SUCCESSOR RIGHTS UPDATE: TRANSFERRING EMPLOYEES WITH OR WITHOUT CONSENT, THAT IS THE *ENMAX* QUESTION

AUTOMATIC EMPLOYEE TRANSFER IN ALBERTA

The Supreme Court of Canada denies leave in *Canadian Union of Public Employees, Local 38 v. Enmax Corporation, et al.* (February 5, 2004)

Facts

The City of Calgary (the "City") disposed of its electrical business to Enmax Corporation ("Enmax"), a wholly owned subsidiary of the City. In addition to selling the assets, the agreement for purchase and sale also transferred the unionized employees of the Utility Customer Accounts Division ("UCAD"), formerly part of a City department, to Enmax.

For various reasons (including job security, fewer career opportunities, the work environment or a desire for a severance package) some of the UCAD employees did not want Enmax as their employer. However, the City advised all of the employees that they would be transferred to Enmax pursuant to the successorship provisions of the Alberta *Labour Relations Code* (the "*Code*") and would not be eligible for either redeployment within the City or a severance package. In the City's view, the employees' choice in the face of the sale was to continue their employment with Enmax or to resign. The employees could not exercise rights against the City.

Alberta Labour Relations Board

The parties concurrently applied to the Alberta Labour Relations Board (the "Board") for its interpretation of the *Code*'s successorship provisions (similar to those of the Ontario *Labour Relations Act, 1995*), posing the question:

> Can the City transfer employees to Enmax or are the employees entitled to refuse the transfer, remain in the City's employ and demand to apply provisions of the City collective agreement such as severance or redeployment?

The Board acknowledged that the *Code*'s successorship provisions did not contain any wording that altered the common law principle against the transfer of employees from one employer to another without the employees' consent. However, the Board held that the provisions had the effect of eliminating the fundamental common law right of unionized workers to choose their employer and ruled that the City had the power to transfer employees without their consent.

In reaching its decision, the Alberta Board reviewed decisions in both British Columbia and Ontario and concluded that there were two opposite approaches to the issue of transfer of employment as a result of successorship:

- **The "British Columbia" approach**: the purpose of labour legislation is to protect the rights and interests of workers. Any interpretation which negates or detracts from those rights must

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be clearly provided for in the legislation. Where the legislation is silent, an important right such as the choice of employers, cannot be read into a statutory provision. Therefore, the employees affected by a sale of a business do not transfer automatically to the purchaser and may elect to remain with the vendor.

- **The "Ontario / *Westbury*" approach**: in the interests of employees generally it is important for labour legislation to have successorship provisions that obligate the new employer to hire the employees. The *quid pro quo* must be that if the employee continues to be an employee under the collective agreement and the new employer must hire that person under the collective agreement, the employee does not get a whole series of new rights such as severance or redeployment because of it (*Westbury/Howard Johnson Plaza Hotel* (1992), 29 L.A.C. (4th) 89 (Ontario, Arbitrator Charney)).

The Alberta Board preferred the rationale of the Ontario /*Westbury* approach. The Board held that the common law rights of employee choice were usurped by collective bargaining and labour relations legislation, that there must be a *quid pro quo*, and that legislators could not have intended employees to gain a whole other set of rights upon successorship to which they were otherwise not entitled. The Union's reconsideration application was not successful. The Union then applied for judicial review.

Alberta Court of Queen's Bench

After an extensive review of the jurisprudence, the Alberta Court of Queen's Bench concluded that the *Westbury* decision was wrongly decided. In its view, the Board's determination that employees automatically continued their employment with Enmax, as the successor, was therefore patently unreasonable. The Court summarized its conclusions:

> By continuing the collective agreement in force, s. 44 [the Alberta *Code*'s successorship provision] imposes an obligation on the successor to employ the affected employees in accordance with the terms of the collective agreement, but, silent as to the effect of successorship on affected employees, s. 44 does not impose an obligation on an affected employee to work for the successor employer. . . . The rights available to an employee who does not wish to accept employment with the successor employer are to be found in the collective agreement, read in conjunction with the sale agreement between the predecessor and successor employers. The consequences may well differ depending on whether all or part of a business has been sold, and I am not convinced that the common law has no role to play when an employee seeks redress from a predecessor employer whose entire business has been sold. [Emphasis added.]

Alberta Court of Appeal and the Supreme Court of Canada

The Alberta Court of Appeal allowed Enmax's appeal, concluding that the lower court judge had erred in finding that the Board's decision was patently unreasonable: "they were not clearly irrational nor were they decisions that no reasonable person could have reached". The Supreme Court of Canada denied the Union's attempt to challenge the Court of Appeal's ruling.

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The Law in Ontario?

The state of the law in Ontario is uncertain. While the *Westbury* approach has been reaffirmed by the Alberta Board, a number of recent Ontario arbitral decisions have called the approach into question (see *Computing Devices Canada*, an unreported decision of Arbitrator Keller and *Nortel Networks v. C.E.P., Local 4 (Cessation of Business Grievance),* [2002] O.L.A.A. No. 160 (Tacon); see also a recent federal case of *Canadian Broadcasting Corporation*, [2001] C.L.A.D. No. 294 (Freedman)).

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