



What about the people?

When corporate and workforce worlds collide

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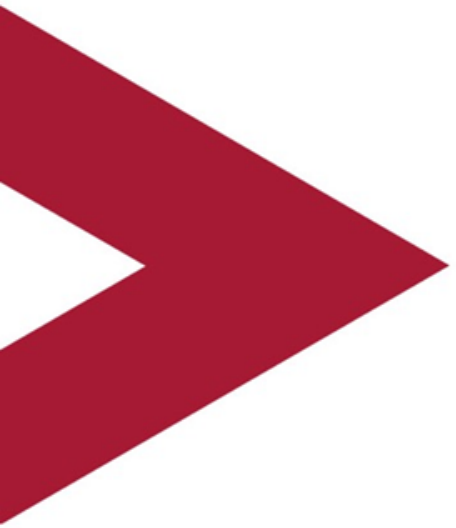
Michelle Black

Why are we here?

- Employment considerations in a corporate context
- Corporate considerations in an employment context
- Key take away: **Don't Forget About the People!**

Outline: Worlds Colliding

- Purchasing a business
 - Employment due diligence considerations
 - New employment agreements
 - Restrictive covenants
- Operating a business
 - Ensuring employee safety while avoiding liability
- Restructuring a business
 - Mass termination



Purchasing a business

Employment considerations and practice tips

Employee issues differ depending on the transaction

Share Purchase

- Purchaser acquires the shares of the target business from the target corporation's shareholders
- Employees continue to be employed unless the employment relationships are expressly terminated by the target corporation

Asset Purchase

- Purchaser acquires specific assets and liabilities of the target business
- Purchaser not automatically required to employ vendor's non-unionized employees (may pick and choose, subject to human rights concerns)
- Vendor's employees only become the purchaser's employees if they are offered, and accept, new employment arrangement with Purchaser. Vendor bears cost of termination (unless negotiate otherwise)
- Accepted employment offers on sale of business deemed to be continuous and uninterrupted



Purchasing a business

Labour and employment due diligence searches

Workers' Compensation Board Clearance Letters

- Standard purchaser search against target company
- Confirmation that the entity's account is up-to-date
- Most employers are required to register in each province (*there are limited exceptions*)
 - Penalties (including retroactive pay) may be incurred if companies fail to register
- Results disclose status of employer account in relation to payments into workers' compensation fund
- **Timeline:** Approximately 1 week

Labour Standards

- Confirmation from the provincial *Department of Labour and Advanced Education* that there are no outstanding orders
- Results disclose whether or not an employer has outstanding liability for unpaid wages and/or vacation pay
- A claim for unpaid wages is a super priority lien over the assets of the employer
- **Timeline:** Approximately 1 week

Purchaser due diligence: workers' compensation

Nova Scotia

- **What to Look For:** “the above employer is not assessed” (*they do not pay into coverage*) or the “employer is assessed by the Workers’ Compensation Board and the account is currently up-to-date”
- **Enforcement:** *Workers’ Compensation Board of Nova Scotia*
- “Not assessed” - not necessarily a bad thing - means the employer is not registered (less than three workers, not in a mandatory industry)
 - Directors and officers are counted as workers, sole proprietors and partners are not

Purchaser due diligence: workers' compensation

Not in good standing: what does this mean?

- Workplace safety and labour standards searches may disclose orders or outstanding balances
 - **Example (Newfoundland):** “In response to your request for the account status of the above referenced employer, WorkplaceNL is unable to issue a clearance letter at this time due to the outstanding balance noted above. Once full payment is received directly from your firm, we will be able to issue a clearance for this employer.”
- Orders may represent a liability of the employer, but may also limit the employer's ability to carry on business or use certain assets
- When an account is not in good standing, amounts owed can form a super priority lien over all of the assets of the employer, and directors can be held personally liable
- Often, the purchaser will ask the vendor to provide details about the order and will require the vendor to pay out any outstanding balances (and provide proof of payment), as a condition of closing

Purchaser due diligence: labour and employment



Labour & Employment Disclosure

For use where the purchaser is offering employment to the vendor's employees in an asset deal and assuming all employment on a share deal

- Obtain worker information; compensation; policies; etc.
- Ensure purchase agreements call for a detailed schedule of all employees of the company with information relating to:
 - Years of service
 - Salary
 - Benefits
 - Employment agreements
 - Potential and existing claims

Purchaser due diligence

Mitigating the risk of purchase

- Assess adjustments that should be made to the workforce (*before or after acquisition*)
- Identify liabilities and risks that will accompany employees/company acquired in the transaction
- Negotiate appropriate adjustments to the purchase price, representations, warranties, and covenants with the vendor



Purchaser due diligence

In the Courts

Snodgrass v. Brunswick Chrysler Plymouth Ltd., 1989 CarswellNB 337

- Appellants sold their automobile business to the respondents using an agreement containing indemnity provisions
- The respondents agreed to hire all of the appellant's employees with the same pay structure
- An employee was discharged by the respondent four months after being hired, and sued the respondents for wrongful dismissal (the respondents added appellants as a third party)
- At trial, the employee recovered judgment and the respondents were entitled to full indemnity from the appellants
- Appeal dismissed
- Indemnity provisions not ambiguous; respondents entitled to be indemnified by the appellants

Purchaser due diligence

At the Labour Board

Power v Quality Blasting & Coating Limited, 2012 NSLB 15

- Asset purchase
- Most, if not all employees accepted “new” employment
- New employment agreements
- Pay on termination not sufficient
- Past years of service had to be taken into account

Think: Section 71

Purchaser due diligence: Use of covenants in share and asset purchase agreements

Pre-Closing Covenants

- Asset purchase interim operating covenant
 - Vendor often seeking covenant from purchaser to offer comparable employment
 - Purchaser seeking covenants that vendor will not materially increase employee compensation, adopt new / amend existing benefit plans, enter into or modify collective bargaining agreement(s)
- Share Purchase Interim Operating Covenant
 - In addition to same covenants sought on asset deal, purchaser often seeks covenant not to accelerate vesting/payment of employee compensation / benefit, hiring employees above set amount or outside ordinary course, terminating employees without cause

Asset Purchase Covenants

- Deals with specific process for:
 - Transferring employees to the purchaser and the termination of those employees who do not transfer
- Key considerations:
 - Target employees: Selection and offer process (and terms of offer)
 - Employees on leave, foreign workers
 - Whether workforce is unionized
 - Employee group benefit claims – providing replacement benefits
 - Termination liabilities
 - Vacation time and vacation pay, entitlement to bonuses



Purchasing

New employment agreements and restrictive covenants

Offers of comparable employment

- Vendors typically negotiate that where a purchaser is taking on employees, those employees are offered comparable employment

Dussault v Imperial Oil Limited, 2018 ONSC 1168

- Imperial Oil was the vendor in an asset purchase with Mac's
- Mac's offered to employ a number of Imperial Oil employees following the purchase
- Two employees refused as they were not told what their salaries would be (but knew that salaries and benefits would be significantly reduced)
- Imperial Oil tried to have employees sign releases but the employees refused
- After being sued for giving insufficient notice, Imperial Oil claimed that the Plaintiffs had failed to mitigate their damages by refusing positions with Mac's

Offers of comparable employment

Decision

- Plaintiffs did not fail to mitigate their losses by accepting the less favourable offers of employment provided by Mac's
- It was unreasonable to expect the Plaintiffs to sign releases under the circumstances
- Mac's also was unwilling to recognize the Plaintiffs' many years of service with Imperial
- The circumstances were exceptional (these were very long-standing employees who were approaching retirement age) and the Plaintiffs were awarded 26 months' notice





Restrictive Covenants: Section 56.4 Elections

Overview of Tax Attribution Rules

- **s. 56.4(2)** contains a general income inclusion rule which provides that (subject to several exceptions):
 - Taxpayer must include the full amount of all amounts received or receivable in a taxation year with respect to a restrictive covenant granted by him or her.
- **Exceptions to Income Inclusion Rule**
 - Employee exception
 - Eligible capital (goodwill) exception (asset sale)
 - Eligible interest exception (share sale)
- **Result:** To avoid income inclusion rules (and potential application of exceptions, parties in transactions allocate no value or nominal value to restrictive covenant on purchase.



Restrictive Covenants: Section 56.4 Elections

Reallocation Rule (s. 68, Income Tax Act)

- CRA retains the right to reallocate amounts that were part of a purchase price where reasonable to conclude the amounts relate to the restrictive covenant.
- Application of s. 68 triggers income inclusion rule creating negative implications for grantor

Exceptions to Reallocation Rule

- Employee exception - no election required
- Goodwill exception - joint election required
- Share sale exception - no election required
- Disposition of property (other than goodwill or shares) exception - no election required

Practical Considerations: Section 56.4 Elections

Enforcement

- Canada Revenue Agency (CRA) does not have a specific form of election and have yet to prioritize reallocation rule
- Developing trend of vendor counsel not seeking election when available
- **Despite lack of enforcement, there is still benefit in being aware**
 - As purchaser, there is no risk of audit from the CRA but there could be a risk to the vendor (who the purchaser could retain as an employee)
 - Purchaser may be able to create good will and/or negotiation leverage by offering (in Atlantic Canada, this is not always thought of in transactions)



Election for restrictive covenants

Since we have not published a prescribed form for the elections contained in section 56.4 of the Income Tax Act, the seller (**grantor**) and buyer (**payor**) have to file a jointly-signed letter to make the election.

This letter must include the following information concerning the **grantor**:

- Full name
- Social insurance number or business number
- Address, and mailing address if applicable
- The taxation year of the grantor in which they sold the restrictive covenant

This letter must include the following information concerning the **payor**:

- Full name
- Social insurance number or business number
- Address, and mailing address if applicable
- The taxation year of the payor in which they bought the restrictive covenant

This letter must include the following information concerning the **covenant**:

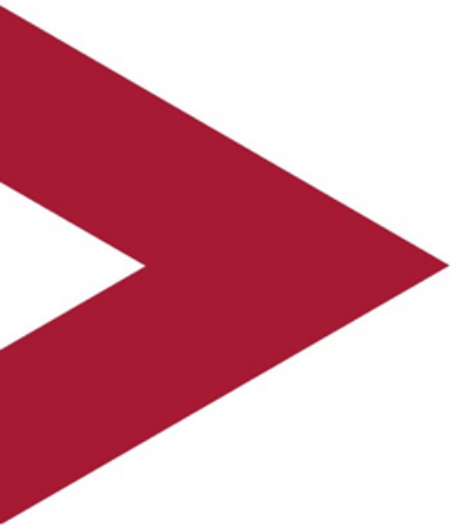
- A description of the covenant
- The full name of the taxpayer granting the covenant
- The full name of the taxpayer receiving the consideration for the covenant
- An indication that these parties deal at arm's length
- Under which provision of section 56.4 is the election being made by the parties



In practice

- Negotiate liability and strategy for new employment offers up front in purchase agreement (vendor will prefer covenant from purchaser to extend offers on same terms of existing employment, while purchaser will prefer covenant to extend offers on terms that are no less favourable in the aggregate)
- Offer comparable terms of employment and group insurance plan benefits or consider impact of providing working notice
- When requesting restrictive covenant from principal, be mindful of the s. 56.4 elections on purchase of a business and inquire with finance / accounting as to applicability. Consider offering joint election if not raised by vendor
- If relying on 56.4 election, ensure non-competition agreement is separate from purchase agreement for nominal amount of \$1.00 only
- If requesting restrictive covenants from a vendor who will become an employee on acquisition, ensure any restrictive covenants given in acquisition agreements align with the employment agreement.

Priority Clause; or
Cross-Reference



Operating

Contracting work & services

Duties under the OHSA

Nova Scotia's *Occupational Health and Safety Act (OHSA)*

- The *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 (“OHSA”) designates nine classes of persons as having a duty to comply with the OHSA and specifies duties for each class:
 - *Employers, contractors, constructors, suppliers, employees, self-employed persons, owners, providers of service, and architects/engineers.*
- Persons may have duties under one or more of the classes.
 - *Ex: An owner may also (or alternatively) be considered an employer.*
- Definition of “*Employer*” (s. 3(p), OHSA):
 - A person who employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor;
- Definition of “*Owner*” includes (s. 3(v), OHSA):
 - *A trustee, receiver, mortgagee in possession, tenant, lessee or occupier of lands or premises used as a workplace and a person who acts for, or on behalf of, an owner as an agent or delegate;*

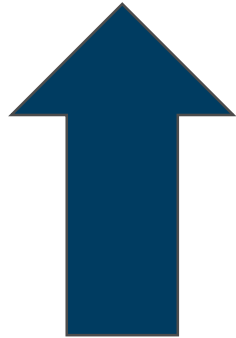
Duties of a constructor or a contractor



Contractor and constructor duties under the OHSA

- A “constructor” is defined as (s. 3(f) OHSA):
 - *A person who contracts for work on a project or who undertakes work on a project himself or herself.*
- A “contractor” is defined as (s. 3(g) OHSA):
 - *A person who contracts for work to be performed at the premises of the person contracting to have the work performed, but does not include a dependent contractor or a constructor.*

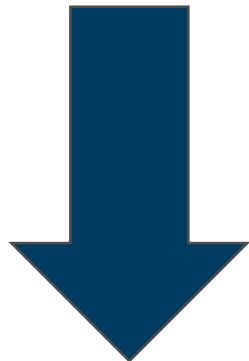
‘Constructor’ in the Courts



R v Aecon Construction Group, 2018 NSPC 61

Accused company found to be a ‘constructor’

Establishes that there can be more than one constructor and that an owner can be a constructor



R v McCarthy’s Roofing Ltd, 2016 NSPC 21

Accused company did not have the requisite authority or control to be a ‘constructor’

Minimal oversight responsibilities

Provisions in the contracts

Distinguishing “contractors”

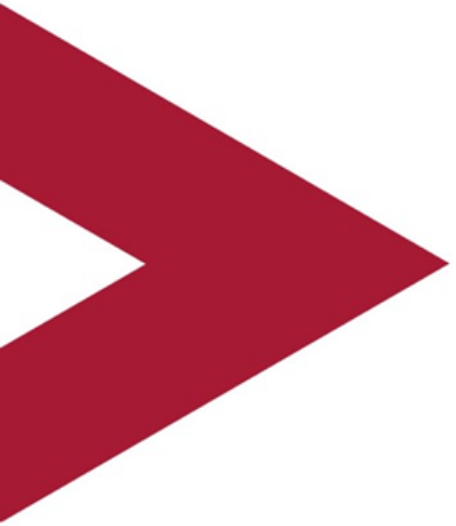
R v McCarthy’s Roofing Ltd, 2016 NSPC 21

*...a contractor has a narrower ambit than a constructor...
A contractor's occupational health and safety obligations are confined to "the workplace." A contractor does not have health and safety responsibilities "at the project". The project is a constructor's responsibility. This is further illustrated by the broader communication responsibilities of a constructor and its obligation to "facilitate communication" with any joint occupational health and safety committee "required for the project"*

In Practice

- Negotiate and establish explicitly in commercial and construction agreement who has authority and responsibility, particularly regarding construction safety of project, to general contractor / design-builder contractor etc.

“For the purposes of construction health and safety legislation governing the Work in respect of the Project, the Contractor accepts the responsibilities of “employer”, “constructor”, “contractor” and “supplier”, and assumes all health and safety liabilities and obligations of the “employer”, “constructor”, “contractor” and “supplier” imposed by such health and safety legislation.”



Restructuring

Mass termination



"Sometime today do you mind putting in a two-week notice so I don't have to fire you?"

Mass termination



- **Must abide by, at least, minimum standards**
- Different in each province and for federally regulated companies
 - Consider:
 - Threshold for mass termination (number of employees)
 - Who must be given notice
 - What kind or amount of notice must be given
 - Nova Scotia = low threshold relative to other provinces, only 10 employees

Notice requirements

Nova Scotia's *Labour Standards Code*

- **10 to 99 employees (within a 4 week period)**
 - 8 weeks' notice
 - Notice period applies for terminating up to 99 employees
- **100 to 299 employees (within 4 weeks)**
 - 12 weeks' notice
- **300 or more employees (within 4 weeks)**
 - 16 weeks' notice
- Notice to *Minister of Labour and Advanced Education* (provincially regulated)
 - No real description is given of the type of notice that is required
- Can also be satisfied by providing pay in lieu of notice

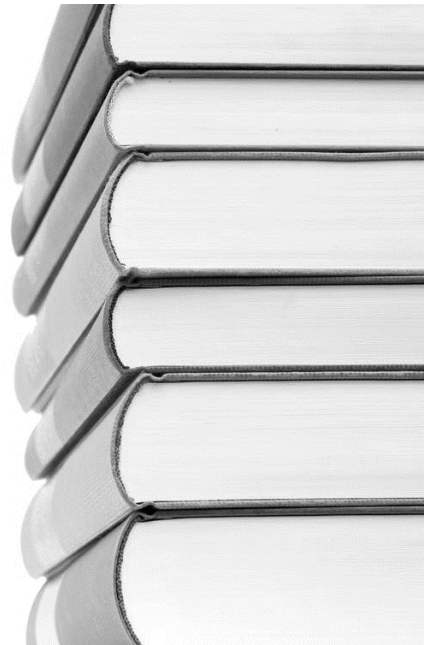
What if you have employees on leave?

Gach v Eleven Point Logistics Inc.

- Claimant was on maternity leave when closure of plant she worked at occurred, and commenced parental leave shortly thereafter
- Company did not terminate any employees on leave during closure but she claimed she was part of the mass termination
- There was nothing to indicate termination during the mass termination period



Industry Closing Act



Application

- Employer is about to close down, discontinue, or abandon the whole or any part of an industry and it affects 50 or more employees
 - Must give employees 3 months' notice
 - Notice must be given to the Minister of Business (formerly the Minister of Industry, Trade, and Technology)
 - Pay in lieu of notice will not suffice

Penalties

- Minister can cause industry to reopen (at the expense of the employer) for a time not exceeding three months
- Employer may be liable for a penalty of \$100 per day

Changes to *Canada Labour Code*: Bill C-86

Provisions affecting group termination are **coming into force on a day to be fixed by order of the Governor in Council – not sooner than September 1, 2019**

- Federally regulated companies must give employees and the Minister of Labour 16 weeks' written notice if 50 or more employees are to be terminated within a four week period.
- If providing pay in lieu and terminating all employees on the same day, the notice must be given 48 hours in advance



Changes to *Canada Labour Code*: Bill C-86

In addition employees must receive:

- At least eight weeks' notice of their upcoming termination;
- Pay in lieu of such notice; or
- A combination of the two
- Employees receiving pay in lieu of notice (or a combination of notice and pay in lieu) must receive transitional support





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The materials should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

If you have specific questions related to these materials or their application to you, you are encouraged to consult a member of our firm to discuss your need for specific legal advice relating to the particular circumstances of your situation.

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