EMPLOYMENT AND LABOUR LAW CONSEQUENCES OF THE SALE OF A BUSINESS

Introduction

In every transaction involving the sale of shares or assets of all or part of a business, or in situations of merger, amalgamation, franchising, subcontracting or contracting out, or any other transaction that can be characterized as the disposition or transfer of all or part of a business, the question of the rights of the employees and/or union arises.

In many transactions, the treatment of individual non-union employees is the subject of much negotiation between vendor and purchaser, with the vendor often looking to protect those who have served him long and well, and the purchaser wanting to take on experienced employees but to minimize the extent of the obligations he inherits.

Where there is a union in the vendor's business, there is often a desire on the part of the purchaser to acquire the business without the union. More than a few deals have "gone west" after the purchaser received legal advice to the effect that this is rarely possible.

There are also the situations of particular interest to labour practitioners such as contracting out, franchising, transfers of very small parts of businesses and so on, which provide an opportunity to review the interesting but not entirely elucidating jurisprudence of the various labour boards in an attempt to advise the client whether or not the successor rights provisions of the applicable statute will affect the transaction.

What follows is an attempt to shed a small bit of light on what can be a tricky area of labour/employment law--hopefully enough to enable the general or corporate/commercial practitioner to recognize the issues and get the right answers, either alone or in consultation with a labour specialist.

Statutory Framework

While the jurisprudence has made sale of a business a fairly complex area of labour law in particular, the statutory framework is reasonable simple.

For non-union employees, the relevant provisions are section 10 of the Labour Standards Code and section 189 of the Canada Labour Code.

For unionized employees, the provisions are section 29 of the Trade Union Act and sections 44, 45 and 46 of the Canada Labour Code.

When is There a Sale?

The common law and statutory provisions relevant from a labour standpoint in the event of a sale of business are not restricted in their applicability simply to sales per se. The language of the various statutes includes, in addition to sales, lease, transfer, merger, amalgamation and other dispositions of businesses. The interpretation by all labour boards is extremely broad and can include, for example, a receivership situation where the purchaser buys the business from a receiver even where the business has been dormant for some time. "Sale" can also include franchising, contracting out and sub-contracting.

When analyzing any situation to determine whether there has been a "sale", it is best to assume that there has been given the breadth of the statutory language, and to move on to the more complex point, which is the definition of a "business".

What is a Business?

While almost any transfer will constitute a "sale", not every one will be the sale of a "business or part thereof". The purpose of all the statutory provisions relating to sale of business is to preserve and protect the status quo in labour and employment situations, so any court or tribunal analyzing facts will be inclined to find in favour of employees or unions, resulting in the jurisprudence we now have, which favours a broad and liberal interpretation of "business" giving employees and unions maximum protection.

Consequences--Non-union Employees

Non-union employees can have their employment terminated either for just cause or upon the giving of reasonable notice (or payment in lieu thereof). The sale of the employer's business has been conclusively held not to constitute just cause for dismissal of an employee; accordingly, an employer wishing to dismiss employees when he sells his business must give them reasonable notice (or pay in lieu) in the same way as he would if the terminations were occurring under non-sale circumstances.

The purchaser of a business will frequently want to retain the services of some or all of the business's existing employees. In this event, regard must be had to section 10 of the Labour Standards Code and section 189 of the Canada Labour Code, both of which provide that an employee's period of

employment with the predecessor employer "counts" and that there is no break in service. For example, an employee who has accumulated five years of service with an employer who sells the business will go to the new owner as a five-year employer rather than as a new employee.

It should be specifically noted that the view held by many business people (and some lawyers) that the vendor can simply fire all the employees and the purchaser hire them the next day is an inaccurate (or at least overly simplistic) one. If the vendor dismisses the employees at the time of sale, he must provide them all with reasonable notice or pay in lieu thereof. If they are hired by the purchaser, they go to him with their years of service with the vendor intact notwithstanding the payment of severance pay by the vendor, unless there are specific agreements between the purchaser and each employee to the contrary.

If the purchaser agrees to take on all the vendor's employees and subsequently decides there are some he does not wish to retain, he must give reasonable notice (or pay in lieu thereof) based on each employee's length of service and position(s) held with the vendor employer as well as with himself. This can be a significant and unexpected expense for the unwary purchaser.

The interests of vendor and purchaser can be quite different, as it is better for the vendor if the purchaser simply takes on all the employees, and better for the purchaser if the vendor properly terminates all the employment relationships, leaving the purchaser free to hire whom he wishes, entering into employment contracts in each case, perhaps recognizing length of service with the vendor for such benefits as vacation, but not for the purpose of determining reasonable notice of termination of employment in the future. This is of course fair, given that

under this scenario the vendor would have already given the employees severance pay based on their years of service with the vendor, so there is no need to recognize those years of service twice.

Consequences--Union Employees

This particular area of labour law is usually called "successor rights". As noted earlier in this paper, the relevant statutory provisions are section 29 of the Trade Union Act for businesses under provincial jurisdiction and sections 44, 45 and 46 of the Canada Labour Code for businesses under federal jurisdiction. Both statutes generally provide that a certification order (and collective agreement, if one is in force) go with the business to its new owner. In other words, once a business is unionized, it cannot be "de-unionized" by a sale of either assets or shares to a new owner.

(a) Section 29 of the Trade Union Act

Section 29 of the Trade Union Act of Nova Scotia operates in such a way that the transfer of obligations from predecessor to successor takes place automatically, without any intervention by the Labour Relations Board. However, where a successor does not live up to its obligations or there is a question with respect to those obligations (such as how the intermingling of employees is to be achieved), an application may be made to the Board for direction by any of the parties involved.

There is a limited number of reasoned decisions from the Labour Relations Board interpreting section 29. From these decisions we can determine that the Board will look at various factors in deciding whether there has been a sale of a business, including transfer of shares or assets, transfer of inventory and

goodwill, whether the new business is operating in the same location as the old business did, whether the same sort of business is being operated by the successor as was operated before, and the extent to which there is continuity of employment for the employees of the old business. None of these factors in itself will be determinative; the Board will weigh the extent to which some or all are present and make a decision based on the facts of the particular case. The Board has clearly stated that the purpose of section 29 is to ensure the continuity of bargaining rights when the transfer of a business, in whole or in part, takes place.

In cases of "intermingling", where an amalgamation, merger or other form of transfer results in the need to combine two or more bargaining units, or unionized and non-union employees, the Board may order that a vote be taken to determine which union, if any, ought to represent the new combined group of employees. These sorts of issues were routinely raised during the process of school board amalgamation in the early 1980's through town boards were grouped together to form country/district boards, and the resulting Board decisions are illustrative of the kinds of solutions the Board can develop.

The Nova Scotia legislation, unlike that in Ontario and some other jurisdictions (including federal), contains in section 29 a specific provision for the application of successor rights as though there had been a sale or other transfer in cases where an employer has contracted out some or all of the work regularly done by employees in the bargaining unit, for the purpose of avoiding its obligations under the Trade Union Act (essentially the obligation to bargain collectively with a certified bargaining agent). There is a reverse onus provision in the subsection, meaning that when a union applies to the Board, the employer must satisfy the Board on a balance of probabilities that it did not contract out in order to avoid its obligations

under the Act. (Note that contracting out for business purposes, not accompanied by an intent to avoid obligations under the Act, could still be covered by subsection 29(1) if the contracting out amounts to a sale or other disposition of a part of the business.)

The Board has held that the language of subsection 29(2), when read in conjunction with the definition of "to contract out" in subsection 1(1)(i), means that one looks at the work done by the specific bargaining unit employees affected by the contracting out to see if the contracted out portion is a "significant part of the work regularly done" by these employees, in which case the requirements of the definition are met. It does not matter that the work contracted out represents a very small proportion of the total work of the whole bargaining unit, it needs only to be a significant portion of the work of the employees affected.

The Board has also dealt with the argument that the provisions of subsection 29(2) should be triggered so long as the results of the contracting out amount to an avoidance by the employer of its obligations under the Act. The Board has held that it is the purpose of the contracting out that is to be looked at, not the results.

(b) **Sections 44, 45 and 46 of the Canada Labour Code**

Sections 44, 45 and 46 (which were a single secton, called section 144 until the Canada Labour Code was renumbered in late 1988) have been the subject of considerable discussion by the Canada Labour Relations Board (CLRB), particularly since the early 1980's. Different panels of the CLRB were interpreting the statute differently, so in 1983, in a case referred to as Terminus Maritime (1983), 50 di 178, the CLRB members all met

together in order to agree on the definition of the concept of "business". The Board, in its decision, indicated that the legislative provisions had been enacted to ensure the protection and permanence of bargaining rights and that the section must be given a "broad and liberal" interpretation. The Board held as follows:

> The business is not merely the sum total of its work functions. It must be viewed in its totality. This "dynamic" interpretation, which takes into account the evolution of the business and its purpose, leaves room for consideration of its individuality and its particular characteristics which may undergo change, depending on the economic climate...We believe, however, given the individuality and dynamism of each business, that it is better to define a business using an inductive approach, that is, case by case, and leave it to the parties to refer to the precedents we will establish...We will try by examining various factors, to determine whether the business, as an organic entity or a part thereof, was carried on by the purchaser.

It should be noted that the Board specifically rejected the "organic" definition of business applied in a number of the earlier cases and favored by one vice-chairman of the Board in favor of the "dynamic" definition favored by another.

The Terminus Maritime decision was apparently intended to give some guidance to those involved in these matters as to how the Board would in future interpret what was then section 144. However, what occurred over the next couple of years made it clear that there were even some Board members who either did not agree with or did not understand the guidance being provided.

A year later, in a case called Freight Emergency (1984), 84 CLLC 16,031, a panel of the CLRB reviewed the history of the interpretation of section 144, (as it then was), both before and after Terminus Maritime, and noted that some members were "still

intent on going off on a frolic of their own". The key points addressed in this decision are included in the following paragraph:

> When section 144 was enacted in 1973, it was our understanding that the goal of the legislators was to protect established bargaining rights and benefits accrued through collective bargaining where new employers assume control of enterprises wherein the employees have already exercised their rights under the Code. In our minds, successor rights were never intended to apply to genuine circumstances of subcontracting, a loss of business to a competitor or where there is corporate dissolution. It was certainly never anticipated that section 144 would be a vehicle to extend bargaining rights to or impose collective agreements on non-unionized employees or their employers.

The CLRB dealt over the next couple of years with contracting out in the context of section 144 in several decisions, concluding that in some circumstances, contracting out can constitute a sale of business under the Code. Where there is contracting out of work only, there is generally no sale of the business, but there if there is a contracting out of work in conjunction with a transfer of assets and know-how, there is a sale of business particularly if what has been contracted out is a "coherent and severable" part of the business. It should be noted that if the original employer does not layoff employees and the alleged successor does not hire, the circumstances favor a determination of no successorship.

In October, 1986, the Board in Logistec (1986), 67 di 120, 87 CLLC #16,008, 15 CLRBR (NS) 338, held there had been a sale of business in circumstances where Logistec acquired vessels and other assets from an insolvent company via the mechanism of a judicial sale. The Board noted that the transfer of assets, personnel, know-how and clientele are important factors to look at in determining whether there has been a sale of business.

In March, 1987, the Board addressed section 144 again in Cyprus Anvil Mining 87 CLLC #16,015 in which the following comment was made:

> A reading of this Board's jurisprudence with regard to the interpretation of section 144 would clearly indicate that there has been some division in the past has to how that section is to be interpreted. However, with the more recent decisions of this Board...there is no doubt that the direction taken by the board is clearly coalescing.
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> ...[W]e believe that any investigation by the Board regarding section 144 has to focus on the continuity of the business through various indicia such as the acquisition of assets, personnel, know-how and clientele.
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> There is nothing magical or particularly mystical about section 144 inquiries. Board decisions will turn on the facts presented in each case to determine whether the purchaser business is the same business as the one that existed before the sale; whether the same ongoing concern that existed before has been carried forward in time.

In September 1987, the Board heard an application brought by the Canadian Union of Postal Workers in respect of the franchising by Canada Post of some of its postal operations to a Shoppers Drug Mart in Toronto. The Board in its decision at 87 CLLC #16,049 granted the application, holding that the ten-year franchise agreement constituted the sale of a business because:

1) There was continuity in the work and activities carried out by the employees;

2) The business sold was being operated for the same purpose by the purchaser;

3) The grant of an exclusive right to operate a post office for consumers in a specified geographical territory amounted to the conveyance of a coherent and severable part of Canada Post's post office business. This was not just the transfer of a work function;

4) A major business asset was transferred--the right to operate in that territory the portion of the business normally operated by Canada Post.

The Board made the comment that the determination of whether a sale of business has occurred "depends on a great number of factors and will, in every case, be dependent on the factual considerations present in each individual case". Canada Post sought a review of this decision by the Federal Court of Appeal, the result of which was an upholding of the CLRB decision. One of Canada Post's key arguments to the Court was that the Board's decision was patently unreasonable because it would place Shoppers Drug Mart in an untenable situation regarding its contractual relations with its own employees given that the manner in which it chose to operate involved having both the drug store and the post office operated by the same employees in rotation. The Court held that these problems could be resolved by a change in the store's method of operation and the appeal was dismissed Canada (Canada Post Corporation) v. C.U.P.W., F.C.A., January 28, 1988, A-762-87, unreported).

A point which becomes painfully clear when reading through the decisions since Terminus Maritime, most of which are extremely lengthy and engage in detailed analysis and discussion, is that the members of the CLRB are still not be counted on to analyze a fact situation consistently as amongst themselves. A perfect example of this is the CAFAS case in which one panel in 1983 held that there was a sale of a business (at 50 di 231) and

a second panel in 1984 (conducting a rehearing after a Federal Court review) held, on precisely the same facts, that there was not a sale (at 84 CLLC 16,034). This is a critically important point for counsel to remember when trying to predict the CLRB's handling of a case given the statement by various panels of the Board that each case has to be considered on its own facts.

While it is often the case that the existence of numerous recent decisions on a legal point or statutory provision makes the lawyer task of advising a client simpler, such is not necessarily the case when the issue is successor rights in the federal jurisdiction, particularly in the more specific areas such as franchising and contracting out. If the purchasing client takes the view that the deal cannot proceed if he is going to inherit the vendor's union, the general commercial practitioner would be well advised to consult a specialist in labour law who should be in a better position to make the required judgment as to how the CLRB would likely view the situation. Even then, the degree of predictability may not be as high as one might wish for.

After the renumbering, the statutory provisions are now set out so that section 44 contains the definitions of "business" and "sale", together with the federal equivalent of subsection 29(1) of the Trade Union Act, making the application of the successor rights provisions automatic upon the sale of a business. New section 45 deals with the situation where employees of the business being transferred are intermingled with the employees of the purchaser or transferee of the business, and gives the Board the authority to determine the appropriate unit(s) for collective bargaining, the identity of the appropriate bargaining agent and the applicability of seniority provisions. Section 46 simply gives the Board the authority to determine whether or not a business has been sold and to answer any question that might arise as to the identity of the purchaser of a business.

Summary

The essential employment and labour law consequences of the sale of a business are:

1. The relevant statutory provisions are, for non-union employees, section 10 of the Labour Standards Code and section 189 of the Canada Labour Code and, for unionized employees, section 29 of the Trade Union Act and sections 44, 45 and 46 of the Canada Labour Code.

2. The sale of a business does not constitute just cause for the dismissal of a non-union employee.

3. In both provincial and federal jurisdictions, legislation provides for continuity of service of non-union employees retained by the purchaser of the business.

4. In both provincial and federal jurisdictions, the legislation operates to preserve and protect the bargaining rights of unions, so that a union will retain its right to represent the employees of a business after that business has been sold.