

Update

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CANADIAN AIRLINE INDUSTRY RESTRUCTURING AND CANADA LABOUR CODE SALE OF BUSINESS PROVISIONS (S.44, 45 & 18.1)

INTRODUCTION

In light of the current discussions concerning the restructuring of the airline industry in Canada, this document outlines in summary form the sale of business provisions contained in sections 44, 45 and 18.1 of the *Canada Labour Code*.

Section 44	Sale of Business
Section 45	Review of Bargaining Units
Section 18.1	Bargaining Unit Structure Reviews

The text of these sections is set out in Appendix "A" to this document for ease of reference.

Other sections of the *Code* may become relevant depending the circumstances of the restructuring, eg. section 35 dealing with a common employer application, but such provisions are not covered here.

As the provisions of the *Canada Labour Code* in this area were changed with the *Bill C-19* amendments effective January 1, 1999, this document notes specifically where there has been a change in the law.

INTRODUCTORY OVERVIEW

Sections 44, 45 and 18.1 work together in the following way:

Section 44 continues bargaining rights and applies automatically:

Where there is a sale of business within the meaning of section 44, bargaining rights are preserved across the sale. Section 44 applies automatically, in other words, bargaining rights remain in place whether or not anyone makes an application to the Board.

The purpose of section 44 is to prevent the loss of bargaining rights where a business is sold. The immediate effect of the section is that the union that was the bargaining agent for the employees employed in a business that is sold or transferred continues to hold the bargaining unit certification for the sold business, and the purchaser or new company is bound by the collective agreements that applied to both seller and purchaser on the day of the sale.

Therefore, the day after a sale (until or if there is a Board order otherwise) a Company that had acquired the entire operations of two predecessor airlines, would be a party to all the collective agreements which bound both predecessor airlines. None of the existing certificates or collective agreements would be automatically extinguished.

Section 45 allows application to review the bargaining unit structure following a sale:

Section 45 gives the Board the power to review the appropriateness of bargaining units following a sale under section 44. The Board can only exercise this power if an application is filed by either the employer or any affected trade union.

Section 18.1 sets out the Board's powers on a bargaining structure review:

Section 18.1 is a new addition to the *Code* which sets out the powers of the Board and the procedures it must follow whenever it reviews the structure of bargaining units. This section applies to all bargaining unit reviews, whether the review follows a sale of business, a common employer declaration or an application directly requesting a review on the basis that the units are no longer appropriate for collective bargaining.

CHANGES IN THE LAW AS OF JANUARY 1, 1999

Bill C-19 came into force on January 1, 1999. The Bill contained amendments to Part I of the *Canada Labour Code*, and was the Government's response to the Task Force Report, *Seeking a Balance*.

Section 44

Section 44 was not amended in substance by Bill C-19 (except to extend its coverage to transfers from provincial to federal jurisdiction).

Section 45 - Pre-1999 Law

Section 45 was, however, substantially altered by Bill C-19.

In the pre-1999 *Code* the Board could only review the bargaining units after a sale where:

- 1) there was intermingling of the employees of the predecessor employers, and
- 2) an affected trade union had made an application for review (though employers could ask the Board to take action under s.18, if no union made an application).

Where the Board did review the units it had express power only to decide what the appropriate unit(s) were; who should be the bargaining agent for such units, and to amend any certificate(s) accordingly. The Board could also grant leave to give notice to bargain on an application from either unions or employers.

Section 45 and 18.1 - Bill C-19

The law following the amendment is different in some significant ways. First, employers may now apply directly under the sale of business provisions. Second, the Board can conduct a review whether or not there is a intermingling of employees. Third, the Board has a new explicit obligation to allow the parties to negotiate an agreement, as well as broader express remedial powers once it decides to conduct a review under s.45. These obligations and powers are to be found in section 18.1, and are discussed further below.

Successive Contractors - Bill C-19

A new section 47.3 provides protection of compensation levels where there are successive contracts for pre-board security screening services in the air transport industry. Where this provision applies the successor contractor will be required to provide its employees with remuneration at least equal to that which employees who provided the same or substantially similar services received under a collective agreement recognized under the *Code*.

SALE OF BUSINESS PROVISION (SECTION 44)

What Does the Provision Do?

When a business is sold, section 44 means that the collective bargaining relationship is transferred to and continues with the new owner of the business. The union that was the bargaining agent for the employees employed in the business that is sold or transferred continues to be their bargaining agent until the Board orders otherwise.

A purchaser company is bound by all the collective agreements that applied to the employees of the purchased business on the day of the sale. The purchaser company also becomes a party to all labour board proceedings and grievances that were in process at the sale date. Similarly, any freeze that is place also continues until a new agreement is reached.

Since the sale of business provision operates automatically, any decision by the Board as to whether a sale has taken place is effective as of the date of the sale.

When Does the Provision Apply?

Section 44 applies where there has been a “disposition of a business.”The Board takes a fact-based approach to this analysis. The Board has held that the purpose of the sale of business provisions is to ensure the protection and permanence of bargaining rights, and that a broad and liberal approach should be taken to the words of the provision. What this means is that the Board is not concerned with the form of the transaction between the corporate employers, but looks at the overall circumstances to see whether there has been a “disposition of a business”.

The Board has held that there are two conditions that must be present for it determine that a “disposition of a business” has taken place: 1. There must be continuity in the work and activities carried out by the employees and 2. the business sold must be operated for the same purpose.

The section has frequently been held to apply to mergers or consolidations of businesses under joint ownership even where they have taken place without any “sale” in a traditional sense [e.g. Quebecair & Regionair 1983 54 di 16; Airwest 1980 42 di 247].

Section 44 has also sometimes been found to apply to protect bargaining rights where a business or part of a business has been contracted out.

BARGAINING UNIT REVIEWS: SECTIONS 45 & 18.1

What Do the Provisions Do?

Section 45 allows employers and unions to apply to change the structure of bargaining units following the sale or disposition of a business. Where there are bargaining units in both employers who are consolidated, and where those employees will work side by side such an application can be expected to be filed.

When the Board decides to review bargaining units following a sale, section 18.1 sets out a procedure and gives the Board extensive powers to resolve the difficulties that arise from the sale of a business.

What will happen on a bargaining unit review?

...Procedure...

When the Board decides to conduct a review of bargaining units it is required to give the parties a reasonable opportunity to come to an agreement and then, if necessary, will make the appropriate order after hearing from the parties. The negotiations between the parties can include the appropriate bargaining units, as well as as any other issues that arise from the review. These issues can include what collective agreement applies, and matters such as how seniority lists will be integrated.

...Powers...

If the parties do come to an agreement the Board may then make any orders it considers appropriate to implement that agreement. [s.18.1(2)(a), (b)],

If the parties do not agree, or the Board's opinion is that the agreement reached would not lead to the creation of units appropriate for collective bargaining, the Board then "decides any question that arises" and "makes any orders it considers appropriate in the circumstances.

In addition the Board is given specific authority to:

1. determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review [s.18.1(4)(a)],
2. amend any certification order or description of a bargaining unit contained in any collective agreement [s.18.1(4)(b)],
3. decide which collective agreement is in force [s.18.1(4)(c)],
4. amend any collective agreement to the extent that the Board considers necessary, including expiry dates and provisions respecting seniority rights [s.18.1(4)(d)],
5. if the conditions for a legal strike or lock-out have been met with respect to some of the

employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions for legal strike or lock-out are met with respect to the unit [s.18.1(4)(e), and

6. authorize a party to a collective agreement to give notice to bargain collectively [s.18.1(4)(f)].

What will the Board Do on a bargaining unit review ?

The Board has very broad discretion under section 45 and 18.1 to make the orders that it considers necessary to resolve problems arising from a sale of business.

It is difficult to predict with certainty what approach the Board will take as there has been no decision to date under the revised sale of business provisions.

A. Determine the appropriate units & the scope of review

Under the new *Code*, the Board's powers on a review are now the same whether the review was triggered by a sale of business, a common employer declaration or a request for a global review. However, this does not mean that the Board will automatically be prepared to set about changing more than it has to on each occasion that it reviews bargaining structure following a sale. It is more reasonable to expect that the Board will use its powers only to the extent it needs to do so to resolve the issues presented by the trigger event, here a sale of business under s.45. The scope of the Board's orders will therefore depend on the facts.

By way of illustration, the sale of a business and its consolidation with another business might present an occasion for a complete restructuring of the bargaining units if the units were organized quite differently in each of the predecessor employers or if the Board were persuaded that a different bargaining unit structure was required by the nature of the merged entity. In general, however, under the old *Code*, where the bargaining units of the predecessor employers were similar, the Board has not varied substantially from that structure.

B. Identify the Appropriate Bargaining Agent

Where the sale of a business brings two sets of unionized employees together and the Board decides that only one unit is appropriate, the remaining question is which of the two pre-existing unions will be the bargaining agent.

The Board will base its decision as to which union keeps bargaining rights on the level of support for a union in the combined unit. In general the Board will take the existing numbers in the predecessor unit as an indication of support and a vote will therefore typically not be

held where one unit is considerably larger than the other (*Seaspan*).

Votes may not be necessary as many of the units which could be brought together are already part of the same union.

C. Identify the Collective Agreement

In a simple sale situation involving more than one collective agreement, the collective agreement that ultimately applies is the one held by the “winning” union.

However, the Board has held in the past that where the two collective agreements are both with the same bargaining agent, it is a matter for negotiation between the bargaining agent and the employer which collective agreement should apply (*Commercial Truck*).

The *Commercial Truck* decision might be superseded by new s.18.1 in that the Board now has clear authority to determine the collective agreement that should apply. However, the board may still find that to decide this issue under these circumstances would be to intrude on free collective bargaining.

It is also possible that neither existing collective agreement will be declared effective for all the employees in a new combined unit. This can occur because the Board has two options when it alters existing bargaining units.

It can decide to expand one of the existing certificate, in which case the employees added to that certificate will be covered by the existing collective agreement under that certificate. However, it can also decide to void both the existing certificates and issue a completely new certificate for the new Company. This has the effect of freezing all the terms and conditions of work until a new agreement is negotiated under the new certificate.

The Board's decision between these two approaches will depend on practical considerations, and in particular, whether the collective agreements that belong to the ultimate bargaining agent can fairly and reasonably be applied to employees newly included in the unit.

D. Amending the Collective Agreement

The Board has authority to resolve difficulties that occur as a result of making a collective agreement apply to employees who were not initially included within it. In particular the Board can make orders concerning the merging of seniority lists, and the alteration of expiry dates. Amending an expiry date allows for faster renegotiation of an agreement that does not properly address the situation of all the employees newly included within it.

APPENDIX 'A'

CANADALABOUR CODE SALE OF BUSINESS AND BARGAINING UNIT PROVISIONS

Section 44 - Sale of Business

44. (1) In this section and sections 45 to 47.1,

"business"

"business" means any federal work, undertaking or business and any part thereof;

"provincial business"

"provincial business" means a work, undertaking or business, or any part of a work, undertaking or business, the labour relations of which are subject to the laws of a province;

"sell"

"sell", in relation to a business, includes the transfer or other disposition of the business and, for the purposes of this definition, leasing a business is deemed to be selling it.

Sale of business

(2) Where an employer sells a business,

- (a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;
- (b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;
- (c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and
- (d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

Section 45 - Review of Bargaining Units

Review of bargaining units

45. In the case of a sale or change of activity referred to in section 44, the Board may, on application by the employer or any trade union affected, determine whether the employees affected constitute one or more units appropriate for collective bargaining.

Section 18.1 - Bargaining Unit Structure Reviews

Review or amendment of orders

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

(2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board

- (a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
- (b) may make any orders it considers appropriate to implement any agreement.

(3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

(4) For the purposes of subsection (3), the Board may

- (a) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
- (b) amend any certification order or description of a bargaining unit contained in any collective agreement;
- (c) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
- (d) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;
- (e) if the conditions of paragraphs 89(1)(a) to (d) have been met with respect to some of the employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions of those paragraphs are met with respect to the unit; and

- (f) authorize a party to a collective agreement to give notice to bargain collectively.