Contents

[COMMON LAW CONTRACT OF EMPLOYMENT 2](#_Toc468447014)

[CONTRACTUAL EMPLOYMENT RELATIONSHIP 2](#_Toc468447015)

[TERMS IMPLIED INTO EMPLOYMENT CONTRACT 2](#_Toc468447016)

[CL TERMINATION OF EMPLOYMENT 2](#_Toc468447017)

[TERMINATION OF UNIONIZED EMPLOYEES 4](#_Toc468447018)

[EMPLOYEE AND EMPLOYER 4](#_Toc468447019)

[WHO IS AN EMPLOYEE? 4](#_Toc468447020)

[WHO IS AN EMPLOYER? 5](#_Toc468447021)

[WHO CAN VOTE? 6](#_Toc468447022)

[CERTIFICATION PROCESS 6](#_Toc468447023)

[APPROPRIATE UNIT 6](#_Toc468447024)

[UNFAIR LABOUR PRACTICES 7](#_Toc468447025)

[REMEDIES 9](#_Toc468447026)

[ESTABLISHING THE RELATIONSHIP 10](#_Toc468447027)

[STATUTORY FREEZE 10](#_Toc468447028)

[RAIDS 11](#_Toc468447029)

[DECERTIFICATION 11](#_Toc468447030)

[COMMON EMPLOYER AND SUCCESSORSHIP 12](#_Toc468447031)

[COMMON EMPLOYER 12](#_Toc468447032)

[EMPLOYER SUCCESSORSHIP 13](#_Toc468447033)

[DUTY OF FAIR REPRESENTATION 14](#_Toc468447034)

[NEGOTIATION 15](#_Toc468447035)

[PROCESS OF BARGAINING 15](#_Toc468447036)

[DUTY TO BARGAIN 15](#_Toc468447037)

[REMEDIES FOR VIOLATING DUTY TO BARGAIN 17](#_Toc468447038)

[INDUSTRIAL CONFLICT 18](#_Toc468447039)

[STRIKES 18](#_Toc468447040)

[LOCKOUTS 18](#_Toc468447041)

[PROCESS OF STRIKE/LOCKOUT 19](#_Toc468447042)

[REPLACEMENT WORKERS 19](#_Toc468447043)

[PICKETING 20](#_Toc468447044)

[SECTION 2(D) CONSTITUTIONAL ISSUES 22](#_Toc468447045)

[2015 TRILOGY – CURRENT TEST 22](#_Toc468447046)

[POLICY NOTES 23](#_Toc468447047)

[OBJECTS OF THE BOARD 23](#_Toc468447048)

# COMMON LAW CONTRACT OF EMPLOYMENT

## CONTRACTUAL EMPLOYMENT RELATIONSHIP

Employment contracts don’t insulate the employment relationship against inequality!

|  |  |
| --- | --- |
| **Christie v York** (1940) – SCC FACTS: C, black, refused service based on waiters' instructions from Co. Dmgs for humiliation? | **Seneca College v Bhadauria** (1981) – SCC FACTS: Woman applied for job 10 times. Attempt to create discrim tort. |
| RATIOS: contractual analyses of employment relationships predominate CL! | |
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## TERMS IMPLIED INTO EMPLOYMENT CONTRACT

|  |  |  |
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| *Duties of Er* | Pay, provide work, safe work environment, provide employees w indemnity for costs | |
| *Duties of EE* | Obey orders, act w skill and care, act w good faith and fidelity, render profits to employer, indemnify employer for costs incurred | |
| **Devonald v Rosser & Sons** (1906) – UK FACTS: Tin plate rollerman reqd to do tasks set by Er, would get 28 days notice before termination. Market for plates fell, no longer cost-effective to pay him. Employer terminated. ANALYSIS/RATIO: "whatever the kind of work on which the workman is employed, **the rights and obligations of the respective parties are treated as standing on the same footing**.” Duty to provide work. | | **Collins v Jim Pattison Industries Ltd** (1995) FACTS: 16-yr car salesman, chosen for layoff when sales slumped. ANALYSIS/RATIO: "There is nothing more fundamental to a contract of employment than that the employee be employed and that he be paid for his services. . . . the employee, subject to contractual arrangements, is **still entitled to reasonable notice or payment in lieu of notice**." Duty to provide notice. | |

Duration of duty: **Hadley v Baxendale** -- dmgs related to what is in reasonable contemplation at time of breach to the parties (General K principle still relied upon in the employment law world)

## CL TERMINATION OF EMPLOYMENT

DUTY OF REASONABLE NOTICE

**Carter v Bell & Sons (Canada) Ltd** (1936) – reasonable notice is an implied contractual obligation

#### **Cronk v Cdn General Insurance Co** (1994) – ON

**Bardal v The Globe and Mail Ltd** (1960)

Factors for calculating reasonable notice:

* Character of the employment
* Length of service of servant
* Age of servant
* Availability of similar employment

*Not exhaustive;* ***no factor primary concern***

FACTS: Cronk dismissed from clerk-stenographer job due to restructuring; 55 y/o, employed at Co 29 yrs. Sued for wrongful dismissal, arguing 20mo would have been reasonable period of notice. ISSUE: is employee's position in hierarchy a factor re period of compensation to which employee entitled when dismissed w/o cause?

HOLDING/RATIO: OCA criticizes Macpherson J’s assessment of notice for focussing too much on value of employee to organization, his own sociological research, and collapse of *Bardal* factors into “re-employability” factor. **Generally, lower-level, low-skill, non-educated, more manual jobs reduce notice in regards to character of employment and availability of equivalent alternate employment**

BUT BC: tends to adopt more holistic arguments raised by Macpherson J!

CONSTRUCTIVE DISMISSAL

#### **Farber v Royal Trust Co** (1997) – SCC

FACTS: F worked for bank ~18 years, promoted steadily through those years. Made ~150k/yr (regional manager). Due to restructuring, bank offered to move to mgmt position at underperforming branch, position A had 8 yrs prior. Estimated 1/2 pay cut. Tried to negotiate, R refused to change offer and told F he had to assume new duties or it would consider him resigned. Did not show up on expected day; sued R for constructive dismissal. Action dismissed at SupCt and CA.

#### **Potter v NB Legal Aid Services Commission** (2015) – **test**

1. Identify an express/implied K term that has been breached
   * Unilateral change must breach K
   * Must substantially alter essential terms of K
     1. Bona fide and legitimate business interest?
     2. Impact on employee?
2. Determine whether that breach was suff to constitute constructive dismissal

ISSUE: do unilateral changes made amount to constructive dismissal?

ANALYSIS/RATIO: test for constructive dismissal = **substantial change to an essential/material term of K**

* *clear that offer would be significant demotion b/c of position, pay, and removal of guaranteed base salary. Fact that branch ended up doing better than expected doesn't touch reasonable expectation of person in situation at time of offer*

JUST CAUSE FOR DISMISSAL

#### **McKinley v BC Tel** (2001) – SCC

FACTS: McK promoted, got raises. Began to experience high blood pressure from hypertension, took leave on Dr advice. Told BC Tel wanted to come back but in job w less responsibility. BC Tel said would try find another position, but nothing offered even if open. While on leave, terminated employment. Offered severance, McK rejected & sued for wrongful dismissal w/o just cause. BC Tel argued just cause existed bc McK allegedly withheld truth re Dr's recommendations and ability of beta blockers to allow him to work w/o health risks. A won at trial, BCCA ordered new trial. ISSUE: can they dismiss him for being dishonest?

ANALYSIS/RATIO: **question of proportionality btwn misconduct and sanction imposed**

**Test** = 1. Whether evidence established employee's deceitful conduct on bal prob;

2. If so, whether nature/degree of dishonesty warranted dismissal (look at context)

\*\* Post-*McKinley*: high level of trust found reqd in, e.g., banking (**Rowe v RBC**), senior public official with broad discretionary authority over expenditure of public monies (**Dowling v Ontario (WSIB)**)

REMEDIES FOR BREACH

CL just treats end of relationship as breach of contractual right to notice. Unlawful dismissal is just failure to give due notice/wages in lieu of notice:

#### **Addis v Gramophone** (1909) – UK

FACTS: works gramophone in London, promoted to Calcutta; soon given 6mo working notice + demoted (prob issue w supervisor) = effect on reputation and health, sued

ANALYSIS/RATIO: If seeking remedy through action for BoC, **only get contractual remedies**, i.e., what you would have earned thru notice period – not addtl dmgs for loss of rep/health

**BUT:**

#### **Wallace v United Grain Growers Ltd** (1997) – SCC

FACTS: W recruited away based on promise of job security and other assurances, incl that he'd have job til retirement if he performed as successful. V successful employee. Summarily discharged 14 yrs later w/o explanation, then "inability to perform duties satisfactorily". Caused great stress, psych help, unemployed etc

ANALYSIS/RATIO: unique nature of employment Ks 🡪 thin exception for **obligation of good faith and fair dealing in the manner of dismissal**. If breached, remedy is extension of reasonable notice

\*\* **Honda v Keays** (2008): reaffirms above duty of good faith but SCC says damages for obligations to be assessed as aggravated damages to avoid double recovery

## TERMINATION OF UNIONIZED EMPLOYEES

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| 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. |

Specific performance available as remedy; layoff available but must be done in accordance with CA

**Criteria for just and reasonable cause**:

* Evidence must be clear, convincing and cogent (**Antrobus v Antrobus**)
* Strong presumption that employer-employee relationship Is ongoing
* Requires prior "corrective" discipline, as underlying principle is rehabilitation
* On single incident, question is whether employment K has been "irretrievably broken"

*No clear way to define just and reasonable cause other than it must be just; proportionate; and reasonable*

**KVP Test for reasonableness** (**Lumber & Sawmill Workers' Union, Local 2537 v KVP Co Ltd** (1965)):

1. Rule must not be inconsistent with the collective agreement
2. Rule must not be unreasonable
3. Rule must be clear and unequivocal
4. Rule must be brought to the attention of employee affected before the company can act on it
5. The employee concerned must have been notified that a breach of the rule could result in his discharge (if the rule is used as a basis for discharge), and
6. Rule should have been consistently enforced by the company from the time it was introduced

# EMPLOYEE AND EMPLOYER

## WHO IS AN EMPLOYEE?

#### **671122 Ontario Ltd v Sagaz Industries Canada Inc** (2001) – SCC – employee vs indep contractor

FACTS: 671122 was Can Tire's principal supplier of synthetic sheepskin car seat covers for 30 yrs; Can Tire over 50% of 671122's sales. Due to bribery, Can Tire changed to Sagaz: dude who oversaw car seat covers would get 2% of all sales from AIM, Sagaz’s consultant dude. 671122 went bankrupt.

ISSUE: Can 671122 sue Sagaz thru vicarious liability for AIM? 🡪 employee or an independent contractor?

ANALYSIS: Development of tests distinguishing between employee and independent contractor:

* **Regina v Walker** (1858) – *Control test* – principal has right to direct agent but master also has right to say how work is to be done
* **Montreal v Montreal Locomotive c Works Ltd** (1947) – *Locomotive/4-fold test* – 1) control test, 2) ownership of tools, 3) chance of profit, 4) risk of loss
* **Harrison Ltd v Macdonald** (1952)– *Business integration/organization test* – is work done as integral part of the business?
* *Enterprise test –* social policy of risk regulation = impose cost of risk on party most able to limit/mng. Consider premises: 1) controls activities of worker; 2) in position to reduce risk of loss; 3) benefits from activities of worker; 4) true cost ought to be borne by enterprise offering product/service

RATIO: no single conclusive test. Q = whether person performing services **in business on his own account**, e.g., consider **control, equipment, whether worker hires helpers, deg of financial risk, deg responsibility for investment/mgmt, worker’s opportunity for profit** \*\*but consider all the other tests if they apply

**+** *Statutory purpose test* **– Cominco Ltd** (1979) **– 1)** recall all the usual characteristics of an employer-employee relationship; **2)** ascertain which of those features are present and absent; **3)** consider whether code was intended to provide access to collective bargaining for the individual in question? (vulnerability?)

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| 1(1) "**employee**" means a person employed by an employer, and **includes a dependent contractor**, but does not include a person who, in the board's opinion,  (a) performs the **functions of a manager or superintendent**, or  (b) is employed in a confidential capacity in **matters relating to labour relations or personnel**; . . . |

#### **Cowichan Home Support Society** (1997) – managerial exception

RATIO: managerial functions = **discipline/discharge** (i.e. determining and administering just and reasonable cause); **labour relations input** (administration of CA; directing of org that determines level of staffing; negotiating CA, like HR managers); and to a lesser extent, **promotion/demotion**

Must play actual part in these things but no set threshold – rationale for exclusion is the CoI

#### **Gateway Casinos & Entertainment Inc** (2010) – confidential capacity exception

ISSUE: do casino surveillance operators fall under exception (or too much like security guards)?

RATIO: board doesn’t make judgment but uses *Burnaby General Hospital*

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

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

* Test/factors used in **West Fraser Mills**:

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| * how the industry operates; * type of work involved and its source; * nature of the applicant's operations; * organization of Er's operations and the degree to which contractors are a continuing part of it; * any K arrangements btwn the parties and others; * 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; * nature/manner of compensation and how it’s determined; | * % of income which the contractor derives from the employer (i.e., lion's share of the contractor's income must derive from the relationship with the employer if dependent – 60%); * opportunity for contractor to make profit through exercise of independent entrepreneurial judgment; * contractor's opportunity for economic mobility / whether contractor advertises or solicits customers elsewhere |

## WHO IS AN EMPLOYER?

**York Condominium** (ONLRB) factors:

* Party exercising discretion and control over the Ees performing the work
* Party bearing burden of remuneration
* Party imposing discipline
* Party hiring Ees
* Party w auth to dismiss Ees
* Party perceived to be Er by Ees
* Existence of intention to create rel of Er-Ee

**Columbia Hydro Constructors** (BCLRB) – *uses York, adds 2 overarching factors*:

* Org into which Ees are integrated
* Org holding fundamental control over Ees

BCLRC 1(1) "employer" means a person who employs one or more **employees** or uses the services of one or more **dependent contractors** and includes an employers' organization; . . .

## WHO CAN VOTE?

No reason to exclude Ees with contingent or future interest if likely to be subj to exclusive agency arrangement

#### **Waldun Forest Products Ltd** (1993) – factors for *casual and part time* workers

FACTS/ISSUE: who is allowed to participate in certification vote?

ANALYSIS: 3 examples of groups of note:

* + *Familial Ee-Er Relationship* – mere existence not sufficient to auto exclude from BU, but here CoI and possible lack of comm of interest suggests should nevertheless be excluded from unit
  + *Management Team –* based on community of interest; mostly going to be excluded
  + *Casuals* – consider **sufficient continuing interest test**, i.e., do they have suff continuing interest in issue of union representation such that are entitled to be included in calculating union support? Factors for PT:
    1. Permanence of employment

E.g. summer students; layoff; off work due to illness; workers promoted to mgmt during time relevant to vote

* + 1. Proportion of casual/temporary Ees in total workforce
    2. Nature and organization of business
    3. Each individuals’ particular employment circumstances

# CERTIFICATION PROCESS

## APPROPRIATE UNIT

**Threshold vote:**

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| 18(1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for **a unit appropriate for collective bargaining**, a trade union claiming to have as members in good standing **not less than 45%** of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit. |

**Re Insurance Corp of British Columbia** (1974) – tension between 2 uses of BU:

1. Scope of unit is key to securing trade unit representation/CB rights, i.e., must facilitate org of Ees
   1. Bigger is better! Preference for most appropriate unit, though Board may be satisfied with an appropriate unit, i.e., a **rational and defensible line** can be drawn around unit
2. Since unit sets framework for future bargaining, need structure conductive to voluntary settlements w/o strikes and that will minimize disruptive effects of strikes when they do happen

#### **Island Medical Laboratories Ltd** (1993) – test for appropriate units

ANALYSIS/RATIO: on *initial* applications, access to CB is most important principle to consider in determining appropriateness; on *additional* applications, industrial stability given increasingly greater weight

**Community of interest test** (Pre-IML: amorphous standard; IML sets out factors)

1. **Similarity in skills, interests, duties, and working conditions**

i.e., who is working? Who is covered by unit scope? What do they do? How? With whom? Type of benefits and pay? Extent and manner of training?

1. **Physical and administrative structure of Er**

i.e., physical cxn btwn sites and ease of movement? Managerial structure/auth? Payment through same system? Is HR separated? Separate BUs/depts involved?

1. **Functional integration**

*Can-Am Produce and Trading*: refers to Ee interchange, shared and integrated duties, team processes and continuous work processes. Must be on day to day basis; NOT the same as functional relationship.

1. **Geography**

i.e., where are work sites? Distance? Separation of function, or interdependence? Wide discretion to this concept. Important to rebutting other factors – creates *prima* facie presumption of appropriate BU (Board may choose to cut across classifications and certify separate location if wide geographic separation)

*Where another unit already exists, also consider:*

1. **Practice and history of the current CB scheme**
2. **Practice and history of CB in the industry or sector**

If fail to find appropriate BU where a unit already exists, Ees must join pre-existing union

*Rebuttable presumption against additional bargaining units increases with each additional unit*

\*\* Current board chair v rarely upholds second bargaining units: concerns about multiple strikes, picket lines, labour disruptions etc at once; but in exam, assume that board totally neutral\*\*

**Cutting across classifications** – generally not allowed unless extreme differences in EEs’ interests or “traditionally difficult to organize” distinction:

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| **Wal-Mart Canada Corp** (2006) – didn’t cut FACTS: auto service cashiers and mechanics. ISSUE: rational defensible line?  ANALYSIS: cashiers similar enough to other cashiers; physically integrated site of emp; not appropriate to cut across classification here bc undermines viability of BU | **Re Sidhu & Sons Nursery Ltd** (2009) – small exception FACTS: domestic farm workers vs Seasonal Agriculture Workers Program EEs who wanted cert.  ISSUE: rational defensible line?  ANALYSIS: extreme diffs in T&Cs of emp due to limits on TFW work to be considered even if no diff in job duties per se; see first *IML* factor. So unique that can cut across |

#### **Woodward Stores** (1974) – relaxes factors for traditionally difficult to organize sector

FACTS: advertising dept + 3 locations’ bakery workers seek to be certified as diff units. ISSUE: appropriate BUs?  
ANALYSIS/HOLDING: allowed ad dept to certify + bakery workers could certify but as single unit

*Ad dept* – functional rel w sales, not functional integration (no interch duties/overlap of duties). Desire to facilitate unionization in industry w low rate over fear of patchwork of unions

*Bakery* – work in individual stores; tho supply other stores, not super closely intertwined. Legal work stoppage wouldn’t cause issues at others such that single BU only reas concl for 105 stores; create 1 unit and enlarge barg unit if Ees organize at other locations. Centralized control = 1 employer

**To argue, must provide**: expert opinion abt sector; evidence from persons knowledge abt sector, or Board records concerning that sector

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| 24(1) If the board receives an application for certification under this Part and the board is satisfied that on the date the board receives the application at least **45%** of the employees in the unit are members in good standing of the trade union, the board must order that a **representation vote** be taken among the employees in that unit.  (2) A representation vote under subsection (1) must be conducted **within 10 days** from the date the board receives the application for certification or, if the vote is to be conducted by mail, within a longer period the board orders.  (3) The board may direct that another representation vote be conducted if less than 55% of the employees in the unit cast ballots.  25(1) When a representation vote is taken, a **majority** must be determined as the majority of the employees in the unit who cast ballots. . . . |

# UNFAIR LABOUR PRACTICES

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| 4 (1) Every employee is free to be a member of a trade union and to participate in its **lawful activities**.  (2) Every employer is free to be a member of an employers' organization and to participate in **its lawful activities.** *Enunciates fundamental principle – doesn’t confer substantive rights* |
| 5(1) *anti-discrimination clause* – protects Ees against retaliation for exercising rights, must est subj motivate  🡪 no history of use to establish violations |

**Interference with trade union** – general principle/presumption that what employers say re unionization may have an undue impact on free choice 🡪 development of s 6 as counterbalanced by s 8

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| 6(1) Except as otherwise provided in section 8, **an employer or a person acting on behalf of an employer** must not **participate in or interfere with** the formation, selection or administration of a trade union or contribute financial or other support to it. |

* Strict objective test – doesn’t req anti-union animus
* Maturity of CB relationship can determine severity of breach
* Incidental or accidental interference could qualify as breach
* Exception for acts saved under s 8, free speech provision
* **Gateway Casinos Ltd Partnership** – inquiries pertaining to union support almost never permitted

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| 6(3) An employer or a person acting on behalf of an employer must not … summary list of actions:  **(a)** *actual conduct to get rid of union people*: **discharge, suspend etc, employ or refuse to employ or mess w T&Cs of employment** because the person  (i) proposes to become or seeks to induce another person to join  (ii) participates in promotion, formation or admin of union  (b) acts during freeze process  (c) impose in K of employment a condition seeking to restrain Ee’s rights under Code  **(d)** *threatening/inducing during cert drive*: **intimidate by dismissal etc, imposition of penalty, promise, wage increase or any other T&Cs of employment to compel or induce Ee to refrain from union-ing**  (e) hire replacement workers (re s 68)  (f) refuse to allow Ees to pay dues if first CA |

* Subjective component requiring anti-union animus – use Weiler’s circumstantial evidence test (**Forano**)
* Re employers/persons acting for employers; defence = didn’t know union drive happening

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| 6(4) Despite subsection (3), except as expressly provided, this Code must not be interpreted to limit or otherwise affect the right of the employer to  (a) discharge, suspend, transfer, lay off or otherwise discipline an employee for **proper cause**, or  (b) make a change in the operation of the employer's business reasonably necessary for the **proper conduct of that business**. |

#### **Forano Ltd** (1974) – employer involvement and anti-union animus

FACTS: 4 employees terminated – 3 union organizers + slacker; anti-union animus vs proper cause?

ANALYSIS/RATIO: under *Code*, don’t need proven subjective intention for anti-union animus to count as unfair labour practice – consider **circumstantial evidence** re existence of anti-union reason for acts

Firing mgr not aware of unionization efforts but nevertheless, firing of 3 employees was *interference*

(so possibility of violating 6(1) while falling short of 6(3)); firing of #4 may fall under 6(4) exception

#### **0720941 BC Ltd** (2008) – 6(1)

FACTS: waste disposal company of only 10 employees; on again off again certification campaign at the worksite led by C who was terminated (but multiple instances of him being late for work). + Qs abt union at beer time

ANALYSIS/HOLDING:

*Re termination* – **“interference” to be interpreted contextually and purposively**, including consideration of both obj effect of action and Er’s business reasons – dude always late, 6(4) applies

*Re inquiries abt union support* – even though manager’s inquiries abt card signing out of surprise or concern for business, meets general bar of 6(1) interference: no legit business interest

#### **Convergys Customer Management Canada** (2003)

FACTS: various statements critical of union; statement that would be dismissed if shared contact info; surveilled Ees; conduct/comm by Elaine House. ISSUE: Unfair labour practices? ANALYSIS/HOLDING:

*Re critical statements, surveillance* – Er allowed to express view under s 8; generally, should **assume that Ees intelligent enough to understand Er POV**. Here, generally not coercive/intimidating & demonstrate intention not to inquire abt how Ees have chosen; **innocent misreps aren’t coercive as long as not lies**

*Re contact info* – threat of dismissal has reas effect of controlling org activity, contravened 6(1) bc chilling effect on organizing activity. BUT, didn’t meet 6(3) or 9 bc no anti-union animus; Er had right to info abt private Ees and may have been exercising legit business purpose in thinking of privacy issues

*Re Elaine House* – Er didn’t endorse House’s campaign and acknowledged her conduct improper, so no dir/circ link btwn them to est her as 6(1) or 6(3) “acting on behalf of an employer”.

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| 8 Subject to the regulations, **a person** has the **freedom to express his or her views on any matter**, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion. |

* “Saving provision” for freedom of expression against 6(1)
* Applies to both Ees and Ers
* Views as ideas, thoughts, beliefs, judgments and opinions, but not acts done to further those views
* *Captive audience meetings* – **Cardinal Transportation BC Inc** (1996) – characteristics incl: held on co property during working hours w/o deduction in pay; attendance compulsory or quasi-compulsory; sr mgmt in attendance; discussion re wages/working conditions, co perf, industry/sector perf

#### **RMH Teleservices International Inc** (2003) – captive audience meetings

FACTS: all-wall projection and anti-union popcorn party, lots of meetings during work hours to discuss union’s org campaign, mgers circulating. Original panel said Ees not compelled to observe. Reconsideration?

ANALYSIS/RATIO**: otherwise permissible views may become coercive or intimidating in context**! Captive audience meeting increases scrutiny of Board due to fact that Ees less able to turn away from Er due to Er’s authority

#### **Peter Ross 2008 Ltd** (2012)– some general principles following *RMH*

1. Threats to job security don’t need to be direct in order to be coercive/intimidating – **doesn’t matter whether speech is indirect or direct** and won’t work as defence to claim
2. Ees need reasonable opportunity (time?) to make inquiries/assess views, or else meeting coercive

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| 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 or cease to be a member of a trade union. |

* Requires subjective intent and objective effect
* Usually applied for in tandem if 6(3) claim also made – a bit redundant!
* Doesn’t require a person to act on behalf of employer as in s 6; thus available for pro-union Ees etc

## REMEDIES

**RMH**: **remedies must be rationally cxd to conseqs of a contravention** and consistent w policy objectives of Code

Relevant features of stat scheme: ensuring freedom to org, recog power imbalance, deterrence

Board must ensure that remedies are compensatory, not punitive, but also not so minimal that they amount to a mere cost of doing business

**Remedial certification –** awarded where, but-for Er interference, certification would have occurred

**🡪 Cardinal Transportation BC Inc**factors as used in reconsideration of **Peter Ross:**

1. Level of membership support before and after Er’s unfair labour practice
2. Seriousness of Er interference and reas effect of that interference on Ees
3. Point/stage in org drive of Er’s interference
4. If minority of Ees members of trade union, whether adequate/suff support to conduct CB
5. “totality of conduct” of Er, AND
6. Specific nature of Er/Ees

# ESTABLISHING THE RELATIONSHIP

## STATUTORY FREEZE

**UFCW, Local 503 v Wal-Mart Canada Corp**: “By circumscribing the employer’s unilateral decision-making power in this way, the ‘freeze’ limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.”

**Process of vote**:

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| * 10 day stat mandate, unless conducted by mail ballot; * Expedited and administrative; * Ees must be given “reasonable opportunity” to vote; | * Like most elections, each side has right to scrutineer; * Almost always a voters' list; * All objections must be made at the time to ballot can be double sealed |

**Freeze during an organizing drive:**

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| 6 (3) An employer or a person acting on behalf of an employer must not . . .  (b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for **proper cause** when a trade union is in the process of conducting a certification campaign for employees of that employer, . . . |

* **White Spot Limited** (1993) –def’n **proper cause**: “whether the employer can advance a reasoned explanation which objectively demonstrates a rational connection between the alleged misconduct and the discipline which was imposed.”

**🡪 Cheshire Homes Society** (2001) **– 1)** establish decision based on good faith; **2)** Ee engaged in conduct deserving discipline; **3)** reasonable rel btwn conduct and discipline (e.g. steps taken to investigate; whether Ee had opp to respond to allegations; Ee’s past record of discipline; rationale for penalty chosen; manner in which similar cases addressed in past; srsness of offence given particular employment context)

**Freeze while certification pending, i.e., after application filed:**

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| --- |
| 32 (1) If an application for certification is pending, a trade union or person affected by the application must not declare or engage in a strike, an employer must not declare a lockout, and an employer must not increase or decrease rates of pay or alter a term or condition of employment of the employees affected by the application, without the board's written permission.  (2) This section must not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for **proper cause**. |

**Freeze once new certification issued:**

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| --- |
| 45 (1)(b) the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until . . .  (i) 4 months after the board certifies the trade union as bargaining agent for the unit, or  (ii) a collective agreement is executed, . . . |

* 4mo deadline pressures unions to negotiate CA as soon as possible

**Freeze during negs for CA renewal if it has expired:**

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| --- |
| 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 . . . |

**Exceptions to freeze** (see ***Kamloops***)**:**

**🡪** *business as usual* test – i.e., decision was made before freeze

🡪 45(3) *Discretion of Board* to grant changes after certification but before CA. Er must disclose:

|  |  |
| --- | --- |
| * Nature and extent of proposed changes * Reason for alteration | * Need for alteration at this particular time * Labour relations implications of proposed changes |

#### **Re Review Kamloops Daily News Inc** (1993)

FACTS/ISSUE: could newspaper institute same 9.4% rollback on unionized staff as non-unionized during freeze? ANALYSIS/RATIO: failed **business as before** test b/c decision not made before freeze. Consider purpose/intent of leg, then look to **45(3) factors** re whether LRB should exercise discretion; main issue = sig change but no evidence of urgency in financial problems.Purpose of freeze to ensure industrial stability – wouldn’t be serving purposes of Code or transition by allowing reduction in salary during stat freeze

**Power to vary – expanded BUs:**

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| 142 The board, on application by any party or on its own motion, may vary or cancel the certification of a trade union or the accreditation of an employers' organization. |

#### **Olivetti Canada Ltd** (1974)

FACTS: union seeking variation of certification to incl 2 Nanaimo Ees. ISSUES: jurisdiction? Merits of case? ANALYSIS/RATIO: allow variation. **Board has broad power to make major alterations in substance of certification** – can’t add new groups to existing cert but can include new pre-cert employees in BU

In this case, if 2 Nanaimo Ees want chance to participate in meaningful CB they must do so as part of larger BU to have real leverage w Er. [*viability* of BU > challenges establishing *comm of interest test*]

#### **Vancouver Museum and Planetarium Association** (1990)

FACTS: complicated cafeteria worker history, trying to include them in BU (i.e., that existing cert as initially granted already encompasses the unrepresented Ees). ANALYSIS/RATIO: **even if CA has provision for adding new Ees, never automatically added to the BU. Scope of BU set at time of certification**; must follow proper procedure to include Ees (i.e., asking Board for inclusion or following steps in provision)

## RAIDS

When one union secures support of majority of Ees in a unit and steals certification of old union

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| --- |
| 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  (a) 6 months have elapsed since the date of certification of a trade union for the unit, or  (b) the board has consented to an application before the expiry of the 6 months.  19 (1) If a collective agreement is in force, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months in each year of the collective agreement or any renewal or continuation of it.  (2) Despite subsection (1), an application for certification may not be made within 22 months of a previous application under that subsection if the previous application resulted in a decision by the board on the merits of the application.  (3) Unless the board consents, a trade union is not permitted to make an application under this section during a strike or lockout. |

## DECERTIFICATION

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| 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 decertifications (s 142** – see above in context of varying certification**)**

#### **Certain Employees of Starbucks Corporation** (2001)

FACTS: Ees apply to vary certification by removing Ees at store 185 from existing BU (partial decert). Union opposes. ANALYSIS/RATIO: **White Spot** **2-step approach to adjudication of apps for partial decertification**:

1. Board considers whether applicants have demonstrated that a rational and defensible line can be drawn around both group wishing to leave unit and employees who would remain
   * Look at 4 IML factors for community of interest (not all 6 – lower threshold than est 2nd BU)
2. If so, consider whether certain factors should outweigh wishes:
   * + Impact of granting app on employees remaining in barg unit;
     + Impact of granting app on collective bargaining rel as whole;
     + Whether app tainted by improper interference from employer or another entity;
     + Whether app is disguised raid application;
     + Whether timing/context of app makes it inappropriate for it to proceed;
     + Whether decertifying entire unity is practical impossibility

HOLDING: rational and defensible line can be drawn around this group; granting app will have negative impact on interests of group who would remain, but amount of harm not great enough to counterbalance weight to be given to employee choice on issue of union representation

# COMMON EMPLOYER AND SUCCESSORSHIP

**Voluntary council of unions**

41(1): minister may appoint a council where they think it would be an appropriate barg agent for a unit

* + - Limited to unions dealing with one employer
    - Not exclusive -- can choose to use council to negotiate for some things, bargain directly as single unions for other things
    - Can only get accreditation if it's the same employer eg if all employers are warehouse holders

**Employers' organization**

43(1): employers' organization

43 (5): will have exclusive authority for employers

* + - Unions can thus go into council in response bc exclusive er org acts as one er
    - Can get accreditation regardless of who the unions or employers are
    - Can’t withdraw from mandated organization without Board consent or during bargaining

*Benefits:*

Less opportunity for industrial instability e.g. in industries like rail/forestry where there are union locals in multiple places who want to bargain together with a common employer, the bigger the BU, the less chance a strike will occur

## COMMON EMPLOYER

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| 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. |

* General test: 1. Must be more than 1 entity carrying on business

2. Entities must be under common control/direction (ownership or control)

3. Entities must be engaged in assoc/rel activities/businesses

4. Must be labour relations purpose served by making declaration

e.g. protect integrity of BU; act against industrial instability from too many BUs

* Meant to protect employees where employer might siphon off workers to different business entity/vehicle and thus circumvent labour relations obligations. Where there's a legitimate relationship/common employer, tends to have no effect

#### **White Spot Ltd v BC (LRB)** (1997) – BCSC – franchisee/franchisor common employer test

FACTS: WS sold to Gilley, continued to be WS franchisee. Ees part of union w CA covering 17 WS restaurants. Panel made common employer declaration, but both WS and Gilley don’t want it. ANALYSIS/RATIO: upheld finding of common employer: **“common control and direction” easily met by dominant control by franchisor over franchise agreements with an independently owned franchisee** – this is met even though there was a bona fide arms-length business arrangement

## EMPLOYER SUCCESSORSHIP

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| 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.  (2) If a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.  (3) If a question arises under this section, the board, on application by any person, must determine what rights, privileges and duties have been acquired or are retained.  (4) For the purposes of this section, the board may make inquiries or direct that representation votes be taken as it considers necessary or advisable. [...] |

* Look to **nature** of predecessor’s business + **discernible continuity** in business from predecessor (**Zellers**)
* *Ee not reqd to accept employment* – at point of purchase, can exercise any right for termination i.e. severance. If Ee accepts severance and is rehired, service count restarts. If Ee accepts employment directly, analyzed as continued service
* *Er successor reqd to offer employment* – Er2 can’t refuse to rehire Ee under a CA:

#### **Granville Island Brewing Company Ltd** (1996) – Er successor reqd to offer employment

FACTS: Gibco acquired by successor, Calona. Merger agreement provided that Gibco Ees dovetailed into Calona in order of seniority. Hired 11 this way, but not M. ISSUE: Compensation for not hiring M? ANALYSIS/RATIO: Ee can’t be transferred against will to successor; if they want to, they may under existing CA; no guarantee jobs available BUT **successor can’t refuse to extend continued employment for improper reasons** – BC *Code* ensures that work continues to be governed by terms of CA

Primary purpose of code to encourage access to CB, which would have little significance if Ers could “deep six” hard-won CB rights thru simple business transaction – right not to be dismissed except for just cause illusory if successor Er could “cherry pick” Ees. Any poor performance issues must be addressed thru normal disciplinary process! HOLDING: Calona has to offer M a job.

#### **Ajax (Town of) v CAW-Canada, Local 222** (1998) – ONCA, aff’d SCC

FACTS/ISSUE: Charterways is contractor for town, CAW organizes CW Ees. CW Ees poached to *direct employment* with Ajax. Successorship? (if yes, CAW’s barg rights continue)

ANALYSIS/HOLDING: uphold decl of sale of business. **Transfer of workforce significant part of interpreting change of employment arrangement:** K btwn CW and Ajax showed clear importance of continuity/stability of workforce, e.g. same drivers for same route, adding value to workforce – “transferred” when Ajax terminated and re-acquired Ees.

#### **Zellers Inc (Store 264)** (2012)

FACTS: Had 137 Ees in BU for union not certified to represent any other Zellers Ees. Target and Zellers entered agreement re Zellers’ interests and mall taking over the store. Successorship? ANALYSIS/RATIO:

**🡪** look to **Lyric Theatre Ltd** **factors for discernable continuity of business** (not exhaustive)

* 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 between the predecessor and successor employer, OR arm's length btwn the predecessor and successor employer

Target and Zellers same *type* of business, but not persuaded that *discernable continuity*

Hiatus btwn closure of Zellers and opening of Target; transfer of pharmacy records ≠ transfer of business; store will be in different area of mall entirely and old Zellers site avail for lease to someone else; no transfer of inventory, systems, policies, etc 🡪 union application denied, not successor.

**\*\*CODE DOESN’T PROTECT CONTRACTING OUT:** e.g. Er1 hires Contractor1 🡪 union certifies Contractor1 🡪 Er1 subcontracts same work to Contractor 2. *Board policy* (no legislative guidance) = union doesn’t follow w/ K

# DUTY OF FAIR REPRESENTATION

Exclusivity of representation on part of union has corresponding requirement that union treats Ee properly:

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| --- |
| 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. |

* **Standard of Care:** Board's inquiry limited to union conduct in its representation of the employee in the workplace, i.e., within confines of CB relationship
  + Doesn't apply to representation of workers before the WCB or other bodies outside CA frame!
* **Contents of Duty**: **Canadian Merchant Service Guide v Gagnon et al** (1984) – SCC:

1. Exclusive jurisdiction model
2. Union enjoys considerable discretion when deciding to take grievance to arbitration
3. Union's discretion to proceed w grievance must be exercised objectively/in GF, paying attn to significance/consequences to employee/legit interests of union
4. Union's decision mustn't be arbitrary, capricious, discriminatory/wrongful
5. Union's rep of employees must be taken genuinely and w/o srs or major negligence or hostility toward employee

= Union doesn't have to pursue every grievance: ultimately will weigh and balance the interests of all the employees, and need to do so in order to remain practical

* ***Arbitrary***
  + **Re Judd** (2003) – union should ideally 1) investigate, 2) make reasoned decision, 3) not act w reckless disregard. Higher standard exists where "critically important employee interests" at stake e.g. termination of employment/loss of seniority
* ***Bad Faith*** *–* Representation w improper purpose and intention to deceive EE (rare!)
* ***Discriminatory –*** General sense of prejudice/personal favouritism – not limited to technical HRC defn
  + *Duty to accommodate* – **Re Bingley** (2004) – CIRB – union has positive duty to be proactive in representing/advising BU Ee when human rights claims engaged
* **Remedies**
  + Board may order union to file grievance; pursue grievance and obtain legal opinion; union to take grievance to arbitration (w or w/o independent counsel paid by union); new arbitration; time limits in CA to be waived; liability for part of any damages awarded – *may affect all parties*!
  + **Re Westmin Resources Ltd** (1993) – Costs awarded where trad remedies inadequate and otherwise no practical avenue for relief

**DFR when negotiating CAs** – “free hand” doctrine = broader discretion to accommodate, trade, compromise etc

EXCEPTION: interference with crucial job interests is *prima facie* unacceptable; need “compelling reason” to trade off seniority rights of specific members

# NEGOTIATION

## PROCESS OF BARGAINING

**1. Serve notice to bargain:**

*New bargaining agent*

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| --- |
| 45 (1) When the board certifies a trade union as the bargaining agent for employees in a unit and a collective agreement is not in force,  (a) the trade union may by written notice require the employer to commence collective bargaining, or the employer may by written notice require the trade union to commence collective bargaining, . . . |

*Continuing bargaining relationship*

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

**2. Statutory Freeze:**

*New bargaining agent*

|  |
| --- |
| 45 (1) When the board certifies a trade union as the bargaining agent for employees in a unit and a collective agreement is not in force, . . .  (b) the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until  (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. |

## DUTY TO BARGAIN

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

* + - 4 purposes: redress fundamental power imbalance; industrial stability (reduces recognition strikes); reinforce exclusivity model and union stability; institutionalization of industrial pluralism
    - Doesn’t require an agreement be met, only that parties try
      * Objective reasonableness component = “every reasonable effort”
      * Subjective component = “good faith”
    - **TACTICS** OF CB (Board won’t interfere) vs **PROCESS**/MECHANICS OF CB (Board will interfere)

CONTENT OF DUTY TO BARGAIN

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

#### **Graphic Arts Intl v Graphic Centre (Ontario)** (1976) – ONLRB

FACTS: Er and union in drawn-out negotiations w refusals on both sides. Eventually, Er proposal made, voted to accept. In middle of negs union brought grievance under old CA and Er refused to sign until dropped + put forth 16 new demands due to ill feelings. ISSUE: did Er fail to make every reasonable effort?

ANALYSIS/RATIO: **conduct that undermines DM capability of other party is contrary to req to bargain in gf** – party holding back then attempting to introduce problem into negs as process nears completion destroys DM framework, even if union here wasn’t entirely forthright

#### **Noranda Metal Industries Ltd** (1975) – CanLRB

FACTS: Er put issue to members, not union, and refused to give factual data to union. ANALYSIS/HOLDING: CB process ideally has **informed discussion on all issues**; if you need info for rational & informed discussion it must be provided. Er wasn’t making every reasonable effort here (esp bc was in relation to claim they made)

#### **Royal Oak Mines** (1996) – SCC

ANALYSIS/RATIO: board may find breach of duty to make every reasonable effort where party **refuses to include in proposal terms widely used in other agreements in industry/basic CA terms**

SUBSTANTIVE AND PROCEDURAL OBLIGATIONS

Breach of duty to bargain if term proposed that can’t be legally included in CA, but may be able to make proposal on other matters which affect parameters of CB relationship e.g. institute multi-Er bargaining

🡪 Jurisprudence on GF requirement limits general freedom to K available to parties

\*\* anything that unnecessarily truncates open dialogue and undermines process in negotiations is a problem!

#### **United Steelworkers of America v Radio Shack** (1980) – CanLRB – surface bargaining

FACTS: Lots of unfair labour practices pre-certification. Er counterproposals for CA incl prohibiting public mention of Er/Ees by union subject to $5k-10k damages, and 11 vague heads of prohibited Ee conduct to result in termination. ANALYSIS/RATIO: **surface bargaining = going through the motions w/o intent of concluding CA (subtle but effective refusal to recognize the trade union)**

Consider totality of evidence incl adoption of inflexible position re issues central to negs. Here, no business reason for Er to refusal union proposal; prior conduct showed anti-union animus

#### **Canada Trustco Mortgage Company** (1984) – ONLRB – hard bargaining

FACTS: Union certified at 2 bank branches, but CA for St Cath’s branch only marginal improvements on non-unionized terms. Er only willing to offer minor improvements on St Cath’s CA during negs for Cambridge. BF?

ANALYSIS/RATIO: **not Board’s role to prescribe precise contents of CA**. Can’t impose own model of DM as normative standard; under statute, only obligation is to endeavor to *conclude* CA. **duty to bargain in GF not designed to redress imbalance of bargaining power**. HELD: conduct hard bargaining in self-interest, no breach.

#### **CAW v Buhler** (2001) – MBLB – resisting attempts to negotiate

FACTS: cyclical nature of tractor industry, fluctuations in # Ees. B bought plant. After CA expired and parties negotiating, B offered less each time and didn’t provide info when asked. ANALYSIS/RATIO: went beyond hard bargaining: tactics were clearly attempts to bully union; lack of attempt to seek common ground

🡪 “my first offer is my last offer” usually just hard bargaining, but Buhler went too far by offering less each time and being generally resistant

Disclosure of Decisions Substantially Affecting BU

#### **Westinghouse Canada Ltd** (1980) – ONLRB

FACTS: after renewal of CA, co relocated to less unionized area. ISSUE: Failure to barg in GF?

ANALYSIS/RATIO: Duty to bargain = Er obligation to respond honestly to union inquiries abt plans that may have sig impact on BU but **no duty to reveal plans that haven’t yet ripened into at least *de facto* final decisions**

**🡪 criticism** (e.g. Brian Langille): incentivizes non-disclosure and conflicts with duty of GF. Acts on assumption that union should have no say in DM process/can’t alter terms but Er is allowed to. Reasoning let in thru back door to effectively limit *functional content* of duty to bargain. **🡪 See *Canadian Union of Public Employees, Local 1251 v Her Majesty in Right of the Province of New Brunswick*** (2009) – Er's duty of disclosure arises only at point where "mere ideas" that emerge in course of planning exercise "**move to the verge of implementation**"

#### **IWA Local 2-69 v Consolidated Bathurst** (1983) – ONLRB – response to *Westinghouse* criticism

FACTS: neg renewal of CA. Union sought to tighten provisions re plant closures and severance pay; eventually just renewed old ones. No indication plant may be closed but a few weeks later Er announced shutdown. ISSUE: expand principle of BF wrt unsolicited disclosure to all disclosure?

ANALYSIS/RATIO: Board needs to be sensitive to limited timespan of duty; potential for unilateral Er action once duty ends and CA signed; incentive for non-disclosure; but also limits of adjudicating policy responses to general problem of industrial change. Difficulties with unsolicited disclosure = **unsolicited disclosure must be understood to be exception**, centered on BF rationale

Requests/answers provide self-regulatory mechanism for CB to resolve problems; union didn’t ask, suggesting union happy w appropriateness of CA.

## REMEDIES FOR VIOLATING DUTY TO BARGAIN

***Radio Shack***: *ON board’s position on remedies for violations:*

* Shouldn’t be seen as penalty – award monetary relief only as compensation, not punitive dmgs
* Can’t just impose CA on parties – would exceed statutory mandate, deviate from principle of free CB
  + Other measures: cease and desist orders; orders to bargain in GF; orders to publish retractions of false/prejudicial statements; orders to pay injured party’s negotiating costs

***Royal Oak Mines****:* **Board’s remedy must be rationally connected to breach and consequences** (*RMH*)

* May exceed jurisdiction where remedy punitive in nature; infringes *Charter*; no rational cxn; where remedy contradicts objects/purposes of *Code*
* In this case, facts so extraordinary that Board justified in going to limits of its powers; Board made best effort to identify last offer to union and restore union to where they would have been absent breach

***Yarrow Lodge Ltd***(1993) – BCLRB: **imposition of first CA? rare, reqs:**

* + - * 1. bad faith or surface bargaining
        2. conduct of Er which demonstrates a refusal to recognize the union
        3. party adopting uncompromising bargaining position w/o reasonable justification
        4. party failing to make reasonable/expeditious efforts to conclude CA
        5. unrealistic demands/expectations arising from either intentional conduct of a party or their inexp
        6. bitter and protracted dispute where unlikely parties will be able to reach settlement themselves

# INDUSTRIAL CONFLICT

## STRIKES

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| --- |
| 1(1) "strike" includes a **cessation of work, a** **refusal to work or to continue to work** **by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services**, but does not include (a) a cessation of work permitted under section 63(3), or  (b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted under this Code, |

* Not “strike” if: (a) hot declaration (calling all unions to boycott), (b) adhering to picket line bc it’s there (allows Ees to refuse to cross picket lines)
* Pre-1984 “strike” included “for the purpose of compelling their employer to agree to terms or conds” = narrower definition that excluded political strikes. Was taken out to prevent such strikes

#### **Graham Cable TV/FM** (1986) – CanLRB – concerted activity requirement

FACTS: union in legal position to strike but believed traditional strike would fail so decided to work to rule: sped up some job areas while slowdown in others, study sessions on each floor. Er took disciplinary action against Ees. Union claimed unfair labour practice. ISSUE: does legal strike include work-related activities?   
ANALYSIS/RATIO: Jurisprudence around *unlawful* strikes says “strike” = concerted refusals to work OT; concerted work to rule and booking of sick; Canada Post processing mail w less postage – all found to be **strike even if work-related activity**

Ers already have freedom to take measures designed to limit disruptive effect of strike activity like lockout – not free for Ers to discipline Ees for engaging in lawful strike.

#### **Saskatchewan Wheat Pool v Grain Workers’ Union** (1994) – CanLRB

FACTS: Er sought unlawful strike decl bc concerted refusal by Ees to work voluntary overtime after temp layoff of 10 Ees in BU. CA said Ees could refuse overtime work. ANALYSIS/RATIO: Parties in midst of CB and Er told union opposed to OT; normal # Ees would have accepted OT work. Board concludes union was architect. **Can’t use clause to circumvent *Code* by giving Ees right to collectively refuse to work when unlawful**. Actions acceptable for individual Ees may constitute unlawful strike when done in concert & aimed at limiting output

#### **Longshoremen v Maritime Employers’ Assoc** (1979) – SCC – sympathetic action = strike

FACTS: police union picket lines at entrance of port, 3 unassoc locals refused to cross, causing shutdown. Ers got injunction, unions challenged. ISSUE: fall w/in “common understanding” to find unlawful strike?

ANALYSIS/HOLDING: “**common understanding” covers commonly understood principle of labour movement that members of unions shouldn’t cross other unions’ picket lines** = this is strike activity and thus unlawful here

#### **Unilux Boiler Corp v United Steelworkers** (2005) – ONLRB – non-union workers ≠ strike

FACTS: non-unionized Ees refused/blocked from crossing picket line. Er argued that this was unlawful strike.

ANALYSIS/RATIO: acting in concert is necessary component of strike 🡪 **Ees who made individual decision not to cross aren’t engaged in strike**

## LOCKOUTS

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| 1(1) "lockout" includes closing a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his or her employees, **done to compel his or her employees or to aid another employer to compel his or her employees to agree to conditions of employment**; |

#### **Westroc Industries** (1981) – CanLRB – use of lockout as economic tool for CB

FACTS: During negs for renewal at one plant, Er concluded that union deliberately prolonging discussions to conduct simultaneous strikes in other locations where CAs had later expiry. Er pre-emptively locked out first union and hired replacement workers to gain upper hand in negotiations. ANALYSIS/RATIO: LO timely, aimed at inducing agreement and thus part of CB process

*Permanent* replacement of locked out Ees would = unilateral destruction of BU etc, but these replacements clearly temporary, paid according to expired CA – Er just using **LO as tool to conclude CB**

## PROCESS OF STRIKE/LOCKOUT

**No strike/lockout during term of CA (prohibition on wildcats):**

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| --- |
| 57 (1) **An employee** 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 employees during that term.  (2) **An employer** 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 employee bound by the collective agreement. |

**No strike/lockout before bargaining and vote:**

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| --- |
| 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 the trade union and the employer or their authorized representatives have bargained collectively in accordance with this Code. |

* i.e., all issues discussed and all proposals advanced

**Pre-strike vote and notice:**

* 60 (1) -- must not strike until majority of Ees who vote have voted for strike
* (3) -- if vote favours strike,
  + (a) can only strike during 3 mo immediately following date of vote
  + (b) Ee can't strike until after 72 hours from when written notice served to Er and filed with board; or, if mediation appointed, 48 hours after associate chair tells union that mediation officer has reported OR 72 hours since notice.

**Only exception to exclusive barg arrangement:**

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| 78 (1) Before the commencement of a strike or lockout, the employer of the employees in the affected bargaining unit **may request that a vote of those employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union** in respect of all matters remaining in dispute between the parties, and if the employer requests that a vote be taken, the associate chair must direct that a vote of those employees to accept or reject the offer be held in a manner the associate chair directs.  (3) **If a vote under this section favours the acceptance of a final offer, an agreement is thereby constituted between the parties.** |

* only allowed once parties have reached impasse
* if Er provides different proposal to Ees than to union, final offer is dismissed and can't do it again

## REPLACEMENT WORKERS

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| 68 (1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,  (a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,  (b) who ordinarily works at another of the employer's places of operations,  (c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, **or**  (d) who is employed, engaged or supplied to the employer by another person,  **to perform**  (e) the work of an employee in the bargaining unit that is on strike or locked out, **or**  (f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out. |

* **(e)** – **Sun-Rype Products Ltd** (2007) – **test:** “whether the work in question would have been done by a BU employee but for the strike.”
* **(f)** – **Re IKEA Canada Ltd Partnership** (2013) – **test:** “whether the individual is backfilling another otherwise permitted person so that they can perform BU work”

## PICKETING

\*\*Unlike most Cdn LR statutes, *LRC* gives board considerable power over picketing, i.e., pretty clear regulation

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| 1(1) "picket" or "picketing" means attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to  (a) enter that place of business, operations or employment,  (b) deal in or handle that person's products, or  (c) do business with that person,  and a similar act at such a place that has an equivalent purpose; . . . |

#### **Canex Placer Ltd** (1975)

FACTS: during legal strike, picketers blocked access to mine and uttered “isolated threats of violence”. Er applied for order prohibiting conduct. ISSUE: does Board have power to prohibit (as economic tort)?

ANALYSIS/HOLDING: LRB has exclusive jurisdiction over industrial relations regulation of picketing, while courts still charged w jurisdiction over its crim/civil features – may be const issues in granting Board jurisdiction

**Boards can regulate place, timing, object of picketing; courts retain auth to deal w tortious/crim acts**

PRIMARY PICKETING

**Picketing limited to employer operations:**

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| 65(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), . . . | *Code elements*:   1. Performed by members of union who are lawfully on strike or locked out 2. Struck work must be by member of trade union who performs work under control/dir of Er 3. Struck work must be integral/substantial part of Er’s operation 4. Location must be site/place of lawful strike/lockout |

* + - * restrictive language: if Er has work but it isn’t “integral” part of operations, can’t picket there
      * 65(4)(a) allows picketing to “follow” work where Er has moved in response to the picketing/LO activity

#### **Harrison v Carswell** (1976) – SCC – early case

ANALYSIS/RATIO: (Dickson J majority) – owner has fundamental freedom of right to enjoyment of property

(Laskin J dissent) – private owner invested members of public w right of entry, to remain. Labour context = Ee had legitimate claim against Er and should be able to peacefully picket

**🡪 in response, BC limitation of trespass actions:**

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| 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 employees to join a trade union made at or near but outside entrances and exits to an employer's workplace. |

SECONDARY PICKETING

**Original position: Hersees of Woodstock v Goldstein** (1963) – ONCA – no right to secondary picketing; even if right, yields to greater interests of the economic community

#### **Pepsi-Cola v RWDSU Local 558** (2002) – SCC – CL wrongful action model

FACTS: legal strike/lockout. Part of picketing activities = peaceful picketing of retail stores which sold Pepsi but had no corporate cxn to company. Pepsi got interlocutory injunction prohibiting secondary picketing.

ISSUE: when might secondary picketing be legally conducted? ANALYSIS/RATIO: issue not abt where picketing taking place but what’s happening at worksite; **secondary picketing generally lawful unless it involves tortious or criminal conduct.** Why?

* Conformity to FoE values: should start w assumption of FoE protected unless justified, I.e., pf legal! Wrongful action approach assures reasonable balance btwn FoE and protection of 3rd parties
* No real reason to emphasize economic harm like in *Hersees*: picketing as expressive, not coercive
  + *Hersees* effectively creates independent secondary picketing tort applying only in labour context
* Leg can still draft own stat provisions where issues arise! (*see below for BC*)

HELD: injunction can’t be supported bc can only initiate injunction proceedings where subject to tort/crim. Did uphold related injunction for picketing of Pepsi employees’ private homes

**BUT, *Code* preserves concept of allies:**

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| 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;  65(2) A person who, for the benefit of a struck employer, or for the benefit of an employer who has locked out, performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, must be presumed by the board to be the employer's ally unless he or she proves the contrary. . . .  (4) The board may, **on application and after making the inquiries it requires, permit picketing** . . .  (b) **at or near the place where an ally performs work**, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out, |

**Common Site:**

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| 65(1) In this section: "common site picketing" means picketing at or near a site or place where  (a) 2 or more employers carry on operations, employment or business, **and**  (b) there is a lockout or lawful strike by or against one of the employers referred to in paragraph (a), **or** one of them is an ally of an employer by or against whom there is a lockout or lawful strike. . . .  (7) If the picketing referred to in subsection (6) is common site picketing, the board must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4), in which case the board may regulate the picketing as it considers appropriate. |

* Where Board finds common site picketing, can regulate picketing by limiting 1) **geography** (i.e., what are the bounds of picketing area); 2) **time** (i.e., what hours of the day); 3) **function** (i.e., no signs?)

#### **Sovereign General Insurance Company** (1994) – picketing where 3rd party common site

ANALYSIS/RATIO: **where 3rd party and common site, picketing can only occur if there is no effect on 3rd party**

* Whether 3rd party is functionally interrelated/integrated isn’t determinative in Board’s discretion
* Won’t consider length of time 3rd parties are present at common site bc doesn’t translate to amt impact
* Board won’t estimate potential relief under comml K law bc speculation

# SECTION 2(D) CONSTITUTIONAL ISSUES

**1987 trilogy**: SCC ruled that 2(d) freedom of association doesn’t protect right to CB or strike bc *Charter* protects individual rights and right to strike is collective in nature

*Charter* s 2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

* **PSAC v Canada** – whether govt can place limits on wage increases in public sector CAs
* **RWDSU v Saskatchewan** – whether govt can order striking workers to go back to work
* **Alberta Reference** – whether govt can take away right to strike for essential service workers

#### **Alberta Reference** (1987) – SCC

McIntyre J majority:

*Rights can’t be enlarged merely by fact of association*. FoA = Charter protection will attach to exercise of individuals’ rights when exercised in association: since fact of assoc won't by itself confer addtl rights, assoc doesn't acquire a constitutionally guaranteed freedom to do what is unlawful for the individual

**Since individual doesn’t have const-guaranteed right to strike, union doesn’t either**

**NOTE** Dickson CJC dissent: **collective rights are fundamentally different than individual rights** – intl norms to which Canada party (e.g. ILO Convention no 87) and purpose behind Charter favour protecting this right

CB only works with right to strike to equalize balance of power!

**Dunmore v Ontario (AG)** (2001) – SCC – **retreat from Alberta Reference; substantial interference test**

**FoA TEST**: “conditions which in effect substantially interfere with the exercise of a constitutional right”

\*\*higher threshold than tests for 2(a) and 2(b) rights:

2(a) – *Big M* – if intent of action to interfere w freedom regardless of deg of infringement

– *Edwards Books and Art* – if interference is more than trivial or insubstantial

2(b) – *Sharpe* – if act attempts to convey meaning, whether govt action actually restricts freedom

#### **Health Services v British Columbia** (2007) – SCC – affirmation of Dunmore, expansion of 2(d)

FACTS: challenge to leg removing CA protections against contracting out and successorship

ANALYSIS/RATIO: grounds advanced in earlier decisions for exclusion of CB from *Charter* FoA protection don’t withstand principled scrutiny and should be rejected. Consider history, intl context, *Charter* values – 2(d) does indeed protect workers’ rights! Use **Dunmore** test. Also, **2 necessary inquiries:**

1. **Importance of matter affected to process of CB**
2. **Manner in which measure impacts collective right to good faith neg/consultation**

only where both met will 2(d) be breached – (substantial interference test again)

## 2015 TRILOGY – CURRENT TEST

#### **Fraser v Ontario** (2011) – SCC – extends right to groups

RATIO: **2(d) protects right to associate to achieve collective goal**

#### **Mounted Police Assoc v Canada** (2015) – SCC

ISSUE: do workers have right to independent org for dealing w mgmt and can govt exclude them from CB?

ANALYSIS/RATIO: 2(d) protects 3 classes of activities –

1. Right to join with others and form assocs
2. Right to join with others in pursuit of other const rights
3. Right to join with others to meet on more equal terms the power/strength of other groups/entities

**CB isn’t a derivative right** – a “meaningful process” of CB (evaluated contextually) is necessary element of right! Sth that substantially interferes with process by reducing Ees’ negotiating power is inconsistent w FoA

Right doesn’t guarantee outcome but protects *process*

#### **Saskatchewan Federation of Labour v Saskatchewan** (2015) – SCC

ISSUE: does interference with right to strike during CB violate FoA? Did adding hurdles to cert violate FoA?

ANALYSIS/RATIO: right to strike is an **indispensable component of right to CB**. Recognized in Canada and as part of intl human rights obligations; meaningful process of CB requires ability of Ees to participate in collective withdrawal of services – balance of power

**Test** = **whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with CB.** Does open door for justification under s 1, but this is fact-dependent

[**Meredith** says same thing basically]

# POLICY NOTES

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| Paul Weiler, *Reconcilable Differences*: “Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law. [...] There are two parts of a labour code which are central to the balance of power between union and employer. One is **the use of the law to facilitate the growth of union representation of unorganized workers**. The other is the **use of the law to limit the exercise of union economic weapons (the strike and the picket line) once a collective bargaining relationship has been established**.” |

## OBJECTS OF THE BOARD

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| 1973 BCLRC 27 (1) The board may exercise the powers and shall perform the duties conferred or imposed upon it under this Act with the **object of securing and maintaining industrial peace and promoting conditions favourable to settlement of disputes**, and, for this purpose, the board may from time to time formulate general policies not contrary to this Act for the guidance of the general public and the board; but the board is not bound thereby in the exercise of its powers or the performance of its duties.  Current duties in BCLRC 2(a)-(h) list duties rather than objects, but hasn’t really changed focus of Board:  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  (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,  (b) fosters the employment of workers in economically viable businesses,  (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,  (d) 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,  (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,  (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,  (g) ensures that the public interest is protected during labour disputes, and  (h) encourages the use of mediation as a dispute resolution mechanism. [*see s 74(1)*] |