

SALE, LEASE OR TRANSFER

INTRODUCTION

Unless a law says otherwise, a contract binds only the parties who sign it. The [Labour Relations Code](#) alters this basic principle of contract law. Under the Code, collective bargaining rights flow through changes in ownership, so long as there is a continuation of the same business.

Section 46 deals with the effect of the sale, lease, transfer or disposition of a business. It also addresses the merger of one business with another. This is a **successorship** application. The purpose of the section is to make sure rights gained under the Code are preserved rather than lost. This section has three functions: to protect the trade union's right to bargain, to protect any existing collective agreement from ending upon the sale, and to continue any proceedings under the [Labour Relations Code](#).

This policy describes:

- the nature of a Section 46(1) transaction;
- the Board's powers under Section 46(2);
- inter-jurisdictional transfers;
- the application; and
- processing the application.

This policy does not deal with the replacement, in whole or in part, of a governing body under Section 48. An application for sale, lease or transfer may be filed with an application under Section 48 where it is not clear that a party falls within the section. See: [[Governing Bodies, Chapter 26\(d\)](#)].

NATURE OF A SECTION 46(1) TRANSFER

Section 46(1) of the [Code](#) covers the sale, lease or transfer provisions. It states:

46(1) When a business or undertaking or part of it is sold, leased, transferred or merged with another business or undertaking or part of it, or otherwise disposed of so that the control, management or supervision of it passes to the purchaser, lessee, transferee or person acquiring it, that purchaser, lessee, transferee or person is, where there have been proceedings under this Act, bound by those proceedings and the proceedings shall continue as if no change had occurred, and

(a) if a trade union is certified, the certification remains in effect and applies to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and

(b) if a collective agreement is in force, the collective agreement binds the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it as if the collective agreement had been signed by him.

Broken down into its basic parts, a successful application under Section 46(1) requires 3 elements:

- a sale, lease, transfer or other disposition;
- of a business or undertaking or part of a business or undertaking;
- so the control of that business or undertaking passes to the purchaser.

What is a Sale, Lease or Transfer

A successful successorship application requires a sale, lease, transfer or disposition of a business or merger of one business, or part of a business, with another. These terms mean:

- **Sale:** The term sale describes a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid.
- **Lease:** The word lease commonly means a specific kind of contract by which one party, called the lessor, for a consideration in money or otherwise, gives to the other, called the lessee, the exclusive possession of certain property for a time.
- **Transfer:** Transfer can describe a multitude of transactions whether by sale, exchange, gift, trust, take-overs, mergers and amalgamations or otherwise by which property, rights, debts, etc. are conveyed from one to another. The transfer may be absolute or may be conditional upon the happening of some other event.
- **Disposition:** “Dispose of” includes “being relinquished—passing on to the control of someone else.” It also includes “finished with” and “got rid of.” It is interpreted broadly to include almost any mode of transfer. Labour boards do not rely on technical legal forms of business transactions. Disposition must mean that in some way the first company conveyed the business or part of the business to the second company.
- **Merger:** The absorption of one company by another.

What is a “Business” or “Undertaking”?

“Business” does not necessarily refer to a profit-making economic activity. Rather, the meaning of “business” depends on the facts and circumstances in each particular case. A business is a combination of physical assets and human initiative. It is more than the sum of its parts. It is a dynamic activity, a **going concern**. It is something that is **carried on**. A business is a **functioning economic vehicle**.

Ultimately, the Board asks itself whether enough significant parts of the business have passed from the predecessor to the successor. 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. The Board will not grant a successorship declaration to create an otherwise inappropriate bargaining unit covering only a small portion of the successor employer’s overall workforce.

Transfer of Control

For Section 46(1) to apply, there must be a contractual or other link “so that the control ... passes to the purchaser.” The business which is a going concern must go **from** the vendor **to** the purchaser. There must be a **legal connection** or **legal relation** between the two entities.

The question of transference of control is often an issue when dealing with contracting out situations. “Contracting out,” or subcontracting, involves the transfer by an employer of work previously done by its own means and its own employees to an outside contractor. See: [[True Employer vs. Subcontractor, Chapter 24\(f\)\(ii\)](#)]. “Contracting in” is a subset of subcontracting. This involves a subcontractor coming into the employer’s premises to perform functions formerly undertaken by the employer’s own employees.

Subcontracting rarely gives rise to a successorship application. The Board looks at whether there is a transfer of the “undertaking” or going concern. There must also be a **legal connection** between the former and successor employers. Transfer of the work functions alone is not enough. The focus for a successorship application is therefore on the “undertaking”, not merely the functions or work performed by employees. The term “undertaking” in a successor-rights context means the vehicle through which work is done or functions are performed—not the work or functions themselves. A similarity or continuity of work functions is not sufficient to establish a “transfer of part of an undertaking,” although if the undertaking has in fact been transferred, there will normally be a continuity of function.

Transfer of Employees

The Board in *CUPE Local 38 v. City of Calgary and Enmax Corporation* [2001] Alta. L.R.B.R. 131 (affirmed on appeal [2003] Alta. L.R.B.R. 119 (Alta. C.A.)) found where the requirements of section 46 have been met, the purchaser is put in the same position as its predecessor, as if no change had occurred. The employees of the predecessor automatically become employees of the successor employer. Three different appellate courts (including the Alberta Court of Appeal) have reviewed this issue, arguably coming to three different conclusions. CUPE Local 38 has filed an application for leave to appeal to the Supreme Court of Canada. (Application for leave to appeal to Supreme Court of Canada denied – [2003] S.C.C.A. 292).

BOARD POWERS UNDER SECTION 46(2)

A successful application may result in a different unit. For example, two unions may hold the bargaining rights for various entities involved in an application. In such situations, Section 46(2) gives the Board powers to address how best to deal with the situation. This section reads:

46(2) Where a question arises under this section, the Board, on the application of any employer, trade union or person affected, may determine what rights, privileges and duties have been acquired or retained and the Board may, for that purpose, make any inquiries and direct the taking of any votes that it considers necessary and decide any questions arising under this section, and

(a) the Board may determine and declare which trade union or trade unions shall be the bargaining agent or agents for a unit or units of employees of the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it,

(b) if a trade union or trade unions are certified with respect to the business or undertaking or part of it, or with respect to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, the Board may amend or revoke any certificate and determine and declare that one or more certificates or certificates as amended are in effect or remain in effect and apply to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it,

(c) if one or more collective agreements are in force with respect to the business or undertaking or part of it, or with respect to the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, the Board may cancel any of those agreements or amend any of those agreements with respect to the employees covered by the agreements and determine and declare that one or more collective agreements or collective agreements as amended are in effect or remain in effect and bind the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it, and

(d) if there are proceedings under this Act before the date of sale, lease, transfer or other disposition of the business or undertaking or part of it, the Board may determine and declare whether those proceedings are binding on or the extent to which those proceedings are binding on the purchaser, lessee, transferee or person acquiring the business or undertaking or part of it.

Under this section, the Board may determine what rights, privileges and duties have been acquired or retained. Upon a sale, the successor employer inherits the position of its predecessor. The union continues to be the bargaining agent of the employees. There may, however, be times when there is more than one union. See: [*Practice Note, p 7*]. There may also be a collective agreement in existence that is inequitable for the successor company. In such circumstances, Board can fashion an appropriate remedy. In making this determination, the Board may direct the taking of any votes that it considers necessary.

INTER-JURISDICTIONAL TRANSFERS

A sale, lease or transfer may take place between companies governed by different statutes. The Board deals with these issues on two fronts: a transfer between federal and provincial companies and a PSERA-LRC transfer.

Federal-Provincial Transfer

The [Canada Industrial Relations Board](#) has consistently held that it has no jurisdiction to make a single-employer declaration where one of the affected parties is a provincial employer (i.e., subject to provincial labour legislation) and excluded from the scope of the federal labour statute.

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. The [Canada Labour Code](#) and the Alberta's [Labour Relations Code](#) are not mutually exclusive pieces of legislation. There is nothing in either statute stating that an employer under the federal statute cannot also be an employer under the provincial statute. This is because, in the federal statute, jurisdiction attaches to the **undertaking**, not the **employer**. Therefore, an employer that is primarily under federal jurisdiction can nonetheless operate an undertaking under provincial jurisdiction. The [Code](#), therefore, may still apply to the provincial undertaking.

PSERA-LRC Transfer

Section 4(2)(a) of the [Labour Relations Code](#) states:

4(2) This Act does not apply to

(a) an employer as defined in the Public Service Employee Relations Act and to whom that Act applies;

This section stands for the proposition that the [Code](#) has no application to a public-service employer governed by PSERA. As such, the [Code](#) has no jurisdiction over employers governed by PSERA. What happens, however, when, in an application for successorship, PSERA governs one employer while the [Code](#) governs the other? In the dividing line between the [Code](#) and PSERA, jurisdiction attaches to the employer, not the undertaking. This is unlike the distinction in federal-provincial transfers. 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.

THE APPLICATION

An affected union or employer may apply for a sale, lease or transfer declaration. The application is usually in the form of a letter with supporting documents. See: [[Rule of Procedure 7](#)]. The Director of Settlement checks the application for:

- 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 or persons involved in the application as far as that information is available;
- section of the Code relied upon;
- details of any relationships existing or alleged to exist between the trade union and one or more of the corporations, partnership or persons involved in the application, including any

- certificate numbers and details of any collective agreements;
- details of the activities, business or undertakings involved (e.g., look to see whether there is a continuity of the work operations normally associated with that business);
- any other facts supporting the allegation of successorship;
- any other supporting information that the applicant wishes to rely upon; and
- the remedy sought.

See: [[Applications, Complaints and References, Chapter 19](#); [Information Bulletin #2, Processing Applications, Complaints and References](#)].

Bring any deficiencies to the applicant's attention immediately. Have them provide any missing information before accepting the application. The applicant must serve a copy of the application on the respondent. See: [[Particulars, Chapter 19\(b\)](#)]. Enter the matter in the database and open a process file. The Director of Settlement then assigns it to an officer and develops a dispute resolution strategy. See: [[Dispute Resolution Initiatives, Chapter 19\(c\)](#)]. A respondent to a application under Section 46 **must** file a reply to the application by a specified date unless the Director of Settlement allows otherwise. See: [[Rule 8](#)]. Once the replies are received, schedule a resolution conference and hearing date.

PROCESSING APPLICATIONS

Processing the Application

The officer contacts all the parties about the application. In order to inform affected employees of the application, the Board prepares notices, and asks the employers to post them. The notices give a brief description of the application in front of the Board. They ask affected employees who have objections or comments to contact the Board by a certain date – usually within 14 days.

Four issues constantly arise on these applications:

- the reply;
- particulars;
- discovery of documents; and
- the role of an officer.

The Reply

For a Section 46 application, the respondent must provide a reply. See: [[Rule of Procedure 8\(1\)](#)]. The reply sets out a version of the facts alleged to refute or vary those alleged in the application. The respondents should be asked to raise any preliminary objections at this stage to reduce unnecessary hearing time later. The reply must include:

- identification of the complaint 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; and
- a concise statement of the facts the respondent relies on if those facts differ from the complainant's. See: [[Information Bulletin #2](#) and [Rule of Procedure 8\(3\)](#)].

If the reply does not comply with the Rules, the Director 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 in support of the application. 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. See: [[Particulars, Chapter 19\(b\)](#)].

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. This does not mean the Board holds a preliminary hearing any time a party objects about insufficient particulars. For a description of sufficient particulars, see: [[Particulars, Chapter 19\(b\)](#)].

Discovery of Documents

Due to the complexity of many sales, parties often seek Notices to Produce Documents before the start of a hearing. Parties may request production of documents either at a hearing or at some other time and place. The Board can direct a party or an individual to attend and produce documents.

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.

Where the notice directs production at a time and place other than the hearing, it normally directs the receiver's attendance at a Board office at a specified date and time. The party requesting such a notice should suggest appropriate dates for attendance.

For processing and service of notices, See: [[Information Bulletin #5, Notices to Attend; Notice to Attend and Produce, Chapter 32](#)].

The Role of an Officer

An officer does **not** normally prepare an officer's report for these types of applications. Rather, 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. Before proceeding, the officer and the Director of Settlement discuss an appropriate dispute resolution strategy. See: [[Dispute Resolution Initiatives, Chapter 19\(c\)](#)].

The Director of Settlement or the Board may ask an officer to do an investigation and prepare a report on a specific area. An officer should not prepare such a report, however, without first receiving instructions as part of the dispute resolution strategy, or directly from the Board.