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PUBLICATION

Building Service Providers: Giving Way to Broader-Based Bargaining Rights

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The *Labour Relations Act, 1995* ("*LRA*") deems that a sale of business occurs when a building security, cleaning or food services provider loses its contract at a building and is replaced by another building services provider. If the existing service provider was bound to a collective agreement, the employees working at the building at the time of the contract turnover will not only be permitted to maintain their employment with the new employer but will also continue to be represented by the same union under the existing collective agreement.

There are two main consequences of these "deemed sale" provisions. The first is that they restrain competition and discourage non-union building service providers from bidding on work being performed by unionized employees. There is no relief for a non-union building services provider from becoming unionized at the site following a deemed sale of business.

The second material consequence of the deemed sale provisions is that a unionized building services provider which assumes a contract from another unionized contractor will need to navigate the demands of two different unions claiming bargaining rights over the same group of employees at the site. In such cases, the Ontario Labour Relations Board ("OLRB") has the jurisdiction to declare which union and collective agreement will prevail at the site. The resolution to the conflict is not automatic, is not always straightforward, and is often misunderstood by building services providers.

In 1994, when the deemed sale provisions of the *LRA* were introduced, the OLRB provided direction to the industry on the interpretation of these provisions in the context of overlapping bargaining rights in *Ensign Security Services c. v. United Steelworkers of America and Canadian Security Union v Pinkerton's of Canada Limited and Burns International Security Limited* 1994 CanLII 9999 (ON LRB) ("***Pinkertons***"). In its decision, the OLRB held that a successor unionized employer should not be bound by the previous employer's collective agreement in cases where it would not make "good labour relations sense". A bad labour

relations result occurs when there is an intermingling of employees and business operations represented by two different unions with overlapping bargaining rights.

In 1995, shortly after *Pinkertons*, the deemed sale of business provisions were repealed. This remained the status quo for over 20 years until a virtually identical provision was reintroduced in 2017.

In *LIUNA, Ontario Provincial District Council v Star Security Inc., and Paladin Security Group Limited*, 2024 CanLII 90816 (ON LRB) (the "Decision"), a decision of the OLRB released in late 2024, much-needed clarity was provided on the status of *Pinkertons* and the conflict between unions in this context.

THE FACTS

In this case, LIUNA had long-standing bargaining rights for security guards employed at Westmount Shopping Centre in London, Ontario with Star Security. Paladin won the security services contract at Westmount, which constituted a deemed sale of business from Star Security to Paladin and required Paladin to recognize LIUNA's bargaining rights at Westmount. LIUNA asserted that, as successor employer, Paladin was bound by the collective agreement it had with Star. However, Paladin refused to recognize LIUNA's bargaining rights for its employees at Westmount because Paladin was already bound to a province-wide collective agreement with the United Steelworkers ("USW") covering its security guards in Ontario, including at Westmount.

Star Security employed very few employees at Westmount and Paladin offered continued employment to all the employees but under the USW Provincial Agreement. Paladin filled vacancies and required shifts at Westmount by both the former Star Security employees who had accepted employment with Paladin and Paladin's employees in the region who were governed by the USW Provincial Agreement. Most if not all the administrative burden and management for security guards was centralized in Toronto and Paladin's regional offices. This resulted in an intermingling of both employees and the business operations of Paladin at Westmount and otherwise.

THE DECISION

In its decision, the OLRB confirmed that the 1992 and current deemed sale of business provisions of the *LRA* are substantively identical and that the analysis in *Pinkertons* remains good law.

The OLRB confirmed that there was intermingling at Westmount, both operationally and on an individual employee level and that any employees governed by the LIUNA collective agreement at Westmount would not have the greater benefit of the USW Provincial Agreement, including specifically, lateral job mobility throughout the province.

The OLRB further concluded that, from an operational perspective, there are good reasons to favour broadly held bargaining rights, noting the unnecessary administrative burden on employers in respect of:

a. the administration of separate collective agreements, including pay scales, benefits and pension plans;

b. the exercise of employee seniority rights under separate agreements and resulting staffing and scheduling issues;

c. the administration of two separate grievance procedures in disputes that involve parties from both bargaining units; and

d. what would otherwise be the need to negotiate multiple collective agreements.

Ultimately, the OLRB declared that all security guards working at Westmount were, are and should be bound to the broader based USW Provincial Agreement.

KEY TAKEAWAYS FOR EMPLOYERS

Broader-based bargaining rights are generally preferred over fragmentation and smaller disparate bargaining units with the same employer.

There need not be immediate labour relations issues arising from a deemed sale of business for the OLRB to find intermingling and to conclude that broader-based bargaining should prevail – the potential for labour relations issues in the future will be sufficient.

Due to the prevalence of contract flips in building service provider industries, a principled and consistent approach based on a standard industry practice should be maintained.

Security service providers and unions regularly gain and lose building contracts. Employers and bargaining agents are well-advised to give way to broader-based bargaining rights when contracts are won and lost as opposed to engaging in selective self-interest and costly litigation to maintain fragmented and inefficient bargaining units.

For specifically tailored advice on a sale of business or deemed sale of business that impacts your business, please reach out to Blaneys' Employment & Labour Group.

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