



CONSIDERATIONS FOR RETIREMENT: NAVIGATING THE ASSIGNMENT OF REPLACEABLE OR MARKET CONTRACTS

The prospect of retirement is a significant moment in one's life, especially for a business owner. A natural concern of the business owner is receiving the highest value possible for their business.

For many owners this simply means selling their shares to a suitable buyer. Or, it could also mean selling the business assets, such as equipment, receivables, or contracts for the highest price possible. An asset sale also allows the owner to sell assets off on a piece-meal basis if necessary.

The same should be true for logging contractors looking to sell their company or assets. However, logging contractors may face some hurdles in trying to sell or assign their contracts because of forestry regulations requirements and industry dynamics, which may complicate the sale process and delay or prevent retirement as planned.

Many logging contractors typically operate under replaceable contracts, also known as "Bill 13 contracts." The replaceable contracts are a long-standing feature of the forestry sector that are intended to provide stability and sustainability to the logging contractor's operations. The *Timber Harvesting Contract and Subcontract Regulation* (the "Regulation") sets out a process for rate determination and determination of predictable allocations of work which is intended, in part, to level the playing field between the licence holders who have the exclusive right to harvest timber and the logging contractors who actually do the harvesting. However, the Regulation and—more significantly—the terms of the replaceable contracts, can impose certain restrictions on the parties.

In particular, a key contractual requirement is that the logging contractor must perform the work specified in the contract throughout its term. If it doesn't perform the work, then subject to any waivers or agreement between the contractor and licence holder, the contractor

will be considered in breach of the contract and potentially liable for any damages the licence holder suffers as a result of such breach. In addition, the licence holder could terminate the contract or allow the contract to expire without offering a replacement contract. However, if the contractor has performed the work satisfactorily, the licence holder must, prior to the expiration of the current contract, offer the logging contractor a replacement contract on substantially the same terms as before. The requirement that the licence holder must offer a replacement contract is what gives replaceable contracts their name and provides contractors with a sustainable business, which is necessary to invest in equipment, training, and other cash outlays to maintain the business.

A contractor that is planning to retire has some options. These include retiring around the time the current replacement contract will expire and refusing to accept a new replacement contract at that time. Of course, doing this means that the contract reverts back to the licence holder without further compensation to the contractor. Alternatively, the contractor seeking to retire may wish to simply assign their replaceable contract. In this case, the contractor could sell the contract and assign it to another contractor. However, the Regulation stipulates that the contractor must obtain the prior consent of the licence holder before any of the contractor's interests in the contract may be assigned. Generally, the requirement to obtain the consent of another party to an assignment of a contract is not in itself unusual. However, licence holders can and often impose conditions which the contractor must satisfy in order to gain the required consent. Accordingly, the licence holder, through the imposition of such conditions for consent, can effectively limit when and to whom the contractor may transfer or assign its contract, which may reduce the pool of potential

purchasers and assignees. These conditions may involve, but are not limited to:

- the experience of the assignee and its directors, officers and employees;
- the financial status of the assignee;
- the type, age and amount of equipment;
- whether the assignee already holds a contract in the licence area; and
- the assignee's relationship with First Nations.

However, the requirement of the logging contractor to obtain the consent of the licence holder does not amount to a complete veto. The Regulation provides that the licence holder cannot unreasonably withhold its consent, and the courts have clarified that this means a licence holder can only withhold consent if it is reasonable in light of the commercial realities of the marketplace, or the economic impact on the licence holder of the assignment, or the financial capabilities and capacity of proposed assignee to perform the work. Therefore, if a logging contractor is able to find a purchaser that is roughly comparable to or exceed the logging contractor's resources and experience, and has the capacity to assume the work, it is unlikely that the licence holder will be able to prevent the assignment.

Another option is for the logging contractor to simply sell the shares of the company outright rather than assign the replaceable contract specifically. By selling the shares of the company, the contractor can recover the value of the business, including the market value of the replaceable contract. The buyer in turn may, subject to the terms of the purchase and sale agreement, continue to do business under the existing company. However, even in such a sale, it may still be necessary for the contractor to obtain the consent of the licence holder before it can proceed with the sale of the shares. While the Regulation itself

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There are a number of strategies contractors hoping to employ First Nations can utilize when hiring and working with Indigenous people, and there is no cookie-cutter solution. According to Statistics Canada there are more than 270,000 First Nations, Inuit and Métis people in BC speaking 30 languages and as many as 60 dialects. Bob Joseph of Indigenous Corporate Training advises visiting communities nearest your project and learning about that community's culture, history, challenges and achievements. "Invite Elders to visit your worksite to talk about their culture and beliefs," he advises. "Ensure that every person in your organization, including those in head office, takes a cultural awareness course. Recognition and respect of cultural differences has to be systemic, and it has to be supported from on high to be sustainable and effective."

It's also a good idea to reject stereotypes and ensure that at the interview and job level applicants feel respected and valued, although Luscombe says she doesn't think racism is really the issue. "I think it's more a lack of awareness of each other, and that can lead to misunderstandings," she says. "If you share teachings and break down barriers that can create good relationships and better work environments."

Inadequate or non-existent transportation and access to safe and affordable child care are other significant barriers to employment. Obviously, these are to address for individual companies working with tight margins, but they need to be considered in the overall equation. Solutions include arranging shuttle service for employees to transport them to job sites in the morning and home again at the end of the day. Child care is a tougher nut to crack, but Bob Joseph would go so far as to say "if the community does not have a child care facility, build one and hire a qualified child care worker, or provide qualified child care on-site, or connect with a local, culturally aware child care provider to ensure there are spots available for the children of your employees."

If Indigenous people feel welcome and valued, and training and support can be provided, it could go a long way toward filling the labour shortage that currently exists, one that is only going to get bigger if bridges don't get built sooner rather than later.▲

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does not contain any provisions dealing with a change of control in a company, it is common practice for the contract to include terms and conditions that provide that a change of control will be deemed an assignment. Accordingly, contractors should carefully review the terms of their contracts in order to understand whether there is a need to seek the consent of the licence holder prior to the sale, keeping in mind that the licence holder will still not be able to unreasonably withhold consent.

Finally, regardless of whether the replaceable contract expires and is not renewed, or is assigned or is sold outright in conjunction with the contractor's business, the retiring contractor must consider whether there are any subcontractors operating under replaceable subcontracts. If there are, the Regulation mandates that as a condition of a sale and assignment of the replaceable contract, the contractor must require the buyer of the contract to either assume those obligations or offer a new replaceable subcontract to the subcontractor on

substantially the same terms and conditions. As with seeking the consent of the licence holder, this may limit the pool of possible purchasers.

In sum, retiring requires careful planning and consideration of the contractual obligations under the applicable contracts, the suitability of potential purchasers, and the potential impacts on the licence holder. If in doubt, or if an issue arises, it is always worthwhile to speak with a lawyer. Terminating or assigning a contract, including a replaceable contract, may not always be a simple process, but with sufficient preparation and due diligence it is entirely feasible.▲

Charles Bois has a diverse practice that focuses on the oil and gas, energy, mining and natural resources, Aboriginal, environmental, commercial, and construction and infrastructure sectors. In addition to his legal experience, Charles has over 20 years of business experience in the natural gas industry, including senior management and consulting roles.



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