of the biggest risks for Great Lakes moving forward".

87. The Union's submission continued as follows:

> 100. The application [by OGL for the former TECNO territory] goes on to advise that a labour lawyer has been retained to provide an analysis of the situation and to draw a reference to the Responding Party's long history of "no union". The application asserts that the Responding Party diligently practices union avoidance and that the Responding Party will advance in a "careful and timely manner" to attempt to avoid the Applicant.
>
> 101. The basis for these comments was to convince GII that the Responding Party would be able to successfully evade the Applicant. This is bourn [*sic*] out be [*sic*] the fact that GII's evaluation of the proposal explicitly considers the Responding Party's ability to avoid unionization.
>
> 102. The evidence plainly establishes that Ms. Nakamura placed considerable blame on the Applicant for TECNO's failure. Whether or not this is true, both the Responding Party and GII have taken these assertions as fact. The ability to avoid unionization was explicitly considered in GII's assessment of the proposal. It is transparent that anti-union animus was a factor in determining to disaffiliate Ms. Nakamura [*sic*] and in the decision to reassign the territory to the Responding Party.
>
> 103. While anti-union animus is not a factor that the Board considers in applications under section 69, it is required to consider the purpose of section 69. That purpose . . . includes preventing the use of corporate or institutional mechanisms to frustrate bargaining rights. That is precisely what occurred in the present matter. GII essentially ended whatever possibility TECNO had for restructuring by disaffiliating it. It then transferred its territory to a different member. The Responding Party asserts that this action by GII ought to extinguish that [*sic*] Applicant's rights. This cannot be what the legislation intended and flies in the face of the purpose of the *Act*.
>
> 104. If the Board supports the Responding Party's position, it runs the risk of providing GII with a mechanism by which it can unilaterally evade unionization. Moreover, it will provide other organizations with the structure that they can mimic to the same end. This cannot be what the *Act*

> intended and, on this basis, the applicant's claim ought to succeed.

88. The applicant concluded its submissions with the following:

> 106. By acquiring the territory from GII, the Responding Party has acquired the very same rights that TECNO once held. In exercising those rights, it is operating the very same business that TECNO once operated. This is especially clear in light of the fact that the Responding Party was affiliated with TECNO prior to the transfer of the territory. Moreover, in expanding its operation, it has acquired significant goodwill related to both the Goodwill brand and to its specific role in rebuilding the TECNO territory.
>
> 107. Perhaps more significantly, this matter raises substantial policy concerns. It is crystal clear that one element of the GII Board's decision to transfer the TECNO Territory was anti-union animus directed specifically at the Applicant. The word "sale" is given an expansive and non-exhaustive definition in the Act in part because section 69 is intended to act as a shield for unions against such unfair and unilateral actions. The Board must determine whether the transfer of the TECNO Territory constitutes a "sale" for the purposes of the Act. The Board cannot accept a determination which would frustrate the purposes of the Act by allowing the unilateral frustration of a trade union's vest [*sic*] right to represent employees.

The Responding Party's Submissions

89. In replying to the applicant's submissions, the responding party referred to many of the cases cited by the Union and added the following: *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 v. 1013644 Ontario Limited c.o.b. as Cartwright Plumbing*, 2017 CanLII 57734 (ON LRB); *I.A.T.S.E. , Local 299 v. Cineplex Odeon Corp.,* 1998 CanLII 27800 (MB QB); and *Canadian Union of Brewery and General Workers, Component 325 v. Molson Coors Canada (Toronto Brewery) and Sherway Warehousing Inc. and Sherway Logistics Inc.*, 2017 CanLII 14504 (ON LRB).

90. The responding party argued that none of the traditionally recognized criteria for a "sale of business" were met on the evidence presented:

53. There is [*sic*] no indicia of a sale or transfer of a business, or even part of a business, in this case. The evidence demonstrates that TECNO, after struggling financially for many years, ceased operating. OGL, which had been in the same business for over 70 years, then began to expand its operations into the Toronto area three years after the closure of TECNO. OGL's ability to operate these Toronto locations was not derived from TECNO in any way.

54. There is no evidence — nor has the Applicant alleged — that OGL purchased, acquired, or otherwise received TECNO's operating name, accounts receivable, customer lists, existing contracts, inventory, employees, licensing agreements, business processes, or that it entered into any restrictive covenants with TECNO.

55. OGL's ability to carry on business in the Unassigned Territory was not derived from TECNO, but rather from its experience and infrastructure built up over more than half a century of OGL's operations.

56. The Board should not be distracted by the fact that TECNO and OGL both operate under the name "Goodwill". There was no transfer of goodwill (as an asset); OGL did not acquire its operating name from TECNO; nor did its operating name change following its expansion into the TECNO territory. When it expanded into the Toronto area, OGL did not use signage to indicate that TECNO "was back" or "under new management". It opened a boutique store, a community store, and three donation centres, styled using its own sleek brand standards and the Goodwill brand that OGL has consistently used, a brand that — as the applicant noted in its closing submissions — is one of the most recognizable in the world.

57. Nor was there "goodwill" in the traditional sense to acquire *from* TECNO; the business was moribund, and its collapse was widely publicized in mainstream media. As stated by Ms. Quintyn, TECNO's goodwill was so tarnished that OGL went into the Unassigned Territory in order to "rebuild". It was essentially "starting from zero" in the territory.

58. The Applicant also adduced no evidence that OGL services the same customers as TECNO. Given the lengthy hiatus between TECNO's disaffiliation and OGL's commencement of operations in Newmarket and Mississauga (three and four years, respectively), it is

> unlikely that any of TECNO's former customers would have come to shop at OGL's stores because of any previous loyalty to TECNO. Rather, those customers are more likely to have moved on to other thrift stores in the area during this time.
>
> 59. Nor did OGL assume any of TECNO's real property leases. In one case, OGL operates from the same Mississauga location as a former TECNO store; however, this lease was negotiated as a new tenancy with a different landlord after the property changed hands, and the location choice was driven entirely by the fact that it was what was available in an extremely competitive Toronto real-estate market. Four different tenants occupied the space between TECNO and OGL.

91. The second branch of the responding party's argument was that the process GII followed in assigning territories was not sufficient to create a "sale of business".

92. The responding party submitted:

> 61. Where an existing business grows or expands its operations, the focus of the factual inquiry is on what flowed from the predecessor's business to the successor's business and whether there is enough evidence to conclude that the successor's ability to carry on its business is derived from what is acquired from the predecessor.
>
> 62. This analysis does not change where there is an alleged transfer of a license to operate, as the Applicant suggests. Even where an alleged sale of business involves such a transfer, the Board has still considered and been guided by whether the other *indicia* of a sale of business were present (none of which exist in this case). To paraphrase what the Board asked in *Ottawa Carleton Lifeskills*, the relevant questions are: What did OGL really acquire from TECNO? What did it really acquire from GII? And, what did it bring to the table itself?

93. OGL relied on *Ottawa-Carleton Lifeskills, supra*, to a substantial degree, arguing as follows:

> 65. In *Ottawa-Carleton Lifeskills*, the Board held that the successors acquired the license and premises to operate semi-independent living services to persons with disabilities from the predecessor employer. However, in finding that no

sale occurred, the Board was guided by the fact that the successors were entities that were already in the business of providing support services of the kind provided by the predecessor, and that they brought their substantial capacity to operate the newly acquired premises to the acquisition. The Board noted that even where there is intervention from a third party intermediary, there still must be a transfer of a going concern between the predecessor and the successor to find a sale of business:

> 24. The applicant is correct that the intervention of a third-party intermediary through which the transfer is affected [*sic*] does not preclude a finding of a sale of business. However, whether or not there is an intermediary in the transaction, in order to find a sale of business **the transfer must still be from the predecessor to the successor**, and the fact that the alleged purchaser may wind up with a similar business to the predecessor **does not constitute a sale if the business did not actually come from the predecessor.** [all emphasis added by the responding party]

66. The Board went on to stress that the transfer of the license was not from the predecessor but from the Ministry, and that the successor did not create the business "out of the ashes" of the predecessor:

> 33. The same analysis applies to the applicant's argument that OCL and OFP acquired TELCI's license — or authorization — to carry on its business at the former TELCI locations. Even accepting that the agreements between OCL and OFP and the Ministry to assume the operation of the buildings and to provide the requisite services to tenants is akin to a license, **the transfer of the license was not from TELCI to OCL and OFP, but from the Ministry**.
>
> 34. **In *Riverview* relied upon by the applicant, the nursing home license was sold by the predecessor to the successor as part of an overall transaction that included the transfer of numerous other aspects of the predecessor's business. Those other aspects of the business depended on the license in order to be used for their purpose, and in this sense the license was the essence of the business**.

> 35. In *Thunder Bay Ambulance*, however, the Board did find a transfer of license even where the successor had applied for and obtained its own license from the Ministry. There is, therefore, some merit to the applicant's argument that when the Ministry authorized OCL and OFP to assume operation of the former TELCI residences, this constituted a similar transfer of license from TELCI to OCL and OFP. **However, in Thunder Bay Ambulance, the board also found that the business at issue was essentially an organizational business (since the assets of the business, and in particular the ambulances, were always and remained the property of a third party), and that in addition to the license, there was a transfer of management and the people who carry out the work. The organizational capacity plus the license was essentially what constituted the business. The instant case is very different, where OCL and OFP already possessed the organizational capacity to carry out the business. They are not businesses that were created out of the ashes of TELCI and licensed to perform its work. Rather, TELCI ceased to carry on business, and the Ministry was obligated to find new contractors who were qualified and capable of looking after the residents in the buildings which TELCI was no longer servicing. In my view, this is the essence of the transaction, rather than a transfer of authorization to carry on the business.**
> [all emphasis added by the responding party]

67. As noted above, the *Thunder Bay Ambulance Services Inc.* case does not assist the Applicant's argument, as far more than a license was transferred between the parties. In securing the license, the successor employer also was provided with the assets necessary to operate the business (i.e. the ambulances), as it had done for the predecessor. All employees and managerial experience also transferred to the successor. Accordingly, the successor obtained all the necessary assets to set up the parallel business, allowing for the continuum of the predecessor's business. This is markedly different from the instant case, where OGL used its own existing assets, or independently acquired new ones, to set up its Toronto locations.

68. The Applicant has also relied on several cases concerning liquor licenses transfers in support of its argument that the grant of a purported "license" from GII to

> OGL alone is sufficient to ground a sale of business. However, all these cases are distinguishable as they involve the transfer of traditional assets in addition to the grant of a license. . . .
>
> 69. Similarly, the nursing home cases relied on by the Applicant are distinguishable because of the captive market that accompanied the transfer of the license. Key to the Board's analysis in those cases was the effect the transfer of the license had on the successor. In those cases, the successor acquired not only the license to operate the nursing home, but a captive market of customers (i.e. the residents) who needed continued accommodation. As such, the practical effect of the successor's acquisition of the license was the significant transfer of most of the residents from the predecessor home to the successor home. Additionally, in all of those cases some of the employees of the predecessor continued to work for the successor employers.
>
> 70. The territory grant from GII provided OGL with nothing more than the opportunity to establish undertakings in the Unassigned Territory. There was no "captive market" to acquire, and certainly nothing analogous to the relationship between the residents of a nursing home and the licensee of that home. As acknowledged by the Applicant, OGL competes with many organizations, including other charities and retailers such as Wal-Mart, for its customer base. On that basis alone, *Riverview Manor*, *Caressant Care* and *Shalom Village South* are not applicable to this situation.

94. The third proposition advanced by OGL was that there was no basis for the inference of anti-union animus or a scheme to circumvent the Act.

> 71. Section 69 does not give the Board the discretion to find that a sale of business has occurred where there are no indicia of a sale. Either a sale of business has occurred, or it has not. This is in stark contrast to s. 1(4) which grants the Board the discretion to find that one or more persons are one employer for the purposes of the Act, "where there is clear evidence of the mischief it was intended to avoid".

95. OGL argued that there was no evidence of an effort to carry out a fraudulent or sham transaction to avoid the transfer of bargaining rights as might have been suggested in *Pavao Meats*. Rather, it contended:

> 74. OGL did not attempt to facilitate TECNO's bankruptcy or closure, or its disaffiliation, to acquire the Unassigned Territory. To the contrary, Ms. Quintyn and OGL did everything they could to keep TECNO operational. OGL provided a loan to TECNO so that it could hire a Trustee in Bankruptcy *to restructure the company.* If OGL desired to take over TECNO's business, it would have had no reason to assist the restructuring, which, if successful, would have meant TECNO could continue as a going concern.
>
> 75. The fact that OGL may have considered the fact of TECNO's relationship with the Applicant, and the potential of transfer [*sic*] of bargaining rights, in its business planning is not sufficient to infer the type of wide-ranging fraudulent schemes suggested by the Applicant. The Board has previously held that, absent unlawful conduct in its efforts to avoid unionization, it will not put significant weight to a party's desire to manage it its affairs to avoid a finding of a sale of business. An employer's preference or desire to remain non-union is not illegal, and its statements to that effect cannot have the effect of creating a sale of business from whole cloth where no other basis to reach such a conclusion exists.
>
> 76. The GII structure does not prevent a sale of business from occurring and bargaining rights transferring to the successor employer. In fact, when OGL and EKL merged, the bargaining rights of EKL's unionized employees transferred to OGL. This merger took place after OGL acquired the Unassigned Territory. There is no evidence to suggest that GII pushed back or tried to prevent this merger because of [*sic*] some of the EKL's employees were unionized. [emphasis in the original]

96. In concluding its submissions, the responding party asserted:

> 77. Throughout Canada and the world, Goodwill Members operate as independent, incorporated charities serving their local communities. Like other corporations, some thrive, while others fail and enter bankruptcy. They expand their operations, merge with one another and, where their employees are unionized, those bargaining rights may transfer.[5] In short, there is nothing unique about Goodwill,

[5] I note that the only evidence of this having occurred was in respect of Unifor Local 200 and OGL's merger with EKL in 2019.

> its structure, or how it operates, and the Board's traditional approach to sale of business applications is well-suited to answer the question: was a business or going concern transferred from TECNO to OGL?
>
> 78. OGL acquired nothing from TECNO. It acquired the right to operate in the Unassigned Territory through an application process, and its subsequent expansion into the Unassigned Territory relied on OGL's well-established structure, management, equipment, employees and accumulated skills, ability, know-how and contacts. There are no indicia of a sale or transfer of business in this case because one simply did not occur.
>
> 79. Finally, the Applicant's argument suggests that public policy considerations require a finding of a sale of business where it may otherwise not apply because the mere possibility that the structure of the GII *could* allow a party to circumvent bargaining rights is an unacceptable state of affairs. The Applicant *must* rely on this argument given the absence of any evidence suggesting that the lack of traditional indicia of a sale of business is due to a fraudulent transaction or other mechanism designed to avoid the application of the Act. However, this "public policy" argument is not grounded in the law; is an inappropriate attempt by the Applicant to expand its bargaining rights; would represent an unprecedented expansion of s.69 of the Act if successful; and for all those reasons, should not be accepted. [emphasis in the original]

The Applicant's Reply Submissions

97. The applicant asserted that OGL's contentions that its ability to operate in the TECNO Territory was not derived from TECNO in any way and that none of the traditional indicia of a transfer were present in this case were counterfactual.

98. As for the responding party's not acquiring its operating name from TECNO, the Union noted:

> It cannot be denied that both TECNO and the responding party under operated under the name "Goodwill". The "Goodwill" name and all rights associated with it flow from GII and, as per GII's bylaws, the use of the name is linked to the assignment of territory. Prior to the assignment of the TECNO Territory, the Responding Party had the right to use the "Goodwill" name within its own territory.

> Subsequent to the assignment of the TECNO Territory, the Responding Party acquired the right to use the name within the TECNO Territory.

99. The applicant suggested that OGL "asserts that it is a fully separate corporation that only happens to use an identical name" and countered: "While they exist under separate corporate forms, they are effectively a single operation".

100. As for the responding party's argument that it did not enter into a restrictive covenant with TECNO, the Union noted that the limitations GII placed on territories and competition had effectively provided the benefit of restrictive covenants to TECNO and now to OGL in that territory.

101. The applicant argued that it "is patently untrue" to assert "that there was no goodwill to acquire with respect to TECNO". Rather, it claimed that there was: "Substantial evidence . . . before the Board to demonstrate that the Responding Party repeatedly leveraged goodwill to TECNO in order to both establish and promote its new operations". The Union concluded the point with: "It is simply not credible for the Responding Party or Ms. Quintyn to assert that there was no remaining loyalty to the Goodwill brand in the TECNO territory" and, referring to *Pavao Meats,* added: "In any event, the Board has held in the past that while formal goodwill may vanish when a business becomes defunct, other advantages related to the prior operation remain relevant to the Board's analysis where the relationship between the two businesses is touted for advertising purposes".

102. The applicant asked the Board to draw the inference that the responding party is providing substantially the same services as TECNO to substantially the same market as did TECNO. Referring to *Accomodex,* the Union argued:

> The Board relied on the new owner's access to the same customers and held that a sale had occurred. It stated that "[the purchased 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. The Board also found that, in light of the access to the same market, Accommodex had received goodwill from the predecessor employer.

103. Referring to *Knechtel Foodland, supra*, at paragraph 58 — a case involving the acquisition of a grocery store that had been closed

for a period of six months before being reactivated under a different brand — the Union offered the following from the Board's comments on the subsistence of goodwill:

> Although loyalty and support might have dissipated over the period of the closure (in *Accomodex* the period of the closure was nearly 18 months), the nature of the service, the continuity in the use of assets and particularly the use of the same location are such that the character of the business remains the same. The nature of the work performed and the skills utilized in the subsequent manifestation of the business are the same as those which obtained previously. The assets acquired ultimately from Loblaws are being used by the Knechtel store "in 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" (*Accomodex,* ¶ 77).

104. On the responding party's second argument that the assignment of the "TECNO licence" does not constitute a sale of sale of business, the applicant noted that the responding party relied heavily on the *Ottawa-Carleton Lifeskills* case and asserted that "All cases relied upon by the responding party are distinguishable and that *Ottawa-Carleton Lifeskills Inc.* was wrongly decided".

105. The applicant's analysis of *Ottawa-Carleton Lifeskills* disputed the propriety of reliance on *Metropolitan Parking, supra*, and the "going concern" standard, and quoted from *Accomodex* to identify the evolution of the Board's approach to these issues. In particular, the Union argued:

> 19. *Accommodex* remains the leading case with respect to the application of section 69. The appropriate test is set out at paragraph 59 of the Board's decision:
>
> > 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.

> 20. The key focus of the Board must not be on whether the business was transferred as a going concern, but rather it must be on whether the nature of the business has been substantially altered by the transaction. As set out in paragraph 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.

106. The applicant commented that the *Accomodex* decision was not provided to the Board in *Ottawa-Carleton Lifeskills* and asserted; "In point of fact, the parties in that case agreed to the application of the going concern test". The Union's reference was to the following paragraph in the *Ottawa-Carleton Lifeskills* decision,

> 8. Both parties relied on the Board's overall "instrumental" approach to the interpretation of this section as set out in the oft-cited decision in *Metropolitan Parking Inc.,* [1979] OLRB Rep. Dec. 1193 ("*Metropolitan Parking*"). In *Metropolitan Parking* the Board canvassed the breadth of the terms "sale" and "business", and concluded that in order to find a sale of business, there must be a transfer of a "going concern", which is something more than a collection of assets or the work of the predecessor. However, what constitutes the essential elements of business that constitute a "going concern", can be highly variable depending on the nature of the business.

107. In critiquing *Ottawa-Carleton Lifeskills,* the applicant noted that the Board had made repeated references to whether the predecessor was a "going concern" and concluded:

> 24. In placing significant emphasis on whether or not the predecessor employer was a going concern, Vice-Chair Gedalof applied the wrong test. Had the Vice-Chair applied the appropriate test and focused on the continuity of the business, as set out in *Accommodex*, he would have held

that the transfer of both an authorization to perform work and the related properties constituted a sale of business.

25. It is also noted that Vice-Chair Gedalof did not address whether the license in question was a "business" or a "part of a business" in the context of the continuing care industry. This issue remains unexamined because the Vice-Chair held that no transfer could have occurred where the predecessor business was no longer a concern. This question is a fundamental component of the section 69 analysis and is one which the Vice-Chair was required to consider. The fact that it went uncommented on further demonstrates a failure by the Vice-Chair to properly apply the Board's jurisprudence.

26. Moreover, the Vice-Chair's comments distinguishing the Board's prior decisions in *Riverview* and *Thunder Bay Ambulance* are uncompelling.

27. In *Ottawa-Carleton Lifeskills Inc.* the licence holder relinquished its licence and the Ministry of Health issued an identical licence to the responding parties. That licence included certain real property. There is no doubt that the Ministry's purpose in issuing the new licence was to fill the void left by the predecessor employer. In *Riverview Manor*, the responding party purchased real property directly from the predecessor employer and applied to the Ministry for a transfer of the licence. The result is the same in both cases — the responding party is performing the same work in the same locations with the same clients as the predecessor employee [*sic*]. Given the Board's pronouncements in *Accommodex*, there is no concrete basis for these extremely similar cases to lead to different results.

28. Similarly, Vice-Chair Gedalof distinguishes the *Thunder Bay Ambulance* decision on the basis that the business in question was established "out of the ashes" of the predecessor while the businesses in *Ottawa-Carleton Lifeskills Inc.* were not. This again evidences is a misplaced focus on whether or not the predecessor was a going concern.

29. The key focus for the Board's analysis should be on the substance of the transfer, as per the Board's decision in *Accommodex*. Vice-Chair Gedalof's focus on the status of the predecessor employer is misplaced and, as such, he reaches an incorrect conclusion. As the Board has said in numerous decisions, how the transaction occurs (i.e. the

> form of the transaction) is of less significance than what the transaction accomplishes (i.e. substance of the transaction). With all respect, Vice-Chair Gedalof places undue weight on the form (i.e. the reissuing of the license by the Ministry) and fails to consider the substance of the transaction (i.e. the reassignment of all rights and obligations by the Ministry to the successor employer).
>
> 30. Moreover, the facts of the present matter underscore that the TECNO territory was not unassigned for a significant period of time. The Responding Party submitted its application for the [*sic*] within 47 calendar days. During that period, the bankruptcy and liquidation of the TECNO estate was not yet concluded. While TECNO cannot be said to have been an active business at the time, if it had been revived by outside investors, there is little doubt that section 69 of the Act would apply.

108. The applicant responded to OGL's argument that its involvement in the former TECNO territory was an expansion of its own long-standing business as follows:

> 31. In any event, the decisions relied upon by the Employer with respect to the expansion of existing operations are distinguishable in the present matter or do not otherwise assist the Employer.
>
> 32. First, it must be noted that the fact that a successor business is expanding its operation by acquiring a part of (or, indeed, all of) another business does not create a bar to the application of section 69. There is no separate test where such an expansion occurs. As per *Sofina Foods* at paragraph 77, "Fundamentally, the question always returns to whether or not there are a sufficient constellation of elements from the predecessor employer that can be found in the successor employer to conclude that a sale of a business has occurred." Ultimately, it is incumbent on the Board to recognize that one business may purchase another for the purpose of expanding its own operations. The assertion that the expansion of an existing business should frustrate bargaining rights is fundamentally inconsistent with the purpose of the *Act*. The Responding Party's assertion that a separate or modified test applies is simply inaccurate.

109. The Union noted that the Board in *Sofina Foods* held that the successor employer was not bound to that applicant's collective

agreement; however, in doing so, the Board was said to have placed no weight on the fact that the successor employer had expanded its business. Rather, the Union contended, "the Board found that the work being performed was sufficiently distinct from the work previously performed by the predecessor employer". Here, the applicant noted, OGL did not establish any significant distinction between the work performed at TECNO and the work now performed in the former TECNO territory by the responding party.

110. The applicant continued in its reply submissions to distinguish the present circumstances from those in *Woodland Store Fixtures*, *supra, Germag Construction, supra,* and *Northern Precast, supra.* Here, it argued, "the TECNO territory is fundamental to the Responding Party's ability to operate within the TECNO territory" as it "represents a series of rights and privileges necessary for the Responding Party to do business" and: "It cannot have opened its new operations absent the authorization to do so from GII".

111. The Union concluded this aspect of its reply as follows:

> 45. Ultimately, in the various "expansion" cases relied upon by the Employer, the Board is attempting to determine whether the item that passed between the purchaser and the seller was fundamental to the business, or whether it was simply a collection of useful assets. In the present matter, it is uncontested that if the Responding Party had not received the TECNO Territory, it would have been prohibited from opening the operations in question. As such, the matter is more closely parallel to the licensing cases relied upon by the Applicant.
>
> 46. Furthermore, to the extent that any of the cases cited by the Responding Party stand for the proposition that a business must be a going concern for a sale of business to be affected, those decisions are wrongly decided for the reasons set out in *Accommodex.* To the extent that any of the cases cited by the Responding Party stand for the proposition that an expansion of an existing business is a bar to the application of section 69, those decisions are wrongly decided for the reasons set out in *Sofina Foods* and in *Pavao*.

112. In the final segment of its reply submissions, the applicant returned to what it referred to as the evidence of an attempt to circumvent the Act.

113. While maintaining that there was an ample foundation for its assertion that there was a basis for inferring anti-union animus — referring to the expressed concerns of both the responding party and GII — the applicant submitted in its reply:

> 48. In any event, the Union has conceded that anti-union animus is not a factor to be considered in an application under section 69. However, as asserted in the Union's submissions at first instance, the Board must consider the purpose of the *Act* and apply the *Act* accordingly. . . .
>
> 49. The fact that the Responding Party's actions were motivated by anti-union animus is does [*sic*] not, ultimately, conclusive in a section 69 application. However, in determining whether section 69 applies to the transaction in question, it is incumbent on the Board to consider the purpose of the *Act* and of the section. The fact that GII was able to frustrate the Applicant's bargaining rights is significant because avoiding such frustration of rights is the purpose of section 69. It is not ultimately important whether the reason that GII disaffiliated TECNO was bona fide or whether it was motivated by anti-union animus. What is important is that this has occurred once and that it can occur again.
>
> 50. The Responding Party asserts that it did not attempt to facilitate TECNO's closure or disaffiliation. These assertions are beside the point. GII undertook steps to disaffiliate TECNO, essentially driving the last nail into TECNO's coffin and ending any possibility for restructuring. If the transfer of the TECNO territory is insufficient to transfer bargaining rights (as the Responding Party asserts), then GII did not only end TECNO's opportunity for restructuring; it also ended the Applicant's vested right to represent these employees. The potential for GII to do the same again ought to be a significant concern for the Board.

114. The applicant ended its reply submissions as follows:

> 54. Ultimately, the theme of the Responding Party's submissions is that they received nothing from TECNO. This is plainly untrue — they received a significant territory that included a bundle of rights, privileges and associated goodwill. The fact that this transfer was effected by GII while TECNO was in receivership is of limited importance.

> 55. The question for the Board is whether there is some concrete package of assets which constitute a business. The Responding Party asserts that the Board must determine what the Responding Party "really received" from TECNO. What it received was the TECNO Territory and all of the rights which attached to it. These rights form the core of any Goodwill operation and no Goodwill operation exists without an assignment of territory. In the context of GII's structure, significant weight must attach to these rights. The fact that the Responding Party did not also receive material assets — products, fixtures staff, — is ultimately insignificant in comparison with what they did receive.

Analysis and Decision

115. Having regard for the circumstances in which this matter arose and in which it has been litigated, the following observations (referring to what is now section 69) in the *Accomodex, supra,* analysis are particularly apposite:

> 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.

The Presence of Anti-Union Animus

116. One of the less than frequently occurring issues raised by this matter is the effect or role of the alleged anti-union animus — shared and demonstrated, the Union says, by GII, OGL, Ms. Quintyn and Ms. Nakamura.

117. In its submissions, the responding party suggested that the Union's argument rested at least in part on the proposition that the Board was required to act and to deal with "fraudulent schemes" or a "fraudulent transaction". Those assertions misrepresented the position advanced by the Union. Its argument was not premised on allegations of any party's committing fraud or acting fraudulently.

118. As noted in *Enercare, supra*, at paragraph 360, this proceeding is not susceptible to a determination framed only in terms of an unfair labour practice:

> Further, as emphasized by the Board at paragraphs 8 and 9 in its decision in *PCL Constructors Eastern Inc.,* [1995 CanLII 9915 (ON LRB)]*,* in making a determination under either subsection 1(4) or section 69, improper motive is not an issue.
>
> > 8. In sections 1(4) and 64 [now section 69] and the Board's jurisprudence, the focus is on trade union collective bargaining rights; and more specifically, on protecting a trade union's bargaining rights from being affected by corporate or commercial activities. Neither section 1(4) nor section 64 is an unfair labour practice provision. Both are concerned with the effects of business decisions or dealings on established bargaining rights, rather than with the motivation for such decisions or dealings. Sections 1(4) and 64 apply equally to commercial attempts to escape from bargaining rights and to BONA FIDE business transactions which are not improperly motivated but which nevertheless erode established bargaining rights. As the Board pointed out in *KNK Limited,* [1991] OLRB Rep. Feb. 209, section 1(4) is not a penalty provision. Instead, it operates to allow the Board to deal with business transactions from a labour relations perspective without the constraints imposed by the rules of common or commercial law. The same is true of section 64.
> >
> > 9. Accordingly, it does not matter whether or not any of the business or corporate dealings which have brought the responding parties to where they are today were improperly motivated.

119. Indeed, the applicant recognized that limitation, but nevertheless insisted on the relevance of its allegations, positing in its submissions and reiterating in its reply:

> While anti-union animus is not a factor that the Board considers in applications under section 69, it is required to consider the purpose of section 69. That purpose . . . includes preventing the use of corporate or institutional mechanisms to frustrate bargaining rights.

120. In its reply submissions, the applicant also asserted:

> 94. The evidence shows that one purpose which the GII board considered in disaffiliating TECNO is the applicant's

> rights to represent its employees. Ms. Nakamura made numerous comments behind closed doors blaming the applicant for TECNO's failure. While Ms. Nakamura's opinion is entirely counterfactual, it took root with Ms. Quintyn and with GII.

121. The applicant would have it that TECNO and Ms. Nakamura — and GII by extension — blamed the Union for TECNO's financial predicament in 2016. The Union was certified in December 2012 — barely three years before the demise of TECNO — and could not have accounted for financial difficulties said to have beset TECNO for the ten to twelve years as documented in the communications generated by Ms. Quintyn and Ms. Nakamura in 2016. Moreover, there was nothing to establish that any opinion Ms. Nakamura had about the applicant's being responsible in part for the downfall of TECNO was counterfactual. The Union could not have been responsible for any difficulties encountered by TECNO prior to its arrival, but the evidence does not permit a conclusion that it had no influence on the negative experiences of TECNO after its certification.

122. While it might be fair to assert, as the applicant did, that Ms. Nakamura "placed considerable blame on the applicant for TECNO's failure", there was no evidentiary basis for the tied submission that "anti-union animus was a factor in determining to disaffiliate Ms. Nakamura [*sic*]" or TECNO.

123. There was no evidence to establish that OGL participated in any scheme designed to subvert the applicant's bargaining rights through TECNO's disaffiliation. In particular, there is nothing in the evidence to suggest that OGL contributed to the demise of TECNO or to suggest its having done so with a view to acquiring what would become an unassigned territory.

124. Furthermore, there was no material evidence of GII's process or considerations in reaching the decision to end TECNO's affiliation and, therefore, no evidence to support the proposition that the applicant was a consideration in GII's decision to disaffiliate TECNO.

125. Mr. Gibbons' communication within GII in which he mentioned TECNO's having "a very strong union" and its "not garnering the cooperation they needed" fell a considerable distance short of constituting evidence of the GII's board considering the applicant's rights to represent employees as a factor in ending TECNO's affiliation.

126. In the result, GII's action in proceeding with disaffiliation was not shown to have been motivated by anti-union animus. Moreover, the disaffiliation of TECNO could not constitute a "sale of business" for the purposes of the Act. Without more, any objection the Union might have taken to that decision alone would have required action otherwise than under section 69.

127. Early in 2016, TECNO presented a scenario in which it had closed all operations, it had let go all employees other than the CEO, its board had resigned *en masse*, and (as demonstrated by the subsequent bankruptcy) its liabilities in the millions exceeded its assets sixfold. GII was confronted with a situation in which it had little choice other than to act, and disaffiliation was not shown to be an unwarranted reaction on its part. I note that notwithstanding — or perhaps because of — the evidence of the efforts of OGL and Ms. Quintyn to assist Ms. Nakamura and TECNO after January 16, 2016, the applicant did not attempt to establish that TECNO could have been resuscitated.

128. GII's decision to install OGL as the Goodwill in what had been the TECNO territory brings a different analysis to bear.

129. There was no evidence of any competition for what had been the TECNO territory. OGL was the lone applicant and there was no suggestion that any other possible applicant for the territory had been ignored or "scared off". Accordingly, there was no basis for a determination that the territory had been assigned to OGL rather than to any other entity as a manifestation of anti-union animus.

130. Even so, in the absence of any exculpatory evidence, the Board must conclude from what was put forward by the responding party that GII proceeded with the assignment of the territory sharing OGL's demonstrated commitment to ensuring to the fullest extent possible that its presence as the Goodwill in that territory would not expose it to the applicant or to any unionization.

131. The evidence about the assignment was limited to the testimony of Ms. Quintyn who did not participate in the decision making by the GII board and to GII documents to which Ms. Quintyn could not speak. In the result, the evidence stopped short of establishing that the territory would have been granted to OGL but for the confidence of GII and OGL that the responding party was well-positioned and had a planned course of action designed to thwart the Union and unionization should the challenge befall it.

132. There was no room for any doubt about the desire of OGL and GII to avoid the need for OGL to recognize and deal with the applicant in the territory previously entrusted to TECNO. The proposal put forward by OGL reiterated the objective of its continuing to avoid unionization. In particular, OGL set out a scheme by which, *inter alia*, it would delay resumption of operations as a Goodwill and then pick a second opening location to test the efficacy of its avoidance strategy.

133. Notwithstanding the observation in OGL's March 8, 2016 "Board Recommendation/Decision Overview" documents that OGL was "moving forward with hast [*sic*]" in part because Goodwill's competitors were "already engaging in the pursuit of donations" and "the least amount of lag time, the more the effect of competition is mitigated", OGL's first entry into the market previously reserved to TECNO was delayed for three years. I return to this consideration below.

134. It would offend labour relations common sense for OGL to deny its anti-union animus while setting out a structured "union avoidance" scheme and announcing to GII and its own board members that the union issue is "the most pressing due diligence concern and perhaps one of the biggest risks for Goodwill Industries Ontario Great Lakes moving forward". Indeed, OGL's posture in this matter was less inclined to denying the presence of that motivation than to arguing its irrelevance to the disposition of the Union's application.

135. In any event, OGL did not explain how that "biggest risk" was unrelated to its being obliged to recognize the Union and engage with it in collective bargaining for a renewal agreement.

136. The applicant argued that a purpose of section 69 is to prevent "the use of corporate or institutional mechanisms to frustrate bargaining rights" and that the Board should not allow the actions of GII in disaffiliating TECNO and transferring the territory to OGL to result in their extinguishing the applicant's rights. The responding party agreed in its submissions that section 69 exists "to protect the union's bargaining rights against employer schemes designed to subvert those bargaining rights".

137. The Union stopped short of contending that the anti-union animus demonstrated by OGL and GII would suffice to preserve its bargaining rights in respect of the territory. However, it did submit that denying GII and OGL that reward — avoiding the delivery of such a result and precluding the operation of the processes of TECNO's disaffiliation and OGL's receipt of affiliation for the territory — would be

consonant with the objective of section 69 to protect a trade union's bargaining rights in the face of business machinations over which the Union has no other control and which would frustrate those rights if allowed by the Board. There is, in my view, substantial and persuasive merit in the Union's analysis.

138. In this situation, GII had and exercised a controlling hand. It determined that TECNO was no longer to be supported and subsequently accepted OGL's application that — throughout its development and its presentation — had as a key feature the proposition that OGL could successfully beat back the Union and overpower any attempt at unionization. Simply put, given the depth and detail of the data required to be submitted by OGL in support of its application for the territory, its repeated references to "the union issue", "the union concern", and OGL's plans to continue its record of not having had "a brush with a union" spoke eloquently to the significance attached by OGL and GII to the "union issue" as a relevant factor in the awarding of affiliation and thus the former TECNO territory.

139. Had GII and OGL not shared the objective of effecting the transfer so as to avoid the impact of section 69 and the applicant's bargaining rights, one would not have expected either of them to have accorded the issue of successorship or unionization the status of "the most pressing due diligence concern and perhaps one of the biggest risks for Goodwill Industries Ontario Great Lakes moving forward"?

140. If GII and OGL had not pursued that objective, I would have expected to have heard evidence from the decision makers at OGL and at GII to the effect that the Union's characterization of the process and the motivation for it was inaccurate, unfounded, and undeserving of consideration. Without that direct evidence, there was no basis on which to ground a finding that the disposition of the territory to OGL would have proceeded in the absence of the assurances — and GII's acceptance of and reliance upon the assurances — of OGL's "ability to mount a successful response to potential labour issues" and to "overpower" any attempt at unionization.

141. In those circumstances, I conclude that — to an undefined extent, but without doubt — OGL was accepted as a worthy applicant for its professed ability to avoid the Union, supported by a plan put forward and expected to make that outcome more likely to be achieved. In the result, the responding party did not rebut the proposition that the transaction itself was one which was designed to defeat the rights of the Union and thus ran contrary to the purpose of section 69.

142. That is to say — and I so find below having considered all of the authorities and submissions advanced by these parties — a sale of business within the terms and dictates of section 69 is made out, as it must be. The identification of the disposition — the transfer of the territory from TECNO and to OGL by GII — as a sale of business for the purposes of the Act is more readily arrived at and seen to be congruent with the objective of section 69 where, as here, the transaction is tainted by the documented goal of the corporate parties to deny the Union the right to continue to represent employees in the subject business, the very rights the section was introduced to safeguard.

143. The second step in the process of disposition here was not simply the grant of a territory in which a successor might operate a business or its business. Rather, it was the grant of that singular, critical, and exclusive asset to a party with a plan for the territory that was predicated, at least in part, upon the elimination of rights the Act is framed to preserve.

OGL Acquired a Business

144. As the applicant argued, OGL acquired significant rights that provide it with a captured and well-protected market for Goodwill services and custom in an area described as accounting for thirty percent of Goodwill's scope in Canada, drawing on a population of almost ten million people in 2016.

145. OGL sought to distinguish its circumstances from those in some of the Board's decisions involving "captive markets" evidenced by the predictable movement of nursing or retirement home residents with the transfer of the business. The responding party suggested that it was unlikely that people who had frequented TECNO's operations "would shop at OGL's stores because of any previous loyalty to TECNO" and that it was "more likely" that those customers would have "moved on to other thrift stores in the area" in the period between the disaffiliation and OGL's opening its stores. There is no doubt that both observations are valid. OGL was not presented with a "captive market" comparable to those in *Riverview Manor* and *Shalom Village South* for examples; however, it was granted the position as the only entity to which a population base of ten million or more could turn as an operator with a brand the responding party described as "one of the most recognizable in the world". The operators of nursing homes and many other businesses are not afforded a scope of opportunity that comes close to matching that obtained by OGL in the former TECNO territory.

146. The applicant's position set out in the following submissions, repeated here for convenience, is incontestable:

> 33. The assignment of the TECNO Territory confers upon the Responding Party certain rights. These rights are of significant financial value. The Responding Party has an exclusive right to operate as "Goodwill" within the territory and to use the trademarks associated with the Goodwill brand within the territory. Goodwill is one of the largest and most recognizable thrift store brands worldwide. The use of the Goodwill brand in the association with GII provides a competitive advantage to the Responding Party as against other thrift brands in the area. As Ms. Quintyn noted during her testimony, the Responding Party competes with other thrift retailers for more than just customers. They also compete for grants, for real estate and for donations. Ms. Quintyn also agreed that the responding party faces a degree of competition from other retailers like Wal-Mart.
>
> 34. Moreover, the territory permits the Responding Party to operate without competition from other Goodwills. This is a significant distinction between GII and more traditional franchise operations. GII protects the territory for each of its members and as such members do not compete with each other. This includes competition for funding, for employees, for real estate and for sales. Instead, Goodwills operate solely within their territories and cooperate with other members with respect to advice, technology and best practices.

147. OGL has functioned as a Goodwill in its original territory for more than seventy years and in the former TECNO and EKL territories since 2019. In all three territories, OGL has engaged in endeavours that were intended to provide and did provide people in need with material assistance for which Goodwill is well known.

148. Fundamental to OGL's business as a Goodwill — in common with others, including TECNO before its demise — are its donation centres and thrift stores. Those generate substantial revenues and, no doubt, result in the public's association of "Goodwill" with those facilities, if not all of the good works Goodwills undertake.

149. TECNO operated a number of those centres and stores in which bargaining unit employees represented by the applicant worked. When OGL commenced business in the former TECNO territory in 2019 it did

so with a public-facing donation centre and boutique store in Newmarket, adding another centre and store in Mississauga one year later, and a third location on Dufferin Street in Toronto. There was no suggestion that the business carried out in those facilities was materially different from what would have been observed in the TECNO facilities until they were shuttered in 2016 or that the work done by TECNO's bargaining unit employees differed in any respect from that done by workers in the three GTA facilities OGL has opened. In the main, donations were and are received, sorted, displayed, and sold. To that extent, at least, there was merit in the applicant's submission that the responding party's operations in the territory were a continuation of TECNO's business as some of OGL's "businesses in the TECNO Territory [might be said to be] virtually identical to those operated by TECNO".

150. The Union has also argued that it was counterfactual to assert that OGL's "ability to operate in the TECNO Territory was not derived from TECNO in any way". TECNO's presence in the territory for several decades would almost certainly have been a factor in establishing the Goodwill name in communities in which it operated stores; however, on the case presented by the parties, the significance of any goodwill attributable to TECNO *per se* is far from measurable and might have been much less than the Union would claim.

151. There was also no suggestion in the evidence or in the material referred to in this proceeding that the public has or had any familiarity with either TECNO or OGL — by name or otherwise — as entities distinct from other Goodwills or separate from their existence as Goodwill operations. The rules enforced by GII required Goodwills to adhere to signage and other protocols that would support the applicant's submission that "any passerby would not realize that the Goodwills in the TECNO Territory are no longer operated by TECNO".

152. I would go further and note that there was no foundation in the evidence for anyone to suggest that a passerby would ever have known that a Goodwill operation in any location was a TECNO property or was now a property of OGL. Indeed, there was nothing to lead one to think that a passerby would have any reason to be curious as to who or what — other than "Goodwill" — conducted business at a location of either of the two.

153. There was also no evidence to suggest that any loyalty to the Goodwill brand was attributable to or an asset of TECNO upon its disaffiliation and bankruptcy, and certainly nothing to support the notion that TECNO transferred any of its goodwill to GII or OGL. In its

submissions, the Union referred to OGL's "making itself the face of TECNO's return". The proposition was baseless. There was no foundation for the implicit suggestion that the public had noted the departure of TECNO rather that the closing of the Goodwill operation with which some or many residents had been familiar.

154. The common theme in various letters OGL submitted to GII in support of its territory application in March 2016 was the revival or rebuilding of Goodwill in the locales of interest to the letter writers. Those supportive letters made no reference to TECNO, other than to note its demise. That Mayor Tory of Toronto and others wrote to welcome the anticipated return of Goodwill by way of OGL's application did not appear as a reflection of TECNO's legacy or a function of the writers' identification of particular attributes of OGL, but as an appreciation of the contribution a revived Goodwill operation was expected to make, in keeping with standards the umbrella organization and its constituent agencies adhered to internationally.

155. In arguing for the recognition of TECNO's subsisting goodwill, the applicant noted that OGL had acquired the lease of the property at 1224 Dundas Street East in Mississauga at which TECNO had carried on business. The Union largely ignored the fact that those premises had been occupied by several businesses in the interim and that the Goodwill signage had been removed in or about February 2016, some four years prior to OGL's taking up that location. In the absence of direct and different evidence, those facts alone suffice to refute the Union's contention that, by returning to the former Dundas Street location, OGL drew specifically on goodwill generated by TECNO.

156. Indeed, there was no evidence that specific locations were significant to the potential success of the responding party in advancing the Goodwill business in the territory. That said, OGL's leasing the specific Mississauga location approximately four years after being granted the territory adds to the assessment of its commitment to union avoidance as evidenced by its plan to proceed with a staged reopening and a design for the choice of locations of the first stores it was to operate.

157. The responding party sought to explain the protracted delay in opening its operation in its new territory with reference to several issues and without mention of its documented plan to stall first openings. A tight real estate market was a factor cited in that context; however, the Dundas Street location to which it returned the Goodwill operation in 2020 was available no fewer than four times after TECNO's demise. The

real estate situation in the GTA might have been limiting, but in light of that evidence the state of the real estate market seems to have been an excuse offered for OGL's delayed return to Mississauga without acknowledging the impact of its intentional process for union avoidance. Given that OGL's plan in 2016 called for a sequence of events in which the second location would be proximate to a former TECNO site and that the very location TECNO had leased was available as often as it was, I have difficulty accepting the evidence as put forward by the responding party. It would appear that, but for its union avoidance planning, OGL might have secured that site on one of several earlier occasions.

158. Regardless of the Union's unsubstantiated assertion of TECNO's having created a legacy of goodwill that was of benefit to OGL, I am satisfied that the business of being *the Goodwill* in that territory passed from TECNO to OGL. The territory was taken from TECNO by GII — unsurprisingly in the circumstances that came to a head in January 2016 — and granted to OGL, on its application, fewer than twenty weeks later.

159. As a result of GII's election, TECNO was barred from carrying on as a Goodwill immediately upon its disaffiliation on February 3, 2016 notwithstanding continuing efforts of Ms. Nakamura, Ms. Quintyn, and OGL devoted to advancing a restructuring plan. The disaffiliation decision was fatal. Without notice or a grace period that GII might have allowed, it denied TECNO the one asset without which its operation as a Goodwill was impossible. Conversely, the grant of affiliation transferred to OGL the singular asset it needed in order to have access to and to secure control of the entire TECNO territory as *the Goodwill* licensed to operate there to the exclusion of all other Goodwills and all others who would wish to operate as a Goodwill anywhere in that immense section of Ontario.

160. OGL argued that its "ability to operate [its three] Toronto locations was not derived from TECNO in any way". That TECNO did not bestow any rights and benefits directly on OGL is not determinative — neither did the hospitals in *Thunder Bay Ambulance*. In that case, two hospitals had provided ambulance services until the day on which the new contractor appointed by the Ambulance Services Branch of the Ministry of Health (the "Ministry of Health") took on the responsibility and began operating the business. The new contractor advertised for attendants and hired twenty-four of the thirty persons who had worked in driver and attendant positions with the hospitals. The successor received nothing directly from the two hospitals.

161. The differences between *Thunder Bay Ambulance* and this matter are limited and, in my view, insufficient to warrant a different result obtaining here.

162. The two hospitals chose to give up their positions as the parties conducting the separate services in Thunder Bay rather than agree to amalgamate their ambulance operations as proposed by the Ministry of Health. TECNO lost the right to carry on the business of being the Goodwill in its territory and did so, involuntarily. The upshot, however, was the same for it as for the hospitals. All three ceased to engage in the subject businesses.

163. In both instances, other entities had opportunities to acquire and conduct businesses previously the responsibility of the hospitals and TECNO.

164. Thunder Bay Ambulance Services Inc. obtained that right through an application to and licensing by the Ministry of Health. With the newly granted licence, and as a term of the licence, it also acquired from the Ministry of Health the use of the physical assets used in the provision of services to the community.

165. OGL was granted the right to acquire and conduct a business previously the responsibility of TECNO through an application to GII. In step with Thunder Bay Ambulance Services Inc., it acquired no physical assets from the predecessor, TECNO.

166. The successor, Thunder Bay Ambulance Services Inc., was started by an individual who had been responsible for the service as a manager at one of the hospitals. Thus, the technical competence and expertise necessary to make proper and productive use of the assets provided by the Ministry of Health was present in the applicant, in the person of the individual who created the entity subsequently licensed by the Ministry of Health to carry out the service.

167. OGL took on none of TECNO's managerial or other staff. Unlike the Thunder Bay Ambulance Service start-up, but similar to its principal, OGL had a long history of experience, expertise and success in the business of being a Goodwill. It required nothing in the way of infrastructure, systems or the like from TECNO. It did not need and did not seek the addition of expertise or even familiarity with the territory from previous employees of TECNO. It hired no one previously employed by TECNO. Obviously, it had and has utilized the capacity to

carry on the business of a Goodwill with which it was fully familiar, competent, and, quite probably, expert.

168. OGL had all of the systems and personnel required to run a Goodwill business. Whether it hired or transferred personnel for the Newmarket or Dundas Street operations was not disclosed, but that was also unimportant to the issue at hand. The applicant's entitlement to invoke its bargaining rights is unaffected by the departure, absence or unavailability of the workers denied entry to the TECNO facilities on January 17, 2016. In any event, there was no dispute that employees in the stores operated by OGL in the former TECNO territory perform work and jobs previously done by bargaining unit employees of TECNO.

169. OLG had no need to acquire any site TECNO occupied prior to its disaffiliation or to engage any personnel to work in the donation centres, stores or boutique as its plan was to delay opening any facility for at least twelve months following the approval of its application by GII.

170. Nevertheless, OGL was entitled to start in business as the Goodwill in the territory formerly served by TECNO as early as June 2016. Accordingly, the business was OGL's from that date forward; the "sale of business" for the purposes of the Act preceded OGL's opening in Newmarket by three years.

171. No physical assets moved from TECNO to OGL, but I am satisfied that their absence is irrelevant on the facts of this matter. The responding party's observation that no TECNO assets were transferred to it is correct — in part because OGL needed no assets from any source for a significant period after it acquired the right to carry on business as the Goodwill in the territory. More importantly, the singular asset that was relevant to the responding party's ability to carry on business and without which all other assets — including OGL's experience and expertise — were of no use or consequence was the grant or the licence from GII.

172. In the grant of territory by GII, the responding party had everything essential to resume the operation of the Goodwill in the territory as soon as it saw fit to do so and secured sites at which to receive and sell donated goods, as OGL did in 2019 and 2020.

173. In *Accomodex,* the Board stated: "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."[6]

174. Similarly, one might observe that a coffee shop proprietor could not be in business as a Starbucks operation without an appointment by Starbucks corporate. The operator of a Starbucks location is not in business simply as a coffee shop. Being in business as a Starbucks, the operator is supported and elevated in its ability to attract custom by the substantial brand recognition and market position established by the international Starbucks enterprise, perhaps little affected or influenced by any independent efforts of the local operator.

175. And so too here, the business under consideration is that of a Goodwill and not merely that of an undifferentiated thrift shop. The operator of the business at issue has the exclusive right to carry on as the Goodwill presence in any of hundreds of communities in a very large portion of Ontario. Without the grant of its affiliation or its territory appointment by GII, OGL could not be in business as the Goodwill operator anywhere in what had been the TECNO territory. In abstract theory, it might have been a thrift store there (subject to restrictions or prohibitions under the terms of its underlying agreement with GII as the Goodwill in Ontario Great Lakes), but without GII's express authorization it could not open as a Goodwill in the former TECNO territory or anywhere in the world beyond the Ontario Great Lakes territory it had for years before 2016 or the EKL territory it gained by merger in 2019.

176. While OGL made reference to competition at the hands of Value Village and Salvation Army thrift stores and donation centres, there was nothing presented to equate those operations with an OGL or a TECNO — Goodwills with the exclusive right to be *the Goodwill* in their assigned territories, obliged as are all to face the competition of other brands, but fully insulated by GII against incursions by any other Goodwills.

177. Accordingly, in words used by the Board in *Accomodex,* OGL acquired TECNO's "business capacity"[7] with its being assigned the territory in June 2016. The responding party was thereafter entitled to all of the rights, privileges, and opportunities afforded a Goodwill in the territory that TECNO had enjoyed until the moment of its disaffiliation by GII on February 3, 2016.

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[6] At para. 7.

[7] At para. 45.

178. The language used in section 69 has been commented upon many times and it is trite to observe that the inclusion of "and any other manner of disposition" as the expansive language defining — but clearly not limiting — the definition of "sells", "sold" and "sale" affords an affected bargaining agent and the Board great scope for an examination and assessment of salient events. Simply put, GII disposed of the business capacity that had been TECNO's by granting the territory to OGL with a view to re-establishing the brand that had been entrusted to TECNO there and staunching the outflow of business to Goodwill's competitors as a consequence of TECNO's demise.

179. The disposition was of the territory formerly controlled by and exclusive to TECNO, and the ability to carry on business as *the Goodwill* in that territory. That the grant of the territory was predicated at least in part on the planned for elimination of the applicant's bargaining rights renders the disposition more obviously the proper subject matter for attention and determination under section 69.

180. The only material difference between OGL's situation and that considered by the Board in *Thunder Bay Ambulance* is that, as an essential feature of the licence it issued, the Ministry of Health provided the successor employer with the physical assets that it was to use in the ambulance business. By acquiring the licence on application to the Ministry of Health, the successor was able to take up and continue the business previously conducted by the hospitals with no hiatus and no disruption of the ambulance service for residents and hospitals in Thunder Bay. So too here, by successfully applying to GII for the exclusive right to be the Goodwill in what had been the TECNO territory, OGL acquired the business of being that Goodwill.

181. Conclusions reached by the Board in *Thunder Bay Ambulance* apply to these facts without any alteration of any importance:

> 16. In a strict commercial or corporate sense, it is clear that there has been no transfer between the predecessor hospitals and the respondent as would constitute a sale. Indeed, *the predecessors had no assets*, inventories (other than sheets, towels and other toiletries), accounts receivable or customer lists *which could have been transferred and they were prohibited by law from transferring their licenses to operate*. The predecessors depended upon the maintenance of their relationship with the Ministry and not on customer goodwill. As discussed in para. 13 herein however, the Board must look beyond the

form of the transaction in determining if there has been a "sale of a business" within the meaning of Section 55 of the Act. *Notwithstanding the absence of contact between the hospitals and the Thunder Bay Ambulance Service, and notwithstanding the lack of consideration given and received between the two, the Board is satisfied that the essential elements of the predecessors' businesses were transferred to Thunder Bay Ambulance Services Inc. so as to constitute the sale of a business within the meaning of Section 55 of the Act.*

17. In the view of the Board, *the two essential elements of the predecessors' businesses were transferred to the alleged successor. Firstly, the exclusive use of the assets owned by the Ministry of Health was transferred.* Although the same licence or piece of paper was not transferred between the two*, the Board has no hesitation in finding <u>that the exclusive entitlement, as embodied in a Ministry of Health Licence, was transferred</u>.* Secondly, the predecessors' management and organization in the person of Mr. Rudyke, and the predecessors' employees were also transferred. The predecessors' ambulance operations were largely managerial and organizational in nature and it follows that the transfer of managerial skills, albeit through a request for proposal system and competition, and the continuation of identical job functions filled by the same persons as were employed by the predecessors must weigh heavily with the Board.

18. *Having regard to the transfer of the exclusive right to use the Ministry's assets, to the transfer of managerial skills and to the uninterrupted continuation of the identical job functions, the Board must conclude that the Ministry of Health, the entity charged with maintaining an ambulance service in the Municipality of Thunder Bay, did not facilitate the establishment of a similar or parallel business but rather it served as the necessary link in the transfer of the predecessors' businesses to the successor.* It is the finding of the Board, therefore, that a sale of a business within the meaning of section 55 has occurred and that the bargaining rights of the union, which were established in respect of the predecessors' businesses, should be preserved. The applicant trade union was entitled to give notice to the predecessors under section 45 of the Act and accordingly, the Board declares, pursuant to the provisions of section 53 of the Act that the trade union is entitled to give the respondent a written notice of its desire to bargain with a

> view to making a renewal collective agreement. (emphasis added)

182. The findings in *Thunder Bay Ambulance* are mirrored in what was presented in this matter. The Board there noted that "the predecessors had no assets"; neither did TECNO at the time of the disposition. The predecessors "were prohibited by law from transferring their licenses to operate; OGL could not operate in a territory as a Goodwill without affiliation — either directly as it achieved with respect to the former TECNO territory or by merger as it did with EKL. The "essential elements of the predecessors' businesses were transferred to Thunder Bay Ambulance Services Inc. so as to constitute the sale of a business within the meaning of section 55 of the Act" and the first of those essential elements was "the exclusive use of the assets owned by the Ministry of Health". The Board held that, although the hospitals' licences were not transferred as the successor was issued its own licence, "the exclusive entitlement, as embodied in a Ministry of Health Licence, was transferred". That exclusive entitlement, essential to the successor's ability to succeed the hospitals, finds its mate here in the grant of the territory by GII, transferring to OGL the exclusive right to conduct business as the Goodwill in the former TECNO territory.

183. The Board in *Thunder Bay Ambulance* identified "the transfer of the exclusive right to use the Ministry's assets", "the transfer of managerial skills" and "the uninterrupted continuation of the identical job functions" in finding that the Ministry of Health "served as the necessary link in the transfer of the predecessors' businesses to the successor". As is the case with GII's grant of the territory to OGL, the licence issued by the Ministry of Health to the successor was the truly essential element as the managerial skills of its founder and the availability of many of the attendants to work for the successor were of no use to Thunder Bay Ambulance Services Inc. if it were not granted the licence to operate the service with access to the Ministry's assets.

184. The cases make it clear that the predecessor need not be a party to or the source of that which constitutes the business disposed of in the section 69 sale. Rather, the business or the means of entering into and carrying on the business can be provided to the successor by a third party. That is at the heart of the decision in *Thunder Bay Ambulance*. The Ministry of Health granted the licence and owned all of the operating assets used by the successor in carrying on the business of providing the ambulance service. The predecessors transferred nothing to Thunder Bay Ambulance Services Inc.

185. The Board in *Accomodex* commented on the viability of "sale of business" applications where the business was transferred through the interposition of receivers rather than directly from predecessor to successor.[8] Moreover, the point was stated succinctly in *Metropolitan Parking, supra*: "The manner of disposition is irrelevant so long as a transfer has, in fact, taken place. The interposition of a third party, acting as an agent or conduit, does not affect the result".[9]

186. The Union argued from *Thunder Bay Ambulance* that "the Board should have no difficulty concluding that GII served as a necessary 'link' in the transfer, notwithstanding the fact that it is a third-party actor". I agree. GII was not only the "necessary link" in this instance, it was entirely responsible for the events that unfolded following the developments at TENCO on the night of January 15, 2016. Once GII disaffiliated TECNO, the territory reverted to GII. It then controlled and delivered the "essential element" of the predecessor's business — the grant of the territory without which neither TECNO nor OGL could conduct business as a Goodwill — just as the Ministry of Health selected Thunder Bay Ambulance Services Inc. as the party to be licensed and to succeed the hospitals in providing service to that community.

187. Accordingly, I agree with the applicant's submission: it is not an answer to the Union that nothing passed from TECNO as its assets had been disposed of (and not to the responding party) or that the ability of the responding party to conduct the business of being the Goodwill in the territory was granted by GII and not received from TECNO. Rather the disposition of the business previously conducted by TECNO was a two-step process: first, with apparent good reason, GII disaffiliated TECNO and, secondly, GII granted OGL the entire territory that had been TECNO's, together, of course, with all of the established benefits that permitted OGL to develop the business on its schedule free from any intervening competition at the hands of another Goodwill.

188. GII's grant of the territory provided OGL all that it needed to take on and take over the business previously conducted by TECNO. That grant was the *sine qua non* for OGL's right to be *the Goodwill* in the former TECNO territory. The affiliation grant is essential to the business. It is integral. No entity may function as a Goodwill without that asset. Other than premises from which to conduct the bricks-and-mortar public-facing aspect of its business as the Goodwill, OGL required

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[8] See para. 73 and the reference to *Hughes Boat Works Inc.*, [1977] OLRB Rep. Dec. 815, at para. 75.

[9] At para. 28.

nothing in order to resume the business TECNO had engaged in for decades.

189. OGL might have had access to the TECNO territory without the approval or involvement of GII by way of merger — just as it acquired access to the EKL territory in 2019. However, a merger with TECNO would have required the continued recognition of the Union — just as OGL has been obliged to deal with Unifor as the bargaining agent of some of EKL's employees. Furthermore, the acquisition of access to the TECNO territory by merger would have required OGL to come to terms with the management of TECNO's indebtedness and longstanding financial difficulties. The closing words in evidence were Ms. Quintyn's unquestionably valid explanation that a merger with TECNO was a risk that OGL, as a charity, could not contemplate.

190. In addition to the analysis in *Thunder Bay Ambulance* — in my view, a most relevant decision sufficient to ground the disposition of this application — the parties also referred to "tavern cases", *Riverview Manor* (singled out by the Board in the *Accomodex* commentary), and other nursing or long-term care homes wherein licensing was recognized as a significant or essential element of the disposition found to constitute a sale of business for the purposes of the Act.

191. The Board's ruling in *Vivace Tavern, supra*, was of some assistance here. While the Board characterized the fact that the parties' commercial agreement "purports to convey to the respondent . . . any right title or interest of the vendor in existing liquor licenses for the named tavern" to be of "even greater significance" than the fact that chattels which would allow the uninterrupted operation of the business were to be transferred, the facts were significantly different from those presented here. All of the commonplace assets of a tavern business passed to the successor; staff were retained; and the purchaser operated the business for five weeks before closing it for one week to re-open as the House of Lancaster, featuring so-called adult entertainment and partially clad dancer-entertainers serving food and drinks when not performing. The Board noted:

> The respondent attached great importance to the licenses, particularly to the adult entertainment license, since no new entertainment licenses are being issued in Metropolitan Toronto and the respondent was dependant [*sic*] upon the predecessor's previously acquired rights in having an application for such a license accepted. The transfer of the two liquor licenses avoided the delay of the normal waiting period for new licenses and allowed continuity of the

> business without interruption. The right to use the name Hollywood Tavern meant that the respondent could continue the business "as is" without risking tarnishing the name House of Lancaster until he was ready to carry on the style of business he believes that name to represent. In addition, the respondent continued the same food operation with the same concessionaires, an operation essential to the dining lounge license. On these facts and all of the facts set out herein, the Board concludes that there has been a sale of a business . . . to the respondent within the meaning of section 63 of the Act and, therefore, the respondent is the successor employer within the meaning of that section.[10]

192. The licenses in *Vivace Tavern* might have been of critical importance in attracting the purchaser to the transaction and of greater significance to that purchaser than other elements of the transaction, but, unlike the facts presented by OGL and GII, those licenses alone were not what constituted the business transferred to the purchaser. The grant by GII had far greater significance in that it did not merely identify what had attracted OGL's interest or affect the time at which OGL could become *the Goodwill* for the former TECNO territory, it was the single asset or attribute without which OGL could never achieve that status. The purchaser before the Board in *Vivace Tavern* might have had no interest in the acquisition if the adult entertainment licence or the liquor licences had not been available for inclusion in the bundle of assets the parties sought to convey, but the facts that it also took up virtually all other elements of an ongoing business and continued that business distinguish *Vivace Tavern* from the facts in this matter.

193. Similarly, in *Krush, supra*, another of the "tavern cases", the Board identified as "the most critical elements of the business . . . the premises and the liquor license, both of which passed to [the successor] either directly or indirectly as a result of the sale". The Board noted that purchaser

> suggested that the licence was unimportant to him since he could simply have applied for a new licence. However, he conceded that transferring the licence previously issued for the same location was faster, and it is apparent from the sequence of events, including the amendment to the purchase and sale agreement and the dispatch with which he applied for the liquor

[10] At para. 13.

> licence transfer after the sale closing, that the licence played a significant role in the transaction.[11]

194. Again, the licence's "playing a significant role" in characterizing a transaction differs markedly from its being the transaction, the singular matter disposed of in circumstances argued to evidence a "sale of business" within the meaning attributed to those words by section 69 and the jurisprudence. GII's grant of the territory to OGL does that and more. The decision by GII permitted OGL exclusivity in the former TECNO territory and allowed OGL to take as long as it wished — up to five years under GII's terms — to develop the territory.

195. The successors in the tavern cases had the option of applying independently of the predecessors or the subsisting licensing to obtain liquor licences outside the transaction. Here the licence or the authority over the territory could be obtained only from GII and was itself the entirety of the transaction.

196. In my view, the nursing home cases were more directly relevant to the disposition of this matter. They dealt with licensing that was without question the focal point of the transactions, similar in many respects to the essential Ministry of Health licence in *Thunder Bay Ambulance* and the singular grant of territory by GII to OGL.

197. In *Riverview Manor*, the sale of the nursing home property was contingent of the Ministry of Health's approval of a transfer of the long-term care licence. The Board found that a sale of business had occurred. Here, as noted, the Union relied on the following comments at paragraph 38 of the decision:

> Riverview obtained two major assets from Balmoral, the licence and the land. The transfer of the licence is particularly significant, because it led most Balmoral residents to move to Riverview Manor. . . *In this sense, the license is the essence of the businesses.* (emphasis added)

The words quoted by the Union were preceded in the paragraph with the following:

> As to customers, the vast majority of the former residents of Balmoral Lodge are now residing at Riverview Manor. That is not surprising. An employer who gives up a licence or government contract, voluntarily or otherwise, can no

[11] At para. 17.

> longer service its former clientele. *Along with the licence or contract, the successor often receives a captive market that is free of competition, not only from the predecessor, but also from others who lack the necessary authorization to carry on business.* (emphasis added)

198. As the Board observed in *Accomodex*,[12] the licence was the critical element in *Riverview Manor*: "In that highly-regulated business, the license was viewed by the Board in that case as the key asset". Here TECNO and OGL were highly regulated by their obligatory adherence to the requirements established by GII as conditions of their being granted the status of Goodwills.

199. In *Caressant Care, supra,* the Board, having received evidence about the process of "transferring" nursing home licenses (by the Ministry's issuance of fresh authorities rather than the operators' "handing over" their licences to successors), had this to say about *Riverview Manor*:

> 16. In the *Riverview Manor* case, *supra,* the operator of Balmoral Nursing Home in Peterborough also was in financial trouble and having difficulty meeting the standards of the Ministry, and ultimately "sold" its licence and some vacant land it held in Peterborough to Daynes Health Care Ltd., an established Nursing Home operator located elsewhere in the Province. Daynes then built a new facility on the land it acquired, and used it to operate the beds formerly under licence to Balmoral. The Board, relying principally on the "transfer" of the licence, found that a "sale" of Balmoral's "business" had taken place.
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> . . .
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> 19. While it is true that the same kind of detailed evidence of the Ministry was not placed before the Board in *Riverview,* there is nothing in that decision which now suggests that the Board in any way misconceived the nature of the transaction before it. The Board, in finding a "sale of a business" in that decision appears to have focussed on the importance of the *licence,* owing to the limited availability of such licences in a given geographic area, and the evidence before the Board in this case only tends to confirm that thinking.

[12] At para. 70.

200. In my view, even more so than in the tavern and long-term care homes cases, the grant or licence issued by GII is the essence of the business of the Goodwill in its territory. Unlike the licences in the tavern cases and the long-term care home cases, the licence granted OGL by GII bars all others — Goodwills and thrift shop operators alike — who would compete with OGL as a Goodwill. The GII grant or licence does not impede anyone's competing in the territory as a thrift store, but it does preclude any entity that would wish to operate and compete with OGL as a Goodwill.

201. OGL acquired access to the entire population of its new territory without competition from its predecessor or any ~~other~~ entity that would aspire to the status of a Goodwill as all those other entities lack GII's "necessary authorization to carry on business" as a Goodwill in that territory. That TECNO had the licence taken away is immaterial to a determination of the status and obligations of OGL. It received the exclusive right to conduct the business which was denied TECNO by the disaffiliation.

202. In the result, I am satisfied by the jurisprudence — particularly the Board's acceptance of licences as the essence of the nursing home business, an essential element supporting the finding of a sale in *Thunder Bay Ambulance*, and of significance in the tavern cases — that the unique licence taken from TECNO and granted to OGL is sufficient to ground a finding of a disposition and sale of business for the purposes of section 69.

203. If OGL were not restricted by GII's rules and if it had been free to move into the territory upon TECNO's disaffiliation and bankruptcy — that is without applying to GII for and being granted the territory — there would have been no disposition and no sale of business for the purposes of section 69. However, the scenario presented by the hypothetical differs fundamentally from the history in evidence as in those circumstances, OGL would not have obtained what TECNO had, a licence that afforded the holder exclusivity and the right to be the only Goodwill allowed to operate as such anywhere in the territory. In the hypothetical, OGL would be exposed to all manner of competition and would not have received the exclusive right to carry on the business that had been TECNO's to the date of its disaffiliation.

The Irrelevance of TECNO's Defunct Status

204. The responding party made the submission that it is trite to say that section 69 of the Act "exists . . . to preserve a union's bargaining

rights in respect of a particular business *when that business is sold but continues to* operate".[13] The words "but continues to operate" are potentially misleading. If the business is never conducted after a sale, an affected union would have no interest in pursuing the application of section 69 as the business would employ no one the union might claim to represent. Here OLG's delay in opening until 2019 ensured that there were likely to be no individuals immediately available to be hired into what might be seen to be bargaining unit positions.

205. The cases are clear in establishing that a business might be shuttered for a period of time with no adverse effect on bargaining rights attached to the business. When business resumes and employees who might be represented by the bargaining agent are engaged, the union's rights are again relevant and might be asserted as the applicant did here. The passage of time alone will not terminate a union's bargaining rights. The predecessor business need not be a "going concern" and need not be in operation at the time of the event put forward or identified as constituting a sale of business within the meaning of the Act — here, in June 2016.

206. TECNO was not a going concern as a Goodwill after its disaffiliation. TECNO had no assets by June 2016 when GII approved OGL's application for the territory. None of the assets TECNO had controlled was transferred to OGL. Its fundamental and essential asset, the license argued for by the applicant, was taken away — not by OGL but by GII. The license alone, however, afforded OGL the opportunity and the exclusive right to conduct business as a Goodwill — to be *the Goodwill* — in the territory granted it by GII. It was able to be that Goodwill and to insist on the exclusion of all others as early as June 2016.

207. In my view, the analysis in *Accomodex* is unassailable and constitutes a sufficient to answer to any argument based on the need for evidence of a "going concern" to engage section 69. The Board's review repays an extensive excerpt:

> 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

[13] The emphasis is mine and, as noted earlier, the responding party's submission added fairly and correctly: "and [section 69 exists] to protect the union's bargaining rights against employer schemes designed to subvert those bargaining rights."

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) 1979 CanLII 1853 (ON SC), 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.

208. The Board's analysis with its focus and commentary on the absence of any reference in section 69 to a requirement of a "going concern" has subsisted now for more than a quarter century. Nevertheless, the Legislature has not "corrected" the Board by injecting language to restrict the application of section 69 to dispositions of active

businesses, operating and identifiable as "going concerns". By its inaction on that front — while making many amendments of the Act — the Legislature must be taken to have confirmed that it considers the Board to have correctly captured its intent on that point in section 69.

209. In *Accomodex*, the hotel, then under the name "Skyline Triumph Hotel", had been closed to the public from July 19, 1991, subjected to a receivership, and re-opened as the "Howard Johnson Plaza North York" on December 1, 1992. Notwithstanding the break in continuity and name change, the Board determined that the transaction by which the new owners of the hotel had acquired "the land, premises, trade fixtures, etc. formerly used by the Triumph" was a sale of business for the purposes of the Act.[14]

210. Similarly, in *Long Lake Forest Products, supra*, the Board was asked to take into account "the significant hiatus, a period in excess of seven years between the closure of the mill, its subsequent sale and current revival".[15] In response to the submission that what had been purchased was not a "going concern" and that the long period between the closure and sale was significant, the Board adopted the statements at paragraphs 72 through 74 in *Accomodex*.[16]

211. The Board in *Long Lake Forest Products* also emphasized the statement in *New Dominion Stores* (cited in *Acccomodex*, at paragraph 75 and also reproduced above): "There is no temporal bright line beyond which bargaining rights will not transfer".[17] The Board then concluded that the transaction in question constituted a sale of a business within the meaning of what is now section 69 of the Act and declared that "the union continues to be the bargaining agent in respect of the Longlac sawmill operations. . . ."[18]

212. I decline to follow the decision in *Ottawa-Carleton Lifeskills* to the extent that it was at odds with the analysis *Accomodex* adopted above, particularly as the parties in that matter might be taken to have sought a determination consistent with a notional pre-condition requiring the subsistence of a "going concern" for the application of

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[14] At para. 82.

[15] At para. 43.

[16] At para. 49.

[17] At para. 50.

[18] At para. 56.

section 69. Moreover, the Board's finding in *Ottawa-Carleton Lifeskills* that the Ministry's need to locate new contractors qualified to look after residents — and not Ministry's authorization to carry on the business — was determinative is distinguishing. GII did not need to find a successor for TECNO as evidenced by its forbearance in respect of OGL's extended delay in servicing the fourth largest Goodwill territory. Furthermore, the determination in *Ottawa-Carleton Lifeskills* that the successor's business had not "arisen from the ashes of the predecessor" is also problematic. The hospitals in *Thunder Bay Ambulance* continued to operate, with the result that Thunder Bay Ambulance Services Inc. might have succeeded to a "going concern", but it did not arise from an entity reduced to ashes.

213. TECNO ceased to be a "going concern" four or five months before GII assigned the territory to OGL; however, I adopt the analysis in *Acccomodex* and attach no significance to the hiatus between the disaffiliation of TECNO and GII's granting the territory to OGL, and no significance to the delay in OGL's emergence in Newmarket in June 2019. This was not a situation in which the responding party might argue that the hiatus was a function of TECNO's being absent from the marketplace for three years before OGL acquired the territory. Rather, OGL applied for and was granted the territory within five months of TECNO's shutting down in January 2016. Moreover, the delay after June 2016 was controlled by OGL and, in part, an element of a scheme — to "expand into the territory in a careful and timely manner" — devised to avoid the Union and the succession OGL described as "perhaps one of the biggest risks . . . going forward" with its acquisition of the territory.

Expansion of OGL's Business

214. As for the responding party's argument that it was simply expanding its business by seeking and achieving GII's grant of the territory, I observe that it had ample opportunity and complete freedom to expand its business by entering into municipalities in its original territory where it had yet to set up a donation centre, store or other facility. However, in order to expand its business in the former TECNO territory it was obliged either (i) to secure a merger with the territory holder, TECNO, before its disaffiliation, or (ii) to secure GII's authorization to take over the territory, the disposition at issue in this litigation. Otherwise, and simply put, OGL had no business in that territory, could have no business in that territory, and, therefore, had no opportunity to expand in that territory.

215. OGL's choosing to characterize its acquisition of the right to be *the Goodwill* in the former TECNO territory as an expansion of its

business was not persuasive. Its belief or impression is of no consequence in the determination of this application. The responding party would not risk a merger with a stricken entity on the brink of bankruptcy. OGL was barred from entry into the territory as a Goodwill and gained that from GII — as the only means of entering the market and, in my view, as a consequence of a sale of business within the meaning of the Act.

216. In this context I adopt the course followed by the Board in *Pavao Meats, supra*. Dealing with the submission that there was no sale of business but merely an expansion of an existing business, the Board in *Pavao Meats*[19] wrote:

> I prefer the approach taken in *Accommodex.* In particular, on the facts before me, I find the focus by Pavao on the fact that it was "expanding its business", as in *Woodland*, to be unhelpful. It is obvious that a business can expand its business by buying another business. Therefore, the question is not whether Pavao was expanding its business, but whether it bought a business in order to do so. There is no doubt, also, that one can buy a business through a purchase of assets. Again, the question is not whether the assets were purchased or whether the assets were idle, but whether those assets together constitute a part of a business.

217. Here, OGL had no ability to expand its business into the former TECNO territory except by acquiring the right as a result of GII's disposition of the territory to OGL. OGL's acquisition of the territory from GII — succeeding TECNO as the Goodwill in the territory — was the disposition of the essential business capacity without which OGL had no business or opportunity in the territory.

DISPOSITION

218. For all of the foregoing reasons, I find that there has been a sale of business within the meaning of section 69 of the Act and the application is granted.

219. Accordingly, as requested by the applicant, the Board declares as follows: there has been a sale of business within the meaning of section 69 of the Act; Goodwill Industries Ontario Great Lakes is bound to the applicant's collective agreement; Goodwill Industries Ontario

[19] At para. 2.

Great Lakes has a duty to bargain in good faith with the applicant; and copies of this decision are to be posted in prominent locations in the responding party's premises within the former TECNO territory so as to ensure that they will be accessible to OGL's employees in those locations.

"Derek L. Rogers"
for the Board