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TOPIC 2
LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

Productive Decentralization
Labour and Social Security Law in Canada

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1. General

Please indicate if in your country there is a trend toward increased productive decentralization of enterprises as described above. If there is such a trend,

a. which are the most current forms of productive decentralization;
b. if possible, present cases of companies operating in your country according to a productive decentralization strategy. What does the principal company typically keep under its direct control and what does it delegate/outsource to affiliated/subsidiary/partner companies? Are the latter enterprises independent of the principal company or they are controlled by it;
c. can you assess the impact of this strategy on individual labour relations;
d. can you assess the impact of this strategy on collective labour relations?

In Canada, the temporary work agencies have taken on a more important role in the contemporary labour market.[1] Privatization of government services, which involves contracting out services previously operated by the government and work performed by government employees, has ebbed and flowed since the 1980s, but

* The response to this questionnaire was submitted on December 8, 2005.
[1] Leah Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto, 2000).

over all it has increased.[2] Outsourcing is a strategy frequently used in both the public and private sectors. It is particularly prevalent in the manufacturing sector, where parts are often outsourced. In general, four types of activities – administrative support, financial, computer, and food – generally tend to be outsourced. In the majority of cases, the firms to which the work is outsourced are independent; however, they are less likely to be unionized than the firms that outsource the work.[3]

In Canada, large telecommunications firms have contracted out support services such as building maintenance, in-house printing, and cafeteria work. These firms have also tended to transfer order processing and accounts to subsidiaries whose employment systems (wages and working conditions) became very differentiated and disassociated from the parent. Alcan (a large aluminium smelter) sold off downstream business to focus on aluminium smelting and production of basic products; Inco, a large nickel mining and refining company, divested itself of a battery factory, and contracted out many tasks that were conducted "in-house". Canada Post, the Crown corporation that has an exclusive privilege to deliver letter mail, privatized many retail outlets using franchising agreements. [4] Air Canada (Canada's national airline) transferred customer-handling services to travel agencies.[5] The upshot of these kinds of changes has been a contraction in the size of the unionized workforce, lower wages for the work that was contracted out, and a weakening of seniority rights for promotion, transfer, layoff and recall for the workers who remained in the core enterprise. Productive decentralization is contributing to the decline of the standard employment relationship, and its typical package of benefits, in Canada.[6]

General matters relating to Canadian labour and employment law

There are two distinctive features of employment/labour law in Canada; the first is the constitutional division of powers regarding employment and labour-related matters, and the second is that different regimes of labour law apply to employees who are not covered by a collective agreement and employees who are covered by a collective agreement.

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[2] Gene Swimmer, ed., *Public Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills; Oxford, 2001).

[3] Patrice Jalette, "Subcontracting in the Manufacturing Sector: A Quebec Ontario Comparison" (2003) 6:4 *Workplace Gazette* 73-86.

[4] For a series of firm-level case studies (both of private and public sector firms) that touches upon aspects of productive decentralization and their impact on individual employment and labour relations see Anil Verma and Richard P. Chaykowski, eds., *Contract & Commitment: Employment Relations in the New Economy* (Kingston: Industrial Relations Centre Press, 1999).

[5] Vivian Shalla, "Technology and the Deskilling of Work: The Case of Passenger Agents at Air Canada" in Ann Duffy, Daniel Glenday, and Norene Pupo, eds., *Good Jobs, Bad Jobs, No Jobs: The Transformation of Work in the 21st Century* (Toronto: Harcourt Brace, 1997) 76.

[6] René Morissette and Anick Johnson found that the median hourly wages of male workers aged 25 to 64 with 2 years or less seniority fell 13 per cent between 1981 and 2004. For women, who started from a lower median hourly wages in 1981, their median wage only dropped by 2 per cent. They explain that "analyzing the evolution of wages of newly hired employees is important since changes in wage offers for new hires are an important channel through which Canadian firms may respond to growing competition within industries from abroad. More intense competition in the product market could induce some companies to reduce their labour costs by cutting wages offered to newly hired employees, while maintaining or increasing wages of workers with greater seniority. Such changes may indicate fundamental changes in the employer-employer relationship that could affect the quality of Canadian jobs in the years ahead." They also discovered that Canadian employers have responded to the changing environment not only by reducing their wage offers for new employees, but also by offering temporary jobs to an increasing fraction of them. R. Morissette and A. Johnson, *Are Good Jobs Disappearing in Canada?* Research Paper Series, Analytical Studies Branch, No. 239, Statistics Canada, January 2005, 11-13.

Labour relations in Canada are divided between the federal government, the (ten) provinces, and (three) territories. The provinces and territories have jurisdiction over employment and labour relations matters since such matters are characterized as pertaining to property and civil rights, which is under provincial jurisdiction. The federal government has authority to enact labour legislation that relates to undertakings that are under federal authority under the constitution, such as banks, telecommunications, railways, aviation, telecommunications, and shipping. Although labour standards legislation (which imposes minimum terms and conditions of employment) and labour relations legislation (which provides a procedural mechanism to assist employees in associating in trade unions for the purpose of collective bargaining) in most jurisdictions are similar in many respects, there are important differences in detail and emphasis. The response to this questionnaire will refer primarily to the legislation in Ontario, the jurisdiction with the largest number of employees, and also to Quebec, which is the only province in Canada that has a civil code instead of the common law, when there are important points of contrast. Occasional reference will be made to legislation in other jurisdictions in Canada.

Employees who are covered by a collective agreement have no access to common law actions relating to employment or to the ordinary courts, and they must pursue all of their complaints relating to terms and conditions of employment (or termination from employment) in relation to the collective agreement and via grievance arbitration. Grievance arbitration is the mechanism mandated by labour relations statutes for resolving all disputes relating to employees who are covered by a collective agreement. Unions have carriage of grievances and, along with employers, control the grievance process. Unions are under a statutory obligation to fairly represent the employees who are covered by the collective agreement regardless of whether or not they are union members. In Canada, union representation and collective bargaining typically take place at the level of the workplace, not at the level of the employer or of the industry. Employer-level union representation and collective bargaining is more likely in the federal jurisdiction than in the provinces and territories, and multi-employer union representation and collective bargaining are rare.

All employees, whether or not they are covered by a collective agreement, are entitled to the benefits of labour standards legislation. However, in Ontario, an employee who is covered by a collective agreement must pursue all complaints regarding employment standards legislation through grievance arbitration.[7]

Problems relating to Multiple Employing Entities

Identifying the employer for the purposes of employment and labour-related responsibilities in situations outside of a simple and straightforward bilateral employment contract can be very complex. There are two main sources of this complexity: the freedom of entrepreneurs to structure their business enterprises as they see fit and the plurality of different legal contexts and legal norms that make up the broad field of employment and labour law.

The entrepreneur is free to determine the organisational structure of the business enterprise, giving her or him considerable freedom in law and practice to determine a firm's boundaries. An enterprise can be organised as a large vertically integrated firm, through a series of contracts with independent firms, or through a number of subsidiary corporations that correspond to different aspects of production.

[7] *Employment Standards Act, 2000*, S.O. 2000, c.41.

This freedom and flexibility leads to a myriad of ways of contracting workers' services for the enterprise. However, even though the entrepreneur has the initial freedom to organise the business enterprise, the parties' agreement does not simply dispose of the issue of identifying the employer.

The second source of complexity is that the legal question of employer status can arise in a number of legal contexts for a range of different purposes. This legal pluralism complicates the process of attributing responsibility for employment-related obligations in situations in which there are multiple employing entities.

Labour regulation occurs at different levels and is multi-dimensional, serving a variety of instrumental goals and responding to different normative concerns. There are two levels at which norm making or contracting takes places within work relationships.[8] Moreover, for the purpose of delineating the scope of labour protection, it is useful to identify three dimensions of labour regulation. First, there is a social justice dimension, which includes human rights concerns (for example, anti-discrimination law and pay and employment equity) and occupational health and safety regulation. These laws operate at the relational level of contracting and they are grouped together because they primarily respond to widely held social norms to the partial exclusion (at least normatively and rhetorically, if not practically) of economic concerns.[9] The second dimension is economic exchange and governance, which includes employment standards and certain common law duties such as implied notice upon termination, as well as the laws regulating collective bargaining. However, because this grouping operates at both the executory and relational levels of contracting, its components might require separate treatment. The third dimension of labour regulation encompasses social wage and social revenue, including employment insurance, public pensions, workers' compensation, and income tax. Although historically underdeveloped in the context of Canada and the United States, social wages and revenue are vital both to workers' well-being and to the operation of labour markets, since social wages provide a baseline on which labour-market exchange occurs. Operating at the relational level of contracting, this dimension of labour regulation is very much influenced by often competing claims of social justice and economic policy considerations.

In Canada, a variety of institutions administer the different dimensions of labour regulation, and several are involved in adjudicating whether or not an entity should be legally responsible for employment-related obligations. Human rights and pay equity tribunals (which may or may not be separate, depending on the jurisdiction) decide which entity bears social justice obligations in employment. However, it is typically the labour relations board (which primarily deals with matters relating to economic governance) that resolves disputes relating to identifying an employer for the purpose of occupational health and safety issues. Labour boards devote the greatest part of their attention to collective bargaining matters involving union recognition, the process of collective bargaining, and the use of strikes and lockouts. Some boards also have the authority to review the decisions of officials regarding minimum standards legislation. Courts are also involved in matters of economic governance; they have exclusive jurisdiction over individual employment

[8] The executory level is concerned with the basic exchange of services for remuneration, while the relational level is more focused on security of expectations. For workers these are expectations about income and employment security and occupational health and safety, while for employers these expectations centre on how to insure that workers' activities will help achieve employers' goals.

[9] While it is possible to include under the rubric of social justice matters related to economic unfairness and the democratic deficit in work relations, this view is not widely accepted in Canada and the United States. For this reason, it is necessary to discuss regulations designed to address economic unfairness and the democratic deficit in relation to other norms as well as in relation to social justice.

contracts, but they have almost no direct access to collective bargaining matters, except for the application of tort (and, occasionally, criminal) law to strike-related activities. Instead, private grievance arbitration is the legislatively required mechanism for resolving disputes relating to collective agreements. By contrast, in the broad area of social wage and social revenue, many of the disputes involving the attribution of responsibility for employment are resolved in the tax courts. Adjudicators who sit on these different tribunals deal with different caseloads and operate in different legal contexts with different policy objectives, and they are subject to different standards of judicial review.

Given the diversity of goals in these different dimensions of legal regulation and the different institutions involved in making decisions, it is not surprising that the attribution of responsibility for employment-related obligations depends upon the legal context in which the case is situated. Canadian courts have been developing techniques for addressing the problem of attributing employment-related responsibility amongst multiple employing entities. There are also provisions in employment and labour-related legislation that deal with aspects of the problem of identifying the employer in specific contexts, such as a sale of a business or undertaking. However, so far, the approach developed by courts (and legislatures) to the problem of attributing responsibility for the obligations of employment in situations involving multiple-employing entities is *ad hoc* and haphazard. It is not clear what approach courts are taking to this issue from one legal context to another or the extent to which contractual norms will be used to interpret remedial legislation.[10] Sometimes courts use a functional approach to impose responsibility on a group of entities for employment-related obligations. Other times courts invoke a contractualist analysis to limit attributions of responsibility for employees to the employing entity with which the worker has a contract.

In Canada, who the employer of an employee depends upon the context in which the question is put, the jurisdiction in which the question is posed, the legal test invoked, and the factual circumstances involved. This creates a high degree of uncertainty regarding which entity amongst multiple employing entities is the employer.

2. Groups of companies and unity of enterprise

Please indicate if under your national law or case law it is possible to consider that a principal company and its contracting affiliates, subsidiary companies or partners must be treated as if they were a single enterprise for the purpose of the application of labour and social protection law. If it is possible, please indicate the criteria on the basis of which such a decision can be reached and the legal effects which would follow.

General

In Canada, the only way that a principal company and its contracting affiliates, subsidiary companies, or partners can be treated as a single enterprise (a single employing entity) is if they are declared to be an "associated, common, or related" employer. The concept of associated, common, or related employer modifies the traditional binary model of the employment contract in order to recognize

[10] See for example *Lian J. Crew Group Inc.* (2001), 54 O.R. (3d) 239 (Cumming J.), which is discussed in Part III of this paper.

interconnected corporate groups or consortiums as a single employing entity. The effect of declaring employers to be related is to trump privity when it comes to the employment contract or collective agreement and to lift corporate veils. Related employers are jointly and severally liable for employment-related obligations owed to employees.

Common Law

At common law, courts have developed two approaches to the problem of multiple employing entities.[11] In one strand of cases, they have used the traditional tests for identifying the employer and imposed liability on *one* employer in situations in which a group of interconnected corporations own and operate an enterprise.[12] This method preserves the separate legal personality of each corporation and respects the notion of a bilateral contract. In the other strand of cases, courts impose responsibility jointly and severally among the different corporations, sweeping aside corporate veils in situations in which an enterprise is conducted through a series of corporations that are commonly owned. In these cases courts are developing a notion of common employer, a concept that is similar, if not equivalent, to the statutory notion of associated or related employers.[13] The Ontario Court of Appeal has indicated its willingness to move away from a rigid bilateral understanding of the employment contract and a simple identification of the employer with the direct or immediate corporate employer in the context of interconnected corporate enterprises. Increasingly, courts recognize that affiliated corporations, although separate legal persons, can share the functions and responsibilities of an employer and they have imposed joint and several liability on these common employers.[14] Typically this occurs when there is both common ownership of the group of corporations and there is some integration of their different functions in a common enterprise.

Although both employment standards and labour relations legislation are part of the broad area of economic governance, the former is primarily concerned with the executory level of contracting (minimum terms and conditions of employments for all employees), whereas the latter is concerned with the relational level (representation and collective bargaining rights for unionized employees).

Employment Standards Legislation

Employment standards legislation imposes liability on separate legal entities if they are related or associated. The related employer provision in employment standards legislation typically arises in the context of a termination complaint brought by an employee who is claiming wages, notice, and severance owing and most frequently involves an insolvent direct employer.[15] The definition of related employer in minimum employment standards legislation from jurisdiction to jurisdiction.

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[11] Initially the test for identifying the employer emphasized the entity's control over the employee. However, in *Pointe Claire (City) v. Quebec (Labour Court)* [1997] 1 S.C.R. 1015, the Supreme Court of Canada adopted a comprehensive test to determine which entity was the employer.

[12] *Bagby v. Gustavson International Drilling Company (1981) 24 A.R. 181 at 199.*

[13] *Downtown Eatery (1993) Ltd. v. Ontario,*(2001) 8 C.C.E.L. (3d) 186 (Ont. C.A.)

[14] *Jones v. CAE Industries Ltd.* (1991) 40 C.C.E.L. 236 (Ont. Gen. Div.); *Kroll v. 949486 Ont. Inc.* (1997), 34 C.C.E.L. (2d) 78 (Ont. Gen. Div); *Jakl v. Russell Tire & Automotive* Centre (1999) Inc., [2005] O.J. No. 88

[15] A claim for common employer status also arises in situations in which an employee is claiming severance pay, which requires that the employer have a minimum size workforce or payroll, and in situations in which the employee wants to accumulate employment service through related employers for the purpose of notice and severance.

In 1987 the basis for imposing responsibility for employment obligations via the statutory related employer provision in Ontario was expanded.[16] The relationship of the associated or related employer to the "principal employer", rather than the relationship of the entity to the employee, became the source of the liability under the revised definition. The related employer provision has been described as

> a deep-pocket" provision in cases of insolvencies, to hold companies, individuals, firms, syndicates, or associations carrying on related activities, businesses, works, trades, occupations, professions, projects or undertakings, accountable as one "employer". It is also intended to prevent employers from "hiving off" parts of their businesses into separate operations to avoid the 2.5 million dollar severance pay threshold.[17]

Moreover, the 1987 amendments changed the related employer provision from a discretionary power (as it remains under the *Labour Relations Act* which covers matters pertaining to collective bargaining) to a "general deeming" provision that does not allow discretion on the part of decision-maker if the requirements of the section are met.

In the first decision under the 1987 related employer provision, Referee Brown commented upon the scope of the changes:

> [t]he overall effect of the amendment was to expand the parameters of section 12…. It is made clear that an employee does not have to be employed by both companies but it is sufficient if he or she is an employee in any of the companies. The activities of the companies no longer have to be carried on under common control or direction but the intent or effect of the arrangement has to be to defeat the true intent and purpose of the Act. Finally, liability is now joint and several rather than merely individual. [18]

He interpreted the deletion of the requirement of common control and direction as meaning that the requirement that the businesses be associated or related became "more expansive in scope and a more critical focus of inquiry."

Despite the elimination of the requirement that the entities be under common direction or control, common control continues to figure as a prominent feature in related employer determinations, and it is "attributed significant weight" both by adjudicators and by the Ministry of Labour.[19] Referees, who were the first line of appeal under the *Employment Standards Act* until the mid-1990s (now that work is performed by the Labour Relations Board), looked to common control in determining whether entities were related or associated. Common management, control, and ownership became the most important factors considered in determining whether or not entities are associated or related, although adjudicators also looked for: the existence of common trade name or logo; movement of employees between two or more entities; use of the same assets by two or more entities, or the transfer of

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[16] Section 12. (1) Where before or after this Act comes into force, associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings are or were carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, and a person is or was an employee of any of such corporations, individuals, firms, syndicates or associations, or any combination thereof, such corporations, individuals, firms, syndicates or associations or any combination thereof, shall be treated as one employer for the purposes of this Act, if the intent or effect of the arrangement is to defeat, either directly or indirectly, the true intent and purpose of this Act.
(2) The corporations, individuals, firms, syndicates or associations treated as one employer shall be jointly and severally liable for any contravention of this Act and the regulations. (S.O. 1987, s.30, s. 3(1)(2)).

[17] *Employment Standards Act* 2000, Policy and Interpretation Manual, 2004 Release (Thomson Carswell).

[18] Re. *Refac Industrial Contractors Inc.* [1990] O.E.S.A.D. No. 83 (Brown) at 26.

[19] *Common Allied Conveyers Ltd*., [1992] O.E.S.A.D. No. 26 (Wacyk), p.5. Also see *Employment Standards Act* 2000, Policy and Interpretation Manual, 2005 Release at 7.31.

assets between them; and common market or customers served by the two or more entities.

The requirement that there be an arrangement – the intent or effect of which is to defeat the intent or purpose of the Act – was also interpreted by referees in a manner that limited the scope of the related employer provision. "Arrangement" was interpreted as requiring a "voluntary, deliberate action." [20] The effect of this interpretation is to allow adjudicators some discretion in applying what was drafted as a mandatory provision designed to spread the costs of wages and termination among related employers.

The first judicial interpretation of the related employer provision adopted a narrow approach, importing corporate law notions to restrict the remedial scope of the provision. *550551 v. Framingham*[21] involved a furniture manufacturing and selling business – organized through a number of separate corporate divisions – which employed over four hundred people. The corporations were all owned and operated by two holding companies, the only shareholders of which were two human beings. The manufacturing arm of the enterprise went bankrupt, owing its employees over $4 million in wages and notice and severance payments. The employment Standards Officer declared all of the corporations, as well as Silver personally, to be related employers. The related employers appealed the order directly to the divisional court, which upheld the Officer's finding that all of the companies were related employers. However, the Court overturned the order holding the sole shareholders jointly and severally liable in their personal capacity.[22]

The related employer provision has proven to be useful for holding vertically and horizontally integrated businesses that are under common control (that is, ownership) jointly and severally liable for employment standards. In fact, the courts are developing an analogous concept in the common law. However, the related employer provision in the *Employment Standards Act* has not been used to impose joint and several liability in situations in which managerial power is distributed amongst different entities that are not under common control (such as subcontracting, temporary agencies, etc.). In these situations, adjudicators default to the traditional bases for attributing responsibility, and in doing so they claim to be deferring to the legislature since it is the appropriate institution to remedy the problem.

Collective Bargaining Legislation

The related employer provision in the *Ontario Labour Relations Act* was intended "to cure the mischief that results from being unable to properly define and tie down the employment relationship."[23] According to the Ontario Labour Relations Board, which has the exclusive authority to interpret and apply the provision,
the goal of the provision is to ensure that the institutional rights of a trade union,

[20] *Re Avant Lithographics*, E.S.C. 2868 (1991) (Gray).

[21] (1991) 44 O.R. (3d) 571 (Ont. Gen. Div.)

[22] When the *Employment Standards Act* was revised in 2000, the common employer provision was specifically amended to enshrine the judicial interpretation of the related employer provision that the joint and several liability for common employers does not mean that shareholders are personally liable, even if there are only one or two shareholders who own and operate the corporation. The *Employment Standards Act, 2000 (ESA 2000)*, S.O. 2000, c. 41, s. 4(4) provides that "subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership." However, the *ESA 2000* does provide in Part XX for directors to be held personally liable for up to six months' wages and it also provides in Part XXV that directors can be prosecuted. But director's liability does not include liability for termination and severance pay.

[23] *Industrial-Mine Installations Ltd*., [1972] O.L.R.B.Rep. Oct. 1029 at 131.

and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights.[24]

Although the general purpose of the common employer provision in the employment standards and labour relations statutes is the same – to look beyond the legal form of the entity to the economic substance of the enterprise in attributing employer status – the specific purpose of the common employer provision in the *Ontario Labour Relations Act* is very different from that of the provision in the *Employment Standards Act.* The purpose of the common employer provision in the *Employment Standards Act* is to spread responsibility for employees' wages amongst a group of related entities to ensure that employees obtain the benefit of labour standards. By contrast, the common employer provision in the *Ontario Labour Relations Act* is designed to ensure the integrity of the collective bargaining process; not to provide for a deep pocket.[25] This difference in aim helps to explain the different definitions of, and approaches to, the concept of related employers in the two statutes.

Under the *Ontario Labour Relations Act*, the question of related employer status is typically raised by a union when it applies to be certified as the exclusive bargaining representative on behalf of a group of employees. In making a certification application, the union must identify the employer and the appropriate bargaining unit of employees from which it must obtain a mandate (majority support of the affected employees) in order to represent them.[26] The question is also raised by unions in situations in which a union fears that the employer has restructured the enterprise or outsourced activities in order to avoid collective bargaining obligations, and in these situations it is often accompanied by a successor employer application and sometimes involves an unfair labour practice complaint. These situations not infrequently involve insolvent employers. Once the labour relations board has found that related entities are common employers it has the discretion to grant a wide range of relief, including a declaration that the entities are to be treated as one. The effect of a declaration is to treat the related entities as one entity for the purposes of the *Ontario Labour Relations Act,* and all of the entities are bound by the collective agreement (if there is one).[27] The board has the discretion to refuse to issue a declaration or to provide a remedy, even if it finds on the facts that the entities constitute related or associated employers.

There are three components to the board's determination of whether or not entities are common employers: there must be more than one entity; the entities must be associated or related and under common control and direction; and there must be a labour relations reason for declaring the entities to be related employers. The first component is easy to establish; the board is clear that the entities do not have to be legal or corporate entities. Although the factual situations in which the

[24] *Brant Erecting & Hoisting and Ironworkers' District Counsel of Ontario (Re).*,[1980] O.L.R.B.Rep. July 945 and 948.

[25] J. Sack, C. M. Mitchell & S. Price, *Ontario Labour Relations Board Law and Practice*, 3rd ed. (Markham, ON: Butterworths, 1997), 6-63.

[26] The onus is on the party seeking the related employer declaration to establish not only that the related and associated entities are under common control but that the Board should exercise its discretion and issue the declaration; however, since 1975 the responding parties are under an obligation to adduce evidence of the nature of their relationship (see s. 1(5) of the *Ontario Labour Relations Act, 199*5).

[27] For a discussion of remedies associated with a common employer declaration, see G.W. Adams, *Canadian Labour Law*, 2nd ed. (Aurora, ON: Canada Law Book, 2004), 8-38-38.1.

board has to determine whether entities are common employers are very diverse and often complex, the approach that the board has developed to the two other components is clearly articulated and rooted in the purpose of the provision – which is to ensure the integrity of collective representation and bargaining.

The factors that are used to determine whether or not the entities are related are also used to determine whether they are under common control and direction.[28] The Board has stated that entities are related or associated where their activities are of the "same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and carried on for the benefit of related principals."[29] What is crucial is the extent to which the operations are functionally integrated, and to determine this the Board looks to the following factors: sharing premises; the interchange of employees performing similar work for other companies; common solicitors and accountants; common payroll and invoicing procedures; an overlap of managerial personnel or principals; and a shared trademark. In determining whether the related entities are under common control, the Board looks to whether there is: common ownership or financial control; common management; interrelationship of operation; representation to the public as a single, integrated enterprise; and centralized control of labour relations.[30]

The labour board's approach to the question of whether entities are related and under common control is very flexible. The related employer provision is designed for situations where there is a common management despite the fact that multiple legal entities are involved in the enterprise. Common ownership and financial control can be crucial factors in situations involving integrated interconnected corporate enterprises. However, if the day-to-day management of the two enterprises is the same, although they are owned by separate entities, this close functional integration is sufficient. In interpreting and applying the related employer provision in the *Ontario Labour Relations Act,* the board considers both the relationships amongst the entities which are involved in the enterprise and the relationships between the entities and the employees. In considering the relationship between the entities, the board gives more weight to common control and direction that is managerial in nature than ownership and financial control.[31]

The labour board is able to adopt a flexible and functional approach to the question of whether related entities are under common control because it has the explicit discretion to grant relief. In exercising its discretion the board has stated that a sound labour relations purpose must be advanced by the issuance of a s.1(4) declaration. In deciding whether or not to exercise its discretion the board considers: if it is necessary to protect and preserve established bargaining rights; whether it would in fact weaken collective bargaining structures or undermine the scheme of the Act; whether meaningful collective bargaining requires the consolidation of employer functions performed by different entities, or the identification of the real locus of economic power; whether the union is attempting to extend its bargaining rights, as opposed to simply preserving existing ones; the employees' wishes; whether the union acted with due diligence to safeguard its bargaining rights against erosion; and whether the employees of the related employer already represented by another

[28] *Ibid.*, pp. 8-33
[29] *Ibid.*, pp. 8-33
[30] *Walter Lithographing Company Ltd.,* [1971] O.L.R.B. Rep. July 406.
[31] Sack, Mitchell & Price at 6.55-6.58.

trade union which has had a long and stable relationship with the employer.[32] The Board summed up its "jurisprudential approach" in the following terms:

> The Board's case law reflects the fact section 1(4) provides the flexibility to make collective bargaining viable in the face of a spectrum of commercial and organizational arrangements through which business activities are carried on and work is performed. Among other things, it may stabilize the labour relationship by facilitating bargaining rights which flow through sequential or contemporaneous corporate structures. In some circumstances, it may prevent negotiations from turning into an elaborate fiction by bringing the real locus of power into the appropriate form. Where employer functions are distributed among different legal entities, section 1(4) may permit their assembly so that meaningful collective bargaining can be carried on.[33]

Operating with a clearly identified policy purpose – the preservation of collective bargaining rights and the integrity of the collective bargaining process – the specialized labour relations board has developed a functional approach to the question of employer status that is coherent, albeit limited. Because the purpose of the provision is to protect collective bargaining rights, the board refuses to declare related entities to be a related employer if the effect of the declaration is simply to extend the union's representation rights and avoid the certification process.

3. Transfer of undertaking and other modifications in the legal situation of an undertaking or parts thereof

a. Does your national law or case law have a legal definition of "transfer of undertaking or parts thereof". Under what situations, if any, does the definition apply to the externalization (subcontracting, outsourcing) of certain operations of an undertaking?

b. Please describe the rules applicable in your country for the protection of workers' rights in situations involving the transfer of an undertaking or parts thereof.

c. Is it mandatory under your national law that the employees' representatives be consulted or informed at the time of a transfer of an undertaking or parts thereof. If it is, what is the procedure for this consultation? Are the employees' representatives informed or consulted when the employer intends to outsource certain of its operations. Is there any obligation under your national law to negotiate on these topics?

d. How are the relations between the transferor and the transferee enterprises organized when the latter continues to operate in the former's premises?

e. How are the relations between the transferred employees and the transferor enterprise organized when the transferee enterprise continues to operate in the transferor's premises. Who of the transferor or the transferee assign tasks and determines wages and conditions of employment?

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[32] *Re O.N.A. and Deer Park Villa*, [1994] O.L.R.B. Rep. 1196; *Ellwall and Sons Construction Ltd*., [1978] O.L.R.B. Rep. 534; John Hayman & Sons Co. Ltd. (1984), 8 C.L.R.B.R. (N.S.) 163); *Diamond Taxicab Ass'n (Toronto) Ltd. and U.S.W.A., Local 1688* (1995), 27 C.L.R.B.R. (2d) 1 (Ont. L.R.B.); *Gerald Davidson Plumbing & Heating*, [1984] O.L.R.B. Rep. 462.); *Great A & P Co. of Canada Ltd*., [1981] O.L.R.B. Rep. 285.; *Farquar Construction Ltd*., [1978] O.L.R.B. Rep. 914.

[33] *Diamond Taxicab Ass'n (Toronto) Ltd. and U.S.W.A., Local 1688*, [1995]O.L.R.B. Rep. June 753 at para. 64.

General

In Canada, "transfer of undertaking or parts thereof provisions" are known as "successor employer" provisions. There is no requirement at common law, under the civil code, or in any labour-related statute for employees or trade unions be to consulted about a "sale of business", which is the event that triggers successor rights. Nor is there any obligation under statute for employees' representatives to be consulted when the employer decides to outsource its operations. Employers are not required to negotiate matter relating to transfers of the business (or parts thereof) or outsourcing with unions that may represent their employees.

Common Law and Civil Law

The *Civil Code* in Quebec specifically provides for the continuity of employment when an employee who is employed by a predecessor employer ids employed by the successor employer.[34] The common law does not specifically provide for this, with the result that unless novation of the contract of employment can be established (which requires the employee's explicit consent) the successor employer will be treated as a new employer and the employee will have to bring an action against the predecessor for reasonable notice.

Employment Standards Legislation

Under the Ontario *Employment Standards Act, 2000*, successor rights apply when there is a sale of business.[35] "Sale" is broadly defined to include any form of transfer or sale and "business" is defined to mean an undertaking, and does not cover just a work function. The effect of successor employer provisions is to ensure that an employee's employment service with the predecessor employer is transferred to the successor employer when there is a sale of business. The continuity of service for employees only pertains to the statutory benefits

Collective Bargaining

Successor employer provisions attach collective bargaining rights to the business – and not the employer – so that a change in the legal ownership of the business does not eliminate union recognition rights or the collective agreements in situations in which the business continues. Successor employer provisions in collective bargaining legislation balance an employer's right to rearrange its business or eliminate itself as an employer against the need to protect employees from sudden changes in their bargaining rights. These provisions are designed to address the lack of fit between the corporation and the enterprise, and to protect collective bargaining rights, and they are administered by specialised labour boards or labour courts.

Successor rights provisions bind the purchaser to the seller's collective agreement until the labour relations board declares otherwise. In Ontario, the collective bargaining legislation imposes an obligation upon employers to adduce at the hearing all of the facts within their knowledge relevant to this issue. The board has the power to declare that the successor employer is no linger bound by the

[34] The Civil Code (C.c.Q 2097) provides that the contract of employment is "not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation or otherwise." In such circumstances the contract of employment is binding upon the successor employer as if it were the former employer.
[35] S.O. 2000, c. 41, s.9.

seller's collective agreement, determine the appropriate bargaining unit(s), and declare which union, if any, shall represent the employees.[36]

Successor employer provisions attach to the "undertaking" in Quebec and "business" in Ontario. In Quebec, the successor employer provisions were interpreted broadly so that subcontractors were bound both by the collective agreement and by the union certificate, which requires that the employer recognize and bargain with it exclusively. The Quebec labour court adopted a functional interpretation of the concept "undertaking," which emphasised a set of tasks or functions as the basis for transferring bargaining rights. In Ontario, the labour relations board has taken an instrumental approach, which emphasises the essence of the undertaking (land, equipment, employee skills, and licenses) in determining whether a sale of business has occurred.

Until very recently, a big difference between Quebec and Ontario had to do with how successor employer provisions in collective bargaining legislation there be a direct contractual relationship between the predecessor and successor employers for the successor employer provision to apply. This meant that cases of building-services contracting – a form of labour-only subcontracting in which cleaning, security, janitorial, and/or cafeteria services are provided to buildings – were caught by successor rights. Unions were able to hold on to their representation rights and collective agreements as subcontractors changed even though there was no legal relationship between the subcontractors. By contrast, in Ontario it is much more difficult to establish successor rights in the context of subcontracting. Not only is the instrumental approach to determining a sale of business taken, the board has decided that is necessary to establish a legal relation between the seller of the business and its purchaser in order for the latter to be liable for the employment obligations accrued by the former.[37] What this means is that in the vast majority of cases, service contracting – where all that is provided by the contractor is labour and not capital – falls outside the scope of successor provisions, and the workers lose their unions and their collective agreements when the service contract is retendered.

Since the late 1980s, the treatment of subcontracting under successor rights provisions in labour relations statutes in Quebec and Ontario has increasingly converged, with the Supreme Court leading the way in pushing Quebec towards Ontario. In 1988, the Supreme Court of Canada brought the interpretation of Quebec's successor employer provision in line with the jurisprudence in the rest of Canada by requiring both that there be a direct legal relation between the contractors and that the undertaking be understood in an organic sense.[38] The effect of the first requirement was to respect privity between the employing entities in the interpretation of the successor employer provisions, even though the legislation did not require a direct legal relationship between the employing entities. By requiring a contract between the employing entities as a basis for ascribing employment-related responsibilities, the decision effectively took building-service contracting outside the scope of successor employer provisions.

Despite the adoption by the Supreme Court of an "organic" approach to identifying when an "undertaking" has been transferred, the successor employer provisions in Quebec continued to be interpreted to include many subcontracting

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[36] *Labour Relations Act, 1995*, S.O. 1005, Chapter 1, Schedule A, s. 69.

[37] Adams at 8-13; Sack, Mitchell and Price at 6.17-17.

[38] *Syndicat national des employes de la Commission scolaire regionale de l'Outaouais (C.S.N.) v. Union des employes de service, local 298 (F.T.Q.).*, [1988] 2 S.C.R. 1048. The *Quebec Labour Code,* R.S.Q. c-27 was amended after this case n order to extend the definition of successor employers (see Adams, 2004:8-40 discussing S.Q. 1990, c. 69, s. 2.

relations, as long as there was a direct link between the employing entities.[39] However, in 2003 the Quebec government amended the provisions to limit their potential to catch subcontracting arrangements.[40]

In 1995, the successor rights provisions from the Ontario *Crown Employees Collective Bargaining Act, 1993* (S.O. 1993, c. 38), which governs labour relations for government employees, were removed in order to facilitate privatization.[41]

Under Canadian and Quebec collective bargaining law, the successor (or transferor) has the right to administer the predecessor's collective agreement. However, the sale or transfer of a business may lead to the integration of what were previously separate businesses and the intermingling of employees working for those businesses. Two types of intermingling can occur – the intermingling of unionized employees of the transferred business with the non-union employees of the successor employer and the intermingling of employees represented by different unions. These kinds of intermingling of employees creates problems in Canadian jurisdictions because one union has exclusive bargaining rights for all of the employees in the bargaining unit (which is typically, although not exclusively, defined in terms of the workplace of an employer). The crucial question in these situations is whether the collective bargaining rights attached to the predecessor (transferor) employer should be continued.

Where intermingling occurs the labour relations board has the discretion to order a vote of the employees to determine the issue of which collective agreement covers them. However, where a union represents a substantial majority of the employees in a bargaining unit boards typically will not order a vote. Moreover, boards are unlikely to terminate a predecessor's collective agreement unless its continuation would result in substantial and immediate prejudice to the operation of the successor (transferee) employer.

4. The legal situation of the employees of contractors and other affiliated enterprises vis a vis the principal/parent enterprise

a. Under which conditions can the principal/parent enterprise be held liable for the obligations of its contractors or other affiliated companies vis a vis employees of the latter in respect to the following:
   i. Health, safety and occupational hazards;
   ii. Wages and other terms and conditions of employment;
   iii. Social Security and other employee benefits insurance contributions;
   iv. Others?

b. Is it mandatory to inform the employees of the contractors and other affiliated enterprises of the identity of the principal company for which their employer works?

[39] *Ivanhoe Inc. v. TUAG, section locale 500*, [2001] 2 S.C.R. 566; *Sept-Iles (Villes de) v. Quebec (Labour Court),* [2001] 2 S.C.R. 670.
[40] S.Q. 2003, c. 26, s.2.
[41] J.B. Rose, "From Softball to Hardball: The Transition in Labour Management Relations in the Ontario Public Service" in G. Swimmer, ed., *Public Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills: Oxford University Press, 2001)

c. Please, describe any judicial decisions whereby the existence of a direct employment relationship between a principal company and the employees of its contractors or other affiliated companies has been established. What have been the legal effects of these decisions?

General

There is nothing in Canadian law (the common law, the *Civil Code* of Quebec, or statute) that requires the employees of a contractor or affiliated enterprises to be informed of the identity of the principal for which the contractor or affiliated companies works. In Canada and Quebec, related employers (which are typically affiliated companies that are under common control) are treated very differently from subcontactors and principals. For a discussion of affiliated companies and their liability for employment-related obligations pertaining to employees of any member of the corporate group refer to the discussion relating to question 2 *supra*. The discussion in this section is confined to situations involving subcontractors and principals.

Subcontracting

i) Health and Safety

Occupational health and safety laws impose a duty on employers not to expose workers to unsafe and unhealthy working conditions and gives workers rights to be informed of hazards, to participate in their management, and to refuse unsafe work. These laws have grown from a patchwork of statutes protecting workers in specific industries to omnibus laws applicable to most workers. There is, however, considerable variation among jurisdictions in the treatment of contractors' employees. In most jurisdictions, employees of contractors who performed work in principal enterprise's premises would have some rights against the principal in its capacity as occupier.

In British Columbia, Part 3 of the *Workers' Compensation Act*[42] deals with occupational health and safety. Its definition of employer and worker contemplates that employers only owe duties to workers who are employees. Section 115 of the Act stipulates that employers owe duties to their own workers as well as any other workers (including other employers' employees) present at the workplace. The *Occupational Health and Safety Regulation*[43] stipulates that the regulation applies to employers, workers and "all other persons working in or contributing to production of any industry" covered by the *Workers' Compensation Act*. As well, it establishes a general requirement that all work be carried out "without undue risk of injury or occupational disease to any person." As a result, it appears that employers are under a duty to provide a safe work environment for the employees of contractors or affiliated companies in circumstances where the work was being carried out in an area under the employers' control. However, these regulations do not provide the employees of contractors or affiliated companies with rights to participate in the employer's internal responsibility system.

ii) Wages and terms of conditions of employment

[42] R.S.B.C.1996, c.492.
[43] B.C. Reg. 296/97 (as amended).

a) *The Common Law and Civil Code*

The practice of subcontracting, in all of its varieties, is not only crucial to determining the effective scope of labour protection, it provides a good example of how discrete and varied the legal treatment of employment-related responsibilities is. Both the civil code in Quebec and the common law in the rest of Canada start from the position that, barring *de facto* management of the subcontractor by the principal, the legal and financial independence of the subcontractor prevents the establishment of a direct legal link between the principal and the subcontractor's employees – which is the basis for imposing employment-related responsibilities. Nor is recourse to subcontracting prohibited by Canadian or Quebec labour law, although some aspects of subcontracting are regulated.

b) *Employment Standards Legislation*

Quebec is much more willing than its common law counterparts to impose joint and several liability in subcontracting situations when it comes to matters relating to economic governance. The minimum standards legislation provides that "(a)n employer who enters into a contract with a subcontractor, directly or through an intermediary, is responsible jointly and severally with that subcontractor and that intermediary for the pecuniary obligations fixed by this act or the regulations."[44]

By contrast, in Ontario, minimum standards legislation does not directly impose joint and several liability on principals and subcontractors. Instead, it imposes joint and several liability on separate legal entities only if they are related or associated and the intent or effect of the arrangement is to defeat the intent and purpose of the legislation.[45] This has been described as a "deep-pocket' provision designed in the case of insolvencies to hold companies, individuals, firms, syndicates, or associations carrying on related activities, businesses, works, trades, occupations, professions, projects, or undertakings, accountable as one "employer".[46] However, even though the wording of the provision is broad enough to capture subcontracting arrangements, it has been given a much narrower interpretation – one that emphasises common control, ownership, and management amongst the employing entities, and not simply functional integrations.[47]

Recently, the Ontario Superior Court emphasised the need to establish something more than functional interdependence between businesses in order to establish a common employer amongst related entities and impose joint and several liability. In *Lian J. Crew Group Inc.*,[48] a union representing garment workers sponsored an application by a home worker who was owed wages and vacation pay from a garment subcontractor for the certification of a class action on behalf of home workers. The claim was that the retailers of the garments produced by the home workers were common employers of the home workers and, thus, jointly and several responsible for their wages and vacation pay. The argument was that the retailers did not take sufficient steps to minimise the risks of subcontractors' non-compliance with

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[44] *Labour Standards Act*, S.Q. 1979, S. Q. 1994, s. 95.

[45] *Employment Standards Act 2000*, S.O. 2000, s. 4.

[46] Employment Standards Act 2000, Policy and Interpretation Manual, 2004 Release (Thomson Carswell).

[47] In the context of a labour-only contracting agency that provided two truck drivers to a client manufacturing company over a period of years the referee refused even to consider whether the agency and client firm were common employers on the 'ground that there was simply no evidence of the kind of relationship contemplated by section 12.' *Eaton Yale Ltd. (c.o.b. Commander Electrical Equipment)*, [1998] O.E.S.A.D. No. 234 (Randall), affirmed in *Global Driver Services Inc. v. Fallon*, [1999] O.J. No. 4786 (Ont. Sup. Ct. J.).

[48] (2001), 54 O.R. (3d) 239.

Employment Standards Act obligations vis-à-vis home workers and that their participation in an industry with well known and continuing problems in respect of compliance constituted an arrangement which had the effect of indirectly defeating the purpose of the *Employment Standards Act.*

The absence of any direct contractual or financial relationship between the retailers and the subcontractor was critical to the Court's finding that the businesses were not associated. Subsequent cases have referred to *Lian J. Crew* as emphasizing the need to find common ownership or control in determining that entities are associated or related.[49] In 2004, one Labour Relations Board vice-chair made it clear (in a case involving the broader public service and the provision of health care) that he did not consider subcontracting relationships to be covered by the recently revised related employer provision; according to him, "whatever [the related employer provision] means, in my view, it could not have been the Legislature's intention to make employers the insurers of the employment standards claims of the employees who work for subcontractors. Such a result would fundamentally alter the employment landscape in Ontario."[50]

c) *Collective Bargaining Legislation*

The Canadian approach to subcontracting in the context of collective bargaining is to permit it unless it is restricted under the terms of a collective agreement. The Ontario Labour Relations Board also starts from the premise that subcontracting is perfectly acceptable unless the effect is to undermine bargaining rights. The purpose of the related employer provision is not to prevent employers from externalizing employment responsibility, but simply to catch it in those limited cases in which is undermines the union's representational rights or collective agreement.

The related employer provision has some limited remedial application in situations in which management is distributed amongst entities that are not united by common control if the goal of the arrangement is to undermine collective bargaining. According to Adams, "[t]he related employer provisions may be powerful tools for dealing with major reorganizations or franchise arrangements and where central functions have been "contracted in" to an outside contractor." [51] Remedial related employer declarations have been issues in a variety of contracting in or labour-only subcontracting situations.

Principals may also be held responsible for the employment-related obligations owed by subcontractors to their employees in certain circumstances by virtue of successor provisions in collective bargaining legislation. For a discussion of this matter, refer to the discussion in response to question 3 *supra* under the subheading collective bargaining.

iii. Social Security and Employee Benefits Insurance Contributions

In Canada, where fiscal considerations, such as social insurance contributions and tax, are involved, legislation that trumps contractual allocations of obligations and risks is justified on the ground that third parties are involved. In Saskatchewan, for example, the workers' compensation legislation provides that principals are liable

[49] *Simmonds Capital Ltd.,* [2004] O.E.S.A.D. No. 601 (Serena) and *PlateSpin Canada Inc.*, [2005] O.E.A.S.D. No. 33 (Wacyk).
[50] *Victorian Order of Nurses* (cited as *VON*) [2004] O.E.S.A.D. No. 1403 (McLean) at 26.
[51] Adams at 8-38.1.

for any contributions that contractors are required to make on behalf of their employees. It also permits the principal to be indemnified by the contractor for such sums. Mr. Justice Iacobucci of the Supreme Court of Canada characterised these provisions in the following way:

> The strength of the fund is thus key to the viability of the workers' compensation system. In turn, the financial integrity of the Workers' Compensation program depends on an effective means of ensuring that sufficient monies are paid into the Injury Fund. It is here that s. 133 plays a key role. It, along with other devices such as statutory liens, ensures that the Injury Fund continues to be replenished and remains solvent. This is accomplished by holding principals liable for the unpaid dues of contractors because, from the perspective of the workers, both contractors and principals are 'employers'. Moreover, from the point of view of rudimentary economic analysis, both gain from the surplus value of the workers' labour. Without the existence of effective methods to finance the Injury Fund, the workers' compensation system is emptied of any content and the 'historical compromise' is rendered meaningless. Provisions such as s. 133 further the policy choice to shift losses for unpaid premiums from the Board and workers to principals. Workers' compensation legislation strives to visit the costs of industrial disease, death and injury on the employer community which exposes its workforce to those risks. An attempt is made to spread responsibility for those costs amongst multiple employers engaged in a single project.[52]

In the context of social welfare legislation that imposed joint and several liability on principals and contractors for contributions to fund a public insurance scheme, legislatures and courts are willing to impose liability on principals for their contractors' employment-related contributions.

5. **Lease of workers and other forms of supply of workers**

a. Can two or more legally distinct enterprises lease workers between them? If they can,
   i. how does the law protect the rights of *leased* employees?
   ii. Who keeps the authority of the employer vis a vis the *leased* employees. Is it the user enterprise or the enterprise which formally employs them?
   iii. Who determines the assignment of tasks, wages and other conditions of employment of the *leased* employees, and may terminate their employment if the case may be. Is it the user enterprise or the enterprise which formally employs them?

General

[52] *Husky Oil Operations Ltd. v. Minister of National* Revenue, [1995] 3. S.C.C. 453, para. 130. The interpretation of this provision arose in a situation in which the principal challenged its constitutionality on the ground that the off-setting stepped into exclusive federal jurisdiction over bankruptcy because the effect of the provision was override the bankruptcy priority system by letting the Workers' Compensation Board obtain funds before the secured creditors. The majority of the Court, with Iacobucci and three others dissenting, declared the provision unconstitutional and inoperative.

There is nothing in Canadian law that precludes two or more legally distinct enterprises from leasing workers between each other. Moreover, there is no law that specifically addresses the situation of leased workers. Thus, which legal entity is the employer of leased employees will depend upon the legal context in which the question is being raised and the facts of the particular situation. Moreover, for most purposes, except where there is a requirement on a temporary work agency – which in Canada are called employment agencies – to obtain a licence, employing entities that lease employees are treated the same as temporary work agencies. Generally, for the purposes of employment standards legislation the direct employer (the TWA) will be treated as the employer. However, when it comes to collective bargaining legislation the TWA or the user enterprise may be treated as the employer. For a discussion of leased employees and collective bargaining see the discussion of collective bargaining and TWAs immediately below.

b. Please describe how the supply of workers through temporary work agencies (TWA) is regulated in your country. In particular:

i. Cases in which leasing temporary workers is permitted;
ii. Industries or activities for which the supply of temporary workers is forbidden;
iii. Is it mandatory in your country that TWAs be licensed? If it is, under which conditions are licenses issued?
iv. What kind of contract governs the respective relations among the principal company (user enterprise), the TWA and the temporary workers who are dispatched to the user?
v. Is the despatching of a temporary worker subject to time limitations?
vi. What other restrictions are there on the use of temporary workers?
vii. How are the temporary workers' wages and other conditions of employment determined?
viii. Under which conditions may a user enterprise be held liable for the obligations of a TWA vis a vis the dispatched employees?
ix. How are the collective labour relations between a TWA and its despatched temporary workers structured? How are the collective labour relations between a user enterprise and despatched workers structured?
x. Please indicate the sanctions envisaged by the legislation of your country for the illegal use of temporary workers.

c. Please describe any judicial decisions holding that there was a direct employment relationship between a user enterprise and employees supplied to it either under the form of a lease (a) or at that of a temporary posting (b), and the legal effects of such decisions.

General

In Canada, there are no restrictions on the use of employees provided through TWAs (which are known as employment agencies). Several provinces have enacted statutes that directly regulate the conduct of employment agencies. This legislation typically requires the agency to apply for an operating license, and licensees are normally not permitted to charge employees for services rendered. Violation of these controls could lead to fines or the revocation of the TWA's license. In addition to these controls, employment agencies may be required to keep records and to provide employees referred to client firms with relevant information about the nature of the employment. In 2001, Ontario repealed the legislation that regulated employment agencies.

A commercial contract governs the relationship between the user (client) firm and the TWA (employment agency), while an employment contract governs the relationship between the TWA and the employee. There are no time limitations on the dispatch of employees by a TWA.

Which entity, the user firm or the TWA, determines the wages and conditions of work of employees dispatched by a TWA to a client firm depends upon the facts of the situation and the type of claim. Which entity is liable for employment-related obligations owed to the dispatched employee depends, again, on the precise facts and the type of claim.

Employment Standards

Common ownership, common control, and close functional interdependence are sufficient to show that businesses are related for the purposes of the Ontario *Employment Standards Act*. More contentious are situations in which the businesses are functionally integrated but there is no common ownership. In the context of a dispute involving a labour-only contracting agency which provided two truck drivers to a client manufacturing company over a period of years the Referee refused even to consider whether the agency and client firm were related employers on the "ground that there was simply no evidence of the kind of relationship contemplated by section 12."[53]

Recently, the Ontario Superior Court affirmed the need to establish something more than functional interdependence between businesses in order to establish a related employer.[54] The heart of the case was whether the common employer provisions should extend beyond situations in which the entities were related or associated by common management, control and ownership, to a situation in which the entities are related through a series of on-going contractual relations and economic dependence.

Collective Bargaining

In *Pointe Claire v. Quebec,* [55] the majority of the Supreme Court of Canada adopted a comprehensive approach to determining employer status – in which the legal subordination and integration of the employee into the business should not be used as exclusive criteria for identifying the real employer – in the context of triangular relationships involving employment agencies. The Chief Justice affirmed the Quebec Labour Court's decision to include in the bargaining unit of the client

[53] *Eaton Yale Ltd. (c.o.b. Commander Electrical Equipment)*, [1998] O.E.S.A.D. No. 234 (Randall), affirmed in *Global Driver Services Inc. v. Fallon*, [1999] O.J. No. 4786 (Ont. Sup. Ct. J.).

[54] *Lian J. Crew Group Inc* (2001) 54 O.R. (3d) 239.

[55] *Pointe Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, 1055.

municipality a temporary clerical worker provided through a personnel agency, noting that current labour legislation allows an employee to have two distinct employers for a single job – one for the purposes of collective bargaining legislation and the other for the purpose of labour standards.[56] In Ontario, the tendency is to treat the client firm as the employer for the purposes of collective bargaining, although under employment standards legislation the typical practice is to treat the employment agency as the employer.[57]

The Ontario Labour Relations Board's approach to the question of identifying the employer in labour subcontracting (labour-only contracting) or TWA cases is very flexible. Labour-only subcontracting or contracting-in arrangements, whether or not they involve TWAs, are not infrequently challenged by unions as a disguised attempt by an employer to avoid collective bargaining or collective agreements. Typically this issue is raised in a certification application, and the question is simply who is the employer, not whether the entities are related. The resolution to this question turns on which entity exercises fundamental control in light of seven factors, and more often than not the client firm in which the employees actually work is held to be the employer.[58] Labour-only subcontracting can also be challenged through a common employer application if the union is able to establish that it is an attempt to avoid collective bargaining obligations. There are several instances in which the Board has held labour only subcontractors to be common employers with their clients. However, the Board has taken pains to describe them as exceptional situations; in one case in which a nursing home that contracted in laundry, housekeeping, and maintenance services from a subcontractor was declared to be a common employer the nursing home exercised such a large amount of control over the employees that it would likely have been considered the only employer.[59] In a second case, the nursing home that contracted in all of its nursing aid workers from a subcontractor admitted that its purpose for doing so was to escape the collective agreement.[60]

6. Franchising

a. If available, please provide some general information on franchising regulation and practice in your country.

b. What is, in your country, the legal position of a franchisee vis a vis a franchisor? Is the franchisee considered an independent entrepreneur or as a subordinated agent of the franchisor? Please describe any judicial decisions holding that a franchisee was in fact a subordinated agent to a franchisor and the legal effects of such decisions.

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[56] *Ibid*., 1055.

[57] See *536670 Ontario Ltd. (c.o.b. Best Personnel Services),* [1997] O.L.R.B. Rep. 849; *Teamsters Local Union 938 v. Mackie Moving Systems Corporation*, [2004] O.L.R.B. Rep. 94; *Lantic Sugar Ltd*., [2004] O.L.R.B. Rep. 69 where the Labour Relations Board found the client firms to be the employer of employees provided by an employment agency for the purposes of collective bargaining legislation. However, vice-chairs of the same board have come to the opposite conclusion in the context of employment standards legislation; see, for example, *Eaton Yale Ltd. (c.o.b. Commander Electrical Equipment)* [1998] O.E.S.A.D. No. 234 (affirmed by *Global Driver Services v. Fallon*, [1999] O.J. No. 4786. In *Eaton Yale* the adjudicator found the provider to be the employer of employees who had been working in, and supervised by, the client firm for over a decade on the ground that he did not want to disrupt commercial arrangements, reasoning which effectively allows the employing firms to determine which firm has employer status.

[58] *533670 Ontario Ltd. (c.o.b. Best Personnel Services*, [1997] O.L.R.B. Rep. 849, para. 11-16.

[59] *Brantwood Manor Nursing Home* (1986) 12 C.L.R.B.R. (N.S.) 332.

[60] *Kennedy Lodge Inc.* (1985), 7 C.L.R.B.R. (N.S. 159 (Ont. L.R.B.).

c. What is the legal position of the franchisee's employees? Can they be also regarded as workers dependent on the franchisor?

Generally, franchisees are treated as independent entrepreneurs;[61] however, there are situations in which the franchisee is treated as an employee of the franchisor. Generally, the franchisee's employees are treated as the employees of the franchisee and the franchisor bears no responsibility for employment-related obligations owed to them. However, there are situations in which the franchisee and franchisor are declared to be related employers under collective bargaining legislation with the result that the franchisor is also liable for the employment-related obligations owed to the franchisees' employees.

Generally, franchise agreements are subject to general and commercial law. However, two jurisdictions, Alberta and Ontario have enacted franchise legislation.[62] Both statutes require the preparation and delivery of a disclosure document in a prescribed format to prospective franchisees, and regulate the franchisee relationship through provisions dealing with the rights of franchisees to associate, a statutory duty of fair dealing, and applicable law, venue, and jurisdiction. Employer-employee relationships are specifically excluded from the Ontario legislation.

Depending on the circumstances of a particular case, it is possible that a franchisee will be considered to be the employee of a franchisor and, thus, entitled to employment standards under minimum standards legislation.[63] Adjudicators will apply the common law and statutory tests of employee status (which emphasize business integration, control and economic dependence) to determine whether or not a franchisee is an employee and not an independent contractor.

The related employer provision in collective bargaining legislation has the potential to capture some franchising situations since it has a limited remedial application in situations in which management is distributed amongst entities that are not united by common control if the goal of the arrangement is to undermine collective bargaining. According to Adams, "[t]he related employer provisions may be powerful tools for dealing with major reorganizations or franchise arrangements and where central functions have been "contracted in" to an outside contractor." [64] Remedial related employer declarations have been issued in Ontario in a grocery franchising situation in which the spin-off retail chain continued to use an established chain's administrative and legal services, warehouse facilities, and delivery system.[65] However, the Ontario board refused to declare the retail grocery franchisor and franchisee related where the union did not have similar declarations made for other franchisees of the franchisor.[66] The effect of the related employer declaration is that the employees of the franchisee are covered by the franchisor's collective agreement and union certificate.

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[61] Peter Snell and Larry Weinberg, eds., *Fundamentals of Franshising – Canada* (Forum on Franchising, American Bar Association 2005).

[62] *The Franchises Act*, S.A. 1971, c.38 and the *Arthur Wishart Act (Franchise Disclosure Act , 2000*, S.O. 2000, c. 3.srue, 20

[63] *Re Sooters Studios Ltd*., ESC 2954, Nov. 1991 (Gray, Referee).

[64] Adams at 8-38.1.

[65] *Dominion Stores Ltd.,* [1979] 1 Can. L.B.R.. 172 (Ont.) (1984), 8 Can. L.R.B.R. (N.S.) 204 (Ont.)

[66] *1390386 Ontario Ltd. and UFCW, Loc.* 175 (re) (2002), 86 C.L.R.B.R. (2d) 268 (0nt.)

7. Collective action and collective bargaining in a context of productive decentralization

a. What is the position of your country's unions vis a vis productive decentralization;
b. does the law provide for the collective representation of employee's at a group's level? If it does, how is such representation structured;
c. are there in your country trade unions which represent the whole of the workers of a group of companies or of several enterprises working in close partnership;
d. has there been collective bargaining covering the all of a group of enterprises or several enterprises working in close partnership. If so, which subjects has the bargaining addressed;
e. have you had strikes or other forms of collective action addressed against a group of enterprises or several enterprises working in close partnership?

Public and private sector unions in Canada are opposed to a many different forms of productive centralization, including privatization, out-sourcing, labour-only subcontracting, franchising, and TWAs, since these forms of productive decentralization tend to erode union representation and weaken collective bargaining. These forms of productive decentralization also tend to exercise a downward pressure on employees' terms and conditions of employment.

In Canada, productive decentralization poses very difficult problems for trade unions because union-representation rights typically are tied to a specific employer's workplace. The law does not provide for collective representation at the level of a group of companies. It is very rare for unions in Canada to represent all of the workers in a group of enterprises or several enterprises working in close partnership. For collective bargaining to cover all of a group of companies the members of the group would have to voluntarily agree to the arrangement, which would not be legally binding. Collective action addressed a group of enterprises or several enterprises working in close partnership would only be lawful if the enterprises acted as an "ally" to the struck enterprise and the workers of the struck enterprise were engaging in a lawful strike and they placed pressure on the ally. An ally is an enterprise that assists a struck employer in minimizing the impact of a lawful strike. The workers employed by the ally enterprise would not be permitted to engage in collective action since the collective bargaining legislation in Canada restrictively regulates the timing of lawful strikes.

8. Other questions

Please present any other issue which in your country's law or practice relates to this topic and has not been addressed in this questionnaire.