



*Through sharing our experience and ideas we can work together to exchange information, elevate our practices, grow our collective capabilities and take action to create new paradigms and better outcomes for all players in Labour Relations in Canada.*

## Industrial & Labour Relations: Risk or Opportunity?



### Industrial Relations Due Diligence

When the purchase of a business or merger is being contemplated involving a unionized business there are specific things that need to be looked at during the due diligence phase related to labour-management relations. Commonly the principal concerns are the potential risks, obligations and liabilities the purchaser may have to assume after the transaction is completed. Some of these are very concrete and measurable (e.g. pension liabilities, pending litigation risks) while others are more related to the culture of the organization and are less measurable.

The consultants who typically are engaged in helping organizations through business transactions fully understand the tangible and measurable risks, particularly those that have specific financial implications. Unfortunately, they have less experience in assessing the potential risks that might exist because of the nature of union-management relations. In obvious situations where the targeted company has had problematic labour relations there will be enquiries. Typically in these circumstances the purchaser will engage legal counsel or similar experts to assess the climate and determine what, if any mitigating strategies might be developed to address the issues.

The assessment will take a fairly high level view of labour relations. The expert might comment on the overall climate, how much time and resources are spent dealing with the unions, what the historic effect has been on business results and what pending litigation is on the books. Certainly there will be a review of the collective agreement to determine what the labour costs are and other financial liabilities. The assessment will also consider the expiry date when potential labour disruptions will occur.

Typically, unless the labour relations environment is problematic in the extreme, the assumption will be that the inherent labour relations' risks merely represent the cost of doing business. It is a common presumption that the risks associated with being unionized will be shared by other companies in the same sector and therefore will not pose a significant risk to competitiveness.

In a few albeit rare cases, where there may be questions about the target's ability to compete, the buyer may engage the union in discussion about how costs/risks may be reduced prior to completing the transaction. These negotiations are likely to be focused on costs but may also include lifting restrictive provisions on contracting out, plant closures or the movement of operations. In other cases, where there is a high potential for labour disruptions in the relatively near future the purchaser may defer the buying decision until after the vendor has been able to get through collective bargaining.

We hope to challenge the thinking of all the parties involved in business transactions like mergers and acquisitions. We want those involved in business transactions to see the industrial relations environment as a key opportunity to create value. Every industrial relations risk represents an opportunity for transformation. In his collective writings Harold Shroeder as discussed extensively what he aptly calls "The Art and Science of Transformation". The Science involves using tools to assess what needs to be done. The Art is determining how to do it. This is very fitting to what we are describing here.

In virtually every acquisition the "what needs to be done" about the industrial relations environment is identified. The "how to do it" though is restricted to the development of contingency plans and a relatively narrow focus on changing some contractual provisions. The "art" of industrial relations strategy as we define it suggests that the how should consider what is needed to transform the culture. It means dealing with the risks but concentrating on the opportunities.

It also means taking a wider view of industrial relations. It should not be considered simply as the relationship between labour and management. There are many other important stakeholders whose interests need to be considered when formulating a strategy for transformation. These include the new shareholders/owners; contractors and suppliers; local communities; First Nations groups; customers and governments. An acquisition almost always represents a time for a change. The new owner intends to unlock the potential of the organization and to create value. To do this means changing the culture of the target organization. We hold that this means ensuring everyone's interests are given due consideration.

## The Challenge for Purchasers

The future success of corporate Canada rests on redefining what success is. In the very recent past we have seen the devastating impact a strict shareholder perspective can have on organizational behaviour. The far too numerous corporate scandals (will they ever end?) often occur because of the unchecked pursuit of increasing shareholder value. When senior executives are too focused on maximum earnings they neglect the value interests of other stakeholders to the detriment of the long-term health of the organization. As agents of the shareholders the executive team needs to consider the long-term benefits of forging strong relationships with all stakeholders.

Many Directors and executives have questioned the shareholder-focused perspective. They believe that success involves much more than just maximizing share price. Hence, we have three emerging and intertwining themes that are gaining momentum in the Boardroom:

- Multi-stakeholder Perspectives;
- Sustainability; and
- Shared Value

## A Multi-stakeholder Approach

The multi-stakeholder perspective calls for the identification of moral or philosophical guidelines for the operation and management of a business enterprise. It considers that there are many identifiable groups who have interests in the business. These include:

- Shareholders;
- Customers;
- Employees;
- Unions;
- Contractors;
- Suppliers;
- Governments;
- Communities; and
- Special interest groups.

The objective for the senior manager is to ensure the interests of each of these stakeholders is balanced with the others. One criticism of this perspective is that it seems to necessitate negotiating between

interest groups to arrive at commonly acceptable terms. Thus there is an apparent need for each stakeholder to make some compromises.

Employees have very strong interests in the health and welfare of the business. To emphasize a point we might suggest that the shareholder perspective sees employees as nothing more than a production input and is therefore primarily concerned with labour costs per unit produced. Under such a paradigm employees are motivated by money and any other aspect of total compensation. Of course we know this is too narrow a construct.

Employees attach important and significant meaning to their work. This can be described in terms of salience which implies that situational and emotional elements interact to create a degree of attachment the individual assigns to an object or experience. Employees who find their work to be highly salient derive meaningfulness from the culture of the organization they work for or from the intrinsic value of the work itself or both.

The term employee engagement has been bantered around as the latest fad in Human Resource Management circles. It stands for the proposition that high attachment to work by employees will result in higher productivity. The issue though is how to measure attachment. This is near impossible as the intrinsic value of work differs in utility from individual to individual. Nevertheless, it is an important concept to be considered in assessing the current culture of an organization.

A group of employees may be engaged in the culture of an organization. They identify with the organization. A sale of the business or merger can disrupt their sense of self. They may fear a potential loss in the values and emotional attachment they associate with the organization. The emotional losses will be manifest in a sense of alienation, which will have a direct impact on the quality and quantity of their work.

In the alternative employees might already feel alienated and a sale or merger will be met with relative indifference. "Meet the new boss, same as the old boss." There is however an opportunity for the buyer to breath new life into the organization and make changes that increase employee attachment. Many employees will grant the new owners a "honeymoon" period where they adopt a wait and see if things improve attitude.

Regardless of the prevailing culture the purchaser has to consider these elements in order to determine what needs to be done and how with respect to creating value from the transaction. These concepts seem too esoteric for many business managers who deem them to be "airy-fairy HR nonsense". The truth is that culture may be the most important driver of organizational success. This is where the "Art" of transformation discussed by Shroeder plays an essential role in creating value.

We will not dwell on the many different approaches organizations can take to transform culture following a transaction but point out that there are numerous ways to do this: preserve the existing

culture of the target as a distinct, independent entity; replace the existing culture with the dominant culture of the purchasing entity; merge the cultures based on “best practices”. Choosing an approach and executing it well is an art. The goal though can be expressed in very practical terms; productivity, quality and profitability are maximized as a function of the degree of employee engagement.

The union is not simply the collective of employees who have chosen to be represented. It is a distinct interest group. The union is a political group. Its main objective is to represent the rights and interests of its members. To do this unions typically take a fairly extreme view of those rights and interests as being independent from the rights and interests of the employer. Union representatives are not trained in business and while they do understand the need for a company to make a profit it is not their primary concern.

We’ll talk about this more later. The challenge for the purchaser is to engage the union representatives early. The propensity is to involve them only if there is a problem to be addressed. However, regardless of the current state of affairs there needs to be a dialogue created between the purchaser and the union. Dialogue is different than negotiations. In order to compel the union to change and accept a different role the employer has to act differently. It makes sense that if you involve them early and in earnest that the union representatives will take an active interest in helping. There is no better time to forge a new relationship than at the beginning of a transformation.

Other stakeholders are addresses below. We should comment though that the multi-stakeholder approach should be tackled in a holistic way. Critics of the stakeholder perspective suggest that the primary way to bring different interest groups together is through negotiations and this necessitates compromise. This criticism itself takes to narrow a view of the dynamics of negotiations. We believe that when people adopt an integrative bargaining approach they are able to create shared value without necessitating any compromise to their core values. If there are any compromises it is to the positions they may have taken to protect their interests when bargaining under an adversarial paradigm.

The “trick” is to involve unions and others in multi-lateral discussions and to get each to understand how collaborative approaches can increase the size of the pie rather than having everyone scramble for a bigger slice of the existing pie. As an example, we need to get unions to consider how restrictions on contracting out help them achieve their goals. We doubt they do. In many cases not only does contracting out save the employer money, it provides security to employees (ensuring the success of the employer), it allows the company to tap into expertise it cannot develop internally and it helps create capacity and capability in the community. The net effect is collectively the parties can help create sustainable communities.

## ***Sustainability***

The concept of sustainability perhaps starts with doing no harm: no harm to the environment; no harm to communities; no harm to the employees. In the early discussions with employees and their union representatives the purchaser should discuss its values with respect to health, safety and the environment. These values or principles will set the stage for engaging people.

Sustainability goes much further. The organization has and will continue to have an impact on the environment around it. In particular any business of any size has a direct influence on the well being of the community it operates in. Without any effort the organization might see itself as providing a benefit to the community by creating employment for local residents. It may also reach out to the community by providing charitable donations to local causes. We say this is merely the price of playing. Neither of these are sustainable in the future should the business cease operations or move elsewhere.

Community sustainability can be fostered through the company's deliberate efforts to enable other stakeholders in the community achieve their goals and objectives. It is understanding how the community will continue to thrive with or without the business.

## ***Shared Value***

The link between competitive advantage and social responsibility lies in the creation of shared value, a concept introduced by Porter and Kramer in their December 2006 Harvard Business Review article *Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility* and the January 2011 follow-up piece *Creating Shared Value: Redefining Capitalism and the Role of the Corporation in Society*. The premise is that the competitiveness of a company and the health of the communities around it are mutually dependent. "Recognizing and capitalizing on these connections between societal and economic progress has the power to unleash the next wave of global growth and to redefine capitalism."

If a business ignores the needs of society and makes a short term decision that benefits it at the expense of the greater good, the prosperity of both the organization and the community will be undermined in the long term. For example, a decision to source locally results in more jobs and more people buying goods and services in the community. Offshore solutions on the other hand may create short term cost advantages but will adversely impact the local economy and infrastructure. The organization can potentially suffer because its direct employees may be unable to purchase the goods and services they need to maintain a healthy lifestyle. This could impact on the organizations ability to attract and retain the core competencies it needs to maintain competitiveness.

The Canadian economy is full of examples past and present where short term thinking has led to “sick” communities. These communities lack the local services and supports to provide the necessary lifestyle choices that will attract skilled workers and their families. Currently this is one of the issues facing companies contemplating precisely how they are going to be able to find the skilled labour needed to build Canada’s resource mega projects.

To some degree the responsible thing for the parties to do is to ensure the local infrastructure can be developed so the community is less dependent on the dominant employer. More importantly, as we develop new resources and create new communities the parties need to think in terms of how to ensure these resources are used and developed to ensure the long term impact is at minimum benign and at best leaves behind a community that can survive and thrive.

It is a collective responsibility and demands long-term thinking and, potentially, short-term sacrifices. In order to shift the present paradigms on both sides of the table the true benefit of creating shared value has to be fully understood. Unfortunately, there are many examples in Canada where a failure to gain this appreciation have left behind broken legacies. Perhaps we are now able to learn from these examples.

The challenge for the purchaser of a business is to consider these three themes and how the concepts behind them can be leveraged to transform the targeted corporation into a success. For some this soft side of the business is an afterthought. The value of an acquisition or merger is measured in terms of the financial synergies that can be gained, the scale of production that can be developed or the redundancies that can be eliminated. However, creating a culture of success built on the foundation of these three themes has the potential for improving productivity, quality, customer service, innovation, engagement and many other things. People ultimately drive value. The challenge is to unlock their potential and there is no better time than when a transaction sets in motion the need for cultural change.

### **The Challenge for Unions**

The primary role of any union is to protect the rights and interests of its members. The problem is that in a two party system (labour - management) the interests of other stakeholders is of secondary or tertiary concern. Unions can be also their own worst enemies. In the pursuit of some of its members’ interests the union may have created certain restrictive covenants that hurt the business. When the business suffers the welfare and security of employees is placed in jeopardy. This is counter to what the union should be striving for. However, the problem does not solely lie at the feet of the union.

At times a business underperforms in part due to the increased costs and reduced operating flexibility. We in no way suggest that unions drive companies out of business. In fact, we stress it takes two to



tango. All the legacy issues imbedded in the collective agreement are there by agreement. However, the collective agreement is a product of a bargaining dynamic wherein it has become inevitable that the parties each will need to make compromises. In truth there are circumstances wherein the bargaining dynamic has resulted in contracts with legacy issues that do impair the organizations ability to operate efficiently and competitively.

The point is that there is an opportunity when a sale of the business or merger is about to take place when the Union can be engaged in the process of seeking ways to change the relationship and the collective agreement in order to enable the business to transform.

It has been said that Unions are losing their relevance in today's world. The evidence supporting this statement seems to be abundant. In the U.S. union density rates have fallen into single digits and appear to continue to be dropping. There is a strong conservative movement that has more than enough political clout to see the passage of "Right to Work" legislation that is little more than an attack on the labour movement. Recently Michigan, despite having given resounding support to Barack Obama (an ardent union supporter), has seen the passage of legislation to allow people to opt out of providing financial support to unions.

While density rates have remained higher in Canada than in many other countries, there is a strong movement to see legislation passed to weaken unions. Bill C-377, a federal private members bill requiring unions to disclose certain financial information, mark the beginning of a conservative attack on the enshrined rights unions have enjoyed for decades.

This should be a wake up call for the labour movement. However, the answer is not for union leaders to fall back to tried and true tactics. The world has changed around them and they need new strategies if they are going to regain market share. Why would a group of management side strategists wish to offer advice to unions to help them stave off these attacks?

Unions represent a lot of potential as stakeholders that can help address some of the endemic economic issues we need to correct. There is a possibility that unions can help address supply issues through improved skills training. They can help facilitate industrial adjustments. They can help address the big issues such as the legacy costs of pensions and post-retirement benefits. They offer a different voice in the dialogue that could lead us to creative solutions.

To do so Unions have to change their perspectives. Like business, unions need to adopt a multi-stakeholder perspective. They need to recognize that collective agreements should be designed as business enablers and not as constraints. They need to be problem solvers and not merely rights advocates. Most importantly they need to think in terms of the long term interests of their members. Their members will not be served by defending rights above defending jobs.



We do not suggest that unions should be “partners” in the running of the business. They have a distinct and legitimate role that is separate from management. Unions need to be willing to engage and consider the interest of all stakeholders in order to become enablers and not constraints. They need to rethink how they serve the true interests of their members.

Unions can adopt the same line of short term thinking. They see themselves as contributing by ensuring the employer pays competitive wages and provides benefit coverage. Their participation in Collective Bargaining is a means to protect job security. They too will engage in acts of social responsibility as good members of the community. However they too will make decisions to their short term benefit without concern for the longer term consequences. This needs to change.

## Risks

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Business transactions involve people. When companies merge or one company acquires another there is a potential for certain liabilities related to employees and labour relations to emerge. Significant attention is sometimes placed on identifying these liabilities during the due diligence phase of an acquisition or merger. In this way mitigating strategies can be developed or the parties can negotiate agreements to ensure the responsibility for these liabilities is clearly defined. The risk of employee claims or the risk of disruption to the ongoing business can be significant if employee relations issues are not specifically thought through by the acquiring management group.

## Vendor and Purchaser Interests

The interests of the seller and the buyer in a business transaction are different. This is particularly so with respect to any potential liabilities. The seller or vendor is interested in transferring any liabilities, including those arising from employment, along with the sale of assets or shares in the business. The buyer or purchaser wants to be indemnified from any liabilities, particularly any that existed prior to the transaction actually taking place.

It is quite common for the buyer to review any obligations created by employment contracts, particularly contracts between the company and its senior executives. The buyer will want to assure itself that there are no onerous provisions that bind it to agreements it does not want. Prior to the consummation of the sale the buyer has an opportunity to renegotiate these terms.

## Sale of Assets versus Sale of Shares

In very general terms when a purchaser acquires the shares of a company or otherwise buys it as a going concern it succeeds the company as a signatory to the collective agreement. This may not be the case if the purchaser is merely buying the assets of a company but nothing is ever simple in labour relations. If the assets are used for a different purpose as the case may be when buying a building then the union would have no claim that the collective agreement should remain in force. If equipment was purchased and moved to another location to be incorporated into the existing business of the purchaser there likely would not be a successful claim.

However, if the cumulative effect of buying assets from the vendor appeared to constitute carrying on the same business a Labour Board may grant a union successor rights.

## Successor Rights

Where the business after an acquisition or merger continues on the union will be granted the rights of a successor. This may be true even in cases where the business has been dormant or where the employees have been permanently laid off.

## Corporate Veils

A company cannot establish a new legal entity to transfer work to in order to escape unions. In 2004 a company called O.E.M. Remanufacturing Inc. (OEM) was established to repair mobile heavy equipment. The company was 100% funded by Finning Canada who was the beneficial owner. The plan was to contract out all the work done by Finning's Component Rebuild Centre (CRC) located in Edmonton. Employees of the CRC were represented by the International Association of Machinists and Allied Workers, Local Lodge No. 99 (the IAM).

In its original decision, the Alberta Labour Relations Board ruled that OEM was a successor to Finning Canada and that the two companies were in fact a common employer. The Board found Finning and OEM to be common employers based on Finning's control over OEM's management through the terms of a Joint Venture Agreement, an operational relationship and interdependence, common ownership and financial control. As a result, OEM was bound by the Union's collective agreement with its predecessor, Finning Canada.

A Reconsideration Panel constituted by the Labour Board subsequently overturned the decision. The Panel ruled that although transfer of capital is a relevant consideration when deciding whether to grant a successor declaration, in this case, the capital transferred to OEM came from Finning International and

not Finning Canada — the portion of the business for which the Union held bargaining rights. Addressing the common employer finding, the Reconsideration Panel found that Finning International exercised virtually no control or direction over the day-to-day management of employees or the work-generating activities, and therefore a common employer declaration was not appropriate. The Court of Queen's Bench later upheld the Reconsideration Panel's decision.

However in the end, The Court of Appeal finally overturned this decision and restored the original Labour Board determination based on the Board's errors in the application of its reconsideration power and the errors in the Panel's analysis of the successor issues. It found that the Reconsideration Panel had deviated from well-established successor principles. The Court of Appeal also criticized the Reconsideration Panel for substituting its opinion for the factual findings of the original panel.

The Court of Appeal focused on the realities of the closely related entities and noted that Finning's \$87-million capital infusion was perhaps the most critical aspect to the establishment of OEM as a viable, ongoing business operation. It also reminded labour tribunals to be wary of creative corporate restructuring that undermines collective bargaining rights.

Courts are increasingly aware of sophisticated corporate restructuring schemes aimed at evading collective bargaining rights. Employers must keep in mind that courts will focus on the realities of the collective bargaining framework and the true effect of the overall transaction.

Moreover, this type of fancy footwork ignores the real issues. The inherent value of a targeted acquisition is not contained solely in physical assets. There is tremendous value locked into the capabilities of the employees. Instead of wrangling through potential legal maneuvers to escape successor rights the focus should be on ways to redefine the relationship and create new shared value for the future.

## **Recognition Clauses**

Careful attention should be placed on the recognition clause of the collective agreement. In some cases the full scope of recognition is sometimes found in other clauses or in Letters of Understanding so a cursory review is not sufficient due diligence. The first thing to check is the recognition clause itself. Typically they are written as all inclusive and list the exceptions:

The all employees approach can cause issues depending on the geographic scope. A union can have jurisdiction over all employees of the employer in the defined bargaining unit within a given geographic location. The location can be defined as a street address, a city or town, a region or across a province (with federally regulated industries national units are of course possible).

## Intermingling

When the operations of a newly acquired unit are blended in with existing operations employees may be intermingled. That is, employees in the various units may be assigned to work in another unit at any given time. If one of the units is unionized and the other is not, this intermingling may give rise to a question of whether or not they share a community of interest and should be considered as one for the purpose of defining the bargaining unit.

## Jurisdictional Disputes

Where the purchaser is already unionized, purchases a unionized entity and intermingles the operations the acquisition may give rise to a jurisdictional dispute as to which union ought to represent the employees. In the absence of intermingling there is no reason, regardless of conflicting recognition clauses, why the two unions cannot co-exist. However, once the operations have been blended there may be a conflict that can only be resolved through a board ordered vote. While the purchaser may be indifferent to the outcome the run-off election can be a distraction and can be quite disruptive to operations. In reality, it is doubtful in such situations that the purchaser would be indifferent to the choice the employees might make.

## Seniority Issues

When bargaining units are merged one problem is what happens to employees' seniority rights. There are many different ways to merge seniority lists. Dove-tailing is the process of simply combining the lists and placing every individual in position according to the date of hire with the original employer. While this might seem to be the fairest way to combine the lists there are many other combinations possible according to the relative power of the unions. In the case where one union is dominant it may insist that the new employees be end-tailed. That is the most senior employee of the newly acquired unit falls in place after the most junior person of the existing business and so on. These issues are very emotional and the process of bringing seniority lists together can actually have a dramatic impact on productivity, cooperation, customer service and over all employee morale.

## Verrin Rights

*Verrin rights* is a principal that stands for the proposition that an individual is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent. Therefore, despite what successor rights might suggest an

employee may be able to refuse to accept employment with the new employer and choose instead to accept a permanent lay-off or ask to remain with the existing employer.

### **Adjustment Plans**

Some collective agreements contain provisions for the closure or partial closure of a business. Others contain clauses that stipulate the notice and severance requirements that are owed in the case of a permanent lay-off. These need to be examined to determine if in combination of other implied or explicit rights of the employees create a financial liability. In some cases the purchaser may want to seek to have the vendor indemnify the buyer from these liabilities.

### **Pension Liabilities**

Not much needs to be said today about pension liabilities. Organizations with defined benefit plans have seen a tremendous increase in pension costs and in many notable examples pension deficits have crippled large enterprises that heretofore were considered too big to fail (General Motors, Air Canada, Chrysler). It is perhaps obvious that any potential pension liabilities be examined closely and where possible contained. This might require some significant creative thinking.

### **Other Post-Retirement Benefit Liabilities**

In addition to pension liabilities many large enterprises offered their employees other post-retirement benefits (life insurance, extended medical coverage, drug reimbursement plans and dental benefits to name a few). These have always been expensive and the expense is growing significantly because of escalating health care costs in general and because of changes in demographics (people living longer, technological change resulting in fewer workers producing the same quantity of good, etc.). Again the purchaser should be as aware as possible as to what potential liabilities it may be acquiring and may want to seek ways to ensure the seller retains responsibility for these.

### **Collective Agreement Provisions**

Any collective agreements should be reviewed carefully. Depending on the future plans of the purchaser, the following issues should be addressed: Are there any restrictions on contracting out, subcontracting or plant closures? Are there any severance terms? (Severance clauses are not overly

common in collective agreements as all unionized employees are protected by the provincial employment standards legislation.) What is the scope of the union's bargaining rights? (For example, do they cover all employees, including office employees, production employees, part-time employees and students? Do the bargaining rights extend to one particular street address, to the entire municipality or even the entire province? Could they apply to other operations already owned by the buyer?)

As well, a collective agreement can reveal future costs in terms of scheduled pay and benefit increases. The manner in which the pension and benefits are structured can restrict the buyer's flexibility in changing plans. If, for example, the carrier and type of coverage is specifically set out in the collective agreement, it would be a breach of the contract to change carriers or plans.

The term of the collective agreement will reveal when the contract expires and when labour unrest or a strike could next occur.

### **Grievances and Arbitrations**

There are a few things the assessor should consider with respect to grievances and arbitrations. Arbitration is a form of litigation and therefore there are associated liabilities. While typically these are not significant in the case of union grievances or group grievances there may be significant associated costs. This is especially true with grievances that carry the possibility of retroactive payments. Individual grievances regarding terminations can also be potentially expensive. In some cases there may be significant back-pay implications if the individual is reinstated. Even in cases where terminations are upheld the circumstances could allow the arbitrator to award the grievor notice and severance payments. Arbitrators are not necessarily bound by the conventions of civil law and severance payments can be extraordinarily high.

### **Human Rights**

Human Rights complaints represent potential liabilities. They can be costly and involve prolonged investigations and processes which are difficult to win. However, the real cost can come in the form of loss of reputation. If there are a significant number of complaints this could be the sign of some systemic issues or a cultural deficiency that needs to be corrected.

## Privacy Issues

During any business transaction the vendor and purchaser will need to exchange information which will include some information about employees. Privacy legislation varies significantly across the country with respect to what can and cannot be shared, for what purposes information about employees can be shared and how the information should be handled. A good rule of thumb is to only share information that is vital to the conducting of due diligence. As a rule any information can be used for business purposes; i.e. the purposes for which the information was given in the first place.

In the early stages of the transaction the vendor/purchaser may want to limit access to aggregate data that does not identify individual employees. As the need increases for more detailed information it is of course advisable to check the applicable legislation but the parties also may want to think about acquiring consent from individuals with respect to the sharing of their personal information. Such consent should indicate what information is being shared and for what purpose. As part of the overall due diligence process the parties may also want to provide assurances that the information will be handled with the appropriate level of confidence and will not be retained by the potential purchaser or its agents in the event the sale does not go through.

Consent from a union on behalf of its members is normally appropriate for many different purposes but in the case of privacy it is advisable to get individual consent forms signed.

## Mitigating Strategies

In collective bargaining the parties are free to alter any terms and conditions contained in the contract without restriction (except for the duration of the contract, which the parties may need to seek Ministry of Labour approval to alter). So negotiating with the union to alter any terms that pose risks to the purchaser is the first option to consider.

The individual circumstances of the bargaining relationship and the specific nature of the potential risks need to be examined. It is always recommended that where there appears to be substantial risks associated with the collective bargaining relationship the purchaser should consult with legal counsel specializing in labour relations and employment matters as well as consulting with labour relations subject matter experts who specialize in the development of multi-stakeholder industrial relations strategies.



## Cultural Risks

In addition to the specific legal and contractual risks associated with a unionized acquisition target there are significant cultural risks that should be assessed. We recommend that prior to any decision to purchase a situational analysis of the current culture be conducted. This is similar to an audit but differs in the same way as the “science” of transformation differs from the “art”. The value and accuracy of a situational analysis is dependent on the skills, experience and expertise of the evaluator and the confidence the purchaser places in her assessment.

The cultural risks may seem non-specific but are not to be discounted. They are very real and can be the prime cause of failure to transform. Is there endemic animosity between employees and management, what are the relative skills of supervisors, is there evidence of a culture of entitlement. Are employees feeling engaged or alienated? These are but a few of the questions that need to be examined.

The situational assessment helps inform the purchaser about the types of interventions that will be necessary after the transaction has taken place. These interventions may include replacing some managers or supervisors, providing training, creating new communications channels and opening forums for participation, to name but a few.

## Opportunities

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### Regain Management Rights

Regardless of the rhetoric the most problematic issue with collective bargaining is that conventional collective agreements inherently restrict some of the rights of management. Inevitably it is difficult to imagine how a contract could be struck by two parties without each giving up something in return for what they want. However, some of the restrictions that can develop over time may be overly restrictive to the point that they impede the organizations ability to compete, its ability to transform and/or its ability to pursue diversity and inclusions objectives.

A number of years ago Air Canada attempted to have its collective agreements with various bargaining agents nullified by declaring that the economy post-911 was a force majeure that frustrated the application of the collective agreement to the point that it was impossible to continue business operations under the terms of those agreements. In particular there were “no lay-off” provisions and pension liabilities that each threatened the financial results and the organization’s ability to make significant operating changes to address what had become critical issues. The courts however ruled that

the doctrine of force majeure was not applicable to collective agreements precisely because it is always open to the parties to renegotiate the terms at any time.

We raise this failed case here as an object lesson. There is no better time to approach the union with respect to asking for significant changes to the collective agreement than at the point when the condition of the business has led to a need for a change in the ownership structure and potentially changes in senior management. These are radical steps in transforming the organization and therefore signal to the union a willingness to do things differently. It is at this point the buyer has the most leverage as implicitly it will be relying on the results of potential negotiations with the employees' bargaining agents as part of its decision-making process to determine whether or not it will buy the company.

There is no magic wand that can help the buyer transform the collective agreements after the close of a sale. While unions are at all times willing to negotiate anything they believe is in the interests of their members one has to remember they are conservative in nature (i.e. resist changes particularly when they represent steps backwards for them), they are political organizations (and therefore will not take actions that may damage their internal followings) and they are not in the pure sense business people. The point is simply that before a decision is made to buy another company where it is desirable to make amendments to the collective agreement the purchaser should develop a labour relations strategy that includes the potential for pre-bargaining of concessions to that collective agreement.

In particular in addition to mitigating against the risks and liabilities identified during the due diligence phase the purchaser will want to examine specific areas in the collective agreement where management rights are impinged. In some cases this simply is part of the price of playing in a unionized environment. However in others there may be opportunities to redefine processes and ultimately the relationship in order to achieve success. We do suggest that in many cases the purchaser may want to be very aggressive in its demands for change. However, the caveat remains you cannot get something for nothing.

## **Contracting Out**

Unions have long fought against employers' right to contract out work. There are many different motivations for this but primarily their concerns are the desire to grow their membership and the need to protect the jobs of their existing members. However, the inability to contract out certain aspects of the work can seriously impede an organization's ability to compete and can restrict its ability to use its economic influence to create value in the community.

Organizations do not as a matter of course contract out their core business. Doing so simply makes no sense. The only scenario where it may make sense is wherein the purchaser is buying the target with the

explicit intent to move the operations to another jurisdiction. Nevertheless, unions have concerns that an unfettered right to contract out work will lead to an erosion of the bargaining unit. To what degree this is a legitimate fear and to what degree it is just rhetoric to raise the fears of members may be a matter of speculation. A company cannot contract work to the extent that it threatens the viability of the bargaining unit regardless of what the collective agreement says or does not say. Regardless the point here is that in discussing the need for management to have the right to contract out work there needs to be binding assurances to the union and to employees that the core work will not be subject to contracting out.

This does not mean that union jobs will not be sacrificed at the point of the business transaction. Anything that impacts on the overall performance of the entity or poses a threat to competitiveness needs to be examined and addressed. There are many aspects of the work that only make sense to have contracted out. Non-value added work should be performed at the lowest transaction cost possible. One of the unfortunate products of collective bargaining is the apparent compression of wages wherein the high wage jobs are used to bring up lower wage positions.

In a hypothetical example skilled trade positions (such as welders, electricians, millwrights, mechanics) may attract wages that are competitive in the marketplace. Let's say these rates are \$35.00 per hour. Over time unskilled jobs in the collective agreement tend to close the gap. So in our hypothetical example, the floor sweepers and warehouse workers may see their wages increase to a rate close to the skilled labour rate. Perhaps they will earn \$28.00 in our example. This can be double what the market suggests these positions should be paid. Overall direct and indirect labour costs then become uncompetitive.

One answer may be for the purchaser to demand an immediate and dramatic decrease in wages. However, doing so is counterproductive. In theory at least decreasing the skilled labour rate will result in higher turnover of those needed skilled people and the inability to attract suitable replacements. Lowering only the unskilled labour rates is on paper a more viable option but will lead to persistent problems in employee morale and likely the short term gains will be eroded by productivity losses. Over time the gap is likely to again shrink. The better solution is to contract out the lower paid jobs (though this is not without pain or complications).

In some cases the pain may be short-lived. For example, in unionized office environments non-value added work can be contracted out in ways that the work is performed off-site. This is good because the surviving employees are not reminded of the sacrifices that were made so their jobs could be preserved. It reduces guilt and ill-feelings. However, other types of work (for example, janitorial services) cannot be performed off-site. Notwithstanding employee may understand and appreciate the need to do this in order to save the higher paying jobs. Regardless there is no reason to suggest that this type of negotiation is easy.

Value added work that is ancillary or complementary (i.e. non-core) is the other area where contracting out makes sense. Maintenance work is the prime example of this. Core maintenance work like preventative maintenance programs should be performed by regular employees simply because it is predictable and continuous. Doing this type of work in-house is invariably the cheaper option. However, emergency repairs, down-time maintenance and capital improvement work all tend to be short-term and may have significant peak requirements for skilled workers. These are plum jobs and the union's self-interest is in capturing as many of these as possible within the bargaining unit. However, doing so impairs the organizations ability to compete.

In addition these jobs represent readily transferable skills and as such the organization may be able to leverage its ability to contract out the work to build local capacity and capability in the community. Helping to develop local contractors is a significant way to create shared value with the community and both the organization and the union can play parts in enabling this to happen. In fact, when done right this will create greater employment opportunities and will contribute to the sustainability of the community. In imaginative scenarios local contractors can be developed in cooperation with special interest groups like the First Nations and Metis communities.

A lot of innovative solutions are made possible when you are able to eliminate some of the constraints created in past relationships.

### **Engage Employees Early**

Certainly from the perspective of an industrial relations strategist the employees are the most significant group of stakeholders. While in the transformation of an organization following a business transaction it is likely necessary to sacrifice some individual interests for the greater good one primary goal should be the protection and enhancement of the core group of employees. The greatest opportunities that this group represents are the possibilities for improvements in orders of magnitude in productivity, quality (reduced waste), customer service, and production costs. While the overall plan will need to look at total and average labour costs this does not necessarily result in all employees having to take a hit in earnings. We suggest that the core employees should be viewed as the prime asset that has been purchased. They are in need of continuous investment. However, in return there must be an expectation of improvement.

In simple terms, though the process is not simple, the overall industrial relations strategy has to be explained to employees. They need to know what they can expect post-transaction. They also need to be involved. Employees understand how the processes work and more often than not already know what needs to be done to make improvements. Changing the culture so employees can have a say in how things will be improved will pay big and almost immediate dividends.

### **Secure the Union as an Ally**

The union needs to understand that the goal in buying an organization is to transform it in some ways to increase its performance and profitability. The union can be a restrictive force or it can be an enabler. Most unions in most circumstances want to be enablers. Engaging them early as an ally will give them some assurance that the goal is not simply to get rid of them. Ignoring them is not a good idea as they are a significant stakeholder and can influence the potential success or failure of the organization post-transaction.

It would be naive to suggest that there won't be union resistance. Hence, there is the need to engage them early and at the point when the purchaser has the greatest leverage. In rare instances the inability of the two parties to come to common terms and understandings may be sufficient cause not to complete the transaction. However, in most instances early discussions will only result in mutual gains.

This was recognized by Buzz Hargrove in his attempt to engage with Gerald Swartz of Onyx Corporation when they were contemplating a takeover of Air Canada. Though the alliance between union and management did not come to anything in this instance, it was remarkable as an example where a labour leader saw the potential in being part of the solution rather than being a reactive agent of resistance.

### **Leverage the Collective Agreement as an Enabler**

By nature collective agreements represent constraints on management. However, there are many other styles of agreement in the world that are constructed in order to promote the success and mutual gains of the signatory parties and other stakeholders. Labour relations practitioners will tell you that the bigger and more prescriptive the collective agreement the greater the probability that there is not trust between the parties.

Establishing the trust necessary to establish agreements that are descriptive of intent and that allow for the degree of operational flexibility necessary for management to succeed is a tall order. It is another reason to engage the union leaders early in a fulsome dialogue of what the transformation will look like and what the long term intent post-transaction is.

### **Remove Barriers for Other Stakeholders to Participate**

It is clear that the intent of a business transaction, whether through acquisition or merger, is to transform the enterprise so it is better able to compete and better able to address the needs and objectives of multiple stakeholders. The transaction itself represents an opportunity to engage the various stakeholders in multilateral discussions. However, the first barrier to overcome is the resistance

to change amongst those stakeholders who have imbedded rights and are liable to take positions to enshrine those rights.

In a multilateral forum every participant has to consider not only their own interests but also what they can do to further the interests of the other legitimate stakeholders. It is a difficult process but can result in mutual gains for all. We like to think about it as the difference between fighting over how big a slice of the pie you are going to get versus working with others to create a bigger pie for everyone.

In the labour relations context many of the barriers to allowing others are considered sacred cows (seniority, restrictions on contracting out, posting provisions, recognition/jurisdiction clauses). We recognize these are difficult for unions to conceive that they may need to give up some protections. On the upside the gains are more speculative to be sure but are definitely worth consideration. They include job security, increased employment opportunities (albeit often outside the enterprise), and improved working climates.

Our warning to unions is that if they are unable or unwilling to shift their positional bargaining stances and adopt a new paradigm they will continue to see their market share eroded. Taking an opposing stand to fight the tides of change will not prove to be a successful strategy for them. They need to seek new approaches and set new objectives if they are to retain any degree of influence in Canada's economic future.

### **Create Shared Value**

In order to reinvent the organization we believe the business leaders today are seeing that there are better ways to define success. If the goal is simply to increase shareholder value in the short term the old ways of conducting transactions are sufficient for some limited successes. If the goal is to create synergies and transform the enterprise to achieve multiple goals for multiple stakeholders than the practices need to change.

It is not sufficient to simply conceive of ways any two parties may be able to create joint value. The new paradigm demands every participant consider their own needs as well as their ability to create value and address the needs of the others. While this may increase the relative complexity of a transaction by establishing a specific strategy early on and engaging stakeholders early transformation will be facilitated and the chances of success greatly increased.

