## 1. Labour Code Purposes + POLICIES:

1. *Access to CB* (protection in setting up union and union rep/activities); 2. *Industrial Stability* (control union’s impact on ER, which includes regulating the use of economic weapons of *strike* and *picketing*) (Weiler). This is **remedial legis**.
2. Duties under Code: 2(a)-(h)

Policies and Assumptions:

-(LIST UNDER HERE)

-Roy Adams Text:

 -All sorts of models exist, e.g. *sectors* in France. Distrustful model of ER against the union won out in NA/BC. Up to BOARD to define, but it’s at **level of WORKPLACE** (by EMPLOYER).

Sanford Jacoby, “Social Dimensions of Global Economic Integration” – UNION POWER DIMINISHING: Due to the increase in global economic integration, there is an increase demand for technology intensive goods and services rather than manual labour (where union rates are higher). Easiness of employers shipping work overseas – hurting labour union’s bargaining power. Government employees are safe from this threat, union rates still high in public sector.

Harry Arthurs, “Reinventing Labor Law for the Global Economy” 2001 – DIFFICULTY UNIONIZING TODAY’S GLOBAL ECONOMY. Structure is a factor: Local production v foreign production v outsourcing. Also, rise in self-employed workers where it is hard to unify common interests if unionization would ever occur.

## 2. Who does Labour Code Apply to?

**S1(1)** **"employee"** means a person employed by an employer, and includes a dependent contractor, **but does not include** a person who, in the board's opinion,

(a) **performs the functions of a manager or superintendent, or**

(b) **is employed in a confidential capacity in matters relating to labour relations or personnel**;

-**CL:** Employee; employee with tools; employee with independence; an employee with own equipment; a contractor fully dependent on one business; an independent entrepreneur with various contracts.

-**s18**: *employees* are eligible for **certification** process.

-> **THEORETICAL APPROACH to defining EE**: *legal formalism vs realism*:

 -> Formalism: *definite meaning* exists, court must come up with definite test; Realism: Indeterminate, meaning *socially dependent* on the purpose of its use, court clarifies *its purpose* so boundaries can be put up (e.g. risk regulation model for vulnerable economic actors).

**EMPLOYEE vs INDEPENDENT-K (CL)**:

***SAGAZ***: *who is employee*? *Distinguishing between contractor + EE*

**-F**: Canadian Tire, Manufact -> **kickback scheme**.

-No single test for whether one is *EE* or *Independent-K*. “The central question is whether the person who has been engaged to perform the services is performing them as **a person in business on his own account.** In making this determination, the **level of control** the employer has over the worker's activities will always be a factor. However, other factors to consider include **whether the worker provides his or her own equipment,** whether the **worker hires his or her own helpers**, the **degree of financial risk** taken by the worker, the **degree of responsibility** **for investment and management** held by the worker, and the **worker's opportunity for profit** in the performance of his or her tasks.”

-Tests*:*

1**. Control test** (*Regina v. Walker*): - (Diff btwn master and servant/principal and agent) A principal has the right to direct what the agent has to do; but a master has not only that right, **but also the right to say *how* it is to be done.**

2. **Locomotive test**: *Montreal v. Montreal Locomotive c Works Ltd*:

(1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss

3. **Business Organizations test** (*Harrison, Ltd. v. Macdonald):* **“**One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it. –Contract **OF** service, or a contract **FOR** services?

4. **Enterprise test [realist approach – helpful]**: (1) she controls the activities of the worker;

(2) she is in a position to reduce the risk of loss;

(3) she benefits from the activities of the worker;

(4) the true cost of a product or service ought to be borne by the enterprise offering it. -Impose the cost of risk on the party most **capable of limiting or managing it**

**- Implications for status**:

 -IF EE, ER *vicarious liability* to third parties, various premiums (EI, CPP), far more protective regimes for EEs.

**EE vs INDEPENDENT-K Under the Code**:

*Cominco Ltd*., BCLRB No. 49/79 *Balance Factors in CL + Code meant to Remedy?*

-All the common law contract of employment factors, plus one more.

-“[T]he starting point for an enquiry such as this one is to recall the **usual characteristics** of an employer-employee relationship. The next step is to ascertain **which of those usual features are present, and which are absent**, in the relationship under consideration. Then, **in close cases, a judgement must be made as to whether the individuals in question are exposed to the kinds of pressures and imbalances which the overall scheme of the statute was intended to correct**. That is a good indicator of whether the statute was intended to apply to them at all.”

**MANAGERS EXCLUDED FROM “EMPLOYEE” IN CODE**:

-1(1)(a) What is managerial authority?

*Cowichan Home Support Society*, BCLRB No. B28/97:

1) **Discipline and discharge**

* 1. *Just cause* provision (power over)

2) **Labour relations input;** and, less importantly,

* 1. Having say in overtime, cost-efficiency, how organization run (anything costing money or about efficiency)

3) **Promotion and demotion**

* 1. Relate to negotiation of CA, center of conflict.

-**F**: Policy reasons for excluding managers: *duty of loyalty to your manager*. Divide *assists unions* with their organization as well. **As long as there is *potential*** **conflict***.* Manager was trying to exclude EEs from compliment (some MGMT, some Confidential).

**EEs IN A CONFIDENTIA CAPACITY EXCLUDED FROM EMPLOYEE IN CODE**:

-1(1)(b) What is confidential capacity?

*Gateway Casinos & Entertainment Inc*., B81/2010

-Persons **regularly and materially** **involved** in personnel matters such that they are **entrusted with confidential information about employees** and must act upon it **discreetly**. The information will include facts of a character which if divulged or misinterpreted **could impact upon the relationship between the employee and employer**, or for that matter between the employee and his fellow employees. Finally, the person receiving the information will be responsible for making **judgments about it**, as opposed to recording it or processing it in a routine way.

 -Question about whether a *real* conflict between ER and Union, because of confidential capacity. This person can’t be EE, otherwise will have competing obligs.

-**Union shouldn’t be able to avail itself of the private info, either**.

 -Has to be info related to **labour relations.**

 **-F**: Q about *security guards* and *surveillance* people… **\***board distinguishes between two. One is conduit.

**DEPENDENT CONTRACTORS INCLUDED IN s1(1) OF “EMPLOYEE”:**

-s1(1) “**dependent contractor**" means a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person **in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor**

-***West Fraser Mills*** test (*trucker’s case*):

1. the way the industry operates;

2. the type of work involved and its source;

3. the nature of the applicant's operations;

4. the organization of the employer's operations and the degree to which the contractors are a continuing part of it;

5. any contractual arrangements between the parties and others;

6. the type and extent of control and direction exercised by the employer with respect to such matters as hiring, firing, discipline, work assignment, hours of work, and so forth;

7. the nature and manner of compensation and how it is determined;

8. the percentage of income which the contractor derives from the employer (generally, the lion's share of the contractor's income must derive from the relationship with the employer);

9. the opportunity for the contractor to make a profit through the exercise of independent entrepreneurial judgment;

10. the contractor's opportunity for economic mobility and whether the contractor advertises or solicits customers elsewhere

**Who is the EMPLOYER**?

-Employer is determined by who maintains control:

 -Who pays;

 -Who can discipline and dismiss;

 -Who directs services;

-*York Condo Factors*:

(1) The party exercising **direction and control over the employees** performing the work...

(2) The party **bearing the burden of remuneration**...

(3) The party **imposing discipline**...

(4) The party **hiring** the employees...

(5) The party with the **authority to dismiss** the employees...

(6) The party who is **perceived to be the employer by the employees**...

(7) The existence of an **intention to create the relationship** of employer and employees

**-***Columbia Hydro Constructors*: \*Overarching **additional** **factors**.

1. The organization into which the employees are integrated;

2. The organization that holds fundamental control over the employees

**WHO CAN VOTE** *to certify union for representation..*

-Relaxed notion of “employee” due to enduring nature of collective bargaining relationship;

-No reason to exclude employees with a **contingent or future interest** if likely to be subject to the exclusive agency arrangement;

-Snap shot as of application for certification to facilitate expedited nature of certification process.

-**“definition of EE”**: *relevant for* **s18** **threshold application** -> who can vote to be certified? Therefore, *those who are not excluded above*, and those who are *more questionable* EE’s should pass **SCI** **test** **below**. Q of *who should have a say in representing them* through CB?

-**Sufficient continuing interest**:

General Standard utilized to determine whether employees have a sufficiently *tangible relationship with the bargaining unit* **such that they deserve a say in who represents them**:

* + Summer students;
	+ Layoff (before vote for union);
	+ Off work due to illness (or on vacay);

-If there is expected **return** date, should **get vote**.

Workers promoted to management during time relevant to vote;

*Waldun Forest Products Ltd*., (**SPECIFIC FACOTRS**) BCLRB No. B158/93, considerations for **casual/part-timers**:

*-permanence* of employment;

-proportion of casual/temporary employees in the *total work force*;

*-nature and organization* of the employer's business;

-*Each individual's particular employment circumstances*

*-\*LAY-OFF?* Look to: *Character + df. of layoff rights, duration of layoff, seniority, and whether EE returned to school/other work.*

-**FAMILY**: **alone not sufficient to exclude from COI**. Colin works for his dad at the mill, ER, went back to part-time to finish studies. He views himself as EE. Does not own shares, etc. Haven’t discussed organizing drive. Q: *whether two bros* *be excluded from unit* (they are EEs). **Whether** **including them causes conflict (not same community of interest)**. **Factor of dependency important** (familial). BOARD EXCLUDED THEM – possible conflict.

-**MGMT TEAM:** Need for *arm’s length distance* between ER and UNION. “Rare” concept of MGMT team exclusion.

-**CASUALS/PART-TIME**: are CLEARLY EE’s. **FACTS OF EACH CASE** to see if *sharing a COI* – thus, a share in *certifying UNION*. The test above.

 -**F**: -*Grewal* – for example, was “SLOW PACKER” (‘last resort’) and only worked 8 hours that year. Not sufficient part of union. Trying to obtain OTHER part time work. **Excluded.**

 **-***McBride* – full-time student. Worked 8 hours. ER wanted to give hours (more during summer). Other casuals worked *way more* (except Grewal). **Excluded**.

 -*McCormick* – No longer at mill, at moving-Co. On-call basis. Worked 63 hours. Will be given more hours when work increase. **Included**.

## 3. CERTIFICATION PROCESS

-All litigation around s18(1) “**a unit appropriate for CB”**.

-**Two steps**: 1. Threshold Vote (s18) of 45% of the **‘employees’** in the proposed unit; 2. Within 10 days, **representation vote** (s24(2)). If less than 55% *voters* (not all EE’s) voted for the proposed unit for CB, then need re-vote (3).

**s18** (1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for **a unit appropriate for collective bargaining**, a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit.

**s24** (1) If the board receives an application for certification under this Part and the board is satisfied that on the date the board receives the application at least 45% of the employees in the unit are members in good standing of the trade union, the board must order that a representation vote be taken among the employees in that unit.

**(2)** A representation vote under subsection (1) must be conducted within 10 days from the date the board receives the application for certification or, if the vote is to be conducted by mail, within a longer period the board orders.

**(3)** The board may direct that another representation vote be conducted if less than 55% of the employees in the unit cast ballots.

**PURPOSES of Appropriate Bargaining Unit**:

**LABOUR Board purposes in establishing appropriate BUs:**

*Insurance Corp of British Columbia (Re)*, 63/74

 **The statute gives no specific direction** for the exercise of our judgment and we must develop the guidelines on our own. That is a difficult task for several reasons, but primarily because there is a **tension between the two uses of the bargaining unit.** **On the one hand the scope of the unit is the key to securing trade union representation and collective bargaining rights for the employees**. Since this is a fundamental purpose of the Code, the Board's definitions must be such as to **facilitate organization** of the employees.///**On the other hand**, that unit sets the framework for actual bargaining for a long time into the future. **A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects** of the latter when they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.

 -1. Effective access to CB; 2. Industrial stability

 -**The Board focused on the *long-range structure of CB***, **and said “ALL EEs of BC” = the appropriate unit**.

**Importance of appropriate BU**

-Bank Unionization Article:

 -

**How to Determine Unit Appropriate**:

*Island Medical* *Labs*

**Community of interest test**:

1. **Similarity in skills, interests, duties, and working conditions:**
	1. Who is working? Who is covered by unit scope? What do they do? How do they do it? Who do they do it with? Types of benefits and pay? Extent and manner of training?
2. **The physical and administrative structure of the ER:**
	1. Physical connection between sites and ease of movement? Managerial structure and authority at each work site? Whether payment through same system? Whether HR are separated? Whether separate business units and/or depts. involved?
3. **Functional Integration; and**
	1. Refers to: employee interchange, shared duties, integrated job duties, overlapping duties, team processes and continuous work processes (*Cam-Am Produce and Trading* – anything functionally integrated must be within the SAME BU). Extent to which duties overlap with others outside unit? Whether work is dependent on others outside unit? Extent to cross-bidding or scheduling of employees? Extent of exchange of workers between work units? NOT the same as *functional relationship*.
4. **Geography**:
	1. Where each work site is located? Distance between each site? Barriers between sites? Whether or not there is separation of function or interdependence between sites?

AND WHERE ANOTHER UNIT ALREADY EXISTS, ADD:

1. **The practice and history of current CB scheme**:
	1. ?
2. **The practice and history of CB in the industry or sector**:
	1. ?

-Policy: **BIGGER IS BETTER**. Largest = most appropriate, but all you have to show to satisfy s18(1) is **it is *an appropriate unit***.. or that there is a **rational defensible line drawn around the unit**. \*FOR the sake of **STABILITY**.

-**Cutting across classification lines**: *not permitted*.. because in a given workplace, it puts EEs INSIDE and OUTSIDE of the union at the same time (same shift, with the **same kind of conditions**). CA has to be *static* in how many people it covers, otherwise unworkable.

-**Geography**: *generally allows you to cut lines by geo*.

**Presumption/Guides**:

-Geographical separation, *prima facie* appropriate;

-Difference between functional integration and functional relationship:

-*Hain-Celestial Canada, ULC (Re)*

 **-“Continuous work process”..**

 -MAY PERFORM SEPARATE TASKS on a continuous process (still part of team), but shared duties helps show FI.

 -Quality Assurance: *excluded from unit* – **functional relationship but not integration**.. because: 1) Separate physical admin (second *IML*) 2) Unique duties 3) Specialized skills (first *IML*) .. *not part of same team*.

 -**Functional relationship**: manufacturer and assembler relationship, etc. communicate, use each other to some extent.. but not integrated.

-Generally won't cut across classifications:

*-Wal-Mart Canada Corp;*

*-Sidhu & Sons Nursery Ltd. (Re)*

-Relaxation of factors in traditionally difficult to organize sector:

*-Woodward Stores (Vancouver) Limited*

**Where SECOND unit**:

-All six *IML* factors.

-“REBUTTABLE PRESUMPTION” against *additional* BUs

-Presumption at its *lowest* at second unit and increases with *each additional unit*.

*Woodward Stores* – ‘**traditionally difficult to organize’**, **policies**..

-F: One location.. SEPARATE OFFICE FOR *GRAPHICS*. Defined classifications.. 20 employees.. 18 (2 excluded as admin).. 18 working day to day.. developing ads for woodwards marketing. Office managing sales.. over 2000 sales staff in various locations. They would send back info to the graphics dept.. they would make up graphics, send it back to sales for verification.. once sales confirmed, they would confirm with printers. **Dealing with EXTERNAL advertising**.. **not in-store**.

-Application was *just for graphics DEPT*: “all EE’s except for Admin staff”.

-Q: **Appropriate unit/rational defensible**?

-**L:** 1. **Bakeries**: Union applied to separately certify 3 of 5 units in GVA. ER argued: *certify all 5 in GVA* as one (or all 9 in BC). ER: Functional integration, and store-transfer policy. Each store = *separate + separately supervised*. **Board**: Provide-wide/area-wide stifling. However, **policy to reduce amount of units** = 3 nearby bakeries **as one unit**. MAJORITY all EE’s at these *three locations* (higher risk of EE’s being inside and outside the union).

 2. **Graphics Dept**: ER argued *all 2000* EE’s = only *rational defensible line*. Union argued graphics dept = an appropriate unit (fear of ‘patchwork’ – INDUSTRIAL INSABILITY). **Applied traditionally difficult doctrine**: *allowed this smaller group* (other EEs in other dept not willing – trumps graphics’ right). **Rational line =/= the BEST, LARGEST**. Risk of *industrial instability*: not best approached by *never allowing small units to certify*. **However:** FLEXIBILITY. Board does not want a build-block of small units with ONE ER. At some point, needs to be LARGER. **Conclusion**: *APPROPRIATE UNIT* (even though some reasons to merge with other groups).

*Wal-mart Canada Corp* – ***don’t be cutting across waterfalllssss (classifications)***

-F: Auto-service cashiers (sell lube, tires, etc) next to auto-service mechanics (who do mechanical work on cars). Auto-service cash has *same equip, skills, etc. as OTHER cashiers elsewhere in the Wal-Mart*. Applied for 10/204 at a **physically integrated, single site of employment** (the Wal-Mart).

-Q: **Rational defensible line** **around auto-service cash and mechanics**?

-**L**: *Not permissible to* ***cut across classification lines (sales)***. The service cashiers are *basically the same as elsewhere in the store* (other sales). “**Never happened before where in integrated work-site, board has issued a cert that cuts”**.

 *-Wishes of the EE are not determinative.*

 *-Extent of the organizing drive not determinative*

 -*Board will not cut-across classification lines* (nor issue a single classification)

 -**MAJOR EXCEPTION = GEOGRAPHY** (different location), OR **fall into *Woodward Stores* = Traditionally Difficult to Organize**.

 -**Not an absolute rule**.

-These restrictions INJECT CERTAINTY into the *IML* analysis.

-**Result**: *NOT EVEN WITH TRADITIONALLY DIFIFUCLT DOCTRINE* (although no basis here)– **unit denied application** (cutting – inconsistent with IML).

*Sidhu & Sons*: ***Temporary foreign workers (TFWs) and IML* – unique EMP status**

**F:** Union Submits the decision was inconsistent with the Code principles. Employer believes it should be upheld. Unionization of all Seasonal Agricultural Workers Program (SAWP) employees because of **different employment status and terms and conditions of employment**., **if not then have a distinct community of interest that a ration and defensible line can be drawn around them.** Employer argues that it cuts across classification (***they are doing the SAME WORK***).  **C:** Decision sent-back. Have to consider the differences not in the work they do, but *their UNIQUE EMP STATUS* (work interests – mobility, linguistic) under 1st factor of *IML*.

**IML Test**

1) Distinctions are far outweighed by similarities (**duties, skills, interests)**

2) Distinctions are far outweighed by similarities (**physical/admin integration**)??

3) More appropriate to ask if it is best to cut across a single classification (**functional integration)**

4) No geographical distinctions can be drawn between SAWP employees and the rest of the farm workforce

- **ORIGINAL DECISION**: Not persuaded that employment status and terms and conditions of employment are aspects of one’s job classification. Different job classifications must be distinguishable either by what work is performed or how the work is performed.
- Not the right approach: **look at unique interests** 🡪 whether the interests of the SAWP employees are **sufficiently unique** **to overcome the rationale and right of the other IML factors and restrictions** (job mobility, restrictions) .. **Fits within first IML factor**.

## 4. UNFAIR LABOUR PRACTICES – SECURING BARGAINING RIGHTS

 *INTERFERENCE WITH CERTIFICATION/ORG-DRIVE*

-*General Shoe Corp:* In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

*Right to participate in union*..

-**s4(1)** Every employee is free to be a member of a trade union and to participate in its lawful activities.

(2) Every employer is free to be a member of an employers' organization and to participate in its lawful activities.

-Enunciation of fundamental principle: Confers **no substantive rights** .

Anti-discrimination clause

**s5(1**)

-Common feature of legislation protecting vulnerable citizens;

-Protects employees against retaliation for exercising rights under the Code;

-Must establish subjective motivation for retribution.

**5(2)** gate-keeps complaints into or out of expedited process.

**OBJECTIVE - Interference with a trade union – formation or admin:**

**UNION-INTERFERENCE WITHOUT ANIMUS** -**s6(1)**: Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or **interfere with the formation, selection or administration of a trade union** or contribute financial or other support to it.

 -***does not require any ANTI-UNION-Animus***; **objective effect of conduct**

 -Maturity of the *CB relationship* (*younger, pre-mature* = more damaging)

 -Difference between: explaining position and facts **vs** disparaging uion/undermining exclusive bargaining agency

 -Appropriate to balance ER’s legitimate interests (business)

 -*Gateway Casinos*: **Inquiries pertaining to** **union support** almost *never* permitted.

**ER FREE SPEECH:** -**s8**: **(2002 VER)** Subject to the regulations, a person has the **freedom to express his or her views on any matter,** **including matters relating to an employer, a trade union** or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

 **AMENDED** **OVER TIME**:

 -*The deletion of “reasonableness” (of opinion);*

 *-The deletion of “undue influence”; and,*

 *-The addition of the word “views”*

-THUS: If ER objectively interferes with *FORMATION or ADMINISTRATION* of setting up union (usually CERT), might be unfair labour practice, unless you can say it was **free expression***, and if you can say it was a* ***VIEW*** (*if not a VIEW, not protected*).

**Purpose of s6**.. *Forano Limited* - *1973 approach w/o free speech*, *b4 AMEND*

-**Scope of s6 defined by value of s4 rights** (right to organize). **S6 intends to *protect that right***.

-“Employer conduct which has a significant impact on the employee's freedom to make up his or her own mind about collective bargaining is the kind of conduct which will run afoul of **s6**. **In making that judgment, we must always be conscious of the fact of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on that choice.** **Comments and predictions which might seem innocuous in a political campaign take on a very different hue when voiced by management**. *The safe course for an employer is to remain an interested bystander*, to resist the temptation to become an active partisan in a campaign against a union. The decision should be **left up to the employees**, both those who are for and these who are against the arguments of the union.” **-> irrelevant now that *s8 exists*.**

-**F**: Few EE’s got fired upon immediately hearing about unionization (some because “bad”). Very **circumstantial evidence**. Argued they had proper cause. BOARD FOUND FOR UNION.

-**CANNOT TERMINATE DURING CAMPAIGN, EXCEPT FOR PROPER CAUSE** (can’t make up *arguable* *cause* after the fact). **Firing for union-purposes has to just be *one small sliver***.

**Amnesty International Reading – Human rights watch**:

-If proper remedies don’t exist, ER will just consider consequences of getting rid of union just *“a cost of business*”. (Weiler talks about importance of *remedial certification*).

*Convergys Customer Management Canada* (2003) ***- 6(1),******incorrect statements, s8 content, surveillance***

-F: 450 emps, union organizers out front handing leaflets.. ER sends out memo, scuffle between organizers and the woman Ms. House. ERs put up surveillance (said it was their *practice generally* any time there is leafletters).

**MEMO ER Statements**:

-Implying Union is *disrespectful* and should *not be trusted*, even when that view is mistaken and unreasonable;

 -**Board: *view*** *protected* (legit expression).

-That EE’s would not gain anything they already have, implying the ER does not have to bargain if the Union is certified;

 -**Board**: Basically a *legally incorrect* statement (there is a duty to bargain in good faith). BUT, interpreted not as interference.

-That signing a Union card has the same legal effect of signing a *contract*;

 -**Board**: false statement, but *not a breach*. (Incorrect statements protected, as long as not “lies”)

-That EE’s would be *dismissed* if they shared *contact info*

 -**Board**: ***breach* 6(1)** – No basis to terminate someone for this. Lists were ER property, but went too far. This is *not a view*.

**ER Surveillance of leaf-letters**:

-They knew union had right to be there.

-Breach of 6(1) – *disproportionate response to actual threat perceived*.. **objective effect of interfering with union**. Scared the picketers.

-**S8**: “views” as ideas, thoughts, beliefs, judgements and opinions, **but not the acts done in furtherance of those views;**

-“views” do not include calls or invitation to act;

-**Lies are impermissible**, *though incorrect and unreasonable statements are protected;*

-Concentrated protection on more direct forms of pressure

*0720941 BC Ltd* (2008) ***6(1), objectivity, and legitimate business decisions, question not view (esp about union support)***

-F: two general facts at issue - a) employee terminated during organizing drive; b) ER’s asked about union-support (question or view?) **– breach of s6(1)**?

-L: **a)** since ER **didn’t know** the EE terminated was *organizer of drive*, **objective component prevails**. No intent-required to get breach. Just *objective effect*. Not a breach because for **legitimate business purposes** (e.g downsizing). *NO BREACH* *of s6(1).* \*\* was not *proper cause*.. but *legit business purpose*.

**b)** Only allowed to *express VIEWS*, therefore **questions are not protected**. **Breached s6(1) and failed under s8** (*NOT A VIEW*).

**Captive Audience Meetings** - *Cardinal Transport*ation

-**Problem**: *inherently coercive…*

-“One of the responses of an employer who wants to **discourage the unionization** of its business is to **suddenly increase its communications with its employees**;

**-It has some or all of the following characteristics**: it is held on company property during working hours, with no deduction in pay; attendance is compulsory, or if the employer states that it is voluntary, all employees feel compelled to attend because not to attend would be to clearly identify oneself as a supporter of the union; and senior management is in attendance. There is typically a discussion about current wages and working conditions; company performance, and industry or sector performance”

*RMH Teleservices* (p250-1**) 6(1), *Popcorn, Projectors, Captive Audience*, *Gifts, Remedies, remedial cert***..

-F: ER responded to U-org, bringing MGMT in from other places, being “available to answer any Q’s”. Little “gifts” to EE’s (Frisbees, popcorn /w anti-union), refused wearing of union-pins, and held many meetings, money-tree /w pension.

-**Unfair practices?**
 -MGMT from other branches: **not unfair**.

 -Nominal value gifts: *not likely swaying EEs*, but **technically a breach not protected by s8** (not a “view”).. [NOTE: **6(3) vs 6(1)**: 6(3) is *not saved by s8* (free speech). 6(3) is about inducing by negative or positive means.. EE not to join a union. **Requires anti-union animus**.]

 -Refused EE’s wearing buttons: **6(1) violation** – not a *view*.

 -Various meetings on org-D: “how much money we’re losing” (? Sent back)

 -**5 PROJECTORS**: **(not violation)** constantly displaying anti-union message. **Factual determination** whether it is *coercive*. Inherent dependence and subordination-relationship. **CONTEXT MATTERS**. **S8 Doesn’t give you RIGHT to have captive audience**.. EE can just walk away. **Here: *THEY COULD AVERT THEIR EYES*..** (NOT A CAPTIVE AUDIENCE MEETING).

-**REMEDIES**: must be *RATIONALLY CONNECTED to the consequences of the breach* and *consistent with the policy* objectives of the code. Fundamental objective of ensuring the freedom to organize, recovering power imbalance. **Deterrence** is important. **Remedies should be *compensatory, not punitive***, but **not so minimal that they become ‘mere cost of doing business’ against the code**.

**REMEDIAL CERTIFICATION** **FACTORS – where re-creation not possible**:

* (1) the level of membership support prior to and subsequent to the employer's unfair labour practice;
* (2) the seriousness of the employer interference and the reasonable effect (assessed objectively) of that interference on employees;
* (3) the point or stage in the organizational drive of the employer's interference;
* (4) if less than a majority of employees are members of the trade union, whether there is adequate or sufficient support to conduct collective bargaining, (i.e. negotiation, representation, etc.);
* (5) the "totality of the conduct" of the employer; and
* (6) the specific nature of the employer and the employees

**S6 Differences**:

**-6(1) Objective interference**: no A-U-A.

* **-6(3)(b).. more like statutory freeze: *ER MUST NOT*** (b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when a trade union is in the process of conducting a certification campaign for employees of that employer
* **-(c)/(d)**: more like the **straight up unfair labour practices**.
* -**6(3)(a) vs (d) – both require anti-union animus**.. AN EMPLOYER (not an employee).
	+ **(A) is about *actual conduct***
	+ ANTI-UNION ANIMUS: “BECAUSE THE PERSON”.. **retribution**: for employee who wants to become union member or participate.
	+ **(d)**: ***covers JUST THE THREATS*..** ***or positive inducements*** (also anti-union animus)

-So part of 6(3) covers anti-union motivated conduct..

-**Differences between s6(3)(d) and s9**

 -6 *can be ineffective*.. only committed by ER, **but** S9 has to be **“reasonably” effective.** Youjust need **intent** for 6.

* **Anti-Union Animus: 6 (3)** ***An employer*** *or a person acting on behalf of an employer must not*
* **Getting rid of pro-union people (trying to certify or existing members):**
* **(a)** discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment **because** the person
* (i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
* (ii) participates in the promotion, formation or administration of a trade union,

**Threatening/inducing during cert drive**:

**(d)** seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union,

**Section 9 – ANTI-UNION ANIMUS – *threats, coercion to influence conduct***

-Available against EEs and Unions too. S6 is *only for ER*.

-**s9: “**A person must not use coercion or intimidation of any kind that could **reasonably have the effect of** *compelling or inducing* a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.”

-**Motivation component + objective reasonableness**

*Peter Ross* (2008) s6, 9, ***board concerned with more direct ‘intimidation’, permissive Labour Code*. *STEP BACK FROM CONVERGYS***. \*“**indirect threats”**

-**F:** Justin Ross (took over Peter R’s weather-proofing). 32 EEs with 2 SIs (Spanish and Iraqi groups). Cesar started org-drive. Got 2/3 support, put in cert threshold vote, 10 days pending for last vote. JRoss finds out when he gets back:

1)“*who started union*?”

 -> **UNFAIR LABOUR PRACTICE** – not allowed *numbered case* (Q not view)

2) “Union is *really going to harm the CO* -> go broke”.

 -**Not unfair labour practice**.

3) Last day before vote, JRoss has meeting about union: shaking everyone’s hand, get paid, monologue about *family business*. Any problems, come to him, he can solve. Difficult competing with others, and *risk of about CO’s viability if unionized*. Competitive against non-union. Said they should go with *another 280 union*. Ended: “support me, vote no for union”

 -**Not unfair labour practice** **in CAPTIVE AUDIENCE MEETING\*\***.

 -**“you guys should vote no” -> board thinks OPINION** **not directive**

4) Sunday night before vote: “call-up campaign” (Board did not accept title). Called some SIs, EE. Called Cesar (leader), and daughter was witness. “Union is going to ruin my business, go broke”

 -**Not unfair labour practice**..

**Rationale**: *not concerned with the subtle forms of discussion*.. board worried about **more coercive and obvious, direct** **intimidation**.

 \*\*\* **WHICH SECTIONS ALLEGED VIOLATED**?

## 5. STATUTORY FREEZE – Keeping Bargaining Process Within Legality

**Purpose**: the ‘freeze’ limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business (*SCC* – *United Food and Commercial Workers*)

**Process of vote**:

-10 day statutory mandate, unless conducted by mail ballot;

-Expedited and administrative;

-Employees must be given a “reasonable opportunity” to vote;

-Like most elections as each side has a right to scrutineer;

-Almost always a voters' list;

-All objections must be made at the time to ballot can be double sealed

1. **FIRST STATUTORY FREEZE: DURING ORG-DRIVE, BEFORE CERT**:
	1. **6(3)(b)** .. An employer or a person acting on behalf of an employer **must not discharge**, suspend, transfer, lay off or otherwise discipline an employee **except for *proper cause*** **when a trade union is in the process of conducting a certification campaign** for employees of that employer
		1. Designed to protect union campaign to certify
		2. **ENDS with filing an application**
		3. Requires more than an “interest to continue drive”
		4. Indication where cards are left to stale-date after 90 days
		5. **Factual determination**: *what is org drive*?
		6. Difficult to prove ER is **aware of drive** + **animus**.

\*\*\* POST APPLICATION FOR CERT \*\*\*

1. **SECOND FREEZE: WHILE CERT PENDING**:
	1. **32 (1)** If an application for certification is pending, a trade **union** or person affected by the application **must not declare or engage in a strike,** **an employer must not declare a lockout**, and an employer **must not increase or decrease** rates of pay or alter a term or condition of employment of the employees affected by the application, without the board's written permission.
	2. **(2)** This section must not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for **proper cause**.
		1. **Cannot use strikes or lockouts, and ERs can’t increase/decrease terms of emp** (e.g. rate of pay).
		2. **ER can still lay-off, but only for *proper cause***.
		3. Must not **INCREASE** (to undermine CB)

\*\*POST CERIFICATION\*\*

1. **THIRD THREEZE**: **WHEN CERTIFICATION ISSUED, CB**:
	1. **FIRST CA - 45(1)(b)** the employer **must not increase or decrease** the rate of pay of an employee in the unit or alter another term or condition of employment **until**
	2. (i) **4 months after the board certifies** the trade union as bargaining agent for the unit,
		1. **UNION GETS 4 MONTHS PROTECTION – CB STAT FREEZE**
		2. After this, only protection might be *UNFAIR LABOUR PRACTICES* – 6(1), (3) or 9.
	3. **EXPIRED CA - 45 (2)** If notice to commence collective bargaining has been given and the term of a collective agreement that was in force between the parties has expired, the employer or the trade union must not, except with the consent of the other, alter any term or condition of employment, until
	4. (a) a strike or lockout has commenced,
	5. (b) a new collective agreement has been negotiated, or
		1. **INDEFENITE PROTECTION UPON RENEWAL** – **ER and UNION must not attack in any way until strike/lockout, or new CA negotiated**.
		2. *Packar case*: ER allowed to offer *different terms* in the CA, only when they tried to negotiate entire package with union first. If union turns down, they can *lockout* or offer those same terms to the EE’s (free to accept that or strike).

**Exceptions to STAT FREEZE**:

1. *Business as usual*; 2. *Board Discretion* under s45(3); 3. Firing for *proper cause*.

*Kamloops* – **business as usual test** (fails test, no authorization under 45(3))

-F: ER looking to roll-back wages, 9.4% (This or ‘out of business’). BU/non-BU trying to get certified.

-A: Either: **BAAT** or **BOARD DISCRETION 45(3)**.

-**BAAT**: ER arguing *regular business decision*, and in *financial difficulty*. Print industry suffering hardship. ALLOWED to do **PERIODIC SALARY REVIEW.** ER also argued **“decision was made earlier but not implemented**”.

 -**ER FAILS**:

 1. There was a ‘vote’ to consider the rollback, but it was **not implemented properly** (no adv notice, ppl didn’t know what was going on, poor attendance, *ad hoc* meeting). EE’s voted, but not with “full-informed consent”.

 -**4 month issue**: Freeze period was less than 2 months away. Therefore, **ER couldn’t show decision was made prior to freeze (2 months ago)**. **Roll-back is proposed 2 months in.**

 -TEST - **Business as Before** - look to the **purpose and intent** of the legislation and consider **factors**:

* + The nature and extent of the proposed change or alteration
	+ the reason for the alteration
	+ the need to make the alteration at this **particular time**
	+ the **labour relations implications** of the proposed change (would allowing the change adversely affect the promotion of meaningful Collective Bargaining?)
		- **2 months into the *statutory freeze* – SUPPOSED TO BE CHILL.** VULNERABLE.

2. **Authorization under 45(3) not allowed**: Either the ER gets the status-quo and goes into negotiations like that, or gets *the ADVANTAGE* of 9.4% wage-cut, before they start talking. Once CA in place, **locked-into years.** Don’t want to **pre-empt** the *negotiations*.

**FIRING FOR PROPER CAUSE**:

-In-between **individual emp, For CAUSE** (non-labour/union – *any essential term breached*)and **just & reasonable cause** (post-CA). For cause: *can give proper notice* or *cause* for dismissal. *Colin just uses Individual EMP* cases of wrongful dismissal for *‘PROPER CAUSSE’*.

-*White spot Limited* ***General TEST***

-"The test is whether the employer can advance **a reasoned explanation** which **objectively demonstrates a rational connection between the alleged misconduct and the discipline which was imposed**. For example, in a discharge case, the question is not whether the employee has given "cause" or "some cause" for the imposition of discipline; the Board must determine whether there existed "**proper cause for discharge"**

-*Cheshire Homes Society* ***Specific Factors***

1. Establish decision based on **good faith**;
2. Employee engaged in **conduct deserving discipline**;
3. **Reasonable relationship** between conduct and discipline:

 -steps taken to investigate;

-whether an employee was given an opportunity to respond to allegations;

-the employee's past record of discipline;

-the rationale for the penalty chosen;

-the manner in which similar cases have been addressed it the past; and,

-the seriousness of an offence in the particular employment setting

## 6. Expanding BU, Raiding BU, Decreasing BU

**Expanding the BU**:

-**s142**: The board, on application by any party or on its own motion, may vary or cancel the certification of a trade union or the accreditation of an employers' organization.

-Must be **appropriate for collective bargaining**

 -Group must be appropriate for BU ON ITS OWN (rational defensible line) otherwise conflict.

-Must not use existing support to **sweep** in other employees (*Olivetti* principle)

*Olivetti*: ***Prohibition on sweeping EEs into union***

-Can’t use s142 to sweep in EE’s **against their WILL**. Absolute discretion of the Board to ensure a BU is *appropriate*. Basically Union trying to swallow up other EE’s to make the unit stronger.

*Vancouver Museum and Planetary Association* – ***Scope of BU at CERT, Cafeteria***

-**F**: Board issued cert for “*all EEs at the museum except for gift shop*”. Q about CAFETERIA staff. Museum opened, not part of original CB. Contracted-out, and then decided to use *own EEs*.

-L: **Scope of BU set at time of *CERTIFICATION***. **Numerical changes are ok (e.g. adding more security guards already in BU –** a group inappropriate to exclude). Board Jurisdiction: **to attach cert to EE’s, not to work/business**. **Cafeteria not important in labour relations sense (maybe in business sense**). THUS: the Q is *whether it would be* ***inappropriate to exclude the new EE’s***. Security guards: yes (existing). Cafeteria under spent agreement: no.

4 ways to amend to include group:

1. Organizing unrepresented EEs and applying for **new cert.**
2. By organizing and applying for a **variation (Olivetti) s142**.
3. **Convincing** the appropriate tribunal that the **parties in fact agreed to include** **the EEs** in the BU.
4. By convincing the tribunal that the existing **cert as initially granted already encompasses the unrepresented EEs** and that it has not been diminished by agreement (THIS IS THE ISSUE IN THIS CASE).

**Result:** Expansion to Cafeteria EE’s DENIED.

**Raiding the BU**:

-**s18(2)** If a collective agreement is not in force and a trade union is certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may, subject to the regulations, apply to the board to be certified for the unit if either

* (a) 6 months have elapsed since the date of certification of a trade union for the unit, or
* (b) the board has consented to an application before the expiry of the 6 months.

-**19 (1)** If a collective agreement is in force, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months in each year of the collective agreement or any renewal or continuation of it.

(2) Despite subsection (1), an application for certification may not be made within 22 months of a previous application under that subsection if the previous application resulted in a decision by the board on the merits of the application.

* (3) Unless the board consents, a trade union is not permitted to make an application under this section during a strike or lockout.

**Decertification**:

**-*Exact mirror image of certification***.

**-s33(2)** If a trade union is certified as the bargaining agent for a unit and not less than 45% of the employees in the unit sign an application for cancellation of the certification, the board must order that a representation vote be conducted within 10 days of the date of the application or, if the vote is to be conducted by mail, within a longer period the board orders.

* (3) An application referred to in subsection (2) may not be made
* (a) during the 10 months immediately following the certification of the trade union as the bargaining agent for the unit,
* (b) during the 10 months immediately following a refusal under subsection (6) to cancel the certification of that trade union, or

**PARTIAL DECERT** **(s142)**:

**Biggest concern**:

 -Might undermine status of the union, stability, etc.

 -Takes away union *exclusive bargaining agent ability* *to trade-off on various conflicting interests*. Union has to **prioritize** these rights, interests.

-**Factors to consider**:

* (a) the impact of granting the application on the employees remaining in the bargaining unit;
* (b) the impact of granting the application on the collective bargaining relationship as a whole;
* (c) whether the application is tainted by improper interference from the employer or another entity;
* (d) whether the application is a disguised raid application;
* (e) whether the timing or context of the application makes it inappropriate for it to proceed; and,
* (f) **whether decertifying the entire unit is a practical impossibility**.
	+ Biggest factor

*Starbucks Case*: ***Example of Partial Decert*..** ***practical impossibility*** ***meaning***

-F: Union rep’d 12 stores. 1 wants *partial decert*. Same complement at each store. Orig had 4 stores, organized, s142. Board applies **4 IML FACRORS, NOT 6** (not proliferation).

-Q: **is one store appropriate on its own**? Yes.

-L: (Colin: Union really demonstrated impossibility of organizing all 12 at once in one BU). **Practical impossibility to decert entire group (factor (f))**?

 -There being an *overwhelming amount of people to speak to* -> **not practical impossibility**. It means **NO ABILITY** to speak to EE’s – **no ability to persuade and discuss with everyone prospect of decert** (e.g. stores in Kelowna, PG, etc.)

 -Union defense: **losing bargaining power** (8%) -> Board: Minimal. Loss of ability to take shifts: Board -> Not exercised anyways.

 -ALLOWED DECERT OF THE ONE STORE.

**EXAMPLE**: *Certification process + accretions of new EE’s, scope of BU*

1. **Before Unit-A certified:** Welder, Forklifter, Lathe Operator in building A opened. A applying for “All EE’s”. B opens up across street, same occupations.
2. IML factors for first certification of Building A: is it appropriate for *A to open up WITHOUT B*? Geographical separation probably makes it okay, but might be concerns about *EE’s moving across*, etc. VERY LIKELY Unit-A certified – *rational defensible line*.
3. **After Unit-A certified**: no B-app yet. Just a Q of whether B should be included in A. Does B make A-alone inappropriate? **Same as first IML question before A-cert**: is A-alone appropriate? If B needs to be in because of first 4 factors, *B needs to be included*.
4. If B can be appropriate on its own, A-alone is appropriate.
5. **Underlying Q**: where new EEs accrete – whether or not *new EE’s would make BU INAPPROPRIATE given their exclusion*.
6. If B built a shop on A, would be inappropriate to exclude (included in Cert).
7. In this example: **no functional integration** between A and B. Thus, union must start organizing B: **apply for s142** (democratic).
8. **Board will always accept BIGGER**: whether or not they auto fall into orig cert. The question NOW is whether it will be *inappropriate to exclude* the unit from bargaining.
9. **If B wants *second unit*:** Board has to weigh *proliferation issue*, and *choice* of union. **Use 6IML factors**. Bigger is better.

**-**\*EASIER (LESS EXPENSIVE) TO ARGUE THAT B IS PART OF CURRENT A-CA WHEN IML FACTORS TIGHT, INSTEAD OF s142 APPLICATION (OR GETTING 2nD UNIT)

\*Something about *Council of Union* .. s41 not important. ER org s43

## 7. COMMON ER AND SUCCESSORSHIP

-**Purpose:** *ensuring the CONTINUATION of Bargaining Rights under CA*. Remedial.

-“**a common employer declaration** **is remedial in nature**. It is designed to address a mischief and to protect, not create, bargaining rights.” – *Richmond Cabs*

-Common ER is where *two entities operating* in certain way, and Sucessorship where some kind of *transfer* between entities.

**s38 Common ER Designation – Broad Remedial Powers**:

-**s38:** If in the board's opinion associated or related activities or businesses are carried on by or **through more than one corporation**, individual, firm, syndicate or association, or a combination of them **under common control or direction**, the **board may treat them as constituting one employer** for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

**COMMON ER ELEMENTS**:

1. There must be **more than one entity** carrying on business.

2. The two entities must be under **common control or direction**.

3. The two entities must be engaged in **associated or related activities** or businesses.

4. There must be **a labour relations purpose** served by making the declaration.

**Factors**:

-Direction or control;

-Control can include operational **control or pervasive influence**;

-Subsidiaries of a parent can be common employers;

-Requires **more than mere suspicion** of erosion of work, union must show a real potential;

-**Industrial instability** from proliferation of bargaining units counts as a labour relations purpose;

**Consequences where MULTIPLE UNIONS**:

-Where serious question as to employee wishes, board will order a vote to determine rights;

-Winning Union's collective agreement survives; and,

-Board will usually dove-tail seniority lists;

*Whitespot* *Case* ***Common ER designation (through franchise relationship)***

-F: Langley WS. Sells to G – both agree G is successor. Union followed to G (successorship), union has rights. Union applied for **common ER**.. because WS is really bossing G around and screwing up the relationship between the union and the ER. **Union felt it had no ability to bargain with the weaker ER (G, not WS)**. ER: felt designation meant it had to *bargain with G*.

-L: No anti-union animus. There is a pretty legit **arms-length relationship** between G and WS (**Here: C-ER test weights *against* declaration**.. test is: *DEGREE OF CONTROL EXTERCISED***)**, but applied the **franchisee-franchisor** **test** **and found COMMON ER**.

**s35 Successorship**: *NEW ER IN SHOES OF PREVIOUS, UNION FOLLOWS*

-**s35**: (1) If a business or a part of it is **sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition** and the proceedings must continue as if no change had occurred.

(2) **If a collective agreement is in force, it continues to bind the purchaser**, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

(3) If a question arises under this section, **the board, on application by any person, must determine what rights, privileges and duties** **have been acquired** or are retained.

(4) For the purposes of this section, the board may make inquiries or direct that representation votes be taken as it considers necessary or advisable.

**GUIDING SUCCESORSHIP:**

* Must be given a purposive interpretation;
* First, look to **nature** of predecessor's business;
* Second, look for a **discernible continuity in business** from predecessor;
* Question is: whether a transfer in business from a labour relations perspective?
* Employee isn't required to accept employment;
* Successor required to offer employment.

*Lyric Theatre*:

* goodwill;
* logo or trademark;
* customer lists;
* accounts receivable;
* existing contracts;
* inventory;
* covenants to maintain a good name or not to compete;
* the same employees;
* the same or similar work;
* hiatus in production;
* service or lack of service to former customers;
* direct contact or lack of contact between the predecessor and successor employer; and,
* arm's length between the predecessor and successor employer

**THE CODE DOES NOT PROTECT SUBCONTRACTING SCENARIOS**:

 -When A has BU doing certain work, and sub-contracts that work to B (non-union ER), the BU does not follow to B, EVEN IF they hire the SAME PEOPLE. **Not caught by *s35***. Union could pop-up for every sub-K, but A (ER) can just do “whack-a-mole”.

 -**US approach**: where both ERs have a dominant influence over terms and conditions, can establish common ER.. that would make cert move across.

*Town of Ajax Case* - ***Form of transfer doesn’t matter, something of value? (workers)***

-F: Town of A had sub-K’s come in and do the bus-driving, mechanics, etc. Rep’d by CAW. Town of A wanted to hire them in-house.

-Q: **successorship**?

-L: The continuity of the SPECIALIZED SERVICES (specially trained). It was a *‘transfer’*.. which doesn’t have to take place in any particular form. **Just a disposition of your interest in something valuable to another party**. S35 BROADLY read. Ajax sought *value in the people*.. **value lies in the purchaser**.

*Target* - ***E.G. OF SUCCESSORSHIP FAILURE, TRANSFER OF BUSINESS?***

-F: Target buying-up various Zeller’s leases in its mega-Canadian-entry-plan. 1.8 Billion dollars worth of lease (case hinged on this). Target set out many strategic reasons why it proceeded the way it did into the Canadian market. Some similar demographics, but some different, slightly different products, etc. They couldn’t build on their own sustainably.

-Q: **whether sufficient continuity of business sold**.. **and whether something transferred *of value***? (*BRENTWOOD MALL STORE AT ISSUE – Union exists, brings s35 app*)

-L: Board thought “*LOCATION WAS OF MARGINAL VALUE”*… Plus, found Target substantially different from Zellers, such that Target is **not really buying any part of Zeller’s business**. They’re just buying an “asset” (their leases).

*Granville Brewing* – ***EE option to take employment at successor* *(can force Master)***

-F: Brewing CO A purchased by another, Brewing CO B. Clear successorship and UNION follows, but B didn’t want to hire A’s brew-master (important part of business).

-L: **You can’t force an EE from CO A with CA to work in successor CO B (slavery)**, **however EE has the right to *exercise his OPTION to work at B*.** ER is arguing that *you can’t force master to take servant* -> **Board**: *YES YOU CAN UNDER s35*, because provision is about **protecting CB** **rights** **of EEs**, even though B doesn’t want this EE (B and A liable for severance pay). **You get seniority rights transferred too**.

 -\*Some limits: *can’t force new company to provide work that isn’t there*?

 -Gave EE a position on line and promotion when available + missed pay.

## 8. DUTY TO BARGAIN: GOOD FAITH + REASONABLE EFFORTS

**Purpose**: Industrial stability; redress fundamental power imbalance; reinforce exclusivity model and union stability; institutionalization of industrial pluralism.

 -IS: preventing *recognition strikes*.. not having to use eco-weapons, educate about each other’s interests.

 -Power imbalance: imposes oblig on ER – can’t just negotiate with whoever they want. Outside of liberal voluntarism

 -Industrial pluralism: forcing parties to *procedural right*, allowing them to make resolution where their interests lie.

**A PROCEDURAL RIGHT**:

 -Board doesn’t want to impose *substantive terms*, and legis tries to **curtail the use of eco sanctions** as much as possible. If they don’t negotiate in *good faith*, will feel it in the $$.

**Resort to the sanctions** **is important**: *just the threat* of having the right to strike/lockout = important to resolving negotiations. **Necessary evil to bargaining in good faith**.

**s11**: **Obligation to Bargain in Good Faith**:

**11(1)** A trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.

 -**Subjective**: *GOOD FAITH*

 -**Objective**: *EVERY REASONABLE EFFORT*

 -Basically the law is that ER cannot just refuse to bargain.. No forced agreement.

**Content (*Buhler case has good summary too*)**:

-Duty to fully discuss all outstanding issues;

-Once dispute and bargaining structure defined need compelling reason to depart from set course;

-Duty to provide enough information that party can adequately assess demands;

-Where an employer makes a plea of poverty must open books;

-Hard bargaining is permitted, though surface bargaining is precluded

*Norada Metal*: ***Parties must disclose relevant info, material to negotiations, violation of GOOD FAITH***

-F: ER kept the facts pertaining benefits/financial things from the Union (‘concession’: reduction of wages + benefits).

-L: **U convinced the Board the disclosure was relevant, since it undermined the capacity to rep its members**. **Needed the info to intelligently appraise their position.**

-Note: In BC, if CO brings up *“poor financial health” (or requests concessions)*, **opens the door** to their **BOOKS** (the only way for union to accurately assess this).

*RadioShack*: *ER rep engaged in* ***surface (not hard) bargaining, stat min***

-F: Previous unfair labour practices overshadowing this negotiation. RS sends in *Gordon* (NY lawyer). Main issue is *Gordon* would only agree to STAT-min for ‘dues-check-off’.

-Q: is *Gordon* (RS) engaging in **hard bargaining** **or surface**?

-L: **Here it is a problem, because of past-history of unfair labour practices**. It’s not an issue in-itself to argue stat-min. Plus, the fact that it’s not even *relevant* to the ER (this issue). **Continuation of this conduct**. Gordon seems to be just acting for *Stewart* -> couldn’t explain why this was such a contentious issue.

 \***NOTE**: 1979 – not as easy to find *hard bargaining today*.

-**Remedy**: Cease & Desist (bargaining in Bad Faith – **withdraw their position** **on check-off**); costs on RS; pay wages for work-stoppage; etc.

 -**Dissent**: *worried that Majority’s remedy = imposing substantive reqs on a PRIVATE RELATIONSHIP*. Just there to ensure fair process.

*Canada Trust Co*: ***Hard bargaining in* *good faith, even though no wage increase and marginal improvements; Distinction: Bad faith vs Self-Interest - Castration***

-F: Union cert in St. Catherines and Cambridge branch. Union got *marginal* improvements over non-U-EE’s. At Cambridge branch, ER refused to negotiation anything above C.

-L: **MERELY ER SELF-INTEREST**. *Bad-faith is anti-union*.. **intent not to sign shows bad faith**. Hardline position here is *self-interest*, BASIS: disincentivizing union participation.. (no real benefit to join). If you get higher rates at union shops, spill over costs. **Bad faith is *avoidance***. **Imposing a term *BECAUSE YOU CAN is not bad faith***. **This is a *raw economic relationship*** *(whoever has the biggest guns*..). Rational discussion and meeting of interests (price discovery). “Liberal voluntarism”. Won’t supervise agreements **that closely**.. the union is stuck in the *capitalist world* + real eco dynamics.

-Note: **board distinguishes between:** A. Addition; B. Equivalent; C. Negative

 -Anything below Equivalent = *bad faith* (**PUNITIVE**)

 -Anything equiv and above = *not bad faith* **(*equiv = self-int)***

**Critique:** *Langille & Macklem*

-Conception of Duty to Bargain with the distinction of *bad-faith vs self-interest* = flawed.

-Doesn’t capture the *rational* yet *powerful* ER who can bargain in good faith but out of self-interest. This renders anti-union animus meaningless.

-As long as you are *willing to sign*.. anything can be justified: *the same terms* (nothing higher for Union).

-Purpose of CB is **not contractualism**, but **to seek justice**.

*Royal Oak*: ***Violent strike, crazy remedy: INTEREST ARBITRATION; refusing to negotiation common term in other CA’s (arbitration clause), Scrutinizing CONTENTS of proposed agreement***

-F: Crazy facts, violent strike. Replacement workers. Idiot killed people with bomb. Royal Oaks *refusing to discuss* common CA term of arbitration (reasonable parties would have).

-L: **SC** gave parties **30 days to negotiation on four remaining issues** **that were at impasse**. If you fail, you get **INTEREST ARBITRATION** (different from telling people what their rights are: *determine interests of parties*).

-**If party refuses to discuss basic term or standard** **that is included in other CA’s** -> NOT MAKING REASONABLE EFFORTS. .

*Buhler*: ***Blatant violation of duty*** ***of good faith***

-F: Tractor manufact. “My first offer is my last”. Made worse offers every time he met with U. U readjusted.

**Imposition of First CA** – *Yarrow Lodge*

*-PERMITS the board to impose, since reaching first CA can be difficult:*

(a) bad faith or **surface bargaining**;

(b) conduct of the employer which demonstrates a **refusal to recognize the union**

(c) a party adopting an **uncompromising bargaining position** without reasonable justification;

(d) a party failing to make reasonable or expeditious efforts to conclude a collective agreement;

(e) **unrealistic demands** or expectations arising from either the intentional conduct of a party or from their inexperience;

(f) a bitter and protracted dispute in which it is unlikely the parties will be able to reach settlement themselves.

*Westinghouse*: ***oblig to honestly respond to U-inquiries, but not where plans not finalized yet***

-F: ER re-locating to Hamilton in less unionized area. U didn’t know, didn’t ask.

-L: **There is an oblig on ER to respond to inquiries about *existence* of CO plans that have significant impact on the BU. However, NOT a duty to *reveal un-ripened* plans** (that are not at least “de fact” decisions).

**CRITIQUE**: *INCONSISTENT WITH DUTY TO BARGAIN IN GOOD FAITH*. What else do you have disclosure for? Does not distort the bargaining process, and has great benefit to the U.

***SOMETHING PRODUCTS CASE*?**

**S78**: **LAST VOTE**

-*Another way the legislature supervises the STRIKE/LOCKOUT weapons*.

-*ONLY exception in the LC* *to ‘exclusive bargaining relationship’*: ER gets to circumvent union and **go straight to a VOTE**. Meant to get around UNION not rep’ing concerns of EE’s.

-**Essential component**: EACH OF THE TERMS IN LAST VOTE HAS TO HAVE BEEN PUT TO UNION AS PACKAGE AND REJECECTED FIRST.

 -Can’t put in “signing bonuses”..

-**Board recognizes important benefit to ER in this**: Just by having resort to it.

-Only allowed **once**.

**-May be an issue if ER makes offer and withdraws it**

**Notice to Bargain**:

**New Bargaining Agent**

**45 (1)** When the board certifies a trade union as the bargaining agent for employees in a unit and a collective agreement is not in force,

(a) the trade union may by written notice **require the employer to commence collective bargaining**, or the employer may by written notice require the trade union to commence collective bargaining, and

**Continuing Bargaining Relationship**

**46 (1)** Either party to a collective agreement, whether entered into before or after the coming into force of this Code, may at any time within 4 months immediately preceding the expiry of the agreement, by written notice **require the other party to commence collective bargaining**.

## THE THIRD Statutory Freeze Within this Process:

 -**45(1)(b)** for FIRST CA**: 4 months** or CA is executed (whatever first), and **s45(2):** after notice given, and term expired, cannot ER alter terms **until strike or lockout** (whichever first).

**Choice between mediation or economic sanctions**:

-s74 or 55.. but in BC, you have to serve notice before strike.

## 9. INDUSTRIAL CONFLICT: STRIKE/LOCKOUT

**Weiler**: the LC must balance the growth of union rep/org vs the use of *economic weapon* of STRIKING/picket line one the CB relationship in place. Rules for growth of unions are made at *expensive of non-U-ER’s*, while regulating eco-weapons is for the benefit of ERs.

 -If you have credible *threat to strike*.. will help conclude the bargaining.

 -Outside of statutory reg: *cooperative action has always existed*.

 -**Wagner Act**: adopts the *ability to unionize* but **trades off on the ability to strike**.

**S1** **Definition of “Strike”:**

"Strike" includes a *cessation of work*, a refusal to work or to continue to work by employees **in combination or in concert** or in accordance with a common understanding, **or a slowdown** or other concerted activity on the part of employees **that is designed to or does restrict** or limit production or services, but does not include

~~(a) a cessation of work permitted under section 63 (3), or~~

(b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted under this Code,

 -**Designed to or DOES**: *Subjective or objective* satisfies

 -**Almost anything EEs do to stop/slow-down work**.

 -Illegal *unless* you meet **TIME** requirements in Code

 -**1(b)** **is an exception for picketing**: Makes legal provisions in CA’s that allow EE’s to *refuse* crossing picket lines.

 -No longer have to listen to boss

 -MEANT TO INCLUDE work-to-rule (doing everything ‘required’ and nothing more), slow-downs, etc.

**BOARD’S DEFINITION OF STRIKE**:

1. a concerted activity, a cessation of work, a refusal to work, a refusal to continue to work, or a slowdown by employees; which
2. is occurring in combination, in concert, or with a common understanding; and,
3. is designed to or is restricting or limiting production or services.

**Common Law Defining Strike Activity**:

*Graham Cable* – ***Work-to-rule, meaning of strike, legal position***

-F: EEs were in legal strike position. Some EE’s sped things up and some slowed down, didn’t train people, didn’t take OT, study sessions, etc. all in order to create *back-log chaos*. ER responded with discipline. ER cannot do this if strike. Since *no replacement worker allowed in BC*, ER can **lockout** to minimize disruption, use MGMT.

-Q: *was there strike*?

-L: Review of other cases.. **concerted effort to refuse supervisorial assignments** = strike (illegal in *Air Canada*), and *Canada post*: **doing mail without appropriate stamps**: also STRIKE. **This case = strike** (concerted action to *slow-down*, disrupt, etc). **Cannot discipline EE’s in legal strike position in relation to work output**.

-**Thus: discipline not legal** **during strike**.

*Sask Wheat Pool*: ***‘Concerted’ refusal to work OT, not in legal strike position***

-F: EE’s CA states that EE’s could refuse to work OT. Board found Union told EE’s to use the OT-refusal provision to keep refusing (wanted ECO-pressure at table). CA was expired, and they were not in a legal strike position according to the Code. They just started negotiation – not legal timing.

-**L**: **This was *concerted action*, and it wasn’t in legal strike time**, **therefore ILLEGAL strike.**

**Sympathetic Action**:

*Maritime ER’s Association*: ***Refuse to cross picket line a strike? Common understanding (U-solidarity), illegal strike***

F: ER had multiple U’s at a specific location. One U on strike, another is not and refuses to cross the picket line. U arguing *NOT a strike*. Each EE showed up individually and picket-line was in their way, and would’ve *individually* come to “oh, shouldn’t cross, union solidarity”.

-L: **In concert/common understanding** **is satisfied on objective ground** – **subjective purpose doesn’t have to be proven.** All you need is the **common understanding of solidarity with picket lines**. It doesn’t matter that *each individually* came to their reasoning, still **in concert**/**common understanding**. ILLEGAL STRIKE.

 -**NOTE**: Current BC leg: *1(b)* -> if it was in their CA, they’d be okay. 1(b) gives you the right to have that in the CA.

**Before 1984 Legislation**: ***Strike prohibition and Political Protest***

-“in common understanding.. **FOR THE PURPOSE OF COMPELLING ER TO TAKE CERTAIN CONDITIONS**.” This was removed – because it protected ability to protest under ‘national day of protest’ in BC (without it being a strike). Mid-K, they could just go on a 1-day strike for **broad political issue**. Now lnguage widened to include **as much as possible**.

-Didn’t include exception for picketing

*Nelson Crushed Stone*: ***Refusal to cross picket*, *CAN’T K-out of code, BC DIFF***

-F: Similar to *Maritime*.. two groups of EE’s working for one ER. One group refuses to cross striking unit’s line. Their K says: “**wouldn’t be considered striking if crossing picket line”**.

-L: *Not an issue in BC*.. *1(b)* *enforces/upholds the K’s*..

-**Here**: two things can happen: 1) **becomes a K-issue** (Labour board doesn’t care); 2) **Certain hot-declarations**: not really contractual. Striking U declares some of ER’s cargo hot, and ER sends to Co. B. CO B’s EEs have prov allowing them to not work on ‘hot cargo’. ER can go to board to remove declaration and board does **balancing of rights** (B’s finances vs EE’s right to put pressure).

-**Board allowed U-EE’s to use the K-provision as a DEFENCE**.. (against liability), although can’t K-out of code provisions.

**ER Economic Weapons**:

**Definition of “Lockout”**:

**S1**: "lockout" includes closing a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his or her employees, **done to compel his or her employees** **or to aid another employer** to compel his or her employees to agree to conditions of employment;

*Westroc*: ***No problem with temp workers*, *no animus***

-SEEMS TO BE DECIDED BEFORE ANTI-REPLACEMENT LEGISLATION.. DON’T CARE

HE DIDN’T COVER IN CLASS:

*NAP BuildingProducts, A Division of Aluminart Products*: *ER withdrawing FINAL OFFER*, *s78*

-F: ER ‘sweetened the pot’ and added **signing bonus**. Must have negotiated this all before with U and U turned down.

-L: **Effects the negotiation process**.. threat is like that of a lockout (disturbs the give & take of the process). Can only do it once. **Look into dynamics and reasons for withdrawl**.. otherwise it can be just used as an *economic weapon*.

 -Rationale for s78: last shot at avoiding a strike or lockout.

HE DIDN’T COVER IN CLASS:

*Limited BCLRB No. B288/95*:

 -

**NO Replacement Workers** (UNIQUE TO BC)

-**You CAN**: use MGMT, existing EE’s not part of the union

-**You CANNOT**: hire *scabs*.. External EE’s

**s68(1)** During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,

(a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,

(b) who ordinarily works at another of the employer's places of operations,

(c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, or

(d) who is employed, engaged or supplied to the employer by another person,

to perform

(e) the work of an employee in the bargaining unit that is on strike or locked out, or

(f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.

**NO STRIKE OR LOCKOUT DURING TERM OF CA**:

-**s57**(1) – strike (2) – lockout

**Strikes or Lockouts prohibited BEFORE BARGAINING AND VOTE**:

-**s59** (1) A person must not take a vote under section 60 or 61 on the question of whether to strike or on the question of whether to lock out **until the trade union and the employer or their authorized representatives have bargained collectively** in accordance with this Code

 -This doesn’t mean you have to *exhaust s11* (good faith barg) and come to an impasse. Board: **you just have given FULL PROPOSAL and DISCUSSED EACH ISSUE** (understanding before strike).

**Pre-Strike Vote and Notice**:

-**60(1)** A person must not declare or authorize a strike and an employee must not strike **until a vote** as to whether to strike has been taken in accordance with the regulations by the employees in the unit affected, **and the majority of those employees who vote have voted for a strike.**

(3) Except as otherwise agreed in writing between the employer or employers' organization authorized by the employer and the trade union representing the unit affected, if the vote favours a strike,

(a) a **person must not declare or authorize a strike**, and an employee must not strike, **except during the 3 months immediately following the date of the vote**, and

(b) an employee must not strike unless

(i)   the **employer has been served with written notice** by the trade union that the employees are going on strike,

(ii)   written notice has been filed with the board,

(iii)   72 hours or a longer period directed under this section has elapsed from the time written notice was

(A)  filed with the board, and

(B)  served on the employer, and

(iv)   if a mediation officer has been appointed under section 74, 48 hours have elapsed from the time the trade union is informed by the associate chair that the mediation officer has reported to him or her, or from the time required under subparagraph (iii) of this paragraph, whichever is longer.

**Can Force Mediation to help CB**:

**s74** (1) The associate chair of the Mediation Division may appoint a mediation officer if

(a) **notice has been given to commence collective bargaining** between a trade union and an employer,

(b) **either party makes a written request** to the associate chair to appoint a mediation officer to confer with the parties to assist them to conclude a collective agreement or a renewal or revision of it, and

(c) **the request is accompanied by a statement of the matters the parties have or have not agreed** **on** in the course of collective bargaining

## 10. INDUSTRIAL CONFLICT: PICKETING

**Purpose**, **Weiler**: facilitating growth of CB through union recognition/protection vs regulating the use of eco WEAPONS (incl picketing) against ER.

* **s1 definition:**
* "picket" or "picketing" means attending at or near a person's place of business, operations or employment **for the purpose of persuading** or attempting to persuade anyone not to
* (a) enter that place of business, operations or employment,
* (b) deal in or handle that person's products, or
* (c) do business with that person,
* and a similar act at such a place that has an equivalent purpose;

-**Bright-line distinction in BC**: If you leaflet, not chanting, =/= picketing. If you have a sign/placard = picketing (can be limited).

-**Board’s concern is the *why/when***.. **Courts: HOW**.

***Canex Placer* (?) DIDN’T GO OVER**

**Primary vs Secondary Picketing at CL**:

*Harrison Carswell*: ***APPLIED TRESPASS ACT TO PICKETER ON MALL SIDEWALK***

-F: Single EE of a store in mall on strike (legally?). She was picketing on the sidewalk of the mall.

-L: Majority used *peters* decision to support reasoning here: peaceful picketing against selling cali grapes, was trespass there. **Applied the trespass act here**.

 -**Dissent**: used *contextual approach*: balancing labour relations rights to picket vs property rights. Also took issue with matter of whether mall was *public place*.

-**MB LEGISLATURE RESPONDED**: to make such picketing LEGAL (doesn’t make much labour relations sense – it was otherwise lawful picketing in the code).

*Hersees* ***striking ER-Ally where U sought breach of K, Business interests, BLOW TO SECONDARY PICKETING***

-F: ER: Deacon, and Hersees sells them products. U went to H to stop selling products to *struck ER*, and threatened to *picket* H as well. Many civil actions, but only inducing breach of K successful.

-L: **Picketing the third-party (H) for dealing with struck-ER** **in order to breach their K** (inducing breach). **You need to yield to greater interests of community**: *BUSINESS*/TRADE*.*

 *-*CONCEPT OF ALLY: used to *allow* third-party picketing. Here, denied, because of tortious breach (of K).

*Pepsi-Cola* ***SCC kills distinction at CL of 2ndary (illegal) vs primary (legal)***

-F: Strike between Pepsi distributers in Sask. People outside picketing pepsi products.

-**L**: ***LEGAL UNLESS THERE IS TORTIUOUS/CRIMINAL CONDUCT***. Endorse Weiler’s view – the ‘why/when’ = the BOARD, and the ‘how’ = the court.

-**ER arguments to limit 2ndary picketing**:

 Involves third-parties who shouldn’t be, privileges unions, etc.:

**SCC**: 1. this view doesn’t take into account the *right of unions* to expressive activity under *Charter*. 2. Also, forgets that third parties are hurt during primary picketing anyways. 3. Further, *no real reason to privilege BUSINESS INTEREST OVER Union rights without BALANCING*. 4. The basis or purpose is *EXPRESSION*, which is meant to be **coercive** (eco & social pressure on ER and public). 5. Hard to restrict by *GEOGRAPHY*: hard to regulate, because some EE’s using office or other facilities with other ERs. (*note: this is how BC does it*).

*Prince Rupert Grain*

*The Sovereign General Insurance Co*

**THUS, CL**:

 -You can engage in expressive activity anywhere you like.. subject to tortious or criminal liability, and doesn’t have to meet the CONCEPT OF ALLY or secondary picketing.

**IN BC CODE:**

**-**Looks like *Pre-pepsi CL*..

-Highly regulated picketing: concept of *ally* survives, limited to ER operation, common site picketing, board interference, primary vs secondary.

**PICKETING LIMITED TO ER OPERATIONS** (primary):

**s65(3)** A trade union, a member or members of which are **lawfully on strike** or locked out, or a person authorized by the trade union, **may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation** and the site or place is a site or place of the lawful strike or lockout.

(4) **The board may, on application** and after making the inquiries it requires, permit picketing

(a) at or near another site or place that the employer causing a lockout or whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3), or

 -**Basic restrictions/ELEMENTS**:

 -U must be *lawfully on strike* or locked-out

 -Must be **integral and substantial** part of ER’s operations

 -Where U-member performs work under the **control** **or direction of ER**

 **-**Location must be the lawful place of the lockout/strike

 **-(4) has to do with ANOTHER of ER’s work sites** – they go and perform the work at another site.

**SURVIVING CONCEPT OF ALLY**:

**s65** (1) In this section:

"**ally**" means a person who, in the board's opinion**, in combination, in concert or in accordance with a common understanding with an employer assists the employer in a lockout or in resisting a lawful strike**;

**65 (2)** A person who, **for the benefit of a struck employer**, or for the benefit of an employer who has locked out, **performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed**, supplied or furnished by the employer, **must be presumed** by the board to be the employer's **ally** unless he or she proves the contrary.

**(4) The board may, on application and after making the inquiries it requires, permit picketing**

(b) at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out,

 -**Elements:**

 **-**Looks like Pre-Pepsi caselaw

 -**PRESUMED ally**, unless proves otherwise, if: dealing with ER (work, supplying goods, services, etc) who is struck or has locked out. The services would be performed, if not for strike/lockout.

 -**U allowed to apply to strike ally under (4)**

**COMMON SITE PICKETING, BOARD REGULATION**:

-**65 (1)** In this section:

"**common site picketing**" means picketing at or near a site or place where

(a) **2 or more employers carry on operations**, employment or business, and

(b) **there is a lockout or lawful strike by or against one of the employers** referred to in paragraph (a), **or one of them is an ally of an employer** by or against whom there is a lockout or lawful strike.

(7) If the picketing referred to in subsection (6) is common site picketing, the board must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4), in which case the board may regulate the picketing as it considers appropriate.

 -**Elements**:

 -Where board finds *common site picketing*, **can regulate the picketing** by: 1) Geography; 2) Time; 3) Function

**Legislative Diminution of Picketing Rights** **Over Time**:

* 1973 - permitted both primary and secondary picketing, which included any other places of business, operations or employment of the struck employer
* 1984 - limited picketing to locations "at or near a site or place where a member of the trade union is locked out or lawfully on strike."
* 1987 - further limited the definition of a primary site and only permitted common site picketing if no effect on 3rd party.
* 1992 - essentially the 1987 provision with permissible effect on 3rd party through common site picketing where it would otherwise be ineffective.

## 11. ESSENTIAL SERVICES

-s

**BC Essential Sergices Legislation**

-**s72**:

(1) If a dispute arises **after** collective bargaining has commenced, the chair may, on the chair's own motion or on **application by either of the parties** to the dispute,

(a) i**nvestigate** whether or not the dispute poses a threat to

(i) the **health, safety or welfare** of the residents of British Columbia, or

(ii) the **provision of educational programs** to students and eligible children under the School Act, and

(b) report the results of the investigation to the minister

**TRUE ESSENTIAL SERVICES**:

(2) *If the minister*

(a) after receiving a report of the chair respecting a dispute, or

(b) on the minister's own initiative

*considers* that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the mi**nister may direct the board to designate as essential services** those facilities, **productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare** of the residents of British Columbia

 -**Note**: 2.1 deals with *threat to education*. Same language as (2)(b), but wrt essential educational services, with risk of seriously disrupting edu programs.

-ELEMENTS:

 -(2) is the *DESIGNATION process*, but (1) is the investigation phase.

 -**Designation**: if *minister* considers 1) **there is a threat** (to health, safety, welfare); 2) Minister may **order the *designation*** **of those essential services**.

 The ‘third’ step: **to order service levels under (8)/(9)** – maintaining levels for public safety/health.

**REQUIRED SERVICE LEVELS (BY U AND ER)**:

(8) **If the board designates** facilities, productions and **services as essential services,** **the employer and the trade union must supply, provide or maintain in full measure those facilities, productions and services and must not restrict or limit a facility, production or service so designated.**

(9) A designation made under this section may be amended, varied or revoked and another made in its place, and despite section 135 the board may, in its discretion, on application or on its own motion, decline to file its order in a Supreme Court registry.

 -**This is the last step in the process**: first you investigate, find threat, then designate, and finally, *REQUIRE service levels* under that designation for safety.

**Mediation at Discretion of Chair of Mediation**:

-(3) When the minister makes a direction under subsection (2) or (2.1) the associate chair of the Mediation Division may appoint one or more mediators to assist the parties to reach an agreement on essential services designations.

(4) A mediator appointed under subsection (3) must report to the associate chair of the Mediation Division within 15 days of his or her appointment or within any additional period agreed on by the parties.

(5) The board

(a) must within 30 days of receiving the report of a mediator, designate facilities, productions and services as essential services under subsection (2) or (2.1), and

(b) may, in its discretion, incorporate any recommendations made by the mediator into the designation under that subsection.

**Strike or lockout delayed unless ongoing**:

(6) If the minister makes a direction under subsection (2) or (2.1) before a strike or lockout has commenced, the parties must not strike or lock out until the designation of essential services is made by the board.

(7) If the minister makes a direction under subsection (2) or (2.1) after a strike or lockout has commenced, the parties may continue the strike or lockout subject to any designation of essential services by the board.

**Return to work** *EVERYONE MUST COMPLY WITH DIRECTION, LAST CA*

73 (1) **Every employer, trade union or employee** affected by a direction or designation made under section 72 with respect to the dispute **must comply with the direction or designation**.

(2) If a designation is made under section 72, the relationship between the employer and his or her employees, **while the designation remains in effect, must be governed by the terms and conditions of the collective agreement last in force** between the employer and the trade union **except as that collective agreement is amended by the board** to the extent necessary to implement the designation of essential services.

(3) The board may under section 72 designate facilities, productions and services supplied, provided or maintained by employees of the employer who are represented by another trade union that is not involved in a collective bargaining dispute with the employer.

*Beacon Hill Lodge*

Board utilizes standard global order in health care to guide the assignment and provision of essential services levels.

 -Will not deviate unless there are “compelling” reasons to do so.