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## Appropriate Bargaining Units and the Employer's Familial Relations

James E. Dorsey

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The policy of Canadian labour relations legislation encourages employees who have a mutuality of employment interests to bargain with their employer through a trade union, selected by them to act as their exclusive agent. To encourage orderly bargaining, labour relations boards, when determining that a trade union has been chosen by a majority of employees, group an employer's employees into units that it considers to be appropriate for bargaining.<sup>1</sup>

There are, however, employees who are caught between a policy favouring group bargaining and the rationale that demands exclusion from the group of managerial and confidential employees. These employees are the familial relations of management. Their twofold relationship with management, familial and employment, places them in unique circumstances. The assumption that would normally accompany their employment status is that their interests are allied with their fellow employees. The assumption founded on their familial relationship may be that their interests are allied with management. The conflict of these assumptions poses a problem for labour relations boards in determining whether they are appropriate for inclusion in a bargaining unit.<sup>2</sup> The problem is most significant when the familial employee occupies the pivotal point in determining whether a certification application will be granted or denied.

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\*James E. Dorsey, Law Clerk Labour Relations Board of British Columbia

1. *E.g.*, *Labour Code of British Columbia*, S.B.C. 1974 (2d Session), c. 122, s. 42(1).

Where a trade-union applies for certification as an agent to bargain collectively in respect of a unit, the board shall determine whether the unit is appropriate for collective bargaining, and the board may, before certification, include additional employees in, or exclude employees from, the unit.

2. Although bargaining units are defined by reference to employment characteristics (See The Labour Relations Law Casebook Group, *Labour Relations Law* (2d ed. Kingston: Queen's University Industrial Relations Centre, 1974) at 138 ff. . For some typical descriptions see J. Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworths, 1973) at 57-78) certification is granted for a group of employees, not jurisdiction over certain types of work. The Boards may decide whether a person is included in or excluded from a unit. (In B.C. see *Labour Code*, *supra*, note 1, s. 34(1) and *Cariboo Memorial Hospital*, [1974] 1 Canadian LRBR 418 (B.C.L.R.B.).

The purpose of this comment is to propose an approach for Canadian labour relations boards when asked to rule on the unit status of an employee who is a familial relation of management.

Relying upon the assumption founded on the familial relationship, the American Congress has excluded "any individual employed by his parent or spouse" from coverage of the National Labour Relations Act.<sup>3</sup> By its determination of appropriate bargaining units the National Labour Relations Board has, in some circumstances, extended this exclusion to other familial relations. Parents,<sup>4</sup> uncles and aunts, cousins,<sup>5</sup> in-laws,<sup>6</sup> nephews and nieces,<sup>7</sup> and siblings<sup>8</sup> may be excluded from bargaining units.

These unit exclusions by the NLRB are based on two judgments on human behaviour. The first is the assumption that these persons

3. National Labour Relations Act, 49 Stat. 449 (1935), c. 372, s. 2(3).

*The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. (Emphasis added).*

An eminent American labour commentator offers this "explanation" for the child and spouse exclusion. "The exclusion in the Act is self-explanatory, and the Board has no real problem in applying it." C. Morris ed., *The Developing Labour Law* (Washington: Bureau of National Affairs, 1971) at 208. The reason for this exclusion stated in the Senate Committee Report was terse. "For administrative reasons, the committee deemed it wise not to include under the bill . . . any individual employed by his parent or spouse." Sen. Rep. No. 573, 74th Cong. 1st Sess. (1935), quoted in *NLRB v. Hofmann et al* 147 F.2d 679 at 681 n. 2 (Circ. C. of A. — 3rd Circ.).

4. In *Hostor, d.b.a. Buffalo Tool & Die Mfg. Co.* (1954), 109 NLRB 1343 an employer's parents were not excluded from the unit where they enjoyed no "special" status although they received additional benefits.

5. I found no cases dealing with uncles, aunts or cousins.

6. In *Olden Camera & Lens Co.* (1954), 108 NLRB 35, a mother-in-law of a partner was included in a unit. A son-in-law was included in *Browne & Buford, Engineers & Surveyors* (1963), 145 NLRB 765 and excluded in *Shapino Packing Co.* (1966), 155 NLRB 777. A corporate president's brother-in-law was included in a unit in *Tri-City Super Market Inc.* 1963 CCH NLRB 12,823.

7. In *P.A. Mueller and Sons* (1953), 105 NLRB 552, a nephew of the president and owner of the employer was excluded from the unit.

8. A sister of a corporate employer's president was excluded in *Tri-City Super Market Inc.*, *supra*, note 6, n. 8.

have more in common with their employer than fellow employees. The second is the NLRB belief that their inclusion would hinder the exercise by other employees of their right to organize. These two reasons were succinctly expressed in the 1953 case of *P.A. Mueller and Sons*.

The Board's policy of excluding such near relatives is based on Section 9(b) of the Act, under which the Board must in every case determine the unit appropriate for bargaining purposes. In making this determination, the Board long has excluded from the appropriate unit those employees who lack sufficient interests in common with the employees included in the unit. The Board early decided in this connection that the familial bond between an employer and employee is in certain cases so close as to remove the near relative from the "community of interest" shared by the other employees. The interests of such near relatives are identified not with their fellow-workers, but with management itself.

The practice of excluding close relatives of management rests on a further practical ground. Pursuant to Section 9(b), the Board must determine the bargaining unit that will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act," including the right to organize among themselves and to bargain collectively without interference, restraint, or coercion. The inclusion of a close relative of the employer in a bargaining unit with the other employees in a particular plant may as effectively hinder the employees in organizing themselves and bargaining collectively as would the intrusion of any representative of management. In the eyes of the other employees, a son or nephew of the employer, although he may work with other workers, is intimately allied with management. Accordingly, the employees may well view with suspicion his membership in the bargaining unit, especially where, as here, the employing enterprise is small and closely held.<sup>9</sup>

The behaviour assumptions of the attitude of familial relations of management and the attitude of fellow employees to them, if valid, in the U.S. would seem to be applicable in Canada. There is no reason to doubt that these attitudes in the American melting-pot would differ in the Canadian mosaic. In the reported decisions of Canadian labour relations boards, however, where a familial relationship was placed in issue, it was argued that the relationship was grounds for finding that the person came within the ambit of the confidential criteria that excludes a person from employee status

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9. *Supra*, note 7 at 553.

under the legislation.<sup>10</sup> Only one Canadian decision has discussed the familial employee in terms of "unit" status rather than "employee" status.<sup>11</sup>

In most of the cases when the question of familial relationship was raised before the NLRB the inclusion or exclusion of the relative was determinative of whether the union had gained majority support.<sup>12</sup> Realistically it can be said that it will only be on these occasions that the issue will be argued before Canadian boards. In the one Canadian decision that specifically dealt with this issue the

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10. In *J. McLeod and Sons*, OLRB Rep. February 1970, p. 1316, a father-son relationship in a plumbing shop did not create a confidential relationship that fulfilled the exclusion. In *Trade-Woods Manor Nursing Home Limited*, [1971], OLRB Rep. 270, a brother of the administrator and son of the owners performed maintenance work. He circulated a petition against a union certification application. The Board found that he was not a person who exercised managerial functions and was in the bargaining unit. The petition was considered to be the voluntary expression of the son's and others' opinion. The brother and son was "not regarded by the other employees as being in position to affect their employment relationship".

Over a dissenting opinion, two sons of the employer's president, and brothers of the general manager who were shareholders and directors, were adjudged by the OLRB to be employed in a confidential capacity in matters relating to labour relations (*Ed Walker's Electric Ltd.* OLRB Rep. March 1970, p. 1434).

In some situations where the familial employee carries the authority of his management relative the "alter-ego" criteria could be employed to exclude him as management also. (*Steep Rock Iron Mines Ltd.* OLRB Rep. April 1968, p. 105).

11. *Alpine Land Development Ltd.* reported in part at [1975] 1 Canadian LRBR 316 (B.C.L.R.B.) (Bd. No. 4/75). In *Reddi Gas Propane Ltd.*, [1974] 1 Canadian LRBR 246 (B.C.L.R.B.) a wife of the president and *de facto* sole owner of the corporate employer was excluded from a unit "on the grounds that her community of interest is not allied with her fellow employees, but with her husband" (at 250). There was no discussion of the question beyond this. The Board seems to assume that this statement is self-explanatory. In an unreported decision of the Nova Scotia Labour Relations Board, a nephew of the owner was excluded by party consent and board approval.

The Board wishes to point out for purposes of clarity that the classifications of . . . and Assistant Manager/Waiter are included in the description of the Bargaining Unit contained in L.R.B. No. 2087. However, Mr. Jim MacLean who occupied the position of Assistant Manager/Waiter is to be excluded from the Bargaining Unit on the basis that he is a nephew of the owner. His exclusion was agreed on by the parties.

(Letter dated August 2, 1974 in N.S. File No. 2072 to the parties, Bluenose Enterprises Limited (Carriage House) and Hotel, Motel, Restaurant, Bartenders, Construction Camp & Club Service Employees, Local 662)

12. Before the NLRB, the challenge was usually made after the ballots in a representation vote were counted and the votes were evenly or almost evenly divided.

unit status of a spouse of the president of a corporate employer was determinative of whether the union held majority support.

In *Alpine Land Development Ltd.*<sup>13</sup> the union sought certification for all sixteen employees of the employer. After deciding that certain employees were professional employees and excluded from coverage of the *Labour Code of British Columbia*<sup>14</sup> the Board was confronted with a determination of the status of the son and wife of the president and major shareholder of the corporate employer. The son, a high school student, was a casual employee and not employed on the date of application for certification. Under the B.C. Code and the policy of its Board he was not considered as a member of the unit for the purpose of testing the union's support among the employer's employees.<sup>15</sup>

The wife was a fifteen percent shareholder in Alpine and was employed to perform and supervise general office procedure. She was paid by the company but maintained no regular working hours. She held the office of secretary in the corporation, attended directors' meetings and had access to all confidential materials. Arguably she may have been excluded from coverage of the British Columbia Code because she was "employed in a confidential capacity in matters relating to labour relations".<sup>16</sup> The Board,

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13. *Supra*, note 11.

14. *Labour Code of British Columbia, supra*, note 1, s. 1.

15. Section 45(1) of the *Labour Code* makes the date of receipt of the application the determinative time for purposes of computing union membership support.

Where the board is satisfied that on the date the board receives the application for certification, a majority of the employees in the unit are members in good standing of the trade-union, or that a majority wish to be represented by the trade-union, and that the unit is appropriate for collective bargaining, the board shall certify the trade-union as the bargaining agent for the employees in the unit.

In *Western Canada Steel Ltd.*, [1974] 1 Canadian LRBR 106 at 108 (B.C.L.R.B.) the B.C. Board considered the argument for exclusion of casual employees from appropriate bargaining units. In that case the argument did not prevail.

16. Section 1 of the *Labour Code of British Columbia* defines "employee" as follows:

. . . a person employed by an employer . . . but does not include a person who, in the opinion of the board

- (i) is employed for the primary purpose of exercising management functions over other employees; or
- (ii) is employed in a confidential capacity in matters relating to labour relations; . . . .

The rationale for these exclusions is discussed in *The Corporation of the District of Burnaby*, [1974] 1 Canadian LRBR 1.

however, did not put its decision on this footing. Instead it looked to the different question of whether she was to be included in the bargaining unit.

Taking all the evidence before us into consideration, the Board feels that in this particular instance, Nancy Leggett stands in a particular relation to the owner and principal shareholder of the two companies, her husband; and that by virtue of her experience, background and knowledge in the business, her duties in the business, and her close personal and working relationship with her husband, she is in a particular position which would exclude her from the bargaining unit.

She lacks any real community of interest with other employees in the bargaining unit. Further, this is not a situation where divided loyalty would even be an issue. Any question of such loyalty would obviously be resolved in the immediate favour of the marital and business partner.

This is not to say that every wife who works for her husband in a business, or every husband who may work for his wife in business, would be excluded by virtue of the marital relationship. Exclusion by virtue of a family relationship alone is not contemplated by either legislation or this board.

But in this instance, there is sufficient evidence to lead us to believe that any business knowledge or decisions of the husband would also be made by or in the presence of, or shared with the wife. Such is the nature of their business and personal relationship, or partnership.

What of the case where a husband or wife may wish deliberately to divide his or her loyalties, and actively seeks the protection of the Union and inclusion in the bargaining unit? That is not the situation here, but it raises an interesting point.

To include Nancy Leggett in the bargaining unit here would lead to abuses that were not and are not contemplated within the collective bargaining process. It would result in the Employer being represented on both sides of the bargaining table.

In finding that Nancy and Chris Leggett are both excluded from the bargaining unit, the count of how many persons were members of the Union at the time of application for certification results in the Union having a bare majority, and the certification is thus granted.<sup>17</sup>

In the few cases where the peculiar employment circumstances of a close relative of management does arise it will be accompanied by very difficult determinations for labour relations boards. An

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17. *Alpine Land Development Ltd.*, *supra*, note 11 at 4-5.

assessment has to be made of the allegiance of the familial employee. The effect of the inclusion of the employee on the exercise of the other employees' rights must be evaluated. Lastly, the institutional capabilities and propriety of a tribunal of labour experts to make inquiry into the nature of a particular familial relationship must be considered.

The community of interests of a familial relation of management may not be as apparent as it seemed to be in *Alpine Land Development Ltd.*. Once a relative of management has gained employment, perhaps solely on the basis of the familial relationship, there is no reason to conclude that in the employment situation the interests of the employee lie with the management relative and his peers. The employee may, because of the relationship, have a strong loyalty for the interests of the employer. On the other hand, the vicissitudes of employment relations complicated by family ties create the possibility that the relationship may account for a strong anti-management sentiment and a close identification with fellow employees.

Familial relationships are far too complex for general assumptions to be made about them. A close relative or spouse can become estranged from his management relative or spouse. In the extreme, the relative or spouse may cohabit with his management counterpart, but because of the division of household and budgeting responsibilities, hope for union representation to bring improvements to the employment relationship. The domestic interests of the relationship of a spouse, child or relative could be severable from the employment interests. In human terms, to confuse the two interests could deny to the employee-relative the very type of third party representation that can give some order and certainty to a portion of their lives. In labour relations terms a confusion of interests could deny to these persons the fundamental freedoms collective bargaining legislation is designed to protect.

The effect on other employees of the inclusion of the familial employee may be a judgment that labour tribunals have expertise to make. In the area of unfair labour practices, statutory language and board attitudes assume that the members' experience qualifies them to assess the effect of actions and words upon employees.<sup>18</sup> Perhaps

18. *E.g., Labour Code of British Columbia, s. 5:*

No person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a trade-union.



their experience also equips them to make reliable decisions on the effects of familial relationships on employees' choice to exercise their rights under collective bargaining legislation. Without reliable studies in this area of industrial psychology or a number of cases on this subject it is impossible for me to comment further.

Whatever the effect on the employee in question, including a familial employee in the unit, also affects the choice of other employees and will necessitate balancing his interests against theirs. In cases where inclusion will defeat a representation bid by a union, the choice demands a careful scrutiny of the precise nature of the familial employee's relationship with the employer. The geneological nature of the relationship can be ascertained by the boards and perhaps they can safely refuse to consider some relationships as too remote to raise any conflicts. Relatives of nominal directors, minority shareholders, majority shareholders in corporations owning substantial portions of other corporate employers and similar relationships behind the corporate veil could easily be ruled outside the ambit of familial relationships. As the NLRB has done, any review of familial relationships could be confined to relationships with shareholders and corporate officers in closely-held corporations.<sup>19</sup>

There remains the question of whether a tribunal, composed of members appointed because of their expertise in labour relations, should inquire into the domestic relations of spouses and relatives of

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For a critique of the NLRB's ability to assess the actual impact of employer or union conduct, see J. Getman and S. Goldberg, *The Myth of Labour Board Expertise* (1972), 39 U. Chi. L. Rev. 681.

19. In the U.S. the range of familial relationships behind the corporate veil that the NLRB will review has been considered most extensively in terms of the express child and spouse exclusion from the coverage of the NLRA, *supra*, note 3. See *O.U. Hofmann & Sons* (1945), 55 NLRB 683 affirmed 147 F.2d. 679 (1945) (Cir. C. of A. — 3d Circ.). (son employed by partnership of father and two brothers was within the exempted class). In *Foam Rubber City No 2 of Florida Inc.* 1968-1 CCH NLRB 21,787, the NLRB stated its policy of exclusion of children and spouses of substantial stock holders in closely held corporations. The NLRB's *per se* rule in *Foam Rubber* was disapproved in *Caravelle Wood Products, Inc.* 69 L.C. 12,931 (1972) (Cir. C. of A. — 7th Circ.). The Seventh Circuit withdrew from the position of the Sixth Circuit in *Sexton Welding Company Inc.* 203 F.2d 940 (1953) reversing 100 NLRB 344, which found that the NLRB had no jurisdiction under its mandate to determine appropriate bargaining units to exclude any persons other than children and spouses excluded by the definition of employee. It approved a special status test set out in 1965 by the Sixth Circuit in *Cherrin Corp. v. NLRB*, 349 F.2d 100 (1965), cert. denied, 382 U.S. 981 (1966) and set out factors the NLRB might consider in determining whether familial relations are to be included in an appropriate bargaining unit. These factors are quoted, *infra*, note 25.

management. In the early years of its administration the NLRB answered this question in the negative. As a matter of policy it adopted an irrebuttable presumption in favour of exclusion of familial relations from a bargaining unit.<sup>20</sup> That presumption effectively foreclosed board inquiry into the issue of conflict. In 1953 the NLRB re-examined this policy and rejected its continued automatic application. Since then it has been convinced that

the mere coincidence of a family relationship between an employee and his employer does not negate the mutuality of employment interest which an individual shares with fellow employees, absent evidence that because of such relationship he enjoys a special status which allies his interests with those of management.<sup>21</sup>

This new approach was not welcomed by all members of the Board. Member Murdock, dissenting in the case that established the new policy, had definite reservations about the practical aspects of administering the new policy.

But it appears that a new rule is announced in the majority decision in this case which establishes in practical effect the “irrebuttable conclusion” for the *inclusion* of close relatives of management in the unit. Thus, under the new rule, to warrant exclusion from the unit of a close relative (other than “any individual employed by his parent or spouse” — Section 2(3) of the Act), it must be affirmatively shown that “because of such relationship he enjoys a special status which allies his interests with those of management.” Such evidence, it appears to me, is virtually foreclosed. For it must be appreciated that apart from the fact itself of the existence of a close family relationship, there is as a practical matter little probative evidence that can effectively be offered to establish the necessary link with management to justify exclusion under the new rule. Moreover, as a matter of good administration I see no reason why the Board should clutter up its records and unnecessarily multiply the issues to be decided in making unit determinations by making microscopic examinations of the exact extent to which each relative involved in a case has achieved some special status or benefit by reason of the familial bond.<sup>22</sup>

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20. For a discussion of the NLRB's early policy, see *P.A. Mueller and Sons*, *supra*, note 7. In that case the NLRB re-affirmed its earlier policy of presumptive exclusion and refused to follow the Court of Appeals for the Sixth Circuit in *Sexton Welding Co.*, *supra*, note 19, until the Supreme Court had passed on the question. See note 7 at 554 of *P. A. Mueller and Sons, Inc.*. Just six months later it reversed its position. See text accompanying notes 22 and 23, *infra*.

21. *International Metal Products Co.* (1953), 107 NLRB 65 at 66-7.

22. *Id.* at 69.

Since establishing the new policy the NLRB has confined its examination of “special status” principally as it relates to the manifestations of the familial relationship in the employment situation.<sup>23</sup>

Examination of only the employment circumstances of the familial relationship accords most with the expertise of labour relations boards. In most cases the presence or absence of any manifestations of special status in the employment environment may be an accurate reflection of where the relative-employee’s interests lie, but the familial relationship, even more than the employment relationship, is full of subtleties. An employee who is a familial relation of management may be subject to many pressures or enjoy more privileges than are apparent in the employment environment or are known to fellow employees.

Labour relations boards must not deny representation to relatives of management simply because they received special benefits from employer nepotism. By incorrectly excluding them from a bargaining unit they would in effect be denied union representation.<sup>24</sup> It is unlikely that a separate relative unit could be created or would be appropriate for certification. At the same time, the boards must be cautious to protect employee rights to organization. The collective bargaining rights of non-familial employees should not be jeopardized by familial employees who receive unseen benefits that ally their interests with the employer. In cases such as *Alpine Land Development Ltd.* labour relations boards must examine the familial relationship. On some fact patterns they may be placed in the uncomfortable position of having to investigate the relationship beyond the employment environment.<sup>25</sup>

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23. This special status test has received judicial approval by the Sixth and Seventh Circuits. *Caravelle Wood Products Inc.* and *Cherrin Corp.*, *supra*, note 19.

24. Although they might receive the benefits that employees covered by a collective agreement receive, they do not have the protection of the grievance and arbitration procedure. They could also be placed in a most difficult social position if they were called upon to work behind picket lines or during a lockout.

25. In *Caravelle Wood Products Ltd.*, *supra*, note 19, the Court suggested the NLRB determine appropriateness on a case by case analysis, considering:

how high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed, as compared with the total number of employees, *whether the relative lives in the household or is partially dependent on the shareholder*, (Emphasis added.)

It can easily be argued that probing inquiries into the extra-employment relations of employees, particularly spouses, are properly beyond the expertise or province of labour relations boards. Board member embarrassment and, perhaps, hostility by the employee under inquiry favour a policy decision against inquiry but this ignores the labour relations needs of employees. Board inquiry should be the last resort, but should be available for parties involved in certification applications.

The boards should adopt a policy favouring determination by independent board investigation. Experienced board officers should be able to unearth enough facts for a board to determine where the employee's interests lie. Unions and employers should be called upon to avoid circumstances where relative-employees may be used as pivot points in attempts to gerrymander units to their respective advantage. Where avoidance proves impossible and union representation revolves around the inclusion or exclusion of a relative of management, labour relations boards should commence their inquiry with the employee's on-the-job status. If the inquiry discloses that the employee enjoys preferential wages, hours of work, vacations or other terms of employment, his interests could be presumed to be allied more with management than his fellow employees. If his working conditions or job status are less or perhaps no more favourable than those of his fellow employees, his interests could be presumed to be with his fellow employees. Any interested party should be entitled to attempt to rebut these presumptions. In the few cases where a challenge is made the boards will have to conduct an inquiry. The board's expert sensitivity to human relations in strictly labour relations circumstances will then have to be tempered with a sensitivity for human relations in a broader context.