

British Columbia Labour Relations Board

Panel: Rene-John Nicolas, Vice-Chair

Decision: April 26, 2023.

Case No.: 2022-000863

**[2023] B.C.L.R.B.D. No. 61**

Sky Café Ltd. ("Sky Café"), and Gate Gourmet Canada Inc. ("Gate Gourmet"), and Unite Here, Local 40 (the "Union")

(117 paras.)

## **Appearances**

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Keith J. Murray, for Sky Café.

Susanna Allevato Quail, for the Union.

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### **DECISION OF THE BOARD**

#### **I. NATURE OF APPLICATION**

**1** The Union applies under Section 35(2.2) of the *Labour Relations Code* (the "Code") seeking, among other things, a declaration that Sky Café is the successor employer to Gate Gourmet with respect to a contract for services involving WestJet Airlines Ltd. ("WestJet") (the "Application").

**2** Sky Café opposes the Application. It says Section 35(2.2) of the Code does not apply to the facts of this case. In the alternative, if Section 35(2.2) does apply to the facts of this case, Sky Café says the Application should be dismissed for delay.

**3** Gate Gourmet was given notice of the Application and invited to file a response submission but chose not to. I find that I am able to decide the Application based on the materials filed by the parties prior to March 30, 2023.

**4** Additional submissions were filed by the parties starting on March 30, 2023 (the "Additional Submissions"). I find that I do not need to consider the Additional Submissions in order to decide the Application.

**5** Finally, I note that the Union initially sought remedies against Dnata Catering Canada Limited ("Dnata") in the Application. However, the Union withdrew the portions of the Application regarding Dnata. Accordingly, my decision only addresses the remaining portions of the Application regarding Sky Café.

#### **II. BACKGROUND**

##### **A. Gate Gourmet and the Union**

**6** Gate Gourmet provides in-flight airline catering and food services to airline customers worldwide, including at the Vancouver International Airport ("YVR").

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7 Gate Gourmet operates a catering kitchen in Richmond, British Columbia where it prepares meals for flights based out of YVR.

8 The Union is the certified bargaining agent for Gate Gourmet employees working at and from its catering kitchen in Richmond, British Columbia (the "Certification").

9 The Union and Gate Gourmet are parties to a collective agreement with a term of August 1, 2019 to July 31, 2022 (the "Collective Agreement").

B. The WestJet Contract

10 WestJet is a Canadian airline company. The Union says Gate Gourmet had a contract with WestJet to "prepare, package, and deliver [WestJet's] in-flight meals for its flights based out of YVR".

11 The Union says, in October 2020, Gate Gourmet's contract with WestJet ended. It says WestJet "retendered the contract to Sky Café for the same services". In contrast, Sky Café says, on or around October 1, 2020, it began to provide what it characterizes as "catering logistics and warehouse services at YVR for some WestJet flights". It says it began providing these services pursuant to a national contract with WestJet. Despite these different characterizations of the services provided by Sky Café, there is no dispute about the actual services now provided by Sky Café. Those are discussed below.

C. Sky Café

12 Sky Café says it is a "logistics, warehousing and transportation company that provides catering solutions to airlines through an entirely different business model than Gate Gourmet".

13 Sky Café says it did not hire any hourly Gate Gourmet employees to service its contract with WestJet at YVR, nor did it acquire any equipment from Gate Gourmet. Instead, Sky Café says it employs the following hourly employees at its YVR operation: Dispatchers, Lead Hands, Commissary Agents, and an Inventory Associate. Sky Café says it does not employ anyone involved in food preparation because it does not provide that service.

14 Sky Café says "Gate Gourmet has and continues to provide food preparation and catering services to [WestJet] at YVR". Sky Café says the services it provides to its airline clients at any location, including YVR, do not include food preparation.

15 Instead of preparing meals like Gate Gourmet, Sky Café says it sources meals from local vendors, along with commissary items such as pop, liquor, etc., that are then delivered to [its] warehouse to be later loaded onto WestJet aircraft at YVR.

16 Sky Café acknowledges that it has a facility in Richmond, British Columbia. However, Sky Café says its facility is not a kitchen, but is instead a "warehouse space".

17 Importantly, Sky Café says the services it provides to WestJet at YVR are as follows:

**The services provided to WestJet at YVR by Sky Café are:**

- \* Ice and Dairy Service;
- \* Cart Build;
- \* Hot Water Flask Service;
- \* Domestic Garbage and Recycling;
- \* International Waste;
- \* **Trucking and Delivery to Uplifter (performed by Dnata);**
- \* Inventory Management - Food Products and Equipment; and

- \* Ware Washing (cutlery).

(emphasis added)

**18** Sky Café says the process of providing those services involves: warehousing commissary and food (which is prepared by others); warehousing other ancillary items (e.g. cutlery, coffee pots, linens, etc.); cleaning of these items when they come off flights; disposing or recycling garbage that comes off flights; and restocking carts and culinary items for the purpose of delivering those items to flights. Sky Café's Dispatchers manage the logistics of loading and unloading commissary carts for incoming and outbound flights.

**19** The Union says Sky Café "subcontracts" the food delivery aspects of its services to Dnata. Sky Café says it does so because it does not have a catering license at YVR that would permit its vehicles and staff to access the tarmac at YVR and service flights directly. As such, it says Dnata "picks up commissary carts, dishes, utensils, napkins and garbage from the WestJet flights Sky Café is contracted to service, and delivers those items to the Sky Café warehouse to be refreshed/restocked by Sky Café employees".

**20** Dnata also transports meals prepared by Gate Gourmet or other vendors to the Sky Café warehouse. Those meals are then stored at the Sky Café warehouse until they are delivered, along with other commissary items and culinary supplies, by Dnata to WestJet aircraft at YVR. This is consistent with Sky Café's assertion that Gate Gourmet continues to prepare food for all WestJet flights, in addition to providing full catering services for a number of other airlines at YVR.

**21** Sky Café acknowledges that some of the services it provides to WestJet "are the same" as those formerly provided by Gate Gourmet to WestJet. For example, it references "warehousing, garbage, stocking carts, etc.". However, as noted above, Sky Café emphasizes that it does not engage in food preparation for WestJet. Rather, this service continues to be provided by Gate Gourmet.

#### D. Period Between the Start of the Sky Café Contract and the Filing of the Application

**22** The Union filed the Application on June 23, 2022.

**23** The Union says "little work" was performed by Sky Café for WestJet between 2020 and early 2022 due to a reduction in air travel related to the COVID-19 pandemic. However, the Union says Sky Café employees recently began working more regularly scheduled hours due to WestJet's higher demand for meals.

**24** Sky Café says flight servicing volumes were lower due to the COVID-19 pandemic when it commenced its contract to provide WestJet with services at YVR in October of 2020. At that time, Sky Café says it was servicing approximately 400 flights per month. Flight volumes increased steadily over time, and by early 2022, Sky Café says it was servicing 1,000 flights per month at YVR. It says that number has now increased to approximately 2,000 flights per month.

**25** Sky Café says that, notwithstanding the reduced flight volume at the time it commenced its contract with WestJet, "it would have been obvious" to the Union's bargaining unit members at Gate Gourmet that food for some WestJet flights was being picked up by Dnata instead of being delivered directly to YVR by Gate Gourmet. Sky Café also says "it would have been equally obvious" that Gate Gourmet was no longer providing other services, such as those listed above, to WestJet flights at YVR.

### III. POSITIONS OF THE PARTIES

#### A. Union

**26** The Union says the issue raised by the Application is whether Sky Café is bound by the Certification and the Collective Agreement. It says Sky Café is indeed bound by the Certification and the Collective Agreement.

**27** The Union says the contract for food services between WestJet and Gate Gourmet was retendered to Sky Café. It says Sky Café is providing substantially similar services as those provided by Gate Gourmet. Indeed, it goes

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farther and says Sky Café is providing services to WestJet that are "identical" to Gate Gourmet. It describes these services as "preparing and delivering in-flight meals to WestJet in order to serve the same in-flight clientele". It says Sky Café, as the "new contractor", "prepares, packages, and delivers meals to WestJet planes for WestJet passengers to consume in-flight", like the "old contractor", namely Gate Gourmet.

**28** The Union says Section 35 of the Code focuses on the services provided by the respective contractors. It says the fact that the contractors operate out of different locations is not determinative.

**29** The Union says the Certification and Collective Agreement apply to Sky Café as of the date Sky Café began performing the services previously performed by Gate Gourmet. The Union says that was when Sky Café began performing meal preparation, packaging, and delivery services for WestJet. The Union says Section 35(2.2) applies so as to bind the successor employer with respect to any certification in place at the time the successor employer begins to perform the services in question.

**30** Among other remedies, the Union requests a successorship declaration, an order binding Sky Café to the Collective Agreement, and an order that the Collective Agreement began applying to Sky Café on the date that Sky Café began performing the services in question.

B. Sky Café

**31** Sky Café says the Application ought to be dismissed because Section 35 of the Code is not engaged in the circumstances of this case for three reasons.

**32** First, Sky Café says the recent amendments to Section 35 of the Code extending successorship protections to contract retendering situations are intended to capture circumstances where the identity of the employer has changed, but employees (generally, the same individuals) continue to do the same work, in the same location, often with the same equipment. In support of this position, it points to comments in the 2018 Report by a Section 3 Code Review Panel (the "Review Panel") and comments in the debates of the Legislature leading to the amended successorship protections. Sky Café says the mischief that these amendments to Section 35 sought to address are not reflected in the circumstances of this case. Instead, Sky Café says the Application is an attempt to expand the Union's bargaining rights, which is not the underlying purpose of Section 35.

**33** Second, Sky Café says it is not providing "food services" within the meaning of Section 35 of the Code because it neither prepares nor serves food or meals. It says the term "food services" is not defined, but is intended to cover situations where one food service provider is "flipped" for another. By "flipped", Sky Café means a situation where another food service provider provides essentially the same service at the same location, often, but not necessarily, with the same staff, typically using the same equipment to prepare food. Sky Café says it is not "preparing, packaging or serving meals". Instead, it says it is "warehousing and assembling the catering items for delivery to flights", but is "not at all engaged in the preparation of food".

**34** Sky Café relies on the industry classification definitions in the North American Industry Classification System (the "NAICS") in support of its argument that it is not engaged in food services. It notes that Classification 72 of the NAICS for "accommodation and food industry" describes that sector as consisting of "establishments primarily engaged in preparing meals, snacks and beverages, to customer orders, for immediate consumption on and off the premises" (emphasis in original). Sky Café says, by this definition, neither it nor Gate Gourmet are providing food services. Instead, Sky Café says Gate Gourmet is in the business of "food manufacturing". Sky Café says that Section 35 applies to food services and not food manufacturing.

**35** Alternatively, to the extent that food services are being provided in this case, Sky Café says it is Gate Gourmet who is providing those services. Sky Café says Gate Gourmet prepares the meals for WestJet flights serviced by Sky Café. As such, Sky Café says it is not in the business of preparing meals, snacks, or beverages for immediate consumption on premise or for takeout. It can therefore not be said to be providing food services within the meaning of Section 35 of the Code. Sky Café says to find otherwise would be to extend the scope of Section 35 to businesses and activities that were never intended to fall within the scope of the amendments to Section 35.

**36** Third, Sky Café says, even if its services could be defined as food services, it is not providing "substantially similar" food services to WestJet as had been provided by Gate Gourmet. It says Section 35 of the Code requires not only "similar" services, but instead imposes a higher standard of "substantially similar" services. Sky Café says the choice to use the word "substantially" underscores the legislative intent of the amendments to Section 35 to apply to situations where "little or nothing has changed beyond the identity of the employer".

**37** Sky Café says the work it performs "contain[s] some tasks previously performed by Gate Gourmet". However, it says the work it performs "is of a fundamentally different nature". Sky Café says it does not prepare meals. Given that it does not prepare meals, Sky Café says it is not providing substantially similar food services to WestJet, as had been provided by Gate Gourmet.

**38** Although Sky Café acknowledges that some services Gate Gourmet provided to WestJet are the same services provided by Sky Café, it says, more specifically, that Section 35 requires substantially similar food services and that does not include the warehousing, garbage handling, stocking of carts, etc. provided by Sky Café. It says any food services (to the extent there are any) continue to be provided by Gate Gourmet.

**39** In the alternative, if Section 35 applies to the circumstances of this case, Sky Café says the Application should be dismissed for delay. If Section 35 is engaged, Sky Café says it would be obligated to offer positions to those performing work at Gate Gourmet. This is consistent with what it says is the legislative goal under Section 35(2.2) of protecting the continuity in employment and the terms and conditions of employment of those affected by a contract retendering.

**40** Sky Café says the delay of two years in filing the Application does not serve these purposes. It says the Union should not be allowed to wait two years and then seek to impose representational rights on a new group of employees at Sky Café who are entirely unconnected to Gate Gourmet. Sky Café says the Application cannot be about securing employment rights for anyone laid off from Gate Gourmet given that the Union waited two years to file the Application.

**41** Sky Café says the Board has not considered the impact of delay on applications under Section 35(2.2) of the Code. It says the Board should require a compelling explanation for the Union's delay. It says the Union does not have a compelling explanation for its delay in filing the Application. Sky Café says it is not credible that the change in the WestJet contract was not immediately noticed by the Union.

#### C. Union Reply

**42** The Union says Section 35 of the Code was not intended to apply only to the limited circumstance where the work is performed at the same location, using the same equipment, but only under a new employer. It says to find otherwise would be to improperly read-in restrictions to Section 35 that are not actually in the Code.

**43** The Union says the comments of the Review Panel and from legislative debates about the amendments to Section 35 of the Code are not determinative with respect to the proper interpretation of the scope of Section 35 or actually support the Union's interpretation. The Union says the Review Panel and the Legislature were ultimately concerned about the erosion of collective bargaining rights in the health sector due to contracting out and siloing of bargaining units. It says this is the precise business model that Sky Café seeks to replicate. It says Sky Café describes this business model as breaking apart the "assembly line".

**44** With respect to the meaning of "food services", the Union says those words must be given a fair, large, and liberal interpretation in accordance with Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 (the "*Interpretation Act*"). As such, the Union says those words cannot be given the narrow meaning ascribed by Sky Café based on the NAICS classifications.

**45** The Union says there are multiple "aspects" or pieces within the full "spectrum" of "food services". It acknowledges that the "direct preparation of food" is one of these pieces. However, it says the remaining pieces

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within the spectrum include the functions that Sky Café continues to perform. The Union says the removal of the food preparation piece does not mean Sky Café is no longer providing "food services".

**46** The Union says Sky Café asks the Board to read Section 35(0.1) as though it says "food preparation" instead of "food services". However, it says the Legislature expressly chose the words "food services" and the Board cannot interpret Section 35(0.1) to mean something else.

**47** The Union says the Board should reject Sky Café's argument that Sky Café's services are not substantially similar to those of Gate Gourmet because Sky Café does not prepare food. It points to the words "in whole or in part" in Section 35(2.2) of the Code (emphasis in original). It says "the contract for services between WestJet and Gate Gourmet was retendered and substantially similar (indeed, identical) services continued to be performed in part under the direction of Sky Café" (emphasis in original). It says, aside from direct food preparation and the actual delivery of food (which was contracted out to Dnata), all of the services Sky Café provides are services formerly performed by Gate Gourmet. Furthermore, it says the positions of employees at Sky Café are the same positions held by bargaining unit members employed by Gate Gourmet.

**48** The Union also says that Sky Café's narrow description of its services (e.g. "warehousing, garbage, stocking carts, etc.") ignores the fact that those services are directed at or tied to food. The Union says Sky Café is "warehousing *food*, handling garbage *from food*, and stocking carts *with food*" (emphasis in original). The Union says "food services" includes these services and thus the Code's amended successorship provisions are engaged.

**49** The Union acknowledges that there is "longer than normal delay" with respect to the Application. However, it says the facts of this case explain the delay. It says the COVID-19 pandemic dramatically reduced air travel and consequently, the work of its bargaining unit members. It was not until air travel began to rebound, and its members began to work more regular shifts, that the Union says its members noticed that Gate Gourmet, and by extension its members, were no longer servicing WestJet.

**50** In any event, the Union says that even if there was unreasonable delay on its part in filing the Application, equitable doctrines based on delay, such as the doctrine of laches, do not apply. Rather, successorship operates as a matter of law. Therefore, if certain facts exist, the Union says a successor employer is bound by the collective agreement signed by the predecessor employer. It says an application to the Board and subsequent declaration by the Board is not necessary to make the collective agreement binding on a successor employer. Rather, it is the operation of law which brings about that result.

#### D. Additional Submissions

**51** The Additional Submissions referred to above started on March 30, 2023. On that day, before I finalized my decision, the Union filed a further submission asserting it had been advised that Sky Café would be assuming delivery driving duties previously sub-contracted to Dnata. The Union stated that it "wish[ed] to add this fact to [its] [A]pplication and to clarify that the bargaining unit to which successorship applies includes...delivery drivers". I asked Sky Café for a response submission to the Union's further submission and provided the Union with the opportunity for final reply. I do not need to address the positions taken in the Additional Submissions in greater detail because, ultimately, as demonstrated by my reasons below, I find that I do not need to consider the Additional Submissions to decide the Application.

#### IV. ANALYSIS AND DECISION

**52** There are four issues that I must consider in deciding the Application. First, I will consider whether Sky Café is providing "food services" within the meaning of Section 35 of the Code. If so, the second issue I will consider is whether those food services are substantially similar, in whole or in part, as the food services provided by Gate Gourmet. The third issue I will consider is whether Section 35(2.2) of the Code was intended to apply to the circumstances of this case. Finally, if I am convinced that the requirements of Section 35(2.2) are met, I must consider whether I should nonetheless dismiss the Application because of the Union's alleged delay in filing the Application with the Board.

**53** Before I go on to consider these four issues, I will first set out the relevant provisions of the Code and the approach I intend to take in interpreting those statutory provisions.

A. Section 35 of the Code

**54** Sections 35(1) and (2) of the Code apply to the sale, lease, transfer or other disposition of a business:

- (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred.
- (2) If a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

**55** Section 35(2.2) of the Code applies to the retendering of contracts for services:

- (2.2) If a contract for services is retendered and substantially similar services continue to be performed, in whole or in part, under the direction of another contractor,
  - (a) the contractor is bound by all proceedings under this Code before the date of the contract for services entered into by the contractor and the proceedings must continue as if no change had occurred, and
  - (b) any collective agreement in force continues to bind the contractor to the same extent as if it had been signed by the contractor.

**56** Section 35(0.1) of the Code defines, in part, "contract for services" as follows:

35(0.1) In this section:

"contract for services" means a contract for any of the following services:

...

- (d) food services;

**57** Section 35(3) of the Code requires, on application by any person, that the Board "determine what rights, privileges and duties have been acquired or are retained" if a question arises under Section 35.

**58** Section 35(4) of the Code provides the Board with the power to make inquiries or conduct a representation vote as it considers necessary or advisable. Having done so, Section 35(5) of the Code provides the Board with a number of powers, including, for example, giving directions it "considers necessary or advisable as to the interpretation and application of a collective agreement affecting the employees in a unit determined under this section to be appropriate for collective bargaining".

**59** As a relatively new provision in the Code, the Board has recently been called on to interpret Section 35(2.2): *Supra Property Services Ltd. and Bee-Clean Building Maintenance Incorporated*, 2020 BCLRB 62 (Leave for Reconsideration of BCLRB No. B140/2019) ("*Supra*"). The reconsideration panel in *Supra*, citing *Rizzo & Rizzo Shoes Ltd.*, [\[1998\] 1 S.C.R. 27](#), accepted that the proper approach to statutory interpretation is as follows:

We accept that the proper or "modern" approach to statutory interpretation is to determine the meaning of statutory language not by reading the words in isolation but rather in context.

As stated in *Rizzo*, the words must be read in their "grammatical and ordinary sense", harmonized with the scheme and objects of the Code and the intention of the Legislature. This does not entail ignoring the words themselves. However, as stated in *Sullivan on the Construction of Statutes*:

... interpretation properly begins with ordinary meaning - with reading the words in their grammatical and ordinary sense - but does not stop there. Interpreters are obligated to consider the total context of

the words to be interpreted in every case, no matter how plain those words may seem upon initial reading. (at 3.7, emphasis added)

(para. 58)

**60** That approach to statutory interpretation is consistent with Section 8 of the *Interpretation Act*, which provides that every enactment, including the Code, is deemed remedial, and "must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In light of the foregoing, the Board has consistently given a full and liberal interpretation to successorship rights under the Code: *Kelly Douglas & Company Limited*, BCLRB No. 8/74, [1974] 1 Canadian LRBR 77 ("*Kelly Douglas*") and *District of Maple Ridge*, BCLRB No. B481/2000. That is the approach I adopt in interpreting Section 35 in this case.

B. Is Sky Café providing food services?

**61** "Food services" are one of the enumerated services set out in Section 35(0.1) of the Code that are captured by the term "contract for services" and thus subject to the protection resulting from contract retendering under Section 35(2.2).

**62** As Sky Café points out, "food services" is not a defined term in the Code. However, as indicated above, I must give a full and liberal interpretation to the Code's successorship provisions. I am not persuaded that a full and liberal interpretation of the Code's successorship provisions, including Sections 35(0.1) and (2.2), is achieved by restricting the meaning of food services to preparing meals, snacks, or beverages for immediate consumption on premise or for takeout, as stated in the NAICS. I do not find that the Legislature intended the meaning of food services to be tied to the definition of "accommodation and food industry" or "food manufacturing" in the NAICS.

**63** Moreover, while Section 35(2.2) is directed at protecting employees from the effects of contract retendering, it is also more broadly designed to ensure that the "contract retendering process cannot achieve costs savings through reducing labour costs or eradicating bargaining rights": *Supra*, para. 87. Furthermore, it is clear "Section 35(2.2) ensures that existing Code and collective bargaining rights are not lost, simply because the work changes hands as a result of a contract flip, rather than disposition of a business": *Everclean Facility Services Ltd.*, 2022 BCLRB 14 (Leave for Reconsideration of 2021 BCLRB 143) ("*Everclean*"), para. 40. I find those legislative purposes are not served by restricting the meaning of food services to an endeavour that involves the actual preparation of food.

**64** Rather, I find that the approach which most accords with a full and liberal interpretation of the Code's successorship provisions and the legislative purposes of Section 35(2.2) is one which assesses the services provided by contractors and whether those services are rationally connected to the provision of food and beverage. This, in my view, involves an assessment of the entire circumstances of a case, which may include, but are not limited to: the business of the contracting entity; the services contracted for; how those services fit into the business of the contracting entity; the services provided by the alleged predecessor employer; and the services provided by the alleged successor employer.

**65** In this case, it is undisputed that WestJet is in the airline industry. As part of that business, it provides its customers with food and beverage on inbound and outbound flights from YVR. WestJet contracts with other entities to assist it in providing these services. Prior to October 1, 2020, WestJet contracted with Gate Gourmet to assist it in providing its food and beverage offerings. After October 1, 2020, WestJet contracted with Sky Café to assist it in providing its food and beverage offerings, albeit in an arrangement which differs from Gate Gourmet's arrangement in some respects. This is the broader context in which Sky Café provides its services to WestJet.

**66** I accept that Sky Café does not directly prepare, package, or serve the food and beverage that is ultimately consumed by WestJet's customers. This was not disputed by the Union. However, I find that this does not mean Sky Café's services to WestJet are not food services. It is not disputed that Sky Café provides WestJet's YVR operations with a variety of services that are integral to WestJet's ultimate goal of providing its customers with food and beverage. For example, it is undisputed that Sky Café provides the following services to WestJet at YVR: ice and dairy service; food and beverage cart build; hot water flask service; domestic garbage and recycling, and



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international waste; trucking and delivery to the uplifter via Dnata; inventory management of food products and equipment; and ware washing (cutlery).

**67** Furthermore, food preparation is only one part of the total spectrum of food services that WestJet requires. The remaining parts of that food services spectrum are provided by Sky Café directly, or by means of sub-contracting to Dnata. For example, it is undisputed that the services described above involve warehousing commissary and food, albeit food that is prepared by others; warehousing other ancillary items necessary for food and beverage service on WestJet flights (e.g. cutlery, coffee pots, linens, etc.); cleaning of these items when they come off flights; disposing or recycling garbage that comes off flights; and restocking carts and culinary items for the purpose of delivering those items on flights. Sky Café also manages the logistics of loading and unloading commissary carts to and from flights.

**68** Even without the context of WestJet's food and beverage offerings at YVR, this list of Sky Café services, on their own, persuades me that Sky Café provides food services. With the context of WestJet's food and beverage offerings, that becomes abundantly clear. I acknowledge that Sky Café characterizes these services as warehousing, logistics, and transportation services rather than food services. However, this only underscores the importance of assessing a contractor's services in context. The key context in this case is that Sky Café's services are ultimately directed at WestJet fulfilling its food and beverage obligations to its customers at YVR.

**69** As such, I find that the services provided by Sky Café are rationally connected to the provision of food and beverage and therefore are "food services" within the meaning of Section 35(0.1) of the Code.

**C. Is Sky Café providing substantially similar food services, in whole or in part?**

**70** Having found that Sky Café is providing "food services" to WestJet, I must now determine whether those services are "substantially similar services" that "continue to be performed, in whole or in part, under the direction of" Sky Café.

**71** This requirement stems from the language of Section 35(2.2) of the Code which makes the retendering of a contract for services and the performance of substantially similar services by a new contractor a pre-requisite to engaging successorship protections under the Code. Importantly, the substantially similar services do not need to be all of the services provided by the previous contractor. Instead, Section 35(2.2) is engaged even if only *part* of those substantially similar services are performed by the new contractor.

**72** Sky Café acknowledges that some services provided by Gate Gourmet to WestJet are the same services provided by Sky Café to WestJet. However, it says that, overall, the services it provides to WestJet are fundamentally different than the services provided by Gate Gourmet. It says that fundamental difference stems from the fact that, unlike Gate Gourmet, it does not prepare food served to WestJet customers. Accordingly, it says the services it provides cannot be substantially similar to those provided by Gate Gourmet.

**73** In considering these arguments, it is important to note that Section 35(2.2) includes the proviso "in whole or in part". Accordingly, as indicated above, Sky Café need only provide *part* of substantially similar services previously provided by Gate Gourmet. That is why I find the lack of food preparation responsibilities does not put Sky Café outside the scope of Section 35(2.2). Indeed, Sky Café concedes that some of the services it provides to WestJet are not only substantially similar, they are the same as those previously provided by Gate Gourmet. The only exception Sky Café points to is food preparation. Accordingly, I find that a contract for services between WestJet and Gate Gourmet was retendered and substantially similar services continued to be performed, in part, under the direction of Sky Café.

**74** To the extent that Sky Café seeks to rely on the work performed by Dnata, I find that Dnata's role does not change my finding.

**75** It is an undisputed fact that Sky Café was sub-contracting out the delivery work to Dnata. That was the Union's assertion in the Application. Sky Café did not dispute that factual assertion in its response submission. Instead, it

noted the following as part of its list of services provided to WestJet: "Trucking and Delivery to Uplifter (performed by Dnata)". It then noted the reason for Dnata performing this work, namely that it was not licenced to enter YVR's restricted premises. Nothing in the Additional Submissions contradicted the Union's factual assertion that Sky Café sub-contracted the delivery work to Dnata.

**76** Given the foregoing, I find that Sky Café, as part of its contract with WestJet, was responsible for trucking and delivery to WestJet aircraft at YVR. I accept that Sky Café, at least initially, chose to sub-contract out trucking and delivery work to Dnata as it did not initially have the licensing requirements to perform that particular aspect of its contract for service with WestJet. However, I am not persuaded that the sub-contracting arrangement means Sky Café is not providing WestJet with the service of delivering food and beverage items from its warehouse to the aircraft at YVR.

**77** For clarity, I make no findings about the propriety of Sky Café's sub-contracting arrangement with Dnata under the Collective Agreement. That, along with the foregoing, is why the factual assertion in the Additional Submissions about Sky Café now choosing to perform the delivery work directly has no bearing on my decision on the Application.

**78** To the extent that Sky Café says it does not provide substantially similar services because the services it does provide are not "food services", I have already dealt with that issue above. Those services are, in my view, food services.

**79** In light of the foregoing, I find that Sky Café does provide WestJet with, at least in part, substantially similar services as Gate Gourmet. That element of Section 35(2.2) is therefore established.

D. Does Section 35(2.2) apply to these circumstances?

**80** Sky Café says more broadly that Section 35(2.2) does not apply to the circumstances of this case because that provision is intended to capture circumstances where the identity of the employer has changed, but employees (generally the same individuals) continue to do the same work, in the same location, often with the same equipment.

**81** The comments of the Review Panel and Legislature relied on by Sky Café demonstrate that contract retendering "often" results in the situation where the same employees are doing the same work, with the same equipment, and in the same location, simply with a different employer. However, the key qualifier is "often". As such, I find that the Review Panel and the Legislature did not foreclose the possibility of other circumstances not involving a mere change in the identity of the employer triggering successorship protections where a contract for certain prescribed services is retendered.

**82** In any event, when one reviews the basic elements of what has transpired in this case, they bear striking overall resemblance to situations that have unquestionably been caught by Section 35(2.2) of the Code. There is a contracting entity who contracts out some service to a third-party contractor. That contracting entity then decides to switch the third-party contractor at some point in the future. The contracting entity, for example, could be a health authority operating a hospital, a long-term care facility operator, a property management company, a community college, or a municipality. The relevant services contracted out, and subsequently subject to contract retendering, are those enumerated in Section 35(0.1), including food services.

**83** In this case, the contracting entity, WestJet, serves food and beverage to its customers on flights to and from YVR. However, it does not have employees whose job it is to prepare that food and beverage, warehouse it, deliver it, and perform the tasks ancillary to the provision of that food and beverage. Instead, it contracts out that work. Initially, Gate Gourmet was the contractor. However, as of October 1, 2020, as noted above, Sky Café was contracted to provide, at least partly, substantially similar services as Gate Gourmet previously provided to WestJet.

**84** Often, the nature of the contracting entity's operations is such that those services must be provided in a fixed location, for example, a hospital, a long-term care facility, an office building, a college campus, or a municipality.

Accordingly, it is not surprising that employees are doing the same work at the same location following a contract retendering. However, this case is not all that different when the location of Sky Café work is considered in context. In my view, that location is YVR and its surrounding area; not a particular warehouse facility. Indeed, I note that Sky Café's warehouse location, like Gate Gourmet's facility, is in Richmond, British Columbia, in close proximity to YVR. Of course, that make sense given that the ultimate destination of the services are WestJet aircraft at YVR. In this broader, contextualized conception of work location, the services provided by Sky Café to WestJet are being provided from the same location as the services previously provided to WestJet by Gate Gourmet.

**85** In terms of equipment, it may be that the equipment used to provide the services is not that of Gate Gourmet. I find that comments about the same equipment being used refer more broadly to the fact that the work done uses similar equipment. That equipment may be owned and provided by a new contractor, but it is typically the same type of equipment used. For instance, there may be very little difference in the equipment used to load pre-packaged food and beverage onto a Dnata delivery truck versus a Gate Gourmet delivery truck.

**86** Similarly, to the extent that Sky Café is providing at least some services to WestJet that were previously provided by Gate Gourmet, one would expect, again broadly speaking, similar working conditions for employees. For example, there is warehouse work, disposal of garbage, stocking of carts, etc.

**87** It is not disputed that Gate Gourmet employees were not offered employment by Sky Café following the retendering of the contract in October 2020. Despite that, I am not persuaded that this alone puts this case outside the Union's claim under Section 35(2.2) of the Code.

**88** As will be explained further below, the right to employment may be a consequence of a successorship declaration and declaration that the successor employer is bound by the collective agreement under Section 35(2.2): *Everclean*. As such, it must first be the case that, as a matter of law, Section 35(2.2) is engaged in the circumstances of a particular case. That conclusion is not impacted by whether a successor employer has in fact offered employment to existing or former employees of the predecessor employer. That is so because the right to be hired may only arise if a successorship and binding collective agreement is established. As is apparent from the Application, the existence of a successorship under the Code is disputed by the parties.

**89** In coming to this conclusion, I wish to clarify that I make no finding about whether any of the Union's members ought to have been offered employment by Sky Café following the retendering of the WestJet contract in October 2020. That is not something the Union sought in the Application. Instead, the relief sought in the Application is limited to a declaration that a successorship has occurred and that the Collective Agreement is binding on Sky Café as of the date of retendering.

**90** Given the foregoing, I find that the circumstances of this case fit broadly within the type of contract retendering situations that Section 35(2.2) of the Code was designed to address. To that end, I find that the Application is not an attempt to expand, rather than merely protect, existing collective bargaining rights. As noted above, Section 35(2.2) is directed at protecting employees from the effects of contract retendering; however, it is also more broadly designed to protect the eradication of bargaining rights simply because of contract retendering: *Supra* and *Everclean*. I find that the Union's Application is consistent with this broader purpose of Section 35(2.2). The Union had collective bargaining rights associated with services previously provided by Gate Gourmet to WestJet and that are now provided by Sky Café, at least in part. I find that the Legislature's intent was to not allow WestJet's contract retendering to extinguish the Union's collective bargaining rights.

**91** Accordingly, my overall finding is that Section 35(2.2) applies to the circumstances of this case.

E. Should the Application be dismissed for delay?

**92** My overall finding above is not the end of the matter because Sky Café says, in the alternative, that I should dismiss the Application because of unreasonable delay on the part of the Union in filing the Application. It says the Board has not considered the impact of delay on applications under Section 35(2.2). It says the Board should require a compelling explanation for delay before granting an application under Section 35(2.2).

93 The Union acknowledges that there was longer than normal delay in filing the Application. However, it says there is a reasonable explanation for the delay. In any event, it relies on Board jurisprudence suggesting that equitable doctrines on delay, such as the doctrine of laches, do not apply because successorship operates as a matter of law and does not depend on an application to the Board.

94 I find that rights under Section 35(2.2) are not foregone by delay because I accept that successorship under the Code, including under Section 35(2.2), occurs by operation of law and is not dependent on the Board issuing a successorship declaration.

95 The starting point for this principle is the Board's first decision on successorship rights: *Kelly Douglas*. In *Kelly Douglas*, the Board made the following comments about the operation of successorship protections under what was then Section 53(1) and is now Sections 35(1) and (2) of the Code:

Section 53(1) establishes the basic rule in the successorship area. Where a business is disposed of, the transferee receives it subject to all proceedings under the Code, especially certification of a trade union. It is also bound by the collective agreement negotiated with that trade union. Most successor cases are clear and this legal standard can be applied by the parties to their own situation. **No investigation or decision by the Board is required for the section to operate** and to permit the union to serve valid notices to bargain or to lodge grievances.

(p. 81, emphasis added)

96 This statement from *Kelly Douglas* was relied on in subsequent decisions of the Board, including those cited by the Union, in support of the proposition that successorship occurs by operation of law.

97 In *Clearwood Lumber Co. Ltd.*, BCLRB No. 74/77, the Board stated:

The present case is a good example of why these provisions are automatic. If the Code had required a declaration of successorship in each instance, the rights of the employees in this instance would have been held in suspension while the Board determined two separate applications; Pine Lake to be declared the successor to Kokusai, then Clearwood to be declared the successor to Pine Lake. We would emphasize that Section 53 does not require a declaration by this Board in order to be activated. Prior to entering into the lease with Clearwood, Pine Lake was the successor of Kokusai for the purposes of the Code. Clearwood is the successor of Pine Lake.

(p. 5)

98 In *3269 Enterprises Ltd. (doing business as The Duncan Inn)*, IRC No. C151/92, the Council stated:

The doctrine of laches is an equitable remedy. It is based upon the delay or acquiescence of one party in enforcing its lawful rights. Since successorship arises automatically by virtue of the operation of the Industrial Relations Act, we entertain great doubt as to whether the doctrine has any application under Section 53 [now Section 35]. However, even if it is applicable, we are satisfied that the prerequisites of the doctrine cannot be established on the existing facts.

(p. 6, underlining in original)

99 In *Expert Floors Ltd. and Cromwell Flooring Ltd.*, BCLRB No. B279/93, the Board stated:

I agree with the Council in *3269 Enterprises Ltd.*, *supra*. The doctrine of laches likely does not apply to Section 53 as this would be inconsistent with the Board's and Council's jurisprudence that the section operates automatically without any application needing to have been made. In any event, the conduct of the parties during the period 1980 to 1992 was such that there can be no argument advanced that the Union in any way waived its right to claim successorship, or acted in any [sic] or [way] which would have led Inlaid or Expert Flooring to conclude that they were not bound by a collective agreement.

(p. 18)

**100** In *Maverick Coach Lines*, BCLRB No. B435/97, the Board stated:

There is an issue of whether laches can apply to successorship as that status arises automatically by operation of law at the time of the transfer without the need for an application: *Clearwood Lumber*, BCLRB No. 74/77; *Expert Floors*, *supra*, and *3269 Enterprises Ltd.*, *supra*, at p. 7. I leave the debate on that issue for another case... .

(para. 56)

**101** The issue of delay and successorship was then considered in a series of decisions involving a successorship from McRae Waste Management Limited ("McRae") to Northwest Waste Systems Inc. ("Northwest"). The citations for this series of decisions is located at paragraph 2 of *Dan Atkinson, et al.*, BCLRB No. B207/2004 (the "Atkinson Decisions"). Successorship was not contested in the Atkinson Decisions. However, a dispute arose as to whether former employees of McRae should have their seniority dovetailed with existing employees of Northwest. The union representing Northwest employees chose to entail instead dovetail seniority. This led to a duty of fair representation application under Section 12 of the Code by former McRae employees.

**102** Vice-Chair Pylypchuk, as he then was, was assigned as the original panel of the Board on the Section 12 application. He held that Section 12 was not breached: *Dan Atkinson, et al.*, BCLRB No. B362/2000 ("Atkinson #1"). In doing so, Vice-Chair Pylypchuk reiterated his initial invitation to the applicants to seek relief under Section 35 of the Code on the dovetailing issue. The history of reconsideration, judicial review, and ultimately remittal of the initial Section 12 application back to Vice-Chair Pylypchuk was summarized at paragraph 1 of *Dan Atkinson, et al.*, BCLRB No. B202/2002 ("Atkinson #4").

**103** The applicants also then filed an application under Section 35 of the Code seeking an order dovetailing seniority, declarations as to when dovetailing applied, and monetary remedies stemming from the failure to dovetail. Vice-Chair Pylypchuk ordered dovetailing under Section 35, but limited the retroactive effect of dovetailing on the basis that the applicants engaged in delay in filing their Section 35 application: *Dan Atkinson, et al.*, BCLRB No. B68/2001 ("Atkinson #2").

**104** Leave for reconsideration of *Atkinson #2* was denied in *Dan Atkinson, et al.*, BCLRB No. B292/2001 (Leave for Reconsideration of BCLRB No. B68/2001) ("Atkinson #3"). The reconsideration panel in *Atkinson #3*, which included Vice-Chair Hall, as he then was, stated the following with respect to the issue delay and successorship rights:

It is sometimes said that successorship is automatic or occurs "by operation of law". The basis for this description of now Section 35 is the Board's comments in *Kelly Douglas & Company Limited*, BCLRB No. 8/74, [\[1974\] 1 Can LRBR 77](#):

...

This passage was relied on by the panel in *Clearwood Lumber Co. Ltd.*, BCLRB No. 74/77, to support the statement that "the primary focus of Section 53 is automatic" (p. 4). Later decisions contain similar observations: see *Expert Floors Ltd.*, BCLRB No. B279/93, at p. 18; and *Maverick Coach Lines et al.*, BCLRB No. B435/97, at para. 56. **However, these and other cases have all glossed over the fact that the above comments in *Kelly Douglas* were specifically concerned with subsection (1) of then Section 53.** Indeed, in the paragraph which immediately followed, Chair Weiler explained that some aspects of a successorship can only be determined after application to the Board:

...

The Applicants maintain the original panel improperly applied the doctrine of laches, and rely on the *Expert Floors* and *Maverick Coach Lines* decisions. Like the panels in those cases, we are not required to decide whether the doctrine is inconsistent with the concept of automatic successorship. But we do make this observation: **any exclusion of the doctrine affects only the occurrence of a successorship under Section 35(1) of the Code.** We see no reason in law or policy to exclude delay as a relevant factor when

the Board exercises its discretionary jurisdiction on applications under the remaining provisions of Section 35. And that is precisely what was done by the original panel in this proceeding.

(paras. 12-14, emphasis added)

**105** Vice-Chair Pylypchuk had further cause to discuss Section 35 when the Section 12 application in *Atkinson #1* was remitted to him following reconsideration and judicial review. In *Atkinson #4*, Vice-Chair Pylypchuk discussed the automatic operation of Sections 35(1) and (2) of the Code as follows:

Successorship under the Code is automatic: *Kelly Douglas and Company Limited*, BCLRB No. 8/74, [\[1974\] 1 Can LRB 77](#), *Clearwood Lumber Co. Ltd.*, BCLRB No. 74/77, *Expert Floors Ltd. and Cromwell Flooring Ltd.*, BCLRB No. B279/93, *Maverick Coach Lines et al.*, BCLRB No. B435/97. What that means is that successorship occurs as a matter of law. The Board may declare whether a sale, lease, transfer or other disposition has occurred and may identify a date on which such sale, lease, transfer, or other disposition took place. Such a declaration does no more than reflect a state of fact brought about by operation of law.

...

**The only other part of Section 35 that operates automatically as a matter of law is Section 35(2), which binds the purchaser, lessee or transferee to any collective agreement in force.** Upon succeeding to a business or part of it that is unionized, the successor becomes bound by the existing collective agreement and enters into a relationship with the union of the predecessor business as though it stood in the shoes of the previous owner.

(paras. 35 and 37, emphasis added)

**106** Leave and reconsideration of *Atkinson #4* was granted: *Dan Atkinson and Rob White*, BCLRB No. B6/2003 (Leave for Reconsideration of BCLRB No. B202/2002) ("*Atkinson #5*"). This resulted in the Section 12 application being remitted to a different panel, namely Vice-Chair Hall. However, the reconsideration panel in *Atkinson #5* took no issue with the above quoted passages from *Atkinson #4*.

**107** Indeed, in the further remittal decision, Vice-Chair Hall again commented on the automatic nature of successorship under the Code. He first discussed the genesis of that principle from *Kelly Douglas: Dan Atkinson, et al.*, BCLRB No. B422/2003 ("*Atkinson #6*"), paras. 22-24. He then identified the portions of Section 35 of the Code which operate automatically and those which do not:

What was previously Section 53(1) of the *Labour Code* is now **Sections 35(1) and (2)** of the *Labour Relations Code*. Thus, **it is only those provisions which operate "automatically"**, thereby binding a successor to all proceedings under the Code and any collective agreement in force (see also the Original Decision at para. 37). **The consequential issues which the Board must address on application under Section 35(3) and may address under Section 35(5) are not automatic.** Those issues include seniority rights as a result of statutory amendments which effectively give the Board jurisdiction to re-write collective agreements and integrate seniority lists (note the discussion at pages 85-86 of *Kelly Douglas* before the amendments).

(*Atkinson #6*, para. 25, emphasis added)

**108** Leave for reconsideration of *Atkinson #6* was denied: *Dan Atkinson, et al.*, BCLRB No. B172/2004 (Leave for Reconsideration of BCLRB No. B422/2003).

**109** The Board has continued to consider Sections 35(1) and (2) of the Code to operate automatically as a matter of law. See for example: *Maxxam Analytics International Corporation*, BCLRB No. B202/2010 (Leave for Reconsideration of BCLRB No. B113/2010), paras. 16-17.

**110** I see no reason why that principle should not apply to Section 35(2.2) of the Code. Section 35(2.2) essentially mirrors and replicates Sections 35(1) and (2) of the Code, but in the contract retendering context as opposed to the sale of business context: *Supra*, paras. 71-77 and *Everclean*, para. 44. The primary rights that flow from a finding of a successorship under either context is that the successor employer becomes bound by all proceedings under the

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Code before the date of the disposition or contract retendering, and those proceedings must continue as if no change occurred. Furthermore, any collective agreement in force continues to bind the successor employer as though it had been signed by the successor employer.

**111** Accordingly, I find that the principles articulated in the Atkinson Decisions, and prior decisions dating back to *Kelly Douglas*, apply to Section 35(2.2) of the Code. This means that when, as a matter of fact, a contract for services is retendered and substantially similar services continue to be performed, in whole or in part, under the direction of another contractor, the law automatically operates to make the new contractor bound by all proceedings under the Code as of the start date of the new contract, and those proceedings must continue as if no change had occurred. Additionally, as a matter of law, any collective agreement in force continues to bind the new contractor to the same extent as if it had been signed by that contractor. These consequences are not dependent on the Board issuing a declaration to that effect. Accordingly, delay in filing an application seeking such declaratory relief under Section 35(2.2) of the Code cannot be a basis to dismiss such an application.

**112** Having found the facts of this case demonstrate that a contract for food services was retendered and substantially similar services continue to be performed, in part, under the direction of Sky Café, I cannot dismiss the Application because of delay. Instead, the rights the Union seeks to confirm as established automatically flow, as a matter of law, from that finding of fact.

F. Remedies

**113** Given the foregoing conclusions, I must grant the Application. There has been a partial successorship from Gate Gourmet to Sky Café resulting from the retendering of the contract for food services with WestJet.

**114** Pursuant to Section 35(2.2) of the Code, I must declare that Sky Café is bound by all proceedings under this Code before October 1, 2020 when it began providing food services to WestJet at YVR and those proceedings continue as if no change occurred. I must also declare that the Collective Agreement continues in force and binds Sky Café to the same extent as if it had been signed by Sky Café.

**115** The Union initially sought remedies against Dnata, but the portions of the Application related to Dnata were withdrawn. Accordingly, the remedies granted above address the balance of the relief sought by the Union.

**116** However, before concluding, I find it appropriate in this case to address what I have not decided. The remedies granted are limited to the two declarations made above. I have not otherwise determined "what rights, privileges and duties have been acquired or are retained" as a result of the partial successorship declaration and the declaration that Sky Café is bound by the Collective Agreement: Code, Section 35(3). My decision should also not be taken as providing any directions as to the interpretation and application of the Collective Agreement dating back to October 1, 2020: Code, Section 35(5). For example, I have not determined whether or not Sky Café's sub-contracting of delivery work to Dnata breached the Collective Agreement, nor have I determined the impact of delay, if any, on such a claim.

V. CONCLUSION

**117** For the reasons above, I grant the Application and issue the above noted remedies.

LABOUR RELATIONS BOARD

RENE-JOHN NICOLAS  
VICE-CHAIR

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