ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2155-13-R**

Labourers' International Union of North America, Ontario Provincial District Council, Applicant v **Pomerleau Ontario Inc.**, Borea Construction, and D.H. Blattner & Sons Inc./Blattner Energy Inc., Responding Parties

BEFORE: David A. McKee, Vice-Chair

APPEARANCES: L.A. Richmond and B. MacKinnon appearing for the applicant; James McKeown and Erich Schafer appearing for the responding party Pomerleau Ontario Inc.; Greg McGinnis and Mehdi Hassan appearing for the responding party Borea Construction; Jeremy Schwartz appearing for the responding party D.H. Blattner & Sons Inc./Blattner Energy Inc.

DECISION OF THE BOARD: May 1, 2015

1. This is an application brought pursuant to the provisions of subsection 1(4) and section 69 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The Labourers' International Union of North America, Ontario Provincial District Council (the "Union") seeks an order or declaration that the responding parties are one employer for the purposes of the Act or that there has been a sale of a business that binds Borea Construction to the Union's collective agreements.

2. Borea is a company whose sole business is the construction of wind farms in Canada. It was originally created by D. H. Blattner & Sons Inc. ("Blattner") and Genivar Construction Inc. ("Genivar"). In 2007 Genivar sold its interest in Borea to Pomerleau Eolian Inc. ("Pomerleau"). Neither Genivar nor Blattner is bound to any collective agreement in Ontario. Pomerleau (operating as Pomerleau Ontario Inc.) is bound to collective agreements with the Union in Ontario. The Union seeks an order or declaration that binds Borea (but not Genivar or, ultimately, Blattner) to the same collective agreements.

3. All of these businesses use more than one corporate entity to carry on their business, and each group of companies has some similar elements in its names. The parties treated each group of corporations as a conglomerate entity, and so I have not distinguished among them, nor tried to recite the precise corporate entity involved in certain transactions.

Blattner

4. Blattner is a 107-year-old company based in Avon, Minnesota. It has a history of shifting its business entirely from one field to another as opportunities present themselves. According to Doug Fredrickson, Vice-President and Director of Operations for Blattner, it constructed many interstate highways in the 1950s, moved to dams and heavy civil projects in the 1960s, then to bridges and concrete structural work in the 1970s, and added mining to its portfolio in the 1980s. It also operates one regional railway. In the 1990s it turned to the construction of wind farms. It built its first wind farm, a 100 MW farm, for Enron in Minnesota. After that project, it steadily withdrew from its other construction activities and concentrated exclusively on wind farm construction, although Blattner also performs work on solar farms, and high voltage transformers and substations not connected with wind or solar farms.

5. Blattner constructs wind farms. It does not develop them. The public incentive program for wind energy in the United States is based on a generous tax credit on the profits from wind energy projects. These credits cannot be carried forward beyond the year in which they are earned. Hence the developer needs to have a relatively robust cash flow each year from its other operations to be able to take advantage of the credits in the year in which the wind farm shows a profit. That is the only way a wind farm is profitable. A construction company is not a good vehicle to develop and own the wind farm given its more volatile profit and cash flow from year to year. Blattner has cultivated relationships with a number of developer clients in the United States, in particular one called Next Era, and works closely with those developers in creating Blattner's bid for its work.

6. Wind farms are a specialized area of construction. On the evidence there are only a few companies (all of them from the United States except for Borea) who perform the work. The work is not unique: it applies engineering and construction principles that are common to all construction, particularly electrical work. However, it is sufficiently specialized that some degree of familiarity with the work

beyond general construction is a significant competitive advantage. One feature of Blattner's business model is that it does not rely on subcontractors. It performs all of the work associated with the construction of a wind farm with its own forces. It believes that, when it is performing similar work on a regular and repetitive basis, greater efficiencies and economies are achieved in that way.

7. In 2004, Blattner was looking for ways to expand beyond the U.S. market. Congressional approval for the tax credits that made the industry viable, suffered at least one hiatus and might suffer another. The total freeze of a company's business for one or more years can be very difficult to survive. Mr. Fredrickson heard of a 200 MW project for the construction of a wind farm in the Gaspe Region of Quebec. The developer was named Skypower. Blattner's interest was engaged. However, Blattner concluded that it could not function on its own in the Quebec market. For "cultural and linguistic reasons" it was necessary to carry on business in conjunction with a local construction company. In 2004, Mr. Fredrickson and others were attending an industry conference (American Wind Energy Association) in Quebec City and entered into discussions with representatives of the developer Skypower. They in turn introduced Mr. Fredrickson to representatives of Genivar, a Quebec-based engineering and construction company, both at the conference and afterwards.

Genivar

8. Genivar was a large Quebec-based construction company that operated primarily in the province of Quebec. It was a large company and operated in two divisions: the Building division and the Engineering division. The Building division accounted for two thirds of the volume of its work in 2000; a year in which the Engineering division earned a total of 150 million dollars in revenue. The Engineering division had no experience in constructing a wind farm, but it was hoping to expand into that area of work. It had worked on a few Co-Gen projects and other more conventional construction for Hydro Quebec.

9. Genivar had received an RFP from Skypower with respect to the project in Gaspe, and submitted a bid. It did not succeed in that bid, according to Marc Richard, because the proposed price was too high. Genivar then concluded that it needed to link up with another business that had the expertise it was missing. To that end, Marc Richard, as Vice-President of Construction, met with three American companies that had expressed an interest in working in Quebec:

Blattner, TIC and Mortenson. He chose Blattner as the business that Genivar wished to work with.

10. According to Mr. Fredrickson, the first discussions were with respect to an arrangement whereby Blattner would supply its expertise in engineering and bidding to Genivar in exchange for a percentage of the profits. Blattner was not very interested in that sort of arrangement, not the least because it involved handing over its own expertise to a potential competitor. Eventually the two agreed on a straightforward partnership or Joint Venture between the two companies. Borea was the ultimate corporate vehicle selected for this business.

Borea under Blattner and Genivar

11. The first agreement between Blattner and Genivar was signed in May of 2004 and finalized in a document dated October 5, 2004. The first agreement focused on specific projects. The concept of the Joint Venture was not that Genivar and Blattner would join their separate forces to work on these projects. The "vision" of Mr. Fredrickson (expressed in an email to Blattner executives on September 8, 2004, was that "Genivar/Blattner will develop a profitable company that lead[s] in the development of the wind farm market in Eastern Canada". That company was ultimately Borea. The October 5, 2004 Joint Venture agreement identified eight projects in Quebec on which Borea would bid at first. Pursuant to that agreement, bids were submitted, and were successful in four of the eight. It also submitted bids to Boralex and the Northland, both developers, for projects on wind farms at Jardin d'Ete Ouest and Mont Laurier, and another in November to Epcor (G E West Energy) for the Kingsbridge project in Ontario. The latter bid was rejected as too high, but the first two proceeded.

12. The strengths that the two parties brought to the enterprise were different. Blattner had expertise in bidding and the experience of having built a large number of these projects in the United States. One of the skills that Blattner possessed was the formulation of the bid itself. According to Jeremy Waker, Director of Wind and President of Blattner, Next Era, and to a lesser extent other developers, have particular ways in which they wish to see a bid structured and it is virtually impossible to submit a coherent and successful bid without training on that system. That particular bit of knowledge, along with the general ability to properly assess and price any wind farm project was a key part of the expertise that Blattner provided. Genivar brought the expertise of an engineering and construction company

that was able to marshal the work forces in Quebec and some other less specific bidding and construction experience.

13. Mr. Fredrickson said that Blattner did not intend to do all of the work for 50% of the profits. Indeed, the idea from the beginning was to create a "self-supporting entity" separate from Blattner's U.S. operations. This was initially not achieved and not clearly achievable. On April 20, 2005, Mr. Fredrickson threatened to dissolve the Joint Venture unless things changed. There were amendments to the Joint Venture agreement dated May 27, 2005 and June 8, 2005 that, in Mr. Fredrickson's view, reduced Blattner's participation to a satisfactory level. As will be seen, it still invested a great deal of time and personnel resources in establishing Borea as a viable commercial entity.

14. Genivar's initial participation in the company was to provide, from its Engineering division, the two Chief Operating Officers of Borea: Daniel Laflamme and Marc Richard as General Manager (replacing Lester Belanger who had been recruited from outside both companies). However, these individuals required considerable assistance from Blattner. Mr. Fredrickson said that Blattner taught Daniel Laflamme the entire business of wind construction. Eric de Gagne, another early executive of Borea, spent time working in Blattner's head office in the U.S. to learn the business better. There have been other Borea staff who have spent time at Blattner's headquarters since 2004. Mehdi Hassan, currently Director of Wind (West) for Borea, Ebrahim Apour and Nina Faro (both recruited from outside).

15. Borea focused its energies for the next two years on developing its business as a wind farm contractor. It bid the projects in Ontario, of which it received two: the construction of wind farms at Conestogo. It also bid successfully on four projects in Quebec, although all of them were delayed for periods of time due to hesitancy on the part of the ultimate customers and regulatory approval. In respect of one project Borea had purchased $18,000,000 worth of transformers and substation equipment that was not installed in any way. It was also the successful bidder on a project in Alberta, Ghost Wind Farm, on which construction did not commence until 2010.

16. Marc Richard said that they were not more successful in those years for a variety of reasons: bidding is always unsuccessful some of the time; the market was, and is, new; and projects were uncertain and sometimes did not proceed. Nonetheless, by 2007 Borea was able, with some support from Blattner, to bid successfully on a number

of wind farm projects and was in a position to commence construction on any of them.

Genivar's sale to Pomerleau

17. In 2007, Genivar was undergoing some redefinition of its business at the instance of its principal, Pierre Shoiry. He decided to take the Building division public in a way that freed up a large amount of capital. Because the Building division would operate as a separate company, it no longer fit Genivar's business model to have a privately owned Engineering division, so it looked for a buyer. Genivar found one in Pomerleau and sold the Engineering division to it. Included in the assets of that division was Genivar's interest in Borea. The sale was concluded on July 3, 2007. After it was concluded, Pierre Shoiry, the President of Genivar, advised Scott Blattner, chief officer of Blattner, who was surprised to learn of the sale.

Pomerleau

18. Pomerleau is a very large general construction company based in Quebec. According to Martin Laroche, Vice-President of the Civil Construction division of Pomerleau, it has about 1000 non-trades employees and is the biggest contractor in Quebec. Its Building division has recently commenced construction work in Ontario. The Civil division (either directly or through its subsidiary, Nielsen) builds bridges, marine installations, hydro dams and substations, tunnels, pipelines and infrastructure works. Its specialty, he said, is foundation work and piling work. Like Blattner, it is a family owned, privately held company and it has been in business for 50 years.

19. In 2007, Pomerleau had no active plans to become involved in the wind farm business. It had submitted a bid to Skypower for a project at Riviere de Loup in 2005 to build a wind farm. That bid was not accepted and Pomerleau did not actively pursue the business after that. In 2007, Pomerleau had no expertise in bidding or building the wind farms, and had no plans in becoming involved in that aspect of the industry.

20. What Genivar offered to Pomerleau was its entire Civil division. The deal included much more than the shares of Borea. Pomerleau was offered the entire civil work of Genivar. According to Mr. LaRoche, Pomerleau saw the offer as a good opportunity because Genivar was a source of good people. In his view the only way to build a company as a business is to acquire good people. It is harder and slower to recruit them individually from outside the company. The

group from Genivar was a particular advantage as they were all familiar with working with one another as a group. He repeatedly referred to the "assets" of Genivar when referring to the people that Pomerleau might and did acquire from Genivar. He specifically denied that Pomerleau had much interest in the construction contracts of Genivar ongoing at the time of the sale. He stated repeatedly that, either generally or specifically in relation to Borea, Pomerleau was not looking to acquire a stake in a wind farm business, but that it simply saw the offer as a good business opportunity that was worth acquiring. He said that Pomerleau wished to continue to grow and that this was an opportunity to grow quickly by incorporating a group of good people. According to Marc Richard, 80% of the employees of Genivar were offered positions with Pomerleau and about 60 to 65% of them accepted. Five employees of Genivar went to Borea, 20 went to Pomerleau's Civil division.

21. With respect to Borea, the corporation retained the entire senior staff of the business: Mr. Richard (general manager), Daniel Laflamme (chief estimator), Francis Houle (who had a vaguely described position with respect to cash flow management), Mehdi Hassan (head of the construction division in Ontario and West) and, I conclude, Sebastien Simard (manager of Quebec and East). Mr. Richard, who had a dual position with Genivar and Borea, believed he had a choice of transferring to the Civil division of Pomerleau or staying with Borea, but not both. He chose to work with Borea. The evidence with respect to Sebastien Simard was a bit unclear. Mr. Fredrickson said that Borea was first introduced to him on the Port Cartier project, and that his previous experience was with Pomerleau. He is currently the manager of construction (Quebec and East) for Borea and has no position in Pomerleau. He was not clear whether he was transferred to Borea from Pomerleau or was simply hired by the joint venture or Borea on the Port Cartier project because of his experience with Pomerleau. However, Martin Laroche from Pomerleau testified that Mr. Simard was one of the employees he interviewed when Pomerleau purchased Genivar's Engineering Division, which he would only have done with persons not employed by Pomerleau.

22. Genivar, pursuant to the terms of the Joint Venture and Shareholders Agreement in Borea, could not transfer its shares in Borea to Pomerleau without Blattner's consent. Accordingly a meeting was arranged between Pomerleau and Blattner executives. After meeting with one another, each decided that the other was a partner it was prepared to work with. Although Blattner was surprised by the sale to Pomerleau, it had already invested considerable time and money in the creation of Borea and was not anxious to abandon it. It

concluded that it could continue the same business with Pomerleau. And, as Jeremy Waker said, Blattner had no "plan B".

23. The transfer to Pomerleau took some time in fact. The sale agreement between Pomerleau and Genivar is dated July 3, 2007. Most of the employees and hard assets were transferred over the two summer months but Genivar continued to hold the shares of Borea. This caused Blattner and Pomerleau some difficulties, as they were not prepared to submit a bid for two upcoming projects on behalf of an unsettled corporate entity. Accordingly on September 11, 2007, Blattner and Pomerleau, in their own names, entered into an "Interim Services Agreement" along with Airtricity Canada Limited (a developer) for the completion of four projects: Victoriaville, St. Paul, Vauban and Port Cartier. Only the last of these projects went ahead.

Borea after the sale to Pomerleau

24. On August 29, 2007, Pomerleau and Blattner entered into a formal Joint Venture agreement to perform the work for Cartier Energy at the Carlton Wind Farm in Quebec. The work was in fact completed under that Joint Venture. Mr. Fredrickson said that the opportunity came up quickly and a joint venture agreement was necessary to proceed with it. He felt, correctly as it turned out, that Pomerleau had good general construction experience in Quebec and Blattner had a good reputation in the United States. Those two names together on the joint venture were sufficient to secure the project.

25. The existing work continued to be done by Borea, but no other bids or projects were commenced under the Joint Venture. There was some delay caused by the time it took to inform Blattner of the surprise sale, for Blattner to decide what to do, and for Pomerleau to interview the staff of Genivar and decide what to offer to whom. It is true, as the Labourers argued, that Pomerleau was in a hurry to get things moving with this company. That is hardly surprising. It paid an undisclosed sum for this business, which was a healthy ongoing business being sold as part of a corporate reorganization, and no doubt wished to see some return on its investment as soon as possible. No business can be allowed to drift in a state of uncertainty in any event.

26. The shares of Borea were finally transferred from Genivar to Pomerleau (through Blattner for liability reasons) in January 2008 and the corporate vehicle for the wind farm business after that time was Borea. The business of Borea had been developing for three years and it was ready to continue to bid on work that was becoming increasingly

available and to commence construction on the two or three projects that were finally proceeding. As Mr. Richardson said with respect to the Joint Venture, "we had to capture an opportunity in Quebec. We could not stay in limbo".

27. The relationship of Blattner and Pomerleau mirrored that of Blattner and Genivar. Each held an equal numbers of shares in the primary corporation. The territory of the agreement with Genivar applied only to Ontario, Quebec and Eastern Canada. Pomerleau insisted on renegotiating this to cover the entire country. Neither party was permitted to conduct independent construction of wind farms in Canada, but all work was to be done through Borea. Included in the agreement was a provision that, upon termination of the partnership, neither party would solicit or employ any of the employees of Borea for one year. No witness said it, but it seems to me that the clauses were designed to keep both parties in the partnership, and prevent them from appropriating what the other had contributed to the business in the event of its dissolution.

28. Borea has continued to pursue the construction of wind farms in Canada. As of the date of the application, it had bid on or completed work on 20 wind farm projects in Alberta, Ontario and Quebec. The management officers of Borea come largely from Genivar, Blattner or were recruited from outside any of these parties. Many of them had been transferred from Borea and to Blattner in the United States for training. There is no doubt that Blattner continues to supply the training and expertise required to operate the business to Borea. Mehdi Hassan and Ebrahim Apour were transferred to Blattner's U.S. operations for two years or so for periods of training. During his time there, Mr. Hassan was an employee of Blattner. Seven of the eight projects secured or constructed in Ontario before the application were developed by Next Era, with which Blattner has a close relationship. Next Era required a Blattner employee, Jason Wideman, to spend at least 50% of his time on six length projects referred to by witnesses as the "six-pack" projects.

29. On one project at Le Plateau in Quebec, Blattner provided the general and trades superintendents for the project at certain "critical junctions" of the project. Mr. Fredrickson said that this was because Borea still did not have within its ranks sufficient personnel to manage the project properly. Indeed the Blattner employees' time was determined by the maximum limits permitted by Immigration Canada. Blattner also supplied personnel at the Ghost Wind Farm project in Alberta in 2010 at the insistence of Next Era, again the developer. On that project, Blattner had designed the entire bid in its offices in

Minnesota rather than having the work done by Borea. Martin Laroche, Senior Vice-President of the Civil Division of Pomerleau, testified that Pomerleau did not have the contacts within the industry that Blattner had, and clearly did not have the necessary expertise that it would have been able to inject into the company.

30. Both parents were from time to time required to provide guarantees of performance to Borea to get a bond for bidding purposes. Neither supplied operating cash. Neither company helps Borea to become pre-qualified for projects in Ontario or Quebec.

31. Both Pomerleau and Blattner had the same governance role and control of Borea that Blattner and Genivar did (except for the question of the boundaries of its territory). The Board of Directors is composed in equal numbers of persons from both Pomerleau and Blattner, with some officers from Borea as well. It meets four times a year. The Management Committee, again with equal representation from both parties, meets twice per month, sometimes by conference call, to discuss bids and other business. The discussion, according to Martin LaRoche, focuses exclusively on items such as risk exposure, risk management and financing, rather than the substantive details of any one bid or the construction issues arising from any one project.

32. The Labourers put great emphasis on the contribution of Martin Laroche, the one person from Pomerleau who represents any sort of contribution from Pomerleau to Borea as the Pomerleau representative at the Borea Management Committee. I do not accept their characterization of his significance to the business. He holds the position of Vice-President of the Civil Division of Pomerleau. He testified that he deals with issues of corporate management and negotiations with Blattner when the two parent corporations are required to act on major issues. He does not, however, participate in the day-to-day running of Borea. Mr. Laroche himself is an exceedingly experienced and skilled person. His work before Pomerleau included the management of extremely large construction projects around the world including dams, bridges, marine work and other heavy civil projects throughout Asia from Beirut to Hong Kong. No doubt he has the ability to manage any engineering company of any size at the highest level of management. He has, however, no specific experience or expertise in the running of the specifics of Borea or any wind farm business in general, and does not play a role in the day-to-day operation of the business. The overall management and governance of the corporation is an important role for any business, but as is evident from the sale of half of Borea from Genivar to Pomerleau, a role that is easily transferred from one person to

another, even one with no particular expertise in running that business, and without affecting the operation of the business itself.

33. Pomerleau performs some functions for Borea. All its record keeping and administrative processes are handled in the offices of Pomerleau in its head office at St. Georges in Quebec. On one occasion Pomerleau was a subcontractor to Borea for the performance of foundation work. That bid was tendered to Borea when it was still owned by Genivar and Blattner. The offices of Pomerleau and Borea are very close together in Mississauga, Ontario, but there is no contact between them. Other than these matters, Pomerleau supplies no assistance to the daily operations of Borea.

Analysis

34. The question to be answered in this case is a fairly narrow one. Borea concedes that the minimum requirements of subsection 1(4) have been met in this case, that is Pomerleau and Borea carry on associated or related businesses or activities and that they do so under common control and direction. Borea argues only that the Board ought not to exercise its discretion under the subsection. It argues that the purpose of the subsection is to protect and preserve bargaining rights in the face of a corporate organization that would otherwise defeat or diffuse the bargaining rights that the Union holds in respect of employees of one business. In this case, Borea argues, the effect of an order would be to expand rather than protect the bargaining rights.

35. The Union accepts that the Board has such a discretion and that in some cases the Board will not issue an order if it is persuaded that the effect of doing so would be to expand bargaining rights. However, it argues that in this case, the order would simply protect the Union's bargaining rights for employees of Pomerleau, and to refuse to issue such a declaration will lead to an erosion of the Union's bargaining rights.

36. The purpose of subsection 1(4) is the protection of bargaining rights. The right of a union to represent employees and the right of employees to be represented by their chosen bargaining agent should not be defeated by the effect of corporate or business organization. As the Board said in an often quoted portion of *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 at paragraph 12:

> Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to

> employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 [now section 69] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bonafide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

37. Counsel relied on the following passage from *City of Toronto*, [2000] O.L.R.D. No. 1687 at paragraph 19:

> At its most basic, section 1(4) is in place to ensure there will be no erosion of bargaining rights caused by a unionized entity spinning off a new company, moving work or opportunities for growth from the old company, and operating the new company without regard to the collective agreement obligations of the old. The mischief in such an arrangement is obvious and this labour relations "sleight of hand" is remedied by the Board's discretion to make both companies a single employer for the purposes of the Act.

38. The most common fact situation that the Board sees in such cases are those where the owner of a company that is bound to a collective agreement creates, purchases or obtains control of a second corporation which begins to perform work that has been performed before by the first business, or might reasonably have been anticipated to be performed by the first business. Since the businesses are under common control and direction, the Board concludes that the union's work has been "eroded" and being shifted

to the new business. As the Board stated in *RLP Machine & Steel Fabrication Inc.*, [2004] OLRB Rep. July/Aug. 784 (a decision I wrote) at paragraph 91:

> 91. It is at this point that the order in which the businesses came into existence, or under common control and direction, becomes important. If a business bound to a collective agreement creates a new company not bound to the agreement, the Board will require very little proof of a potential erosion of bargaining rights. Indeed, the performance of any work, no matter how slight by the second company, that is covered by the collective agreement binding on the first company, will be proof of an erosion of bargaining rights: see *Acme Plumbing & Heating,* [1992] OLRB Rep. Jan. 1; *Steebil Limited,* [1989] OLRB Rep. April 304.

39. The Union further argues, correctly, that the Board does not need to see identical types of work performed in the new business as were performed by the old business. Businesses can change and grow as the marketplace and as technologies change. In *Brink's Canada Limited,* [1987] OLRB Rep. May 647, Brink's was bound to a collective agreement with the Teamsters Union. Employees performed the work, among other things, of delivering currency and picking up currency to and from banks and trust companies. It created a new company that took on work that Brink's had never done before (filling and recharging ATM's). The Board concluded that, absent the new second company, Brink's itself would have performed the work by using bargaining unit members. The Board saw the work of servicing the ATM Machines as a logical outgrowth of the business in which Brink's was engaged. The work was seen to be an accretion to the work done by employees represented by the Union and the Board concluded that neither they nor the Union ought to be deprived of that increase of work opportunities or to be deprived of collective representation simply because of a choice of corporate organization made by the employer. At paragraph 35 the Board said:

> Brink's claims that there has been no erosion of the applicant's bargaining rights respecting the Toronto Armoured Division employees because none of them have been laid off as a result of ATM's business. The Board has held that there can be an erosion of bargaining rights without the loss of business and employment by the unionized employer. See the Board's decision in *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531. As the Board stated in that

> decision, the union's bargaining rights attach to the business; if the business expands and employees are added, the union's bargaining rights would encompass the new employees. In the *Kustom Insulation* decision, the Board found that the creation of a new, non-union employer, even though not competing for the same business as the unionized employer, was effectively carving out work which the unionized business might otherwise try and get. That was sufficient erosion of the union's bargaining rights to cause the Board to declare that the two employers be treated as one for purposes of the Act. In the instant application, the facts are that some of the work previously done by employees of the Toronto Armoured Division is now done by employees of ATM. Had the work remained with the Toronto Armoured Division, it is reasonable to expect that there would have been an accretion to the applicant's bargaining unit. Therefore there has been an erosion of the applicant's bargaining rights which is directly attributable to the existence of ATM and the transfer to it of part of the work of the classification falling within the bargaining unit of the Toronto Truck Agreement.

40. In *Vaunclair Meats Limited,* [1981] OLRB Rep. May 581, the Board said:

> If, in making a section 55 [69] determination, the Board were to give overriding significance to the reduction in the scale of operations, the term "part of a business" could be robbed of all meaning, and virtually written out of the Statute. Likewise, we do not think that we should lightly conclude that there has been a change in the "character" of the business simply because the transferred "part" operates in a new environment, in a somewhat different manner from the way it operated when it was part of the larger organization. This is to be expected of any severed "part", and it would be an unusual entrepreneur who did not initiate any new initiatives, or try to put his own imprint upon his recent acquisition. If a change in circumstances, or scale were sufficient to trigger section 55(5) [69(5)], there would be few sales of "part of a business" which could survive its application, and cases such as Canac, Alcan, More Groceteria and Automatic Fuels would have little significance.

41. These decisions or the principle on which they rest was approved and applied numerous times since then: *Milton Hydro Electric Commission,* [2002] OLRB Rep. July/Aug. 701; *Ontario Hydro Services Company and Hydro One Inc*., [2003] OLRB Rep. May/June 428; *Ontario Hydro Services Company and Hydro One Inc*., [2003] OLRB Rep. Sept./Oct. 872; *Hydro One Inc.* 2007 CanLII 680; and *Kinetrics Inc*. 2009 CanLII 24173.

42. There are, however, decisions in which the Board concluded that there was only a theoretical potential for the erosion of bargaining rights, and refused to issue a declaration under subsection 1(4) on the facts of the case before it. In *Mirtren Contractors Limited* 2010 CanLII 56212, the Board concluded at paragraph 49:

> 49. We accept there is a theoretical potential for the erosion of bargaining rights. That potential exists any time two entities engaging in related activities or business are under common control or direction. It seems to us there must be more than a theoretical potential for the erosion of bargaining rights to warrant the Board exercising its discretion to issue a single employer declaration. The risk of erosion must be real and be more than mere speculation about what might possibly occur. See, for example *Dobben Group Inc.,* [1996] OLRB Rep. Feb. 57 at 61. In *Hydro One Inc*., [2003] OLRB Rep. Sept./Oct. 872 the Board made the following comment about the potential erosion of bargaining rights at pages 881-82:
>
> > The purpose of section 1(4) is to preserve the meaningful nature of bargaining rights. It serves to protect them from being deliberately subverted, or from being eroded by commercial decisions entirely divorced from labour relations considerations. It is therefore necessary for an applicant to demonstrate that there is either actual or potential erosion of those bargaining rights. … The erosion need only be minor or be only reasonably likely to happen.
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> See also *Environmental Management Solutions Inc*., [2005] OLRB Rep. May/June 405 at 410.

43. Finally, the Union relies on decisions of the Board where the Board has concluded that "the union must demonstrate some actual erosion or some reasonably foreseeable erosion of its bargaining rights" (see *Hydro One Inc.,* above, at paragraph 65). Often that is

demonstrated by identifying work that the second company is performing or is likely to perform, work that was done by the company with which the Union has bargaining rights, or appears to be an accretion to the work of that company. See also *Georgian Construction Company Limited,* [1995] OLRB Rep. Mar. 354; *Penny Lane Food Markets Limited*, [1993] OLRB Rep. Mar. 230.

44. This statement of the Board's case law is true in many circumstances, but is too broadly stated and subject to a number of other variables. The most significant one and for the purposes of this application arises when companies existed either before the Union acquired bargaining rights or before the two businesses came under common control and direction. The cases referred to all dealt with fact situations where the second company was created after the Union acquired bargaining rights for employees of the first company. To return to *RLP Machine & Steel Fabrication Inc*., above:

> 92. However, it is not possible to draw the same presumptive conclusion about an erosion of bargaining rights (which as indicated, is often synonymous with the erosion of work opportunities for persons in the bargaining unit), where the "non-union" company pre-dates the date on which the company bound to a collective agreement was created or came under common control and direction. The existence of the prior company cannot, in and of itself, be evidence of an erosion of bargaining rights. That evidence must come from an examination of what happened to the company bound to the collective agreement. In this case, there is simply no evidence of an erosion of bargaining rights. While RLP Machine has not recognized the existence of bargaining rights, it has performed very little work that I can identify covered by any of the collective agreements. And certainly there is no evidence of any change in the amount of construction done by RLP. Mr. Symes could not "drain" construction work from RLP Machine to CCE without attracting a remedy under subsection 1(4), but that section does not require him to direct construction work from CCE to RLP Machine, or to expand the amount of construction work done by RLP Machine relative to its previous level of activity.

45. In this case, Borea's existence predated the date on which Pomerleau obtained partial control of it. In many cases, the Board did not grant a declaration where the business bound to a collective agreement is created after the other business under common control

and direction with it: *Aecon Buildings* 2006 CanLII 14393; *Carwood Store Fixtures Limited* 2008 CanLII 26532. The Board has often, but not always, treated that fact situation as an expansion of bargaining rights. The same result may be obtained, depending on the facts, when both of the companies involved in the litigation came into existence before the acquisition of bargaining rights or the development of common control and direction: see *Landmark Contracting Ltd,* [1990] OLRB Rep. June 660 and *City of Toronto and Toronto Parking Authority* 2000 CanLII 7860.

46. However, there are no hard and fast rules. What the Board will conclude depends to a great extent on the facts of each case. It is to those facts we return.

Pomerleau's plans and intentions

47. The Union asserts that Pomerleau was looking to expand into the field of wind farms and Borea simply represented an opportunity to pursue that interest with a separate corporation. As a factual matter I do not accept that proposition. The most that could be said was that Pomerleau was not opposed to the possibility of doing that sort of work. It had made one bid on a project, after all. But it made no effort after failing to obtain that contract to pursue that type of work. It is obvious from the experience of Genivar, a company much more interested in pursuing this sort of work, that it was necessary to acquire at least some expertise and experience in that area not to be found in other types of civil construction, no matter how large those other projects were. Pomerleau did not seek to pursue any opportunities to develop expertise within its staff (as Blattner did in the 1990's), or to require skilled people from other businesses or to partner with a company with the expertise and experience (as Genivar did in 2004). It simply never bid another project.

48. Further, it should be remembered that Pomerleau did not simply buy Borea. It bought the Engineering division of Genivar and added 80% of the staff that it retained from Genivar to its own operations. Borea was a single asset that constituted part of the purchase.

Pomerleau's potential to do the work

49. The Union and Borea argue the extreme opposite positions with respect to whether or not Pomerleau could or would have ever performed the work undertaken by Borea. Relying on the evidence of the witnesses from Blattner (Messrs. Fredrickson and Waker), Borea

argued that the business was so specialized that it was not possible for any new entrant to acquire the necessary expertise and reputation and to be able to obtain a contract for the work, much less perform it. Borea argued that the developer will be motivated by an extreme need to have the project completed on time. Since the amounts of money needed to construct a wind farm are very large, although this is truer in the United States, the developer cannot afford to pay interest without a corresponding cash flow for longer than anticipated. Hence the developer will be very reluctant to deal with someone that does not have a proven track record of being able to complete a project on time.

50. Frankly, aside from the fact that the numbers may be larger, the need to complete a project on time to satisfy the owner is a fairly common element in the construction industry.

51. On the other hand, the Union argues, with complete faith in the entrepreneurial energy and determination of contractors in the construction industry, that successful construction companies move to where the work is and that any good company will find a way into the business.

52. Blattner's entrance into the business was precisely what the Union suggested Pomerleau's might have been. It had some engineering expertise, it performed a project well, it developed its expertise and its contacts with developers and became one of the dominant players in the industry. However I do not accept the fact that Blattner, and other large American firms, make it impossible for anyone else ever to get into the business. It is no doubt more difficult to compete with businesses that have an established reputation than it is when the business is being developed for the first time. However, the infinite number of possible scenarios that might occur means that it is impossible to rule out the prospect that someone might find the right opportunities, the right times, and the right contacts to do so. Genivar certainly tried and, had it been able to hire the right people with the right expertise and relying on the favorable position that local contractors have in the province of Quebec, might well have gained a foothold in the business through projects in Quebec. However, the fact still remains that Pomerleau had taken no steps to do any such thing. On its own behalf, it simply never pursued the business at all. The opportunity to purchase Borea was simply a part of a larger opportunity that Pomerleau was offered by a former competitor.

53. I conclude that there was no reasonable chance that Pomerleau was likely to have performed the work of a wind farm

constructor before it purchased the Engineering division of Genivar. It is at best a theoretical and speculative possibility.

Was Borea a functioning business?

54. The Union argues that Borea was not a fully operational business, and that it was only after Pomerleau entered the picture that it was able to function as a fully operational construction business. It had only been incorporated recently and in the Union's argument was not yet functioning as a wind farm builder. Indeed, the Union points to the conflict between Genivar and Blattner to speculate that the business was not functioning and had no chance of success until Pomerleau replaced Genivar as one of the partners.

55. Once again, I do not accept that factual conclusion. Borea was not as active in its first year as it was in its seventh year. That is hardly surprising. In its early days, Borea was staffed by persons from Genivar who required considerable training from Blattner in the United States for the work they were doing. At that time, Borea relied heavily on Blattner for its bidding and its pre-construction work. It was that heavy reliance, although perhaps necessary, that caused Blattner to push back and demand more participation from Genivar. That sort of conflict between partners should not be surprising in the early days of a partnership.

56. I do not accept the proposition that Blattner was only "happy", in a business sense, with Borea when Pomerleau became the partner. There is no evidence of that and the relative absence of conflict with Pomerleau as compared to some instances with Genivar was, I conclude, simply due to the fact that Borea was running more smoothly by 2007. Pomerleau was not a "better" corporate fit than Genivar, simply a different one.

Human Resources of Borea

57. The Union argued that Pomerleau appointed the management staff from among its own ranks to take positions in Borea. However, except for Martin Laroche, that is simply not the case. Daniel Laflamme, Marc Richard, Mehdi Hassan and Sebastien Simard were Genivar employees who were transferred to Borea in whole or in part before the sale to Pomerleau. Eric de Gagne, Ebrahim Apour and Nina Faro were hired from the outside, and in fact mostly during the time that Genivar was the partner. The origin of Francis Houle was not put into evidence but he was working for Borea at the time of the sale to Pomerleau. Some employees, such as Marc Richard, were paid by

Genivar rather than Borea, although he served as general manager of Borea. There is no evidence as to whether he ever received a paycheque from Pomerleau, but if he did it was only during the transitional phase before he moved exclusively to Borea. The fact is that Pomerleau contributed none of the human resources necessary to make Borea run.

58. Further, the desire expressed by Pomerleau to get Borea moving is simply good business practice rather than evidence of a burning desire to jump head first into the wind farm business. Any investor expects the investment to produce a revenue stream. A company that is simply standing still wondering what the future is, arising out of a corporate reorganization is not going to generate a great deal of income. In addition, rightly or wrongly, Mr. Fredrickson of Blattner believed that the market in Quebec was ripe for growth and, as he put it, "we had to capture an opportunity in Quebec; we couldn't stay in limbo". No doubt that view was shared by those at Borea. It is not surprising that Pomerleau should feel the same way.

Conclusion

59. I conclude therefore, that to grant the declaration under subsection 1(4) would represent an expansion of the Union's bargaining rights for employees of Pomerleau. Borea was an existing and functioning business that had all the necessary components of its operations to constitute a discrete and complete economic organization. The business it operated, that of a wind farm constructor, was a kind of business in which Pomerleau had never engaged. As purchaser it added oversight and general direction to the company, but it did not possess any skills, expertise, experience, reputation, contacts or customers to add to Borea's business. It simply became an owner.

60. Further, Pomerleau did not transfer or direct any business that might have been done by its own employees to Borea. Nor does it refrain from performing work in order to leave the field clear for Borea to obtain it. There is no reasonable prospect that Pomerleau would ever have entered this field. The Union has lost nothing from this transaction. Accordingly any action by the Board would be an expansion of bargaining rights which goes beyond the purpose and appropriate application of subsection 1(4).

61. The application under subsection 1(4) is dismissed.

The Sale of Business application

62. The sale of business application can be dealt with relatively briefly. This section does not provide the Board with any discretion in making an order. It must simply examine the facts and determine whether a sale of a business has taken place. However, informing that analysis of whether a sale has taken place, the Board has regard to the purpose of the section. Like subsection 1(4), it is to be applied to preserve bargaining rights from erosion caused by a sale or transfer of all or part of a unionized business to another entity with which the union has no bargaining rights.

63. That is not what happened here. The Union's bargaining rights with Pomerleau remain intact. No portion of the business, indeed none of the work performed by Pomerleau was transferred in any way to Borea. The Union asserts that what was transferred was the opportunity for work to accrete to the work of the employees for whom it has bargaining rights. As set out above, this assertion is simply not factually sustainable. No such loss of opportunity occurred.

64. In the end, what occurred was not a sale of a business, but a purchase of a business by Pomerleau. Pomerleau acquired (among other things) a pre-existing business. The Union's bargaining rights were in no way diminished or undermined by that purchase. Accordingly, the application under section 69 is also dismissed.

"David A. McKee"
for the Board