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# A Brief, Anglo-Centric Overview of Employment Law

* Employer = Master …Employee = Servant 🡪 law reinforces assumption that master purchase time of servant to extract surplus value
* Assumption that there is a fundamental inequality of bargaining power between an employee and employer

## Historical Development of Employment Law

1. Feudalism to master and servant regime
2. Master and servant regime to liberal voluntarism
3. Liberal voluntarism to industrial pluralism
	1. Represents the wagner act model
		1. Creates a certification procedure; upon obtaining and proving majority support amongst the EEs in a bargaining unit, the union becomes exclusive bargaining agent for all EEs and the ER is compelled to bargain with the union. Key principle underlying this model are majoritarianism and exlclusivity.

Key goals of Industrial Pluralism

* Reduce industrial conflict by ending recognition and sympathy strikes, postponing strikes and lockouts, prohibiting mid-term strikes and lockouts
* Facilitate exercise of freedom of association by protecting rights and mechanisms for democratic choice by workers
* Promote industrial citizenship through collective agreement as constitution, and workers right to rule of law in the workplace.
* Promote equality through unions act as a countervailing economic force

# The Common Law Contract of Employment

## 2:100 Introduction (77-78)

The common law contract of employment is based on general contract notions, modified by statute: freedom of bargaining between parties with equal power. In reality, the **employer** holds most of the bargaining power and will essentially be making the contract himself or herself. Terms and conditions of employment is a contract of subordination with implied terms and duties on both employer and employee.

* Employement = consideration and meeting of the minds
	+ Fixed term contract = performance will end with the contract
	+ Employment contract or oral contract = no fixed term contract...law decides how to deal...but there are implied terms to the contract.
* **CL Implied duties of employer;**
	+ Pay wages; provide work; provide safe work environment; provide employees with indemnity for cost

Case example Duty to Provide Work: Devonald v Rosser & Sons

* It is unreasonable for a master to claim the right to decline to find any further work for a man during the time when he is bound to hold himself ready to obey orders. **Master has duty to provide work** when creating fix contracts.
* Court decides that an ER cant lay off an EE when there is a fixed term contract without paying out full contract.
* **CL Implied duties of employee**
	+ Obey orders; act with skill and care; act with good faith and fidelity; render profits to employer; and indemnify the employer for costs incurred.

Case Example: Fasken Martineau:

* Was a partner that was forced to retired an employee?
* Court decided that partners have a right to engage in **meaningful decision-making process** and was an EE because he had meaningful input in terms of employment.

### Layoff at Common Law

Case Example: Collins v Jim Pattison

* An EE must be employed for the services that they were contracted for. However, if an ER has to cut down during economic downturn but EE is subject to contractual agreement, **then the EE is entitled to reasonable notice/pay in lieu of notice subject to contractual arrangement.**
	+ *Concept of no lay off at Common Law, ER has duty to provide work*
	+ *There is nothing more fundamental to a contract of employment than that the EE be employed and that he be paid for his services. Doman unilaterally changed those fundamental terms. One can appreciate the need for ER to cut down on management or supervisory staff during economic downturns but the EE, subject to the contractual arrangements, is still entitled to reasonable notice or payment in lieu of notice.*

Principle:

* No concept of layoff because ER has obligation to provide work

### Duration of CL implied Duty?

Case example: Hadley v Baxendale

* When there is a contract made between ER and EE, and is broken,
* **TEST:**
	+ The damages should be fair and reasonably considered
	+ Which are determined **naturally** at the time of the event,
	+ Or at the time the **contract was originally made.**

Christie v. York (81);

* **F:** Man refused to sell beer to a “coloured” man in his bar. The black man claimed $200 for humiliation.
* **R:** Court found that the general principle is complete freedom of commerce- there is no question of motives; the only restriction is the existence of a specific law. **No law prevented** the bar’s decision in this case, so respondent was within his rights to deny the claimant service

 Bhadauria v. Seneca College (81-82)

* **F:** Indian woman w/ PhD in math can’t get a teaching position at the college. Never given an interview. Claims it’s because of race. Want to pursue action in court instead of the HR regime.
* **R:** Action cannot succeed because of comprehensiveness of the HRC in its administrative and adjudicative features. A refusal to enter into contract relations, or a refusal to even consider the prospect of such relations has not been recognized as giving rise to any liability in tort*.*
* **Lecture**: general principle that CL is based on broad concept of freedom of contract. Court has been prepared to recognize some new torts in the employment area, but not where there is some other parallel statutory procedure that is meant to provide a remedy

## 2:322 Reasonable Notice of Dismissal

Contract for indefinite employment terminable by either party upon reasonable notice to the other. Very rough rule of thumb is one month of notice per year of service, up to a max of 1-2 years.

Case Example: Carter v Bell & Sons

* Reasonable notice is implied in the hiring contract to **give reasonable notice of intention to terminate contract**.

Case Example: Bardal v The Globe and mail LTD

* **Factors to consider**:
	+ Character of employment, length of service by the EE, the age of EE, the availability of similar employment, having regard to the experience, training and qualifications of EE.
	+ Also consider, development of special skills with 1 employer
* **TEST: assed at what a reasonable person would decide at the beginning of the contract not end.**

Cronk v. Cdn Gen Ins (94-100)

* **F:** EE dismissed at age 55. Clerical position. Worked for ER for 29 years. ER downsizes and EE’s position is eliminated. Not likely she has any career prospects. EE gives her 9 months; EE asks for 20 months - amount that is typically given to managers who are dismissed
* **I:** Is employee's position (managerial vs clerical) a major factor in determining reasonable notice?
* **L:** Reasonable notice depends on all the **Bardal factors**. These factors can NOT be reduced to re-employability. Maximum notice for a clerical employee will be about 12 months, compared to 24 months for a managerial employee.
	+ **Court of Appeal:**Wrong for trial judge to rely on stats. His result could disrupt practices of commercial world. ERs need certainty of the cost of downsizing, and certainty of legal advice. Character of the employment (clerical; low-level) does not entitle an EE to a lengthy notice period.
* CL entitlement to reasonable notice of termination or pay in lieu of reasonable notice is essentially the biggest right that CL gives in practical legal terms to employees that are not unionized. They also have employment standards act and human rights legislation

## 2:400 Terminating the Contract –Constructive and Wrongful Dismissal

### Quitting- Individual Contract of Employment, EE needs to provide

* Notice requirement;
* Subjective and objective intention;
	+ *Actually have to now show up to work to have requisite intent to end relationship*
* Implied or deemed quit; [stomping off job site]
* Frustration of contract [long term absence]

### Wrongful dismissal can occur as a result of:

1. The employer firing the employee without cause and without notice or pay in lieu.
2. The employee quits in response to a breach of contract by the employer, and sues for damages (constructive dismissal)
3. The employer dismisses the employee and is then unable to prove cause
4. The employee is fired contrary to statutory rule governing the employment relationship

### Constructive Dismissal

**Test:** is whether a reasonable person in the situation of the EE felt that the essential terms of the contract were being substantially altered.

Consider Farber [2 factors] + Mckinley [proportionality]

Farber v. Royal Trust (119-125)

* **F:** After many years and promotions, F's position is eliminated and he is offered a return to the job he had 8 years earlier, resulting in a substantial loss of earnings.
* **I:** Does this constitute constructive dismissal? **Yes**
* **L:** To determine apply *doctrine of fundamental breach;*
	+ whether there was **unilateral changes imposed by ER that substantially altered the essential terms of EEs contract** consider whether a *reasonable person in the situation of the employee would have felt that the essential terms of the employment contract were being substantially changed*.
		- Not a bad faith test, but may impact damages awarded to EE**.**
		- Wages, level of authority/responsibility, opportunities for advancement, not collateral matters
		- Unilateral change must breach contract
		- Must substantially alter essential terms of contract
	+ 2nd; Determine whether the breach was sufficient to constitute a constructive dismissal?
* On these facts:
	+ **Substantial change**: a demotion
	+ Essential feature: **how he is paid** (straight commission or salary/commission mix – less security), less responsibility, at the time reasonable person would’ve guessed it would result in substantially less pay too
	+ Appropriate period is one years notice
		- *So just b/c employee quits in formal sense doesn’t mean its not constructive dismissal*
* Willingness to accept some of the changes does not mean that there is no breach. Demotion, change or significant reduction of wage usually found to be constructive dismissal.

### Just Cause for Dismissal

* If EE commits a **breach that is severe enough to constitute a repudiation [breach] of the employment contract**, ER has just cause for dismissal. ER entitled to treat contract as terminated, and to dismiss the EE without notice or pay in lieu of notice.
* **Test:** is are the fundamental terms of the contract changed and was there dishonesty, disobedience, willful neglect of duty, serious misconduct on part of EE.

**McKinley v. BC Tel (125-134) [Factors co consider Just cause]**

* **F:** Man came back to work after taking disability leave. He told ER he needed workplace accommodation and overstated the side-effects of his medication, it was not really the case – overstated the extent of his needs. When ER discovered this they fired EE.
* **I:** Is any act of dishonesty sufficient to constitute just cause? **No**
* **L:**The nature of the dishonesty and circumstances surrounding its occurrence must be considered.
	+ 3rd: To determine must consider **whether the EE’s dishonesty gave rise to a breakdown in the employment relationship**.
		- Just cause for dismissal exists where the *dishonesty violates an essential condition* of the employment contract, disobedience, willful neglect of duty breaches the *faith inherent to the work relationship*, or is *fundamentally inconsistent with the EEs obligations to his or her employer.*
			* If grounds for termination are not specified in contract = contextual approach.
		- Some type of dishonesty include; theft, misappropriation or serious fraud = EE/ER breakdown.
	+ **Policy:** Work is integral to people's lives; is dismissal proportionate to the degree of harm caused by EEs breach of duties. 🡪Punishment must be proportional to the conduct at issue.
* **C:** It was open to the jury to find that the dishonesty in this case was not sufficient for just cause.

## 2:520 Extent of Financial Compensation for breach of Contract

* Financial compensation for wrongful dismissal is done to compensate for the lack of notice given to the employee. Wrongful dismissal requires payments in lieu of notice. Common-law length of reasonable notice comes from *Bardal v The Globe and Mail* Employee must take reasonable steps to find suitable employment, or damages can be reduced based on a failure to mitigate [Cecol Case].
* Therefore the EE can recover **for wages and benefits that he would have been legally entitled to during the contractual notice period.**

### Remedies for Breach:

* Both parties are entitled to damages arising from the breach of reasonable notice
* CL = breach of contract

Case example- Addis v Gramophone [Additional Damages]

* In cases of malice, fraud, defamation, or violence there may be tort action available for alternative remedy to an action for breach of contract. Can recover exemplary damages, vindictive damages = tort; for breach of contract = form of action in contract.

### Bad Faith in Manner of Dismissal

Wallace v. UGG (137-144) [Extension of Notice Period]

* **F**: W convinced to leave old employer by UGG. They promise permanent employment and fair treatment. He works for UGG for 14 years until being dismissed with no explanation other than “inability to perform his duties successfully”. UGG maintains there was just cause until commencement of the trial. W experiences mental health problems as a result of this treatment.
* **I**: Can damages be awarded for mental distress? Can W sue for “bad faith discharge”? Can punitive damages be awarded? How long is the period of reasonable notice?
* **L**: **There is no compensation for mental distress resulting from dismissal, there must be an independent tort committed by ER to get mental distress damages.**
* Punitive damages are available when conduct is “harsh, vindictive, reprehensible and malicious”.
	+ **TEST:** In order to get damages beyond reasonable notice:
		- You need *independent actionable wrong* - like a tort or breach of term of contract
		- BUT if manner of dismissal has caused mental distress the court can extend notice period to take into account bad faith in the manner of discharge; this is not an independent tort.
		- No punitive damages- the conduct did not meet the standard of harsh, vindictive, reprehensible and malicious
* a notice period of 24 months.
	+ **Policy:** Employment Contract is one of vulnerability; work is essential component of life.
* **C:** Jacobucci: not going to recognize bad faith discharge as tort or contract action – **injuries arising from fact of dismissal not compensable**; *but injuries such as embarrassment, humiliation, and damage to self-worth- arising from bad faith conduct in manner of dismissal is another factor that is properly compensated for by an addition of the notice period*.

Honda. v. Keays (145-154) [Aggravated Damages/ not a notice period extenstion]

* **F:** Issues of dishonesty and bad faith on the parts of both parties. Honda fired Keys because Honda wanted him to see their doctor, K wouldn’t engage.
* **I:** should Keays be entitled to reasonable notice, “wallace” damages, punitive damages? **No**
* **L:** no punitive damages, Wallace damages shouldn’t have been awarded – just gets the original 15mos.
* In such circumstances, **it is not a bump-up of reasonable notice period, but rather, if mental distress was in contemplation of parties, damages should be awarded though foreseeability concept in negligence and should reflect the actual damages**.
	+ ***basic principle****: EE entitled to damages resulting from ER’s failure to give proper notice. No damages available to the EE for the actual loss of job and/or pain and distress that were caused from dismissal.*
	+ **Punitive damages**: **damages must be awarded only in "exceptional cases" where the employer’s "advertent wrongful acts…are so malicious and outrageous that they are deserving of punishment on their own."**
	+ **Policy:** However, aggravated damages may be awarded in wrongful dismissal cases where the acts were independently actionable (narrowly interpreted in *Wallace* as requiring an independent tort)
* **A:** Some examples of actions that would result in additional damages being awarded under the *Hadley* principle are: attacking employee's reputation by statements made at the time of dismissal, misrepresenting reasons for dismissal, dismissal intended to deprive employee of benefits.
* **C: To be compensable, the ER must have done something more that could foreseeably cause mental distress,** such as the conduct in Wallace, ERs conduct must be **unfair**, or in **bad faith** by being, for example, **untruthful**, **misleading** or unduly **insensitive**”

Overview

* At CL EEs have to follow unreasonable rules or face dismissal compared to unionized force where there is an outline for ERs to follow.
* At CL can be dismissed with just cause and reasonable notice, under union the focus is on rehabilitative behavior of EE before dismissing.

## Who is EE under Common law/ Individual Contract

### Who is EE?

Employee= with tools, with independence, own equipment, a contractor fully dependent on one business, an independent entrepreneur with various contracts.

### Who is Consultants?

Contractors, casuals, part-timers, homeworkers, agency supplied temps

### Purpose of Having Status?

* EE have access to far more protective regimes regarding unequal economic relationships
* ER are liable fro CPP, EI premiums, reasonable notice
* ER are vicariously liable for acts of EE not contractors
	+ Policy decision to make ER liable
	+ Practical remedy for 3rd party victim
	+ Imposition of risk creates legal obligation to pay

### Employee vs. Independent Contractor under CL/ Individual Contract

####  Step 1a: Control Test- Who is in control?

Case Example: Regina v Walker

* Difference = a principle has the right to direct what the agent has to do; but a master has not only that right, but also right to say how it is to be done.

Case Example:67112 Ontario v Saagaz- Employee vs Independent Contractor

* 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.

Case Example: Montreal v Montreal Locomotive

* Additional factors to consider;
	+ Control
	+ Ownership of tools;
	+ Chance of profit
	+ Risk of loss.

#### Step 1b: Business Organization/Integration Test

Case Example: Harrison LTD v Macdonald

* Under a contract of service, a man is employed as part of the busiess and work is done integral part of the business
* Under a contract for service his work, although done for the business is not integrated into it but only an accessory.

#### Step 1c: Enterprise Test

* Based on social policy of risk regulation supported by following premises, where the cost of risk is on the party most capable of limiting or managing the risk.
	+ He controls the activities of the worker;
	+ He is in the position to reduce the risk or loss
	+ He benefits from the activities of the worker
	+ The true cost of a product or service ought to be borne by the enterprise offering it

Case Example: 67122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983- Voluntary working relationship

## There is no one conclusive test to determine EE from independent contractor.

* Central question: whether the person who is engaged to perform the services is performing them as a person in **business** **on his own account**. The level of control the ER has over the worker’s activities will be a factor. Other factors to also consider include whether the worker provides their own equipment, worker hires own helpers, degree of financial risk taken by worker, degree of responsibility for investment and management held by worker, and opportunity for profit in performance of tasks

#### Step 1d: Dependent Contractor- Intermediate Status

Dependent contractor

* A status relationship based on economic dependency;
* Entitlement to reasonable notice;
* Courts analyze various factors such as permanency and proportion of work from primary source;
* Inchoate as courts are adjusting to this new category;
* At this point, no clear test

#### Who is ER?

ER is determined by who maintains control;

* Who pays;
* Who can discipline and dismiss;
* Who directs services;

Risk regulations dominant purpose for test;

General rule is that general ER is liable unless clear transfer of control;

# Unionization

Unionization applies to individuals that are under a **contract of employment**. There are some practical differences between Common Law employment and unionized employment. CL = reasonable notice

* One key difference is termination under code is governed by legislation and there must be **just and reasonable cause for dismissal** but difficult to do. The relationship must be ongoing and rehabilitative to correct behavior of EE.
	+ Evidence must be clear, convincing and cogent although likely required in both contexts
	+ Strong presumption that ER-EE relationship is ongoing;
	+ Requires “corrective” discipline as underlying principle is rehabilitation
	+ On single incident, question is whether employment contract has been irretrievably broke.

## Termination under Labour Code

84 (1) Every collective agreement must contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision must require that the employer have a **just and reasonable cause for dismissal** or discipline of an employee, but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.

* Expectation of continued employment under the code = specific performance available and;
* Layoff available where EEs have recall rights.

### Just and reasonable cause for dismissal [high standard]

* Evidence must be clear, convincing and cogent although likely required in both contexts
* Strong presumption that ER-EE relationship is ongoing;
* Requires “corrective” discipline as underlying principle is rehabilitation
* On single incident, question is whether employment contract has been irretrievably broke.

Case example: Re Lear Sieglar Seating Corp

* in order to determine if a discharge is just, one must look to the precipitating incident. Is it an act or omission which is so repugnant, so grave, or so repudiator of the EE/ER relationship to justify a severance of that relationship? If so, need to consider consequences of the act upon the ER- loss or harm on ER, potential loss or harm on ER, ER state of mind, intentions behind the act or omission.

#### Reasonable Requirement by ER to dismiss EE under Union

Case Example: Lumber & Sawmill Workers’ Union

* **Reasonableness requirement [KVP Test]**
	+ Rule must not be inconsistent with the collective agreement
	+ Rule must not be unreasonable
	+ Rule must be clear and unequivocal
	+ Rule must be brought to the attention of the employee affected before the company can act on it;
	+ The employee concerned must have been notified that a breach of the rule could result in his discharge [if rule used as a basis for discharge] and;
	+ Rule should have been consistently enforced by the company from the time it was introduced.

## Purpose of Labour Code

Purpose is to protect EE’s from abuse of managerial power. Further it is to **increase representation for unorganized workers and use code to limit economic weapons [strike/lockout]**.

Post WW2 there was very little slack in the labor market where workers demanded wage increases and ERs resisted to demands ,which resulted in loss of production and productivity due to strikes. Also increased violence among ERs, unions, and 3rd parties.

### Objects and Policies in 1977

s.27(1) stated that the Act must secure and maintain industrial peace and promote conditions favourable to settlement of disputes.

* Main focus was on industrial stability

## Present duties of BC Labour Code

- larger focus on productivity and economic viability .

S.2) The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

* 1. Recognizes the rights and obligations of employees, employers and trade unions under this Code,
	2. Fosters the employment of workers in economically viable businesses,
	3. Encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
	4. Encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
	5. Promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
	6. Minimizes the effects of labour disputes on persons who are not involved in those disputes,
	7. Ensures that the public interest is protected during labour disputes, and
	8. Encourages the use of mediation as a dispute resolution mechanism

# Creating a Union – status under collective bargaining

#### 3:100 Introduction- LABOUR CODEWhy we need to determine definition of EE

* Major issues: who is an "employee"; are they excluded from certain aspects of collective bargaining (usually public sector, essential services); who is the legal employer.
* Certain industries, such as agriculture, are traditionally underrepresented and even when collective bargaining rights are extended to them, they often do not produce significant benefits.
* Some non-unionized employees, such as medical doctors, manage to bargain for themselves just fine. So, collective bargaining might have limited success in reducing the disparities between the powerful and powerless. Additionally, it is unclear whether the current system of collective bargaining adequately responds to changes in labour skill, mobility, temporary and part time work, etc.
* Premise of a right to exists is purpose of labour code

Theoretical Approach to Term

**Legal Formalism**

* EE = determinate meaning, court must elaborate test that captures meaning

**Legal Realism**

* EE= indeterminate meaning which is a social concept dependent upon purpose for its use where court must clarify so a boundary can be ascertained
	+ Eg: risk regulation model or access to protections for vulnerable economic actors.

## Step #1: Who is an employee Covered by Labour Code?

|  |  |
| --- | --- |
| Service | Employee Duty/ Employer Right |
| Remuneration | Employee Right/ Employer Duty |
| Ownership | Employer owns process and product |
| Control | ER controls both planning and execution |
| Entrepreneurial Risk | ER undertakes Risk and enjoys Profit |

### 3:200 Who is an Employee?Step 1: Board Definition of Employee

* "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,
* Performs the functions of a manager or superintendent, or
* Is employed in a confidential capacity in matters relating to labour relations or personnel;
	+ **"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;-**the way the industry operates;
1. the type of work involved and its source;
2. the nature of the applicant's operations;
3. the organization of the employer's operations and the degree to which the contractors are a continuing part of it;
4. any contractual arrangements between the parties and others;
5. 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;
6. the nature and manner of compensation and how it is determined;
7. 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);
8. the opportunity for the contractor to make a profit through the exercise of independent entrepreneurial judgment;
9. the contractor's opportunity for economic mobility and whether the contractor advertises or solicits customers elsewhere.

#### Dependent contractor can be certified under Code [City of Surrey Telecom system/Pardeep]

S 28(1)

* if an application for certification is made for a unit consisting of, or including, dependent contractor, and the application meets the requirement of s.24 and 25, board must
* (a) if no other certified unit of EEs of the same ER, determine whether unit is appropriate bargaining unit or
* (b) if certified unit of EEs of the same ER, whether inclusion of dependent contractors in the existing unit would be more appropriate and if so application be made

s 28(2)

* if board has determined under 1(b) that variance of the existing bargaining unit is more appropriate, application for variance must be made to
* (a) determine what rights, privileges, and duties have been acquired or are retained
* (b) ensure reasonable procedures are developed to integrate dependent contract and EEs in a single bargaining unit
* (c) modify or restrict operation or effect CA in order to determine seniority rights under it of EEs or DC and
* (d) give direction to board as to the interpretation and application of CA affecting EEs and DC in a unit determined under section.

S. 24: (1) If board receives an application for certification that at 45% of the EEs in the unit are members in good standing of TU, board must order vote be taken among the EEs in that unit (2) must be conducted within 10 days of board receiving application for certification (3) another vote be directed if less than 55% of EEs case ballot

S 25: (1) when vote take majority must be determined (2): (a) majority favor TU; and (b) is appropriate unit for collective bargaining, the board must certify TU as bargaining agent for the unit (3) if after representation vote is taken, & the board is (a) satisfied majority vote not in favour of TU or not satisfied that unit is appropriate for collective bargaining; the TU may not be certified as bargaining agent.

### Step 1b: Determine which factors are present for EE vs. IC under Code

Need to apply Common Law factors of Independent Contract + 2 additional to determine under code.

Case Example: Cominco Ltd, BCLRB

* Next step to **consider after looking at the factors;** is which of those usual features are present and which are absent in the relationship under consideration. Then a judgment must be made as to whether the individuals in question are exposed to the kind **of pressures and imbalances, which the overall scheme of the statute was intended to correct.** Does statute apply to them at all?

#### Step 1a: Control Test- Who is in control?

Case Example: Regina v Walker

* Difference = a principle has the right to direct what the agent has to do; but a master has not only that right, but also right to say how it is to be done.

Case Example:67112 Ontario v Saagaz- Employee vs Independent Contractor

* 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.

Case Example: Montreal v Montreal Locomotive

* Additional factors to consider;
	+ Control
	+ Ownership of tools;
	+ Chance of profit
	+ Risk of loss.

#### Step 1b: Business Organization/Integration Test

Case Example: Harrison LTD v Macdonald

* Under a contract of service, a man is employed as part of the busiess and work is done integral part of the business
* Under a contract for service his work, although done for the business is not integrated into it but only an accessory.

#### Step 1c: Enterprise Test

* Based on social policy of risk regulation supported by following premises, where the cost of risk is on the party most capable of limiting or managing the risk.
	+ He controls the activities of the worker;
	+ He is in the position to reduce the risk or loss
	+ He benefits from the activities of the worker
	+ The true cost of a product or service ought to be borne by the enterprise offering it

Case Example: 67122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983- Voluntary working relationship

## There is no one conclusive test to determine EE from independent contractor.

* Central question: whether the person who is engaged to perform the services is performing them as a person in **business** **on his own account**. The level of control the ER has over the worker’s activities will be a factor. Other factors to also consider include whether the worker provides their own equipment, worker hires own helpers, degree of financial risk taken by worker, degree of responsibility for investment and management held by worker, and opportunity for profit in performance of tasks

*ADDITONAL FACTOR BOARD CONSIDERS: VOLUNTARILY WORKING RELATIONSHIP*

*MIGHT NEED TO CONSIDER BUSINESS ORGANIZATION/INTEGRATION, ENTERPRISE TEST AND INTERMEDIATE STATUS FOR LABOUR CODE AS WELL*

## 3:420 ER influence

There is concern that employers can create or take control of a union so that there is no longer a genuine bargaining relationship. Employers cannot interfere with unionization or form or financially support a union. If a group is applying for certification, have to consider whether it is dominated by the employer.

#### Step 2: Who is not covered by labour code: Managers /SI / confidential capacity are not covered by board

#### Why 3 categories are not covered

The Corporation of the District of Burnaby, BCLRB No. 1/74

* Because there might be a conflict resulting in a dilution of interest both of the union and the ER which both require executives with undivided loyalties.

#### Confidential Capacity:[ Exception to EE]

* Is a person who performs functions a confidential manner related to labour relations which has 3 requirements
	+ 1: has to be a substantial part of persons job
	+ must be some significance in confidential information and requires some form of discretion on part of EE and whether or not there is a need for secrecy
	+ Needs to relate to labour relation or personnel.

Case Example: Gateway Casinos & Entertainment

* Stated that a person regularly and materially involved in personnel matters where they are entrusted with confidential information about EEs and must act upon it discreetly.
* Information includes; facts of a character, which if divulged or misinterpreted could impact the relationship between EE and ER.
* Person receiving the information will be responsible for making judgments about it, as opposed to recording it or processing it in a routine way.

#### Manager Exclusion

* A manager is excluded because they need to have undivided loyalty to effectual business interest, whereas unions have different collective interest, and when conflict arises, it is a conflict of interest

Case Example: Cowichan Home Support Society

* Test for managerial exclusion requires determining if the person is involved in;
	+ Discipline and discharge;
	+ Labour relations input, and [can they approve overtime, department functions, etc.]
	+ Promotion and demotion.

### Step 2b: Who is Employer? Control + Integration Test

* ER is determined by who maintains control
	+ Who pays;
	+ Who can discipline and dismiss
	+ Who directs services
* Risk regulations dominant purpose for test
* General rule is that general ER is liable unless clear transfer of control.

Case example TRUE ER: York Condominium

* Case stated that the true employer is;
	+ The party exercising direction and control over the EEs performing the work
	+ The party bearing the burden of remuneration
	+ The parting imposing discipline
	+ The party hiring the employees
	+ The party with authority to dismiss the EEs
	+ The party who is perceived to be the ER by the EEs
	+ The existence of an intention to create the relation of ER and EE.

Case Example: Columbia Hydro Constructor [Control and Integration **Test]**

* Provided 2 additional factors to consider **control and integration** of an Employer vs. Employee.
	+ The organization into which the EEs are integrated;
	+ The organization that holds fundamental control over the EEs.

\* once you have established who is an EE—determine if they have a *sufficient continuing interest* to vote. REMEMBER- the 3 exclusions

## Step #3: Which Employee’s can vote for Unionization?

### Sufficient and Continuing Interest- VOTING ONLY

* EE can vote as long as they have a **contingent or future interest** in the exclusive agent agreement.
* An EE has to have **sufficient continuing interest** in order to vote. Apply test!
* General standard utilized to determine whether EE have a sufficiently tangible relationship with the bargaining unit such that they deserve a say in who represents them;
	+ Summer students
	+ Layoff;
	+ Off work due to illness
	+ Workers promoted to management during time relevant to vote

Case Example: Waldun Forest Products—casual/part-timers

* Board said that specific factors for sufficient continuing interest include:
* **TEST**
	+ Permanence of employment
	+ Proportion of casual/temporary EEs in total work force;
	+ Nature and organization of the ERs business;
	+ Each individual’s particular employment circumstances.
* There is a generalized standard to determine whether EEs have a sufficiently tangible relationship with the bargaining unit, that they deserve a way in who represents them
	+ Summer students; layoff, or vacation = sufficient continuing interest
	+ Off work due to illness = yes, but if there is no return to work day then no
	+ Workers promoted to management during time relevant to vote.

Relaxed notion of EE due to the enduring nature of collective bargaining relationship. However, there is no reason to exclude EEs 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.

# The Right to Join a union: Certification Process

**Overview**

**Step 1: Organize support**

* + Union must be able to demonstrate the support of a min of 45% of EEs in the proposed BU
		- This enables unions to certify even if there are people who are not willing to put their name on a card

**Step 2: Apply for certification**

* + Union files an application for certification with the BC Labour Relations Board

**Step 3: Certification vote – within 10 days of application for certification**

* + Secret ballot vote is held
	+ All EEs in BU are eligible to vote
	+ Union must receive a majority of votes case in order to be certified
		- This means union can be certified without majority of BU, There is some discretion if the turnout is too low

**Step 4: Board Hearing**

* + Labour board will hold a hearing to determine if the union has majority support
	+ Employer can raise objections at this time (eg some voters were not eligibile or some signatures false)
	+ If all procedures followed, ballots are counted

## Step #4: How to get certified as Union-

### *5:100 The Wagner Act ModelHistory – Wagner Act Model*

*Before 1930s, unions often had to strike in order for recognition (recall Triangle Factory Fire). Wagner Act, introduced in the US and subsequent Canadian legislation creates a certification procedure: upon obtaining and proving majority support amongst the employees in a bargaining unit, the union becomes exclusive bargaining agent for all the employees and the employer is compelled to bargain with the union. Key principles underlying this model are majoritarianism and exclusivity.*

Adams,

*Wagner Act model is unusual and developed out of a model designed to protect employer interests. Although forced statutory recognition is a benefit for unions, anti-union employer gains a number of benefits from this system:*

1. *Employer can contest employee representation plans*
2. *No political pressure for universal enfranchisement. Since employees CAN establish collective bargaining through the union process, employers are free to ignore any other so-called unions.*
3. *No requirement for employers to take positive steps to create unions (due to fear such unions would be company dominated)*

*As a result, the majority of employees are in non unionized jobs where the employer can freely set the terms and conditions of employment.*

 Jacoby,

*Globalization of trade has mostly negative effect on organized labour. Lower cost options overseas means lots of manual labour work, traditionally a highly unionized area, is being moved offshore. The threat of relocation, now available in many sectors, saps unions power. Public sector workers, mostly immune to this, retain high unionization rates.*

 Arthurs (279-283)

*Globalization similar to the race to the bottom in The States before Federal power over commerce was used to create a single system of labour law. No global law on labour is possible. Organization philosophically difficult and practically almost impossible: different languages, culture, politics, legal rights, etc*

## Determining Support – union support models and critiques

Three Canadian models for **determining support for union**:

1. Quick vote
	1. (we have this in BC – s 45 – vote must be within 10 days of certification)
2. Reliance on membership evidence
	1. (eg membership cards), with brief period after cert to allow for change-of-heart petitions
		1. doesn’t require vote – if you can get enough people to sign a membership card, the union is certified without a vote
		2. unions typically prefer card certification – you can do it without telling the employer
			1. much less opportunity for employer to campaign against and reverse tide of union support
		3. if you are the employer you may be genuinely concerned about this system
			1. concern about pressure to sign card, no anonymity
3. Primary reliance on membership
	1. evidence as of the date of application (no change of heart petitions or vote)

You can also have a change in union representation – ie another union can try to gain majority support to represent a bargaining unit

* limit on how many times raiding union can make an application – s 18, 19 of code
* there is also a grace period where union cant be decertified or raided by another union
* for first ten months after certification you have some stability, you have some time to bargain with employer and reach an agreement
* once agreement is reached there is the possibility of decertification, or the possibility of raiding - another union could come in and try to displace the existing one, say this union is not working for you and we will offer you a better quality of representation

### "Bankworker Unionization and the Law", Rosemary Warskett

* Case states that law is corrosive and facilitative—that law is embraced in a statutory form which embodies victory of labour movements embraced by union activist. It was handed off to union and lawyers because it required the need to navigate through complex waters due to the fact that the law does not change. In this case the structure of the law undermined the actual unionization movement in the sector.

### Labour Code Requirements

The Bargaining unit must conduct a representation vote to determine who wants to be represented by a union and who does not.

45% of EEs must apply to be represented, and the final vote after the *representation vote* must be 50+1.

S.18(1)

* If a collective agreement is **not in force** and TU is **not certified** as bargaining agent for an appropriate unit for collective bargaining, *a TU claiming to have members in good standing not less than* 45% of the EEs in that unit may at any time, subject to the regulations, apply to be certified.

S.18(2)

* If collective agreement is not in force and a TU is certified as bargaining agent for a unit appropriate for collective bargaining, a TU claiming to have members in good standing a majority of EEs 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 date of certification of TU for the unit or
* (b) the board has consented to an application before the expire of the 6 months

S.18(3)

* unless the board consents, a TU is not permited to make an application under (2) during strike or lockout

S.18(4)

* despite section 18 and 19
* (a) a TU that is a party to a collective agreement, but is not certified for the EEs covered by it, may apply to be certified at any time and
* (b) a council of TU comprised of TUs that are parties to collective agreeements may apply to be certified at any time in place of those TUs.

S.24(1)

* If 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 EEs in that unit are members of good standing, board **must order** a representation vote to be taken among the EEs in that unit

s.24(2)

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

S.24(3)

* Board *may direct that another representation vote* be conducted if less than 55% of EEs vote.

## \*NOTE- you can have reliance on membership card to show that there is enough people to have union certified without a vote. However, this creates a less of a campaign for ER to prevent it.

## 5:200 The Appropriate Bargaining Unit(283-286)

Bargaining unit is the group of workers defined based on the employer for whom they work and the positions they occupy. Could be as broad as all employees of the employer, or narrowed based on task, location or other factors. The employees in the bargaining unit are the ones who will vote on certification and the ones who will be covered by the collective agreement.

The test for the appropriate bargaining unit is traditionally whether all the employees have "**community of interest**". However, broader bargaining units are generally favoured as administratively more effecient, allowing for mobility of employees, creating a common framework of employment conditions and lessening the number of strikes and lockouts that may occur with multiple unions and negotiations in place.

The size of the bargaining unit will have a number of effects:

1. pressure towards equivalent wages amongst employees in the bargaining unit – generally simplifies matters for the employer, but high skilled employees may feel mistreated.
2. If there are many bargaining units, disputes may arise between unions over who belongs in which union and which tasks should be carried out by which employees.
3. Broader bargaining units may be better able to bring industrial pressure. On the other hand, a small union of key employees may have large amounts of bargaining power that would be somewhat neutralized if they were in a larger bargaining unit.
4. Multiple bargaining units may mean each tries to get a better agreement than the previous one – leapfrogging.

It is possible for an employer and union to come to a voluntary recognition agreement and thereby avoid the certification process. Agreement will be invalid if the union is inappropriately influenced by the employer, acts in a discriminatory manner, does not represent a majority of employees or if another union has already been certified. Labor board can adjudicate over these issues and revoke the bargaining rights if necessary. More frequently, a union will apply to the labour board for certification of a bargaining unit (s. 18(1)) and the board will determine whether the proposed unit is appropriate (s. 22). The board can add or exclude employees from the unit if necessary.

## Step #5: Is the group an appropriate unit for unionization?

* CONSIDER; is it possible to draw a rational defensible line?
	+ Yes = likely to have separate unions
	+ No= only one collective bargaining.
* The board will NOT CERTIFY if;
	+ IT cut across classifications
	+ Cant have classifications where people are in and out of the unit

\*NOTE: board is concerned with a community of interest, as it is the most stable arrangement. Also, think of alternative options to include all members of the unit.

APPROPRIATE UNIT: THE BALANCE; Insurance Corp of BC

* What standards the Board should apply?
* The statute gives no specific direction and we must develop the guidelines on our own. That is a difficult task 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.

### Test for creating a Bargaining Unit

Case Example: Island Medical Laboratories LTD –

*Note appropriate unit & community of interest = same thing*

* When there is a collective bargain that wants to create a union of some members, or all members of the work force, if it is a **first union creation than factors a-d need to be considered**. For **every additional** collective bargaining done on a worksite **factors a-f need to be considered**. The key principles underlying appropriateness of industrial stability and access to collective bargaining.
	1. Similarity in skills, interests, duties, and working conditions;
		1. Who is working?
		2. Who is covered by unit scope?
		3. What do they do?
		4. How do they do it?
		5. Who do they do it with?
		6. Type of benefits and pay?
		7. Extent and manner of training?

\* wont cut across classifications, have to ask if you can draw a **rational defensible line** between the 2 groups of EEs.

* 1. The physical and administrative structure of the employer;
		1. Physical connection between sites and ease of movement?
		2. Managerial structure and authority at each work site?
		3. Whether payment through same system?
			1. Salary vs. hourly
		4. Whether human resources are separated?
			1. Does each department have their own manager?
		5. Whether separate business units and/or departments involved?
	2. Functional Integration; and
		1. Refers to: employee interchange, shared duties, integrated job duties, overlapping duties, team processes and continuous work processes.
		2. Extent to which duties overlap with others outside the BU?
		3. Whether work is dependent on others outside unit?
		4. Extent to cross-bidding or scheduling of employees?
		5. Extent of exchange of workers between work units?
		6. NOT the same as functional relationship

\* cant have functional integration between 2 bargaining units. Problem when it occurs regularly
- Functional relationship is when the work force is set up where EEs go in and out of different facilities to do their job due to efficiency.

* 1. Geography.
		1. Where each work site is located?
		2. Distance between each work site?
		3. Barriers between work sites?
		4. Whether or not there is a separation of function or interdependence between work sites?
1. And, where another unit already exists...
	1. The practice and history of the current collective bargaining scheme.
	2. The practice and history of collective bargaining in the industry or sector.

#### Step 5a: Is it better to have a ‘bigger is better’ bargaining unit?

* Board is under the impression that a bigger bargaining unit is better because it is all-inclusive units, which is the most appropriate since there will not be issues with stability, power for unionized EEs, administration complications with ER. The most appropriate unit will not disbar or bar a union application because all board is concerned about is that it is an appropriate unit.BUT board is satisfied with an appropriate unit where a rational and defensible line can be drawn around the unit applied for.

### Presumptions and guides for SINGLE BARGAINING UNIT vs MULTIPLE

* Geographical separation, *prima facie* appropriate;
	+ Board has a presumption that a second unit is impermissible
* Difference between functional integration and functional relationship:
	+ All work places have to have functional relationship amongst departments or it is not a going to be a good business
	+ Functional integration- is specific definition related to labour relation and function of bargaining unit
* 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*
	+ Industrial stability- to relax factors in relation to organizing sectors.

#### Why is industrial stability important?

Case Example- ICBC

* Board said that there needs to be a structure which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur. Don’t want to create an unstable organization that is going to disturb and disrupt the work force when there are 2 or more unions.

#### Examples of IML factors at work

Case Example: Wal- Mart Canada Corp., BCLRB

* Facts:
	+ Wal-Mart has an automotive department—tire and lube which had 2 different classifications. Automotive staff would sell only automotive supplies.
	+ Employees in both area would work the same till and had the same skills and equipment for scanning products. Some of the shelving items were sold in other areas of the store. The jobs were bid jobs and people would stay in the jobs.
* Analysis
	+ Look at the IML factors the board said board doesn’t cut across classification during an integrated work force because there is one building.
	+ Can cut across classification if it is 2 different ends, but harder when its within the same workforce in an integrated worksite that cuts across such as sales.
	+ Cant create one because you want an employee in and out of the classification.

Sidhu & Sons Nursery Ltd. (Re), BCLRB No. B63/2009

* **F:** Union wants to organize seasonal agricultural workers - applying for **bargaining unit of only the SAWP** **employees** who are employed at the nursery**.**  There are other employees who work at the nursery who are not SAWP workers, they are Canadians**.**
* **I:** Is this is an appropriate unit for collective bargaining, or is the appropriate unit all of the workers who are doing these jobs for the employer, regardless of what program it is**?**
* **A: Board**: the work they are doing is exactly the same, they have to be in the same bargaining unit, only distinction is their status
* **Reconsideration Panel**: board focused on nature of work to exclusion of all other factors; turn it back to the original decision-maker
	+ “we do not agree that classification of employees is only distinguishable in a significant way on the basis of their work characteristics”
	+ The diff between SAWP and domestic workers are real, simply because they arise from stuff other than job duties does not make them different from fundamental standpoint
	+ Looks at IML test and says there is a distinct community of interests of this group, rooted in their employment status and the aspects of their terms and conditions of employment that are unique to them -> these fall within “interests” crtieria of IML test
* **Board reconsiders**: grants certification but on conditions; can’t bargain on work jurisdiction -> cant take work away from people who are not part of the unit, or reallocate the tasks in a way that favours them and disfavors the other people. Limited certification

#### Why it is difficult to organize multiple bargaining units.

Woodward Stores (Vancouver) Limited, BCLRB No. 129/74

* Graphic art store that wanted to create a bargaining unit with only one aspect of the graphic art store. It was rejected because it was for only 18 EEs and by creating the bargaining unit would be difficult to organize since there was over 2000 staff and wouldn’t meet 45% threshold. Board stated that if you can prove that you have a difficult work place to organize, the board will relax the IML factors and allow for smaller units then they otherwise would have.

# Expanding Bargaining Unit- 2nd bargaining Unit

* Can expand bargaining unit to add more members, but don’t need to renegotiate terms just need to go through IML factors to determine if it would be appropriate to include them.
* The solution to the issue of proliferation [increase] piece of IML factors is to expand the bargaining unit. However, it is not SOLUTION if there is another union coming in because there will be problem with operation and there will be a real hurdle to over come proliferation
* If **second union** coming in then all 6 IML factors But **don’t have access to s.142** because they don’t have status, so there only option is proliferation.

## Is it possible to expand the bargaining Unit to add more members to union? *Same union applying for expanded unit*

S**.142**:

* The board on application by any party or on its own motion, may vary or cancel certification of a trade union or the accreditation of an ER’s organization
	+ Must be appropriate for collective bargaining
	+ Must not use existing support to sweep in other employees [*Olivetti Principle]*
* Board prefers BIGGER & BETTER and this goes against it

Case Example: All of Eddys

* Employees of All of Eddy’s had a certified union for a Vancouver office, shortly after it was certified the union wanted a variance under s.36 to include 2 workers at Nanaimo location and ER opposed on 2 grounds;
	+ Labour board had no jurisdiction and even if it does the application should be rejected on its merits.
* Analysis
	+ Board stated that you cant use base of support to sweep in other EEs who don’t care to have union
* Expanding bargaining Unit
	+ Cant reach out to people against their will s.142
	+ Board said the ability to carry a bargaining unit is our right because we have to ensure all bargaining units are appropriate that is their role ven though not defined, they can vary the Vancouver Unit.

Case Example: Vancouver Museum and Planetarium Association, IRC No C194/90

* FACTS:
	+ Board issued certification for the museum except the gift shop who was contracted out and Food shop were excluded since no EE of museum worked there.
	+ Museum eliminates contract with food services and hires same people
* ANALYSIS
	+ Certification said that gift shop EE were not included. However, you can’t cut across classifications according to IML. If excluding food services = appropriate and adding them later wont have a labour relations effect on existing bargaining unit.
	+ Board ok with including gift shop with existing bargaining unit because when looking over IML factors it would be inappropriate to cut across classification.

#### Second or Additional Units

* Utilize all 6 factors set out in IML
* Rebuttal presumption against additional bargaining units;
* Presumption at its lowest at second unit and increases with each additional unit
* Overview of application; Metro-McNair

Case Example: Metroland Printing

* **F:** The Metroland office in question has four full time sales employees, paid on commission, and two full time distribution empoyees, paid an hourly wage. Part time and temporary employees are also occasionally hired. Part time employees don't get benefits. Temporary employees often full time employees if there is a position available. Students are occasionally hired through Ministary of Education and get no salary or benefits. The distribution employees do not want to be unionized.
* **I:** What is the appropriate bargaining unit?
* **L:** Have to consider whether there is *sufficient* community of interest AND whether the proposed bargaining unit would cause serious labour relations for the employer. No assumptions about community of interest should be made, instead the board must consider the particular circumstances of the workplace. Test has merged, such that, generally, employees of the same employer will have sufficient community of interest unless the placement of them in the same bargaining unit will create serious labour relations problems for the employer. Bargaining units should generally be broad and avoid unnecessary fragmentation.
* **A:** Although the different employees have different terms and conditions of employment, the differences are unlikely to cause any labour relations problems. In fact, fragmenting the groups would be more likely to create problems. Desire to not be in the bargaining unit is not, of itself, a reason to fragment the bargaining unit. Those wishes are a factor to be considered.

# Securing Bargaining Rights: Unfair Labour Practices

An unfair labour practice = ER dismisses or punishes an EE because of membership in union.

“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 EE’s- General Shoe Corp

1. First kind is dismissal based on **anti-union animus**
	1. **Test:**
		1. Burden on **ER** to show they did not have any anti-union animus
		2. BC = provision in 6(3) that nothing is meant to interfere with the right of an ER to terminate an EE for proper cause.
			1. ER has right to discharge for proper cause regardless of what else might be going on
2. Second kind is **non-motive unfair labour practices**
	1. Some labour codes prohibit conduct that interferes with unions, regardless of motive. Looks at effect

## Step #6: Has ER participated in an unfair labour practice during union drive?

### Rights of ER and EE:

#### Section 4

S.4(1): Right of ER and EE

* EE is free to be a member of a trade union and to participate in lawful activities

S 4(2)

* ER is free to be a member of an ER’s organization and to participate in lawful activities

White Spot Case:

#### Section 5

S5(1): Anti discrimination clause

A person must not

* (a) Refuse to employ or refuse to continue to employ a person,
* (b) threaten dismissal of or otherwise threaten a person,
* (c) discriminate against or threatened to discriminate against a person with respect to employment or a term or condition of employment or membership in a TU or
* (d)intimidate coerce or impose a pecuniary or other penalty on a person

because of a belief that the person may testify in a proceeding under this code or because the person has made or is about to make a disclosure that may be required of the person in a proceeding under this code or because the person has made an application, filed a complaint or otherwise exercised a right conferred by or under this code or because the person has participated or is about to participate in a proceeding under this code

*common feature: protect vulnerable citizens; protect EEs against retaliation for exercising rights under code; establish subjective motivation for retribution*

S 5(2): Gate-keeps complaints into or out of expedited process

If **no collective agreement** respecting a unit **is in force** and a **complaint is filed** with the board alleging that an **EE in that unit has been discharged, suspended, transferred or laid off** from employment or otherwise disciplined in contravention of this code, the **board must** forthwith **inquire** into the matter and if the complaint is not settled or withdrawn the board must

* (a) commence a hearing on the complaint within 3 days of its filing
* (b) promptly proceed with the hearing without interruption, except for any necessary adjournments, and
* (c) render a decision on the complaint within 2 days of the completion of the hearing

## Interference with Trade Union

#### What is purpose of Free-speech/Interference for ER?

* In 73 legislation didn’t have an exemption of free speech. The creation of s.6 and 4 was in line with the national labour board with the idea of trying to create an environment/atmosphere free of ER-EE for free will and free choice.
* In 77 added exemption which permitted ER to communicate to an EE a statement of fact or opinion reasonably held with respect to ER’s business.

Case Example: Crown Zellberbach

Statements made to EEs in this regard must be couched in neutral terms; anything said must not have effect of interfering with or appearing to interfere with the EE’s fundamental right to join union

* In 87 amendments were made to outline that nothing in the act deprives a person of his views provided he does not use undue influence, intimidation, coercion or threats

Case Example: Focus Building Services

Undue influence is a species of intimidation. The legislators have clearly stated that the use of such a weapon by an ER has no place in the industrial relations arena.

* 92 there were amendments made that stated that there was no language for undue influence.

### Step 6a: Did ER interfere according to s.6 and was it protected by s.8? [NON MOTIVE UNFAIR LABOUR PRACTICES]

S 6(1) – Interference with Union [is it problematic for the union?]

* Subject to s.8, an ER or person acting on behalf of ER must not participate or interfere with formation, selection or administration of TU or contribute financial or other support
* Under this section it does not matter if there is an anti union animus, the ER or person must not **interfere** regardless of the message.
* Inquires into union support are almost never permitted- subject to an objective test of whether or not it interferes with the administration of the union
	+ *No anti union animus [attitude] required;*
	+ *Turns on objective effect of conduct*
	+ *Maturity of the collective bargaining relationship*
	+ *Explaining position, stating facts v disparaging union and undermining exlcusive bargaining agency*
	+ *Appropriate to balance ER’s legitimate interests*
	+ *Inquires pertaining to union support are almost never permitted [Gateway Casinos]*

##### Employer Protection Legislation

S 8 – difference BETWEEN ACTION/VIEW

* Subject to the regulations a person has the freedom to express his or her views on any matter, including matters relating to an ER, a TU or the representation of EEs by a TU, provided that the person does not use intimidation or coercion.
	+ Views as ideas, thoughts, beliefs, judgments, and opinions = are ok BUT not actions done in furtherance’s 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.
		- Action: Wearing Chucks to work, VIEWS: to thinks its appropriate to wear them

**S 6(3) is not protected by s.8**

Case Example: Excell Agent Services- CONTEXT SPECIFIC INTERFERENCE s.6

* Judge said whether the ER’s action amounts to interference, Board must look at totality of the circumstances- the context, timing and audience. Each case must be decided on its own individual facts as the force and weight of conduct may be coloured by its context.

Case Example: Convergys Customer Management Canada Inc., BCLRB No. B62/2003- Unfair Labour Practice

* **Facts:**
	+ Union alleged that the ER violated ss.6.1,6.3(a)(b)(d) and s.9 by publishing memos to the EEs about union organizing drives and hiring security guards to monitor the unions leafleting activities.
		- Statements were made that implied that the union is disrespectful and should not be trusted, even when the view was mistaken and unreasonable
		- Statement that employers would not gain anything they already have implying the Employer does not have to bargain if the union is certified;
		- A statement that signing a union card has the same legal effect of signing a contract.
		- Statement that employees would be dismissed if shared contact information with other employees;
		- Surveillance of employees and;
		- Conduct and communication by Elaine House.
* **Analysis**
	+ Court held that even though the views were unreasonable, it was a legitimate expression of a view.
	+ Board will look at
		- Does ER have power, who was speaking, what was said, and what context? They are looking for coercion/intimidation.
		- Views; has to be views genuinely held.
	+ Board held that the hiring of security guards to conduct constant surveillance of EEs interaction with organizers was a breach of s.6 (1) and fell **outside the protection of s.8**.
	+ Board held that non-coercive, non-intimidating views based on preference to resist certification are protected by s.8 and do not constitute interference for the purpose of s.6.1

Case Example: RMH Teleservices (250-251)

* **F:** At a call centre, employer displays anti-union slide shows on all four walls of the working area. ER gave out candy with slogans.
* **I:** Is this an unfair labour practice?
* **Analysis**
	+ **:** Employees should not be expected to avert their eyes during ordinary working circumstances. s. 8 rights of expression do not permit employer to coerce others to listen. Forced listening not OK.
	+ The slide show is not OK since it is practically impossible for the employees to avoid seeing it.
	+ Candy was considered speech because it sent out a message
	+ Gifts when viewed in the context of overall ER communication was a breach of s.6 regarding interference with joining a union

## Captive Audience Meetings

### Step 5b: Did ER hold a Captive Audience Meeting? Violate s.8?

When an employer wants to discourage the unionization of its business is suddenly increase communication with its employees which takes place during a union organizing drive = captive audience meeting. They are context specific and depend on voluntariness.

Case Example: Cardinal Transportation

One of the responses of an ER who wants to discourage the unionization of its business is to suddenly increase its communications with its EEs; and one particular kind of communication by an ER, which often takes place during a **union organizing drive** that has received special attention by all Canadian labour boards is called a captive audience meeting. It has some or all of the following characteristics.

* They are held on company property during work hours,
* With no deduction in pay;
* Attendance is compulsory, or ER states it is voluntary,
* ALL EE feels compelled to attend,because not to attend would clearly identify oneself as a supporter of the union
* and a senior manager is in attendance.
* Discussion is usually about current wages and working conditions, company performance, and industry or sector performance.

Case Example: Peter Ross 2008 Ltd. (Re), BCLRB Nos. B59/2012 and B104/2012

* **F:** Employer at captive audience meeting: "Our competitors and contractors all non-union; economy is fragile; difficult to get work as it is".
* **L:** Implied threats can be just as coercive or intimidating as explicit ones. Being an honest belief of the employer does not mean it is not also coercive/intimidating

## Anti Union Animus

#### Did EE get dismissed due to motivation by anti union animus? S. 6(3)(a)—UNFAIR LABOUR PRACTICE REQUIREMENT

S 6(3)

An employer or a person acting on behalf of an employer must not

* (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 production, formation or administration of trade unions.
* (b) discharge, suspend, transfer, lay off or otherwise discipline an EE except for **proper cause** when a TU is in the process of conducting a certification campaign for EEs of that ER
* (c) impose in a contract of employment a **condition** that seeks to restrain an EE from exercising his or her rights under the code
* (d)*EE induces or promises ER:* 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 EE to refrain from becoming or continuing to be a member or officer or representative of a TU

## Intimidation

#### Step 5c: Did ER use intimidation of any kind?

### Section 9

*If corrosive/intimidating—s.8 cant save = breach of s.9*

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 to cease to be a member of a trade union.

* Limits what union can say and do in their attempt to win the EEs over to the dark side.
* The use of force, threats, fear or compulsion for the purpose of controlling or influencing conduct;
* Requires anti-union animus;
* Section 6 requires a person to act on behalf of employer, while section 9 is not so restricted;
* Available against rank and file employees and unions.

Keep in mind that even if there is a s.8 – right to express views by ER- if it is corrosive or intimidating it will breach s.9.

BOTH unions and Anti Union Animus can breach s.9

## Remedies

Purpose of remedies is deterrence not meant to punitive. Section 14(4) are remedies board can order after finding an unfair labour practice. S. 14(5) allows conditions to be attached to a s. 14(4)(f) known as remedial certification.

S 14(1)

If written complaint is made to the board that any person is committing an act prohibited by section 5,6,7,9,10,11, or 12 board must serve a notice of the complaint on the person against whom it is made and on any other person affected by it

S 14(4)

If on inquiry, the board is satisfied that any person is doing, or has done, an act prohibited by section 5,6,7,9,10,11,12 it may

* (a) make an order directing the person to cease doing the act
* (b) in the same order direct any person to rectify the act
* (c) in case of an ER, include a direction to reinstate and pay an EE a sum equal to wages lost due to his her discharge, suspension, transfer, layoff, or other disciplinary action contrary to s. 6(3)(a) or (b)
* (d) in the case of TU, include a direction to reinstate a person to membership in the TU and pay to that person
	+ (i) sum equal to wges lost due to suspension
	+ (ii) direct ER not to increase or decrease wages or alter terms or condition of employment of the EE affected by the order for period not exceeding 30 days without written permission of board and board may extend longer than 30
* (f): EEs affected by the order are seeking TU representation and the board is of the opinion that the union would likely have obtained the requiste support had it not been for the act prohibited, certify the TU.

14(5)

board may impose conditions it considers necessary or advisable on a TU that is certified under 14(4)(f) and if the conditions are not substantially fulfilled the boards satisfaction within 12 months from the date of the certification, or lesser period, the certification is deemed to be cancelled.

#### Step 5d: What remedies are available for unfair labour practice

RMH Case

* Court held that remedies must be rationally connected to the consequences of a contravention and consistent with the policy objectives of the code. Relevant features of the statutory scheme include the fundamental objective of ensuring the freedom to organize, recognizing the power imbalance between employer and employees.
* Deterrence is relevant factor insofar as it is consonant with these objectives.
* The board must ensure that remedies are compensatory, not punitive, but also not so minimal that they amount to a mere cost of doing business in contravention of the code.

### Remedial Certification

Supposed to be deterrent but considered to be remediated and not punitive.

* 6 factors the board considers where a party or union is requesting remedial certification.
	+ 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

Forano Limited, BCLRB No. 2/74

* Case states that you need to look at s.4 which states it has to be a perfectly freely chosen space, and cant be free if there is element of coercion.

# After Cards are signed & Application Filed

A freeze limits any influence the ER might have on the association forming process, ease concerns of EEs

## Process of Voting

* 10 day statutory mandate, unless conducted by mail ballot;
* Expedited and administrative
* Employee must be given a reasonable opportunity to vote
* Like most elections as each side has a right to scrutinizer;
* Almost always a voter’s list
* All objections must be made at the time to ballot can be doubled sealed.

## During an Organizing Drive- Before Certification and 1 card is signed.

* An organizing drive is designed to protect unions running up until the certification application. The purpose of 6(3)(b) ends when the application is filed and once union established protected by s.32.
* Indication where cards are left to stale-date after 90 days

## Statutory Freeze During an organizing drive:

### Section 6(3)(b) [knowledge + employer conduct [anti union animus]

* An employer or a person acting on behalf of an employer must not
	+ b: 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
		- Is or proposes to become or seeks to induce another person to become a member or officer of a trade union or;
		- Participates in the production, formation or administration of trade unions

## 4:300 The Statuary Freeze

Ballots remain sealed and can last from 6-8 Months. Freeze ends when they board decision is whether to certify or not = 50+1

### Step #6: What rights are entitled to EE while Certification Pending

**Certification Freeze**

s. 32(1):

* while an application for certification is pending, a person affected must not declare or engage in a strike. An ER must not declare a lockout, must not increase or decrease rates of pay or alter a term or condition of employment of the EEs affected by the application, without the boards written permission.

s. 32(2):

* Employer can still discipline, ER can suspend, transfer, lay off, discharge, including by termination, an employee for proper cause.

### Step 6a: What rights are entitled Once Certification issue?

**Stat Bargaining Freeze**

s. 45(1)(b):

* After union certification is issued, employer cannot change rates of pay or terms of employment until 4 MONTHS after the board certifies the trade union as bargaining agent for the unit.

### Step 6b: What rights entitled to EE during negotiations for collective agreement renewal;

s.45(2):

* After collective agreement has expired AND If notice to commence bargaining has been given the ER must not except with the consent of the other, alter any term or condition of employment until;
	+ (a) A strike or lockout has commenced,
	+ (b) A new collective agreement has been negotiated

Case Example: Kamloops Daily News Inc. (Re), BCLRB No. B258/93)

* FACTS:
	+ Got certification and was a 4 month freeze looking for a 9.4% roll back on wages of employment which is instituted on non-union members and then later tries to institute it on union members regarding the salary roll back
* Analysis
	+ Test was Business as usual and explicit discretion.
	+ Stated it was business as usual because they didn’t do it for unionization and they applied for certification.
	+ Business as usual= if there are periodic salary review or seasonal = business as usual if they have always done it.
	+ Board stated it wasn’t accepted because it wasn’t implemented before certification. There was no advance notice after vote and it was an ad hoc.
* 2nd defence = decision was made prior but not accepted yet = second line of defence

### Exception to Freeze- BUSINESS AS USUAL

* s 6(1)
	+ except as otherwise provided in section 8, an ER or a person acting on behalf of an ER must not participate in or interfere with the formation, selection, or administration of a TU or contribute financial or other support to it
* business as usual
* board discretion to grant changes under section 45(3)
	+ nature and extent of proposed changes;
	+ reason for the alteration
	+ need for alteration at this particular time
	+ the labour relations implication of proposed changes

#### Step 6c: Was ER’s conduct a result of Business as Usual?

S45(3): Business as usual; board discretion to grant changes under this section. But have to outline

* Nature and extent of proposed changes
* Reasons for the alteration
* Need for alteration at particular time;
* The labor relations implications of proposed changes

s. 45(4): Like s. 32(3).

There is no need to prove an anti-union animus to show a violation of the above sections, but the employer is still permitted to carry on **business as usual**. Additionally, both the freezes allow the board to authorize alterations.

Was this decision made prior to the collective agreement = DEFENCE

### Proper Cause

#### Step 6d: Was there proper cause for ER action?

## TEST for Proper Cause defence –*Cheshire Homes Society BCLRB No. B472/2001*

1. Establish decision based on good faith
	1. S.11 of Labour Board?
2. EE engaged in conduct deserving discipline;
3. Reasonable relationship between conduct and discipline
	1. Steps taken to investigate
	2. Whether an EE was given opportunity to respond to allegation
	3. The EE’s past record of discipline
	4. The rational for the penalty chosen
	5. Manner in which similar cases have been addressed in the past and;
	6. Seriousness of an offence in the particular

Case Example: White Spot and CAW 93

* S.6(3)(b) imposes a proper cause standard on the employer for a wide range of disciplinary sanctions during a certification campaign.
* **The test of proper cause for** discharge is found somewhere between the test of "just cause" at common law, and "just and reasonable cause" under the provision of a collective agreement.
	+ The test is whether the ER can advance a reasoned explanation which demonstrations a **rational connection** between the misconduct and the discipline imposed.
		- *Eg: in a discharge case; question is not whether EE has given “cause” or “some cause”; the board must determine whether there existed “****proper cause for discharge”***
	+ Look at previous conduct of ER
		- **nature of the Employer's operation and the manner in which similar circumstances have previously been addressed.**
		- The Employer must show it **acted in a *bona fide* manner**, and **was not influenced by extraneous** **or improper factors** (this obviously includes discriminatory or arbitrary motivations).
	+ Of course, the presence of anti-union animus will continue to defeat any argument of proper cause.

# Raids

## Raids- Is one union tried to take membership of another BU?

* When one union tries to take membership of another bargaining unit. Usually occurs within the 7/8 month of every bargaining period. It is created to allow EE’s choice in case they are not happy and is better than to decertify and wait for period and certify again, this is a seamless transition from one to the other.
* Instead of 45%, they need majority vote
* S.18 – normal certification if no union presence
* S.18(2) is where there is another union enforced
* S.19- opens it up to every 7 or 8 months

S 18(1)

* If collective agreement is not in force and a TU is not certified as a bargaining agent for a unit appropriate for a collective bargaining, a TU claiming to have as members in goo standing not less than 45% of the EEs in that unit may at any time, subject to the regulation apply to the board to be certified for the unit

S. 18(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
* 6 months have elapsed since the date of certification of a trade union for the unit, or
* the board has consented to an application before the expiry of the 6 months.

s. 18(3)

* unless the board consents, a TU is not permitted to make an application under (2) during strike or lockout

S 18(4)

* despite section 19
* (a) a TU that is a party to a collective agreement, but is not certified for the EEs covered by it, may apply to be certified at any time and
* (b) a council of TU comprised of TU that are parties to collective agreements may applied to be certified at any time in place of those TU

#### Change in Union Representation

S 19 (1) – usually calls for majority 50 +1. Get one shot every 2 years.

* 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

Have to get 45% revoking card and provide them to the board, who sends out notice and have vote, if there is 50+1 = de certification

S 33(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 Decertification

Board doesn’t like decertification’s of a small portion of the bargaining unit. Need to look at IML factors to determine if there is a rational defensible line [something that allows EEs to be separate] that will allow partial decertification.

#### Why board doesn’t like partial decertification

The board has an underlying policy reason because it goes against the bigger and better and goes against balancing unions, which are compromised, and undermines the unions role as exclusive agent and requirement to trade off constituent interest.

s. 142

* The board on application by any party or on its own motion, may vary or cancel certification of a trade union or the accreditation of an ER’s organization

Factors to consider:

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

Case Example: Starbucks

* FACTS:
	+ 12 stores represented by union, 1 store wants to decertify. Originally had 4 stores and expanded the units which resulted in 12 stores all together.
* ANALYSIS:
	+ board said the consideration is to use the 4 IML factors to determine if there is a rational or defensible line.
		- Have to consider if one store is appropriate on its own. If it is—board will allow union to have one store.

# 3:520 Common Employer and Successor ship

## Voluntary Council of Unions

a voluntary council becomes exclusive union to negotiate terms and conditions of employment with ER.

* Limited to one employer;
* Board considers impact on all affected parties;
* No exclusive agency [rules set by constitution]
	+ No obligation to accept main table agreements;
	+ Can have separate and main table discussion;
	+ Can pursue grievances and arbitration independently
* *Ex: Forest Industry between pulp and paper industry. All have their own agent, which is president of each local and all negotiate with ERs association who has agent for all of wood companies.*

S.41(1):

* To secure and maintain industrial peace and promote conditions favourable to settlement of disputes, the minister may, on application by one or more trade unions or on his or her own motion, and after the investigation considered necessary or advisable, direct the board to consider, despite, s.18, 19, or 21, whether in a particular case a council of trade unions would be an appropriate bargaining agent for a unit.

### Employer’s Organization

s.43(1):

* despite this code, an ER’s organization may, apply to the board to be accredited as a bargaining agent for the ERs named in the application

s.43(5):

* In an ERs organization is accredited, it has **exclusive authority** for the time the ER is named to bargain collectively for the ER and to bind the ER by collective agreement.

Effect under the code

1. Associated unit must be appropriate for collective bargaining
2. Council or organization is exclusive bargaining agent
3. Organization can be arranged outside of statutory regime
4. Cant withdraw from mandated organization without board consent;
5. Cant withdraw from either during bargaining;

## Step 1: Is there a common employer where a union is automatically enforced on 2nd employer?

A common ER declaration is remedial in nature. It is designed to address mischief and protect, not creating bargaining rights- *Richmond Cabs LTD*

S.38:

* 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.

#### Step 1a: How to determine common employer

* Employer A = construction business that becomes unionized. Employer A tries to undercut by making a dummy core and biding through dummy core to divert some work through company B.
* To avoid A’s obligation and EEs right under the code. Union has discretion to declare common employer declaration.
* Company B
	+ Doesn’t change legal status, allows ER to make corporate arrangement for tax purposes but the consequences are that union now has certification right for both A and B.

### Test for Common Employer

1. Must be more than 1 entity carrying on business.
2. The 2 entities must be under common control or direction
3. The 2 entities must be engaged in association or related activities or businesses.
4. There must be a labour relations purpose served by making the declaration.

Further Factors to consider; keep in mind that a company can be directed by 2 manageres, but if CEO is the same of both = common ER

* 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 of Multiple Unions

* Sometimes you get 2 entities where A and B are both unionized. The board will usually issue a vote to determine which new collective agreement employees want to have as their exclusive bargaining agent based on a seniority list. The winning unions collective agreement survives.

Case Example White Spot (202-206)

* **F:** WS sells restaurant to Gilley as a franchise. Restaurant was unionized. Union wants to negotiate with WS instead of with G.
* Factors considered: WS has substantial control of menu items and prices; G required to use WS suppliers and pay WS rates; G must pay marketing fee to WS; franchisees must have WS trained general manager and are subject to quality checks.
* **I:** Are G and WS related/common employers? Can s. 38 be used where s. 35 applies?
* **L:** The application of s. 35 does not prevent the board from imposing a s. 38 remedy.
* s. 38 is available whenever the entities are under "common control and direction". This is the case when a franchisor exerts dominant control over the franchisee under the franchise agreement. A particular franchise arrangement, and the degree of control exercised, must be considered on its facts.
* **A:** Since WS substantial control = Common Employer under franchise test

## Step 2: If no Common Employer, Is there Employer Successor ship?

Employee successorship = person who buys company and steps directly into shoes of previous employer.

* s.**35** continues the relationship so when ER B buys it, it is unionized exactly the same and same collective agreement until it comes to an end.
* Labour code protects **successorship + common employer**
* Labour code does not protect
	+ Subcontracted work
		- Where A subcontracts C, C is non-union even if it hires same people. If C is certified under union, and A decides to subcontract with D, C dies and D is non-union.
			* *Hospital janitors, City of Surrey Janitors, Food Staff -> don’t get same benefits as hospital staff, have own unionization. New staff = new bargaining unit*

#### Step 2b: Does Section 35 apply?

35 (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.

35(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.

35 (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.

35(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. [...]

#### Step 2c: Apply Employer Successorship Factors

* 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

Case example: Ajax (206-209)

* **F:** Town of Ajax used Chaterways Transportation for transit. The employees were unionized. Town decides to take back operation of transit system, cancels contract with external company and hires drivers, mechanics and cleaners – the majority of whom were previously employed by CT.
* **I:** Is the town a successor employer, within Ontario's s. 35 equivalent?
* **L:** [s. 35] is worded broadly: "sell, lease, transfer or otherwise dispose of" and is remedial, so should be interpreted broadly and liberally. "transfer" need not be in a particular legal form.
* **A:** Town had been and continued to be driven by ensuring continuity of service – same drivers on the same routes. Thus, the workforce was a substantial part of the "business" and so an effective transfer of the employees from Charterways to Ajax falls within [s. 35].

### Step 2d: Do these factors determine continuity of business for successorship?

* + 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

Case Example: Zellers Inc. (Store No. 264) (Re), BCLRB No. B243/2012

* **F:** Employees at one Zellers store are unionized.
* **I:** Is Target a successor employer to Zellers under s. 35?
* **L:** The successor must draw its 'life-blood' from the predecessor. Has there been a transfer of the essential elements of the business as a going concern: transfer of assets; transfer of goodwill; transfer of logo; transfer of customer lists; transfer of accounts receivable, existing contracts or inventory; promises to refrain from competing; whether same employees are performing the same work; hiatus in business; whether customers of former business are server by new business.
* **A:** No transfer of inventory, IT systems, employment policies, fixtures, customer loyalty programs, etc.
	+ Has been a transfer of rights to leases, pharmacy records and a Brand Waiver. The location will be a key part of Target's success. However, this aspect is not specific to Zellers – could have achieved the same purpose by acquiring a lease from ANY big box store.
	+ Hiatus of business (6 months – 3 years) is significant. Although employees in any retail store will be performing similar tasks that does not create continuity of business where work processes are different.
	+ Target is bringing a successful operation into Canada, did not need anything from Zellers except the lease.
* **C:** No successor relationship between Zellers and Target.

# Negotiating a Collective Bargaining

Collective bargaining is the mechanism through which EEs and ER seek to accommodate their differences. It is different from other types of bargaining as the parties cant choose to walk away and negotiate with others. ER’s are often unwilling party; strikes and lockouts are unique. Timeline is set by statute. Once agreement is reached, work stoppage no longer allowed and duty to bargain is suspended. There is mandatory arbitration if necessary to resolve interpretation or application of the agreement.

**Freeze begins when bargaining notice is served…ends when**

* A: strike or lock out stared; or
* B: collective agreement has been signed; or
* C: Bargaining rights terminated

## Steps:

* Serve notice to bargain engages obligation (ss. 45 and 46);
* Terms are frozen (ss. 45(1) and (2));
* Subjective element (good faith); [S.11]
* Objective element (every reasonable effort);
* Choice between mediation (s. 74 or s.55) or economic sanctions.
* S. 78 – last process before STRIKE/LOCKOUT

## What is requirement for Bargaining

### Obligation to Bargain- Labour Code

#### Requirement to bargain in good faith

s.11(1)

* A trade union or ER must not fail or refuse to bargain collectively in **good faith** in BC and to make **every reasonable effort** to conclude a collective agreement
* Purpose of this duty is to eliminate refusal of employer to bargain at all; prevent employer from not recognizing the union; create equality of bargaining power. Have to distinguish between permitted "hard" bargaining and unpermitted "surface" bargaining, which just goes through the motions

*Remember s.11 can constitute a problem where ER is forced to arrangement to negotiate with a set of EEs or unions where they don’t normally have the requirement to do so in an individual contract law, so to ensure the process of unionization isn’t obstructed at stage of where they should conclude collective agreements, they should bargain in good faith to make every reasonable effort.*

### Step 1: Serve notice to Bargain to ER

#### New bargaining agent

s. 45(1)

* When board certifies a trade union as the bargaining agent for EEs in a unit and a collective agreement is not in force, the trade union may
	+ (a) **By written notice require the ER to commence collective bargaining,** or the ER may by written notice require the trade union to commence collective bargaining and

#### Continuing Bargaining Relationship

s.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**.

### Step 2: Statutory Freeze- Terms Frozen For ER

Important in establishing a stable environment in which parties can approach renewal or discussion of the collective agreement

New Bargaining Agent

s.45(1)

* When **board certifies a trade union** as the bargaining agent for EEs in a unit and a collective agreement is not in force,
* (b): the ER must not increase or decrease the rate of pay of an EE in the unit or alter another term or condition of employment until
	+ (i) 4 months **after the board certifies the trade union as bargaining agent for the unit** or
	+ (ii) a collective agreement is executed
* whichever occurs first.

Continuing Bargaining Relationship

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
	+ (a) a strike or lockout has commenced,
	+ (b) a new collective agreement has been negotiated, or
	+ (c) the right of the trade union to represent the employees in the bargaining unit has been terminated,
* whichever occurs first.

## Step 3: If refuse to bargain then…Mediation or economic Sanctions

If negotiated agreement doesn’t work, either side can apply to the board for conciliation [alternative dispute mediation] which is supposed to assist parties reach agreement.

* If conciliation doesn’t work then there can be a strike/lockout, which is a process of economic warfare designed to exert pressure to make the other side return to the bargaining table. Which can lead to a negotiated agreement or **back to work legislation**

### Back to work legislation

* Workers legislated back to work. This takes away right to strike [used against teachers, railway, postal workers]
* Legislation may impose terms or they may be submitted to some kind of arbitration
* Parties can also agree to interest arbitration to bring their strike to an end
* Theres also possibility of going to first contract arbitration [s.55] if there is an impasse and there never has been an agreement

s.55- first collective agreement

* Parties can apply if they have **never had a prior collective agreement**, and the union took a successful strike vote. The procedures are set out in the code: both parties must present issues and their positions, if conclusion is not reached in 30 days it can go to arbitration, allow parties to strike/lockout, or further mediation.
* (1) Either party may apply to the associate chair of the Mediation Division for the appointment of a mediator to assist the parties **in negotiating a first collective agreement**, if
* (a) a trade union certified and an employer have bargained to conclude their first collective agreement and have failed to do so, and
* (b) the trade union has taken a strike vote under section 60 and the majority of those employees who vote have voted for a strike.
* (2) **If an application** is made under subsection (1) an **employee must not strike** or continue to strike, and the **employer must not lock out** or continue to lock out, unless a strike or lockout is subsequently authorized under subsection (6) (b) (iii).
* (3) The associate chair must appoint a mediator within 5 days of receiving an application under subsection (1).
* (4) An application under subsection (1) must include a **list of the disputed issues** and the position of the party making the application on those issues.
* (5) Within 5 days of receiving the information referred to in subsection (4), the other party must give to the **party making the application** and to the associate chair a **list of the disputed issues** and the position of that party on those issues.
* (6) If the first collective agreement is **not concluded within 20 days** of the appointment of the mediator, the mediator must report to the associate chair and recommend either or both of the following:
* (a) the terms of the first collective agreement for consideration by the parties;
* (b) a process for concluding the first collective agreement including one or more of the following:
	+ (i) further mediation by a person empowered to arbitrate any issues not resolved by agreement and to conclude the terms of the first collective agreement;
	+ (ii) arbitration by a single arbitrator or by the board, to conclude the terms of the first collective agreement;
	+ (iii) allowing the parties to exercise their rights under this Code to strike or lock out.
* (7) If the parties **do not accept the mediator's recommended** terms of settlement or if a first collective agreement is not concluded **within 20 days** of the report under subsection (6), the associate chair must direct a method set out in subsection (6) (b) for resolving the dispute.
* (8) If the associate chair directs a method set out in subsection (6) (b) (i) or (ii), the parties must **refrain from or cease any strike or lockout activity**, and the terms of the collective agreement recommended or concluded under that subsection are binding on the parties.

Imposition of the first collective agreement- Yarrow Lodge LTD

* bad faith or surface bargaining;
* conduct of the ER which demonstrates a refusal to recognize the union
* the part adopting an uncompromising bargaining position without reasonable justification
* a party failing to make reasonable or expeditious efforts to conclude a collective agreement;
* an unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience;
* a bitter and protracted dispute in which it is unlikely the parties will be able to reach settlement themselves

S 74- Mediation Offer

* (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**
* (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.
* (2) A person appointed as a **mediation officer need not be an employee** of the board.
* (3) The minister may at any time during the course of collective bargaining between an employer and a trade union, if he or she considers that the appointment is likely to facilitate the making of a collective agreement, appoint a mediation officer to confer with the parties.
* (4) If a mediation officer is appointed to confer with the parties, the mediation officer must, no **later than 10 days after first meeting** with the parties or **20 days after the mediation officer's** appointment, whichever is sooner, or such longer period as the parties agree on or as the minister directs, **report to the associate** chair setting out the matters on **which the parties have or have not agreed** and such other information as the mediation officer considers relevant to the collective bargaining between the parties.
* (5) If either party so requests of the associate chair, or if the minister so directs, the mediation officer must provide to the associate chair and the parties a report concerning the collective bargaining dispute, and the report may include recommended terms of settlement.
* (6) Parties conferring with a mediation officer under this section must provide the information that the mediation officer requests concerning their collective bargaining.

## What is purpose of Duty to Bargain?

1. Industrial stability
	1. Intent and purpose is that if both parties approach process of negotiation in good faith and want to come to resolution they are going to and don’t have to use the economic web
2. Redress fundamental power imbalance
	1. Gives representation;
	2. One thing is to ensure imposing upon ER that they cant contract with whom it wishes anymore. It has duty to negotiate with union and outside of the liberal voluntarism model and is gone.
3. Reinforce exclusivity model and union stability
	1. Have necessity for ER to negotiate and provide union with full duty and respect of contract party
4. Institutionalization of industrial pluralism
	1. Heart of labour code. Idiosyncratic to that relationship, it is a procedural right and forcing parties to come to their own resolution on where interest lie.
	2. It is plurality of circumstances of terms and conditions, which they can contract to but they can choose which and where there interest all lie.

#### Substantive vs Procedural right

Important piece to the whole concept. It is a procedural right and board is to impose substantive terms on a relationship. Does not want to impose its own terms and condition of employment onto these parties but essential component of good faith bargaining piece.

### 6:422 Disclosure of Decision- Why must EE’s Disclose information

Case Example: Westinghouse (366-369)

**F:** During bargaining, company considering moving operations to less-unionized area, but had not decided yet. This information not volunteered, and union didn't ask. After agreement concluded, move is announced.
**I:** Does this amount to bad faith?
**L:** Duty to bargain requires employer to respond honestly to union inquiries and disclose (*de facto*) final decisions, but not to volunteer information about all its plans.
**O:** Langille critizes this decision – rational bargaining is best achieved when all parties have full information.

### Contents of the Duty

Boards have to decide when they are imposing too much on the relationship and where to inject themselves in the relationship

1. Duty to fully discuss all outstanding issues;
2. Once dispute and bargaining structure defined need compelling reason to depart from set course;
3. Duty to provide enough information that party can adequately assess demands;
4. Where an ER makes a plea of poverty must open books;
5. Hard bargaining is permitted, though surface bargaining is precluded.

#### Case Example: Graphic Arts

* F: used a protocol of how they are going to negotiate and commence bargaining. As they go long they sign off on things and have a comprehensive proposal with a clear understanding of the outstanding issues. The parties have a sense of what they are going to trade off and what is important to membership. In this case the parties were nearing end of negotiation with a few items left. Union didn’t want to file grievance at first but eventually filed it during negotiation. The ER as a result failed to sign the remaining demands until Union dropped grievance
* **A:** The board said that this was an unfair labour practice
	+ When parties are coming close to a collective agreement and one party changes the whole dynamic, then the collective agreement changes that took place wouldn’t have happened. Board said that this was incompatible with the duty to bargain in good faith and to make reasonable effort and found this to be an unfair labour practice.

#### Case example: Noranda Metal

* **F:** ER sent letters to each EE to pressure union to change position on fringe benefits. Union asked ER to disclose the costs of benefits. ER refused- said it only has to bargain on the extent of benefits, not the cost of benefits. Union alleged this violated duty to bargain in good faith
* **A:** This violates duty to bargain in good faith. Scope of duty to bargain determined on a case-by-case basis, but basic principle is that deliberately withhlding relevant factual data is not “making every reasonable effort” to conclude an agreement. In this case, ER raised the issue of benefits, made it a public obstacle to settlement, and then refused to participate in more discussions about it. Violation of duty withholding relevant information is not making every effort to reach an agreement

##### Concession in BC- Pleading Poverty

* In BC if ER requests concession, reduction in wages and benefits, they can say we want concession = no requirement to disclose financial statements
* BUT, if they say we **need concession** because we are losing money = requires them to open book to prove
* SO to prevent
	+ Board requires parties to disclose relevant information that pertains to issues in dispute.

#### Case Example: Radio Shack

Case about subjective duty to bargain in good faith. Board found that all the conduct indicated no genuine interest in reaching a conclusion, therefore breach of good faith duty.

* **F:** Union had received automatic certification because the ER had engaged in prior unfair labour practices—
	+ failing to reinstate an EE contrary to board order, circulating anti union petitions, warning it would move out west if union was certified, statements to EEs disparaging board’s procedures, distribution of free anti-union t shirts to EEs.
	+ Notice to bargain served. Sent EE a memo ridiculing the union’s request for names, classifications, and seniority dates for EEs, and details of fringe benefits. Sent another memo ensuring the EEs that despite the unions demand for a union shop clause, no EE would ever have to pay dues to work at the ER.
	+ Right after first bargaining session, ER sends EEs another memo commenting on issues discussed at the bargaining table. Put forward counterproposals prohibiting the unions from publicly mentioning the ER without prior authorization, would have allowed grievances over any mention of the ER to go immediately to arbitration. THEN ER sends in a new bargaining team and they reach some agreements. Four issues left outstanding. Team tells the union to strike to make more progress. ER uses scabs. Union complains of surface bargaining.
* **I:** Breach of duty to bargain in good faith? YES
* **R:** Where the ER has clearly demonstrated anti-union sentiments, and then adopts hard line approaches and makes no effort to compromise, and does not testify to justify their positions, it is essentially clear that they are not engaging in good faith bargaining. Requires an analysis of what the perspective of the ER was at the time.
	+ Eg Where the ER adopting an anti-union security clause position has played **no significant role in unlawfully contributing to the absence of support**, the position is unobjectionable.
	+ But **where an ER adopts this stance after having engaged in the kind of pervasive unlawful conduct that the ER did here, the ER has failed to bargain in good faith.**
	+ Consider whether the ER adopted a position which the union cannot accept, making it impossible to reach an agreement
	+ Offering what the statute requires as a bare minimum in the area of union security is not always bargaining in bad faith. But when considered in the light of other employer actions, it can be one of the most coercive elements of a scheme to discourage and undermine trade union support.
	+ To the extent that absolute rigidness is inconsistent with good faith bargaining and reasonable effort, it should be clear from our reasoning that we are of the view that an employer can be no more rigid and unbending on union security that ER can be on any other issue
	+ Where ER was engaging in bad faith bargaining, onus is on them to prove change of heart. Cant disguise bad faith bargaining as “hard bargaining” permitted under code
* **I:** What is surface bargaining?
* **R:** TEST: SURFACE BARGAINING**:** describes **going through the motions or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union.** Distinct from **hard bargaining – parties are entitled to take firm positions which may be unacceptable to the other side.** The Act allows for the use of economic sanctions to resolve these bargaining impasses. Merely tendering a proposal which is unacceptable (predictably so) is not sufficient, standing alone, to allow the Board to draw an inference of surface bargaining. Inference will be drawn from the totality of the evidence including the adoption of an inflexible position on issues central to the negotiations. Test is met here.

#### Case Example: Canada Trust Co

* **F:** Union organized 2 branches, are in negotiations with employer for CA. ER refused to offer anything more than what non-union employees got. Board was forcing union to take deal.
* **I:** So is that bad faith bargaining or hard bargaining? **H:** Not bad faith
* **R:** Bad faith means you just go through the motions without really trying to make an agreement, that is different from bargaining for an agreement on your own terms.
	+ Bad faith = no intent to sign/ avoidance
* **A:** Union said this is surface bargaining – union has no real opportunity to challenge any existing practices or make any gains over status quo that ought to be understood as surface bargaining.
	+ Board says you need some consistency in your proposals, if they are totally off you may have suspicion that bargaining isn’t really going on, but outcome of bargaining is still dependent mostly on strength of union. (eg, if your offers get progressively worse)
	+ Significantly board says that **collective bargaining does not compel some form of just wages or redistributive justice.**
	+ **Rational discussion, power, and persuasion are effective tactics to gain one’s bargaining objectives. So is economic pressure**. Collective bargaining permits the outcome of a just wage or distributive justice, but does not compel it. Under the statute, **the only obligation is to endeavor to conclude a collective agreement, and if that is the true intent, neither the content nor the consequences of that agreement are of any concern to the Board.** It is OK to pursue one’s own self-interest and legitimate business objectives in the course of collective bargaining—this is hard bargaining and is permissible.

## 6:500 Remedies

Remedies should not be punative. From *Radio Shack,* possibilities include: compensation to union for pay increases or other benefits it failed to achieve due to emlpoyer's actions; orders to bargain in good faith; order to correct or retract false or prejudicial statements; orders to pay negotiation costs. *Radio Shack*: Cannot impose collective agreement on the parties.

In *Buhler Versatile Inc*, board found that strike had been caused by employer's breach of duty to bargain and imposed a compensation order for lost wages of all affected employees for the 4 month strike: millions of dollars!

#### Case Example Royal Oak Mines- Remedy for failure to bargain in good faith

**R:** The duty to make every reasonable effort to conclude an agreement requires ER to make some compromises in area of standard CA matters, such as grievance arbitration clauses. Rigidity in these ares may violate reasonable efforts requirement (in all cases? We don’t know)

**A:** SCC says, the duty to bargain, has a subjective and objective component

*Subjective component* is **duty to bargain in good faith** –does party have intention to conclude an agreement, act with anti-union animus?

*Objective component*: have to make every **reasonable effort to conclude an agreement –** can look to comparable standards w/in industry

* Putting forward a rigid stance, which it should be known the other party could never accept must necessarily constitute a breach of that requirement.
* Board may reference industry to determine whether other ERs have refused to negotiated on a particular issue – if it is common knowledge that the absense of such as clause would be unacceptable to any union, then a party refusing to negotiate on that topic is not bargaining in good faith. Taking such a rigid stance on these issues indicates there is no real intention to reach an agreement.
	+ **The employer’s rigidity on that issue violated the reasonable efforts part of the duty.**
* That gives authority to inquire to at least some degree into the substance of agreement – no grievance arbitration clause (just cause dismissal) was considered so unacceptable it could not be accepted
	+ What we don’t know from this case is whether the board would be as willing to look into the agreement in a more conventional bargaining dispute – in this case it was extremely heated (Benedet thinks court wouldn’t go that far typically)

# Industrial Conflict- If no bargaining agreement reached- RIGHT TO STRIKE

## 7:100 Industrial Conflict (390-394)

If no collective agreement is reached, even after mediation or other processes, then, if statutory prerequisites are met, the parties can **strike/lockout**. However, law generally tries to limit negative effects of strikes. *Weiler* discusses whether right to strike is a necessary part of free collective bargaining. Premise of freedom of contract implies freedom to disagree. A strike hurts both sides economically for this disagreement, eventually forcing the parties to realize agreeing will be less painful than disagreeing. Often, agreements are made on the eve of a strike, showing its effectiveness. According to *Weiler*, striking is not necessary as a constitutional right, but as a necessary part of our current system.

## Right to Strike- Weiler

* 2 parts of labour code to balance power between union and ER. 1) to facilitate growth of union representation of unorganized workers, 2) use of law to limit the exercise of union economic weapons [strike and picket line]

## 7:300 Legal Forums (396-398)

s. 59: Strikes and lockouts prohibited before bargaining and vote.

See s. 55, 74-78: Mediation & Last offer vote

Labour board has jurisdiction over whether actions constitute a strike/lockout and, if so, whether the action is "timely". Timely means that all statutory requirements have been met. However, courts may be involved if events constitute a tort or criminal action; additionally, collective agreements prohibit striking while they are in force, and a violation may go to grievance arbitration (s. 57, 84)

Remember definition to strike and lock out is different

* strike: there is no subjective element, it just needs to be full cessation to work

## 7:411 Defining Strike Activity- What is Strike in Code?

s. 1: "strike"

* Includes a cessation of work, a refusal to work or to continue to work by EEs in contribution or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the party of EEs that is designed to or does restrict or limit production or services, **but does not include**
	+ (a) a cessation[end] of work permitted under section 63(3) or
	+ (b) a cessation, refusal, omission, or act of an EE that occurs as the direct result of and for no other reason than picketing that is permitted under this code.
* *S.63(3)*
	+ An act or omission by a TU or by the EE does not constitute a strike if
		- A) it is required for the safety or health of those EEs or
		- B) it is permitted under a provision of a collective agreement by which an ER agrees that EEs within the bargaining unit covered by the collective agreement are not required to work in association with persons who are not members of
			* The trade union representing the bargaining unit or
			* Another trade union contemplated by the collective agreement

#### Definition of Strike Prior 1984

* Strike includes a (a) a cessation of work; (b) a refusal to work; (c) a refusal to continue to work or; (d) an act or omission is intended to or does restrict or limit production or services, by EEs in combination, in concert or in accordance with a common understanding for the purpose of compelling their ER to agree to terms or conditions of employment or of compelling another ER to agree to terms or conditions of employment of his EE and to strike has a similar meaning

#### BOARD 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 EEs 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

### No Strike During Term

**Strikes and lockouts prohibited during term of collective agreement**

S 57(1)

* An EE bound by a collective agreement entered into before or after the coming into force of this Code must not strike **during** the term of the collective agreement, and a person must not declare or authorize a strike of those EEs during the term

S. 57(2)

* An ER bound by a collective agreement entered into **before or after** the coming into force of this code must **not** during the term of the collective agreement lock out an EE bound by the collective agreement

### Strikes/Lockout Prohibited before bargaining vote

S 59(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 trade union and ER or their authorized representatives have bargained collectively in accordance with this code

*Difference between s.11 [bargain in good faith] & s. 59 🡪 don’t need to breach like under s.11, just need to exchange proposals*

### Pre- strike vote and notice

S 60(1)- Pre strike vote and notice

* A person must not declare or authorize a strike and an EE must not strike until a vote as to whether to strike has been taken in accordance with the regulations by the EEs in the unit

S.60(3)

* Except as otherwise agree in writing between the ER and ER’s organization authorized by the ER and the TU representing the unit affected, if the vote favours a strike
* (a) a person must not declare or authorize a strike and an EE must not strike, except during the **3 months** immediately following the date of vote and
* (b) an EE must not strike unless
	+ The ER has been served with written notice by the TU that EEs are going on strike
	+ Written not have been filed with the board
	+ 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 ER and
	+ if a mediation officer has been appointed under section 74, 48 hours have elapsed from the time the TU 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

*S 61(1)- Pre-lockout vote and notice*

* *If 2 or more ERs are engaged in the same dispute with their EE’s a person must not declare or authorize a lockout and an ER must not lock out his or her EEs until a vote as to whether to lock out has been taken by all the EEs in accordance with regulations.*

### Mediation

S 74(1)

* The associate chair of the mediation division may appoint a mediation officer if
* (a) Notice has been given to commence a collective bargaining between a TU and an ER
* (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.

## Defining Lockout

### 7:421 Regulating Lockouts/Changes without Consent (409-410)

* s. 1"lockout": closing place of employment or suspending work by an employer in order to compel employees to agree to conditions of employment.
* Definition of a lockout always includes purposive element, otherwise every dismissal or closure would be a lockout. Since statutory freeze ends once lawful strike/lockout period begins, employers can make unilateral changes to terms and conditions of employment once they are in a position to lawfully institute a lockout. During a strike/lockout, the employer may continue to try and operate and workers can try find jobs elsewhere. This helps to gain an idea of the value of the work and helps ensure the workplace will still be running at the end of the strike/lockout.

#### What is lockout in CODE?

* Lockout includes closing a place of employment, a suspension of work or a refusal by an ER to continue to employ a number of his or her EEs, done to compel his or her EEs or to aid another ER to compel his or her EEs to agree to conditions of **employment**
* Subjective element

### ER’s right under Code- Strike/Lockout- FINALL OFFER VOTE

S 78(1)

* Before the commencement of a strike or lockout, the ER of the EEs in the affected bargaining unit may request that a vote of those EEs be taken as to the acceptance or rejection of the offer of the ER last received by the TU in respect of all matters remaining in dispute between the parties, and if the ER requests that a vote be taken, the associate chair must direct that a vote of those EEs to accept or reject the offer be held in a manner the associate chair directs.

S 78(3)

* If a vote under this section favours the acceptance of a final offer, an agreement is thereby constituted between the parties.

### Replacement Workers

S 68(1)

* During a lockout or strike authorized by this code an ER must not use the service of a person whether paid or not
* (a) Who is hired or engaged after the earlier of th 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 ER’s places of operation
* (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 ER by another person, to perform
* (e) the work of an EE is the bargaining unit that is on strike or lockout, or
* (f) the work ordinarily done by a person who is performing the work of an EE in the bargaining unit that is on strike or locked out.

*Replacement workers definition = s. 68(1), anyone who doesn’t fall within definition can participate in replacement work or can work at work site*

Graham Cable (399-402)

**F:** Striking would be timely, but union feels a traditional strike would be unsuccessful. They conduct a coordinated program where certain employees speed up and others slow down, all employees stop working overtime, etc. Employer warned that all employees must fulfil their job descriptions or be disciplined.
**I:** Is this activity a strike? (If so, the employees cannot be disciplined).
**L:** Defenition of striking is broad and requires only two components: collective or concerted action, and intention to disrupt operations or reduce output.
**A:** The activity is a strike and the employer cannot discipline employees for participating. The employer can use management and/or institute a lockout

Sask. Wheat Pool (404)

**F:** Parties in the midst of collective bargaining, so strike would be untimely. Employees all refuse voluntary overtime.
**I:** Is there collective/concerted action?
**L:** What is lawful for a single employee to do under the collective agreement (refuse overtime) may still be an untimely strike if it is done collectively.
**A:** In the normal course of business, a sufficient number of employees would have accepted the overtime. In the absence of any contrary evidence, only logical conclusion is that this was orchastrated by the union.

## 7:413 Sympathetic Action

s. 1"strike"(b): Strike does NOT include cessation that occurs as a direct result of and for no other reason than permitted picketing.
s. 2(f): Board supposed to minimize the effects of labour disputes on uninvolved parties.

s. 57: strikes prohibited during term of collective agreement
**"hot cargo"** clauses: refusal to deal with work/goods coming from or destined to another employer.

Maritime Employers Assn (405-406)

**F:** Legal strike undertaken by harbour police. Employees of different employers, represented by different unions, refuse to cross the picket line.
**I:** Does refusing to cross a picket line constitute a strike?
**L:** Defenition of strike contains no purposive element. All that is required is common understanding and cessation of work. Motive is irrelevant.
**A:** The "common understanding" is that unionized employees won't cross another union's picket line. **Note** the definition of "strike" in BC allows employees to respect a picket line.

Nelson Crushed Stone (407-408)

**F:** Collective agreement says employees will not be required to cross another union's picket line.
**I:** Is this clause valid?
**L:** Cannot contract out of the *Code*, so collective agreement cannot make lawful what would otherwise be unlawful. However, the clause may limit the liability of employees or the union.

7:414 Strike Prohibition and Political Protests (408-409)

If there is a purposive clause, then political strikes are fine. Unions have argued that political striking should be allowed all the time as a *Charter* right, but haven't been successful yet.

## 7:423 Employer Economic Weapons

Use of lockouts and changes to terms of employment is still subject to unfair labour practice sanctions. So, employer cannot do either of these if it is motivated by anti-union animus.

Westroc (410 – 413)

**L:** So long as lockout is timely and directed towards achieving a collective agreement and is not motivated by a refusal to recognize the union or a desire to punish employees involved in bargaining, it is lawful. Have to examine conduct carefully to determine the purpose.
**Note**: This argument seems subject to the same problems as *Canada Trustco*, p. **Error! Bookmark not defined.**.

N.A.P. Building Products, A Division of Aluminart Products Limited, BCLRB No. B288/95

# Industrial Conflict- Picketing

## 7:700 Picketing (441-443)

s. 1(1)"picket": declared to be of no force or effect. See s. 65, 136.

### Picketing in Code

**65**

* (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;
* **"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.
* (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. (

s 65(3)/(4) 🡪 limited to EMPLOYER operation

* 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
	+ (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,
	+ but the board must not permit common site picketing unless it also makes an order under subsection (6) defining the site or place and restricting the picketing in the manner referred to in that subsection.
* (5) In subsection (4), **"employer"** means the person whose operation may be lawfully picketed under subsection (3).
* (6) The board may, on application or on its own motion, make an order defining the site or place at which picketing that is permitted by subsection (3), or that is permitted under subsection (4), may take place.
* (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.
* (8) For the purpose of this section, divisions or other parts of a corporation or firm, if they are separate and distinct operations, must be treated as separate employers.

### What is picketing in CODE

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 of 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.

*Remember difference between common law picketing and statutory mandated is that it is highly subscribed to general right to picket and other less regulated jurisdiction. In BC they have a structured code to limit the hardship to the parties involved. Can only picket to the core business of the ER*

### Elements of Picketing

1. Must be performed by members of a union who are lawfully on strike or locked out;
2. Struck work must be where a member of the TU performs work under the control or direction of the ER
3. The struck work must be an integral and substantial part of the ER’s operation and
4. The location must be a site or place is a site or place of lawful strike or lockout

Board can add additional site if the ER shifts work to another site or operation.

*Must be integral and substantial part. ER’s warehouse is unlikely the EE wouldn’t be able to picket there. If member of the TU performs work there on a regular basis, then you would be able to picket there, but also has to be integral and substantial.*

### Ally- Secondary picketing at second ER

S 65(1)

* Ally means a person, in the boards opinion, in combination, in concert or in accordance with a common understanding with an ER assists the ER in a lockout or in resisting a lawful strike;

S 65(2)

* A person who, for the benefit of a struck ER, or for the benefit of an ER 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 ER, must be presumed by the board to be the ER’s ally unless he or she proves the contrary

S 65(4)(B)

* The board may on application and after making the inquires 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 ER, or for the benefit of an ER who has locked out

### Picketing—Limited to ER operations

S 65(3)

* A TU, a member or members of which are lawfully on strike or locked out, or a person authorized by TU, may picket at or near a site or place where a member of the TU performs work under the control or direction of the ER if the work is an integral and substantial part of the ER’s operation and the site or place is a site or place of lawful strike or lockout

S 65(4)(A)

* The board may, on application and after making the inquiries it requires, permit picketing
	+ A) At or near another site or place that the ER causing the lockout or whose EEs are lawfully on strike is using to perform work, supply goods or furnish services for the ERs 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 3

### Common Site

S 65(1)(A)/(b)

* Common site picketing means picketing at or near a site or place where
	+ A) 2 or more ERs carry on operations, employment or business and
	+ B) there is a lockout or lawful strike by or against one of the ERs referred to in paragraph (a), or one of them is an ally of an ER by or against whom there is a lockout or lawful strike

S 65(7)

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

S 65(5)

* The board may, on application on its own motion make an order defining the site or place at which picketing that is permitted by subsection (3), or that is permitted under subsection (4), may take place.

Must get common employer declaration—way for board to curtail amount of picketing to limit it.

### Regulating by imposing limitations

1. Geographic
2. Temporal
3. Functional

## Limitation of Trespass Action

S 66

* No action or proceeding may be brought for
	+ (a) petty trespass to land to which a member of the public ordinarily has access
	+ (b) interference with contractual relations, or
	+ (c) interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business opportunity or other economic loss
* arising out of strikes, lockouts or picketing permitted under this code or attempts to persuade EEs to join trade union made at or near but outside entrances and exits to an ER’s workplace.

Canex Placer (443-444)

**F:** Picketing involved "isolated threats of violence" and complete blockage of mine access by standing across the road.
**I:** Can board regulate this conduct?
**L:** Labour Board has power to regulate object, timing and location of picketing, while superiour courts control the conduct of the picketing, including both criminal and tortious behaviour.

Harrison (446-449)

**F:** Picketing taking place at mall parking lot, against one of the shops in the mall. Carswell charged with trespass.
**L:** Right to private property outweighs right to strike.
**Note:** s. 66 overrules this case.

Hersees (454-458)

**F:** Union picketing retail store selling products of the employer.
**I:** Is this type of picketing legal?
**L:** Secondary picketing is illegal *per se* – even if no illegal activity taking place.
**Note:** This was relaxed where the secondary employer was an "ally". See s. 65.

## Legislative Diminution of Picketing Rights

1973- permitted both Primary and secondary picketing, which included any other places of business, operations of employment of the struck ER

1984- limited picketing to locations “At or near a site or place where a member of the TU 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

Pepsi-Cola (458-471)

**F:** Union striking at retail stores where Pepsi products are sold.
**I:** Is secondary picketing legal at common law?
**L:** *Charter* values must be considered. Picketing includes a broad range of actions, but they are always expressive, in the s. 2(b) sense. Innocent third parties should be protected from undue harm resulting from pickets. *Hersees* model, even with ally or other exceptions, is too strict and unnecessarily restrains s. 2(b) expression. The distinction on location is too formalistic. So....
**All picketing is permitted unless it involves a tort or crime** ("wrongful action" model). This best protects freedom of expression, does not overemphasize protection of third parties and is adequetly flexible to protect third parties when necessary.

This model does away with the primary/secondary distinction, and also avoids distinctions between labour and non-labour activities. If conduct of the picket is sufficiently harmful, it can be captured under torts of intimidation or interference with contractual relations.

**Note:** This case is just about the common law, and expressly permits legislative provisions that may limit secondary picketing in a different way.

Prince Rupert Grain (473-474)

**F:** Union lawfully on strike at 5 locations. Those employees picket at a 6th location. Employees of the 6th location refuse to cross the picket line.
**I:** Is this picketing lawful?
**L:** Since *Pepsi-Cola*, have to determine whether a tort has occurred. No third parties would be affected by the picket, and the collective agreement has a clause allowing members of the Union to honour a picket line. So, no breach of contract has occured and the picketing is legal.

The Sovereign General Insurance Company, BCLRB No. B451/94

# Remedies in BC

*Code* gives explicit power to labour board to preside over picketing, and has a strong privative clause; courts nonetheless retain power to issue injunctions. s. 137!

## 7:620 Employer Discipline of Strikers

Employer can legally discipline workers who participate or lead an ILLEGAL strike. *Graham Cable*, p. **Error! Bookmark not defined.**: unfair labour practice to discipline employees for participating in legal strike. What about disciplining employees for their activities during the strike?

Rogers Cable (439-441)

**F:** Serious violence during legal strike. Some employees have disobeyed injunctions and are in contempt of court and others face criminal charges
**I:** Can employer impose disciplinary suspension on these employees?
**L:** Although employees are not currently under a contract, the employment relationship still exists and employees are still subject to discipline. Will have to ensure that the discipline is not because the employees went on strike or otherwise motivated by anti-union animus.

## 7:800 Job Rights of Strikers

Royal York Case (475-477)

**F:** Employer sends letter to employees on a lawful strike: either come back to work or resign.
**I:** Is this permitted?
**L:** This is an unfair labour practice.If a settlement is never reached, employer may hire replacement workers and does not have to give the striking employees a job back when the strike eventually ends. Note in BC the hiring of replacement workers is prohibited by the *Code*.

## 7:820 Replacement Worker Laws

Legislative provisions on replacement workers vary wildly. Most provinces prohibit the use of permanent replacement workers. Some set a time limit on the right of return – if the strike ends during this time, the replacement workers must be displaced in favour of the strikers. In BC, not even temporary replacement workers are allowed.

“Seeking a Balance” (480-485)

Views on temporary workers differ depending on view of purpose of a strike. If it's about testing market value, then employer should be allowed to hire replacements. If it's about testing financial resources, then allowing replacements may be an unfair advantage. Other issues:

1. Potential for violence between strikers and replacement workers. Although this happens, it could be regulated to reduce its likelihood.
2. Impact of investment. Companies may move to jurisdictions where replacement workers are allowed or move towards a more transient workforce.
3. Impact on length of strike. Studies are inconclusive, but one indicates the prohibiting replacement workers results in more frequent and longer strikes.
4. Variable vulnerability of employers. Some can survive perfectly fine for long periods without replacement workers, while others would need replacements immediately.
5. Abuse of replacement workers threatens collective bargaining rights. This can be mitigated by investigation into whether replacement workers are hired out of anti-union animus.

Recommendations: Replacement workers allowed until anti-union animus is shown. Board may then restrict replacement workers for the duration of the dispute.

## 7:910 Essential Services (486-488)

See ss. 72-73. Board or minister can designate services as essential and prevent strikes.

Motivated by concern that public will suffer undue hardship if certain workers go on strike – health care workers, firefighters, etc. It has also been used if extreme economic damage would result – railways, Saskatchewan dairy, Quebec construction. Another issue is when a certain number of employees in a workplace would be essential (eg to keep machinery operating safely), how can that number be determined. In BC, ss. 72 & 73 allow Board to determine which services are essential upon application by the union or employer. Government can also declare certain services to be essential (eg "educational program delivery).

ILO’s supervisory bodies have considered this as an appropriate alternative in such services, provided that it is not such as to call into question the right to strike of the large majority of workers. 2 requirements need to be met

1. the service required must genuinely and exclusively be a minimum service, that is one which is limited to the operations that are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear; and
2. the worker’s organization concerned should be able to participate, if they so wish, in defining such a service, along with ERs and the public authorities.

### S.72(1)

If a dispute arises after Collective bargaining has commenced, the chair may, on the chairs own motion or on application by either of the parties to the dispute

* (a) investigate whether or not the dispute poses a threat to
	+ (i) the health, safety or welfare of the residents of BC, or
	+ (ii) the provision of educational programs and students and eligible children under the school act, and
* (b) report the results of the investigation to the minister

### S 72(2)- True essential services

If the minister

* (a) after reciving 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 BC**, the minister 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 BC.

### S 72(2.1)-Threat to Education

If the minister

* (a) after receiving a report of the chair respecting a dispute, or
* (b) on the minister’s own intiative

considers that a dispute poses a threat to the provision of educational programs to students and eligible children under the school act, the minister 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 disruption to the provision of educational programs.

### Mediation at Discretion of Chair of Mediation

S 72(3)

* When minister makes a direction under (2) or (2.1) the association chair of the mediation division may appoint one or more mediators to assist the parties to reach an agreement on essential services designations.

S 72(4)

* A mediator appointed under (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

S 72(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

S 72(6)

* if the minister makes a direction under 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 boards

S 72(7)

* if the minister makes a direction under 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.

### Service levels required by Union and Employer

S 72(8)

* if the board designates facilities, productions and services as essential services, the ER and the TU 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

s 72(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 on its own motion, decline to file its order in a Supreme court registry

## Previous Collective Agreement Governs

### Return to work

S 73(1)

* Every ER, TU or EE affected by a direction or designation made under section 72 with respect to the dispute must comply with the direction or designation

73(2)

* If a designation is made under section 72, the relationship between the ER and his or her EEs, while the designation remains in effect, must be governed by the terms and conditions of the collective agreement last in force between the ER and the TU except as that collective agreement is amended by the board to the extent necessary to implement the designation of essential services

S 73(3)

* The board may under section 72 designate facilities, productions and service supplied, provided or maintained by EEs of the ER **who are represented by another TU** that is not involved in a collective bargaining dispute with the ER

### Essential Services Levels

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.

## 7:920 Interest Arbitration (488-492)

Designed to replace strikes by allowing an arbitrator to set the terms of a collective agreement. The most common form allows the arbitrator to fashion any compromise she sees fit. Sometimes final-offer selection is used instead: each party submits their final offer and the arbitrator picks one.

Problems with this approact are that it is expensive and parties are more likely to be happy with a negotiated agreement than an arbitrated one. It also has narcotic and chilling effects: parties less likely to bargain or to concede any points leading up to arbitration in case those concessions are used against them.

Settlement before arbitration is significantly less likely than settlement before a strike.

Abritrators traditionally take into account a private employer's ability to pay, but not the government's ability to pay, arguing that the government can always find a way to raise the necessary money. However, this traditional rule has been weakened. Additionally, government can legislate themselves out of an arbitrator's decision.

# Duty of Fair Representation- S. 12

## Standard of care

* A union must not act in a manner that is arbitrary, discriminatory or in bad faith
* A boards inquiry is limited to union conduct in its representation of the EEs in the workplace, ie. Within the confines of the collective bargaining relationship
* Section 12 does not apply to representation of workers before the WCB, or other bodies outside of the ER/Union collective agreement framework

### Contents of the Duty?

The SCC has described the contents of the union’s duty of a representation in respect of a grievance as follows🡪 *Canadian Merchant Service Guild v. Gagnon et al*., [1984] 1 SCR 509

1. The exclusive jurisdiction to act as spokesman of all employees in a bargaining unit entails a corresponding duty to act fairly.
2. A union enjoys considerable discretion when deciding to take a grievance to arbitration.
3. A union’s discretion to proceed with a grievance must be exercised objectively and in good faith, paying attention to the significance and consequences to the employee and the legitimate interests of the union.
4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful.
5. A union’s representation of employees must be taken genuinely and without serious or major negligence or hostility towards the employee.

## Arbitration

* In the context of s.12 arbitrary conduct focuses on the quality of the union representation. Therefore a union should ideally; 🡪 Judd
	+ Investigate
	+ Make a reasonable decision; and
	+ Do not act with blatant or reckless disregard

### Arbitrary: Higher standard

A higher standard of care may be warranted when “critically important EEs interests are at stake”

* As the Board explained in Judd:
	+ when the Board is faced with an allegation of arbitrary conduct under Section 12, it takes into account the fact that it is the union's job to represent the employees' employment interests. Therefore, the more serious the matter is for the employee, the more closely the Board reviews the union's conduct. Because the union is the representative of the employees' interests, it can be expected to treat matters involving critically important employee interests -- such as termination of employment or loss of seniority -- with more care and concern

## Bad Faith

* representation with an improper purpose; and
* representation with an intention to deceive the EE

## Discriminatory

Discriminatory representation involves unequal treatment in the general sense of prejudice and personal favoritism as well as the technical sense of the HRC [cant be under hrc]

* General rule: treat similar situations in a similar manner and ensure any deviation is justified

## Duty to Accommodate

* *Haggith v. Canadian Union of Public Employees, Local 401*, BCLRB No. B273/2001 has been cited for the proposition that a higher standard of representation is required when certain aspects of the complainant's grievance are potentially founded on human rights principles.
* In *Bingley (Re),* 2004 CIRB 291, the Canada Industrial Relations Board held that arbitral law clearly set out that a union has a positive duty to be proactive in representing and advising a bargaining unit employee with human rights claims are engaged.
* Most recently, the higher standard outlined in *Bingley (Re),* was affirmed by the Manitoba Labour Relations Board which held:

… a process undertaken by a union which may be sufficient in the case of an employee who is not disabled may be insufficient in the case of someone with a disability.

## Remedy

Broad remedies are available and board uses them, mostly effect ER

Where a violation of s.12 is found the board may order

1. the union to file a grievance;
2. the union to pursue grievance and obtain legal opinion;
3. the union to take grievance to arbitration;
4. the union to take grievance to arbitration with independent counsel, paid for by the union;
5. a new arbitration based on conduct of union at previous arbitration;
6. time limits in the collective agreement be waived; or,
7. liability for part of any damages awarded.

S 12

* *(1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith*
* *(a) in representing any of the employees in an appropriate bargaining unit, or*
* *(b) in the referral of persons to employment whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.*
* *(2) It is not a violation of subsection (1) for a trade union to enter into an agreement under which*
* *(a) an employer is permitted to hire by name certain trade union members,*
* *(b) a hiring preference is provided to trade union members resident in a particular geographic area, or*
* *(c) an employer is permitted to hire by name persons to be engaged to perform supervisory duties*
* *. (3) An employers' organization must not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employers in the group appropriate for collective bargaining.*

## Costs

Costs will be awarded in exceptional cases

* costs may be granted where traditional remedies would be inadequate and there would be otherwise no practical avenue for providing effective and meaningful relief [westmin resources ltd]

## Apportionment of damages

General rule: a union is responsible for the portion of the damages attributable to its breach of s.12, the ER is liable for its breach of the collective agreement

* Apportionment is discretionary
* Respective liability must be determined at one time

## DFR: Negotiating collective agreements- International Brotherhood of Locomotive

* Free hand doctrine: broader discretion to accommodate, trade, compromise, prioritize and abandon interests
* Exception: interference with crucial job interests
	+ Prima facie unacceptable
	+ Compelling reasons to trade off seniority rights of specific members
* Remedy: strike, amend or impose collective agreements terms - I