The Zellers, Inc., and Target Canada Co. decision establishes that collective bargaining rights will not necessarily follow the enterprise when a company acquires something previously used or possessed by the unionized business. Although the case considers the application of the British Columbia Labour Relations Code (Code), the principles contained in the decision have broader application across Canada.

This decision is important to any employer considering expanding operations by acquiring an element formerly used by an existing, comparable enterprise.

Background
Target's well-publicized entry into Canada was made possible, in part, by its decision to acquire lease-hold interests that Zellers previously held.

The ability to assume the Zellers leases was an important benefit to Target, which sought to operate in a number of geographic areas already populated by Zellers stores. Target was also interested in assuming the leases of Zellers locations to prevent other potential competitors from operating out of those locations, and to ensure that a Canadian competitor (e.g., Zellers) no longer operated in the same geographic areas as Target.

Assuming Zellers' leases gave Target a significant bargaining advantage with the landlords of the sites previously occupied by Zellers stores. In the case at hand, that advantage was realized when Target entered into negotiations with the landlord of the Brentwood Town Centre in Burnaby, British Columbia, to negotiate a new lease in a new “marquee location” in what was planned to be a significantly renovated shopping centre.

Notably, Target's acquisition of Zellers also gave it the right to carry a brand that had previously been exclusive to Zellers in Canada (the Cherokee brand) and the right to obtain Zellers' pharmacy files should it wish to do so. While Target owned the right to carry the Cherokee brand in the United States, it would not have had the right to do so in Canada without the assignment of that right as a term of the acquisition.

The legal issue
The majority of employees at the Zellers in the Brentwood Town Centre (which will continue to operate until June 2013) are represented by a union. It is possible, although not a certainty, that a number of these employees will obtain employment with Target after Zellers closes.

Understanding this to be the case and based upon the terms of the acquisition between the parties, the union applied to the British Columbia Labour Relations Board (BCLRB) pursuant to section 35 of the Code for a declaration that Target was a successor employer to Zellers.

Sections 35(1) and (2) of the Code state:

- 35(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.
- 35(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.

In short, the union alleged that a portion of Zellers’ business was sold or transferred...
to Target and that Zellers’ business remained in a form requiring the preservation of the employees’ collective bargaining rights.

In support of its position, the union argued that Target intended on carrying on an operation — the sale of general merchandise — that was similar to Zellers’ operations. The union noted further that Zellers had operated its Brentwood Town Centre location since approximately 1988. It called evidence about the “locational goodwill” of that location, or the potential to access customers that would transfer to Target upon its acquisition of Zellers.

Target countered by noting that its new lease within the renovated Brentwood Town Centre would leave the “old” Zellers location available for rent by another retailer. Furthermore, completing the shopping centre renovations would result in a three-year hiatus between Zellers’ closure and Target’s opening.

Target noted that, even if it decided to occupy Zellers’ retail space, its own stores would bear no similarity to Zellers. In fact, the significant renovations to Zellers that would be required to take over its existing location would result in a period of six to nine months during which Target was not operating from that location.

Whether or not Target assumed Zellers’ store location or opened a new location within the Brentwood mall, it would not take any of Zellers’ assets, including its inventory, business processes, information technol-

The BCLRB determined that a sale of the business had not taken place and, as a result, the union’s bargaining rights did not transfer to Target.
ogy or employment policies. The evidence of Target was also that it had decided not to take Zellers’ pharmacy files once it became clear it could not easily operate pharmacies within the store. With regard to the waiver of exclusivity over the sale of the Cherokee brand, Target noted that it already had exclusive rights to that brand in the United States; it was therefore Target’s position that it was simply bringing its own business into Canada. The evidence before the BCLRB was that, in any event, sales of the Cherokee brand formed less than 2 percent of Target’s sales. Target disagreed that it was obtaining any locational goodwill from Zellers, noting that it was not taking advantage of Zellers’ business or associating itself with Zellers in any manner.

The BCLRB was strongly influenced by the evidence led by Target regarding its position within the retail sector and how it distinguishes itself as a mass merchandiser.

The decision of the BCLRB
The BCLRB determined that a sale of the business had not taken place and, as a result, the union’s bargaining rights did not transfer to Target.

The BCLRB acknowledged that both Zellers and Target were mass merchandise department stores and that the Zellers lease rights as a whole and, specific to the case before it, Zellers’ attractive location within the Brentwood mall would contribute to the success of Target. However, the BCLRB accepted that:

- Target occupied a unique position in the retail mass merchandising industry and was bringing a unique and established brand to Canada. As a result, Zellers customers would not necessarily become Target customers.
- The decision to acquire Zellers was not related to the value that it hoped to attain from Zellers itself, but rather from the real estate on which Zellers had been located.
- Target was not acquiring any of Zellers’ assets, goodwill, logos or trademarks, customer lists, accounts receivable, contracts or inventory.
- Target had not promised to maintain Zellers’ name or to refrain from competing with Zellers.

The BCLRB also considered it relevant that, whether Target operated out of the existing Zellers location or assumed a new location within the Brentwood Town Centre, there would be a period of closure while renovations were undertaken that would interrupt the continuity of the two businesses. Furthermore, the BCLRB determined that the ability to assume Zellers’ pharmacy records and the right to sell the Cherokee brand in Canada did not constitute definitive parts of Zellers’ business such as to indicate Zellers’ operations were being continued.

Although the BCLRB acknowledged that Target may hire Zellers employees to perform similar functions, that fact alone was not sufficient to establish that a sale of the business had occurred.

The meaning for employers
The BCLRB was strongly influenced by the evidence led by Target regarding its position within the retail sector and how it distinguishes itself as a mass merchandiser. For example, Target led evidence, including expert evidence, relating to its own marketing strategies and brand recognition. Factually, it helped that Target was not taking any of Zellers’ assets in acquiring the company. To an extent, therefore, this case is fact-specific.

However, employers would be wise to take note of the decision. Target successfully established that it was primarily acquiring Zellers for its lease rights, and not for its assets or goodwill. Acquiring a competitor to expand within Canada, which might otherwise be deterred by a concern that the competitor’s bargaining rights would attach to the new enterprise, can continue to be seen as a viable business strategy in circumstances similar to those in this decision. CB