BRITISH COLUMBIA LABOUR RELATIONS BOARD

ZELLERS INC. (STORE #264)

("Zellers")

-and-

TARGET CANADA CO.

("Target")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Ritu Mahil, Vice-Chair
APPEARANCES:	Lindsie M. Thomson, for Zellers Thomas A. Roper, Q.C., Ryan D. Copeland and Michael G. Sherrard, for Target Brett Matthews, for the Union
CASE NO.:	62846
DATES OF HEARING:	August 27-30, October 3-5, 2012
DATE OF DECISION:	November 8, 2012

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union applies under Section 35 of the *Labour Relations Code* (the "Code") for a declaration that Target is a successor employer to Zellers with respect to the business carried on by Zellers at the Brentwood Mall in Burnaby, B.C. (the "Brentwood Store").

II. AGREED STATEMENT OF FACTS

2 The parties agree to the following statement of facts:

Zellers

1. Zellers Inc. ("Zellers") is a mass merchandise department store operating across Canada. It is the second largest such retailer in Canada, behind Walmart.

2. Zellers is a separate legal entity from and a subsidiary of the Hudson's Bay Company ("HBC"). In Canada, HBC operates various retail chains including Zellers, the Bay, Home Outfitters, and Fields.

3. It has been widely reported in recent years that Zellers has struggled with eroding market share.

4. Zellers offers a large number of brands in its stores and holds trademarks and exclusive licenses to sell many brands.

5. Zellers, until recently, operated pharmacies in many of its stores. Some pharmacies were operated by Zellers directly and some by licensees.

6. Zellers operates 32 stores in B.C. One of its B.C. stores is at unit 300 of Brentwood Mall, 4567 Lougheed Highway, Burnaby, B.C. (the "Brentwood Store"), which store Zellers refers to as Store #264.

7. Until September 23, 2011, Zellers operated the Brentwood Store by lease dated November 23, 1988, as amended June 1, 1994, April 26, 1995 and February 1, 2009. On September 23, 2011, Zellers entered into a new lease for the Brentwood Store, as described below.

UFCW, Local 1518

8. The United Food and Commercial Workers Union, Local 1518 (the "Union") is certified to represent employees at the Brentwood Store, except loss prevention officers, students employed in a cooperative training program, supervisors, and persons above the rank of supervisor (the "Bargaining Unit").

9. As of December 6, 2011, there were 137 employees in the Bargaining Unit.

10. Zellers and the Union agreed to a new collective agreement on March 16, 2012, with a term of April 1, 2011 to March 31, 2013, which included a Workplace Closure Agreement applicable to the Brentwood Store. The Union advised Zellers when it negotiated these agreements that they would be without prejudice to the Union's position on the matter presently before the Board.

11. The Union is not certified to represent any other Zellers employees in B.C.

Target

12. Target Corporation is a United States [("U.S.")] company, which owns Target Canada Co. (together, "Target").

13. In 1902, George Draper Dayton opened "Goodfellow's" in Minneapolis.

14. In 1962, the Dayton family participated in the opening of the first "Target" store in Roseville, Minnesota.

15. Target operates more than 1,750 stores across the U.S. and employs approximately 355,000 "team members". Target is the second largest mass retailer in the United States, behind Walmart.

16. Target is recognized as an upscale discounter, known for providing high-quality, on-trend, stylish and contemporary merchandise.

17. Target's present foray into Canada represents Target's first significant retail venture to expand outside of the U.S.

18. Target's first Canadian store is planned to open in 2013.

19. Target spent a considerable amount of effort to understand how compatible the Target brand was with the Canadian Consumer. Customer satisfaction ratings were also obtained in relation to selected retailers as a way of better understanding Target's 'fit' in the Canadian market place.

20. Market research identified those markets that were most desirable to operate Target stores.

21. Having chosen to enter Canada, one of the options available to Target was building stores at new and undeveloped locations (the "Greenfield Approach").

22. The Greenfield approach would have allowed Target greater flexibility.

23. The Greenfield approach was not a viable option for Target in Canada.

24. A critical mass of stores was important to Target's Canadian venture.

25. Land use regulation in Canada means that it would take a significant period of time between the identification of a suitable parcel of land and the completion of the process required to build on that land.

26. Moreover, it became clear that much of real estate locations with favourable demographics were already "locked up" by other retailers. It would be extremely difficult for Target to penetrate the urban cores of many key cites to achieve the critical mass of stores it required to succeed in Canada.

Transaction

27. In late 2010, Target began negotiating with Zellers, and on January 12, 2011, Target and Zellers entered into a written agreement regarding Zellers' leasehold interests and other matters (the "Transaction Agreement").

28. The Transaction Agreement refers to an additional document called the Disclosure Letter.

29. As of the January 12, 2011 execution date of the Transaction Agreement, Zellers operated 275 stores in Canada.

30. By the second selection deadline identified in the Transaction Agreement, Target had selected 189 of the 220 leases that it had the right to select. Some of those leases

were assigned to other retailers including Walmart, Sobeys, and Canadian Tire.

31. At present, Zellers continues to operate 223 stores across Canada.

32. Target has the exclusive right to Cherokee in the U.S.

33. In addition to the brands to which Zellers waived its rights as part of the Transaction Agreement, Zellers has exclusive rights to brands in Canada, which rights it has not waived.

34. Target has exclusive rights to market and sell certain brands in both the United States and Canada.

Brentwood Store

35. On September 8, 2011, Target entered into an agreement with Shape Properties (Brentwood) Corp. and Brentwood Towncentre Inc. (collectively the "Landlord') regarding, inter alia, the termination of Zellers' lease at the Brentwood Store and good faith negotiations concerning a lease for Target at a new location in a redeveloped Brentwood mall property (the "Agreement Regarding Lease Termination").

36. On September 9, 2011, Target sent to Zellers a letter regarding the Second Tranche Selection List, Designee Notice and Lease Termination Notice.

37. The Zellers lease at the Brentwood Store is the only lease that Target selected pursuant to Article 2.3 of the Transaction Agreement, for termination by Zellers.

38. On September 23, 2011 Zellers and the Landlord entered into a Lease Termination Agreement regarding the lease at the Brentwood Store.

39. On September 23, 2011, Zellers and the Landlord also entered into a new lease for the Brentwood Store (the "Lease Agreement").

Subsequent facts

40. On January 20, 2012, Target and Zellers entered into the First Amending Agreement to Amended and Restated Transaction Agreement Dated September 12, 2011, which amending agreement concerns Zellers' pharmacy files.

41. On June 22, 2012, Target and the Landlord entered into the First Amendment to Agreement Regarding Lease Termination, which amending agreement concerns certain

deadline extensions for negotiations between the parties concerning a new lease in the redeveloped Brentwood mall.

42. On July 12, 2012, Zellers announced the closure of the Brentwood Store, effective March 14, 2013.

43. On July 26, 2012, Zellers announced "[a]fter a lengthy review and numerous discussions with various parties it became apparent that continuing to operate the Zellers in its current form was not viable, particularly given the geographic footprint of the remaining locations. Zellers has decided not to operate most of its remaining stores beyond March 2013. Zellers is considering options for certain locations, including potentially rebranding some stores, which will result in certain stores remaining open for the foreseeable future. This will be determined at a later date."

III. ADDITIONAL FACTS

3 In March 2010, Target conducted an analysis of the opportunity to expand its business into Canada. "Project Bacon" was the code name given to Target's potential Canadian venture. A powerpoint presentation given in March 2010 to Target's Executive states that Canadian consumers are highly aware of Target, perceived good value and shopping atmosphere, and that there appears to be an opportunity for Target to build on current equity and create a differentiated value proposition. The powerpoint presentation sets out examples of previous U.S. retailers that have entered the Canadian market (such as Costco and Walmart) and compares the Greenfield approach based entry with the acquisition of existing stores. The presentation then states that Target may benefit from an acquisition strategy because "taking over existing locations would potentially circumvent expensive and restrictive zoning regulations" and "acquiring a competitor would help strengthen Target's position within the marketplace, especially if the competitor offers a similar value proposition". A more extensive economic strategy for Project Bacon was presented in April 2010.

4 The March and April 2010 documents reveal that if Target wanted to expand its business into Canada, it considered three options. It could do so by a Greenfield approach, acquisition of a competitor, or a combination of those two.

5 Target regarded the Greenfield approach as the preferred method for establishing new stores. Building entirely new stores on undeveloped sites would allow Target greater flexibility to develop its prototypical stores that meet its desired parameters. The Greenfield approach, however, was not viable in Canada. It was important to Target to enter the Canadian market with critical mass, both from a marketing brand awareness perspective and also from a product distribution perspective.

6 The intensive regulation of land use in Canada meant it could take a significant period of time between the identification of a suitable parcel of land and the completion of the process required to build on that land. A Greenfield approach would mean building four or five stores per year, which would not give Target the critical mass it required to launch its business in Canada.

7 Moreover, Target analyzed Canadian demographics to determine which sites would be most appropriate to enable it to serve its identified market and be profitable. Joan Ahrens, Director of Real Estate for Target, gave evidence that a strategy team for Target conducts detailed studies before recommending where Target should expand its business. Judith Friedman, Group Manager for the Regional Marketing and Analysis division for Target also gave evidence. Friedman's division is charged with market research and strategic priorities from a locational standpoint for new and existing stores. They conduct multiple levels of research and help prioritize what metropolitan areas Target would like to expand into. They research each individual market, the current market landscape and where opportunities exist to maximize Target's business. They then work with the Real Estate team to determine exact locations for new stores in markets Target has yet to enter. Friedman conducted six to eight months of field research in Canada before preparing an extensive strategic document setting out her findings about the potential expansion into the Canadian market. In addition to the Real Estate team and the Regional Marketing and Analysis team, Target also has an Enterprise and Strategy team that was also involved in research and presentations regarding Target's expansion.

8 After conducting extensive analysis and research and deciding to expand into Canada, it became clear to the Real Estate team of Target, however, that much of the real estate in Canada was already "locked up" by other retailers. It would be difficult for Target to penetrate the urban cores of many key cities as it sought to do and achieve the critical mass of stores it wanted upon entry in Canada.

9 Target came to the conclusion it had to look to existing sites for redevelopment into Target stores. Target considered acquiring either Sears or Zellers. Target's analysis showed that Zellers was the most attractive opportunity to quickly build to the scale it desired. The March 2010 powerpoint document shows that Target concluded "Zellers uncertainty presents the most immediate path to critical mass, while also eliminating a competitor". The April 2010 powerpoint document notes that Target had been approached twice in the last decade regarding potential interest in Zellers. In 2004, HBC approached Target in search of a "white knight" to "acquire the entire Zellers portfolio".

10 Based on overtures from Zellers in the past, Target was aware that Zellers was prepared to consider a transaction that would provide Target with the right to acquire leasehold interests in a portion of Zellers' sites. Based on its market research, Target was aware that Zellers was located on sites in a number of geographic areas that had been identified as desirable for Target stores. One of those desirable areas was North Burnaby, specifically the Brentwood Store.

11 A November 22, 2010 Target document discusses its Canada strategy and the Zellers potential. The document states that Target estimated a total Canada buildout of approximately 229 stores. It notes that there were 100 Zellers locations that were of interest to Target (44% of total buildout). The document sets out a number of key reasons why Zellers was of strong interest to Target to acquire. These are:

- Pickup key urban markets / locations Target could not get via Greenfield
    - Enables strong presence in the 6 major markets (VETCOM)
    - Represents 44% of Target's Canada buildout
- Provides instant critical mass of Target Stores (i.e. beachheads in key markets)
    - Leverages fixed assets more quickly
    - Sales ramp up quickly
    - Marketing opportunity
    - Acquisition is complementary to Greenfield strategy
- Blocks competition from entering key market locations and/or expanding market share
- Enables Target to gain experience/learnings from acquisition in a foreign market
- Canadian familiarity with Target Brand
- Enables Target to utilize brands Zellers currently controls (Mossimo, Cherokee etc.)
- Leverages Target's experience and strength in execution of building over 100 stores in a year
- Signal to market that Target is a growth company

12 In late 2010, Target began negotiating a transaction with Zellers. On December 22, 2010, Target produced a Material Issues List setting out those matters that still remained in dispute between Target and Zellers as to the potential transaction. At that time, Zellers took the position that a portion of the purchase price would be allocated to goodwill. It was Target's position the purchase price would only be allocated to assets purchased, not goodwill. Ultimately, when the Transaction Agreement was completed, none of the purchase price was allocated to goodwill and this was verified by Zellers' internal accountants and external auditors. The Material Issues List also shows that as of December 22, 2010 it was Zellers' position that Target would not have to assume liability from employee benefits. Target's position was that it would not assume any liability or obligation with respect to employees or employee benefits. With respect to

pharmacy assets, Zellers took the position that Target would acquire the prescription files. Target took the position that it may at its sole discretion acquire prescription files.

13 The Transaction Agreement between Zellers and Target is dated January 12, 2011. The Transaction Agreement sets out a purchase price of $1.825 billion dollars split up into two payments of $912.5 million dollars. Ahrens gave evidence that the $1.825 billion amount was arrived at by calculating the difference between the lease cap values (the current values of the leases) and the market value of the approximately 180 selected locations. On average, the Zellers lease cap value per location was around $10 million.

14 The Transaction Agreement provided Target with the right to select up to 220 leasehold interests held by Zellers. There were two lease selection deadlines (referred to in the Transaction Agreement as "tranches")—the first in May 2011 and the second in September 2011. Prior to the first selection deadline, Target was required to deliver a notice to Zellers designating up to 110 leases. Prior to the second selection deadline, Target was required to deliver a notice to Zellers designating up to 110 additional Zellers' leases.

15 Acquiring the rights to certain Zellers' leases allowed Target to take on leases that in many cases had terms well below market value and allowed Target to save millions of dollars in rent. Further, the lease acquisition gave Target the right to talk to landlords, and as a result of those discussions, some leases were significantly renegotiated to meet Target's business requirements.

16 Pursuant to the Transaction Agreement, once Target selects a lease, it can direct Zellers to assign the lease to Target, assign it directly to a third party designated by Target, or terminate the lease. Upon selection by Target, Zellers assigned or terminated the lease and then at the same time entered into a sub-lease with Target or the third party or a new lease with the landlord as the case may be for a period of time.

17 There were 275 Zellers locations at the time of the Transaction Agreement. Target selected 189 stores and sold a number of those stores to Walmart, Sobeys and Canadian Tire. Target kept a number that will allow it to open 125 to 135 stores from 2013 to 2016. Target plans to open approximately 220 stores in Canada within the next 10 to 15 years.

18 In those locations where Target elected to terminate the Zellers lease, Zellers was to receive approximately 270 days' notice of termination of its lease and would, by the end of this notice period, vacate the site and strip it down to an empty shell in "broom clean" condition. Target is to then receive each site and thereafter there will be a hiatus period (6 to 9 months at most sites) ("go dark" period) during which time Target will undertake significant remodeling and building activities, at an average anticipated cost of $10 to 12 million dollars per site, to rebuild the site as a Target store.

19 Zellers terminated its Brentwood Store lease with the Landlord and entered into a sub-lease with Target. It was not given the 270 days' notice to vacate. However, the

latest possible date was March 14, 2013 and by default, that has become the vacancy date for the Brentwood Store.

20 On January 12, 2011, a powerpoint presentation was made to the Target Board of Directors at the meeting where they approved the Transaction Agreement. The presentation, entitled "Canada Opportunity", sets out the possibilities for each location selected under the Transaction Agreement. These are:

- Convert to new Target Store
- Trade with landlord
- Sell to Kohl's, Wal-Mart, others
- Remain as Zellers

21 Section 2.5 of the Transaction Agreement required Zellers to continue to operate its stores in each of the leased properties in the ordinary course of Zellers' business until the expiration of the second tranche deadline. Todd Marshall, Senior Vice President for Marketing for Target, gave evidence that the reason for this requirement was that if Zellers discontinued operations at any of the locations, it could default on its lease thereby making the deal worthless.

22 The January 12, 2011 powerpoint also sets out the rationale for acquiring Zellers. The page entitled "Zellers Rationale" states:

- Unique market entry opportunity that gives Target scale
- Immediate critical mass in key dense urban trade areas
- Complements greenfield strategy, which is not viable entry strategy
- Closes the gap with competitors
- Provides opportunity to negotiate for licenses on key brands
- Represents foundation for future expansion
- "Bullseye" trade areas and demographics with "Kmart" buildings

23 With respect to the Brentwood Store, Target chose to "trade with the landlord". Target commenced negotiations with the Landlord for a better location at the Brentwood Mall.

24 On January 13, 2011, Mark Foote, President of Zellers at the time, sent a letter to Zellers Associates. He stated in part:

> I know you will have many questions so I would like to provide additional context, address issues that are important to us in managing through this transition and reinforce our commitment to open and ongoing communications with all Associates.
>
> First, the decision was made because it provided the company with very high value for the business. This value considered all aspects of Zellers' current and future earnings as well as the long term best interests of the company given all of its businesses.
>
> * * *
>
> All Associates should be proud of what has been achieved in Zellers. The decision to sell leases to Target was not driven by poor performance. Our earnings over the past two years have more than doubled and our new store prototype launched in Winnipeg demonstrated that there could be an exciting future where comparable store sales and income would be driven by providing the customer with a much better shopping experience.
>
> * * *
>
> ... While this announcement has an obviously significant effect on Zellers' future, it also means three very important and positive things will happen: one of the world's great retail brands will enter the market, the vast majority of our Zellers locations will transform into this new offering to provide a brand new customer experience for Canadians and finally, qualified and high-performing Associates will have new opportunities to do what they love.

25 On September 9, 2011, Scott Nelson of Target wrote to Zellers and HBC identifying from the leases that Target had selected from Zellers, those which were to be assigned and transferred on the second tranche closing date, those which it wished to terminate on the second tranche closing date and those leases which Target wished to assign to other parties. The only lease identified to be terminated on the second tranche closing date was that of the Brentwood Store.

26 A document dated November 1, 2011 from Target breaks down the "Canadian Leasehold Acquisition Purchase Price Allocation". That document divides the purchase price allocation between the first and second tranche total lease values as well as the "Customer List" which it values at $10,522,440 dollars and 0.66% of the relative purchase price. Robert Harrison, Vice President and Comptroller for Target, gave evidence that this customer list referred to the pharmacy records.

27 Zellers has a customer loyalty rewards program and also a credit card business. It holds various permits and licenses in order to be able to operate. Zellers carries a number of licensed brands such as Alfred Sung, Cherokee, Tower by London Fog and Disney. All but Disney are exclusive licences to sell in Canada. At the time of the

Transaction Agreement, both Zellers and Target had license agreements with Cherokee.

28 Zellers owned the exclusive right in Canada to sell Cherokee brand products. No other store or entity in Canada could sell Cherokee products without the permission of Zellers or its parent company. Under Section 9.2(e) of the Transaction Agreement, Zellers and Target entered into an agreement waving exclusivity by Zellers and HBC on their own behalf and on the behalf of their affiliates with respect to brands licensed to or controlled by Zellers (the "Brand Waiver"). Zellers and HBC agreed not to enforce any of their current trademarks against Target. The Brand Waiver states in part:

> Zellers and HBC...waive any right they may have to exclusively manufacture, market, sell or distribute any product or service under any trademark in Canada that has been licensed to Zellers, HBC... which trademark is used as of the Execution Date by Target or its Affiliates in the operation of its or their business, including but not limited to those trademarks listed on Exhibit A. ... Neither Zellers nor HBC shall object to Target, or any of its Affiliates, manufacturing, marketing, selling or distributing products or services on a non-exclusive basis under any trademark licensed to Zellers or HBC for its use.

29 Exhibit A of the Brand Waiver lists Cherokee and Mossimo as the two trademarks licensed exclusively to Zellers. The exclusive license for Mossimo had expired by the time the Transaction Agreement and Brand Waiver were signed. Accordingly, the Brand Waiver effectively applied only to the Cherokee brand. As a further term of the Brand Waiver, Zellers agreed that by 2016 it would terminate all licensing agreements with Cherokee.

30 Section 2.6 of the Transaction Agreement states that at any time up to 90 days prior to the applicable vacancy date for a location, Target can elect to have Zellers transfer its pharmacy records to Target on the vacancy date. Section 2.6 states in part:

> At the option of Target Canada, which may be exercised by Notice given by Target Canada to Zellers from time to time no later than 90 days prior to the applicable Vacancy Date (the "**Pharmacy Notice Date**"), but subject to Laws, Zellers shall cause its Affiliates and shall use all commercially reasonable efforts to cause any third-party operator of the pharmacy in the applicable Subject Leased Property to transfer to or upon the direction of Target Canada all or any portion of the Pharmacy Records specified in such Notice (to the extent a pharmacy is operating in the applicable Subject Leased Property), including paper file backup and backup tape for all prescriptions (to the extent such exist), without retaining any copies of such Pharmacy Records other than such copies as Zellers or applicable pharmacy operator is required to retain by Laws (and, in such case, only to the extent and for so long as required by Laws). ... Neither Zellers nor any of its Affiliates will directly or indirectly solicit the transfer of any of the Pharmacy

> Records that may be transferred to or upon the direction of Target Canada pursuant to this Agreement to any stores or pharmacies operated by Zellers or any Affiliates or, subject to Laws, provide to any other Person any of the Pharmacy Records that are to be transferred to or upon the direction of Target Canada pursuant to this Agreement.

31 The *Pharmacy Operations and Drug Scheduling Act*, SBC 2003, c. 77 sets out licensing requirements for pharmacies in Canada including the safe transfer and continuing availability of prescription records. Under the regulations, it is not permissible for a pharmacy to transfer pharmacy records to a non-operating pharmacy. As such, Target was not able to exercise its right to the pharmacy files by taking possession of them as it was not a "pharmacy operator" under the regulations, capable of filling prescriptions in Canada.

32 Marshall gave evidence that after Target learned that it could not legally possess the pharmacy records, Target researched what other entity could take possession of the records and then operate the pharmacy. Target determined that the issue of pharmacy records had become unduly complicated. It then explored how the records could be sold on the open market but it did not have enough information.

33 On January 26, 2012, Target and Zellers entered into an agreement whereby Target sold back the pharmacy records to Zellers for $10 million. Zellers then sold a large number of the pharmacy files to Loblaws for $35 million. In addition, it sold its Alberta and B.C. pharmacy files to a different entity, for an unknown amount.

34 David Pickwoad, Senior Vice President and General Counsel for HBC and Zellers gave evidence at the hearing. Pickwoad agreed in cross-examination that Zellers employs a similar strategy to Target's with respect to its use of exclusive private label merchandise. He further agreed that in January 2011, when the Transaction Agreement was signed, Zellers was still a going concern. He stated he was not aware at the time of any risk to Zellers of going out of business or bankrupt. With respect to Zellers' announcement on July 26, 2012, Pickwoad agreed that it stated Zellers could not continue to operate in its current form due to the geographic footprint of the remaining locations (those that had not been selected by Target by either the first or second tranche dates). Finally, Pickwoad agreed that had it not been for the Transaction Agreement with Target, Zellers would have continued operating.

35 The Union called Dr. Murray Rice as an expert. Dr. Rice is currently a professor at the University of Texas in the Department of Geography. He is originally from Saskatchewan. He is an expert in business geography which studies a targeted geographical area related to business decisions. It is an applied component of geography. Dr. Rice serves within the Association of American Geographers. He is currently the Vice-Chair of the Business Geography Specialty Group of that organization and will become Chair in 2014. Dr. Rice's speciality area is retail urban geography. Over the last seven years, his teaching has focused on the expansion of store chains and various strategies they can use to expand their business.

36 In studying the acquisition of the Brentwood Store, Dr. Rice examined Target's economic rationale, Burnaby City plans as well as ease and access to transportation. Dr. Rice stated in his evidence that he did not see Zellers or Target as being unique kinds of stores. He stated that both have common clusters of customers that would fall within either store. Dr. Rice used the term "locational goodwill" in his Report. He defined that as a characteristic that might be transferred from one business to another. It is an intangible value conveyed to a particular retail location. In preparing his expert Report for the Board, Dr. Rice was asked by the Union to answer whether "given Target's desire to move into the Canadian market, was the decision to acquire Zellers locations an optional choice in any way, perhaps linked directly to facilitating a more rapid expansion by Target and gain it scale advantages, or was the Zellers acquisition an absolutely necessary precondition for Target to enter Canada as a national retailer?". He answered in his Report as follows:

> In my opinion, the difference between these two situations would be indicative of a distinction between a <u>routine real estate transaction</u> (with consequences that might be important but not central to the viability of Target's Canadian expansion) and the <u>acquisition of assets of such immense strategic value to Target</u> (and in the past, to Zellers) that it would lead me to characterize the acquisition as the purchase of Zellers' core business capabilities in Canada. (emphasis in original)

37 Dr. Rice explains the difference of his Report as follows:

> **<u>Site versus situation:</u>** In geographic use, the term "site" relates to the characteristics of the immediate location of the place in question (*e.g.* Greater Vancouver's site is characterized in part by a deep harbor, river, and a relatively flat delta setting mostly suitable for urban development). "Situation" refers to what is accessible to and from a given location (*e.g.* Greater Vancouver's situation is characterized by close access to mountains, the Pacific Ocean, Vancouver Island, and trading links with western Canada, the western U.S., and the Pacific Rim). Thus, site refers to the attributes of the location itself, while situation refers to what is around it (Rodrigue *et al.* 2012b).
>
> In a retail context, it is important to not confuse the importance of site with situation. Site characteristics (pad size, orientation, parking, etc.) are certainly key factors for a retailer to assess, but they should not be considered to the exclusion of market access. Having a store in a chain that serves a desirable and profitable market is obviously much different from the chain not having a store that serves that desirable market. In my opinion, analysis of a location's <u>site attributes</u> without consideration of its <u>situation</u> leads to an incomplete assessment of the location's desirability (and value) for any given purpose. (emphasis in original)

38 With respect to the site and situational aspects of the Brentwood Store's lease, Dr. Rice stated in his Report:

> This trade area dimension deserves further attention relative to the present question in two additional ways. First, a store location at Brentwood Town Centre offers not just proximity to the market around the mall, but <u>access to transportation infrastructure</u> that facilitates travel to and from the mall. Brentwood Town Centre is located at the intersection of Lougheed Highway and Willingdon Avenue in Burnaby (see Figure 4). These major routes provide excellent accessibility to communities north and south (along Willingdon Avenue) and east and west (along Lougheed Highway) in the region adjacent to the mall. Additionally, Brentwood Town Centre is located immediately next to a station on the east-west Millennium SkyTrain line that runs adjacent to Lougheed Highway, providing direct access to the mall for SkyTrain riders (Translink, 2012). The combination of substantial transportation infrastructure linking the Brentwood mall site with the broader region emphasizes the importance of situation as a consideration in assessing the nature of the assets Target has acquired from Zellers.
>
> A second situational aspect worth noting here relates to the location of potential Target competitors relative to Brentwood Town Centre. <u>Wal-Mart</u>, one of Target's most direct competitors in the U.S., <u>Real Canadian Superstore</u>, a large Canadian grocery chain that has extensively expanded their non-food offerings in recent years, and <u>Sears</u> (another major but troubled Target competitor in the U.S. and Canada) serve as a basis for this competition analysis. Figure 5 represents the location of Brentwood Town Centre relative to the locations of Wal-Mart, Real Canadian Superstore, and Sears in the Burnaby/east Vancouver region (it should be noted that Sears has a location in Brentwood Town Centre, along with the future Target). Figure 6 represents the trade area within Burnaby that is geographically closer to Brentwood Town Centre than to any Wal-Mart, Real Canadian Superstore, and Sears located outside of Brentwood Town Centre.
>
> These maps collectively indicate that Brentwood Mall has an advantageous geographic position to offer Target and Sears in accessing the market in north Burnaby, relative to their regional competition (again, represented in this case by Wal-Mart, Real Canadian Superstore, and the Metrotown location of Sears). Both Target and Sears will benefit in the future (as Zellers and Sears benefited in the past) from the good situational positioning of the mall, as their regional competition is located some distance to the southwest, south, and far to the east of the Brentwood location. Such positioning and competition spacing gives the Brentwood-based Target and Sears stores an inherent locational advantage in competing in the markets specifically delimited in Figure 6. (emphasis in original)

39 Extensive evidence was called in the hearing regarding the mass merchandise retail market and Target's unique position in it. In Canada, there are true discount retail stores such as Walmart and Zellers, and there are high end fashion retailers such as Holt Renfrew. While the market space in between these stores in the U.S. is occupied by Target, JC Penny, and Kohl's, those stores have few if any comparables in the Canadian market. Target portrays itself as a mass merchandise store that is "fashion forward at discount prices". It has received celebrity endorsements, partnered with high end designers, as well as held and participated in fashion shows. Target is a unique and distinct store and brand that is easily recognized by Canadian shoppers.

40 In expanding its business to Canada, Target has established a head office in Mississauga, Ontario that is staffed by 400 to 500 Target employees. It has also established its own distribution centers, and is utilizing its own systems, business knowledge, policies and practices.

41 Target called Dr. Stephen Hoch as an expert witness. He is a professor at the Wharton School of Business at the University of Pennsylvania. At one point, Dr. Hoch was the Chair of the Marketing Department at the Wharton School. Prior to obtaining his PhD, Dr. Hoch was the National Vice President of Sales for the Disney Corporation. In preparation for his expert Report to the Board, Dr. Hoch visited six Zellers stores, five Target stores and two Walmarts.

42 From his observations, Dr. Hoch gave evidence that Zellers' stores typically were very crowded, had bad sight lines, and the shelves were piled high with junk. He also noted there was little consistency from one store to another. This is as compared to Target stores which had consistent floor plans that were easy to navigate, wide clean aisles and sparkly clean floors. Both Target and Zellers are discount mass retailers that sell apparel, housewares and lifestyle items. While Zellers is cheap, it is not cheap chic like Target. Dr. Hoch's Report discusses the brand development of Target with its bullseye logo, something unique amongst retailers.

43 The primary focus of Dr. Hoch's Report was whether Target had any interest in taking over and continuing the business of Zellers. Dr. Hoch has studied the area of "consumer confusion" and in his evidence stated there is no way consumers would be confused between Zellers and Target. He stated that Target wanted to distance itself as much as possible from the Zellers brand.

44 Dr. Hoch's Report concludes the following:

> 1. ... Location is always important in bricks and mortar retailing. With that said, I believe that the exact store location of a Target is less important than it is for grocery stores. ...
>
> 2. ... Target is known as Targét for good reason. The classy design aesthetic associated with Target does not exist at Zellers and never has existed.

3. ... The Brentwood location looks to be a good one. It is located right next to mass transit station and the surrounding area appears to be at least moderately affluent. My own view is that Target will attract a broader mix of consumers, both affluent and less so because they offer consumers a more compelling combination of value, accessibility, and discovery than Zellers and so consumers will be willing to travel great distances. Given Zellers shabby experience, many more affluent consumers are less likely to visit than will be the case with Target.

4. ... The current Zellers location is more in the back of the Mall and has much less visibility compared to where the Target will be located, which is in the front. The new format of the mall will be dramatically different from what is currently in place. The mall is undergoing a major overhaul and will be laid out in a dramatically different fashion and offer a new and different retail, eating, and entertainment portfolio along with residential and office towers. ...

5. ... 2-3 years is a long time in retail. Many consumers will move during that time and be replaced by new consumers not as familiar with the area. ...

45 Dr. Hoch described the concept of "locational goodwill" as an intangible asset associated with a location previously occupied by a store. Dr. Hoch noted there may be anywhere between a six-month and three-year hiatus between the Zellers store closing and the Target store opening at Brentwood Mall, during which shoppers may change their habits. He stated in his Report that a hiatus of anywhere from six months to three years will have the following effects:

> … In the meantime, Zellers customers will still need to buy the goods they previously purchased at Zellers and they will do that at competitive retailers. When a Target store finally opens up in that location, Target will have to fight to get those customers to come in the door. In deciding whether to patronize the new Target location, the customer will take into account the convenience of the location and what Target has to offer relative to the many retail competitors also operating in the same geographical area.

46 Dr. Hoch further stated that while a location in Brentwood Mall is important, it is less important that there was a Zellers in that location. While some people who previously shopped at Zellers may shop at Target when it opens, that is not guaranteed. Further, people will travel a greater distance to shop at Target than they did to shop at Zellers.

47 Dr. Hoch stated three reasons why locational goodwill would not be relevant in this case: 1) although the stores would be in same mall and next to the Skytrain station, Target may not open in the exact location in the mall as the Zellers store; 2) there will be a significant hiatus between Zellers closing and Target opening, during which a lot of

people who live in the surrounding neighbourhoods will move; and 3) other than the fact that both are mass merchandisers who use the colour red in their logos, there are very few similarities between Zellers and Target.

48 In cross-examination, Dr. Hoch agreed there is value for retailers in having exclusive brands. It differentiates one store from another and it softens the price competition. Dr. Hoch was asked to read and review the Brand Waiver and was asked if he agreed that by waiving exclusivity in favour of Target whether Zellers was giving away a piece of its business. Dr. Hoch replied: "Well, they gave away something".

49 Dr. Hoch was also asked to address the potential value in keeping pharmacy records. He stated that where people have prescription drug plans, they are repeat customers at the pharmacy that has all of their records and paperwork. There are "recurring revenues due to the fact that you have been buying prescriptions from that pharmacy. So you get back end pharmacy business along with front end business". As such, a transfer or sale of pharmacy records provides a higher probability of keeping the recurring business from those customers. Pickwoad was also asked in evidence for the reason why Zellers operated pharmacies in about 80% of its stores. He replied: "It drives a huge amount of traffic".

IV. POSITIONS OF THE PARTIES

UNION'S POSITION

50 The Union submits there is no question a transaction took place in which something was sold by Zellers to Target. According to the Union the only question the Board must answer is whether what was sold was "a business or part of it". The Union submits that in answering this question the Board must fairly balance freedom of trade with the reasonable expectations and hard won rights of employees within the bargaining unit. The Union urges the Board to consider whether the enterprise has been left in a form in which earlier collective bargaining rights of the employees should be preserved. Such consideration must, in the Union's submission, inform the Board's interpretation of "a business or part of it".

51 The Union submits that the transfer of a business must be viewed from a labour relations perspective. Relying on the line of cases from the Board's decision in *Redskin Cedar Co. Ltd.*, BCLRB No. 251/85 ("*Redskin*"), the Union submits the following two-part test. First, the Board must determine the nature of the predecessor employer's business and the various assets used in its operation and then determine whether there has been a sale, lease, transfer or disposition of that business or part of it or a substantial part of its entire assets.

52 Accordingly, the Union submits the first step in the appropriate analysis is to determine the nature of Zellers' business and the various assets used in its operation. Here, the Union submits, prior to Zellers' deal with Target, Zellers operated the Brentwood Store selling general merchandise—clothing, food, household items, etc.—to the public. To do so, Zellers employed about 137 employees in a range of jobs which

were integral to Zellers' general merchandise retail business. The approximately 137 employees supplied their trade to the Brentwood Store. Since at least 1988 their employer had leased that workplace and pursuant to the February 1, 1999 lease amending agreement, had the absolute right to continue to lease that workplace through to November 15, 2014.

53 The Union asserts that the leasehold rights acquired by Target are a crucial asset because they give Target access to the "situation" of the North Burnaby market. This access, says the Union, constitutes locational goodwill.

TARGET'S POSITION

54 Target submits the Board can and should dismiss the Union's successorship application. Target argues there is no factual basis for the Board to conclude that Target acquired the business, or part of the business, of Zellers.

55 Target submits that it will likely enter into a new corner lease in a redeveloped Brentwood Mall. If that transpires, the hiatus will increase to over three years, the Target store will be in a different area of Brentwood Mall, and the old Zellers premises will be available for lease to another business or businesses. Target submits these factors point against a finding of successorship.

56 Even if Target was to assume the space formerly occupied by Zellers at the Brentwood Mall, Target submits that its store will bear little resemblance to the Zellers that existed previously. It further argues there was no transfer of any assets that constitute Zellers' business. Specifically, there was no transfer of inventory, business processes, IT systems, employment policies, distribution networks, trade fixtures, customer loyalty programs, contracts, accounts, customer lists, etc. Target argues that the Union's application should be dismissed on the basis that the facts of the transaction—what actually happened—do not support the conclusion that there was a transfer of business.

57 With respect to the Brand Waiver, Target argues that the mention of Mossimo in the Brand Waiver is irrelevant, as Zellers' rights to sell that brand had previously expired. This leaves Cherokee, which is just 1 of 44 brands that Target owns or has exclusive rights to sell in the U.S. That Target desired to also sell Cherokee in Canada is not evidence that it wished to continue or acquire Zellers' business, but rather evinces a plan by Target to bring its own business to Canada. Further, Target submits that Cherokee brand products account for less than 2% of Target's store sales in the U.S. Target argues that this *de minimis* figure shows that the brand is not crucial to Target's operations. It notes that this point was confirmed in evidence, by Derek Jenkins, Senior Vice President for External Relations for Target, who stated that Target would suffer no harm to its business if it was not able to sell Cherokee in Canada. Moreover, Target notes the Cherokee brand clothing sold at Target is different than that sold by Zellers as it is designed exclusively for Target by its in-house design team.

58 Target submits that the Board should place no weight on the pharmacy file issue because Target never exercised the right to the transfer of pharmacy files. Target

argues the Board must decide this case on what happened, not what could have happened. Target states in its written argument that "the simple facts are that Target never exercised the right to acquire pharmacy files and that decision was made for bona fide reasons relating to regulatory restrictions".

59 Target further argues that the facts clearly demonstrate that there was no transfer of goodwill in this case. To constitute locational goodwill in the context of a Section 35 application, Target submits there must be a nexus between the claimed goodwill and the prior business at that location. In Target's submission, there can be no locational goodwill attributed to Zellers because of the demographics of the North Burnaby area. This, Target submits, was precisely the finding in *Cineplex Odeon Corporation*, BCLRB No. B490/2000 ("*Cineplex Odeon*"), wherein it was held that "any location value which [the Indo-ethnic movie theatre] Bollywood realized was not endemic to the facility but rather to the area generally being proximate to the Indo-Canadian community" (para. 116). Thus, according to Target, the locational goodwill as described by Dr. Rice cannot support a successorship finding under the Code.

60 Target submits that it will not acquire locational goodwill for a number of other reasons (even if it was to take over the existing Zellers space), including that Target is not trading on Zellers' business, that Zellers and Target occupy different market segments and that there will be a hiatus of many months, when Target will be drawing up plans, acquiring the necessary permits and approvals, and renovating the premises at an expected cost of $10 to 12 million.

61 Target argues that all the Union is left with is the issue of employees performing similar work in the same (or similar) location. Even if one assumes that this will occur on the facts of this case, Target submits this alone is not sufficient in the face of other factors that show no continuity in the business.

62 Target submits that on review of all the evidence, it is readily apparent that no such continuity is present. Target is already a major force in retailing, possessing far broader goodwill than Zellers, and strong name recognition in Canada. As a result, Target will not be drawing on Zellers' "life-blood" at Brentwood Mall. To the contrary, Target has gone to significant steps and expense to preserve its ability to expand its own brand and retail experience into Canada. It states it has tried to distance itself from Zellers' current retail business. As a result, Target argues that the store that opens at Brentwood Mall will not be a continuation of all or part of Zellers' business.

ZELLERS' POSITION

63 Zellers argues that the only aspect of its business that was transferred to Target was the right to a space at Brentwood Mall. Zellers submits if that right to a location carries any value, its value will be significantly diminished during the lengthy hiatus. According to Zellers, given the Board's jurisprudence, this simply cannot under any circumstances amount to a transfer of Zellers' business to Target.

64 Zellers agrees with Target that in this case there has been no transfer of fixtures and equipment, goodwill, trademark or logo, inventory, accounts receivables, customer

lists, existing contracts, employees or business systems. It also notes that there has been no covenant to maintain a good name or not to compete.

65 Zellers relies on *Leeds Enterprises Ltd*., BCLRB No. B271/96, where location, a liquor license and key employees were transferred and the same work was being performed by the same employees, yet no successorship was found. It further relies on *High-Low Foods (1982) Ltd. carrying on business as "High-Low"*, BCLRB No. 215/85 (Application for Reconsideration Dismissed, BCLRB No. 172/87) where locational goodwill was assumed yet no successorship was found. Further, it relies on *F.W. Woolworth Co*. *Limited – F.W. Woolworth Cie Limitee*, BCLRB No B231/95 ("*Woolworth*") which it argues represents very similar facts to the instant case, and no successorship was found.

66 Zellers notes that the case relied on by the Union, *Redskin*, was distinguished in *Coal Island Ltd.*, BCLRB No. B308/2001 ("*Coal Island*") on the basis that in that case a significant part of the machinery used to manufacture the same product was transferred. Zellers further submits that *Redskin* was distinguished in *Woolworth*.

67 Zellers submits that Target is coming to Canada with an already established business. It is not taking a going concern from Zellers.

V. ANALYSIS AND DECISION

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

> **Successor rights and obligations**
>
> 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.
>
> (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.

69 In *Lyric Theater Ltd.*, BCLRB No. 38/80, [1980] 2 Can LRBR 331, the Board identified a number of factors or indicia to consider in determining whether a transfer of business has occurred. These include: transfer of assets; transfer of goodwill; transfer of a logo or trademark; transfer of customer lists; transfer of accounts receivable, existing contracts or inventory; any promises to maintain a good name or refrain from competing; whether the same employees are performing the same work; whether there is a hiatus in the business between the two companies; and whether customers of the predecessor are now serviced by the putative successor.

70 The list of factors is not exhaustive, nor will any individual factor or collection of factors be in themselves sufficient for the Board's determination. The Board summarized its approach in *Blackdome Mining Corporation*, BCLRB No. B419/99, 56 C.L.R.B.R. (2d) 271 at para. 14:

> These factors are not, however, to be applied as an automatic checklist in a successorship case as the importance of each factor may vary with the circumstances. No single factor should be relied upon. The crucial determination is whether "the successor draws its 'life-blood' from the predecessor": *Lyric Theater Ltd*., BCLRB No. 38/80, [1980] 2 Can LRBR 331 at p. 335. Bargaining rights do not attach to specific employees, the assets of a business or the location of a business; therefore the question becomes whether there has been a transfer of the essential elements of the business as a going concern:
>
> > ...the Board has consistently required a "discernible continuity" in the business, even with a transfer of assets. That continuity may be lost by a significant change in the type of business. It may also be lost by the death of the first business, attended by an absence of those factors which have been considered significant indicators (although not of themselves self-sufficient) such as transfer of goodwill, customers, name, skills, managerial talent and so on. A similarity in the net work done is a relevant factor, but it does not keep a dead business alive, especially in the long (but *bona fide*) absence of any of the employees whose interests might be at stake. Nor does a transfer of assets long after such a death, since they are no longer assets of a business, but merely of a type of business. Section 53 exists to protect interests which have a real and practical purpose; not to continue a certification into the indefinite future on a piece of equipment or a location. Successor rights "run" with a business, not with assets or locations. (To hold otherwise could result in the loss of a certification if an employer moved, or changed assets (a possibility rejected in *Stadco*, [1979] 3 Can LRBR 477).) (*Lyric Theater*, *supra*, p. 343).

71 In this case, there has been no transfer of inventory, business processes, IT systems, employment policies, distribution networks, trade fixtures, customer loyalty programs, contracts or accounts. There has, however, been a transfer of rights to leases, pharmacy records and a Brand Waiver.

72 Target concedes that a transfer of certain rights occurred between Target and Zellers. Therefore, the central question the Board must determine is whether Target acquired the business of Zellers, or part of it, at Brentwood Mall, or whether Target

acquired merely the real estate through which it can bring its own, pre-existing business.

73 My determination depends on what was actually transferred between the parties as of the Transaction Agreement and the second tranche deadline where Target selected to terminate Zellers' lease at the Brentwood Store so that it could open its own store. As such, I have carefully examined the various transaction agreements, lease agreements and other documents tendered into evidence in this case. Given the extensive amount of evidence and documents produced in this proceeding, it is helpful to note, in point form, the relevant facts for the purposes of this case:

- Target has achieved a unique position in the retail mass merchandising industry. Target has a very successful and recognizable brand in the U.S., and it is that brand that it is bringing to Canada.

- Target sought to expand its business into Canada. The Greenfield approach was not a viable option for Target in Canada. After much research, Target identified the acquisition of Zellers' stores as the most attractive opportunity to quickly build to the scale it desired in Canada.

- Through the terms of the Transaction Agreement, Target acquired the right to select a specified number of leasehold interests held by Zellers. Acquiring the rights to certain Zellers' leases allowed Target to take on leases that, in many cases, had terms well below market value and represented an opportunity for Target to save millions of dollars in rent.

- The Zellers lease at the Brentwood Store is the only lease that Target selected pursuant to Section 2.3 of the Transaction Agreement, for termination by Zellers. Through that termination it entered into an agreement with the Landlord that presents two possibilities for Target's presence in the Brentwood Mall. First, Target may negotiate a new corner lease with the Landlord for a new, marquee space in the redeveloped Brentwood property. Second, Target may convert to the old Brentwood Zellers location under slightly revised lease terms.

- Based on its market and demographic research, Target was aware that Zellers was located on a number of sites in a number of areas that had been identified as desirable for Target stores. One of those desirable areas was North Burnaby, specifically the Brentwood Store.

- Through the terms of the Transaction Agreement, Target obtained a waiver of exclusivity in relation to one brand (Cherokee) that Zellers carried as of the date of the transaction. As noted earlier, the Brand Waiver mentioned another brand—Mossimo—but Zellers' rights to sell that brand had previously expired.

- Target acquired a right to the transfer of pharmacy files from Zellers. Those files were eventually sold back to Zellers for $10 million because Target was not able to use them due to certain pharmacy regulatory restrictions. Zellers then sold some of the pharmacy files to Loblaws for $35 million, and other files to other retailers for undisclosed amounts.

74 The Board in *Whitebottom Enterprises doing business as West End Chevron*, BCLRB No. B402/95 explained that:

> At the first stage of the inquiry, the Board identifies the components of the business enterprise which may include such assets as premises, tools and equipment, management and bargaining unit personnel, goodwill and other intangible assets. (para. 40)

75 I find that Target has acquired the real estate associated with the Brentwood Store and has also acquired market access that is central to its ability to thrive. It is clear from the evidence that Target and Zellers are different stores and they have different marketing and branding strategies. Target has a proven success formula and in many ways it will be a much more attractive store than the Zellers store at the Brentwood Mall now. However, there is a geographical aspect and access to the regional market in North Burnaby and Vancouver that comes with the acquisition of the Zellers lease. As Dr. Rice noted, Brentwood Mall is at the key intersection of Willingdon Avenue and Lougheed Highway, and there is a Skytrain stop directly there. Target will likely be a more successful store at Brentwood Mall than Zellers was but part of its success will be attributable to the physical location in proximity to the market it has gained through the acquisition of the Zellers lease.

76 I accept Dr. Rice's evidence that location within Brentwood Mall was an important acquisition for Target. This was confirmed by the evidence called by Target. Target's Enterprise and Strategy team, its Market Research and Analysis team, and its Real Estate team all conducted an extensive level of research and analysis prior to selecting the exact location of a new store. The Brentwood Store was the only location selected at the second tranche deadline whose lease would be terminated so that Target could negotiate a lease for opening one of its own stores at that location. Though Target's research was extensive, none of it discussed why Zellers should be acquired as a "business" that Target would wish to continue or even associate itself with.

77 The Board found as follows in *Cineplex Odeon*:

> With respect to the location value that may have been generated by the Cineplex Scott 72 as a venue for Indo-ethnic films, I find that any such value would have been relatively minor. Cineplex Scot 72's showing of Indo-ethnic films went on for a period of relatively short duration, and was intermittent in nature (both in terms of regularity and in the sense the rental shows shown were sometimes Chinese rather than East Indian). Most significantly, it should have been obvious to patrons attending these shows from the surrounding circumstances (e.g., the means of advertising, and the fact that tickets were available at other venues), that these movies were not part of Cineplex Scott 72's "regular" business. Accordingly, Bollywood's assessment of the relative insignificance of location value as a factor in opting to lease

> the Scott 72 Facility appears to me to have been fairly accurate. Any location value which Bollywood realized was not endemic to the facility but rather to the area generally being proximate to the Indo-Canadian community. Thus this factor does not support successorship. (para. 116)

78 I find the Board's conclusions in *Cineplex Odeon* to be helpful in this case. Dr. Rice stated in cross-examination that it would not matter whether the lease was purchased by Target from Zellers, Home Depot, Best Buy or some other big box store. The locational goodwill attaches to the access to the site in the Brentwood Mall, not necessarily the specific business and brand of Zellers. Without acquiring the rights to Zellers' lease at Brentwood Mall, however, Target would not have had access to that space or been able to negotiate even another new location within Brentwood Mall. I accept Dr. Rice's Report and evidence that Target did not just acquire an empty box with the Brentwood Store's lease. It also acquired access to the particular demographic market it sought from that location with easy access to the Skytrain. While these are features of the location of the Brentwood Store, they are not features endemic to Zellers as a business in that location. Accordingly, this factor does not support a finding of successorship.

79 I turn now to the issue of the pharmacy records. Target argues that it did not realize any value from the pharmacy files. It further argues that the Board need only consider what actually transpired, not what could have been, in determining whether a successorship took place. Target also notes that Zellers and HBC acquired customer information through a number of sources, including the HBC Rewards program and their credit card business. None of that customer information was transferred to Target.

80 The Union's application for a declaration of successorship is dated November 8, 2011. If the Union's application succeeds, the successorship would have taken place as a matter of law on January 12, 2011, the date of the Transaction Agreement, or September 8, 2011, the date of the second tranche deadline when the Brentwood Store was selected by Target. The sale of the pharmacy records from Target back to Zellers did not occur until January 26, 2012 and accordingly does not impact on my determination of whether a successorship occurred upon the execution of the Transaction Agreement or the second tranche deadline.

81 The Board stated in *Pope & Talbot Ltd.*, BCLRB No. B202/2008 (Leave for Reconsideration Denied, BCLRB No. B220/2008):

> Successorship arises by operation of law when all or part of a certified business is transferred: Section 35. Thus the issue is whether the Respondent became the successor on September 22, 2008. It was at that moment that the Respondent obtained ownership of the business assets from the Receiver. As noted above, it is undisputed that "[a]t the time of purchase, the Respondent had intended to operate the Mill in a warm up stage until October 22, 2008, then a pre-start up and start-up phase until

> November 15, 2008, at which time it was hoped that the Mill would start producing product".
>
> The Respondent has not (correctly in my view) taken issue with the inter-position of the Receiver. Nor does the Respondent argue that the hiatus has resulted in the demise of the certified business. Rather, the Respondent argues that the acquired assets do not amount to a business because they were transferred in "idle mode". Hence, the Respondent contends that it did not acquire a going concern.
>
> In my judgment, the suspension of operations put the certified business into a state of dormancy. The Respondent acquired that dormant business when it bought the assets. That dormant business is capable of surviving a shutdown of some four and a half months (May 5 to September 22, 2008). Thus, the assets comprised a functional economic vehicle on the date of purchase. *I have reached that conclusion in view of the fact that the Respondent bought the assets fully intending to resume the business. It was only later that the Respondent chose to shelve that plan, due to deteriorating economic circumstances.* (paras. 20-22, emphasis added)

82 I find that the pharmacy records were a component of Zellers' business. The fact that Target later discovered that it was unable to use this asset or component of a business does not change this fact. However, I find the transfer of the pharmacy records does not in itself constitute the transfer of a business or a part of it. Moreover, as a factor to be considered in determining whether a business or a part of it has been transferred, it must be weighed against the absence of a transfer of most of the other indicia of a business, including goodwill, customer lists, accounts receivable, etc.

83 In *Woolworth*, the Board found no successorship between Woolco (another department store) and Zellers in part because there was no direct dealings between the predecessor and the putative successor:

> The Woolco division, not including these stores, was sold to Walmart. Woolworth then closed the stores. The landlords, independent of Woolco, then approached Zellers directly to negotiate leases into the empty space. (para. 51)

84 In the instant case, however, the Transaction Agreement was negotiated between the two businesses directly. Target then chose the Brentwood Store as a location to require Zellers to terminate its lease because based on its own market analysis and research, it is an ideal location at which to open a Target store.

85 Also in *Woolworth*, the Board concluded that Zellers and Woolco operated the same type of business:

> Turning to the facts in this case, I note first I am mindful of the principle that the importance of "business" in its labour relations

> aspect are the jobs it provides for the employees. Successorship rights attach to a business, not to an employer. In this case, the work presently done by employees of Zellers is substantially the same type of work that was formerly performed by employees of Woolco. In addition, Zellers is engaged in the same kind of business as Woolco; the nature of the business is substantially the same, a general merchandise department store. As a result, Zellers cannot argue that the continuity in business is lost by a significant change in the type of business. (para. 49)

86 In this case both Target and Zellers are mass merchandise department store retailers. They both sell clothing, footwear, housewares, toys and lifestyle products. They both require cashiers, sales staff, logistics staff, inventory clerks etc. to operate their stores. I find that Zellers and Target are the same *type* of business. I am not persuaded, however, that there is a discernible continuity of Zellers' business at Brentwood Mall even though there was a transfer of pharmacy records and the Brand Waiver with respect to Cherokee. These are not definitive parts of Zellers' business or a discernible part of it such that would indicate that its business is being continued, even if Target opens in the old Zellers' space in the Brentwood Mall.

87 The Target brand is unique and distinctive in the retail industry. Target presented evidence of high awareness amongst Canadian consumers for the Target brand. Dr. Hoch gave evidence that there was no likelihood of consumer confusion between Zellers and Target. Dr. Hoch further stated that it is in Target's best interests to distance itself as much as possible from Zellers. It is attempting to do so through negotiations with the Landlord for a different location in a redeveloped Brentwood Mall and a "go dark"/hiatus period of six months to three years. As noted in *Coal Island*, "the longer the hiatus, the more likely that those intangible but valuable attributes to a 'going concern' will have passed from active use through limbo to oblivion" (para. 64, citing *Lyric Theater, supra*).

88 Finally, I turn to the Union's argument that the 137 Zellers' employees would be performing the same jobs for Target. The Union does not dispute that Target has its own work processes, point of sale systems, trade fixtures, distribution centres and store layout and that it did not acquire any of this from Zellers. While retail sales employees perform similar functions from one store to the other, that is not sufficient to establish continuity of Zellers' business.

89 A significant feature of this case is the enormous amount of evidence led regarding Target's unique position in the retail sector, its marketing strategies and the high amount of consumer recognition of its brand. I find that Target is bringing its own highly successful business to Canada. It did not need Zellers for anything but the lease or the opportunity to negotiate a new lease in a new area of Brentwood Mall. Though the employees may perform similar jobs in both stores and the Transaction Agreement confirmed the transfer of leases, pharmacy records and the Brand Waiver, I find those are not sufficient for me to conclude there is a discernible continuity of Zellers' business. This is particularly the case in light of the hiatus of six months to three years between

the closure of Zellers' Brentwood Store and the opening of Target's store in the Brentwood Mall.

VI. CONCLUSION

90 The Union's application is denied.

LABOUR RELATIONS BOARD

"RITU MAHIL"

RITU MAHIL
VICE-CHAIR