CONTRACTING OUT: NOT ALWAYS SUCCESSOR OR COMMON EMPLOYER

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A recent decision from Ontario's Labour Relations Board confirms that contracting out bargaining unit work performed by unionized employees is not always improper. In its decision in *Molson Coors Canada*, 2017 CanLII 14504, the Board held that contracting out by Molson to a warehousing company was neither a sale of business nor a related employer arrangement.

Background

As part of an effort to streamline the operation of its Toronto Brewery, Molson reorganized the way in which beer brewed on site was packaged and shipped. This changed both the work being done on site by unionized employees at the Brewery, and tasks of employees of Sherway Warehousing, Molson's non-union warehousing contractor. Some work moved to Sherway, and other work was brought back in house.

Prior to this "flip" of work between the Brewery and Sherway, there had been a longstanding business relationship between Molson and Sherway, which is a company that provides storage to a number of companies. As one might expect with any significant customer, Molson provided direction to Sherway about expected procedures for handling their product.

Union Complaint

The Canadian Union of Brewery and General Workers Union, Component 325, which represents production, maintenance and warehousing employees at Molson's Toronto Brewery, filed an application with the Board which challenged the movement of unionized work to Sherway. In their complaint, the Union alleged that the move of work to Sherway was both a sale of business and indicative of Molson and Sherway acting as one common employer.

The sale of business portion of the Union's application was based on the claim that an identifiable portion of the Molson business (being one part of its warehousing work) was transferred to Sherway.

The Union's related or common employer application was based on the extensive amount of interaction between Molson and Sherway. This included a focus on the fact that the two companies were carrying on

"associated or related activities" with respect to the storage and shipping of Molson product.

Responses of Sherway and Molson

Both Sherway and Molson denied that there was a sale of business. No assets, equipment or inventory were transferred, and the change was instead only a revision to the scope of Sherway's contract (which could potentially change again at any future point).

Sherway emphasized that it was not a captive client of Molson. Instead, they had been in business for many years, and did warehousing work for a wide range of companies.

Molson's argument before the Board highlighted the separate ownership between the companies. Thus, even if the activity in dispute was an "associated or related activity", the two were not related employers because of the lack of common control and direction.

Board Decision: Contracting Not Improper

The Board conducted a detailed analysis and ultimately dismissed the Union's application.

On the issue of the alleged sale of business and successor rights, the Board held that no severable or standalone portion of the Molson business had been transferred. This outcome provides helpful clarification about the fact that "work" and "business" are distinct for the purposes of labour law. When an existing contractor has its scope of work change, that is not necessarily a sale of business.

The related employer component of the Union's application was dismissed on the basis of failing to prove that Molson and Sherway were under common control and direction. While there was evidence of interaction, the Board found that this did not exceed what would normally be expected in a contracting arrangement. Indeed, regular reporting, communication and review of procedures is a reasonable expectation in any business relationship.

Takeaways for Employers

This decision provides a detailed review of the tests applicable in sale of business and related employer cases. While the outcome is based on established law, the implications for employers could be significant: the Board has expressly recognized that even in cases of significant and regular interaction between a company and its contractor, union bargaining rights may not always continue with contractor employees.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.