

BUYER'S REMORSE: ASSET PURCHASER LIABLE FOR PRE-CLOSING EMPLOYMENT LIABILITIES OF VENDOR

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In *Overstory Media Inc.*,^[1] an eyebrow-raising appeal of a determination issued by British Columbia's Director of Employment Standards, an asset purchaser was held liable for the pre-closing employment-related liabilities of the vendor.

Purchaser Liable for Unpaid Wages

On September 22, 2022, Overstory Media Inc. ("Overstory") acquired substantially all of the physical operating assets and intellectual property of Vancouver Free Press Publishing Corp. ("VFP"). In connection with the transaction, VFP purported to terminate the employment of nine of its employees; however, the terminations were not made effective until September 27, 2022: five days after the closing of the transaction.

Overstory did not offer employment to VFP's employees. Nevertheless, following the closing, VFP's employees filed complaints against Overstory alleging that the company was liable for unpaid wages and other entitlements accrued during their employment with VFP. In this regard, the employees relied on Section 97 of the *Employment Standards Act* (the legislation that prescribes minimum standards of employment in British Columbia, the "ESA"), which states:

"If all or part of a business is disposed of, or the business continues to operate under a receiver or receiver-manager, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition or receivership, as applicable."
[Emphasis added.]

According to the Panel, the effect of Section 97 of the ESA – also known as the "successorship" provision – is that "all employees on the vendor's payroll as of the date of the disposition are deemed to have continued their employment with the purchaser". In the Panel's view, this deeming provision does not require the purchaser to offer new employment to the vendor's employees in order to be effective.

In other words, Section 97 of the ESA overrides the well-established common law rule that employment with the vendor constructively terminates on the closing of an asset purchase transaction and, if the purchaser

wishes to retain the vendor's employees, it must offer them new employment.

In *Overstory's* case, because VFP's employees weren't dismissed until after the closing date, *Overstory* was deemed liable for unpaid wages, vacation pay, and compensation for length of service with VFP pursuant to the ESA. In the result, *Overstory* was ordered to pay upwards of \$270,000 to the VFP employees.

Key Takeaways for Purchasers

In many asset purchase transactions, the vendor's employees are a key part of the business that is being acquired. Therefore, the purchaser often covenants to offer employment to the vendor's employees as a condition of closing. The Panel's decision in *Overstory Media Inc.* will have minimal impact on these transactions, assuming that the purchaser obtains customary representations and warranties from the vendor regarding its compliance with applicable employment laws (including the timely payment of wages under the ESA).

However, in transactions where the purchaser wishes to leave the vendor's employees behind, the Panel's decision is significant. In these situations, based on the Panel's guidance, the purchaser should require that the vendor terminate the employment of its British Columbia-based employees, with proper notice under the ESA, before the closing. It is also prudent for the purchaser to obtain an indemnity from the vendor for any pre-closing employment-related liabilities.

With that said, the Panel was also clear in its decision that *Overstory* had failed to make comprehensive submissions regarding Section 97. Therefore, it is possible that the correct interpretation of British Columbia's successorship provision could be revisited in a future case.

It is also worth noting that the approach taken in British Columbia appears to be unique amongst Canadian common law provinces – including other provinces with legislation containing similarly worded “continuous”, “uninterrupted” and “unbroken” successorship provisions (such as Alberta, Manitoba, Newfoundland-Labrador, New Brunswick and Nova Scotia).^[2] For example, New Brunswick's Court of Appeal once famously opined that the successorship provisions do not operate so as to “create a fictional employment relationship” with the asset purchaser.^[3]

[1] 2024 BCEST 109.

[2] Successorship provisions in other provinces, such as Ontario, expressly do not apply unless the asset purchaser actually employs the vendor's employees after closing.

[3] *H.J. Hotels v. Stone*, 2001 NBCA 103.

by [Paul Boshyk](#) and [Claire Wanhella](#)

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.

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