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Eric Tucker

Christopher Grisdale

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SUCCESSION AND TRANSFER OF BUSINESSES IN CANADA

Eric Tucker, Professor
Christopher Grisdale, Third-Year Student
Osgoode Hall Law School, York University

Introduction

Canada is a liberal market economy and as such the freedom of owners of capital to transfer businesses is not heavily regulated and the rights of workers affected by those transfers are limited. Before discussing those rights some preliminary matters need to be addressed.

First, labour and employment law is regulated at the level of the provinces and territories. As a result, there is no nationally applicable statutory labour or employment law. However, the laws of most provinces and territories are roughly similar. Because we cannot possibly canvas the laws of each Canadian jurisdiction, we have used the laws of Ontario, Canada's most populous province, as the basis of our answer. The one exception is in the area of bankruptcy and insolvency, which is under federal jurisdiction. As a result, in that area, provincial labour and employment laws have to be coordinated with federal bankruptcy law.

Second, labour and employment rights are layered. Employment standards statutes establish rights for all workers, whether they are unionized or not. The common law, which is judicially made, only applies to non-unionized workers. Collective bargaining statutes only apply to unionized workers and only address the question of the continuity of collective bargaining rights as the result of a transfer. Currently, about 30% of the Canadian labour force is unionized, but unionization in the private sector, where the issue of transfer of a business is most likely to arise, is about 17%.

Generally speaking, employees may be terminated as the result of the transfer of a business and their principle protection is that they become entitled to notice, or termination pay if notice is not given, and severance pay. Employment standards laws establish minimum entitlements to notice/notice pay and severance pay based on years of employment with the terminating employer. Non-unionized employees may seek greater entitlements to notice/notice pay under the common law and unionized employees may have greater rights under the collective agreement. Where employees of the transferor are hired by the transferee then the law may also provide there is continuity in employment and that seniority for the purposes of calculating various entitlement is unaffected by the transfer.

1.a. Does the legal system of Canada establish a specific regulation regarding the rights of workers affected by a transfer of businesses? If so, is this rule the result of a supranational agreement?

Yes. The individual rights of workers in the context of a transfer are regulated through the *Employment Standards Act* (ESA) (S.O. 2000, c. 41). Collective bargaining rights in the event of a transfer are regulated by the *Labour Relations Act* (LRA) (S.O. 1995, c. 1, Sched. A). As well, non-unionized employees may claim certain rights in the event of a transfer based on the common law, which is judge-made law. None of these rules were created as the result of a supranational agreement.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

2.1. Collective Bargaining

Collective bargaining law provides that the union enjoys successor rights when there has been the "sale of business". The term is defined broadly to include "*leases, transfers, and any other manner of disposition*" (LRA, s. 69). The labour board is vested with authority to determine whether a sale has occurred so that a declaration of successor rights should be issued. Needless to say, the question of when there has been the sale of a business has been the subject of an enormous amount of litigation. Generally speaking, the board looks to see whether there is continuity between the business of the transferee and the business of the transferor by examining a number of factors including, whether there is continuity in the work being performed, whether the location has changed, whether there is the same management, whether tangible assets and goodwill have been transferred and whether the employees have been transferred (see *Lester (W.W.) (1978) Ltd.*, [1990] 3 SCR 644). Successor rights can arise upon the sale of all a business or a discrete part of a business.

Because collective agreements operate between an employer and its employees, they cannot determine whether a purchaser or third party will be bound by the collective agreement. This is a matter within the excusive jurisdiction of the labour board. There is also no special provision regulating situations in which one contractor replaces another and hires the former contractor's employees, such as frequently occurs in the context of building maintenance services. Therefore, unless there has been a transfer of a business between the two contractors and a declaration of successor rights to the labour board, collective bargaining rights will not be preserved.

2.2. Non-Unionized Employees at Common Law

At common law when a business is sold or transferred by one legal entity to another the legal starting point is that all employees are constructively dismissed and their only entitlement is to notice or pay in lieu of notice. A change in the ownership of a corporation is not a transfer between parties and does not terminate the contract since there is no change in the legal identity of the employer. Although the contract of employment is not assignable, where the purchasing employer hires the employees of the business it has purchased on the same terms and conditions and on the understanding that their accrued seniority from their previous employer will be respected, and the employees accept this understanding, no dismissal will be deemed to have occurred. This is called novation (see *Major v. Philips Electronics Ltd.* (2005), 253 DLR (4^{th}) 94 (BCCA)). The issue of whether a sale or transfer of a business has occurred has not proven to be contentious in this context.

2.3. The Employment Standards Act

The ESA establishes minimum standards applicable to all employees, whether or not they are unionized. It provides that in the event of the sale of business (which includes leases, transfers and other dispositions) employees who are hired by the purchaser are deemed *not* to have been terminated and so that their seniority for the purposes of the ESA includes the time they were employed by the vendor (ESA, s. 9). Litigation over the question of whether there has been a sale of a business for the purposes of the ESA is common but has produced a broader interpretation that under the LRA. The continuity of employment provision has been held to apply not only when there is a transfer of a business as a going concern but to other situations such as a contracting out of a function where the former employees of the company contracting out are hired by the company that now provides the service (see *Abbott v. Bombardier Inc. (c.o.b. Bombardier Aerospace)*, [2007] O.J. No. 1173 (ONCA)).

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

No. As mentioned, at common law the sale of a business will normally result in the constructive dismissal of all employees and it is entirely up to the purchaser whether it wishes to re-hire those workers. Employment standards laws do not change this result, although they do provide that if workers are re-hired on the same terms and conditions there is continuity in their employment for the purposes of calculating employment standards entitlements, such as notice and severance pay.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

No, the terms of the collective agreement cannot be modified because of the transfer of a business. In virtue of an amendment the Ontario *Labour Relations Act* passed in 1970, the purchaser of a business, the transferee, stands in the shoes of the transferor with respect the collective agreement (LRA, s. 69(2)).

There is no suspension in the binding effect of the collective agreement on the transferee and the transferee stands in the same position as the transferor vis-à-vis any rights or obligations under the agreement. If either certification or bargaining right termination procedures are underway during the sale of the business, the transferee is treated as the transferor for the purposes of those proceedings before the Ontario labour board (LRA, s. 69(2)). These procedures continue as if the transferee where in fact the transferor.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

5.1. Common Law

Yes, but it is important to remember that under the common law when there is a sale of a business the employees are terminated and it is up to the purchaser whether or not to hire the former employees of the business it has acquired. If the purchasing employer hires those workers on the same terms and conditions of employment then normally the court will find there has been novation and the contract of employment is continuous between the vending and the purchasing employer. However, if the terms and conditions offered the employees by the purchaser are different then novation will not be found to have occurred and, if the employees were not given notice of termination by the vending employer they will be entitled to seek wrongful dismissal damages consisting of pay in lieu of notice. This is true even if they accept the offer of employment from the purchasing employer.

5.2. Employment Standards Act

Yes, but as under the common law it is important to remember that the purchasing employer has no obligation to hire the employees of the business it has acquired. However, if the employer does rehire those workers, but substantially changes the terms and conditions of employment, then the employees may argue that the provision of the ESA that deems that they were not terminated does not apply and that they can claim statutory notice and severance entitlements against the transferor.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

The Ontario *Pension Benefits Act* (R.S.O. 1990, c. P.8) and the Asset Transfer Regulation (O.Reg. 310/13) set out the transferee's obligations where the transferor made pension commitments to its workers. Upon the sale of a business the transferor and transferee may enter into an agreement to transfer the responsibility for administering the original pension plan for entitled persons under the plan to the transferee employer.

Where the transferee has devised a different pension plan, the transferee is able to move assets from the original pension plan to the successor plan pursuant to the rules set out in the Act and its Regulations. The successor plan is not required to provide identical pension benefits for the transferred members. However, a defined benefit plan cannot be converted into a defined contribution plan.

Workers entitled under the original plan must maintain the value of their pension on the date of sale when integrated into the successor plan. The calculation under the Regulations requires the each re-hired worker's benefit be calculated as if the worker was terminated. That value is isolated and migrated to the successor plan for each worker. Additionally, the successor plan must provide at least 85% of the value promised in the original pension plan.

A government official must consent to the transfer of assets from the original to the successor plan. That discretion must be exercised in accord with the Act, which requires that consent only be given upon an agreement between the transferee and transferor.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Yes, the transferee will be liable for those debts as they remain in the business; however, the terms of the acquisition may include an indemnity clause that allows the transferee to seek indemnity for any outstanding labour debts. If no such clause exists, and the transferee knows of the labour debts, the purchase will likely be discounted for the value for those unpaid wages or unsatisfied Social Security contributions.

If the transferee hires the employees of the transferor and there has been novation under the common law, then the employees' entitlement to notice or pay in lieu is a contingent debt to the employees that may materialize at some point in the future. That debt is assumed by the transferee and continues to increase since notice entitlements are partially calculated on the basis of length of service. If the transferee does not hire the employees of the transferor, then the transferee is not liable for any unsatisfied notice entitlement owed to those employees at the time of the transfer.

The situation is the same under the ESA. Section 9 of the ESA provides that when a transferee hires an employee from the transferor the employee's length of service is treated as unbroken. Consequently, the transferee assumes a liability with respect to the notice requirement, which is a contingent liability in the sense that it is only triggered on dismissal. If the transferee does not hire an employee of the transferor, then the transferee does not assume that liability (*Ross (Monica) (Lavalin Engineers Inc. (Bankrupt)) (Re)*, ESC 94-202 (November 10, 1994 – Randall)).

There is one exception to this rule, which applies to the contracting in of building service such as janitorial services. Normally, building owners contract for such services and often change contractors. The new contractor commonly hires the employees of the former contractor. Because there is no sale or transfer of a business between the contractors, the employees have very little protection and are unable to accrue seniority for the purposes of the ESA. To address this situation, s. 10 of ESA provides that the employment of the employees of the outgoing provider is deemed not to be terminated and that they become the employees of the incoming provider, with the seniority that they accrued with the outgoing provider. As a result, if the new provider does not hire the employees of the former provider, the new provider is responsible to pay the accrued statutory notice and severance pay entitlements.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

Workers in Canada do not enjoy a general entitlement to representation. However, there are two situations in which such a right exists: unionized workers and representation in regard to occupational health and safety. These are considered below:

8.1. Unionized workers

As noted earlier, collective bargaining rights are transferred upon the sale of a business. Therefore, a union that represented a bargaining unit of the transferor continues to represent the workers in that bargaining unit after it has been transferred. Shop stewards and other local representatives appointed by the union or elected by the employees retain their positions.

The situation becomes more complicated where the transferee is also unionized and the employees of the transferor will be merged with employees represented by a different union. In this situation the labour board will determine whether separate bargaining units should be maintained or whether they should be merged. In deciding this question the board will consider both the employees' wishes and whether maintaining two units makes industrial relations sense. In the event that the board decides to merge the two units, a decision will have to be made about which union will represent the merged bargaining unit. Here the wishes of the majority of workers in the bargaining unit will be determinative.

8.2. Occupational Health and Safety

Occupational health and safety laws provide that in a workplace where more than five workers are regularly employed, the employer shall cause the workers to select a workplace health and safety representative (*Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 8). In workplaces with twenty or more employees there shall be a joint labour management health and safety committee half of whose members are to be appointed by the union where there is one or elected by the employees (OHSA, s. 9). In the event of a transfer of a business these workers representatives would continue in their position. However, if the transferee is merging the business into its own operations then the joint health and safety committees would be consolidated and the choice of worker representatives would either be made by the union representing those workers or by the employees.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

There is no duty to consult.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Generally, there are two possible outcomes in the event of a commercial bankruptcy. A company may liquidate or restructure. However, the legal regulations to achieve those outcomes are complex as there are two governing federal statues, provincial legislation and various processes to arrive at those outcomes. During a liquidation there may or may not be a sale of a going concern. During a restructuring the owner attempts to keep the business alive under current management. There are protections for workers in the event of a transfer or restructuring.

10.1. Protections on transfer

Where the business is sold as a going concern or a segment of the business is sold as a going concern during a bankruptcy or restructuring, then employees have the same protection under the ESA as they would have in any other transfer.

To illustrate, *Hentshell Clocks Canada* ((1977) Ltd. (Re), ESC 981 (April 23, 1981 – Howe)) a company went into bankruptcy and an employer purchased assets from the bankrupt estate and used them to produce the same products that had been produced prior to bankruptcy. The employer employed the same workforce. The referee concluded that there had been a transfer within the meaning of section 9 of the Act, which conferred on the employees the benefit of the length of service dating back the original employment with the transferor for the purposes of termination damages under the ESA.

Similarly, for the purposes of collective bargaining rights, if the labour board determines there has been a transfer of a continuing business in the context of a bankruptcy then the transferee would be found to be a successor employer bound by existing bargaining rights.

10.2. Protections on liquidation

Typically, during liquidation, the assets of the business are bundled into discrete packages and sold for the benefit for the creditors. When a business goes through restructuring proceedings, there is an attempt to strike a new deal with creditors to maintain the business as a going concern under old management.

In liquidation, an employee's claim to unpaid wages is given super priority with a limit whereas termination and severance pay receive the lowest priority. During a liquidation or pure bankruptcy employees have the benefit of paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act*, which came into force July 7, 2008 (RSC 1985, c B 3, s 136). Under that paragraph unpaid wages have super priority for six months of arrears up to $2,000 plus $1,000 expenses. Any balance is recoverable as a preferred creditor. Termination and severance pay are ranked with the general unsecured creditors, the lowest priority, and will receive payment on a *pari passu* basis. However, affected employees may claim unpaid wages and termination and severance pay from a wage earner protection plan to a maximum (in 2015) of $3,800 (S.C. 2005, c. 47).

In most provinces, directors of businesses are jointly and severally liable to employees of the corporation for labour debts. Therefore, at the point of insolvency when the business is no longer able to satisfy its wage obligations, workers have the right to enforce these obligations against the directors personally (for example, see *Canada Business Corporations Act*, RSC 1985, c. C-44, s 119, as well as the ESA, s. Part XX).

The rationale for this super priority and the wage protection fund is that employees are the least protected creditors of the bankrupt. Employees supply services to the business; however, they are rarely able to assess the financial health of their employer. In other words, they do not have the ability to assess the risk associated with supplying services to the business or diversity it.

10.3. Protections during a restructuring

In the event of an attempt to restructure the business and maintain it as a going concern workers are provided with a set of protections. Any collective agreement that the company has entered into remains in force and cannot be altered unless labour and management agree to strike a new collective agreement under section 33(8) of the *Companies' Creditors Arrangement Act* (RSC 1985, c C-36, s 33). Labour will be incented to pull back its position on wages and other compensation to keep the business alive. Moreover, the bargaining agent will have a claim as an unsecured creditor for an amount equal to the concessions granted with respect to the remaining term of the agreement. The Act makes clear that, if the parties cannot agree on changes to the agreement, the court will not be allowed to intervene and modify its terms.

It must be noted, however, that even though the collective bargaining rights are continued during receivership, there is nothing to prevent the receiver, with the court's permission, from terminating all the employees if it decides that it is not in the best interests of the creditors to continue to operate the business pending its transfer or liquidation.