Date: 19990202 C.A. No. 148507

NOVA SCOTIA COURT OF APPEAL

Glube, C.J.N.S.; Hallett and Freeman, JJ.A.

Cite as Saan Stores Ltd. v. Nova Scotia (Labour Relations Board), 1999 NSCA 26

BETWEEN:

SAAN STORES LIMITED Appellant	)	Scott Sterns and Deanna Borden for the appellant
- and - LABOUR RELATIONS BOARD (NOVA SCOTIA) Respondent	)	Labour Relations Board not appearing
- and - RETAIL WHOLESALE CANADA CANADIAN SERVICE SECTION DIVISION OF UNITED STEELWORKERS OF AMERICA, LOCAL 596 Respondent	)	Leanne W. MacMillan for the Union
	)	Appeal Heard: January 5, 1999
	)	Judgment Delivered: February 2, 1999

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

HALLETT, J.A.:

This is an appeal by an employer from a decision of Justice Tidman dismissing an application to review and quash a decision of the Labour Relations Board. The Board, on application by the Union that represented the employees of a predecessor company, declared that the appellant was a successor company within the meaning of s. 31(1) of the **Trade Union Act**, R.S.N.S. 1989, c. 475 and was, therefore, bound by the collective agreement entered into between the Union and the predecessor company.

The matter proceeded before the Board by way of an Agreed Statement of Facts. As in all legal proceedings, the facts are very relevant in arriving at a just decision. Furthermore, on a review, a knowledge of the facts is critical to a proper understanding of the decision arrived at by the decision-maker. In this case the Agreed Statement of Facts sets out, in a clear and concise manner, the relevant facts as follows:

> 1. The Retail Wholesale and Department Store Union, Local 596, was certified as the exclusive bargaining agent for a bargaining unit consisting of "all full-time and regular part-time employees of Metropolitan Stores of Canada Limited #420, Glace Bay, Nova Scotia, but excluding the Manager, Management Trainees, Office Employees and those persons excluded by paragraphs (a) and (b) of Sub-section 1 of the *Trade Union Act*", pursuant to an order of the Labour Relations Board (Nova Scotia) LRB No. 2205 on July 15, 1975. A copy of the order is attached as exhibit "A".
>
> 2. By order of the Labour Relations Board (Nova Scotia) dated September 23rd, 1994 (LRB No. 4198), the Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 596, ("the Union") was declared the successor to the Retail Wholesale Department Store Union, Local 596. A copy of the order is attached as exhibit "B".
>
> 3. Metropolitan Stores (MTS) Ltd. ("MTS") operated a retail store at Glace Bay, Nova Scotia ("the Store"). MTS and the Union were parties to a Collective Agreement dated May 26, 1994 to May 26, 1995. A copy of the Collective Agreement is attached as exhibit "1" in the book of exhibits. There is no other applicable Collective Agreement.
>
> 4. On July 30, 1994, Greenberg Stores Limited ("Greenberg") purchased the assets of MTS including the assets relating to the Store at Glace Bay. Greenberg operated the Store at Glace Bay from July 30, 1994 until February 11, 1997. The Union states that it was not aware of the purchase

by Greenberg.

5. On February 11, 1997, Greenberg, including its 169 retail stores across Canada, made an voluntary assignment in Bankruptcy as a result of losses in the previous three years of approximately $80,000,000. A trustee in bankruptcy, Caron Belanger Ernst and Young ("the Trustee") was appointed for Greenberg on February 11, 1997 and immediately took control of the assets of Greenberg including the Store at Glace Bay. A copy of the Certificate of appointment of Trustee in Bankruptcy is attached as exhibit "2" in the book of exhibits.

6. Effective February 11, 1997 Saan Stores Ltd. ("Saan") purchased the assets of 89 of the former retail stores of Greenberg from the Trustee for approximately $31,000,000. The store at Glace Bay was included in the 89 retail stores purchased by Saan. The purchase of the 89 stores by Saan was approved by the Quebec Superior Court (In Bankruptcy) on February 11, 1997. A copy of the Order of the Quebec Superior Court, together with the offer to purchase, is attached as exhibit "3" in the book of exhibits.

7. While the purchase was effective February 11, 1997, the Trustee remained in control of all financial aspects of the business until May 10, 1997.

8. On or about February 11, 1997, the Trustee sent the employees of the store the correspondence attached as exhibit 4 in the book of exhibits.

9. On or about February 11, 1997, Gendis Inc. ("Gendis") sent the employees of the Store the correspondence attached as exhibit 5 in the book of exhibits.

10. On or about February 11, 1997, Saan sent the employees of the Store the correspondence attached as exhibit 6 in the book of exhibits.

11. The Union has forwarded three notices to bargain dated April 3, 1995, April 24, 1996 and March 25, 1997. The parties did not meet to bargain. The correspondence forwarded by the Union is attached as exhibit 7 in the book of exhibits.

12. Metropolitan Stores (MTS) Ltd., Greenberg Stores Limited, and Saan Stores Ltd. are, or were, wholly owned subsidiaries of Metropolitan Stores of Canada Limited ("MSCL") which, in turn, is a wholly owned subsidiary of Gendis Inc. Saan states that at all material times MSCL, Greenberg and Saan have concluded [conducted] independent operations and are separate and distinct from the management, operations and affairs of each other.

13. The terms and conditions of employment for employees in the Store have continued unchanged from February 11, 1997 to the present and are consistent with the terms of the Collective Agreement. Except for normal turnover, the employees normally considered in the bargaining unit have remained the same. Union dues were deducted and remitted to the Union by MTS and Greenberg up to February 10, 1997. From February 10, 1997 to May 10, 1997, the Trustee has deducted union dues and held them in trust. From May 10, 1997 to the present, Saan has deducted union dues and held them in Trust. Copies of examples of the union dues deductions

> are attached as exhibit 8 in the book of exhibits.

It is to be noted that the assignment in bankruptcy, the order of the court approving the sale of 89 stores to Saan, the letters from the trustee to the employees, the letters from Gendis to the employees and from Saan to the employees all took place on February 11, 1997. The agreement of purchase and sale between the trustee and Saan as purchaser was made on February 11 and is attached to the Order of the Quebec Superior Court in Bankruptcy approving the sale on February 11th, 1997.

I will refer only to the most relevant exhibits attached to the Agreed Statement of Facts.

The letter from the trustee to the employees of the Glace Bay store which is referred to in paragraph 8 of the Agreed Statement of Facts provides, in part, as follows:

> Dear Sir/Madam:
>
> Your employer has been declared bankrupt on the February 11, 1997 and we have been named as the Trustee to the bankrupt estate.
>
> As a result of the bankruptcy, your employment is terminated effective immediately, and the amounts due to you by your employer may constitute a claim provable in bankruptcy. .....
>
> Although the Trustee has no obligation in this regard, we intend to provide funding for the regular pay for wages due up to the date of bankruptcy. This amount will be paid to the employees on the due date, as an advance against the dividend that you would be entitled to receive on account of the above-mentioned claim, and in reduction of the claim. This payment will be restricted to regular wages and will not include termination, severance, vacation pay or other benefits.
>
> ..... Your rights against the bankrupt for work performed prior to the bankruptcy are not prejudiced by accepting a daily work assignment from the Trustee.

On the same date the trustee advised the employees of the Glace Bay store as follows:

> **Re Greenberg Stores Ltd.**
>
> Dear Sir/Madam,
>
> As you are aware Saan Stores Ltd. ("Saan") has completed the purchase of the Greenberg Stores Limited ("Greenbergs") assets in your location. In this regard, we have been advised by Mr. Bob Whitney that Saan intends to incorporate your location into the Saan chain that Saan will be making offers of employment to employees at your store. .....

The letter forwarded by Gendis referred to in paragraph 9 of the Agreed Statement of Facts advised the employees of the Glace Bay store that the Greenberg stores were in financial difficulties and that Gendis had decided to terminate its financial support of Greenberg and restructure Greenberg's retail operations by consolidating certain Greenberg stores with Saan. The letter also provided:

> .... To achieve the restructuring, effective today, MMG voluntarily assigned itself into bankruptcy and Caron Belanger Ernst & Young Inc. was appointed as Trustee in Bankruptcy of MMG.
>
> SAAN has made a bid to acquire 89 of MMG's stores effective immediately.
>
> Your store is one of the 89 locations. We will inform you of the court's decision as soon as possible. The Trustee will be in charge of your store and will be advising you directly of the status of your store and your ongoing involvement. .....

The February 11th letter from Saan to the employees of the Glace Bay store, referred to in paragraph 10 of the Agreed Statement of Facts, advised the proposed employees as follows:

> Greenberg Stores Limited has made an assignment in bankruptcy under the Bankruptcy and Insolvency Act whereby your employment with Greenberg Stores Limited was terminated.
>
> Saan Stores Ltd. has offered to acquire this retail location and add it to our corporate structure. Provided the lease can be assigned and this we will know within several weeks and provided you assign any claims you may have in the bankruptcy, all terms and conditions of employment prevailing under the former owner will be extended to you as a new Saan Stores Ltd. employee. This includes service seniority dates, vacation entitlements, wage and salary levels and group benefits. .....

The relevant labour relations legislation that was engaged before the Board and on this appeal is contained in the **Trade Union Act**, R.S.N.S. 1989, c. 475 in ss. 19(1) and 31(1):

> **19(1)** If in any proceeding before the Board a question arises under this Act as to whether .....
>
> (d) a collective agreement is by its terms in full force and effect and upon whom it is binding; .....
>
> (j) an employer has sold, leased, transferred or agreed to sell, lease or transfer his business or the operations thereof or any part of either of them or has contracted out or agreed to contract out any part of the work done by his employees;
>
> (k) ...
>
> the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act.
>
> **31(1)** Where an employer sells, leases or transfers or agrees to sell, lease or transfer his business or the operations thereof or any part of either of them and either
>
> (a) the employer or the purchaser, lessee or transferee or any of them is a party to or is bound by a collective agreement with a bargaining agent on behalf of any employees affected by the sale, lease or contract;
>
> (b) one or more bargaining agents have been certified as bargaining agent for any such employees;
>
> (c) one or more trade unions have applied to be certified as bargaining agent for any such employees; or

> (d) one or more bargaining agents have given or are entitled to give notice under either Section 33 or 34 with respect to any such employees,
>
> unless the Board otherwise directs, the collective agreement, certification, application, notice or entitlement to give notice continues in force and is binding upon the purchaser, lessee or transferee. (emphasis added)

The Board's Decision

The Board reviewed the facts as set out in the Agreed Statement of Facts and made reference to the statements in the February 11th letter from Gendis Inc. sent to the employees of the Glace Bay store that: (i) Gendis as the banker to Greenberg had decided to terminate its support for Greenberg and restructure its retail operations; (ii) in order to achieve this objective, some of the Greenberg stores are to be consolidated with Saan and serviced from Saan's operation in Winnipeg; (iii) in furtherance of the restructuring, effective February 11th, 1997, Greenberg voluntarily assigned itself into bankruptcy; and (iv)that Saan had made a bid to acquire 89 of Greenberg's stores effective immediately.

The Board made reference to the letter sent to the employees by Saan on the same date advising them of the Saan offer and that:

> all terms and conditions of employment prevailing under the former owner will be extended to you as a new Saan Stores Limited employee. This includes service, seniority dates, vacation entitlements, wages and salary levels and group benefits.

The Board then made reference to the facts set forth in paragraph 13 of the Agreed Statement of Facts that the union dues collected by the trustee and then Saan were being held in trust.

The Board reviewed the position of the employer on the application. It was the position of the employer Saan that the bankruptcy of Greenberg terminated the collective agreement and by necessary implication the certification. Therefore, the appellant submitted that there was not a collective agreement which could be binding on Saan. The Board in its decision considered the submission made by counsel for the appellant that the Board was bound to follow the decision of the Nova Scotia Supreme Court in Bankruptcy in **Associated Freezers of Canada Inc. (Bankrupt) v. Retail, Wholesale Canada, Local 1015 (Division of United Steelworkers of America)** (1995), 149 N.S.R. (2d) 385 (N.S.S.C. in Bankruptcy).

In that decision Justice MacDonald concluded that, as bankruptcy terminated the employment contract, there could be no collective agreement and therefore nothing for the trustee to succeed to pursuant to s. 31(1) of the **Trade Union Act**. The Board did not comment on this aspect of Justice MacDonald's decision.

I will digress from a review of the Board's decision to comment on the **Associated Freezers** decision and the decisions relied on by Justice MacDonald in concluding that without employment there was no collective agreement to which the trustee could succeed.

In **Associated Freezers** Justice Michael MacDonald was dealing with an application by the trustee in bankruptcy of Associated Freezers for a stay of a proceeding

before the Labour Relations Board. The union representing the employees of the bankrupt had applied for a declaration that the trustee was a successor employer by virtue of s. 31(1) of the **Trade Union Act**. The trustee was operating the Dartmouth facility of Associated Freezers and employed all the members of the union at that facility.

Justice MacDonald granted the stay primarily on the ground that an order of Justice Spence of the Ontario Supreme Court, General Division in Bankruptcy provided that the trustee "shall not be deemed to be a successor employer". Justice MacDonald concluded that the Ontario order was valid and that the Ontario court had jurisdiction over the issue.

However, Justice MacDonald went on to state in paragraphs 12, 13 and 17:

> [12] Furthermore, I find that upon bankruptcy all employment with the bankrupt terminated. Mr. Justice Austin of the Ontario Court of Appeal in **Rizzo and Rizzo Shoes Ltd. (Bankrupt), Re** (1995), 80 O.A.C. 201; 30 C.B.R.(3d) 1, at p. 13 C.B.R. and p. 210 O.A.C. noted:
>
> > "I conclude that while the Ministry had the status to make these claims on behalf of the former employees of Rizzo, no liability arose with respect to termination, severance, or vacation pay, because the employment was ended by the order of bankruptcy and not by the act of the employer."
>
> The fact that the court in Rizzo was dealing with a non-union situation is not material to the issue before me. With no employment there can be no collective agreement.
>
> [13] I agree with Justice Abella in, **Re St. Mary's Paper Inc. (Bankrupt), Re** (1994), 73 O.A.C. 1; 26 C.B.R.(3d) 273 (C.A.), where at p. 291 C.B.R. she states:
>
> > "Contracts of employment with employees, including collective agreements, terminate with a bankruptcy." ...
>
> [17] In light of the clear wording of clause 8 of the Spence order and in light of my finding that the trustee is not bound by the collective agreement it would be inappropriate for this court to grant leave.

The union's appeal to this Court from Justice MacDonald's decision was dismissed. Justice Flinn, writing for the Court, stated that Justice MacDonald's conclusion to grant the stay application was correct as the Nova Scotia Court was required to enforce Justice Spence's order. Justice Flinn went on to expressly state that he was not expressing an opinion on the *obiter dicta* comments of Justice MacDonald.

I would also note that the Supreme Court of Canada on January 22nd, 1998, allowed an appeal from the decision of the Ontario Court of Appeal in **Rizzo**. The decision is reported in [1998] 1 S.C.R. 27. An issue in that appeal was whether termination of employment, when an employer is petitioned into bankruptcy by a creditor, would constitute a termination by the employer so as to entitle employees to certain benefits under the **Employment Standards Act (Ontario)**.

The Ontario Court of Appeal had held that termination of employment by bankruptcy was not a termination by the employer and thus the benefits of the **Act** were not available to the employees. The Supreme Court rejected the narrow interpretation applied by the Ontario Court of Appeal to the word "employer". The Supreme Court held that the provisions of the **Act** giving employees who had been terminated by their employer, without compliance with the statutory requirements of the **Act**, entitlement to severance pay would apply even when the termination of employment was due to the bankruptcy of the employer.

The Supreme Court held that the **Act** was remedial legislation, the purpose of which was to protect employees. The Court stated that such legislation must be interpreted in a broad and generous manner with ambiguities resolved in favour of the claimant. The Court held that to interpret the word "employer" in the **Act** so as to preclude the application of the sections when an employer becomes bankrupt and the termination arose out of the bankruptcy would be incompatible with the objects of the **Act** and would lead to absurd results.

The decision of the Supreme Court in **Rizzo** overruling the Ontario Court of Appeal on this point also had the effect of overruling **Tkachyk v. Delton Co-operative Assn. Ltd.** (1994), 25 C.B.R. (3d) 14 (Alta. Q.B.) and **Tkachyk v. Delton Co-operative Assn. Ltd. (Trustee of)** (1995), 33 C.B.R. (3d) 97 (Alta. C.A.).

In **Re St. Marys Paper, supra**, the majority held that the trustee who was operating the business following the petitioning of the company into bankruptcy became an employer within the meaning of that term in the **Pension Benefits Act (Ontario)** and, as a result, incurred the statutory payment obligations for unfunded liabilities that existed in the pension plans. The majority held that these obligations were separate from those of the bankrupt company as, in the opinion of the majority, the trustee had become an employer within the meaning of the **Pension Benefits Act**. I agree with Justice Abella's dissent. On the facts of that case the trustee ought not to have been responsible for the unfunded liabilities in the plan. I note, however, that both Justice Abella and the majority

were in agreement that, in certain circumstances, a trustee in bankruptcy can become an employer and bound by statutory requirements.

I will return to a review of the Board's decision.

The Board reviewed the respondent's argument which relied on several decisions of the Ontario Labour Relations Board that a finding by a labour relations board that a sale, lease or transfer had occurred (within the meaning of a similar provision in the Ontario **Labour Relations Act** as that contained in s. 31(1) of the **Trade Union Act** of this Province) is not precluded even though the sale is through a receiver. Counsel for the respondent also submitted to the Board that the **Associated Freezers** case was not applicable to the proceedings before the Board as the Union was not seeking that the trustee be declared a successor employer. The Board accepted this submission.

The Board also concluded, without giving reasons, that the application before it did not involve consideration of the **Bankruptcy and Insolvency Act**, R.S.C. 1985 c. B-3, as amended.

In its decision, the Board then reviewed the decision of the Supreme Court of Canada in **W.W. Lester (1978) Ltd. v. U.A. Local 740** (1990), 76 D.L.R. (4th) 389 which held that the purpose of the provincial legislatures and Parliament in enacting successor provisions such as s. 31(1) of the **Trade Union Act** was to prevent employees from losing

union protection when a business is sold or transferred.

The Board was well aware of how to determine whether a successor situation exists as the Board quoted from the Supreme Court of Canada decision in **Lester, supra** where the Court stated at 76 D.L.R. (4th) 411:

> "To determine whether or not the business or part of the business has been disposed of, most boards examine the nature of the predecessor business, and the nature of the successor business determines if the business of the predecessor is being performed by the successor. Most boards approach the issue by examining factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed. ..... No single factor is determinative ... . In each case the Board must determine if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor. Because a business is not merely a collection of assets, the vital consideration "is whether the transferee has acquired from the transferrer a functional economic vehicle"; .....

The Board then concluded:

> What we have here is a situation where, on one day in February, a bargaining relationship existed between the employees and Greenberg. On the next day, the employees were advised that the store had been purchased by Saan, and that their employment would be continued with the same salaries, benefits and terms and conditions as previously. They are working in the same location, selling the same goods, to the same customers. Union dues have been deducted throughout. The employment has continued unchanged. There has been a substantial continuity of all the elements of the predecessor employer's business. The business is being operated for the same purpose by Saan as it was by Greenberg, and there is continuity in the work and activities carried out by the employees. Both Saan and Greenberg are wholly owned by the same company, Gendis Inc. The Board can infer that, prior to February 11, a plan was in place, subject to approval by the bankruptcy court, that the sale would occur. Everything transpired on February 11.
>
> We have carefully considered all of the factors referred to in LESTER, the argument of counsel and the cases to which they referred, as well as the applicable provisions of the TRADE UNION ACT and their underlying rationale. We find that the section 31 application should be granted in this case. To hold otherwise - that the employees' bargaining rights have come

> to an end because of the fact that the sale or transfer took place through the Trustee in bankruptcy rather than directly - would, in these circumstances, fly in the face of the purpose for which the successorship provisions were enacted, and would not make good labour relations sense. Further, to find otherwise would create a mechanism which, in its' extreme, provide employers with a means to void the certification of a bargaining unit.
>
> For these reasons, the Board allows the application.

Justice Tidman's Decision:

On the *certiorari* application to quash the Board's decision the appellant raised essentially the same arguments put before the Board. Justice Tidman reviewed the facts and the Board's decision. He then dealt with the issues raised on the appeal; the first of which was to determine what was the appropriate standard of review of the Board's decision and whether or not the Board fell below that standard. Justice Tidman correctly concluded that s. 19(1) of the **Trade Union Act** was a very broad privative clause.

He then referred to the appellant's submission that the privative clause did not protect the Board. Appellant's counsel submitted that the Board was required to apply and, therefore, interpret the **BIA** and be correct in its interpretation. The appellant's position was that in failing to conclude that the provisions of s. 69.3(1) and s. 215 of the **BIA** were applicable to the proceedings before it, the Board misinterpreted the **BIA**.

Although counsel for the appellant had referred both the Board and Justice Tidman to s. 69 of the **BIA**, the proper section to which he ought to have referred them was s. 69.3.(1). However, this does not materially affect the argument he raises. Section 69.3(1) provides:

> 69.3(1) **Stays or proceedings - bankruptcies** - Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.
>
> 215. **No action against Superintendent, etc., without leave of court** - Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Sub-sections 69.2, 69.4 and 69.5 are not relevant to his submission.

Justice Tidman recognized the substance of the appellant's argument, which is the same argument made to this Court, that upon bankruptcy the assets of Greenberg vested in the trustee free and clear of the rights of employees under a collective agreement as the bankruptcy terminated the collective agreement. Therefore, the appellant submits that upon the trustee transferring the business to Saan, the business no longer carried the obligation of the collective agreement. Therefore, he submits that there was no collective agreement that could be binding on Saan.

Counsel for the appellant has correctly pointed out that Justice Tidman did not specifically consider if sections 69.3(1) and 215 of the **BIA** prevented the Board from hearing the union application.

The appellant also submitted to Justice Tidman that the business was not sold by the employer (Greenberg) but by the trustee and, therefore, s. 31(1) of the **Trade**

Union Act, which refers to sales of a business “by an employer” does not apply.

Justice Tidman concluded that the Board in deciding as it did was doing exactly as it was mandated to do by the legislation and that the Board neither acted outside its area of expertise nor, in coming to its conclusion to grant the union application, did it exceed its jurisdiction. He found the standard of review of the Board’s decision was not one of correctness but rather one of patent unreasonableness.

Justice Tidman then dealt with appellant’s submission that the Board’s decision was patently unreasonable. The appellant submitted that to allow the Board’s decision to stand would set a dangerous precedent by creating a new class of creditors under the **BIA** with new priorities which would fundamentally change the existing bankruptcy law. Justice Tidman made reference to the appellant’s submission that contracts of employment, including collective agreements, terminate with the bankruptcy and referred to the cases wherein that proposition was stated.

He then considered the respondent’s argument that the statements in **Associated Freezers** stand only for the proposition that the trustee in bankruptcy is not bound by the terms of a collective agreement entered into by the bankrupt. He then reviewed the decision of the Supreme Court of Canada in **Lester, supra**, as to the purpose and circumstances under which the successors’ rights provisions apply. He then made reference to s. 31(1) of the **Trade Union Act** and concluded:

> The question then is whether s. 31(1) encompasses the situation here. The board, in finding that it does, looked at the realities of the transaction it was considering. The realities were that all of the companies involved were inter-related although the operating companies operated independently of one another. The Glace Bay store was originally owned by Metropolitan Stores (MTS) which entered into the collective agreement in issue. The business including the collective agreement was transferred by MTS to Greenberg Stores Ltd. Greenberg's made a voluntary assignment in bankruptcy and the trustee sold the Glace Bay store (among others) to Saan Stores Ltd. All of those operating companies, Saan, Greenbergs, and MTS were wholly owned subsidiaries of Metropolitan Stores of Canada Ltd. which in turn is wholly owned by Gendis Inc. Gendis Inc. was banker to the retail operations and as such decided that the assignment should be made and nominated the trustee of the bankrupt Greenberg. Although the trustee was the nominal owner and operator of the Glace Bay store from the time of its appointment as trustee until the sale, nothing in the actual operation of the store changed. After the bankruptcy the store operated as it had before and continued to operate in the same manner after the sale to Saan, which actually operated the store from the time of the assignment in bankruptcy. In those circumstances the board found that it was the same operation, selling the same goods from the same stand with the same employees and, in fact, with the purchaser and bankrupt having the same ultimate owner, namely, Gendis Inc. Thus the board found that there had been a sale or transfer from Greenberg to Saan.

Justice Tidman went on to state:

> .....it is obvious that the whole scheme was engineered and carried out by Gendis in order to protect its corporate interests.

Justice Tidman stated that in the context of labour relations law, the field of concern of the Labour Relations Board, he could not conclude that the Board's finding that Saan was a successor employee was patently unreasonable.

Justice Tidman concluded that:

> ... In order to hold that a trustee is not bound by the bankrupt's contracts, and in particular a collective agreement with its employees which was the prime concern of the courts in *Associated Freezers, 588891 Ont. Ltd* and *St.Mary's Paper*, <u>does not necessarily lead to a finding that other parties are not so bound.</u> (emphasis added)

Having found that the decision of the Board was not patently unreasonable,

he dismissed the application.

Issues on Appeal before this Court:

The appellant has raised three issues in its factum:

1. In the present circumstances is the standard of review of the decision of the Labour Relations Board that of correctness or patent unreasonableness?

2. Was there a sale as contemplated by Section 31 of the *Trade Union Act*? Did the bankruptcy terminate the prior existing Collective Agreement and certification?

3. In the alternative, if the standard of review was patent unreasonableness, did the Honourable Court err in failing to find the Labour Relations Board's decision was patently unreasonable because it did not recognize that a bankruptcy terminates a collective agreement and certification.

The appellant seeks an order from this Court that the judgment appealed from be reversed on the following grounds:

(a) The appropriate standard of review of the decision of the Labour Relations Board (Nova Scotia) in this matter is correctness.

(b) The decision of the Labour Relations Board (Nova Scotia) was incorrect. There was no sale pursuant to section 31 of the *Trade Union Act* as the bankruptcy terminated the Collective Agreement and certification.

Disposition of the Appeal

The essential underpinning of the appellant's submission that the Board erred in declaring Saan a successor employer is a submission that bankruptcy terminates an employment contract. Therefore, counsel submits, there was no collective agreement which could be declared binding on Saan by the application of s. 31(1) of the **Trade Union**

Act.

The review of the jurisprudence has led me to conclude that it seems to be accepted that bankruptcy does terminate employment. (See statements to this effect in **Re: Bryant Isard** Co. (1922), 3 C.B.R. 352; **Kemp Products Ltd. (Re)** (1978), 27 C.B.R. (NS) 1 (Ont. S.C. (Bkcy.))**; Rizzo & Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27; (1997), 154 D.L.R. (4th) 193; **St. Marys Paper Inc., Re** (1994), 26 C.B.R. (3d) 273 (O.C.A.); **588891 Ontario Ltd., Re** (1995), 33 C.B.R. (3d) 28 and **Associated Freezers of Canada Inc. (Bankrupt) v. Retail, Wholesale Canada, Local 1015 (Division of United Steelworkers of America** (1995), 149 N.S.R. (2d) 385 (N.S.S.C. in Bankruptcy)) This would include employment governed by the terms of a collective agreement. See also Annotation by Morawetz to **Re: Pennington's Stores Ltd.** (1996), 42 C.B.R. (3d) 45 at p. 46 where he stated:

> It has generally been assumed that bankruptcy terminates an employment contract.

I would have thought that, in the exercise of the trustee's power to affirm contracts, that a trustee could elect to affirm the employment of a bankrupt's unionized staff and affirm the collective agreement. I am of this view because bankruptcy of itself does not constitute a breach of contract. As a general rule, with respect to contracts that a trustee can perform, the trustee may, within a reasonable time, elect to either adopt the contracts or to disclaim them (**Re: Thomson Knitting Company** (1925), 2 D.L.R. 1007 (S.C.A.D. Ont); **Bankruptcy and Insolvency Law of Canada**, 3d, Houlden and Morawetz, paragraph

F45.2). A trustee would normally have the capacity to perform an employment contract with the bankrupt's unionized staff should the trustee choose to carry on the business for a period of time. In my opinion, such contracts are not of a personal nature.

If an employee becomes bankrupt, the employment contract could not be affirmed by the trustee as the contract would require the personal services of the bankrupt. The other party to the contract could not be required to accept a substitute to perform the employment services for which the bankrupt had been engaged prior to bankruptcy. However, employment contracts in question in proceedings involving the bankruptcy of the employer are not contracts for the employment of the bankrupt but of the employees of the bankrupt. Therefore, it would seem to me that such employment contracts would fall within the general rule that contracts are not discharged by bankruptcy and, therefore, such contract could be either affirmed or disclaimed by the trustee.

It is rather unlikely that a trustee would elect to affirm employment in accordance with the terms of the collective agreement but there could be circumstances where it would be beneficial to the administration of the estate to do so. If affirmed by the trustee, the employees ought to be bound to perform their obligations under the employment contract and collective agreement.

In my opinion, statements in the case law that bankruptcy terminates employment contracts, including collective agreements are broad and, therefore, subject to misinterpretation and misapplication when taken out of context. In my opinion, the

statements in the case law stand only for the proposition that the relationship of the employer and the employee is terminated as between the bankrupt employer and the employees on the bankruptcy of the employer.

A review of the decision of the Supreme Court of Canada in **Rizzo** and the majority decision of the Ontario Court of Appeal in **St. Marys Paper** has led me to conclude that, although employment is terminated by bankruptcy, the termination of the employer/employee relationship between the bankrupt and the employee does not necessarily terminate benefits the terminated employee is entitled to by reason of statutory schemes. Statutes providing such benefits are to be given a liberal interpretation so as to achieve their objective.

Applying this reasoning I am of the opinion that the statutory scheme created by s. 31(1) of the **Trade Union Act** to protect employees from the loss of their rights under the collective agreement on the sale of the employer's business is not rendered inoperative by reason of the bankruptcy of the employer. As a general rule, if a trustee in bankruptcy sells all the assets of a bankrupt business to a third party that is not associated with the bankrupt, the purchaser would not likely be found to be a successor employer within the meaning of s. 31(1) of the **Trade Union Act**. However, the facts of this case are very different; this was, in reality, a sale by Greenberg to Saan.

<u>The obligations imposed on Saan</u> pursuant to the Board's declaratory order

that Saan is a successor employer are statutory obligations separate from those of the bankrupt predecessor employer and, therefore, not affected by the termination of the employment relationship between Greenberg and its employees by reason of Greenberg's bankruptcy.

In arriving at this conclusion I have also rejected the appellant's submission that sections 69.3(1) and 215 of the **BIA** had application to the question before the Board. The appellant submits that the Board ought not to have entertained the union's application.

For ease of reference I will again set out the provisions of s. 69.3(1):

> 69.3(1) **Stays or proceedings - bankruptcies** - Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

The union representing the employees of Saan did not file a claim for the employees against the bankrupt or its property that was provable in bankruptcy such as would be a claim for wages due at the date of the bankruptcy. The proceedings before the Board were not brought against the trustee by a creditor with a claim provable in bankruptcy. The union, on behalf of the employees, did not seek a remedy against the debtor or the debtor's property. The remedy sought was an order that would bind Saan to the terms of the collective agreement. The purpose of s. 69.3(1) of the **BIA** is to prevent creditors from seeking remedies against the debtor's property or commence actions for the recovery of a claim provable in bankruptcy other than in accordance with the procedures

provided for in the **BIA**. An application under s. 19(1) of the **Trade Union Act** which engages s. 31(1) of that **Act** does not fit within the type of proceedings contemplated in s. 69.3(1) of the **BIA**. These sections of the **Trade Union Act** create a mechanism to protect the rights of employees as contained in the collective agreement if the employer's business is sold or transferred. The obligations of a purchaser of an employer's business that flow from s. 31(1) of the **Trade Union Act** are not obligations of the predecessor employer and, therefore, do not give rise to a claim provable in bankruptcy. In my opinion, s. 69.3(1) of the **BIA** was not engaged when the appellant union applied for a declaration that Saan was a successor employer within the meaning of s. 31(1) of the **Trade Union Act**.

Although I have concluded that s. 69.3(1) of the **BIA** was not engaged on the application to the Board, I will nevertheless deal with the appellant's submission that s. 31(1) of the **Trade Union Act** conflicts with s. 69.3(1) of the **BIA** and, therefore, he submits, s. 31(1) must give way to the provisions of s. 69.3(1) of the **BIA**.

In **Her Majesty the Queen v. Sobeys Inc.**, C.A.C. No. 148131, December 4, 1998, Cromwell, J.A. of this Court in commenting on the doctrine of paramountcy stated at p. 3:

> The test for determining whether there is conflict was set out by the Supreme Court of Canada in **Multiple Access v. McCutcheon**, [1982] 2 S.C.R. 161 and reiterated in **Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)**, [1987] 2 S.C.R. 59 and **Irwin Toy Ltd. v. Attorney General (Quebec)**, [1989] 1 S.C.R. 927. In **Multiple Access**, Dickson, J., as he then was, said at page 191:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where **there**

> **is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.** (emphasis added)

The provisions of s. 31(1) of the **Trade Union Act** are not in conflict with s. 69.3(1) of the **BIA** as there is no actual conflict in their operation. The proceedings before the Board did not engage s. 69.3(1) of the **BIA** for the reasons I set out above. The provisions of s. 31(1) of the **Trade Union Act** are within the legislative power of the provincial Legislature and as there is no actual conflict there is no issue of paramountcy of the federal legislation over s. 31(1).

Section 215 of the **BIA** has no application whatsoever to the proceedings heard by the Board. Section 215 simply prevents, without leave of the court, actions against the Superintendent, an official receiver, an interim receiver or a trustee. The purpose of s. 215 is to ensure that the purposes of the **BIA** can be carried out properly by the trustee and the other bankruptcy officials named without the undue intervention of other proceedings. The application to the Board did not involve the trustee in any way.

To interpret s. 69.3(1) of the **BIA** so as to render ineffective s. 31(1) of the **Trade Union Act** is unnecessary to protect the rights of creditors of a bankrupt and, more importantly, unnecessary to facilitate the distribution of funds realized from the orderly disposition of the bankrupt's assets. These are primary objectives of the **BIA**. Both s. 69.3(1) of the **BIA** and s. 31(1) of the **Trade Union Act** can operate within the legislative

objectives of both provisions without encroaching upon either federal or provincial legislative powers.

In summary, I have concluded that although employment of the unionized employees by Greenberg was, in effect, terminated by the bankruptcy of Greenberg, the employment and the collective agreement were not terminated for all purposes. The intent of the Legislature in enacting s. 31(1) of the **Trade Union Act** was to protect employees of a business which employed them in the event the business was sold or transferred as an operating commercial entity. This is beneficial legislation the purpose of which would be frustrated if the appellant's view as to the effect of a bankruptcy were accepted. The legislation must be interpreted liberally so as to achieve its objectives.

The obligations imposed by s. 31(1) of the **Trade Union Act** on a purchaser of a business, if on the facts, the purchaser is a successor employer are not obligations of the bankrupt but of the purchaser. Such obligations are statutory and, therefore, unaffected by the termination of the employer/employee relationship between the bankrupt and the former employees. By Statute, the terms of employment, as provided for in the collective agreement, are to govern the new employer/employee relationship between a purchaser that has been found to be a successor employer.

An assignment under the **BIA** transfers the bankrupt's assets to the trustee for realization and distribution to the creditors as provided for in the **BIA**. In my opinion

there is nothing in the **BIA** which would indicate that Parliament could have intended that a bankruptcy would nullify statutory rights that may arise pursuant to s. 31(1) of the **Trade Union Act**.

I have also rejected the appellant's submission that s. 31(1) of the **Trade Union Act** cannot apply as the sale and transfer evidence by the agreement between the trustee and Saan which was approved by the Quebec Superior Court was not a sale and transfer by Saan, the predecessor employer, but a sale and transfer by the trustee.

I reject this submission for the same reasons as expressed by the Board and Justice Tidman. The reality is that there was a sale and transfer by Greenberg to Saan through the mechanism of the **BIA**. It was open to the Board to look at realities, as evidenced by the facts, rather than be blinded by the technicality that the transfer was via a trustee in bankruptcy. As noted by both the Board and Justice Tidman, in reality this was a sale from Greenberg to Saan arranged by Gendis prior to February 11th, 1997.

The Board's decision is not patently unreasonable given the unique facts surrounding the sale and transfer of the stores to Saan.

The Board acted within its jurisdiction as it decided the very issue that the Legislature authorized it to decide pursuant to the provisions of s. 19(1) and s. 32(1) of the **Trade Union Act**. The question as to whether or not an entity acquires a business from

an employer bound by a collective agreement that was in force is a question that the Board is directed to determine.

Justice Tidman did not err in determining that the Board's decision was reviewable on a patently unreasonable standard. The Board was not required to interpret the **BIA** and, therefore, the question as to whether its interpretation of the **BIA** was correct or not does not arise.

Justice Tidman did not err in deciding that the Board acted within its jurisdiction in declaring Saan a successor employer within the meaning of s. 31(1) of the **Trade Union Act.**

I would dismiss the appeal with costs to the respondent in the amount of $2,000.00 plus disbursements.

Hallett, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.

C.A. No. 148507

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SAAN STORES LIMITED Appellant - and - LABOUR RELATIONS BOARD (NOVA SCOTIA) Respondent - and - RETAIL WHOLESALE CANADA CANADIAN SERVICE SECTION DIVISION OF UNITED STEELWORKERS OF AMERICA, LOCAL 596 Respondent	)	REASONS FOR JUDGMENT BY: HALLETT, J.A.