BUYING AND SELLING A BUSINESS:

A COMPREHENSIVE GUIDE

EMPLOYMENT CONSIDERATIONS IN THE SALE OF A BUSINESS AND RECENT AMENDMENTS TO THE ONTARIO *EMPLOYMENT STANDARDS ACT*

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I. INTRODUCTION: EMPLOYER'S LIABILITY UPON TERMINATION

The respective liabilities of vendor and purchaser for employee entitlements upon termination can become a major issue in negotiating the sale of a business. This paper will discuss employment law considerations in the sale of a business in both the statutory and common law contexts in Ontario.

Before exploring the employment implications of selling a business, it is helpful to understand an employer's obligations under statute and common law upon terminating an employee.

The *Employment Standards Act, 2000* ("*ESA*") is the governing legislation that sets out minimum termination and other entitlements for employees in all provincially regulated industries.[1] It contains statutory minimums for employers' liabilities to employees upon termination with and without cause. Part XV, sections 54 to 58 and 61 of the *ESA* govern statutory notice, or pay in lieu of notice of termination, which must be provided to employees with more than three months' service who have been terminated without cause, as defined in the legislation. It is based upon completed years of service, ordinarily up to a maximum of 8 weeks. If the employer terminates the employment of 50 or more employees at the employer's establishment in the same four-week period, the entitlements increase, ranging from 8 to 16 weeks, depending upon how many employees are terminated.

Section 64 governs statutory severance pay, which is payable only to an employee severed without cause, as defined, who has five or more years' service and is either employed by an employer which has a payroll of $2.5 million or more or where there is a permanent discontinuance of all or part of the employer's business at an establishment which results in 50 or more employees

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[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41; The *Canada Labour Code* has roughly equivalent provisions for federally regulated undertakings.

having their employment terminated within a six month period. Statutory severance pay is equal to one week per completed and partial year of service, up to a maximum of 26 weeks.

The relationship between unionized employees and employers is also governed by the *ESA*, in addition to their collective agreements and the Ontario *Labour Relations Act, 1995* ("*OLRA*").[2] However, unionized employees can only be terminated for just cause in accordance with the provisions of the collective agreement.

The entitlement to reasonable notice of termination at common law is virtually always greater, and often significantly greater, than an employee's minimum entitlement under the *ESA*. The amount of reasonable notice depends on a number of considerations, referred to as the *Bardal* factors, which for the most part are the employee's age, length of service, compensation, character of employment, and the availability of similar employment given the employee's experience, training and qualifications.[3]

II. MANNER OF SALE OF THE BUSINESS:

A. SHARE TRANSACTION

There is no termination of employment upon the sale of shares of a company. As the identity of a corporation does not change with the sale of shares, the rights and obligations of a corporation with respect to its employees and any trade union are not modified by a change in share ownership unless either party intentionally and specifically addresses such issues.[4] If a purchaser does not wish to take on the employees of the vendor in a share sale, it must ensure that the vendor is contractually obliged to terminate the employment of those employees prior to the sale.

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[2] *Labour Relations Act*, *1995*, S.O. 1995, c. 1, Sch. A.
[3] *Bardal v. Globe & Mail Ltd*., 1960 CanLII 294 (Ont S.C.).
[4] *Whittemore v. Open Text Corporation*, 2013 ONSC 2339 at paras. 22-23.

If a collective agreement exists, the purchaser may not wish to complete the transaction without certain amendments. As a practical matter, the purchaser in a share purchase transaction should have the vendor try to negotiate the changes to the collective agreement that the purchaser desires, as the vendor is likely in a more advantageous position to negotiate with the union. The union has no legal obligation to negotiate with the intended purchaser prior to the sale, notwithstanding that the purchaser will automatically take on the vendor's obligations in respect of the employees under the collective agreement.

B. ASSET TRANSACTION

In comparison to a share purchase, the sale of some or all assets of a business is likely to attract more scrutiny at law as the nature of the sale affects employees' rights upon termination.

(i) Employment Implications Under The Common Law

At common law, the business must be sold as a "going concern" in order for employees to benefit from an implied term that the purchaser will recognize their past service with the vendor (see section (b) below). The going concern test also applies in the unionized Ontario Labour Relations Board context, but does not apply in respect of the *ESA*.[5]

The analysis begins with the traditional common law principle from *Nokes v. Doncaster Amalgamated Collieries Ltd.* that a contract of employment cannot be assigned by one employer to another.[6] The principle is rooted in a desire to avoid any hint of slavery and protect employees' freedom of choice. This choice does however come with consequences; the principle in *Nokes* dictates that upon the sale of a business, where the employment of the employee is not continued with the vendor, the contract of employment with the vendor must be terminated and an employee

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[5] See e.g. *Federated Building Maintenance Co., Re*, [1989] O.E.S.A.D. No. 14 (Ont. E.S.B. (D.E. Franks)).

[6] *Nokes v. Doncaster Amalgamated Collieries Ltd*., [1940] C 1014.

who chooses to enter into a new contract with the purchaser forfeits recognition of his or her tenure and seniority with the previous employer. On the other hand, an employee who declines a comparable offer from the purchaser is deemed at common law to have failed to mitigate his or her damages, negating a claim for wrongful dismissal.[7] Courts have attempted to temper this harsh reality with a variety of exceptions.

For instance, the Ontario Court of Appeal has recently clarified that declining an offer of employment with a successor employer does not always constitute a failure to mitigate. In *Dussault v. Imperial Oil Limited*, the vendor sold a branch of its business as a going concern by way of an asset transaction.[8] The plaintiff employees received offers of employment from the purchaser. They refused the offer and elected to sue the vendor for wrongful dismissal. On a motion for summary judgment which was upheld by the Court of Appeal, the Court rejected the employer's argument that the employees had failed to mitigate their damages by refusing the successor employer's offer.

First, the Court held that if an offer from a purchaser is made *before* the employees are terminated by the vendor, the employee's duty to mitigate is not triggered.[9] Further, the Court held that the employees acted reasonably in refusing the purchaser's offer and therefore did not fail to mitigate. In *Dussault*, the employees were not obligated to accept the purchaser's offer owing to material differences in their conditions of employment with the purchaser as compared to the vendor: The employees would receive inferior benefits and were guaranteed continuation of their base salary for only 18 months after termination, at which time their salaries would be reduced by an unspecified amount.[10] Vendor employers should therefore be aware that they may be liable for

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[7] *Addison v. M Loeb Ltd.* (1986), 53 O.R. 602 at p. 604 (C.A.) [*Addison*].
[8] *Dussault v. Imperial Oil Limited*, 2018 ONSC 1168 [*Dussault*], aff'd 2019 ONCA 448.
[9] *Dussault*, *supra* note 8 at paras. 58-59. See also *Farwell v. Citair, Inc. (General Coach Canada)*, 2014 ONCA 177.
[10] *Dussault*, *supra* note 8 at paras. 66-67.

common law termination pay notwithstanding a purchaser's offer to re-employ terminated employees.

1. Express Recognition of Past Service

Where a purchaser expressly recognizes past service in its new employment contract with the employee, no issue arises. An employer may make the choice to recognize past service in consideration for the valuable skills and experience it is receiving with a long-service employee.

In the case of such an explicit recognition by the purchaser, the vendor would normally have no further liability at common law. However, in situations where the purchaser becomes insolvent after the purchase or for any other reason is unable or unwilling to continue to employ the employee, that employee may still be able to pursue the vendor for wrongful dismissal, depending upon how long he or she was employed by the purchaser. Specifically where the employee is unable to completely mitigate his or her common law damages through employment with the purchaser because the purchaser is no longer in operation or no longer elects to continue the employment, the employee's claim for damages against the vendor survives. The vendor would then be liable for the unmitigated portion of the employee's losses, unless the vendor can establish that there was novation of the contract between the purchaser and the employee.

Novation is described as “a trilateral agreement by which an existing contract is extinguished and a new one brought into being in its place”. Assent to the discharge of the old obligations and substitution of the new obligations by the employee, the old employer and the new employer is essential.[11] Thus there must be evidence that the employee elected to let the vendor "off the

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[11] *Major v. Philips Electronics Ltd.,* 2005 BCCA 170 at para. 10; Novation requires 1. The new debtor (employer) must assume the complete liability; 2. The creditor (employee) must accept the new debtor (employer) as principal debtor and not merely as an agent or guarantor; and 3. The creditor (employee) must accept the new contract in full satisfaction and substitution for the old contract.

hook" upon the closing of the transaction, which in the face of an employee's claim for damages, will only be satisfied with clear and cogent evidence.

2. Implied Recognition of Past Service

Contrary to the traditional common law principle based upon *Nokes,* courts now generally presume that an employee will be credited for service with his or her former employer for the purpose of calculating reasonable notice of termination, unless the new employer notifies the employee to the contrary. This was first recognized by the Ontario Court of Appeal in *Addison v. Loeb.*[12] In *Addison,* the purchaser treated the employee as if he had 20 years' service, and not just the 18 months' service he had with the purchaser alone, for the purposes of wage increases and employee records. The Court found it would have been unfair to treat the employee as a short-service employee for the purposes of common law notice.

In *Sorel v. Tomenson Saunders Whitehead,* the British Columbia Court of Appeal came to the same result by implying a term of continued service into the employment contract based on the parties' pattern of conduct. The principle stands undisturbed in British Columbia.[13]

This implied term of continued service applies where a purchaser acquires a business as a "going concern"; described by the Court of Appeal in *Abbott v. Bombardier* as "the transfer of a functional economic vehicle, the activities of which could be carried on without interruption".[14]

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[12] *Sorel v. Tomenson Saunders Whitehead Ltd*., 1987 CanLII 154 (BC CA), [1987] 15 B.C.L.R. (2d) 38 (C.A.).) [*Sorel*]; *Addison, supra* note 7.
[13] See e.g., *Kennett v. Superior Millwork Ltd*., 2003 ABQB 650, aff'd 2005 ABCA 84; *Kamen v. Rose*, 2003 CanLII 26816 (Div Ct); *Sorel, supra* note 12.
[14] *Abbott v. Bombardier Inc*., 2007 ONCA 233, 2007 CarswellOnt 1815 at para. 13 [*Abbott v. Bombardier*].

The Ontario Superior Court of Justice recently adopted from a British Columbia Supreme Court decision the following factors that a court may consider when deciding whether a business was purchased as a going concern:

> *a) the nature of the transaction;*
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> *b) the portion of the sale price allocated to goodwill;*
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> *c) whether the duties of the individual or the terms of the employment with the new company are similar to and of the same character to the duties the individual had performed for the vendor of the business;*
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> *d) whether the individual received a substantially reduced salary and no benefits;*
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> *e) whether the purchased company had ceased its operation prior to the purchaser and vendor entering into discussions for the purchase and sale of the company;*
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> *f) whether the vendor told their employees that the purchaser would not recognize their prior service;*
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> *g) whether the purchaser told employees that it would be "business as usual"; and*
>
> *h) whether the purchaser retained all of the vendor's employees and the right to use the vendor's name.*[15]

Where the transaction is not an obvious "going concern", the implied term of continuous employment may not apply. In *Carpenter v. Brains II Canada, Inc*., the employee had 11 years' service with a company that encountered financial difficulties and was subject to creditor protection proceedings. The employment of all of the employees was terminated, with Court approval. A further Court order authorized the sale of one division of the company to the Defendant, and the Defendant went on to hire the Plaintiff in a capacity similar to her previous position, in the same location, earning the same salary. In the result, the Divisional Court declined

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[15] *Manthadi v. ASCO Manufacturing*, 2023 ONSC 3499 at para. 127, citing *Frederiks v. Executive TFN Waterpark Limited Partnership*, 2022 BCSC 1725 at para. 17. For an application of these factors, see *Manthadi v. ASCO Manufacturing*, 2023 ONSC 3499 at paras. 129-167.

to disturb the lower Court's decision to consider only her period of service with the Defendant and not her past service, stating:

> *Here, however, this was not a simple asset sale and a mere change of ownership. There was a bankruptcy, a termination of employment, a purchase of some of the assets of the former employer and a new employment where the employee was told that the new employer would not be honouring her prior severance entitlements.*[16]

Similarly, in *Hall v. Quicksilver Resources Canada Inc.*, a pulp mill ceased operations and was decommissioned for a number of months before it was purchased by a new company. The new company offered employment to the Plaintiff, who was an employee of the former owner of the mill. The BC Court of Appeal found that the business was not sold as a going concern, and moreover, the employee was provided with what was effectively a generous severance payment when the mill ceased operations.[17]

The Ontario Court of Appeal recently took "the opportunity to review and restate the applicable law of Ontario" with respect to an employee's entitlement to reasonable notice at common law in the context of the purchase of a business.[18] In *Manthadi v. ASCO Manufacturing*, the plaintiff was terminated by the vendor employer, offered termination and severance pay, and signed a release. She was re-employed by the purchaser and, shortly thereafter, was placed on layoff and not recalled. On a motion for summary judgment, the motion judge held that in assessing the *Bardal* factors to determine reasonable notice, she was required to deem the plaintiff to have been continuously employed from the beginning of her employment with the predecessor employer.[19]

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[16] *Carpenter v. Brains II Canada, Inc*, 2016 ONSC 3614 (Div Ct) at paras 14-15.
[17] *Hall v. Quicksilver Resources Canada Inc*., 2015 BCCA 291 at paras 33-34.
[18] *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485 at para. 6 [*Manthadi*].
[19] *Manthadi*, *supra* note 18 at paras. 22-24.

The Court of Appeal rejected this approach, holding that it is an error to "stitch together" an employee's length of service with a vendor and purchaser for the purposes of awarding common law reasonable notice.[20] Instead, the Court held that service with a predecessor employer must be taken into account "by applying the usual *Bardal* factors considering all the circumstances of the particular case and appropriately weighing the experience a long-time employee brings to the purchaser".[21] The Court thus rejected the implied continuous employment approach taken by the British Columbia Court in *Sorel* and affirmed the more flexible approach set out in *Addison* as the governing law in Ontario.[22]

3. Avoiding Vendor Liability at Common Law

An examination of the jurisprudence, including the case law hereinbefore mentioned, supports the contention that at common law, a purchaser can avoid liability for the employees' prior service by requiring the vendor to provide common law reasonable notice of termination or pay in lieu thereof before the purchaser hires the employees. As discussed in more detail below, a vendor providing only *ESA* minimum termination entitlements upon termination will not be sufficient to cloak the vendor with protection in such circumstances. Therefore, a purchaser wishing to try to insulate itself from employee termination liabilities should include a provision in the purchase and sale agreement requiring the vendor to provide reasonable notice of termination at common law, as well as require the vendor to indemnify it for any future termination payments for those employees, or at least for that portion of future termination payments attributable to the

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[20] *Manthadi*, *supra* note 18 at para. 59.
[21] *Manthadi*, *supra* note 18 at para. 62.
[22] See also *Antchipalovskaia v. Guestlogix Inc*., 2022 ONCA 454. The Court of Appeal reversed the judgment below for a failure to give effect to the plaintiff's termination and a court ordered release of the plaintiff's claims pursuant to a *Companies' Creditors Arrangement Act* proceeding. The Court of Appeal reiterated that it is an error to imply a continuous length of service for the purposes of awarding reasonable notice when there has been a sale of business and reduced the period of reasonable notice awarded from 12 months to 7 months.

employees' pre-sale service. Of course, if the purchaser declines to offer employment to the employees of the vendor, the vendor remains liable to the employees for common law reasonable notice.

Alternatively, the purchaser can expressly inform the employee in an employment offer, e.g., in a written contract of employment, that it will not recognize any previous service with the vendor.[23] In the Ontario Court of Appeal decision *Krishnamoorthy v. Olympus Canada Inc.*,[24] the Court of Appeal stated that Olympus Canada's offer of employment itself amounted to adequate consideration for the termination clause and set aside a summary judgement that had determined otherwise.

In that case, the employee had worked with the vendor for five years prior to a 2005 asset sale to a different entity. In his new employment contract with the purchaser, Krishnamoorthy agreed to accept the greater of his *ESA* termination entitlement or 4 weeks' notice per year, to a maximum of 10 months' notice upon termination.

Upon the initial summary judgment motion, the Court had found that as the employee had received no consideration, his new contract and its termination provision was unenforceable and awarded him 19 months' notice in recognition of his long service. This result was somewhat inconsistent with previous case law which had held that a fresh offer of employment by a purchaser is sufficient consideration for a new contract. The employer appealed the Court's decision and on appeal, the finding was overturned and the action was ordered to proceed to trial.

In *Dussault v. Imperial Oil Limited*, discussed in section (a) above, the Court found that, among other factors, the fact that an offer of employment with a successor employer stipulated that it

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[23] *Sorel*, *supra* note 12.
[24] *Krishnamoorthy v. Olympus Canada Inc.,* 2016 CarswellOnt 18204, 2016 ONSC 5338, 2017 CarswellOnt 17795, 2017 ONCA 873.

would not recognize any past service with the previous employer rendered it reasonable for the employees to refuse the offer.[25] Further, the Court held that it was unreasonable that the offer required that the employees release the vendor from all claims related to their employment in exchange for a lump sum severance payment, thereby waiving the right to sue the vendor for any shortfall in their entitlement to damages.[26] The vendor was therefore liable to pay wrongful termination damages at common law. Vendor employers should therefore carefully consider the offers of employment proffered by purchasers if they wish to avoid such liabilities.

4. Enforcement of Termination Clauses

Both vendors and purchasers should be aware of a recent line of Ontario appellate authority which requires that all termination clauses strictly comply with the *ESA* lest they be declared enforceable. The decision of the Court of Appeal for Ontario in *Waksdale v. Swegon North America Inc*. and the cases following hold that if one termination provision in an employment contract breaches the *ESA*, all termination provisions are void. As a result, an employee may be presumptively entitled to reasonable notice of termination at common law, which may be significantly greater than the amount of termination pay set out in the contract and intended by the employer.

In *Waksdale*, the employee was terminated without cause.[27] The employee's contract included termination clauses which referenced termination for cause and termination without cause. The parties agreed that the "termination for cause" provision was unenforceable because it did not comply with the *ESA*, while the "termination without cause" provision did.[28] The Court of Appeal held that the invalidity of one termination clause rendered all termination clauses unenforceable,

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[25] *Dussault*, *supra* note 8 at paras.62-64.
[26] *Dussault*, *supra* note 8 at paras. 60-61.
[27] *Waksdale v. Swegon North America Inc*., 2020 ONCA 391 [*Waksdale*].
[28] *Waksdale*, *supra* note 27 at para. 6.

notwithstanding that the employer did not seek to rely on the illegal provision.[29] Further, the Court declined to give effect to a "severability" clause in the employment agreement, which stated that if any term of the contract was found unenforceable, that term was to be severed, with the remainder of the contract continuing in effect.[30] The Court of Appeal in *Waksdale* reasoned that because "[a]n employment agreement must be interpreted as a whole and not on a piecemeal basis," an invalid termination clause cannot be considered separately from a valid one, even if they were contained in separate clauses.[31] In the result, the employee was entitled to damages in lieu of reasonable notice at common law.

In particular, employers should ensure that "termination for cause" provisions cannot be interpreted to contract out of the *ESA*'s minimum notice requirements. The courts have been clear that in Ontario, "just cause" for dismissal at common law, which disentitles an employee from reasonable notice or pay in lieu, is a different and lower standard than "wilful misconduct,"[32] which disentitles an employee from statutory termination and severance pay under the *ESA*.[33] In other words, various forms of intentional or unintentional conduct may justify termination for just cause at common law, but only misconduct that not trivial, is not condoned by the employer, and is done deliberately and with knowledge that it was wrong, will disentitle an employee from *ESA* notice and severance pay. As such, a termination for cause provision which purports to allow an employer to dismiss an employee without notice or pay in lieu thereof "for just cause" is an illegal attempt to contract out of the *ESA* minimum.[34]

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[29] *Waksdale*, *supra* note 27 at paras. 9-12.
[30] *Waksdale*, *supra* note 27 at paras. 13-14.
[31] *Waksdale*, *supra* note 27 at para. 10.
[32] *Oosterbosch v. FAG Aerospace Inc*., 2011 ONSC 1538; *Render v. ThyssenKrupp Elevator (Canada) Limited,* 2022 ONCA 310; *Rahman v. Cannon Design Architecture Inc*., 2022 ONCA 451 [*Rahman*].
[33] *Termination and Severance of Employment*, O. Reg. 288/01, s. 2(1).
[34] *Lamontagne v. J.L. Richards & Associates Limited*, 2021 ONSC 2133 at paras. 21-37, aff'd 2021 ONSC 8049 (Div. Ct.); *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967 at paras. 87-96.

The holding in *Waksdale* has been applied consistently by Ontario courts and applies even where a court is satisfied that the parties subjectively intended that the termination clauses comply with the *ESA* or where the employee was a sophisticated individual who negotiated the contract with access to independent legal advice.[35] Further, the courts hold that "saving provisions," which state that in the event that the *ESA* provides for greater rights than the contract, the *ESA* governs, will not save an employer if a provision conflicts directly with the *ESA*.[36]

This line of authority does not only apply to clauses which purport to terminate employees without notice for "just cause" which falls short of the standard set out in the *ESA*, but to other provisions of termination clauses which, on their face, would disentitle the employee from any minimum standards. For instance, termination without cause provisions which combine notice and severance pay entitlements and stipulate that the employer may provide working notice *or* pay in lieu of notice, without acknowledging the employer's obligation to provide severance *pay*, are unenforceable.[37]

As a further example, in the recent decision of the Ontario Superior Court of Justice in *Wilds v. 1959612 Ontario Inc.*, the termination provisions of the plaintiff's employment contract were void because: (1) The "termination without cause" provision stated that the plaintiff would receive only base salary and the continuation of health and dental benefits during the notice period, in violation of section 61 of the *ESA* which guarantees employees the continuation of all wages and benefits, including vacation pay, bonus, and other benefits; (2) the contract required the plaintiff to execute a full and final release in exchange for pay in lieu of notice, thereby making *ESA* entitlements contingent on signing a release; (3) the "termination with cause" provision indicated that the

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[35] *Rahman, supra* note 32.
[36] *Rossman v. Canadian Solar Inc*., 2019 ONCA 992 at paras. 40-41; *Perretta v. Rand A Technology Corporation*, 2021 ONSC 2111 at para. 58; *Wilds v. 1959612 Ontario Inc*., 2024 ONSC 3452 at para. 54 [*Wilds*].
[37] *Sewell v. Provincial Fruit Co. Limited*, 2020 ONSC 4406

employee could be terminated without notice for categories of "just cause" misconduct which fell short of the *ESA* "wilful misconduct" standard.[38]

Prior to a sale of business, vendors should carefully review the employment contracts of existing employees and consider whether the existing termination clauses therein have become unenforceable in light of the *Waksdale* line of authority. Employers should be aware that they may be liable to pay damages in lieu of reasonable notice at common law if their attempts to contractually limit the notice owing to employees dismissed without cause are found to contract out of the *ESA*. Vendor employers may wish to consider amending employees' contracts prior to sale to ensure that all termination clauses comply with the *ESA*, bearing in mind that fresh consideration may be required to render those changes enforceable.[39]

(ii) Employment Implications Under The *ESA*

The *ESA* effectively reverses the traditional presumption at common law that an asset sale results in a termination and that prior service will not be recognized by the new employer. Section 9 of the *ESA* ensures that the subsequent employment of an employee with the purchaser through the sale of all or part of a business is treated as continuous employment for the purposes of statutory notice of termination, severance, vacation pay, vacation time and various leaves, including pregnancy and parental leave, for which length of employment is relevant. The *ESA*'s protection of continuous employment does not apply to the common law entitlements discussed above.[40]

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[38] *Wilds*, *supra* note 36 at para. 63.
[39] *Holland v. Hostopia Inc*., 2015 ONCA 762.
[40] Although commentators have argued that perhaps it should - see e.g. Edward Mazey, "No more Nokes in Ontario: Employment continuity after the sale of a business – An argument of statutory interpretation" (2008) 34 *Advoc Q* 52.

Section 9(1) of the *ESA* states:

> *If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.*

Section 9(2) creates an exception where a purchaser hires an employee of the vendor more than 13 weeks after the earlier of the date of the sale and the last day of the employee's employment with the vendor.

Selling a business or part of a business is defined by section 9(3) to include leasing, transferring or disposing of in any other manner. It can include the transfer of only some assets and even the transfer of a lease of the business's premises.[41]

1. Going Concern Test Not Applicable in ESA Context

In *Abbott v. Bombardier,*[42] the Court of Appeal explored the application of section 9. The claim arose from a transaction in which certain computer assets were transferred from Bombardier to a company called CGI. CGI was to assume responsibility for the delivery of IT services to Bombardier. CGI offered employment to 194 of Bombardier's employees who were considered essential to the outsourcing transaction. The parties explicitly agreed that the employees' prior service with Bombardier would be recognized if CGI was to later terminate them.

The case is unusual in that it was the employees who sought a narrow interpretation of section 9 that would require Bombardier to pay *ESA* statutory termination and severance pay at the time of

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[41] See e.g. *Revin v. Lamantia Garcia Products Ltd*., 2008 CanLII 790 (ON LRB).
[42] *Abbott v. Bombardier, supra* note 14.

the sale, rather than treat their employment as continuous such that the payments would be due upon any future termination by CGI.

In rejecting the employees' claim, the Court of Appeal upheld the Ontario Superior Court of Justice's view that the "going concern" test does not apply in the *ESA* context. The test had its roots in the *OLRA*, which does not define "business". To apply it in the *ESA* context would unnecessarily narrow the ambit of section 9. The Court stated:

> *[T]he OLRA regime is aimed, at least in part, at providing for the continuity of relationships between unions and employers in the context of the sale of a business. By way of contrast, the purpose of the ESA regime is to protect individual rights and to preserve continuity of seniority. Viewed in this context, in our view, the meaning of business in s. 9 of the ESA is to be given an expansive interpretation.*[43]

Although the employees argued that the nature of their employment had changed such that there was no continuity, the Court found that the evidence failed to demonstrate changes that rose to the level of a "fundamental or radical difference". The Court declined to decide whether such a qualification could even be read into section 9.[44]

Abbott v. Bombardier should not be taken to mean that outsourcing always constitutes a sale of a business. This particular outsourcing transaction involved the transfer of a specified group of employees who continued to apply essentially the same skills using the same facilities and equipment. There was also an obligation in the transaction agreement on the part of the purchaser to make offers of employment to affected employees, and the future employment of the employees was provided for in the agreement.

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[43] *Abbot v Bombardier*, *supra* note 11 at para 20.
[44] *Abbot v Bombardier, supra* note 11 at para 25.

Conversely, circumstances wherein a contract is lost by one business and awarded to another contractor that retains the previous contractor's employees will not constitute a sale of a business pursuant to the *ESA*. In *Stock Transportation Ltd. v. Llanos*, a bus transportation company's contract was not renewed, and it contracted to introduce its terminated employees to the new contractor on the condition that any offer of re-employment would be on similar terms and recognize the employee's past service. The Divisional Court upheld the Small Claims Court's holding that the previous holder of the contract, once the contract expired, had no underlying right to the business activity and therefore no interest in the business to sell to the new contractor.[45]

2. Avoiding Application of the ESA to a Purchaser

As *Abbott v. Bombardier* indicates, the application of section 9 is difficult to avoid for a purchaser, which is the party to whom the provision is intended to apply. Being remedial legislation, the *ESA* is given a broad and liberal interpretation.[46] It applies even if a business is sold between Canadian jurisdictions, and often if the business is sold through a trustee in bankruptcy.

Unlike the employee's right to reasonable notice at common law, the application of section 9 of the *ESA* cannot be attenuated through the drafting of a release or a termination clause. The Court of Appeal in *Kerzner v. American Iron & Metal Company Inc*. reversed the lower court's holding and held that an employee could not validly waive his right to accrued termination and severance pay pursuant to section 9 of the *ESA*.[47] Similarly, the Court of Appeal in *Groves v. UTS Consultants* upheld a ruling that a termination clause purporting to limit the employee's *ESA*

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[45] *Stock Transportation Ltd. v. Llanos*, 2024 ONSC 575 (Div. Ct.). See also *Naranjo v. Canadian Back Institute*, 2018 ONSC 2882 (Div. Ct.).
[46] *Abbott v. Bombardier*, *supra* note 14 at para. 17.
[47] *Kerzner v. American Iron & Metal Company Inc*., 2018 ONCA 989.

entitlements to those accrued prior to a sale of business was invalid and unenforceable for contracting out of the *ESA*.[48]

It has been generally understood, on the basis of the Divisional Court's decision in *Ontario (Employment Standards Officer) v. Equitable Management Ltd.*, that the effect of section 9 cannot be avoided by terminating employees prior to the date of the sale.[49] This aligns with the rule, set out in section 5, that there can be no contracting out of the *ESA*. However, the effect of section 9 does appear to be somewhat inconsistent with its plain language. Section 9(1) specifically refers to the hiring of an *employee* of the vendor. If a valid termination occurs prior to hiring by the purchaser, with *ESA* statutory termination and severance pay being satisfied by the vendor, the employee is no longer an employee of the vendor at the time of hiring by the purchaser. There is some authority from Employment Standards Branch referees to support this view, which can be distinguished from *Equitable Management* on the basis that, in that case, no *ESA* statutory termination or severance pay was provided by the vendor such that there was no valid termination of the employees prior to that sale.

In *Debiasi Tool and Machine Ltd*., the referee avoided the "blind application of the statute" by taking into account the prior payment of severance and termination pay by the former employer, and decided the purchaser need not be responsible for later termination entitlements.[50] This is in line with the minority view in *Equitable Management* which left the door open to a different result where there is an actual discontinuity of employment of the employee. However, a contrasting view is apparent in more recent cases, such as *Jegasothy v. The Label Depot Inc.,* in which the

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[48] *Groves v. UTS Consultants*, 2019 ONSC 5605, aff'd 2020 ONCA 630.
[49] *Ontario (Employment Standards Officer) v. Equitable Management Ltd.,* 1990 CarswellOnt 785, [1990] O.J. No. 1746 (Div Ct) at para 16-17 [*Equitable Management*].
[50] *Debiasi Tool and Machine Ltd,* [1991] O.E.S.A.D. No. 106 Decision No. 2928; Some older cases, such as *Rene Sauve Ltd*, ESC 1207 (April 15, 1982) and *539747 Ontario Ltd*., ESC 2185 (October 14, 2986) follow the same reasoning, but there is a dearth of more recent cases taking this position.

Labour Board points out that if it had been intended that a prior payment of termination pay ought to be deducted from the successor employer's liability, there would have been a provision like section 65(8)3 of the *ESA*, which plainly states that a successor employer is entitled to set off or deduct from the severance amount a prior payment of severance pay by a predecessor employer.[51]

To avoid the risk of uncertainty to purchasers in attempting to avoid future *ESA* obligations, purchasers should instead contract to have the vendor indemnify them for all *ESA* liabilities if the purchaser cannot avoid their payments. However, given that the vendor is ordinarily no longer financially viable after the closing funds have been disbursed, it may still be worthwhile for a purchaser to require a vendor with substantial severance pay obligations to terminate the employees with all *ESA* statutory entitlements being paid immediately prior to the closing, with new contractual offers of employment from the purchaser becoming effective upon closing so that the purchaser can thereafter at least obtain the statutory set-off, noted above under section 65(8)3 of the *ESA*, for severance pay amounts previously paid by the vendor.

(iii) Employment Implications Under The *Labour Relations Act*

Section 69 of the *OLRA* specifically governs the sale of a business. As recognized in *Abbott v. Bombardier,* the unionized context is quite different than the individual employment context with respect to statutory protections upon the sale of a business. Section 69 of the *OLRA* does not define business, although it does define "sells" to include "leases, transfers and any other manner of disposition". Section 69(2) and (3) provide that upon the sale of a business, the purchaser continues to be bound by the collective agreement until the Labour Board declares otherwise.

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[51] *Jegasothy v. The Label Depot Inc*., 2003 CanLII 48602 (ON LRB) at para 12.

Further the purchaser becomes the new employer of all members of the bargaining unit, who continue to be represented by the union as their bargaining agent.

While these provisions are generally interpreted liberally in favour of the employees and union, not all commercial transactions will be found to involve the sale of a business for the purposes of the *OLRA*. A pure subcontract, without the transfer of any assets, generally does not have the effect of transferring labour relations obligations to the subcontractor.

The purchaser's intentions concerning the operation of the business following the sale are a relevant consideration in determining whether bargaining rights attach to the purchaser. For example, a union's bargaining rights often attach to a geographic area; if the purchaser intends to move its operations to a different location, the union's right to bargain for the employees will not extend outside the region in which it was certified.

A purchaser should carefully consider whether its business plan is feasible within the bounds of a current collective agreement prior to a purchase. While the purchaser will benefit from an experienced workforce that comes with the business, it may be prevented by the collective agreement from subcontracting areas of work or changing certain conditions of employment, and it may be bound to retain employees it would prefer to terminate as there can be no **termination** under a collective agreement without just cause.

III. CONCLUSION

Counsel advising clients on the sale or purchase of a business must carefully consider obligations to employees as an integral part of any transaction.

At common law, the sale of a business traditionally results in an automatic termination of the employee's contract with the vendor. However, unless a clear and explicit term of the new employment contract dictates otherwise, and provides adequate consideration, courts are likely

to find an implied term that an employee's prior service will be recognized for the purpose of calculating reasonable notice of termination at common law when the employee is eventually terminated by the purchaser. While such an implied term only applies where a business has been transferred as a going concern, the Court will be liberal in its interpretation to the benefit of the employees.

Section 9 of the *ESA* reverses the traditional common law assumption by dictating that upon the sale of a business, employment is deemed not to be terminated for the purpose of *ESA* entitlements. The going concern test does not apply, such that the sale of a business is broadly defined to include all or part of a business and may even include some outsourcing transactions. The application of section 9 is difficult to avoid, perhaps even when employees are properly terminated and paid their *ESA* termination entitlements prior to the sale.

A union's collective bargaining rights normally transfer to the purchaser when a business is sold. A purchaser is well advised to consider what changes to the collective agreement it might wish the vendor to try to negotiate with the union prior to the sale, and should be aware of any outstanding grievances and limitations on its abilities to make changes to terms of employment and to the workforce.

As counsel for a purchaser, you should ensure that the vendor is contractually obliged to disclose as much information as possible about the employment aspects of the business and the age, tenure, compensation terms and character of employment of the employees. Potential common law and statutory employment liabilities must be considered in full and financially accounted for, through payment and/or indemnities, in any purchase and sale negotiation by both parties.

IV. RECENT AMENDMENTS TO THE *ESA* AND IMPLICATIONS FOR EMPLOYERS

Recent years have seen numerous important amendments to the *ESA*. Employers should ensure that policies are compliant with the most recent version of the *ESA* prior to concluding a sale transaction. The most salient amendments since 2021 are summarized below.

A. LEGISLATIVE RESTRICTIONS ON RESTRICTIVE COVENANTS (NON-SOLICITATION AND NON-COMPETITION AGREEMENTS)

Of particular relevance for counsel contemplating the sale of a business are amendments to the *ESA* prohibiting certain types of restrictive covenants. Amendments to the *ESA* which came into force on October 25, 2021 addressed "non-compete agreements," defined in statute as:

> *an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends.*[52]

Section 67.2 prohibits an employer from entering into an employment contract or other agreement that includes a non-compete agreement and renders any non-compete agreement void.[53] This section applies only to non-compete agreements concluded after October 25, 2021. The Ministry of Labour, Immigration, Training and Skills Development's website makes clear that a non-compete agreement that is time-limited or geographically restricted is still a prohibited non-compete agreement for the purposes of the *ESA*.[54]

The *ESA* does not impose restrictions on other forms of restrictive covenants, such as non-solicitation agreements, which prohibit employees from actively pursuing clients, customers, vendors, or other employees of their former employer, or non-disclosure agreements, which

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[52] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 67.1.
[53] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 67.2.
[54] Ontario, "Your Guide to the Employment Standards Act," online: https://www.ontario.ca/document/your-guide-employment-standards-act-0/non-compete-agreements.

prohibit employees from sharing confidential employer information.[55] Such agreements may be found unenforceable at common law in certain circumstances.

There are two important exceptions to this prohibition which are of particular import for employers considering the sale of a business. First, the prohibition does not apply where there is a sale of a business, the seller becomes an employee of the purchaser immediately after the sale, and the purchaser and seller enter an agreement that prohibits the seller from competing with the purchaser's business after the sale.[56]

Further, the prohibition does not apply to executives. An "executive" is defined in the *ESA* as a "chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer, chief corporate development officer," or the holder of "any other chief executive position."[57]

Vendor and purchaser employers therefore remain able to negotiate and enter non-compete agreements as part of a share or asset transaction in certain circumstances.

B. OVERVIEW OF RECENT ESA AMENDMENTS

Vendor and purchaser's counsel should also be aware of the following recent amendments:

a) Working for Workers Act, 2021[58]

1. Written Policy on Disconnecting from Work:

The new section 21.1.1 requires that any employer that employs more than 25 employees on January 1 of any year must enact a written policy with respect to disconnecting from work by

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[55] Ontario, "Your Guide to the Employment Standards Act," online: https://www.ontario.ca/document/your-guide-employment-standards-act-0/non-compete-agreements.
[56] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 67.2(3).
[57] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 67.2(4)-(5).
[58] *Working for Workers Act, 2021*, S.O. 2021, c. 35.

March 1 of that year. "Disconnecting from work" is defined to mean "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work." The employer must provide a copy of same to its employees within 30 days of the date the policy is made or changed, and to a new employee within 30 days of hiring.

2. Non-Compete Agreements:

As discussed above, the new section 67.1 prohibits an employer from entering into an agreement with an employee that includes a non-compete agreement. Such agreements are defined as an agreement that "prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends." This prohibition does not apply to an agreement made in the context of a sale of a business or part of a business in which the seller becomes an employee of the purchaser, or to employees who are executives.

3. Licensing of Temporary Help Agencies and Recruiters:

The new section 74.1 permits the Director to issue licences to operate as a temporary help agency or a recruiter and prohibits any person from operating a temporary help agency or acting as a recruiter, or using the services of a temporary help agency or a recruiter, unless that person holds a licence. This section provides a procedure for applications for a licence, revocation of a licence, and review of the Director's decisions with respect to licencing. Section 74.12.1 prohibits reprisal by a recruiter against a prospective employee who exercises their rights pursuant to the ESA.

b) Working for Workers Act, 2022[59]

The *Working for Workers Act, 2022* enacted the *Digital Platform Workers' Rights Act, 2022*. This Act regulates the working conditions of workers who perform "digital platform work," described as "ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform."

Amendments to the *ESA* in the *Working for Workers Act, 2022* include:

1. Inapplicability of ESA to business or IT consultants:

Section 3(5) is amended to add business consultants and information technology consultants to the list of workers to whom the *ESA* does not apply. This exception applies only if the criteria set out in subsection 3(7) are met. These workers are exempt only if: (1) the consultant provides services through a corporation of which the consultant is a director or shareholder, or a sole proprietorship registered under the *Business Names Act*; (2) there is an agreement setting out compensation for the consultant's services, expressed as an hourly rate, which must be equal to or greater than $60 per hour, excluding bonuses, commissions, expenses, travelling allowances and benefits; and (3) the consultant is paid the amount set out in the agreement.

2. Written Policy on Electronic Monitoring:

The new section 41.1.1 requires that any employer that employs more than 25 employees on January 1 of any year must enact a written policy with respect to electronic monitoring of employees by March 1 of that year. The employer must provide a copy of same to its employees within 30 days of the date the policy is made or changed, and to a new employee within 30 days of hiring. This policy must indicate whether the employer electronically monitors employees and

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[59] *Working for Workers Act, 2022*, S.O. 2022, c. 7.

if so, how it monitors employees and the purposes for which such information is used, as well as the dates that the policy was prepared and any changes were made.

c) Working for Workers Act, 2023[60]

1. Reservist Leave:

Subsection 50.2(1), which concerns reservist leave, was amended to extend such leave to an employee who is a reservist and is in treatment, recovery, or rehabilitation in respect of a mental or physical illness or injury that resulted from service as a reservist. The new section 50.2(3) requires that an employee be employed for at least two consecutive months to avail of reservist leave.

2. Meaning of "Establishment":

Section 53.2 is added to Part XV (Interpretation) and provides that the definition of "establishment" within the meaning of most sections of the *ESA* is amended to modify the phrase “location at which the employer carries on business” to include an employee's private residence, if the employee does not perform work at any other location.

d) Working for Workers Four Act, 2024[61]

1. Trial Period:

The new subsection 1(2.1) clarifies that training includes work performed during a trial period for the purposes of defining an "employee" under the *ESA*, which includes "a person who receives training from a person who is an employer".

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[60] *Working for Workers Act, 2023*, S.O. 2023, c. 15.
[61] *Working for Workers Four Act, 2024*, S.O. 2024, c. 3.

2. Job Postings:

The new Part III.1 of the ESA concerns job postings. Section 8.2 requires that all employers who publicly advertise a job posting must include information about expected compensation or the range of expected compensation. Section 8.3 prohibits a publicly advertised job posting from including any requirement related to Canadian experience. Finally, section 8.4 requires that any employer who uses artificial intelligence to screen, assess or select applicants, include in an advertised job posting a statement disclosing the use of artificial intelligence.

3. Tips and Gratuities:

Part V.1 is amended to specify that tips or gratuities must be paid to an employee by cash, cheque payable to the employee, or direct deposit in accordance with subsection 14.1(3). Subsection 14.1(6) requires that an employer with a policy with respect to the employer sharing in tips or gratuities must keep posted a copy of any such policy in a conspicuous place.

C. IMPLICATIONS FOR EMPLOYERS

Given the numerous amendments to the *ESA*, buyers' counsel will want to ensure that all employee handbooks and policies are compliant and review all of their employee materials prior to closing the transaction to make the necessary revisions.