

2024 TBLA Fall Conference

Employment Considerations on the “Sale” of a Business / Related Employer Applications under the Labour Relations Act

Jeremy Kirk
Cheadles LLP

Triggers for Successor Employer

- Key factors to consider:

- (1) The Type of Sale: Asset Sale versus Share Sale
- (2) The Employment Regime: Common Law, ESA, or OLRA

Share Sale

- The legal employer remains unchanged, and all rights and obligations toward employees continue as before.
- Employment contracts and any collective agreements remain in effect without termination.
- If purchaser does not wish to retain certain employees, they must require the vendor to terminate those employees and settle any entitlements as part of the closing transaction.

Asset Sale

- The legal employer changes.
- Common Law: Employment contracts cannot be assigned from one employer to another unless purchaser expressly recognizes past service, or the business is acquired as a “going concern”.
- ESA, section 9(1): If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee’s length or period of employment.

Asset Sale

- “Sale” includes leases, transfers or dispositions of any other manner.
- An employee who accepts re-employment is not entitled to ESA termination pay at the time of the sale.
- ESA, section 9, is difficult to avoid for a purchaser, which is the party to whom the provision is intended to apply.
- Purchasers could require a vendor with substantial severance pay obligations to terminate the employees with all ESA statutory entitlements being paid immediately prior to the closing, with new contractual offers of employment from the purchaser becoming effective upon closing so that the purchaser can at least take advantage of severance pay set-off.
- Purchasers could also contract to have the vendor indemnify them for all ESA liabilities if the purchaser cannot avoid their payments.

Sale of Unionized Business

- If a business is a unionized workplace, the Ontario Labour Relations Act, 1995 (“LRA”) governs the relationships between trade unions, employers, and employees.
- LRA, section 69: Purchaser becomes a “successor employer” and is bound by any collective agreement by which the vendor is bound, until the Ontario Labour Relations Board otherwise declares.
- “Business” includes a part or parts thereof.

Related Employers

- LRA, Section 1(4): “Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

Purpose Underlying “Related” Employers

- The policy underlying LRA, section 1(4) is to preserve the institutional and contractual rights of a trade union by attaching those rights to a commercial activity as opposed to a particular commercial entity.
- To avoid the erosion of bargaining rights.
- Similar to LRA, section 69, which preserves bargaining rights where a business is sold or transferred.

Carpenters' District Council of Ontario v Stead & Lindstrom (1977) Limited and RML Contracting (2005) Limited

- 2024 CanLII 16436 (ON LRB)
- Application filed by the Carpenters under LRA, section 1(4) and/or section 69.
- Carpenters sought to have bargaining rights they held in respect of S&L flow through to RML.
- Carpenters argued that S&L and RML were under the common control and direction of members of the Lindstrom family; that RML is the current iteration of the family construction business; that work performed by clients of S&L was diverted to RML and performed on a non-union basis; and that the Lindstrom parents were key persons who transferred from S&L to RML along with goodwill and property.

Carpenters' District Council of Ontario v Stead & Lindstrom (1977) Limited and RML Contracting (2005) Limited

- S&L ceased operating in the construction industry in 1994 at a time when the Lindstrom sons were children.
- RML began operating in 2005, growing its business year over year.
- RML was a tenant of S&L until it purchased same building years later.
- Carpenters brought their application in 2019.

Carpenters' District Council of Ontario v Stead & Lindstrom (1977) Limited and RML Contracting (2005) Limited

- Para. 63: Three conditions must be met to determine if the Board should exercise its discretion under LRA, section 1(4): (1) there must be more than one corporation, firm, individual, syndicate or association; (2) these entities must be engaged in associated or related businesses or activities; and (3) these entities must be under common control or direction.
- The Board was not satisfied that the Lindstrom parents exercised any control or direction over RML's general contracting business.

Carpenters' District Council of Ontario v Stead & Lindstrom (1977) Limited and RML Contracting (2005) Limited

- Para. 69: On the application of LRA, section 69, the Board found that there was no transfer of equipment, employees, customers or customer lists from S&L to RML.
- Carpenters relied heavily on the purported transfer of goodwill from S&L to RML as the basis for the Board to conclude there has been a sale from S&L to RML. Argument rejected by Board: 'For "goodwill" to be transferred, there must be an economic value in business or patronage moving from the predecessor company to the successor.'

Carpenters' District Council of Ontario v Stead & Lindstrom (1977) Limited and RML Contracting (2005) Limited

- Nothing of value was transferred from S&L to RML. When the Lindstrom sons looked to commence a business that bore some similarities to that of S&L, there was no economic vehicle to transfer at that time.
- When the building was purchased by the Lindstrom sons from S&L, it was not purchased as an asset from a construction company but rather from a commercial landlord.
- The Lindstrom parents were not “key” persons.
- Many contracts obtained through public tenders.

Purpose Underlying “Related” Employers

- A declaration should not be made where doing so would result in an extension or expansion of the union’s bargaining rights.
- LRA, section 1(4), is not meant to replace the certification process.

Thank You for Listening



The End.



Questions?