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LABOR EFFECTS OF CORPORATE GROUPS IN CANADA

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Introduction

In Canada, the norms of capitalist legality are deeply entrenched. As a result, businesses are generally free to structure their affairs in any way that serves their interests. One of the most foundational norms is that each corporation has a distinct legal personality. Not only does this protect shareholders and directors from personal responsibility for the corporation's liabilities, but it also means that one corporation is not normally liable for the obligations of another corporation even though both corporations are owned and controlled by the same individuals.

Based on this legal framework, a common legal mechanism that businesses resort to is the creation of multiple related entities that have separate legal personalities, but serve a common business purpose or enterprise[145]. However, the norms of capitalist legality are not absolute and will be compromised in some situations in order to protect other social interests, including those of employees. So, while businesses can resort to this legal mechanism to avoid some forms of liability, Canadian law has responded to the deliberate fracturing of business enterprises by enabling employees, in certain circumstances, to bring claims for their entitlements against inter-related business entities.

Four preliminary notes are warranted before proceeding to the analysis of the specific questions at hand. First, Canadian law does not use the term "corporate group" and does not differentiate between correct or incorrect constitutions of corporate groups. However, Canadian protective labor and employment law uses the concepts of "related employer," "associated employer," or "common employer" to hold that in some circumstances, discussed in more detail below, inter-related corporations can be made jointly liable for each other's obligations. We use all of these terms interchangeably.

[145] It is impossible to provide statistical data about the prevalence of this technique because Canadian enterprises are not required to disclose or register with a governmental agency when they create multiple related entities.

Second, we have followed the structure of the questions as outlined. However, we have merged the first and second questions together to avoid repetitiveness. The way Canadian law is structured lends itself to answering these two questions concurrently and not separately.

Third, it should be noted that Canada is a federal state and, therefore, there is a federal employment law regime that covers the federal public sector and federally regulated private sector employers (about 10% of the labor force) and each province and territory has its specific employment law regime. Of course, we cannot provide a comprehensive overview of each jurisdiction in the space provided. The focus here will be on Ontario, but specific examples from the federal and other provincial regimes will be provided when appropriate. Fourth, the labor and employment law regime in each jurisdiction consists of three strands. Specifically, there are minimum employment standards legislation that set out the minimum entitlements that employees have a right to regardless of whether they are unionized or not. There are also collective bargaining regimes that govern unionized employment relationships. Finally, the common law (in Quebec, the civil law) governs all employment relationships that are outside of the collective bargaining context. Where necessary, we organize our answers in relation to each regime.

1. Is there a definition of corporate group or group of companies in your labor legal system? and 2. In your legal system, are there joint labor and Social Security liabilities between the companies of a valid corporate group?

In order to answer this question, we must consider each strand of the labor and employment law regime, as well as in regard to social security law.

Minimum Standards Legislation

Minimum standards laws cover such matters as occupational health and safety, employment discrimination and minimum terms and conditions of employment such as minimum wages, vacation entitlements and termination and severance pay. We focus on the Employment Standards Act, which addresses the latter set of entitlements[146].

Section 4(1) of the Employment Standards Act (ESA) recognizes the concept of a corporate group. Specifically, when there are multiple entities that carry on related or associated activities where the intent or effect of them doing so is to directly or indirectly defeat the intent and purpose of the ESA, they are deemed to be one

[146] SO 2000, c. 41.

employer. The determination of whether the "related and associated activities" requirement is met depends on whether "there is a functional interdependence amongst the business entities such that there is a complementary and integrated structure[147]". Some of the factors that have arisen in the case law interpreting the "related and associated activities" requirement include:

1. Common management or directing mind
2. Common financial control,
3. Common ownership,
4. The existence of a common trade name or logo,
5. The movement of employees between two or more business entities,
6. The use of the same premises or other assets by the entities,
7. The transfer of assets between them, and whether there is a common market or customers served by the two or more entities[148].

In addition to meeting the "related and associated" activities test, it is also necessary to prove that the intent or effect of the arrangement was to defeat the purposes of the ESA[149]. This requires that there have been particular interactions between the entities that go beyond common ownership and control[150]. The most common scenario in which the related employer provision will be satisfied is when a group of companies operates a single business.

If the requirements for section 4(1) of the ESA are met, section 4(5) deems all entities to be jointly and severally liable for all violations of the ESA, the associated regulations, and for the payment of any outstanding wages that arise under the ESA and the associated regulations.

Collective Bargaining

The Labor Relations Act (LRA) recognizes the concept of a related employer in the collective bargaining context. Specifically, section 1(4) of the LRA grants the Labor Relations Board (LRB) the discretion to deem multiple entities as one employer when: (1) these entities carry on associated or related activities whether simultaneously or not; and (2) there is a common control or direction between the entities. The LRB applies this section in a purposive manner, meaning it will not deem multiple entities as one

[147] Lian v Crew Group Inc., [2001] OJ No 1708 at para 48, 104 ACWS (3d) 1062.

[148] Ibid [numbering ours and citations omitted].

[149] As of the time of writing, the Ontario legislature is considering Bill 148 that would remove this requirement.

[150] Abdoulrab v Ontario (Labor Relations Board), 2009 ONCA 491, 178 ACWS (3d) 144.

employer if such deeming will weaken collective bargaining or undermine an existing collective agreement, but it will apply the section when doing so will support collective bargaining rights[151].

A declaration that a number of related employers are one employer allows a union to negotiate a collective agreement with the member of the group that has the central control of the corporate group and the agreement will be binding on all members of the group[152]. Further, a finding that a number of related employers are one employer renders a collective agreement with one employer binding on all members of the corporate group. Finally, a finding that related employers are one employer leads to the result that all of the employers are jointly and severally liable for any liabilities that arise from breaches to a collective agreement that is in force or any breaches of collective bargaining law[153].

Common Law

In Ontario, the common law recognizes a similar concept to corporate group through the related employer doctrine. The leading case on this issue is the Ontario Court of Appeal decision in Downtown Eatery (1993) Ltd. v Ontario[154]. To this extent, the Ontario Court of Appeal held that when there is a sufficient degree of common control between a number of entities, they can be treated as one employer. The determination of whether there is a sufficient degree of common control is case and context specific, but some of the factors that can be taken into consideration include "individual shareholdings, corporate shareholdings, and interlocking directorships[155]". As is the case under the ESA, the most common scenario for a successful related employer claim will be when a group of companies operates a single business. If the court is satisfied that the test has been met, employees are able to claim their common law entitlements against any related entity.

Social Security

In general, there is no obligation on employers to provide social security benefits to employees. To be sure, there are statutory schemes, such as the Employment Insurance

[151] For example, see: L.I.U.N.A., Local 1059 v John Hayman & Sons Co., [1984] OLRB Rep 822, 8 CLRBR (NS) 163; Carpenters & Allied Workers, Local 27 v Dobben Group Inc., [1996] OLRB Rep 57, 1996 CarswellOnt 4162 ["Carpenters & Allied Workers"].
[152] For example, see: Carpenters & Allied Workers, supra note 7.
[153] For example, see: Carpenters & Allied Workers, supra note 7; C.U.P.E. v Brantwood Manor Nursing Homes Ltd., 1986] OLRB Rep 9, 12 CLRBR (NS) 332.
[154] [2001] OJ No. 1879 at para 30, 105 ACWS (3d) 434 ["Downtown Eatery"].
[155] Ibid at para 30.

Act (EIA),[156] that impose an obligation on employers to deduct specific amounts from employee's wages to contribute to the insurance scheme. Employers must pay these deductions in addition to the premiums imposed on them to the Canada Revenue Agency. Under the EIA, employers are entitled to refunds in some circumstances. The concept of corporate group is relevant in this context because section 96 of the EIA allows associated employers to receive a refund payment that is applicable to one of the employers in the association. There is no provision for the government to collect unpaid premiums owed by one corporation from other corporations owned and controlled by the same individuals.

The concept of associated employers also arises under other social security insurance schemes. In Ontario, for example, the Workplace Safety and Insurance Act (WSIA) sets out varying tiers of premiums that employers have to pay.[157] If there is an association of employers, meaning there are a number of entities that operate for a joint purpose, and the employees of one of the entities perform ancillary tasks to the others and these tasks have higher premiums, all employers in the association to whom the ancillary work is performed have to pay the higher premium rate vis-à-vis these employees.[158] Understood this way, the WSIA creates joint obligations for associated employers. Section 141 of the WSIA also imposes joint liability on contractors and subcontractors, in certain industries, for the payment of premiums. Thus, when an employer hires a contractor to perform certain tasks and the contractor hires employees, the principal employer and the contractor are both liable for the reporting and payment of the premiums[159].

3. Are there cases in which there is joint liability of the companies of a group with respect to labor and Social Security obligations of other companies of the group? That is to say, what labor consequences derive from the incorrect constitution of a corporate group or group of companies?

As mentioned in the introduction, there is no concept in Canadian law of a correct or incorrect constitution of a corporate group. The only question is whether a group of associated companies is operating in such a manner as to attract joint liability for each other's employment obligations.

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[156] SC 1996, c. 23.

[157] SO 1997, c. 16.

[158] For example, see: Decision No. 2124/09 (17 December 2009), online: WSIAT <http://www.wsiat.on.ca/Decisions/2009/2124%2009.pdf>.

[159] For example, see: Decision No. 2440/05 (16 February 2006), online: WSIAT <http://www.wsiat.on.ca/Decisions/2006/2440%2005.pdf>

However, even if corporations are not found to be related, commercial and corporate law may, in certain circumstances, protect employees against the consequences of certain inter- or intra-company transactions.

For example, Canadian law deals specifically with the issue of fraudulent conveyances. In Ontario, section 2 of the Fraudulent Conveyances Act deems as void any conveyance of property that is executed with the intention of defrauding creditors.[160] Thus, if employers transfer funds to any other entity or person with the intention of evading liability for the payment of entitlements to employees, the transfer of funds is deemed to be void and the employees can make a claim against the transferred funds[161].

Another example is the oppression remedy in corporate law. The oppression remedy allows creditors of a corporation, which include employees, to apply for judicial review of corporate restructuring that is oppressive or unfairly prejudicial to the interests of creditors.[162] There is no requirement to prove an intention to defraud creditors, but simply that the restructuring has the effect of being oppressive or unfairly prejudicial to creditors.[163] If such circumstances are present, courts have the authority to issue orders of rectification that would remove the oppressive or unfairly prejudicial elements of the restructuring.[164] Therefore, there are limitations on how employers can restructure their corporations – they cannot do so in a way that is oppressive or unfairly prejudicial to the entitlements of their employees.

4. What are the labor effects of the fact that a worker provides services for more than one company of the group? What are the labor effects of contractual or commercial relationships between companies of the group, such as loans, financing agreements or cash pooling? And transfer pricing policies? And the development of management functions by a company of the group with respect to another company?

In general, the factors listed in this question are relevant to the determination of whether businesses in a group will be treated as related employers. If the companies are related employers then they will be jointly liable for the labor and employment obligations of each other.

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[160] RSO 1990, c F-29.

[161] For example, see: McFadden v 481782 Ontario Ltd., [1984] OJ No 3268, 26 ACWS (2d) 200.

[162] For example, Ontario Business Corporations Act, RSO 1990, c B. 16, s 248 [“OBCA”].

[163] Downtown Eatery, supra note 10 at para 56.

[164] For example, OBCA, supra note 18, s 248.

If the presence of these factors does not make them related employers then the fact that an employee simultaneously provides services for more than one employer will not create any joint liabilities. The rights and obligations of the employee are determined vis-à-vis each specific employer. Similarly, if an employee provides service successively to two different companies within the group of companies, there will be no continuity of service. The situation will be exactly the same as if the employee ended employment with one company and then started employment with a company that had not relation to the first.

5. How are working conditions of the workers hired by companies of a group of companies determined? In particular, is there a principle of equal treatment between workers of the different companies of the group?

The fact that a group of employers is considered to be one employer does not have any effect on the substantive content of employee entitlements. These are determined in the context of each employer. There is no principle of equal treatment of employees between employers in the same corporate group in Canada.

6. Is it possible to adopt a collective bargaining agreement applicable to all companies of the group? Can collective bargaining agreements at company level also exist? In this case, what agreement will be applicable, the industry-level, the group-level or the company-level collective agreement?

The starting point of Canadian labor law is that the level of bargaining is determined by the level of certification. That is to say, that under Canadian labor law, a union acquires bargaining rights by applying to the labor board to be the bargaining representative of a group of employees in a bargaining unit approved by the board. Under Canadian law, bargaining units are usually based on the enterprise, which accepts the corporate structure of the employer. Thus normally the board will identify a single corporate entity as the employer notwithstanding that the corporation is part of a larger group.

There are two ways that the level of bargaining can change. First, the parties may jointly agree to bargain at a different level than the level of certification. Thus, there is nothing to prevent the parties from agreeing voluntarily to bargain at the level of the group of companies or at the industry level. But this is rare in Canada.

The other way for the level of bargaining to change is through a related employer application under s. 1(4) of the LRA, discussed in the answer to questions 1 and 2. While it is possible for a related employer application to succeed with respect to a group of related companies, it could not succeed with respect to a group of companies who

operate at arms length from each other. Such an application could neither be used to enable employees of a company at the bottom of a supply chain to bargain with the lead firm, nor to have industry-wide bargaining imposed.

As discussed above, the LRB will not issue a section 1(4) declaration if doing so will undermine collective bargaining. For example, if an employer made an application for a related-employer declaration for the purposes of enlarging the bargaining unit at the time of certification to reduce the possibility of a union obtaining majority support, the Board would be reluctant to grant the application.

7. What are the consequences of the integration of a company into a corporate group or group of companies in the context of redundancies? In particular, to prove the grounds for the redundancy, does the regulation take into account the situation of the group or only the situation of the company in question?

For the purposes of answering this question, we are assuming a situation in which the company that is terminating employees is a related employer for the purposes of the ESA and the common law. If a group of companies are not legally related employers, then their legal relation has no legal consequences for the purposes of redundancies.

It is helpful here to consider each legal regime and the provisions it makes for redundancies. It will be recalled that the ESA establishes minimum standards for both unionized and non-unionized employees. It provides minimum notice and severance entitlements in the event of a termination of employment where there is no cause for summary dismissal without notice. With respect to termination, the amount of notice or pay in lieu of notice is determined by the length of employment. In a related-employer context, the duration of employment would be calculated from the date of hire by one of the related companies. Severance too is calculated on the basis of the duration of employment, but not all employees are entitled to severance. The ESA limits severance to employees who have been employed by the same employer for five or more years and the employer must have a payroll of more than $2.5 million. In this context, the related employer provision may help establish both the requisite seniority and the size of payroll since that will be calculated on the basis of the combined payroll of all the related employers. Finally, if an employee is terminated by a company that is a related employer, all the related employers are a single entity jointly responsible for the ESA liabilities owed to that employee.

In the common law context, notice entitlements are based on a number of factors, one of which is years of employment. Thus, a finding that employers are related may be relevant to determining the notice period. As well, related employers are jointly liable

for notice payments owed by each other and so this will improve the ability of a terminated employee to collect the notice payment that the employee is owed.

In the collective bargaining context, apart from ESA notice entitlements provided by statute, agreements may provide workers with additional protections in the context of economic lay-offs. The most common protection is that lay-offs are to be by seniority, but some agreements impose substantive restrictions on the employer's right to lay-off workers by, for example, requiring the employer to demonstrate economic exigency. In a related employer scenario, it may be necessary to consider the economic resources of all the companies that are related employers.

8. Who are the negotiating partners within the framework of a redundancy? Are they employers' and workers' representatives from the particular company or from the parent company?

The only relevant parties are the specific employer and the employee/union. The corporate group does not play any role in the context of redundancy, but are liable for the provision of entitlements if the specific company does not provide them to the employee.

9. In the event of a redundancy, is there an obligation to relocate to another company of the group the employees affected by such redundancy?

No unless the employment contract or the collective agreement specify otherwise. Minimum standards legislation do not impose such a requirement.

10. What is the effect of calling a strike in a group company? Could the other companies of the group contract with a third company to replace the services provided by the company on strike?

In Ontario, the LRA does not prohibit an employer from hiring replacement employees in the event of a strike. Therefore, there is no need for other members of the corporate group to hire replacement employees, but there is no legal prohibition them on doing so. Ontario is representative of all Canadian provinces, except British Columbia and Quebec where employers are prohibited from hiring replacement employees during a lawful strike[165]. In British Columbia, employers are also prohibited from relying on another party to employ replacement employees, meaning they cannot rely on a member

[165] Labor Relations Code, RSBC 1996, c 244, s 68 ["Labor Relations Code"]; Quebec Labor Code, c 27, s 109.1 ["Quebec Labor Code"].

of the corporate group to do so[166]. In Quebec, employers are also prohibited from utilizing the services of an employee hired by another employer, meaning it is not possible to rely on another employer in the corporate group to hire replacement employees[167]. At the federal level, employers can hire replacement employees, but cannot use such employees for the “purpose of undermining a trade union’s representational capacity rather than the pursuit of legitimate bargaining objectives[168]”. There is no need, therefore, for federally regulated employers to rely on other employers in the corporate group to conduct such hiring.

The other consideration is with respect to sites of lawful picketing. Under Canadian law, normally a union is limited to picketing at the site of employment and could be prevented from picketing elsewhere, including the premises of other companies that continue to do businesses with their employer. However, if those other businesses were related employers, then their sites of work presumptively would be legitimate targets. Otherwise, picketing would only be permitted against another company, including a company that was part of the same group as the struck employer, if that company had become an ally of the employer, by for example allowing struck work to be transferred and performed on its premises.

11. Other relevant matters concerning corporate groups or groups of companies

As noted in the introduction, Canadian law embraces the principle of corporate personality and does not require groups of companies to register as such or prospectively impose joint liability for labor and employment obligations. However, it does permit workers to apply to courts and tribunals to have groups of companies declared to be related employers and thereby become jointly liable for the employing corporation’s employment obligations. However, the law limits the circumstances in which related employer declarations will be issued so that the fact of common ownership and control is not sufficient. As a result, applications are most likely to be successful where a group of corporations operate a single business, where one corporation exercises effective control over another, or where transactions have occurred between corporations in the group that have the intent or effect of depriving workers of their legal entitlements.

References and judicial decisions

See footnotes.

[166] Labor Relations Code, supra note 21, s 68(1)(d).
[167] Quebec Labor Code, supra note 21, s 109.1(b).
[168] Canada Labor Code, RSC 1985, c L-2, s 94(2.1).