

# Employment, Labour Relations, Human Rights and Privacy Issues Arising in the Purchase and Sale of a Business

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# Introduction

- Agenda
  - Overview
    - Asset vs. Share Transaction
    - Common Issues
  - Employment Standards Act Requirements
    - Section 97 Successorship
    - Group Termination
  - Labour Relations
    - Successorship
    - Common Employers
    - Section 54 of the BC *Labour Relations Code*

# Introduction

- Agenda, continued
  - *Human Rights Code* Issues
  - Privacy and Due Diligence
  - Pension and Benefits
  - The Common Law
    - Credit for Prior Employment Service
    - The Purchase and Sale Agreement
    - Indemnities
    - Common Problems and Pitfalls

# Overview

- Asset Sale vs. Share Sale
- Common Issues



# EMPLOYMENT STANDARDS ACT

# BC *Employment Standards Act*

- Governs most employees not subject to a collective bargaining agreement in BC
- Specific provisions regarding **successorship** and **group terminations** that diverge from the common law

# BC ESA: Sale of Business

## Sale of business

**97** If all or part of a business is disposed of, or the business continues to operate under a receiver or receiver-manager, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition or receivership, as applicable.

# BC ESA: Sale of Business

- What does this mean?
  - An employee's employment continues with the purchaser/new employer
    - The purchaser *becomes responsible for all outstanding wages*, including unpaid wages and accrued vacation pay under the *Act*, even those due before the sale of the business
- What if the employment isn't actually continued?



# BC ESA: Group Terminations

## Group terminations

**64** (1) If the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must give written notice of group termination to all of the following:

- (a) **each employee** who will be affected;
  - (b) a trade union certified to represent, or recognized by the employer as the bargaining agent of, any affected employees;
  - (c) **the minister.**
- (2) The notice of group termination must specify all of the following:
- (a) the number of employees who will be affected;
  - (b) the effective date or dates of the termination;
  - (c) the reasons for the termination.

# BC ESA: Group Terminations

- (3) The notice of group termination must be given as follows:
- (a) at least **8 weeks** before the effective date of the first termination, if **50 to 100 employees** will be affected;
  - (b) at least **12 weeks** before the effective date of the first termination, if **101 to 300** employees will be affected;
  - (c) at least **16 weeks** before the effective date of the first termination, if **301 or more** employees will be affected.
- (4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.

# BC ESA: Group Terminations

(5) The notice and termination pay requirements of this section are **in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63** or under the collective agreement, as the case may be.

(6) This section applies whether the employment is terminated by the employer or by operation of law.

- Some exceptions under section 65: employees employed for a definite term, construction employees, some teachers, some seasonal union employees who are laid off or those **who have been offered and have refused reasonable alternative employment by the employer.**

# *Mitchell v. BC (Director of Employment Standards)*

- BC Systems, a Crown corporation, transferred a group of non-union employees over to essentially identical positions with the BC government
- 58 employees refused the transfer and claimed entitlement to group termination pay under the *Act*
- The BC Supreme Court upheld the Employment Standards Tribunal's decision that by operation of section 97, the employment of those employees was deemed continuous
- Their choice not to continue their employment was thus voluntary and they were not entitled to individual or group termination pay under sections 63 or 64

# ***Nanaimo Seniors Village v. BC (Director of Employment Standards)***

- A contract for healthcare services at Nanaimo Seniors Village was re-tendered from Well-Being to CareSource
- Prior to the commencement of the new contract, Well-Being terminated the employment of its employees but did not provide group notice of termination or pay in lieu to the employees
- The ESB ordered that Well-Being had breached section 64 of the *Act* and ordered that it pay over \$700,000 to the employees

# *Nanaimo Seniors Village v. BC (Director of Employment Standards)*

- Well-Being alleged that it made every attempt to have continuity between the contractors
- CareSource, the new contractor, informed the Employment Standards Branch that it believed that section 97 applied
- Well-Being appealed the decision to the Employment Standards Tribunal

# *Nanaimo Seniors Village v. BC (Director of Employment Standards)*

- The Tribunal noted as follows:

“Prospective vendors and purchasers know that **either** the vendor must give section 63 and 64 notice and/or termination pay to its employees and terminate them on or prior to the disposition, in which case the vendor is responsible for all obligations under the *Act*, **or** there is no termination of employees on or prior to the disposition and the purchaser assumes accrued obligations under the *Act* by operation of section 97. Vendors and purchasers, then, will take this into account in determining the price they will accept or pay.”
- Section 97 is not triggered if there is a termination of employment on or before the disposition, and Well-Being was still liable for notice of termination

# Corporate Officer Liability

- Under **section 96** of the *Act*, a director or officer of a corporation, at the time wages should have been paid, is personally liable for up to 2 months' unpaid wages for each employee
  - Risk of personal liability to an officer of a seller corporation if the seller decides to terminate employment, fails to provide sufficient notice, and the corporation does not pay



- In summary:
  - If the employees transfer to the *purchaser*, the purchaser is now responsible for all liabilities under the *Act*... including prior unpaid wages
  - If the *seller* terminates the employment of the employees prior to the sale, it incurs the liability... including group termination pay
  - If the *employees* refuse to accept substantially the same employment with the purchaser, they have effectively “quit” and are not entitled to termination pay from either seller or purchaser

# LABOUR RELATIONS

# Labour Relations

- Successor and common employer provisions in Labour Codes are remedial provisions designed to protect existing union rights in respect to business transactions.
- The true employer issue under the Labour Code can also be used to protect union rights.

# Labour Relations

- These provisions under the British Columbia *Labour Relations Code* are:
  - section 35 - successorship
  - section 38 - common employers
  - sections 1 and 139 (a) - true employer.
- Under the *Canada Labour Code* they are:
  - sections 44-47 - successorship
  - section 35 - single employer
  - section 2-4 - real employer

# Labour Relations

- Conceptually a successor provision deals with business or employer change over time. A common employer provision deals with identifying the employer (which may be a number of employers or businesses) at a point in time.
- The true employer approach can include both.

# Labour Relations

- The union rights at issue include:
  - voluntary recognition of the union by an employer
  - certification of the union under the *Code*
  - a collective agreement between a union and an employer
- It is important to note that once a union is voluntarily recognized, certified, or there is a collective agreement, the union has the exclusive right to represent the employees for collective bargaining and Labour Code purposes.
- An employer is not entitled to deal directly with the employees in the bargaining unit in respect to these matters, it must deal with the union.

# Labour Relations

- Union rights are not just protected under Labour Codes. It is now recognized that the following rights are constitutionally protected under section 2(d) of the *Charter*:
  - the right to a meaningful process of collective bargaining (*B.C. Health Services*)
  - the right to unionize (*Mounted Police Association of Ontario*)
  - the right to strike (*Saskatchewan Federation of Labour*).

# Labour Relations

- In respect to all the remedial provisions – successorship, common employer, and true employer status – it is not necessary for the union to show that a business or employer intended to defeat or avoid the union’s rights through whatever transaction(s) or steps were undertaken. A finding of such an intent is relevant and potentially damning. But it is not necessary. It is sufficient if the effect of the steps taken is to improperly affect the union’s rights.



# Successorship

- For those of you who may have a number of businesses, some of which are federal and some of which are provincial, the Labour Codes attempt to cover successorships from one jurisdiction to the other:
  - B.C. section 36 – business moving from the federal to the provincial jurisdiction
  - Canada section 44(3) – business moving from the provincial to the federal jurisdiction

# Common/True Employer

- *BC Labour Relations Code S.38* - a provincial common employer determination requires:
  - more than one entity carrying on business
  - the entities be under common control or direction
  - they be engaged in associated or related activities
  - and there be a labour relations purpose to the declaration.
- The approach under section 35 of the *Canada Labour Code* is essentially the same, but specifically requires that the businesses fall under federal jurisdiction and allows that some of the businesses need not be employers, if at least two of them are employers.

# Common/True Employer

- The B.C. true employer test addresses two general questions:
  - into which organization or undertaking are the employees integrated?
  - which organization or undertaking holds fundamental control over the employees?
- The test also looks at the following specific factors:
  - the party exercising direction and control over the employees performing the work
  - the party bearing the burden of remuneration
  - the party imposing discipline
  - the party hiring the employees
  - the party with the authority to dismiss the employees
  - the party who is perceived to be the employer by the employees
  - the existence of an intention to create the relationship of employer and employees.

# Common/True Employer

- While the tests for common employer or true employer status (single or real employers federally) can be clearly stated in this manner, it needs to be acknowledged that often, in fact very often, applying these tests can be quite involved, with “quite involved” often meaning heavily disputed, resulting in lengthy, factually dense, and costly proceedings. The delay and uncertainty involved can be distracting and disruptive to the operation of the businesses, with the proceedings and any remedial orders which may follow being expensive.

# Successorship

- A successorship determination essentially addresses two questions:
  - 1. what is the nature of the predecessor employer's business and the various assets used in its operation
  - 2. is there a discernible continuity in the business or part of it formerly carried on by the predecessor employer and now being carried on by the alleged successor employer.

# Successorship

- In respect to the first question, the B.C. Labour Relations Board has set out a list of non-exhaustive factors to be considered, including:
  - goodwill
  - logo or trademarks
  - customer lists
  - accounts receivable
  - existing contracts
  - inventory
  - covenants to maintain a good name or not to compete
  - the same employees
  - the same or similar work
  - a hiatus in operation
  - service or the lack of service to former customers
  - direct contact or lack of contact between the predecessor and alleged successor employer

# Successorship

- An important aspect of a successorship inquiry is proper recognition of what a business or operation in fact is. The core of this is captured in the following, widely accepted description:
  - A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a “going concern”, something which is “carried on”. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a “business” from an idle collection of assets.

# Successorship

- This definition of a business is the foundation of employers' typical positions that the business does not simply run with the land or location and a successorship does not simply result because a similar business is operating at the location and does the same work, even with some of the same employees.
- On this basis it became established that the re-tendering of a contract by an owner did not result in a successorship when the previous and alleged successor employers were arm's length competitors.



# Successorship

- Legislative amendment to the Code which in effect deems there to be an automatic successorship if there is a re-tendering of a contract for services in the following sectors:
  - building cleaning services;
  - security services;
  - bus transportation services;
  - food services;
  - non-clinical services in the health sector;
  - services prescribed under section 159 (2) (f) [i.e. by order of the Cabinet through a regulation - which has not yet been used].

# Successorship

- Difference between approach to successorship in the B.C. and Canada *Labour Codes*:
  - Canada *Code* deems continuity of employment
  - B.C. successorship provision gives rise to **Verrin rights** for the employees: at the time of the successorship, the predecessor employer's employees:
    - have the right to be employed by the successor, or
    - elect to remain with the predecessor employer and seek whatever options or remedies exist there under that collective agreement

# Labour Relations

- All of these determinations under the successorship, common employer, and true employer provisions can be further complicated by:
  - there being 2 or more unions
  - there being an intermingling of employees within the successor, common, or true employer's workforce.
  - there being a bankruptcy or insolvency.

# Remedies

- Remedies for breach of the successorship, common employer, or true employer provisions often include make whole orders for the negatively affected employees, but seldom costs and virtually never fines (which nonetheless were recently increased under the B.C. *Labour Relations Code* from a limit of \$1,000 to \$5,000 for individuals and \$10,000 to \$50,000 for organizations).

# Adjustment Plans

- Section 54 of the B.C. *Labour Relations Code* requires an employer intending to introduce a change that will impact a significant number of employees in the bargaining unit to provide 60 days notice to the union to allow discussion of an adjustment plan.
- There is no equivalent provision under the *Canada Labour Code*.

# Adjustment Plans

- An adjustment plan must be discussed and the employer must engage in that decision in good faith. An adjustment plan may include:
  - consideration of alternatives, including amendment of provisions in the collective agreement;
  - human resource planning and employee counselling and retraining;
  - notice of termination;
  - severance pay;
  - entitlement to pension and other benefits including early retirement benefits;
  - a bipartite process for overseeing the implementation of the adjustment plan.

# Adjustment Plans

- Failure to provide the 60 days notice can lead to the Board ordering damages and/or delay of the transaction or change.
- Initial criticism of lack of remedies for failure to agree upon an adjustment plan led to the suggestion of interest arbitration to resolve issues. Ultimately the *Labour Relations Code* review panel recommended mediation because it was more consistent with cooperative labour relations. Ultimately, mediation, not arbitration, was added to section 54 in the subsequent amendments.

# HUMAN RIGHTS



# Introduction

- Human rights considerations in the context of a purchase and sale of a business
- BC Human Rights Tribunal decision:

***Fenton v. Rona Revy Inc.***

2004 BCHRT 143

# FACTS

- Ms. Fenton was a 15 year employee of Revy and its predecessor
- In 2000, she went on medical leave
- She kept in touch with her employer on a regular basis during her disability leave
- GRTW plan - return to work by end of July 2001 and return to full time work by September 2001

# FACTS

- July 13 2001 – Revy Home Centres were sold to Rona Inc.
- Asset Purchase and Sale Agreement
- All Revy employees, were offered new employment with Rona, with a few exceptions

# FACTS

- EXCEPTIONS:

The sale agreement excluded the rehiring of all **“Revy Employees on Long Term Authorized Leave”** at the closing date

# FACTS

- There were two groups of employees in the “Long Term Authorized Leave” category that were not rehired:
  - 1) employees on LTD; and
  - 2) employees on other forms of leave who were not expected to return to work within 364 days.

# FACTS

- Revy and Rona identified 24 employees on LTD
- Ms. Fenton, the complainant, was one of those employees on LTD at the time of the sale
- Her employment was terminated following the sale of the Revy stores to Rona

# FACTS

- Significant negative affects on Ms. Fenton as a result of the termination
- Both financially and emotionally devastating to her

# ISSUE

- The issue in the hearing was whether it was a breach of the *Human Rights Code* for Rona to refuse to offer employment to Ms. Fenton because she was on LTD at the date the sale closed



# RONA'S POSITION

- It is not a breach of the Code for an employer to refuse to offer employment to a person who is, as a result of disability, unable to perform work at the time the job would begin

# DECISION OF THE TRIBUNAL

- **Was this *prima facie* discrimination? YES**
  1. Ms. Fenton was disabled within the meaning of the *Code*
  2. Rona refused to offer her employment.
  3. The only reason Ms. Fenton was not offered employment was that she was on LTD. The reason she was on LTD was that she was disabled. Therefore, her disability was the reason she was not offered employment.

# DECISION OF THE TRIBUNAL

- Next issue:

**Was the refusal to hire Ms. Fenton because of her unavailability due to her disability justifiable as a *bona fide* occupational requirement (“BFOR”)**

# DECISION OF THE TRIBUNAL

- **BFOR Test:**

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate and work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose

# DECISION OF THE TRIBUNAL

- What was the standard Rona adopted?

**No employees on LTD would be offered employment**

This was regardless of whether they could return to work within 365 days, because Rona didn't even look at expected dates of return to work

# DECISION OF THE TRIBUNAL

- What was the purpose for which the standard was adopted?

There was no evidence as to the reasons why Revy and Rona adopted this standard in the negotiation of their contract

# DECISION OF THE TRIBUNAL

- Is the standard reasonably necessary?

To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

# DECISION OF THE TRIBUNAL

- No consideration to the individual circumstances of the employees on LTD
- No undue hardship to make such enquiries with respect to the 24 employees on LTD and to have made individual assessments regarding the likelihood of their returning to work



# SUMMARY

**Whatever the reason for excluding the employees on LTD, Rona failed to establish that the exclusion of employees on LTD was reasonably necessary, or that it would have caused Rona undue hardship to accommodate them on an individual basis**

**Therefore, Rona discriminated against Ms. Fenton**

# PRIVACY LAW CONSIDERATIONS

# Applicable legislation

- *Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA]*
- *Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [PIPEDA]*

# Cross-border Transactions

- Cross-border transactions may engage multiple pieces of privacy legislation:
  - i.e. BC and Saskatchewan would engage *PIPA* and *PIPEDA*
  - i.e. BC and Washington state would engage *PIPA* and any Washington state and USA Federal legislation of application

# PIPA – Section 20

**20** (1) In this section:

**"business transaction"** means the purchase, sale, lease, merger or amalgamation or any other type of acquisition, disposal or financing of an organization or a portion of an organization or of any of the business or assets of an organization;

**"party"** means a person or another organization that proceeds with the business transaction.

# PIPA – Section 20

(2) An organization may disclose personal information about its employees, customers, directors, officers or shareholders without their consent, to a prospective party, if

(a) the personal information is necessary for the prospective party to determine whether to proceed with the business transaction, and

(b) the organization and prospective party have entered into an agreement that requires the prospective party to use or disclose the personal information solely for purposes related to the prospective business transaction.

# PIPA – Section 20

(3) If an organization proceeds with a business transaction, the organization may disclose, without consent, personal information of employees, customers, directors, officers and shareholders of the organization to a party on condition that

(a) the party must only use or disclose the personal information for the same purposes for which it was collected, used or disclosed by the organization,

(b) the disclosure is only of personal information that relates directly to the part of the organization or its business assets that is covered by the business transaction, and

(c) the employees, customers, directors, officers and shareholders whose personal information is disclosed are notified that

(i) the business transaction has taken place, and

(ii) the personal information about them has been disclosed to the party.

# PIPA – Section 20

(4) A prospective party may collect and use personal information without the consent of the employees, customers, directors, officers and shareholders of the organization in the circumstances described in subsection (2) if the prospective party complies with the conditions applicable to that prospective party under that subsection.



# PIPA – Section 20

(5) A party may collect, use and disclose personal information without the consent of the employees, customers, directors, officers and shareholders of the organization in the circumstances described in subsection (3) if the party complies with the conditions applicable to that party under that subsection.

# PIPA – Section 20

(6) If a business transaction does not proceed or is not completed, a prospective party **must** destroy or return to the organization any personal information the prospective party collected under subsection (2) about the employees, customers, directors, officers and shareholders of the organization.

# PIPA – Section 20

(7) This section does not authorize an organization to disclose personal information to a party or prospective party for purposes of a business transaction that does not involve substantial assets of the organization other than this personal information.

(8) A party or prospective party is not authorized by this section to collect, use or disclose personal information that an organization disclosed to it in contravention of subsection (7).

# PIPEDA – Section 2

## Section 2 – Definitions

***business transaction*** includes

- (a) the purchase, sale or other acquisition or disposition of an organization or a part of an organization, or any of its assets;
- (b) the merger or amalgamation of two or more organizations;
- (c) the making of a loan or provision of other financing to an organization or a part of an organization;
- (d) the creating of a charge on, or the taking of a security interest in or a security on, any assets or securities of an organization;
- (e) the lease or licensing of any of an organization's assets; and
- (f) any other prescribed arrangement between two or more organizations to conduct a business activity. (*transaction commerciale*)

# PIPEDA – Section 7.2

- Very similar to requirements in BC's *PIPA*
  - S. 7.2(1) – Prospective business transaction
  - S. 7.2(2) – Completed business transaction
  - S. 7.2(3) – Agreements binding
  - S. 7.2(4) – Exception
- 
- A notable *express* difference: requirement to protect the information with security safeguards appropriate to the sensitivity of the information

# PIPEDA – Schedule 1

- Clause 4.3 – Principle 3 - Consent
  - Overarching principles in Schedule 1 which inform interpretation and purposes behind the sections of the Act
  - Note: Clause 4.3.8 – withdrawal of consent – specifically mentioned in s. 7.2

# Integration Issues

- Different pieces of privacy legislation
- Confidentiality Agreement Terms
- Securities Legislation
- SEDAR
  
- AB OIPC Decision - 2005

# Case Example

- AB OIPC Investigation Report – P2005-IR-005
  - Builders Energy Services Ltd. was a public company involved in acquiring other businesses
  - One vendor, Remote Wireline Services Ltd. disclosed a schedule of employee names, home addresses, and SIN numbers in the course of the negotiation of the agreement
  - Confidentiality Agreement in place
  - As Builders was a public company, securities legislation required to disclose all material contracts on SEDAR, a public registry



# Case Example

- AB OIPC Decision – 2005
  - By posting the agreement on SEDAR, the personal information of the employees was published to the public
  - AB OIPC found a breach of privacy legislation
    - Personal information disclosed not necessary to:
      - Comply with securities legislation
      - Complete the transaction
  - Law firms looking after the transaction were held accountable for the breaches

# PENSION CONSIDERATIONS

# Applicable Legislation

- Provincial and Federal Legislation address requirements for the wind-up of a pension and the transfer of assets of a pension plan where a business is sold or transferred:
  - *Pension Benefits Standards Act, 1985, R.S.C., 1985, c. 32 (2<sup>nd</sup> Supp.)*
  - *Pension Benefits Standards Act, S.B.C. 2012, c. 30*

# Plan early

- Complex area with potentially large liabilities if mishandled
- Pension and Benefits consultants should be consulted early in the process

# Warning

- Potential liability where terms of new pension (and benefits) plans are less beneficial to employees than those provided by the predecessor employer
  - Employees could be left without critical coverage and have claims against the predecessor employer during the period of what would have constituted required periods of notice
    - Well drafted employment agreements and releases may reduce liability

# THE COMMON LAW

# The Sale of the Business and Termination of Employment

- What are the terms of employment?
- Are there written contracts of employment?
- How do you determine appropriate severance packages?
- What should the severance package include?
- Dispute resolution/mediation
- Defending employment claims arising upon completion of the business transaction
- Did the parties contemplate the sale of the business and change of control?

# The Impact of the Sale on Employment Contracts

- Offers of employment to all or some employees
- What are the terms to be offered?
- Who is responsible for severance costs?
- Who are the key employees?
- How does the purchaser protect its investment when key employees may leave to go to a competitor?



# *Sorel v. Tomenson Saunders Whitehead Ltd.*

- 26-year employee continued his employment with a new legal entity when the company he worked for was acquired
- After another 11 years, and two mergers, his employment was terminated without cause
- Should his entire service of 37 years be recognized for the purpose of calculating *reasonable notice*?

# *Sorel v. Tomenson Saunders Whitehead Ltd.*

- Change of ownership
- Credit for prior service
- Implied term may be negated by an express term to the contrary:

*“Where the new employer does not advise the employees that he is unwilling to contract on the basis that the employees have credit for past years of service, the employer is deemed to have contracted with the employees on the basis that the employees will be given such credit. ”*

# Change of Control

- Incentive for key employees to assist in concluding transaction
- Applicable in either share sale or sale of business assets
- A stay bonus is also a common way to retain employees during a transaction

# QUESTIONS?

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