ALBERTA LABOUR RELATIONS BOARD

# INFORMATION BULLETIN

# #21 SUCCESSOR EMPLOYERS

## I. INTRODUCTION

Businesses are often sold, leased, transferred or disposed of. Public-sector bodies also change regularly. Usually, a contract binds only the parties who signed it. This might mean that organizational changes could jeopardize an existing collective agreement. The *Labour Relations Code* prevents this via its successorship provisions. These provisions:

- protect a trade union's right to bargain;
- prevent any existing collective agreement from ending with the change; and
- continue any proceedings under the Code.

In this way, the Code alters a basic principle of contract law to preserve existing bargaining relationships. Under the Code, collective bargaining rights flow through changes in ownership so long as there is a continuation of the same business. This Bulletin describes the principles of successorship, Sections 46 and 48, filing applications, Board remedial powers, and inter-jurisdictional transfers.

## II. PRINCIPLES OF EMPLOYER SUCCESSORSHIP

The Code's successorship provisions protect established bargaining rights. They allow the Board to examine organizational changes. The Board then determines how existing bargaining relationships, collective agreements and Board proceedings are affected. The Board examines each application and rules based upon the facts of the case. *See: W.W. Lester v UA 740 [1990] 76 DLR (4th) 389*.

The Board gives a full and liberal interpretation to the successorship provisions. The sections were meant to preserve bargaining relationships. This does not guarantee that a sale results in no changes to a certificate or collective agreement. The Code does not absolutely guarantee the right to all the work performed by the employer.

## III. SECTION 46

Section 46(1) of the Code covers the sale, lease, transfer or other disposition of a business or undertaking. Broken down into its basic parts, a successful application under section 46(1) requires three elements:

1. a sale, lease, transfer or other disposition;
2. of a business or part of a business;

3. so the control of that business passes to the purchaser.

*See: Alberta Projectionists, Local 302 v. H.J.M. Investments Ltd. [1982] Alta. L.R.B. 82-018*.

The Board examines applications to ensure a business (or part of one) was transferred. A business is a combination of physical assets and human initiative. It is a dynamic activity, a going concern, or a functioning economic vehicle.

The Board focuses on the vehicle through which work is done or functions are performed. Less emphasis is placed on the functions or work performed by employees. This is because a transfer of work functions alone may not be enough to find a successorship. For example, a business could lose a contract to a competitor. While the competitor would then perform the work, clearly no part of a business was transferred to them.

The Board also looks at whether there has been some continuity of the work operations normally associated with that business. This is the case whether the whole business is sold or only part of it. What must be transferred is a portion of the business capable of being defined and identified as a functioning entity. It must be a coherent and severable part of the business. Each case turns on its own facts. *See: CUPE v. Metropolitan Parking, supra and ATU 1374 v. Greyhound Lines of Canada Ltd. and Ferguson Bus Lines Ltd. [1991] Alta.L.R.B.R. 646; W.W. Lester v UA 740 [1990] 76 DLR (4th) 389; HSAA v. Dynacare Kasper Medical Laboratories et al. [1997] Alta.L.R.B.R. 57; HSAA v. Dynacare Kasper Medical Laboratories et al. [1997] Alta.L.R.B.R. 464*.

The Board determines whether a sale of a business occurred by examining several factors. These factors include the transfer of:

- fixed assets such as buildings, machinery, fixtures, or leasehold improvements;
- goodwill;
- logo or trade mark;
- customer lists;
- accounts receivable;
- existing contracts;
- inventory;
- an agreement not to compete;
- an agreement to maintain a good name;
- business know-how and reputation embodied in key personnel;
- work; and
- location.

Ultimately, the Board asks itself whether enough significant parts of the business have passed from the predecessor to the successor to warrant a successorship declaration.

## IV. SECTION 48

Governing bodies are public-sector bodies acting as employers under the Code. These governing bodies can have assets, liabilities, and own property, land etc., just like a business. Legislation sometimes changes a governing body. For example, the government may vary the boundaries of a regional health authority. This, in turn, may affect a bargaining relationship. *See: ATA. v. Airdrie Roman Catholic Sep. School Dist. and Rocky View School Dist. [1992] Alta.L.R.B.R. 673*.

Section 48(1) and (2) allow a certificate to pass to a successor body. Additionally, collective agreements and any proceeding under the Code may be continued. Unions or governing bodies can make successorship applications when changes to this body occur. A successful application requires:

1. there must be a governing body;
2. the governing body must be incorporated or established; and
3. the governing body must replace or take the place, in whole or in part, of another or other governing bodies. Alternatively, the governing body or government bodies must, in whole or in part, be formed into, incorporated into or annexed to another governing body or governing bodies.

Section 48 gives an all-inclusive list of "governing bodies". A governing body is one of the following:

- a city, town, village or summer village established by the Lieutenant Governor in Council under the Municipal Government Act;
- a municipal district established by the Lieutenant Governor in Council under the Municipal Government Act;
- a board of trustees of a school district or division established by the Minister of Education under the School Act;
- the owner or operator of a non-regional hospital as defined in the Hospitals Act; or
- a regional health authority under the Regional Health Authorities Act.

## V. FILING AND PROCESSING THE APPLICATION

An affected trade union or employer may apply for a Section 46 or 48 declaration.

**Filing the Application**
The application is usually in the form of a letter with supporting documents, containing:

- the names and contact information of all affected parties and their counsel (if any);
- the names, addresses and telephone numbers of all associated or related corporations, partnerships, governing bodies, or persons involved in the application as far as that information is available;
- the section of the Code relied upon;
- the details of any bargaining relationships existing or alleged to exist between the union and one or more of the corporations, partnerships, persons or governing bodies involved in the application, including any certificate numbers and details of any collective agreements;
- the details of the activities, business, undertakings, or governing bodies involved and details identifying whether there is a continuity of the work operations normally associated with that business, including supporting documents;
- the details of the sale, lease, transfer or disposition under Section 46 or the incorporation or establishment of a governing body under Section 48, including supporting documents (letters, agreements, sale documents, Ministerial Orders, etc.);
- any other facts supporting the allegation of successorship;

- a statement of whether the applicant is alleging avoidance of a collective bargaining relationship, and the reasons in support of that allegation;
- any reasons important for labour relations purposes and the administration of the Code for the Board to grant the declaration;
- any other supporting information that the applicant wishes to rely upon;
- the remedy sought; and
- a statement in a form prescribed by the Board, confirming the application has been served in a manner approved by the Board, on any parties known to be affected by the proceeding or subsequently added by the Board.

*See: Rules of Procedure, Rules 5.1, 6; Bulletin 2*.

The Director of Settlement reviews all applications and may refuse to process those lacking sufficient information. In that event, the Director asks the applicant to provide further particulars or refers the matter to a panel with a recommendation to dismiss.

The applicant must serve a copy of the application on the employer and any other affected persons. The Board will direct how the employees will be notified, usually by posting of a notice at the worksite.

**Filing a Reply**

The respondent must provide a written reply in every case. *See: Rules of Procedure, Rule 8(1)*. The reply sets out any different version of the facts or any new facts from those raised in the application. The respondents should raise any preliminary objections at this stage to reduce unnecessary hearing time later. The reply must include:

- identification of the application responded to;
- name, address, telephone number and fax number (if applicable) of the respondent;
- name, address, telephone number and fax number (if applicable) of a contact person for the respondent;
- respondent's address for service if it differs from the information already provided;
- an admission of any uncontested allegations;
- a concise statement of the facts the respondent relies on if those facts differ from the applicant's; and
- a statement in a form prescribed by the Board, confirming the reply has been served in a manner approved by the Board, on any parties known to be affected by the proceeding or subsequently added by the Board.

*See: Rules of Procedure, Rules 5.1, 8(3); Bulletin 2*.

If the reply does not comply with the rules, the Director of Settlement may act on the information provided to the Board by the applicant. The Board may then issue an order based on the available evidence.

**Particulars**

Sale, lease or transfer applications are often complex applications involving many issues and parties. Respondents often complain about the sufficiency of the particulars provided by the applicant. Applicants may also complain about the adequacy of the respondent's reply. If any party feels the particulars are inadequate, the Board may deal with the matter.

If a party complains about lack of particulars, the Board will review the application for sufficiency of particulars. If the Board decides the particulars are insufficient, it may dismiss the application. The Board may also provide another opportunity and order the provision of further and better particulars. *See: Stuart Olson et al. v. Labourers 92 and 1111 & Cement Masons' 924 [1990] Alta.L.R.B.R. 210; Plains Pacific Construction, Midwest Management (1987) Ltd., et al. v. UA 488 [1993] Alta.L.R.B.R. 497; Carpenters 1325 v. Fraser Bros. Roofing Ltd. et al. [1997] Alta.L.R.B. LD-039*.

**Discussion Before and After Application**

The Board expects the parties to have attempted to resolve the issues. Parties should discuss an application before filing. The Board may order discussion if it has not occurred. Board officers or members may be asked to assist the parties. The parties may also be required to participate in a resolution conference. The parties may also wish to consider independent mediation services.

The Board expects parties (in any application or reply) to list any outstanding issues not agreed among them, as well as those upon which they agree. These issues might include:

- the identity of the employer or employers;
- amendments to bargaining unit descriptions necessary to preserve the geographical scope of existing certificates;
- the identity of the bargaining agent in any consolidated bargaining units;
- the application of collective agreement rights, especially seniority rights, to minority employees in a consolidated unit; *See: Mistahia Regional Health Authority v. Mistahia Community Nurses' Association [1997] Alta.L.R.B.R. LD-043*. and
- details of any proposed votes.

**Production of Documents**

Parties often ask the Board to order the production of documents before the start of a hearing. Parties may request documents be produced before a hearing.

The person seeking the notice must provide enough details of the documents or class of documents sought that the person receiving the notice can identify and isolate those documents without undue difficulty. *See: Bulletin 5; IBEW Loc. 424 v. Canem Systems Ltd. et al. [1987] Alta.L.R.B.R. 170 and [1987] Alta.L.R.B.R. 203*.

**The Role of An Officer**

An officer does not normally prepare a report for successorship applications. An officer's role is to assist in settlement discussions or, if the matter is going to hearing, to narrow the issues. An officer may try to get the parties to agree on documentation as well as an agreed statement of facts before the hearing date. *See: Bulletin 3*.

**Processing Consent Applications**

When a union and an employer can decide upon an appropriate bargaining unit, they can apply for a consent order. Consent orders offer the parties considerable flexibility during a transition. An order might include any terms the Board could grant in a contested application, including suitable modifications to collective agreements and seniority terms.

Parties seeking a consent order should include an agreed statement of facts upon which the Board may assess the application. The Board retains the right to determine if the unit sought is

appropriate. It reviews applications to ensure they lead to units appropriate for collective bargaining and protect the rights of all affected parties under the *Labour Relations Code*. If the Board has concerns with the proposed consent order, it will advise the parties. A Board officer will then attempt to achieve a suitable resolution with the parties. Once an appropriate consent order is reached, the Board reviews the order and makes any necessary changes before granting it.

In reviewing a consent declaration, the Board considers the rights of those employees who are presently unorganized. It will require such posting of notices and conducting of votes as may be necessary to ensure all employees' rights are considered

## VI. BOARD REMEDIAL POWERS

If the Board issues a successorship order, the successor employer assumes the bargaining rights and obligations of its predecessor. The trade union continues to be the bargaining agent of the employees now working for the successor. Sections 46(1)(a) and (b) provide that existing certificates, collective agreements and proceedings under the Code continue.

**Effective Date**
A declaration under Section 46(1) is not necessary to give effect to the provisions of the Code. However, where one is sought and given, it applies as of the date of the sale, lease or transfer rather than the date of the Board order. A declaration under Section 46, however, and any remedies ordered under Sections 46(2) and 48(2) are effective the date of the Board order. *See: UFCW v. Fletchers Ltd. [1985] Alta.L.R.B. 85-021*.

**Appropriateness of the Bargaining Unit**
In a successorship affecting the continued appropriateness of the bargaining unit, the Board begins with the presumption that the unit continues to remain appropriate until it is satisfied that the unit is no longer appropriate. While it may determine that a unit remains appropriate, the Board may amend the unit description to reflect the new circumstances.

**Merger of Work Functions or Sites vs One-Time Reorganization**
A one-time reorganization may not amount to a merger if it involves only the permanent transfer of a workgroup from one bargaining unit to another. These types of transfers normally involve the movement of a single program or service to another site, such that the employees of the program or service are absorbed into the new site. A workgroup transfer may well raise issues of how to treat those employees in the new unit (a "reciprocity issue"). Such questions are for the parties to negotiate and resolve under their current collective agreements. The likelihood of ongoing management and operational integration and intermingling of employees between two separate bargaining units (as opposed to a "one-time" reorganization to simply move some persons from one unit to another) may convince the Board a unit is no longer appropriate.

Mergers are different. They involve the successor employer realigning its structure and services such that there is management and operational integration of the corporate functions and ongoing intermingling between previously separate bargaining units that would be hampered by maintaining that separation. In this section we are speaking about merging the same types of bargaining units *geographically*. The Board will assess each case to determine if the degree of integration and intermingling, in conjunction with other common factors considered by the

Board, support the argument that change is required to the current bargaining unit configuration. *See: Bulletins 9, 10; HSAA v. Chinook Regional Health Authority et al. [1996] Alta.L.R.B.R. 289; South Peace Health Unit No. 20 SNAA v. Mistahia Regional Health Authority et al. [1996] Alta.L.R.B.R. 362; David Thompson Health Region v. SNAA et al. [1996] Alta.L.R.B.R. 347*.

The Board's position is that the geographical limits of existing bargaining units should remain unchanged until:

- the employer and bargaining agent or agents consent to a consolidation of bargaining rights; or
- the employer merges operations across existing bargaining unit boundaries, making existing bargaining units inappropriate in the future, thus making consolidation of bargaining units necessary. *See: HSAA v. Calgary Regional Health Authority et al. [1997] Alta.L.R.B.R. 549*.

**Principles Underlying Merger-Based Declarations**

Where operations are merged across existing bargaining unit boundaries and consolidation of bargaining unit is appropriate, the Board will consider the following principles:

- Union representation of employees in the appropriate consolidated bargaining unit will be decided by assessing the relative support of unions among employees in the consolidated unit.
- If one union represents an overwhelming majority (80% or more) of employees in the consolidated unit, the majority union will become the bargaining agent for the consolidated unit without a vote. The same is true where the minority group is not unionized.
- Conversely, a trade union that represents only a small percentage of employees in the consolidated unit, compared to another bargaining agent or an overwhelmingly large unorganized group, may lose its bargaining rights, without a representation vote.
- If one union or the only union represents between approximately 20% and 80% of employees in the consolidated unit (these figures are only rough guidelines), the Board will conduct a representation vote to determine employees' wishes on representation. A union representing a small percentage of employees overall will not be included on the ballot for the vote. The Board may set guidelines enabling competing unions (or spokespersons for a non-union group) to address employees before the vote.

Trade unions may wish to settle representational issues arising from a merger of operations in a way that avoids a run-off vote. One option is to apply for a single joint certificate.

**Collective Agreement and Transitional Issues**

The Board has authority to make any necessary amendments to collective agreements under Sections 46, 48 or 12 of the *Labour Relations Code*. Where bargaining units are altered, existing collective agreements will follow the certificates. Employees changing bargaining agents will become governed by the majority union's collective agreement, subject to any Board jurisdiction to make any appropriate amendments. The Board may also continue the various collective agreements until the parties have had an opportunity to negotiate the transfer to a single agreement. Unionized employees joining a non-union majority will cease to be governed by a collective agreement.

A transfer of employees to another collective agreement can affect employee rights, including salaries and benefits, but especially seniority rights. The Board encourages parties to meet and

try to resolve transitional issues involving collective agreement rights arising on a merger of operations. Some collective agreements actually provide a mechanism to do this. In the case of a dispute, however, the Board urges parties to consider the following principles:

- The majority union's collective agreement will presumptively govern employee rights for the whole of the consolidated unit, subject to any direction made by the Board to deal with the merger.
- In merging workforces, all employees in the new bargaining unit should be treated equally and consistently in respect of their previous seniority rights. Thus employees not previously represented by the successful trade union should acquire seniority or similar rights consistent with the rights of those who were. The predecessor trade union may be a valuable resource in this process.

*See: Bulletin 9; Mistahia Regional Health Authority v. Mistahia Community Nurses' Association [1997] Alta.L.R.B. LD-043; Miscellaneous Employees Teamsters 987 v. York Farms, et. al., [1987] Alta.L.R.B.R. 541; CUPE 3203 v. Horizon School District No. 67 et al [1995] Alta. L.R.B.R. 439; ATA v. Airdrie Roman Catholic School District [1992] Alta.L.R.B.R. 673; Miscellaneous Teamsters 987 v. N.A.D.P. et al (#3) [1991] Alta.L.R.B.R. 172*.

**Mergers Affecting Units Represented by Different Union Locals or Different Unions**

The Board will entertain applications from two or more trade unions to hold a certificate jointly, where it is appropriate to do so. This joint-certificate option may be useful for two or more locals of the same parent union, either as a permanent solution or as an interim measure pending reorganization of the locals. It would avoid the need for any run-off vote upon consolidation. The trade unions wanting such a joint certificate would have to satisfy the Board they had a very clear agreement between the unions for the administration of the single bargaining unit. Unions considering such an option are encouraged to prepare their agreement (e.g., articles of association) and discuss the content with the employer to anticipate any problems that may arise. *See: CUPE Locals 1240 and 8 v. HSAA and Calgary Lab. Services et al. [1997] Alta.L.R.B. LD-028*.

**Employee Input**

Sometimes affected employees do not wish to be represented by the bargaining agent. The Board may receive a petition from these employees indicating opposition to a union. Under Sections 46(2) and 48(2) the Board has the power to order a representation vote to determine the true wishes of these employees.

If the Board orders a vote, it must decide which units, or portions of units, vote. Other decisions may involve whether they require majority support only in the "add-on" group or a majority in the single, expanded unit. Most representation votes simply determine the bargaining agent of the single, expanded unit. *See: Miscellaneous Employees Teamsters Local 987 v. N.A.D.P. et al. [1991] Alta.L.R.B.R. 50; HSAA v. Calgary Regional Health Authority et al. [1997] Alta.L.R.B.R. 549.*

## VII. INTER-JURISDICTIONAL TRANSFERS

A sale, lease or transfer may take place between companies governed by different statutes. This happens in two different circumstances: a transfer between federal and provincial companies and a transfer between the *Public Service Employee Relations Act* and the *Labour Relations Code*. *See: ATU 1374 v. Greyhound Lines of Canada Ltd and Ferguson Bus Lines Ltd. et. al. [1991] Alta.L.R.B.R. 646; HCEU v. Versa Food Services Ltd. & Marriott Management Services [1993] Alta.L.R.B.R. 452; AUPE v. Municipal District of Saddle Hills #20 et al. [1996] Alta.L.R.B.R. 1, [1996] Alta.L.R.B.R. 260; [1998] Alta.L.R.B.R. 332 (Q.B.); Crown in right of Alberta v. LRB and Municipal District of Saddle Hills #20 et al. [1997] Alta.L.R.B.R. 49; NASA v. University of Alberta and Focus Bldg. Services et al. [1995] Alta.L.R.B.R. 396*.

It is possible for an employer to be both a federal and a provincial employer at the same time. In such situations, the Board has jurisdiction to deal with the matter. A federal certification cannot be transferred, however, and has no effect under Alberta legislation even if a part of the employer's operations are found to be within provincial jurisdiction.

If in an application PSERA governs one employer while the Code governs the other, the PSERA certificate cannot flow to the new employer. In the dividing line between the Code and PSERA, jurisdiction attaches to the employer, not the undertaking. Because of Section 4(2)(a) of the Code, if an entity is an employer under PSERA, the Code has no application to that employer.

A collective agreement may, however, flow from one jurisdiction to another.

*See also*:

Bulletins 2, 3, 4, 5, 9 and 10
Rules of Procedure
George W. Adams, Canadian Labour Law, 2d ed. (Canada Law Book, 1993)

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