COMMON EMPLOYER/SPIN-OFFS

INTRODUCTION

The Code authorizes the Board to make common employer declarations—often called "spin-off" declarations. A party seeking such a declaration asks the Board to find that one or more businesses carry on under common control and direction. The party asks the Board to declare those businesses to be one employer for the purposes of the Code.

The purpose of the spin-off (or common employer) provisions in the Code is to ensure established bargaining rights are not eliminated because of a corporate reorganization or split. It also recognizes that corporate structures can obscure the true employer. The Code does not prevent corporate bodies from modifying their structures to accommodate tax, financing or other legitimate objectives.

Under these provisions, unions can preserve bargaining rights for a group of employees they represent but they cannot acquire rights they could not otherwise obtain through certification. Nor does it allow a union to sweep employees into inappropriate bargaining units.

The Code contains separate provisions dealing with spin-offs in the construction industry and non-construction industry. Information Bulletin #19 summarizes the Board's approach to common employer declarations. This policy describes:

- what is a common employer declaration;
- the non-construction industry; and
  - statutory requirements;
  - the application;
  - processing the application; and
  - remedies.
- the construction industry;
  - statutory requirements;
  - the application;
  - processing the application; and
  - remedies.

WHAT IS A COMMON EMPLOYER DECLARATION?

A common employer declaration is a finding by the Board that two or more entities operate under common control and direction. The finding binds the associated entities as one employer for all purposes under the Code concerning that bargaining relationship. The trade union, therefore, has a bargaining relationship with all the employers jointly for a single unit of employees, preserving its bargaining agent status.

A trade union usually seeks a declaration because the employer creates a spin-off company. An employer **spins-off** when it creates one or more other corporate entities which perform the same or similar work to the employer's. The second entity may engage in all the same work but with non-union labour. This is called **double breasting**.

Another form of employer sometimes considered in common employer declarations is the **labour broker**. More often, labour brokers are the subject of "true employer" applications under Section 12(3) rather than a common employer application. See: [*True Employer v. Subcontractor, Chapter 24(f)(ii)*]. The labour broker only employs persons whom it contracts to the original employer (and perhaps other companies). The labour broker does not engage in any work except the supply of labour to other employers. In the labour broker case, the original employer may transfer all of its employees to the broker and continue to operate without employees.

These activities may have the intentional or unintentional effect of frustrating the provisions of the Code, particularly continuation of collective bargaining rights. Sections 47 and 192 are intended to control the practice of moving employees from one employer to another, usually without the consent or knowledge of the employees, for the purpose of avoiding or evading the obligations imposed by the Code.

NON-CONSTRUCTION EMPLOYERS

Statutory Requirements

Section 47 of the Code covers spin-offs outside of the construction industry. It states:

> 47(1) On the application of an employer or a trade union affected, when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.
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> (2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations and the Board may grant such relief, by way of declaration or otherwise, as it considers appropriate, effective as of the date on which the application was made or any subsequent date.
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> (3) This section does not apply with respect to employers engaged in the construction industry in respect of work in that industry.

Subsection (1) contains four statutory conditions. First, only an employer or affected trade union can apply. Second, there must be associated or related activities. This means there must be some connection between the work done by the entities. Third, the evidence must show, or lead to an inference of, common control or direction. Finally, there must be more than one entity.

Section 47(1) is discretionary. The Board will not use a common employer declaration to indirectly certify a unit, or tie two entities which do not have an actual or potential ongoing bargaining obligation.

Section 47(2), however, is mandatory. The Code requires the Board to grant an application where the evidence shows the employer's intent to avoid a collective bargaining relationship.

The applicant has the onus to prove the statutory elements to satisfy the Board. The Board will, however, consider circumstantial evidence and draw inferences.

The Application

An affected trade union or employer may apply for a common employer declaration. The application is usually a letter with supporting documents. Applicants must serve a copy of the application upon the respondent(s). See: [*Rule of Procedure 6*].

The Director of Settlement checks the application for:

- names and contact information of all affected parties and their counsel (if any);
- the names, addresses and telephone numbers of all associated or related corporations, partnerships or persons involved in the application as far as that information is available;
- section of the Code relied upon;
- details of any bargaining relationships existing or alleged to exist between the trade union and one or more of the corporations, partnership or persons involved in the application (this includes any certificate numbers and details of any collective agreements);
- details of the activities, business or undertakings involved;
- any other facts supporting the allegation of common control or direction;
- a statement of whether the applicant is alleging avoidance of a collective bargaining relationship, and the reasons in support of that allegation;
- any reasons important for labour relations purposes and the administration of the Code for the Board to grant the declaration;
- any other supporting information that the applicant wishes to rely upon; and
- the remedy sought.

Bring any deficiencies to the applicant's attention immediately. Have them provide any missing information before accepting the application. See: [*Particulars, Chapter 19(b)*]. Enter the matter in the database and open a process file.

Processing the Application

The officer contacts all the parties about the application. In order to inform affected employees of the application, the Board prepares notices, and asks the employers to post them. The notices give a brief description of the application in front of the Board. They ask affected employees who have objections or comments to contact the Board by a certain date—usually within 14 days.

The respondents must file a written reply unless the Director of Settlement directs otherwise. See: [*Rule 8(1)*]. The purpose of the reply is to narrow the issues in dispute and shorten the hearing time required. The Director of Settlement sets the time for filing the reply, normally 7 to 14 days from the application date. The reply must contain:

- the full name and address of the party replying;
- the name of a contact person or solicitor to whom correspondence may be directed;
- an address for service, where different from the address of the party;
- a clear identification of the proceeding to which the reply relates;
- an admission of the allegations contained in the document commencing the proceeding that are not contested; and
- where the party replying relies upon a different version of the facts alleged by the party commencing the proceeding, a concise statement of the facts relied upon.

These applications are often complex, involving numerous documents and transactions over extended periods. The Board must often decide the issue using circumstantial evidence and, therefore, it is important to obtain as much information as possible from the parties with the application and reply.

The Director of Settlement, usually with the officer, decides on a dispute resolution strategy. See: [*Dispute Resolution Initiatives, Chapter 19(c)*]. Most often the dispute resolution strategy will include setting the matter to hearing and the officer then working with the parties to narrow issues, agree on exhibits, or settle the matter. This often reduces the hearing time required and focuses the arguments.

The Director of Settlement and officer may await the reply before scheduling the hearing. This enables them to set an appropriate number of hearing days and further refine the strategy.

Advise all the parties in writing about the steps the Board will be taking. The officer should work with the parties, selecting the appropriate methods to, on the one hand, maximize information sharing before the hearing but, on the other hand, minimize "fishing expeditions" by any party.

Remedies

If the applicant satisfies the Board that the respondents carry on the related activities in order to avoid a collective bargaining relationship under Section 47(2), the Code requires the Board to grant a declaration that the respondents are one employer under the Code. The Board can make declarations retroactive only to the date of application or a subsequent date. See: [*Section 47(2)*]. This differs from sale, lease or transfer declarations that are effective on the date of the sale, lease or transfer. See: [*Sale, Lease or Transfer, Chapter 26(e)*].

Once the Board makes its decision, advise the parties in writing. If the Board grants the application, update the database by creating a new ER number showing the related entities as one employer and a corresponding new BR number. Update the old BR file revoking the old certificates and cross-referencing the new BR file. Revise the certificate, if any, naming as employer all of the entities found to be the common employers.

CONSTRUCTION INDUSTRY

The same procedures and considerations apply to applications received under Section 190 as those under Section 47 except as distinguished below.

Statutory Requirements

Section 192 dealing with construction common employer declarations provides:

> 192(1) On the application of an employer or a trade union affected, when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.
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> (2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship with a trade union in a part of the construction industry, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations and the Board may grant such relief, by way of declaration or otherwise, as it considers appropriate, effective as of the date on which the application was made or any subsequent date.
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> (3) Notwithstanding subsection (2), if a trade union makes an application under subsection (1), the Board shall not make a declaration under subsection (1) in respect of a corporation, partnership, person or association of persons that does not employ employees who perform work of the kind performed by members of the applicant trade union.

Common employer applications in the construction industry are particularly significant where one of the entities is bound by a registration collective agreement. This is so because of the potentially unfair competitive advantage that can arise if an entity attempts to escape registration by creating a spin-off company.

In *UA 488 v. Mid-West Pipeline Contractors Ltd. et al*. [1990] Alta.L.R.B.R. 579 the Board set out a five-step process which it follows in applying Section 192:

1. Review the four statutory requirements that are the same as under Section 47(1).
2. If the four criteria are met, is there evidence of activities to avoid a collective bargaining relationship? Section 192(2) does not require evidence of anti-union sentiment. The test involves a finding that the "overall enterprise is using the existence of its two or more entities to allow the entity bound by a bargaining relationship to avoid the obligations of that bargaining relationship." This can include avoiding the collective agreement, a strike or lockout, or some other consequence of the relationship. The Board looks at the substantial reason for the enterprise's operation when applying the subsection.
3. If the applicant is a trade union, the Board examines whether the related corporate entity employs employees doing work of the kind performed by members of the trade union. Section 192(3) prevents the Board making a common employer declaration in the construction industry unless the business employs employees who perform work of the kind performed by members of the applicant trade union.
4. If the Board finds avoidance under Step 2, the Board must make a declaration and considers the relief appropriate and the effective date.
5. If the Board does not find avoidance under Step 2, it decides whether to exercise the discretion under Section 192 (1) to grant a declaration.

The Application

The applicant must include the same information required for a Section 47 application and also provide evidence that the related corporate entities employ employees doing work of the kind performed by members of the trade union. The applicant must serve a copy of the application on the respondent(s).

Processing the Application

The officer implementing the dispute resolution strategy must understand and appreciate the construction industry and registration collective bargaining. See: [*Construction Industry, Chapter 25*]. The officer should approach the file using the five-step procedure outlined in *Mid-West*. Included in the officer's consideration must be the information about the work done by the employees of the related entity. Is it similar to the work done by the members of the trade union?

Remedies

The Board may issue a declaration finding two or more entities to be common employers. Section 192(2) restricts the Board from making a declaration retroactive past the date of the application. The effect of the declaration is to make any collective agreement applicable to all work done from the date of application. The Board may also make any orders necessary to give effect to the directive.