Labour Law – 2017 – September 5 -- December 1

Lecture #	Readings/Discussion Topic

1. (Sep 5) — A Brief Overview of Employment Law and Discussion on Associated Problems Regulating Labour Relations

3. (Sep 12) Overview of the Code and Issues Related to Unionization

"Bankworker Unionization and the Law", Rosemary Warskett— Displacing the Individual Contract of Employment

2. (Sep 19) — The Common Law Contract of Employment

1. Introduction — supremacy of FOC & statutory law over common law
2. Reasonable Notice of Dismissal
3. Terminating the Contract –Constructive and Wrongful Dismissal
4. Extent of Financial Compensation
5. Who is an EE?

Introduction

Christie v The York Corporation (1940) SCC — supremacy of freedom of commerce; NB: case was pre-HR legislation.

Facts: C, a black male, was denied service at the R's tavern; R's EEs had been instructed not to serve coloured people

Issue: was C owed damages for the humiliation suffered at the hands of R? **NO**

Analysis: since the general principle of the law of Quebec allows complete freedom of commerce, any merchant is free to deal as he/she may choose with any individual member of public, including whether to deal or not to deal.

Ratio: in the absence of a specific law, the general principle of complete freedom of commerce prevails, as long as its adoption is not contrary to good morals or public order.

Commentary: there was no rule against racial discrimination at the time, so the issue came down to business interests (upheld by the Court); tacit assumption that discriminatory conduct is not contrary to good morals or public order.

- ***Christie*** is a pre-Charter case, thus NOT longer good law.

Seneca College v Bhadauria (1981) SCC— supremacy of statutory law over common law.

- ***Bhadauria*** is affirmed in ***Honda*** on page 4.

Facts: P, an East Indian female, was turned down for a job despite being qualified, claiming discrimination. The Ontario Human Rights Code (OHRC) had provisions for this but P pursued a separate action for a tort of discrimination. The appellate court held for P, arguing that a civil right of action flowed directly from a breach of the Code.

Issue: was the appellate court justified in creating the new common law tort? **NO.**

Analysis: The OHRC does not contemplate a civil cause of action. A new economic tort is barred by the legislative initiative that exists within the framework of human rights law in Ontario. The Code not only bars any civil action directly based on a breach, but also excludes any common law action based on an invocation of public policy expressed in the Code.

Ratio: the comprehensiveness of the OHRC effectively precluded a common law cause of action in tort; the OHRC has laid out the appropriate procedures, which P chose not to use

Reasonable Notice of Dismissal/ common law duty to provide work

Devonald v Rosser & Sons (1906) UK — implied duties: reasonable notice

Facts: P, a tinplate rollerman at D's factory, was paid for each completed box of 112 tinplates; P's contract said he was required to do the tasks set by the ER & that he would get 28 days' notice before termination; unfortunately, tinplates were in decline & D announced the plant would close in two weeks; there was a 6-week period, when the ER gave no work

Issue: was P owed a notice period by D, given that P was hired on piece-work basis? **YES.**

Analysis: EEs would be bound to the ER for a period of at least 28 days even if they gave notice to quit the employment; the necessary implication to be drawn from this contract is at least that the ER will find a reasonable amount of work up to the expiration of a notice given in accordance with the contract.

Ratio: an implied term of employment contracts is that when there is no work available for the EE, the ER must bear the risk by continuing to pay wages.

Collins v Jim Pattison Industries Ltd (1995) BC — implied duties: layoffs & reasonable notice

- In a Union context, just and reasonable cause is required for discharge; since this is the only way an EE can be dismissed, there is no dismissal with reasonable notice.
- However, the concept of layoff applies since employment is assumed to be a continuous relationship, there has to be an ability for the ER to lay off EEs.

Facts: P was employed by D as a general mechanic; he had no written contract but had been in D's employment for 16 years; due to bad economic conditions, he was laid off for an unspecified period; D sought advice from the Employment Standards Branch & was advised that the ESA provided for a 13 weeks lay-off without termination of employment.
Issue: is there a concept of 'layoff' in the common law employment relationship? **NO.**
Analysis: the ESA's provision for "temporary layoffs" do not confer additional rights on ERs to temporarily layoff their EEs; rather, the provision places limits on the right to temporarily lay off EEs where such a right already exists; therefore, unless the right to lay off is otherwise found within the employment relationship, the ESA's provision is not relevant.
Ratio: the ESA does not displace common law principles with respect to reasonable notice. **An implied term** is that the ER provides work for the EE; if the ER lays off the EE, even for short period of time, the EE is entitled to reasonable notice.

Cronk v General Insurance Co. (1995) Ont. CA — reasonable notice: *Bardal* factors (*stare decisis*)
Facts: P lost her job due to internal restructuring; she was 55 & had been employed from 1958-1993 (including 6 years off to raise her children); P sued for wrongful dismissal, arguing 20 months would be reasonable notice in the circumstances.

- TJ held for P, rejecting D's position re: (a) legal significance of the 6-year break in employment & (b) upper limits of reasonable notice are reserved for senior EEs with major responsibilities.

Issue: does the character of the employment entitle an EE to longer notice period if dismissal is without cause? **NO.**
Law: ***Bardal v Globe & Mail (1960) Ont. HC*:** factors for determining reasonable notice:

- **(1)** character of the employment; **(2)** length of service; **(3)** EE's age; **(4)** availability of similar employment, having regard for EE's experience, training & qualifications
- **(5)** bad faith — added in ***Wallace* on page 4.**

Analysis (majority): reasonable certainty is an important consideration in commercial transaction & to employment law practitioners; *stare decisis* plays an important role to this end so TJ's decision cannot stand.
Ratio: ***Bardal*** test requires a balancing act; TJ erred by improperly focusing on the EE's value to the organization, his own sociological research, & collapsing all 4 ***Bardal*** factors into "re-employability factor".
Dissent: relied on the fundamental objective of reasonable notice is to help EEs find alternative employment; the character of the employment is only relevant as a proxy measure of likelihood of re-employment

- THEREFORE, would have remitted the case back to trial for a full inquiry into the empirical validity of the proxy rationale as the dissenting decision partly relied on TJ's review of empirical evidence, which rejected the assumption that high-status EEs face greater difficulty in finding a new job than low-status EEs.

Post *Bardal* and *Cronk*

- The factors enumerated in ***Bardal*** are not exhaustive —> in ***Wallace,*** bad faith conduct— inducing the dismissed EE to leave previously secure employment created reliance & expectation interests — is added to the ***Bardal*** factors.
- Courts have said there is no primary factor; in reality, however, length of service is in fact the primary factor.
- Estimated rule of thumb: 1 month of reasonable notice per year of service; general 'maximum' of 24 months.
- All of the ***Bardal*** factors are influenced by various 'value' judgments being made by the deciding judges.
- EEs in specialized fields or with significant training (specific position) are entitled to longer reasonable notice period

Terminating the Contract – Constructive and Wrongful Dismissal

- **Constructive dismissal** = unilateral changes, by ER, to essential contract terms —>***Farber***
- **Wrongful dismissal** = termination without just cause —> **Wallace (1997) SCC — page 4**

Farber v Royal Trust Co. (1997) SCC — constructive dismissal = unilateral changes to essential contract terms by ER
Facts: R's company underwent a major reorganization which potentially resulted in F's job loss; R offered F a lower position and did not guarantee similar remuneration terms; F sued R for damages on the basis of constructive dismissal.
Issue: was F constructively dismissed? **YES.**
Analysis: either party can resiliate from an indeterminate employment contract; the resiliation becomes a dismissal if initiated by the ER or a resignation it originates from the EE.
Ratio: if the ER unilaterally makes substantial changes to the essential terms of an EE's contract of employment & EE does not agree to the changes & leaves his or her job, the EE has not resigned, but has been constructively dismissed.

- Test for unilateral changes that substantially alter the essential terms of EE's contract of employment is whether a reasonable person (i.e., objective assessment), in the same situation as EE, at the time the offer was made, would have concluded that the essential terms of the employment contract were being substantially changed.

Potter v NB Legal Aid Services Commission (2015) – revised *Farber* test re: constructive dismissal

1. Identify an express/implied contract term that has been breached
    - Unilateral change must breach contract
    - Must substantially alter essential terms of contract:
        - **(i)** bona fide and legitimate business interest? & **(ii)** Impact on EE?
2. Determine whether that breach was sufficient to constitute constructive dismissal.

Terminating the Contract – Just Cause for Dismissal

McKinley v BC Tel (2001) SCC — dismissal MUST be proportional to the degree of harm caused by EE's breach
Facts: P, employed by D for 17 years, had medical issues that required him to take a leave of absence; upon return from leave, P requested less stressful position which D refused & instead terminated P; prior to trial, D learned that P had been dishonest about his medical condition & his ability to work; D abandoned its defence of frustration & argued just cause to dismiss P on the basis of dishonesty.

- TJ instructed jury to consider the extent of P's dishonesty, in order to determine whether dismissal was warranted.
- BCCA held that dishonesty equals just cause.

Issue: is the EE's dishonesty, in itself, just cause for summary dismissal? **NO.**
Analysis: reviewed jurisprudence supporting TJ and BCCA's contrasting decisions; opted for the former.
Ratio: dishonesty is not always just cause for dismissal; just cause for dismissal exists where the dishonesty violates an essential condition of the employment, breaches the faith inherent to the work relationship, or is fundamentally inconsistent with the EE's obligations to his ER.

1. Whether evidence established EE's dishonest conduct on a balance of probabilities;
2. If so, whether dishonesty warranted dismissal (proportionality); factors to consider include:
    - EE's position; nature & degree of misconduct; single incident or repeated pattern of behaviour; EE history; acknowledgement of the misconduct/apology; willful v accidental conduct

Post *McKinley*

- Banking: caution is the norm… trust & confidence in the EE is essential→ ***Rowe v Royal Bank of Canada***
- Senior public official with broad discretionary authority over expenditure of public monies required rigorous integrity & public trust —> ***Dowling v Ontario (Workplace Safety and Insurance Board)***
- Manager of service sector business: ER can expect utmost honesty & reliability when dealing with customers —> ***Saumer v Genie Office Services Ltd***.

Extent of Financial Compensation

Hadley v Baxendale (1854) ER — remoteness; consequential damages from a breach of contract (BOC)
Facts: P operated a mill & contracted D to deliver a broken down component of their steam engine (shaft) that had caused P's mill to shut down; delivery was delayed due to D's neglect, causing P's mill to remain closed longer than expected.
Issue: was the delay reasonably foreseeable (i.e., was it a BOC)? **NO.**

Analysis: Because P failed to inform D of the special circumstances surrounding the shaft, the sole reason for the mill's closure, D had no reason to believe that a delay in delivering the shaft would result in several days' worth of lost profits.
Ratio (test for remoteness): damages are limited to those that arise naturally from a breach OR those that are reasonably contemplated by the parties at the time of contracting; ask 2 questions:

1. Did damages arise naturally from the BOC?
2. Was it in reasonable contemplation of the parties as the probable result of the breach?
    - D is liable for damages if informed of special circumstances by P.
    - Damages flow if reasonable person could have foreseen those circumstances despite NOT being informed of special circumstances.

Addis v Gramophone (1909) ERHL — BOC actions preclude tort actions (e.g., exemplary damages)
Facts: P was employed by D in London, promoted to Calcutta; given 6 month working notice + demoted (issues with supervisor) = effect on reputation and health; sued for BOC
Ratio: in many BOC cases, there may be circumstances of malice, fraud, defamation, or violence which would sustain a tort action as an alternative remedy to a BOC action.

- if tort action, P can recover exemplary damages, or what is sometimes styled vindictive damages
- if BOC action, P can ONLY recover based on D's failure to give reasonable notice or pay in lieu (i.e., losses P would have received had the contract been kept).

Wallace v UGG (1997) SCC — basis for aggravated & punitive damages; fifth *Bardal* factor — bad faith.
Facts: P, then 45, left his job with a competitor to work for D under assurance that if he performed as expected he would work for D until retirement; P enjoyed great success at D's (top salesman) but was later summarily terminated, 14 years later, without explanation; P sued for wrongful dismissal; meanwhile, D maintained that P had been dismissed for just cause, only dropping the allegation just before trial; allegations destroyed P's reputation & caused severe mental stress
Issues (pertinent) & reasoning:

1. Was the Appeal Court right in overturning TJ's award for aggravating damages resulting from mental distress? **YES.**
    - damages beyond compensation for failure to give reasonable notice require a separate actionable action as per ***Vorvis***; P had insufficient evidence to support the separate action.
2. Can P sue in either contract or torts for a bad faith discharge? **NO, but can get more $$ as per #4.**
    - there's NO implied contractual duty of good faith OR independent tort of bad faith discharge.
3. Is P entitled to punitive damages? **NO**
    - there's no basis as ER's conduct, as per ***Vorvis***, must be "harsh, vindictive, reprehensible and malicious"**.**
4. Did the Appeal Court err in reducing P's reasonable notice of damages from 24 to 15 months? **YES.**
    - if ER does NOT have just cause (reasonable notice of an intention to terminate contract or paying in lieu thereof), EE can bring a wrongful dismissal action based on breach of an implied contractual obligation.
    - since ER had NO no just cause, bad faith conduct in the manner of dismissal was added as a factor (separate from the 4 ***Bardal*** factors) relevant in the addition of reasonable notice period.
        - bad faith conduct includes being untruthful, misleading, or unduly insensitive

Honda v Keays (2008) SCC — overturned *Wallace*; damages = what was reasonably contemplated by the parties

- overturned the ***Wallace*** factor (extending reasonable notice due to ER's bad faith conduct during termination).
- restricted the availability of punitive damages awards to exceptional cases where "advertent wrongful acts…are so malicious and outrageous that they are deserving of punishment on their own".
    - focus on punitive damages is SOLELY on D's conduct, not P's loss.
    - punitive damages require independent actionable wrong, unlike aggravated damages
- affirmed ***Bhadauria*** vis-à-vis discrimination NOT being an independent actionable wrong.

- prohibited double compensation (i.e., if actual damages serve to compensate EE, as well as to deter future misconduct on ER's part, absent any other sufficiently egregious or outrageous behaviour, no additional punitive damages should be awarded).

Facts: P dismissed by D after 14yrs of service; P was diagnosed with chronic fatigue which impacted his ability to attend work on a regular basis; D placed P in a special disability program that allowed absences with a doctor's note; after repeated absences, D believed P was exaggerating the extent of his disability & asked P to meet one of D's doctors; when P refused to meet with the doctor, D terminated P; P sued for wrongful termination;

- TJ awarded P $500,000 in punitive damages, which appeal court reduced to $100,000.

Issue: was P entitled to aggravated and punitive damages? **NO.**

Ratio: damages for mental distress flowing from a BOC (aggravated damages) can NO longer be awarded through an arbitrary extension of the notice period (***Wallace***), ONLY through an award that reflects actual damage (i.e., the EE must:

1. prove that the manner of dismissal CAUSED mental distress AND
2. the mental distress was in the contemplation of the parties

Bhasin v Hrynew (2014) SCC — importance of the general principle of good faith in contract/employment law

- Previously, a requirement of good faith (honest performance) was tacitly embodied in contract law (e.g., ***Whiten, Fidler***); in ***Bhasin***, the general principle of good faith is explicitly embodied).
- Suggested there should be a good faith requirement not only with regards to manner of dismissal, but also throughout the employment relationship —> Not fully adopted yet in employment context

Facts: Can-Am repeatedly misleads Bhasin by not disclosing; Bhasin loses a lot of money due to lost business; NOTHING in the contract prohibited Can-Am's actions;

- Previously, remedies would be in tort, NOT in contract law as NO duty within contract law to help Bhasin.

Ratio: parties MUST NOT lie about something significant (i.e., something that can cause losses on the other party) OR knowingly mislead each other. Essentially, there is a general duty of honest performance in contractual obligations.

4. (Sep 26) Employee and Employer at Common Law

3:420 ER influence

- There is concern that ERs can create or take control of a union so that there is no longer a genuine bargaining relationship. ERs 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 ER.
- Workers (non-EEs) not covered by labour code: managers // confidential capacity.

Some common law duties of ER — To pay wages; to provide work; to provide a safe work environment; & to provide EEs with indemnity for costs.

Common law duties of EE — To obey orders; to act with skill and care; to act with good faith and fidelity; to render profits to ER; & to indemnify the ER for costs incurred;

Statutory (LRC) definition of EE — a person employed by an ER, 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;

***Cominco Ltd* (1979) BCLRB — who is an EE under the LRC?**

1. The starting point for who's an EE under the LRC is to ascertain which of the common law characteristics of an ER-EE relationship are present/absent in the relationship under consideration
2. In close cases, a judgement must be made as to whether the individuals in question are exposed to pressures & imbalances which the overall scheme of the LRC was intended to correct (i.e., protecting vulnerable EEs)

Ontario Ltd v Sagaz Inc. (2001) SCC — who is an EE?; vicarious liability applies to EE not independent contractor (IC)

- if in doubt about the weighting test below, revert back to the intention of the Code (protect vulnerable EEs)

Facts: R (original supplier) suffered substantial losses when it was replaced as CT's supplier. This happened because a bribe was paid by Sagaz's (rival supplier) consultant to the head of CT's automotive division, causing R to become bankrupt
Issue: is Sagaz vicariously liable for the tort (unlawful interference with economic relations) of its consultant? **NO**
Analysis: Why should vicarious liability be imposed on the ER where the worker is an EE as opposed to an independent contractor? The answer (policy-based) lies with the element of control that the ER has over the direct tortfeasor (EE). The Court canvassed the development of tests distinguishing EEs & ICs:

- **Regina v Walker** (1858) – ***Control test***: the essential criterion of ER/EE relations is the ER's right to give orders & instructions to the EE regarding the manner in which to carry out his work (control).
    - While ER has the right to direct IC/EE, ER has more control on EE (e.g., right to say how work is to be done)
- **Montreal Locomotive** (1947) – *4-fold test*: 1) control test, 2) ownership of tools, 3) chance of profit, 4) risk of loss
- **Harrison Ltd v Macdonald** (1952) – *integration/organization test* – is work done as an integral part of the business or as an accessory to the business? if the former, EE; else IC.
- ***Enterprise test*** – ER's vicarious liability flows from: 1) control of worker's activities 2) position to reduce risk of loss; 3) benefit from worker's activities 4) true cost of a product/service ought to be borne by enterprise offering it.

Ratio: central Q is whether person engaged to perform the services is doing so as a person in business on his own account. there's NO single conclusive test re: whether a worker is an EE or IC. Factors to consider include:

- level of control (pay//discipline//directing work) ER has over worker's activities; whether the worker (i) uses own equipment or (ii) hires helpers; the degree of financial risk taken by worker; the degree for responsibility for investment & management held by the worker; & the worker's opportunity for profit in the performance of tasks.

McCormick v Fasken LLP (2014) SCC — who is an NOT an EE?; degree of control & dependency test
Facts: P was an equity partner at D's law firm; in the 1980s, the equity partners voted to adopt a provision that required equity partners to retire at 65; each partner could continue working as an EE or as a non-equity partner; at 64, P filed a HR complaint arguing the provision constituted age discrimination in employment contrary to **s. 13(1)** of the HR Code.
Issue: was P, as an equity partner, considered an EE? **NO.**
Analysis: to determine whether an employment relationship exists for the purposes of the Code, it is necessary to examine the ER's control over working conditions & remuneration, in relation to the EE's corresponding dependency.

- P was in control of, rather than subject to decisions about workplace conditions; also, as an equity partner, P was part of the group that controlled the Partnership, not a person vulnerable to its control — accordingly, P was not in an employment relationship with D for the purposes of the Code

Ratio: control & dependency are the animating determinants as to whether an employment relationship exists.
Commentary: the SCC rejected the notion that a partner could never be an EE for purposes of the LRC; the key is the degree of control and dependency.

***District of Burnaby* (1974) BCLRB — who is NOT an EE?; manager//confidential capacity//trade or profession**
Facts: dispute regarding classification of certain workers. **Issue**: are the workers EEs as defined by the LR Code?
Analysis (Weiler): BC legislature's intent vis-à-vis workers EXCLUDED the following from the EE definition:
—>Workers who perform the functions of a manager or superintendent: challenge in classifying junior managers (since both are deemed EEs — by virtue of dependency on the ER for livelihood and ERs — by virtue of wielding substantial power over the working life of EEs) are assigned to the ER's side.

- **rationale**: (i) ER's need for undivided loyalty of its senior workers & (ii) protecting unions, thus EEs, from interference by ERs through management workers.

- The above rationale, stretched by the modern enterprise (e.g., EEs who supervise other EEs can be readily replaced, thus prone to the same weaknesses faced by typical EEs), resulted in the enactment of **s. 47** which allows for such supervisory EEs to join a separate union separate from that of typical EEs.

—>Workers employed in confidential capacity in matters relating to labour relations (as a substantial & regular part of their job, as opposed to incidental involvement).

- **rationale**: conflict of interest concerns (i.e., ER's interest in keeping confidential matters that are of special interest to the Union).
    - EXCLUDES workers with incidental access to confidential information e.g., secretaries.
- Also, being a worker in the personnel dept is NOT determinative vis-à-vis classification as EE or non-EE; must consider whether worker accesses confidential information at the heart of LR matters.
    - Includes workers with regular & material access to personnel matters, and are required to act on that information discretely + make judgments about the information (not merely recording/storing).

—>Workers qualified in a profession, trade, or calling & is licensed under statutory regime (e.g., engineers)

Waldun Forest (1993) BCLRB — sufficient continuing interest//exclusions re: familial r/ship; mgt team concept; casuals
Facts: issue surrounds who can vote...LR Board considered exclusions
Issue: should the two sons of the ER's majority owner be excluded from the BU by virtue of their r/ship? **YES.**
exclusion of other EEs on the basis of management concept? **NO**
Analysis — exclusions re: familiar relationship; management team concept; casual EEs
A familial relationship between ER/EE, in itself, does NOT exclude that EE from the BU; rather, the exclusion flows from:

- the EE's lack a community of interest (COI) with the remaining EEs in the BU AND/OR
- the concern that inclusion of such EEs unit might give rise to conflict of interest within the BU.

The management team concept is "a relatively rare" ground for exclusion; the workers in question are EEs, thus entitled to CBing; however, they are excluded on the basis of lacking a COI (i.e., their COI lies with management, not the union)

- "near managers" (i.e., supervisors merely performing some administrative or management duties) are NOT excluded under the management team concept.
- **IMPORTANT:** Colin —>management team concept **discarded** in a subsequent LRB decision.

Casuals: while jurisprudence has clearly established that casual & part-time workers are EEs, the test is whether they have a "sufficient, continuing interest" in the issue of union representation that entitles them to be included in calculating union support (e.g., Union certification).
Factors to be considered include:

- permanence of employment;
- proportion of casual/temporary EEs in the total work force
- nature and organization of the ER's business
- each individual's particular employment circumstances
- if layoff is a factor, review the character & definition of layoff rights, duration of layoff, seniority, and whether an EE has returned to school or found other employment.

Cowichan Home Support Society (1997) BCLRB – managerial exclusion; conflict of interest
Facts: Union wanted to carve out certain managers as EEs?; ER objected **Issue:** who is to be included/excluded?
Analysis: a worker is excluded from the Code's definition of an EE if the worker exercises functions with a CA or labour relations nexus. The broad purpose of managerial exclusion is to ensure loyalty to the ER & to avoid conflict of interest.

- IOW, loyalty in the LRs context = putting ER's interest first; loyalty in the union context = putting EE first;
    - Conflict of interest is self-evident during the negotiation & administration of CA
- **IMPORTANT:** managerial exclusion MUST be bona fide, NOT an attempt to circumvent the process.

Ratio: Test for managerial exclusion (from the LRC's definition of EE) is primarily contingent on three factors:

- **discipline/discharge** (i.e., determining and administering just and reasonable cause);
  - Colin —>merely reporting discipline is not sufficient to engage managerial duties
- **labour relations input** (negotiation & administration of CA; layoffs, directing of org that determines level of staffing; approving overtime, etc);
- To a lesser extent, **hiring & promotion of EEs** (includes **demotion** if NOT captured under **discipline/discharge**)

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

Issue: are casino surveillance operators excluded from the Code's definition of EE by virtue of the confidential personnel exclusion? **NOT determined; sent back to the Board for reconsideration.**

Issue: do casino surveillance operators fall under the confidential capacity exception?

Analysis: the underlying policy rationale for the confidential personnel exclusion is the same for all three categories for exclusion from employee status under the Code:

- the importance of an arm's length relationship between management & a union
- the need to avoid a potential conflict of interest which could be created by placing a person within a bargaining unit when they should be excluded from EE status

—>whether or not surveillance operators are EEs is contingent on a careful consideration of their duties in the context of the casino industry.

- This determination is likely to require evidence regarding the actual nature of the surveillance operators' duties, as well as perhaps how those duties compare and contrast with the duties of others in the casino (such as surveillance supervisors, casino security guards and dealer supervisors).

Ratio: persons excluded = persons regularly & materially involved in LRs or personnel matters such that they are entrusted with confidential information about EE & must act upon it discreetly.

- Said information includes that which if divulged or misinterpreted could impact the EE/ER or EE/EE relationship.
- 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.

5. (Oct 3) — The Right to Join a Union: the Certification Process

- All litigation around **s. 18(1)** "**a unit appropriate for CB"**.
- **Two steps** to certification:
  - 1. Threshold Vote (**s. 18**) of 45% of the **'employees'** in the proposed unit;
  - 2. Within 10 days, **representation vote** (**s. 24(2)**).
  - If less than 55% *voters* (not all EE's) voted for the proposed unit for CB, then need re-vote [**s. 24(3)**].
- **Expanded BUs —** two applications:
  - under **s. 18** (new BU/proliferation: demonstrate all 6 ***IML*** factors to have 2nd BU deemed appropriate)
  - under **s. 142**: union must show they obtained support (ex. through letting EEs vote)
    - this is building block approach: start with base and apply to have expansions
- Policy: **BIGGER IS BETTER**. Largest = most appropriate, but all you have to show to satisfy **s. 18(1)** is **it is *an appropriate unit***.. or that there is a **rational defensible line drawn around the unit**. *FOR the sake of **STABILITY**.
- **Cutting across classification lines**: *not permitted*.. because in a given workplace, it puts EEs INSIDE and OUTSIDE of the union at the same time (same shift, with the **same kind of conditions**).
  - CA has to be *static* in how many people it covers, otherwise unworkable.

5:100 The Wagner Act Model — Adams, Jacoby, Arthurs (279-283)

Two interrelated principles are central to the ***Wagner Act*** Model:

- Exclusivity & Majority—>exclusivity is justified by the majority support of EEs in favour of unionization

***Island Medical Laboratories Ltd.* [IML] (1993) BCLRB — test for appropriate BUs**

Issue: what is the appropriateness of the proposed bargaining units (BUs)?

Law/general principles:

- to determine an appropriate BU, the Board MUST balance two objectives (flowing from purpose of the Code itself):
  - (1) facilitating the organization of EEs via CBing.
  - (2) to foster industrial peace & stability through CBing
- Community of interest (COI) is the CRUCIAL factor vis-à-vis what constitutes an appropriate BU.
  - Board must consider whether there is a COI among the EEs which is likely to facilitate CBing
  - If casual EEs, refer to page 7—>**Waldun Forest** — sufficient continuing interest.
- LR experience & common sense dictate that the structure of the ER physically, administratively, & operationally is really the evidentiary basis upon which the appropriateness of the BU is determined.
  - IMO, tacit emphasis of #s 2 & 3 in the **IML** factors.

Analysis: in an initial application for certification (for an ER with no existing CBing relationship in place), COI is determined by the following four factors (hereafter **IML Factors**):

- 1. Similarity in skills, interests, duties & working conditions — focused on EE; all other factors focused on ER
  - **Common-sense assumption:** EEs who perform similar work under similar terms & conditions of employment will have a COI within the framework of a single CA.
  - **Reality:** changes in the 60s, 70s, & 80s — BUs nowadays include within one CA EEs with widely different skills and terms and conditions of employment.
  - **Therefore:** despite being a commonsensical factor in establishing COI, similarity in skills... offers less help in drawing a rational & defensible line; thus can ONLY provide limited conceptual guidance.
    - **Considerations:** Who is working? Who is covered by unit scope? What do they do? How do they do it? Who do they do it with? Types of benefits and pay? Extent and manner of training?
- 2. ER's Physical & administrative structure — involves a complete picture of the ER, including everything from the physical layout to the organizational chart (*this factor was NOT in contention, thus no further enquiry needed*).
  - **Considerations**: Physical connection between sites and ease of movement? Managerial structure and authority at each work site? Whether payment through same system? Whether HR are separated? Whether separate business units and/or depts. involved?
- 3. Functional Integration — focuses on how the ER has organized itself operationally.
  - Functional integration is NOT to be confused with functional relationships between departments.
    - Functional relationship between departments (expected in any business) does NOT in itself prevent COI from being found in a single department NOR prevents a finding of a larger COI.
    - Functional relationship = EEs work across different departments for efficiency purposes.
  - F/I of EEs in several departments (EE interchange, shared duties, etc.) requires all such departments to be within 1 BU. It MUST be on a day-to-day basis, reflecting a consistent managerial policy of functional integration (as opposed to mere holiday relief or the replacement of sick EEs).
  - Integrated work processes that go beyond a F/R b2in departments such as a continuous work process (e.g., assembly line), overlapping & shared duties, team processes favours 1 BU—>link to ***Celestial*** & ***Ming Pao***.
  - **Considerations**: Extent to which duties overlap with others outside unit? Whether work is dependent on others outside unit? Extent of scheduling of EEs? Extent of exchange of EEs between work units?
- 4. Geography — EEs who are physically separated, whether at different branches or outlets, have a separate COI simply because of their physical separation.

- Starting point — separate geographical locations are, ***prima facie***, a rational and defensible boundary since, due to physical separation, EEs' everyday work life is only with those EEs at that one location;
  - NOTE: above does NOT justify multiple BUs units with separate CAs at each location.
- Also, where there is a consistent managerial policy of <u>interchange of EEs (not simply holiday relief)</u> between geographical sites, then the COI favours 1 BU among several geographic sites.
  - <u>Important to rebut other factors</u> – creates *prima* facie presumption of appropriate BU (e.g., if wide geographic separation, Board can cut across classifications & certify separate location)
- **Considerations**: where are work sites? Distance? Separation of function, or interdependence? Wide discretion to this concept.

—>in an <u>additional application for certification</u> (for an ER with an existing CBing relationship), COI is determined by considering the following two extra factors):

- 5. Practice and history of the current CBing scheme
- 6. Practice and history of CBing in the industry or sector

Ratio: if *initial* applications, <u>access to CBing</u> is most important principle to consider in determining appropriateness of a unit; if *additional* applications, <u>industrial stability</u> given increasingly greater weight.

- the Board MUST <u>balance</u> the two competing objectives: CBing for EEs & industrial stability:
  - The Board would NOT put into a single BU EEs whose COI directly conflict; further, no BU would be created that <u>cuts across a particular classification</u> (e.g., where all members are in the same physical location, resulting in half of the EEs in that classification in the BU & the other half out of the BU; both of these situations would not be conducive to the settlement of CBing disputes).
- **IMPORTANT:** the Board affirmed that it will NEITHER cut across classification lines NOR certify a single classification. An EXCEPTION to the single classification would arise if:
  - (i) it happens to be the majority of BU members at a certain geographical location OR
  - (ii) the EEs fall within the TDO sectors of the economy with low union densities as per *Woodward Stores*.
    - **RATIONALE:** relaxing the COI factors will facilitate access to CBing.

Commentary: If there's no appropriate BU where a unit already exists, EEs must join pre-existing union: *Rebuttable presumption against additional BUs increases with each additional unit* (concerns re: industrial stability).

***Woodward Stores* (1974) BCLRB—relaxation of IML factors re: <u>traditionally-difficult-to-organize (TDO)</u> sectors**

Facts: advertising department (18 EEs) + bakery EEs in 3 separate locations seek to be certified as BUs; ER contests certification of advertising dept; does NOT contest bakery dept, only wants it certified as a single BU.

Issue: are the two departments appropriate BUs? **YES**

Analysis: ER will always have a functional relationship among its EEs & various departments(coordination/teamwork is needed to provide the service/product). Functional relationship always has to exist for ER's efficient operation; If there's <u>functional integration</u>, there's <u>functional relationship</u>, but not necessarily the other way around.

- *Advertising dept* — has a functional relationship with sales dept, but the r/ship is NOT functionally integrated (since there's no EE interchange/overlap of duties). There's no defensible reason to deny the former's unionization desire in a hitherto unorganized industry with a low rate merely because the ER is in fear of a patchwork of unions.
  - ***Obiter***: while the advertising dept shares a functional r/ship with the display dept., thus both departments can be grouped together into a single BU, the fact that the latter has not shown interest in CBing should not be used to deny the former's desire to bargain collectively.
- *Bakery dept* – EEs work in geographically separate stores & supply other stores, so not too closely intertwined; work stoppage wouldn't prevent work at other stores such that a single BU is the only reasonable conclusion.

Ratio: if EEs can prove they have a difficult to organize workplace (TDO), the LR Board is willing to relax the ***IML*** factors & allow certification for smaller units than they otherwise would have.

Holding: allowed advertising department to certify as a BU; also, bakery workers to certify but as single BU

Wal-Mart Canada **(2006) BCLRB — UNSUCCESSFUL app to certify as a BU; generally won't cut across classification lines**

Facts: 2nd reconsideration request under ***s. 141***; Board INITIALLY held that a BU unit including both the Tire Lube Express EEs & automotive dept EEs at some 7 stores in BC was appropriate for CBing for TWO reasons:

- (i) while there was a minimal amount of functional integration between the two groups, it was INSUFFICIENT to defeat the application to certify.
- (ii) CBing would NOT be undermined even though the proposed BU cut across the sales associate & department manager classification lines in each store (i.e., both groups were found inside & outside the proposed BU)

Issue: is there a rational defensible line to cut across classification lines? **NO.**

Analysis:

- **PRO joint BU**: EEs in both area would work the same till & had the similar skills & equipment for scanning products; some of the shelving items were sold in other areas of the store
- **ANTI joint BU**: integrated workforce within 1 building; can't create BU just to move EEs in & out of the classification (i.e., it was NOT appropriate to cut across the classification because it undermines the BU's viability—>**PREVAILED.**

Ratio: cutting across classification lines without a sufficient degree of distinctiveness between the EEs NOT allowed.

- **Why?** because it will necessarily give rise to LR concerns as EEs doing the same job, under the same terms & conditions will be inside & outside the BU.
- anti joint BU prevailed because the TDO concept was NOT applicable in the circumstances; even if it was, it would not justify the manner in which the original panel permitted the BU boundaries to cut across classification lines.

Sidhu & Sons Nursery **(2009) BCLRB — CONDITIONAL apP to certify as BU; generally won't cut across classification lines**

- ***Sidhu*** is an EXCEPTION where LRB allows cutting across classification where there's NO geographical separation.

Facts: reconsideration request under ***s. 141***; Board INITIALLY dismissed Union's ***s. 18*** application for certification on the basis that the BU applied for was inappropriate?

—>Common ground: domestic farm workers (DFWs) & SAWP EEs performed the same work at all ER locations.

—>ER's position: the proposed BU was inappropriate because it would cut across the farm worker classification by including SAWP EEs while excluding DFWs

- IOW, a BU that cuts across classification lines is not viable for collective bargaining & does not conform to the principles of appropriateness set out in ***IML***).

—>Union's position: SAWP EEs have a distinct COI from the domestic farm workers due to their different employment status & terms and conditions of employment.

- proposed BU did NOT cut across classification lines because SAWP EEs' temporary employment status & other distinctive terms & conditions of employment defined them as a separate classification; one's classification is not defined solely by job duties or content (i.e., includes employment status & terms & conditions of employment)
    - IOW, SAWP EEs constitute a distinct & separate classification from DFWs = NOT cutting CC lines.
- Alternatively, if the SAWP EEs cannot be classified as a separate BU, the application should be allowed on the basis that the agricultural sector is TDO, thus allowing sufficient "relaxing" of the appropriateness principles to permit the BU to cut across classification lines.
    - IOW, if SAWP EEs=single worker classification, they have such a distinct COI that a rational & defensible line can be drawn around them, if necessary on the basis of a relaxation of the Board's standard criteria for appropriateness under the TDO test.

Issue: is there a rational defensible line to cut across classification lines? **YES.**

Analysis: the Board's policy against cutting across classification lines continues to be strictly applied; exceptions to this policy will only arise in rare and unusual circumstances.

- whether SAWP EEs constitute a separate & distinct classification **turns largely** on whether the different employment status & terms and conditions of employment as compared to DFWs are a relevant consideration.
    - **yes,** there is a serious question as to the correctness of the original panel's determination that the different employment status and terms and conditions of employment of the SAWP workers as compared to the domestic farm workers are essentially irrelevant in respect to the ***IML*** issues under consideration
- The distinctions between the SAWP & DFWs are marked and real. Simply because they arise from differing terms and conditions of employment and employment status, rather than job duties, does not make them any less meaningful from a CBing standpoint.
- the fact that it is impossible to distinguish BU work from non-BU work is ordinarily determinative of the ABSENCE of a distinct COI that would justify drawing a rational & defensible line around a unit of EEs within a classification.
    - Concerns regarding disputes about work jurisdiction are integral to the Board's consideration of functional integration as a COI criterion, as well as the policy against certifying units that cut across classification lines

IML Factors — similarity of skills, interests, duties and working conditions — key question: are the "interests" of SAWP EEs sufficiently unique to overcome the rationale & weight of the other IML factors and "restrictions".

- ➢ **YES;** the distinctiveness of SAWP EEs lies NOT in the work they do (same as that of DFWs), but rather in their interests as a result of their unique employment status & terms & conditions of employment.
- ➢ Significant differences (distinctiveness) between domestic farm workers & SAWP EEs include:
    - SAWP EEs are temporary (must return to home country) & can only work 8 months in a 1 year period
    - SAWP EEs must live on ER's premises (no mobility rights); DFWs have option to live elsewhere
    - linguistic, social & cultural diffrcs (DFWs speak Punjabi; SAWP EEs from Mexico=Spanish, Caribbean=English)

Holding: original decision is overturned, matter sent back for redetermination; essentially, **Board rules in Union's favour**, granting certification but on conditions (partial certification);

- can't bargain on work jurisdiction ->
- can't take work away from people who are not part of the original BU?
- can't reallocate the tasks in a way that favours them and disfavors original BU EEs.

Hain-Celestial (2011) BCLRB — initial BU application; analysis of *IML's* 4 COI criteria; difference between F/I & F/R

Facts: Union applies under **s. 18** to be the certified bargaining agent for a group of EEs excluding "lab EEs" in the QA dept.
Issue: must the proposed unit include EEs in the QA department to be appropriate for CBing? **NO.**
Analysis

- Geography — single production facility favours single BU; a separate location is prima facie a rational boundary.
    - REMEMBER: issue is whether the proposed unit is an appropriate unit, not the most appropriate, so the key question is whether a rational line can be drawn around the proposed unit based on the COI criteria.
- ER's physical & administrative structure—EEs work in 5 separate depts, each with its own supervisor who reports to a plant manager; QA EEs work in a separate office within 1 dept, but spend 0.5 of time on a floor used by diff dept.
    - separate line of supervision & physical layout supports QA EEs as a separate team, thus rational line around the proposed unit; however, line is blurred by the fact QA EEs spend half their day outside their office.
- similarity of skills, duties, interests & working conditions—no EE interchange as QA EEs have unique work skills & also troubleshoot issues raised by proposed unit EEs, thus rational line between proposed unit EEs & QA EEs.
    - no natural line of progression between jobs in the proposed unit & jobs in QA dept; however, line is blurred as both groups work under the same employment framework re: benefits, vacations, scheduling, etc.
- **functional integration** — ER argues that, as a food production facility, all EEs have to work together to ensure food safety & product quality="continuous work process"—>**LRB says ER's argument points to F/R, not F/I**.
    - testing in the context of a continuous work process, does not give rise to functional integration in the **absence** of significant overlapping or shared duties —> IMO, this suggests minimal F/I at best.

Ming Pao Newspapers (2012) BCLRB — distinction b2in F/R (continuous work process) or F/I

Facts: Original Decision found the BU applied for by the Union was appropriate BU.

- **ER's position —** EEs included & excluded from the Proposed BU interact in a continuous work process—one that extends beyond a functional relationship (F/R) between departments —> **ER's focus is on the F/I criterion**.

Issue: since the proposed BU was one part of a continuous work process, was it inappropriate for CBing? **NO.**
Law: *Sears Canada* (Mullin): Interdependence & integration are fundamentally different concepts for LRs purposes. integrated work processes (F/I) in ***IML*** refers to overlapping & shared duties, not necessarily interdependent duties (F/R).
Analysis: —>upheld the Original Decision****:

- Geography favoured a single BU; however, 3 other factors supported the proposed BU.
- ER's physical & administrative structure — both the physical separation of the press room & its separate "dedicated manager" supported the drawing of a rational line around the proposed BU.
- EEs in the proposed BU had clearly **distinct** skills, duties, & working conditions.
- F/I as a COI criterion describes situations where EE job duties in & out of a proposed unit are connected in a way that a rational & defensible line cannot be drawn around a proposed unit for the purposes of CBing.
    - absence of shared & overlapping duties does not preclude a finding of F/I based on a continuous work process (e.g., EEs on a manufacturing assembly line may perform discrete tasks yet be F/integrated)
    - **Contrast with F/R:** if a separate team is working closely in tandem with other departments, the fact that EEs rely on one another to do their jobs in the sequential work process described above is = **close F/R**.

Ratio: there was NO continuous work process but merely a close F/R;

- LRB also affirmed F/I alone is not determinative of COI.

EXPANDING BARGAINING UNITS

- Rebuttable presumption against additional BUs
- Presumption at its lowest at 2nd BU unit & increases with each additional BU

***Olivetti Canada Ltd.* (1974) BCLRB — expanding BU as per s. 142; challenges COI test**

- **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.

Facts: union seeking variation of certification to include 2 Nanaimo EEs to existing BU for Vancouver EEs.

➢ **ER's position**: Nanaimo EEs are supervised separately & working conditions differ from Vancouver EEs; also Nanaimo EEs will find it difficult to participate effectively in the affairs of a BU dominated from Vancouver.

Issue: does the Board have jurisdiction? **YES.** Allow variation? **YES.**
Analysis: can't assume narrow interpretation, that LRB can ONLY include pre-certification EEs to a new BU, but can't add new groups to existing BU— the Board has broad power to make major alterations in substance of certification.

➢ ER's position makes sense abstractly; practically, however, factors relevant to forming a BU have to be evaluated in proportion. The viability of BU is more important than COI; here multi-location units are appropriate for CBing.
➢ if the 2 Nanaimo EEs want a meaningful chance to participate in CBing, they MUST do so as part of larger BU to have real leverage with ER —>**NOTE:** this rationale challenges establishing COI *test*.

Ratio (Olivetti principle): for the LRB to consider adding new EEs to an existing BU, the proposed BU:

➢ MUST be appropriate for CBing —>rational defensible line, else conflicting jurisprudence.
➢ MUST not use existing support to sweep in other EEs against their will —> MUST obtain support from new EEs.

***Vancouver Museum & Planetarium Association* (1990) IRC — leading case re: expanding BUs**

- Under **s. 142**, when keeping one BU, but adding EEs into it, use 4 ***IML*** factors.
- Under **s. 18**: for a new BU, use the 6 ***IML*** factors — remember LRB has presumption against proliferation
    - may be the only option if it is a different union;. If it is a different union, you cannot apply for **s. 142**.

Facts: Board issued certification for Museum EEs except the Food shop (excluded since no Museum EE worked there); Museum eliminates contract with food services & hires same people

Issue: new cafeteria EEs appropriate to include in existing certification? **NO.**

Law:

- **Local 835 v Terra Nova… Ltd. (1974) SCC:** the purpose of a certification is to get CBing process underway; once process is underway, the certification is, for most purposes, spent.
- ***Automatic Electric*… (1976) BCLRB**: If the ER refuses to agree to a BU expansion, a union wishing to encompass other unrepresented EEs may only do so in one of four ways:
    1. organizing the unrepresented EEs & applying for a new certificate (**s. 18**)
    2. organizing the unrepresented EEs & applying for a variation pursuant to the ***Olivetti principle*** (**s. 142**);
    3. convincing the appropriate LR tribunal that the parties have in fact agreed to include these EEs in the BU;
    4. convincing the appropriate LR tribunal that the existing certification as initially granted already encompasses the unrepresented EEs and that it has not been diminished by agreement
- ***Bell Canada*… (1982) CLRB**: when determining the BU scope, LR tribunal is concerned with what **it** had intended the scope of the certificate to be, not with what the parties **had** intended it to be
    - the interpretation or clarification of a certification order is a question of law, not a question of fact.
    - The intentions of the parties to the application are relevant only insofar as they assisted in clarifying the intent of the original LR tribunal.
    - Disclaimer — evidence re: intention of the parties or LR tribunal will, however unintentionally, reflect a party's current view of what it intended as opposed to what it actually intended originally.

Analysis:

- after certification, the parties can freely adjust the scope of the BU; however, neither party is obliged to agree to subsequent adjustments.
- #4, in ***Automatic Electric***, begins with a determination of the BU scope when the certificate was initially granted
    - While the scope may change a moment after certification due to the voluntary activity of the parties, nothing, however, affects the scope which existed at the moment of certification.
    - That is the moment of the BU's conception, as determined by the appropriate LR tribunal. It is from this unique point in time that all else flows in a labour relations sense
- Providing a framework for new classifications to accommodate new groups of EEs from time to time is only evidence of a mechanism for reaching agreement to extend the scope of the BU. It is not, by itself, evidence of an agreement to extend the scope of the BU.
- Scope of BU set at time of certification. Numerical changes are ok (e.g., adding more security guards already in BU since the new group EEs are inappropriate to exclude). The Board's jurisdiction is to attach cert to EE's, not to work/business.
    - EEs who are employed by a different ER cannot be covered, in the labour relations sense, by the original certification despite its generic wording NOR can they be covered by the certification in a legal sense because they were not EEs of the ER for which the certification issued.
- When an agreement is concluded for each new group of EEs, the framework of the BU extends to encompass them. Framework agreements alone, however, do NOT oblige the ER to agree to each new group of EEs proposed by the union. If an ER refuses to agree to the union as the bargaining representative of a new group of EEs, the issue becomes whether the existing certification compels ER to bargain with Union vis-à-vis this new group of EEs

Ratio: the parties' agreements since the original certification are NOT determinative of the scope of the original certification. Even if the CA provided a framework for the inclusion of the cafeteria workers at some point, the parties are required to reach an agreement in the CB process to include these workers.

- the issue between the parties in this case was never whether the current CA contained agreement to include the cafeteria workers but, rather, whether the original certification was broad enough to encompass them
- The findings made by the reconsideration panel concerning the parties' agreement from time to time to expand the BU simply confirmed that the original certification order issued by the Board encompassed less than the present configuration of the BU. The certification order could not include cafeteria workers, who at that time, were not even a glint in eye of the either the VMREU or the Association

Partial decertification — process for de-certification (***Starbucks***):

- First answer threshold question —> make sure both groups have an appropriate BU (so that if one group left, the remaining BU would still be a remaining BU, AND the group that is leaving would also be appropriate.
    - For threshold question, go through ***IML*** factors for each group – the one staying, and the one leaving.
- Then go through factors (i.e., a-f below).

***Starbucks Corp*. (2001) BCLRB — reducing BU size; partial decertification: focus here is [f] —>practical impossibility**

Facts: 12 stores represented by union; originally had 4 stores & expanded the units to 12 stores altogether; certain EEs apply to vary the union's certification by removing EEs at store 185 from existing BU (partial decertification **s. 142**).

➢ Starbucks (ER) supported the EEs seeking partial decertification; union opposed the application.

➢ **Dilemma**: can't decertify through **s. 33** since decertification provision because will not reach the 45% threshold.

Issue: is one store appropriate on its own? **YES.**

Law/Analysis: ***White Spot* (2001) BCLRB:** 2-step approach to adjudication of applications for partial decertification:

1) Board considers whether applicants have demonstrated a rational & defensible line can be drawn around both groups wishing to leave BU & EEs wishing to remain
    a) held the applicants have a sufficient distinctiveness — a distinct COI — based on the first four ***IML*** factors.
        - Look at 4 ***IML*** factors for COI (not all 6 – lower threshold than establishing 2nd BU)
2) If YES, consider whether certain factors should outweigh the applicants' wishes:
    a) Impact of granting application on EEs remaining in BU;
        - Board likes bigger is better: any time a BU loses members, there is diminution of bargaining power, but here, it is only 8%; minimal impact NOT sufficient to overcome applicants' wishes.
    b) Impact of granting application on collective bargaining relationship as a whole;
        - Focus is on the impact on CA rights, but can include other interests, such as career advancement opportunities —>here, impact is minimal since seniority rights for remaining EEs will not be significant (since EEs usually apply to work in one store as opposed to multiple stores).
    c) Whether application is tainted by improper interference from ER or another entity;
    d) Whether application is disguised raid application;
    e) Whether timing/context of application makes it inappropriate for it to proceed;
        - Example, in the middle of bargaining, partial decertification even more destabilizing
    f) Whether decertifying entire unity is <u>practical impossibility</u> — most significant factor here
        - if applicants demonstrate that decertifying the entire BU is NOT a practical possibility, for geographic or other reasons, the Board may be more inclined to allow <u>partial decertification</u>.
        - Conversely, if the party opposing the partial decertification demonstrates that decertifying the entire BU is a practical possibility, the Board is likely to dismiss the application & require EEs who no longer wish union representation to apply pursuant to **s. 33(2)** rather than **s. 142**

Holding: <u>rational & defensible line</u> can be drawn around this group; granting application will have <u>negative impact on interests of EEs who would remain</u>, but amount of harm not sufficient to counterbalance weight to be given to <u>EE choice on issue of union representation</u>; NOT enough evidence whether decertifying entire BU is/is not a <u>practical impossibility</u>.

➢ THEREFORE, partial decertification granted.

Commentary:

➢ <u>Policy implications</u> —>Board affirmed decision in ***Whitespot*** insofar as partial decertification is ONLY available in limited circumstances as opposed to "on demand". <u>Refusal/bad faith participation</u> by applicants to Board ordered mediation and/or <u>failure to adduce evidence</u> supporting partial decertification will likely be fatal to application.

- Moreover, the Board still has to weigh other factors against wishes of applicants for partial decertification.

6. (Oct 10) — Securing Bargaining Rights: Enforcement Through Unfair Labour Practices (S. 6)

- **NOTE:** Explicit link between **s. 6** & **s. 11** (duty to bargain in good faith) made in ***Noranda Metal*** **(p. 30)**
- one possible remedy to unfair labour practices is automatic certification —>***Radio Shack*** **(p. 30)**

4:100 Introduction— Estevan 1931; Human Rights Watch — If proper remedies don't exist, ER will just consider consequences of getting rid of union just "a cost of business" (Weiler talks about importance of remedial certification).

- ➢ **Section 4 —** the ER & EE have rights to join organization & unions respectively & participate in lawful acts.
  - merely enunciates the fundamental principle & does NOT confer substantive rights.
- ➢ **Section 6(1) —** except as otherwise provided in **s. 8**, an ER or ER's rep must not interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.
  - does NOT require anti-union animus; focus is the objective effect of ER's conduct on EEs
  - Explaining position/stating facts versus disparaging Union & undermining exclusive bargaining agency
- ➢ **Section 6(3) —** requires anti union animus**:**
  - **(a) —** an ER or ER's rep should NOT discipline/terminate an EE for involvement in unionization attempts.
  - **(b) —** an ER or ER's rep should NOT discipline/terminate an EE without proper cause when a union is conducting a certification campaign.
  - **(d) —** an ER or ER's rep should not use coercion or intimidation to prevent EEs from unionizing.
- ➢ **Section 6(4) — s. 6(3)** does NOT preclude ER from disciplining/terminating EE for proper cause or make reasonable business changes —> catch-all provision "business as usual defence"
- ➢ **Section 8 —** Subject to the regulations, a person has the freedom of expression re: matters relating to an ER, a trade union or unionization, provided that the person does not use intimidation or coercion.
  - "views" as ideas, thoughts, beliefs, judgements & opinions, but not acts done in furtherance of those views;
  - "views" do not include calls or invitation to act;
  - Lies are impermissible, though incorrect and unreasonable statements are protected;
  - Concentrated protection on more direct forms of pressure;
- ➢ **Section 9 —** a person must NOT use coercion or intimidation to compel a member to/from join or continue as a member to a union —>requires anti-union animus or the perception of it.

Forano Limited **(1974) BCLRB — S. 6 — unfair labour practices; ER anti-union animus (hostility)**

- ➢ **S. 4** enunciates the fundamental principle of **s. 6**. Weiler relies heavily on this provision
- ➢ ***Forano*** was overtaken by several LRC amendments, thus NOT helpful beyond context.

Facts: 4 EEs terminated post unionization attempts – 3 union organizers + 1 slacker

Issue: anti-union hostility vs proper cause?

Analysis/Ratio: ER conduct which has a significant impact on EE's freedom to make up his or her own mind about CBing is the kind of conduct which will run afoul of **s6** —> objective test

- ➢ we must always be conscious of the fact of EE dependence on the ER, especially for job security, and the opportunity this gives the ER for undue influence on that choice.
  - Comments and predictions which might seem innocuous take on a very different hue when voiced by management during unionization.
- ➢ *The safe course for an ER is neutrality*, to resist the temptation to actively partisan in a campaign against unionization; decision should be **left up to EEs**, both for and against—>**irrelevant now that *s. 8 exists*.**

***Convergys Customer Management Canada Inc.* (2003) BCLRB — *Forano* no longer good law re: ss. 6-9.**

➢ Neutrality component in ***Forano*** is essentially overturned — reflects the Liberal agenda after LRC amendments.

Facts: Union alleged that the ER violated **ss.6.1,6.3(a)(b)(d)** & **s.9** by publishing memos to the EEs about union organizing drives & hiring security guards to monitor the union's leafleting activities, & conduct & communication by Elaine House.

Law:

➢ ***Cardinal***: the unfair labour practice provisions of **ss. 6 & 9** are aimed to meaningfully preserve EE's freedom of association (i.e., the EE's right to "freely chose" union representation for the purpose of CBing).
  - ⇑⇑ is necessary given EEs economic dependence on ERs.

➢ **LRC**: contemplates an ER's right to express its views in coexistence with EE' freedom of association, having regard for the economic dependence & resulting vulnerability of EEs (i.e., MUST weigh **s. 6** in light of **s. 8**)
  - The Board weights the two rights by making judgments about: the impact of an ER's views; the EEs' ability to account for that impact; an ER's legitimate interest to express its views; the desirability/efficacy of Board intervention; & how best to preserve EEs' freedom of choice given the realities of the particular workplace

➢ ***Focus Building Service***: ER is no longer required to remain "strictly neutral" during a union organizing drive or prior to a representation vote insofar as the ER does NOT use undue influence, intimidation, coercion or threats"
  - undue influence is a species of intimidation. It maybe distinguished from the more direct form of equally coercive pressure by a certain subtlety of application.

➢ ***North Shore…***: the absence of undue influence, a subtle/indirect form of intimidation, in **s. 8** suggests that the Board should focus the application of coercion & intimidation to the use of more direct forms of pressure.
  - under **s. 9**, coercion or intimidation involves a person using force, threats of adverse consequences, fear or compulsion for the purpose of controlling or influencing an EE's freedom of association. A violation (e.g., economic pressures) will more likely be found where the person is an ER or exercises "ER-like influence".

➢ A deliberate lie is not within the scope of **s. 8** & can be considered interference under **s. 6(1)** — an objective test can determine a person's intention; however, an honest but mistaken belief is exempt from this scrutiny.

Analysis/holding:

➢ Board held that even though ER's views were unreasonable, it was a legitimate expression of a view; will look at:
  - Does ER have power, who was speaking, what was said, and what context—>evidence of coercion/ intimidation; views have to be genuinely held.

➢ Board held that Elaine House had no direct link to ER, thus no breach of **s. 6(1)**
  - However, a link could be created if ER allowed Elaine to act during paid time or using work resources.

➢ Board held that the deployment of security guards to conduct constant surveillance of EEs interaction with organizers was coercive & intimidating, thus a breach of **ss. 6(1), 6(3)(d) & 9**, 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** & do not constitute interference for the purpose of **s. 6(1)**. Views protected by **s. 8** included:
  - View that Union is disrespectful & untrustworthy – even where view is mistaken and unreasonable.
  - The incorrect statement that the ER is under no obligation to bargain with the Union.
  - A false statement that signing a union card is the equivalent of signing a contract.

➢ Board held that the ER's threat to dismiss EEs for contravention of a blanket prohibition on disclosing contact information improperly interfered with the selection, formation or administration of a union contrary to **s. 6(1)**

Cardinal Transportation BC Incorporated (1996) BCLRB — s. 8; characteristics of captive audience meetings

Ratio: one method for an ER to discourage the unionization is to suddenly increase its communications with its EEs (e.g., "captive audience" meeting during a union organizing drive).

Characteristics of a captive audience meeting include:

- held on company property during working hours, with no deduction in pay;
- attendance is compulsory, or if the ER states that it is voluntary, all EEs feel compelled to attend because not to attend would be to clearly identify oneself as a supporter of the union; and
- senior management is in attendance

- there is typically a discussion about current wages & working conditions; company performance, & industry or sector performance;

***RMH Teleservices* (2005) BCLRB — section 8; captive audience meetings; remedies**

Facts: reconsideration of a 2003 LRB decision holding the ER's conduct — to display a slideshow containing anti-union messages on all four walls at work several times during a union organizing campaign + holding an anti-union popcorn party + giving out nominal gifts + inviting managers from other branches — to NOT constitute unfair labour practices.

Issue: did the ER's conduct constitute unfair labour practices? **YES**

Analysis: since **s. 8** does NOT guarantee an audience, captive audience meeting increases LRB's scrutiny due to fact that EEs are less able to turn away from the ER due to the latter's authority —>context matters.

- ➢ a reasonable EE would feel compelled to hear about the ER's views & ultimately influence the EE's free choice

Ratio: where an ER expresses its views about unionization in a manner that effectively forces EEs to listen, this manner of communication may render otherwise permissible expression coercive or intimidating.

- ➢ MUST consider both <u>content</u> & <u>method</u> used by ER

Commentary

- ➢ inviting managers from other branches: **not unfair**.
- ➢ Nominal value gifts: *not likely swaying EEs*, but **technically a breach not protected by s8** (not a "view").
- ➢ Difference between **6(3) & 6(1)**: 6(3) is *NOT saved by s8* (free speech). 6(3) is about <u>inducing</u> by negative or positive means an EE not to join a union. **Requires anti-union animus**.]
- ➢ Refusing EEs from wearing buttons = **6(1) violation** – not a *view*.

Remedies

- ➢ remedies must be rationally connected to the consequences of a contravention & consistent with the LRC's policy objectives & statutory scheme (e.g., ensuring freedom to organize, recognize power imbalance; deterrence).
- ➢ Board must ensure that remedies are compensatory, not punitive, but also not so minimal that they amount to a mere <u>cost of doing business</u>.

***0720941 BC Ltd (Re)* (2008) BCLRB — ss. 6-9; interference**

Facts: waste disposal company of only 10 EEs; certification campaign at the worksite led by EE who was terminated (but multiple instances of him being late for work) + ER asking which EEs had signed union cards while out for drinks

Law:

- ➢ ***Convergys*:** Not every action by ER constitutes "interference" within the meaning of **s. 6(1)**.
  - <u>"interference" to be interpreted contextually and purposively</u>, requires consideration of both objective effect of impugned ER action on the union & ER's business reasons for its actions
- ➢ ***Viva Pharmaceuticals***: since unionization campaigns are a sensitive time, certain conduct by ER will almost always constitute **s. 6(1)** "interference" (e.g., ER asking EEs if the latter has signed union cards or supports the union)
- ➢ ***Island West***: ER asking whether EEs support unionization or asking who are the union organizers is NOT an "expression of a view", thus not protected by **s. 8**.
- ➢ ***Excell Agent…***: under **s. 9**, coercion or intimidation involves use of force, threats (whether actual or implied), fear or compulsion for the purpose of controlling or influencing EE's freedom of association.
  - relevant factors include context of ER's statements, power imbalance, & ER's ability to exert economic pressures —> focus is the objective effect of ER's conduct against a reasonable EE.

Analysis/holding:

- ➢ while <u>EE's termination</u> was without proper cause, it was also without anti-union animus, thus only **s. 6(4)** applies
  - terminating manager did NOT know that EE was union campaign organizer + EE was mostly late for work.

- ➢ *Re inquiries about union support* – even though manager's inquiries about card signing came out of concern for business, conduct meets **s. 6(1)** interference as there was NO legitimate business interest in the inquiries.
    - ER's conduct NOT protected by **s. 8** since impugned inquiries are not "expression of a view"
- ➢ A breach of **s. 9** requires an anti-union animus; manager's inquiries did NOT meet this threshold (spur of the moment & did not involve premeditation + manager had not expressed anti-union sentiments = innocent mistake).

***Peter Ross 2008 Ltd. (Re)*, BCLRB Nos. B59/2012 — reconsideration on ss. 6 & 9 grounds**

Facts: 32 EEs (mostly ESL); started org-drive with ⅔ EEs signing membership cards; only 5 out of 39 voted to certify.
Issue: reconsideration on 4 grounds: (i) direct threats were needed for **s. 9** finding, (ii) EEs didn't have enough opportunity to assess the choice of a 2nd union, (iii) internal inconsistency, & (iv) ER contravened **s. 6(1)** for instructing EE to vote NO.
Law/analysis:

1. ***Excell Agent***: a direct or implied threat to job security does NOT fail to be coercive or intimidating under **s. 9** merely because it is based on legitimate or honestly held beliefs or views of an ER about certification —> **context matters**.
    - relevant factors include context of ER's statements, power imbalance, & ER's ability to exert economic pressures —> focus is the objective effect of ER's conduct against a reasonable EE.
    - ER told EEs that ER's competitors were all non-union, all the contractors from which the ER obtained work were non-union, the economy was still fragile, and it was difficult to get work as it was. The ER clearly conveyed that it would likely be more difficult to secure contracts if the EEs voted to certify the Union.
2. ***Simple Q***: broadened speech rights in the Code allowed an ER to express favour for one union over another, even in the context of a captive audience meeting; however, the absence of a reasonable opportunity for the EE to make enquiries & assess the ER's views, & the timing of such meetings, is sufficient to constitute a breach of **s. 9**.
    - captive meeting was held on Friday & the vote was on Monday; also most EEs were ESL immigrants who often brought non-work documents to be explained by ER's superintendent, thus especially vulnerable to coercion & intimidation.
3. Original decision that a superintendent's breached **s. 9** by telling an EE that unionization would bankrupt the ER's company was internally inconsistent with the finding that the ER calling 3-4 EEs a day before the vote saying certification would cause ruin did not breach **s. 9** --> **context matters**.
    - the timing of ER's telephone calls to the EEs (the day before the vote, and shortly after communications at a captive audience meeting that we have found were coercive or intimidating), the fact that the ESL EEs were particularly vulnerable group, and the content of the calls = coercion or intimidation as per **s. 9**.
4. **s. 6** ground NOT successful; ***Simple Q*** held a distinction between the expression of a view & a direction to others to act. An ER merely expressing the view that EEs should NOT vote for a union is NOT sufficient to found 'directing'.
    - comments need to be deemed "inciting" or "provocative" to meet **s. 6** threshold.

Concurring: outside the context of a deliberate lie, the proper focus of **s. 9** (i.e., whether comments are coercive or intimidating) should be on the impact of the comments on the EEs in the particular circumstances of the case.

***Peter Ross 2008 Ltd. (Re)*, BCLRB B104/2012 — remedy = but-for ER's interference, certification would have occurred**

- one possible remedy to unfair labour practices is automatic certification —>***Radio Shack* (p. 30)**

Issue: what are the appropriate remedies in light of the reconsideration decision above?

- ➢ **Union's position:** a remedial certification order because union enjoyed the support of a significant majority of the EEs before the ER's unfair labour practices, & because those unfair labour practices were so severe and widespread.
- ➢ **ER's position:** the union's failure to complain of the unfair labour practices until four months after the fact must be taken into account in assessing the seriousness of the alleged unfair labour practices
    - if ER's actions been as egregious as claimed, the Union would have complained immediately (i.e., "but-for")

Law/analysis: ***Cardinal***: factors to be considered before issuing a remedial certification order (focus is 'but-for'):

- (1) the level of membership support prior to and subsequent to the ER's unfair labour practice;
  - more than ⅔ EEs had signed membership cards during the organizing drive
- (2) the seriousness of the ER's interference & the reasonable effect (objective) of that interference on EEs;
  - NO subjective evidence re: impact of ER's conduct on EEs needed, ONLY objective evidence.
- (3) the point or stage in the organizational drive of the ER's interference;
  - after the organization drive but before the vote —>not possible to establish momentum loss
- (4) if less than a majority of EEs are members of the trade union, whether there is sufficient support for CBing.
- (5) the "totality of the conduct" of the ER;
  - use of implied threats on vulnerable EEs, timing, refer to ***Excell*** contextual factors.
- (6) the specific nature of the ER & EE
  - most EEs were ESL, thus particularly vulnerable.

7. (Oct 17) Establishing the Relationship: Statutory Freeze, Proper Cause, Raids and all that

4:300 The Statutory Freeze — prohibits unilateral alteration of employment terms & conditions:

- restrains ER conduct which may undermine the union's organizing or negotiating efforts
  - anti-union animus is NOT required for a breach of statutory freeze provisions, therefore legitimate conduct on the ER's part may be illegal during the freeze period

There's a three-stage "statutory freeze" process:

- before the certification process (i.e., during the organizing drive) —> **s. 6(3)(b)**:
  - **S. 6(3)(b) —>**ER must not terminate/discipline EE during certification drive without proper cause.
  - organizing drive ends with filling of application to certify.
  - Requires more than mere interest to continue with organizing drive.
- **during the certification** process —> **s. 32**:
  - starts when an application to certify is filed
  - ends after the application to certify is dismissed or after certificate is issued
- during the bargaining process **after certification** —> **s. 45**:
  - starts after certification or when notice to bargain is given
  - ends when parties are in a legal strike or lockout position

Proper Cause — appropriate standard during organizing drive

- S.6(3)(b) imposes a proper cause standard on the ER re: disciplinary sanctions during a certification campaign.
- Proper Cause — basically a middle-ground between termination with reasonable notice (i.e., individual employment in common law) & just and reasonable cause (implemented once a CA is in force).
  - proper cause displaces common law contract of employment.

White Spot (1993) BCLRB — the test for proper cause 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 ER's operation & the manner in which similar circumstances have previously been addressed.
  - ER must show it **acted in a *bona fide* manner**, & **was not influenced by extraneous or improper factors** (e.g., discriminatory or arbitrary motivations).
- Of course, the presence of anti-union animus will continue to defeat any argument of proper cause.

***Cheshire Homes Society* (2001) BCLRB — ER's defence re: proper cause**

1. Establish decision based on **good faith**;

2. EE engaged in **conduct deserving discipline**;
3. **Reasonable relationship** between conduct and discipline:
    - steps taken to investigate;
    - whether EE was given an opportunity to respond to allegations;
    - EE's past record of discipline;
    - the rationale for the penalty chosen;
    - the manner in which similar cases have been addressed it the past;
    - the seriousness of an offence in the particular employment setting

Organizing Drive

- ➢ What constitutes an organizing drive is not necessarily always clear
    - »contextual analysis (i.e., factual determination).
- ➢ Mere interest is not an organizing drive —>KEY IS DEMONSTRATING THERE IS SOMETHING MORE THAN MERE INTEREST (e.g., process of getting EEs to sign cards is an organizing drive).
- ➢ Important to determine when the organizing drive starts (i.e., when is it the actual campaign vs when is it just mere interest?) because this starting point needs to be relied on for some of the **s.6** provisions,
    - **S. 6(3)(b)**: ER cannot discharge without proper cause during certification campaign.
- ➢ **EXAM**: show reasoning for why the facts indicate mere interest vs organizing campaign.

Exceptions to ALL STATUTORY FREEZEs:

1. Business as usual test —> ***Kamloops***
2. LRB discretion —> **s. 45(3)**
3. Termination/discipline for proper cause —> **s. 45(4)**

S. 45 (exceptions to statutory freeze):

- ➢ **(1)** prohibits an ER from changing the EEs rate of pay or altering any other term of employment within the 4 months following certification of a unit, or until a CA is executed, whichever occurs first.
- ➢ **(3)** Despite subsection (1), the board, after notice to the trade union, has the discretion to:
    - (a) authorize an ER to change the EE's rate of pay, or alter a term or condition of employment, AND
    - (b) specify conditions to be observed by an ER so authorized.
- ➢ **(4)** This section must not be construed as affecting the ER's right to discipline/terminate an EE for proper cause.

***Kamloops Daily News Inc (Re)* (1993) BCLRB — exception to statutory freeze [business as usual test & s. 45 (3)]**

Facts: ER had applied under **s. 45(3)** to reduce pay, by 9.4%, a newly certified unit of EEs.

Issue: is the ER's roll-back attempt within the business as usual test AND/OR existed pre-certification? **NO**

Analysis: the LRB ought to either decide on the basis of the business as usual test or **s. 45(3)** discretionary power:

- ➢ business as usual test: the ER is barred from taking unilateral action which could be reasonably inferred as likely to influence the certification process
    - No evidence that the ER had previously imposed or introduced a wage roll-back; the evidence established that, in the past, wage increases & benefits negotiated with unionized EEs were given to the non-union EEs.
    - ER cannot rely on non-unionized EEs vote—>NOT representative of EEs true wishes given the procedural irregularities + ER had NOT initiated the roll-back scheme when the union applied for certification.
- ➢ discretionary power: the purpose of **s. 45(3)** is to ensure the integrity of the CBing process by providing a period of calm. Prior to the LRB exercising its discretion to grant changes post-certification & before CA, the following factors MUST be considered:
    - Nature and extent of proposed changes—>9.4% reduction.
    - Reason for alteration —> economic justification NOT sufficient to allow unilateral changes by ER

- Need for alteration at this particular time —>NO evidence of urgency
- LR implications of proposed changes—> do the proposed changes promote meaningful CBing?
  - ER has other options e.g, initiate unilateral changes if no CA (since freeze period lapses in 2 months)

Ratio: failed **business as before** test because roll-back decision was NOT made before freeze; **discretionary test** considers purpose/intent of leg, then look to **45(3) factors**.

➢ Purpose of freeze is to ensure industrial stability – allowing reduction in salary during stat freeze wouldn't serve purposes of Code; main issue = significant change in pay but no evidence of urgency in financial problems.

UFCW, Local 503 v Wal-Mart Canada Corp. (2014) SCC — test for business as usual (Quebec-based)

Facts: Walmart in a Quebec branch (ER) gave notice of shutting down store "for business reasons".

Issue: was the ER's unilateral right to shut down its business a breach of the statutory freeze provision? **YES.**

Analysis/ratio: the true purpose of statutory freeze provisions is to foster the exercise of the right of association for the purposes of establishing CB agreement & limiting the ER's influence on the workplace

➢ the 'business as usual' defence —> evidence MUST show that the impugned act was reasonable or consistent with that ER's past practice OR reasonable/consistent with what another ER would do in similar situation.

8. (Oct 31) — 3:520 Common Employer and Successorship — ss. 35 & 38

➢ ***Richmond Cabs Ltd*. Re (1995) BCLRB**—>a common ER declaration is remedial in nature, designed to address a mischief & to protect, not create, bargaining rights**.**

S. 41 — Voluntary Council of Unions (Example 1 — examinable)

- 1 Common ER at 4 different sites; each site with a different BU at each site.
- Union could apply under **s. 38** to have 4 units joined because they are all part of one union for CBing purposes.
- Each individual BU still maintains autonomy (e.g., 1 BU can decide to join the main group's negotiation just with regards to wage rate, & continue to negotiate separately for the remaining work terms & conditions.
- Not an exclusive group arrangement (i.e., no exclusive agency).
  - e.g., can pursue grievances & arbitrations separately

S. 43 — Amalgamated ER Agency (Example 2 — NOT on exam):

- 4 different ERs; each ER needs to be represented by 1 BU one unit, thus 4 different BUs.
- Here, ERs can apply to the Board to be joined into one group for negotiation; however, each ER must negotiate EVERYTHING as a group with the other ERs (i.e., they are an exclusive group arrangement; ERs cannot negotiate as a group for only some terms, like the union).
- This grouping is often done to promote industrial stability; else, one union unit would consider which ER was most vulnerable (e.g., having financial difficulties) & target that ER for negotiation. All the other BUs might then rely on this as the new 'industry standard', thus making all the other ERs capitulate (i.e., unfair advantage).

Common/related ER requirements (s. 38):

➢ There must be more than one entity carrying on business.
  - Subsidiaries of a parent can be common ER

➢ The two entities must be under common control or direction.
  - Ownership or control;
  - Control can include operational control or pervasive influence

➢ The two entities must be engaged in associated or related activities or businesses.
  - Requires more than mere suspicion of erosion of work, union must show a real potential;

➢ There must be a labour relations purpose served by making the declaration.
  - Industrial instability from proliferation of BUs counts as a labour relations purpose;

➢ Multiple Unions —> where a serious question vis-à-vis EE wishes, Board will order a vote to determine rights;

- Winning Union's CA survives; Board will usually dovetail seniority lists

***White Spot* v BCLRB (1997) BCSC — common/related ER test.**
Facts: WS sells restaurant (unionized) to Gillies as a franchise; Union wants to negotiate with WS (dominant ER).
—>Case history: BCLRB decisions, original & reconsideration, challenged by franchisor & franchisee (Gillies Restaurants); both decisions held common ER status as per **s. 38** based on the following facts:

1. the franchisor has substantial control over menu prices & food items.
2. the franchisor has substantial control over the franchisee's profits.
3. the franchisor has substantial control over the franchisee's promotions & advertising.
4. franchisor requires the franchisee to have a GM trained by WS & operating within WS's standards.

Issue: is White Spot and Gillies Restaurants a common ER as per **s. 38** of the LRC? **YES.**

- ➢ what's the interrelationship between **ss. 35** & **38**? IOW, Can s. 38 be used where **s. 35** applies? **YES.**

Law: a franchisor & franchisee are held to be a common ER, notwithstanding separate ownership & management, on the basis of degree of control exercised by the former over the latter's activities as per the franchise arrangement.
Analysis: it is within the LRB's jurisdiction to vary the form & scope of the existing certification if a petitioner wishes to contest the particulars of a **s. 38** remedy (i.e., a **s. 35** application does NOT prevent the LRB from imposing a **s. 38** remedy)
Ratio: whether or not a franchisor has sufficient (dominant) control over a franchisee to justify a **s. 38** declaration is a question of fact. **S. 38** is available whenever the entities are under "common control & direction".

- ➢ while a bona fide r/ship between franchisor & franchisee (i.e., ***no anti union animus***) is one factor that can influence against a **s. 38** declaration, it was NOT the DOMINANT factor.

Holding: BCLRB's original decision & reconsideration decisions upheld.

Successor ER requirements (s. 35):

- ➢ Aims to discourage improper ER practices vis-à-vis CBing
- ➢ Must be given a purposive interpretation;
- ➢ First, look to nature of predecessor's business;
- ➢ Second, look for a discernible continuity in business (COB) from predecessor—>***Lyric Theatre*** via ***Zellers***
  - **KEY Question**: whether a transfer is a business from a labour relations perspective?
- ➢ EE is NOT required to accept employment;
- ➢ Successor required to offer employment

***Zellers Inc. (Store No. 264) Re* (2012) BCLRB — common successor NOT found**
Facts: Target bought various Zeller's leases in its mega-Canadian-entry-plan; EEs at one Zellers store are unionized.
Issue: Is Target a successor ER to Zellers as per **s. 35**? **NO.**
Law: ***Lyric Theatre*****—>**successor must draw its 'life-blood' from the predecessor—>essential question to be asked is whether there has been a transfer of the essential elements of the business (i.e., discernible continuity in business):

- ➢ 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 EEs are performing the same work; hiatus in business; whether customers of former business are served by new business; arm's-length r/ship.

Analysis: No transfer of inventory, IT systems, employment policies, fixtures, customer loyalty programs, etc.

- ➢ there's been a transfer of rights to leases, pharmacy records, etc. While the location will be a key part of Target's success, this aspect is not specific to Zellers – same can be achieved by acquiring a lease from ANY big box store.
- ➢ Hiatus of business (6 months – 3 years) is significant. Although EEs 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.

Ajax (Town) v CAW (1998) Ont. CA — common successor found (Ontario's s. 35 equivalent)
Facts: Charterways (unionized EEs) is contractor for Town; Town poached Charterways EEs after terminating contract.

➢ **History**: Ont. LRB held actions to constitute "sale of a business"-->successorship; TJ quashed LRB's decision

Issue: did Town employing Charterways constitute successorship as per **s. 64** of Ont. LRC? **YES.**

➢ IOW, do the facts support the sale of a business?

Law:

➢ **S. 64 of Ont. LRC**: successorship provision protects the permanence of bargaining rights after business sale.

➢ ***Lester* (SCC)**: while the terms "sale" & "lease" may have restricted meanings, "transfer" & "other disposition" have been broadly interpreted to include transactions such as exchange, gifts, trust, take overs, mergers & amalgamation

- virtually all LRBs have interpreted "disposition" broadly to include almost any mode of transfer

Analysis/ratio: Transfer of EEs is a significant part of interpreting change of employment terms since prior contract showed clear importance of continuity/stability (e.g., same drivers for same route).

➢ The continuity of the SPECIALIZED SERVICES was a *'transfer'* which doesn't have to take a particular legal form—>focus is **disposition of a valuable interest to another party** (broad interpretation).

***Granville Island Brewing Co. Re* (1996) BCLRB — s. 35(3): determination of acquired/retained rights & privileges**

Facts: Gibco acquired by successor ER (Calona); merger agreement, negotiated by Union, provided that Gibco EEs join Calona in order of seniority; Calona hired 11 EEs this way, but not brewmaster M (important part of business).

Issue: is the successor obliged to offer continued employment to the predecessor's EEs? **YES.**

Law: **—>*BCGEU v BC* (1988) BCCA**: an EE cannot be forced to transfer/ take up employment with a purchaser.

➢ IOW, **s. 35** does NOT require EEs to follow the assets after the sale of a business; rather, if EEs wish to move to the successor ER, & if there are jobs available for them, the terms & conditions of employment will continue.

➢ any EE termination or layoff MUST be for "just cause" (i.e., a successor ER may not use the excuse of a successorship transaction to weed out EEs deemed undesirable by refusing to extend continued employment)

—>*Paccar* (1989) SCC: once a CA is in place, NO further room for individual contracts of employment; the LRC supplants common law provisions of the employment r/ship (e.g., the "just cause" provision imported in CAs).

Analysis: the successor inherits all of the predecessor's obligations, including the obligation to continue employment subject to the CA; THEREFORE, if the predecessor's EEs wish to continue their employment with the successor, the successor employer MUST extend to them continued employment.

➢ IOW, while common law applies re: a servant may follow master, the master may NOT choose the servant.

➢ above policy approach is tied to the LRC's primary purpose —> to encourage & provide access to CBing; this purpose would be undermined if ER's could cherry pick EEs subsequent to successorship.

- the right NOT to be dismissed except for just cause follows CBing & is a fundamental law & policy under LRC

Ratio: the successor MAY not use the successorship process to circumvent the just cause provisions in the CA to which it is bound: just cause provisions are mandated by, & are the law and policy of, the LRC.

➢ IOW, any poor performance issues by EE MUST be addressed through the normal disciplinary process.

Commentary: **Some limits: can't force successor ER to provide work that isn't there.

➢ continued employment does not mean a guarantee of work or a job for all of the predecessor's EEs (e.g., the successor merging the newly acquired operations into existing ones in a legitimate manner might renders many, and sometimes all, of the predecessor's "jobs" redundant

- if the above happens, CA provisions regarding layoffs, severance, seniority, bumping, posting, etc apply
- alternatively, LRB under **s. 35(3)** has a range of options to fashion an appropriate remedy.

11. (Nov 7) — Constitutional Issues – Section 2(d)

7:200 Constitutional Right to Strike? (395-396)

1987 Trilogy: SCC ruled that **S. 2(d)** freedom of association does NOT protect right to CB or strike since the ***Charter*** protects individual rights and the right to strike is collective in nature.

- ➢ **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—most significant re: 1987 Trilogy
Majority holding:

- FOA protects only activities performed by an individual; *rights CANNOT be enlarged merely by fact of association*.
- FOA = Charter protection will NOT attach to the exercise of individual rights when exercised in association; since association in itself won't confer additional rights, no constitutionally guaranteed freedom follows.
    - **IOW, since individual doesn't have const-guaranteed right to strike, union doesn't either**

Dissent by Dickson CJC:

- **collective rights are fundamentally different than individual rights** —> international norms to which Canada is party to (e.g., ILO Convention no 87) & purpose behind Charter favour protecting this right
- Inherent dignity interest involved, NOT just an economic interest; not possible to divorce the dignity a person in having a say in working conditions —> link to **Paul Weiler's** perspective on dignity of the person (page 32).
    - CBing only works with right to strike to equalize balance of power of the corporation.

Dunmore v Ontario (AG) (2001) SCC – **retreat from Alberta Reference; substantial interference test**
Issue: does the exclusion of agricultural workers in labour law legislation contravene **s. 2(d)**? **YES, but...**
Holding: exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right

- Section 2(d) above is higher threshold than tests for 2(a) and 2(b) rights:
    - **2(a)** –> ***Big M***: if intent of govt action is to interfere w freedom regardless of degree of infringement
    - **2(a)** –> ***Edwards***: if intent of govt action's interference is more than trivial or insubstantial
    - **2(b) –> *Sharpe***: two-stage test:
        - (a) does impugned activity attempts to convey meaning in a non-violent form
        - (b) if yes, does govt action actually restricts expression?

Health Services v BC (2007) SCC – affirmation of *Dunmore*; expansion of 2(d) — substantial interference test
Facts: constitutional challenge to legislation removing CA protections against contracting out and successorship
Analysis:

- earlier decisions re: exclusion of CB from FOA protection don't withstand principled scrutiny & should be rejected; protection of CBing under **s. 2(d)** is consistent with the underlying values & the purpose of the Charter as a whole.
- Similar language to dissent in ***Alberta Reference:*** recognizing EEs right to CBing as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality & democracy that are inherent in the Charter.

Ratio: government action or inaction which has the effect of interfering with associational activities violate the Charter if the action or inaction substantially interferences with the exercise of the freedom.
Substantial Interference test — only where both met will **2(d)** be breached:

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

Fraser v Ontario (2011) SCC – SCC backtracks on *Health Services*; new test is effectively impossible

Issue: challenge to Agricultural Employees Protection Act [AEPA] giving limited rights to farm workers
Holding: If the impugned legislation (i.e., AEPA process), viewed in terms of its effect, makes good faith resolution of workplace issues between EEs & their ER effectively impossible, then the exercise of the right to meaningful association guaranteed by **s. 2(d)** will have been limited.
Commentary (Craig Davis0): why did SCC shift from the previously used substantial interference test?

- Perhaps SCC considered the academic criticism that followed ***Health Services***: ER organizations wrote academic articles saying SCC had gone too far by creating a right to collectively bargain. Part of the criticism was the court was in effect constitutionalizing the **Wagner Model.**

2015 LABOUR TRILOGY
Mounted Police (2015) SCC — right to independent voice
Facts: challenge to both exclusion from bargaining & the Staff Relations Representative Program (SRRP)

- SRRP, an ER-dominated labour relations system, is the sole means for RCMP officers to have say in workplace matters, including grievances & pay; RCMP refuses to recognize independent, voluntary associations of officers

Issue: do EEs have a right to **(a)** an independent organization for dealing with management & **(b)** CBing? **YES.**
Analysis:

- Bargaining is NOT a derivative right protected only if state action makes it effectively impossible to associate for workplace matters.
    - **derivative right** – is a necessary element of right
- EEs have the right to associate for the purpose of addressing workplace goals through a meaningful process of CBing, free from the ER's control. FOA protects the right to join with others:
    1. and form associations;
    2. in the pursuit of other constitutional rights; and
    3. to meet on more equal terms the power and strength of other groups or entities.

Ratio: the right to a meaningful process of CBing is a necessary element of the right to collectively pursue workplace goals in a meaningful way. A process that substantially interferes with a meaningful process of CBing by reducing EEs' negotiating power is therefore inconsistent with **s. 2(d)**

Meredith (2015) SCC — restrictions on bargaining
Facts: challenged the ***Expenditure Restraint Act***; NOT a challenge to the SRRP system; **ERA** capped wages increases across public sector; however, RCMP still got wage increases & could somewhat discussion compensation
Issue: do government restrictions on wage increases in the ERA interfere with the FOA? **NO.**
Analysis/Ratio:

- RCMP members still had a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place
- Level at which the ERA capped wage increases for members of the RCMP was consistent with agreements concluded with other bargaining agents inside & outside of the core public administration and so reflected an outcome consistent with actual bargaining processes.

Saskatchewan Federation of Labour (2015) SCC — right to strike constitutionally enshrined; substantial interference
Facts: challenged **Public Service Essential Services Act** (introduced without consultation) which allowed ER to determine who is deemed "essential"; Unions could only challenge the 'numbers' of those deemed essential, & not the classifications of those deemed essential; duties or services severely impacted ability of unions to have an effective strike
Issue: does interference with the right to strike during CBing violate **s. 2(d)**? **YES**

- Does adding hurdles to the certification system violate **s. 2(d)**? **YES**

Analysis: The right to strike is NOT merely derivative of CBing, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

- **derivative right** – is a necessary element of right

Ratio: reiterates the dissent in ***Alberta Reference*—>** if the freedom to strike was denied & no effective/fair means for resolving bargaining disputes was put in its place, EEs would be denied any input at all in ensuring fair & decent working conditions, and labour relations law would be skewed entirely to the ER's advantage.

- underpins the EE's inherent dignity interests —> link to **Paul Weiler's** perspective on dignity of the EE (p. 32).

The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with CBing. Ask two questions:

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

Application to facts:

1. restriction on right to strike violates FOA, but can be saved under **s. 1** (since essential services, strictly construed, are justified).
2. **PSESA** was too one sided, very little chance for union to review, no alternate means to resolve disputes, & not minimally impairing.

9. (Nov 14) Negotiating a Collective Agreement (340-342)

- **S. 11** — a trade union or ER must NOT not fail or refuse to bargain collectively in good faith in BC & to make every reasonable effort to conclude a CA.
    - **S. 11** is at the heart of the LRC — sets the stage for the entire process by which the Code operates (i.e, the process of CBing is what the Labour board seeks to protect).
- ***Royal Oak* (1996) SCC**— the "duty to bargain" has two requirements:
    - *Subjective component* is **duty to bargain in good faith**
        - ask whether party has intention to conclude CA? does ER act with anti-union animus?
    - *Objective component*: have to make every **reasonable effort to conclude CA –** 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.
- The service of a notice to bargain triggers the start of the statutory "duty to bargain"
- The State will intervene to help the parties reach an agreement; however, it will generally not impose terms
    - EXCEPTIONS: first contract arbitration (i.e., first CA after certification) & ad hoc back-to-work legislation

6:300 The Bargaining Freeze (342-343)

- Similar to the "certification freeze", the bargaining freeze prohibits changes in terms & conditions of employment after notice to bargain has been given.
- **S. 45(2)** —the bargaining freeze remains in force until a lawful strike or lockout actually occurs.
    - IOW, if the Union does NOT strike when it's lawful to do so, the ER must institute a lockout to end the freeze

6:400 The Duty to Bargain (343-345)

Purpose of the statutory "Duty to Bargain"

- Industrial stability — if both parties negotiate in good faith, there's less need to resort to economic sanctions.
- Redress fundamental power imbalance by coercing the ER to negotiate with the Union
- Reinforce exclusivity model — everything must be negotiated through the Union
- Institutionalization of industrial pluralism — both parties can discuss & solve all issues in the best way they see fit.

Content of Duty to Bargain — S. 11

- Duty to fully discuss all outstanding issues;
- Once dispute & bargaining structure defined need compelling reason to depart from set course —>***Graphics Arts***
- Duty to provide enough information that party can adequately assess demands—>***Noranda Metal***

- Where ER makes a plea of poverty must open books;
- Hard bargaining is permitted, but surface bargaining is precluded ***—>Radio Shack; Canada Trustco***

Graphic Arts Local v Graphic Centre (1976) Ont. LRB — departure from agreement requires compelling reason

Facts: ER & union in drawn-out negotiations with refusals on both sides; eventually, ER made proposal & EEs voted to accept; after verbal agreement, union brought grievance under old CA & ER refused to sign until grievance was dropped + put forth 16 new demands due to ill feelings.

Issue: did ER fail to make every reasonable effort? **YES.**

Analysis: although Union wasn't completely forthright in holding back grievance until bargaining was concluded, it was the ER's conduct — putting forth 16 new demands — which gave rise to that grievance

Ratio: conduct that undermines the decision-making capability of other party contravenes the req to bargain in good faith

- the tabling of additional demands after a dispute has been defined, in the absence of a compelling evidence, MUST be construed as a violation of the duty to bargain in good faith.

Noranda Metal Industries Ltd (1975) CLRB — reasonable effort; duty to provide sufficient information

Facts: during negotiations to renew new CA, ER wrote letters to EEs against benefits & refused to give factual data to union

Issue: does ER's refusal constitute a violation of the duty to bargain in good faith? **YES**

Analysis: CB process ideally has **informed discussion on all issues**; Union required info for rational & informed discussion; ER's refusal was unreasonable in light of its claims to EEs — having data about cost of fringe benefits to EEs.

Ratio: a party commits an unfair labour practice (**s. 6**), thus contravenes its duty to bargain (**s. 11**), if it deliberately withholds information relevant to CBing without reasonable grounds.

- scope of **s. 6** obligation developed on a case-by-case basis.

***Radio Shack* (1980) CLRB — leading case on surface bargaining**

- **NOTE:** Explicit link between **s. 6** (unfair labour practices) & **s. 11** (duty to bargain in good faith) = page 17.

Facts: Union had received automatic certification because 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
- When notice to bargain served, ER sent memo ridiculing the union's request for names, classifications, & seniority dates for EEs, & details of fringe benefits; sent another memo assuring EEs that despite Union's 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; also put forward counter proposals 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.

Issues: Breach of duty to bargain in good faith? **YES.** What is surface bargaining?

Ratio: Where ER has clearly demonstrated anti-union sentiments, 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. For example:

- where ER adopting an anti-union security clause has played **no significant role in unlawfully contributing to the absence of support**, the position is unobjectionable; HOWEVER, **where ER adopts this stance after having engaged in pervasive & unlawful conduct, ER has failed to bargain in good faith.**
- Consider whether ER adopted a position which 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 ER 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 & reasonable effort, it should be clear from our reasoning that we are of the view that an ER 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. Can't disguise bad faith bargaining as "hard bargaining" permitted under code

What is the test for surface bargaining?

- SURFACE BARGAINING is going through the motions or preserving superficial indications of bargaining without the intent of concluding a CA. It constitutes a subtle but effective refusal to recognize the union; very difficult to prove
- **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.

Holding: ER's conduct indicated no genuine interest in reaching a conclusion, therefore breach of good faith duty

Canada Trustco Mortgage Company (1984) Ont. LRB – hard bargaining NOT contrary to duty of good faith

Facts: Union certified at 2 bank branches; CA for one branch only had marginal improvements over non-unionized terms; during negotiations with 2nd branch, ER was only willing to offer minor improvements over 1st branch.

Issue: was the ER's approach re: bargaining about 2nd branch in bad faith? **NO.**

Analysis: not Board's role to prescribe precise contents of CA (i.e., can't impose own model as the normative standard); under statute, the parties are only obliged to endeavor to *conclude* a CA; **duty to bargain in good faith is not designed to redress imbalance of bargaining power**.

Holding: ER's conduct constitutes hard bargaining in pursuit of self-interest & legitimate business objectives; no breach.

6:422 Disclosure of Decisions

Westinghouse (1980) Ont. LRB — failure to disclose decisions substantially affecting BU not bad faith

Facts: after renewal of CA, ER relocated to less unionized area; Union did NOT ask ER if there were plans to relocate.

Issue: did ER's conduct constitute failure to bargain in good faith? **NO.**

- did ER's conduct constitute an unfair labour practice? **YES**

Analysis/Ratio: Duty to bargain in good faith = ER's obligation to respond honestly to Union's inquiries — at the bargain table — about the existence of plans that may have significant impact on BU;

- **NOT a duty to voluntarily reveal plans that haven't yet ripened into at least *de facto* final decisions**.

Commentary — criticism of *Westinghouse*

- Brian Langille — decision incentivizes non-disclosure & conflicts with duty of good faith. Acts on assumption that union should have no say in decision-making 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.
- ***CUPE Local 1251 v 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**"

6:500 Remedies

Radio Shack: *Ont. Board's position on remedies for violations:*

- Shouldn't be seen as penalty – award monetary relief only as compensation, not punitive damages
- Can't impose CA on parties – would exceed statutory mandate, deviate from principle of free CBing.
- 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* (1996) SCC: Board's remedy must be rationally connected to breach & consequences** (RMH***)

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

Ratio: If party refuses to discuss basic term or standard included in other CA's = NOT MAKING REASONABLE EFFORTS.

Holding: gave parties 30 days to negotiate on 4 remaining issues that were at impasse; else INTEREST ARBITRATION (i.e., compulsory arbitration—>different from telling people what their rights are; rather it's *determining the parties' interests*).

Remedies: may exceed jurisdiction where remedy is punitive in nature; infringes *Charter* if there's no rational connection & 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

10. (Nov 21) Industrial Conflict — Weber, Beatty and Weiler (pp. 47-50) — **POSSIBLE ESSAY MATERIAL**

Max Weber: skeptical that Canada's heavily regulated employment r/ship, on the basis of inequality of bargaining power, actually serves this function. Regulation in Canada's employment r/ship is two-fold:

- Regulating the substance of the bargain between EEs & ERs (e.g., minimum wage & labor standards legislation)
- Regulating the process of bargaining (e.g., through CBing legislation)

However, the ER has an upper hand given the financial advantage over EEs, thus able to apply coercive power.

- link to **Paul Weiler's** notion (below) that CBing can neutralize the above coercive power.

Paul Weiler: There are two parts of an LRC which are essential to the balance of power between Union & ER — the use of the law to **(i)** facilitate the growth of union representation of unorganized EEs & **(ii)** limit the exercise of Union economic weapons (striking & picketing). Obviously legal rules designed for the first objective (CBing) help in expanding Unions at the expense of non-union ERs; by contrast, legal rules designed for the second objective (reducing industrial conflict) hamper the established Unions for the benefit of organized ERs.

- **Dilemma —** whichever option the lawmaker chooses, it is exceedingly difficult to look neutral in doing it.

How to resolve Weiler's dilemma? CBing.

- a basic assumption of Canada's industrial relations system, the notion of freedom of contract, is at odds with the system of free CBing given that the function of labour relations does not support an ER's coercive 'take it or leave'.
- THEREFORE, a fundamental function of CBing is to subject the employment terms & conditions to the **rule of law**.
    - IOW, CBing protects EEs from the abuse of managerial power, by allowing EEs to challenge any ER edict — for compliance with the CA — before a neutral arbitrator, thus enhancing the dignity of the person.
- THEREFORE, CBing is intrinsically valuable in the exercise of self-government inasfar as EEs participate in setting the terms & conditions of employment, as opposed to merely accepting the typically coercive ER's offer.
- **How exactly does CBing resolve the dilemma**? If no CA is reached & statutory prerequisites are met, the parties can **strike/lockout**. However, the law generally tries to limit negative effects of strikes. Premise of FOC 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. Seen this way, striking is not necessary as a constitutional right, but as a necessary part of our current system.

7:100 Industrial Conflict (390-394)

The ultimate means of dispute resolution, under LRs legislation in Canada, is the use of economic sanctions

- IOW, the ability to maintain or withstand work stoppage is CENTRAL to CBing.

7:300 Legal Forums (396-398)

- **S. 59**: Strikes and lockouts prohibited before bargaining and vote.
- LRB 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, CAs prohibit striking /lockout while CA is in force (**s. 57**), and a violation may go to grievance arbitration (**s. 84**)
- **IMPORTANT:** distinction between strike & lockout:
    - **Strike**: there is NO subjective element; a strike just requires full cessation of work
        - it now constitutes a strike to simply engage in demonstrations/political strikes/solidarity strikes etc.
    - **Lockout**: subjective element remains "….for the purpose of compelling their ER…"
- Pre-Strike Vote and Notice — vote & notice needed before EEs can strike
    - Must wait 72 hours after giving notice before starting strike—meant to prevent parties from 'rushing' into a strike & allows ER and Union to have last-minute exchange of ideas or to reconsider some of their positions

7:411 Defining Strike Activity

Graham Cable (1986) CLRB – lawful strike; work-to-rule; explicit concerted activity requirement

Facts: Union in legal position to strike but believed traditional strike would fail so coordinated a work-to-rule where certain EEs sped up & others slowed down, all EEs stopped working overtime, ER took disciplinary action against EEs;

- work-to-rule: an industrial action where EEs do no more than the minimum required by the rules of their contract, & precisely follow all safety or other regulations, which may cause a slowdown or decrease in productivity.

Issue: does the ER's disciplinary action constitute unfair labour practice? **YES.**

Analysis: jurisprudence says the following activities constitute *unlawful* strikes if held outside strike/lockout provisions:

- concerted refusals to work O/T; concerted work-to-rule & booking of sick; concerted refusal to cross a legal picket line – all found to be **strike even if the impugned conduct entails lawful work-related activity**.
- THEREFORE, the opposite holds true (i.e., lawful strike if within timelines) BECAUSE previously, Union's lawful conduct was deemed unlawful if it occurred outside stipulated strike/lockout provisions.

Ratio: ERs are free to take measures that limit the disruptive effect of a strike (e.g., imposing a lockout, using managerial personnel & non-striking EEs); HOWEVER, this freedom does NOT extend to disciplining EEs engaging in a lawful strike.

Commentary:

- Hard to reconcile ***Graham Cable*** with ***Canada Post*** (EEs refusal to deliver anything but first-class mail; LRB held that ER's decision to defensively lockout striking EEs was permissible despite the latter acting within strike provisions).
    - what's the difference between defensive conduct (permissible) & discriminatory (not permissible)?

Saskatchewan Wheat Pool v GWU Local 333 (1994) CLRB — unlawful strike; circumstantial evidence = concerted action

Facts: ER lays off 10 EEs during CBing; EEs refused to work voluntary O/T; CA explicitly stated that EEs could refuse O/T

Issue: ER sought unlawful strike declaration? **YES**

Analysis: circumstantial evidence (normally, EEs would've accepted O/T & Union's opposition to O/T during layoffs) enough for LRB to conclude Union orchestrated a concerted (collective) effort to strike.

Ratio: Union can't use CA clause to circumvent the Code (by giving EEs right to collectively refuse work).

- IOW, lawful acts by individual EEs may constitute unlawful strike when done in concert & aimed at limiting output.

7:413 Sympathetic Action

Maritime ERs' Association (1979) SCC — sympathetic action = unlawful strike

Facts: police Union initiates lawful strike; EEs from unassociated unions refuse to cross the picket line, causing a shutdown; ER filed for an injunction which unassociated unions appealed coz it was not a strike since no "common understanding"
Issue: Did refusal by unassociated Unions to cross picket line = "common understanding" = strike? **YES**
Analysis: Definition of strike contains no purposive element. All that is required is common understanding & cessation of work. Motive is irrelevant.
Holding: The Court inferred a "common understanding" that unionized EEs won't cross another Union's picket line.

- The definition of "strike" in BC allows EEs to respect a picket line; if picket line provision was in CA = lawful strike.

Commentary

- Contrast with ***Nelson*** below where the CLRB held such an action to be unlawful.

***Nelson Crushed Stone* (1978) CLRB — sympathetic action where CA allows lawful picketing = unlawful strike**
Facts: CA clause explicitly allows EEs to refuse to cross a lawful picket line; EEs refuse to cross another Union's lawful picket line; **Issue:** Is this clause valid? **NO**
Analysis/Holding: Cannot contract out of the Code, so CA cannot make lawful what is otherwise unlawful; HOWEVER, the clause may limit the liability of EEs or the Union.

United Steelworkers (2005) Ont. LRB — action by non-union EEs ≠ strike

Facts: non-unionized Ees refused/blocked from crossing picket line.

Issue: ER argued that this was unlawful strike? **NO.**

Analysis: acting in concert is necessary component of strike;

- THEREFORE, **EEs who made individual decision NOT to cross aren't engaged in strike**

7:423 Employer Economic Weapons — lockouts & unilateral changes

- in addition to lockouts, ER's can make unilateral changes to employment terms & conditions if within lawful strike/lockout phase—>***Paccar* (1989) SCC**

***Westroc Industries* (1981) CLRB — lockout as an economic tool; r/ship between lockouts & anti-union animus**
Facts: During negotiations for CA renewal at one plant, ER concluded that the Union was deliberately prolonging discussions to conduct simultaneous strikes in other locations where CAs had a later expiry. ER pre-emptively locked out first Union & hired replacement EEs to gain an upper hand in negotiations.
Analysis: ER's lockout was timely & aimed at inducing agreement, thus part of CBing process

- HOWEVER, a p*ermanent* replacement of locked out EEs is NOT lockout — in the case at hand, replacements are clearly temporary, paid according to expired CA – ER just using lockout **as a tool to conclude CB**

Ratio: lockout is lawful if timely & done for legitimate business reasons (i.e., not motivated by anti-union animus).

- Have to examine conduct carefully to determine the purpose.

Section 78 — Only provision in the Code which circumvents the Union's exclusive bargaining agency

- Before a strike or lockout occurs, the ER can make an application to the board that puts what the ER is proposing directly to the EEs, and the Board will supervise the vote by the EEs.
    - ER circumvents the union
- Before ER can utilize **s. 78**, ER must have bargained exhaustively to impasse. ER also cannot 'sweeten the pot' (e.g., if ER had been bargaining with the union for certain amount, then changes that amount or adds signing bonus when they make the application to the Board to go directly to the EE vote, Board will dismiss ER's application because this violates good faith requirement in **s.11**).

- ER only has one chance to use **s. 78** to avoid a strike or lockout.

N.A.P. Building Products* (1995) BCLRB — *ER withdrawing FINAL OFFER, s. 78
Facts: ER 'sweetened the pot' & added **signing bonus**; ER had negotiated this before, unsuccessfully, with Union.
Analysis/ratio: affects the negotiation process — threat like that of a lockout (disturbs the give & take of CBing). The Board MUST look into dynamics and reasons for the ER's withdrawal.

- use of **s.78** can alter the entire dynamics of CBing — is it an economic weapon used by the ER or is it an intrusive tool that seriously undermines the relationship between the Union and its EEs.

Replacement Workers — Section 68

- **You CAN**: use MGMT, existing EE's not part of the union
- **You CANNOT**: hire *scabs*. External EE's

68 (1) During a lockout or strike authorized by this Code an ER 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 CBing is given and the date on which bargaining begins,
(b) who ordinarily works at another of the ER'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 EE in the BU that is on strike or locked out, **or**
(f) the work ordinarily done by a person who is performing the work of an EE in the BU that is on strike or locked out.

- Needs to meet one of **s. 68(1) a,b,c, or d** AND one of **e or f**.
  - To be excluded they must meet a class AND perform one of the two functions.
- **a,b,c,d**: everyone that cannot be used. So anyone that does not fall in these categories can continue to work.
  - If hire someone, ex. a manager after the commencement of CBing, they can't be used as a replacement worker. They can still do management work but not BU work.
  - any ambiguities in (**b**) should be read in favour of the Union
- **(e) Sun-Rype Products Ltd (2007)** – test: "whether the work in question would have been done by a BU EE 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"

BCAA v OPEIU Local 378 (1999) BCLRB — replacement workers; s. 6(3)(e) & s. 68(1)(b)
Facts: Union, engaged in lawful strike, is alleging the ER is using replacement workers contrary to **s. 6(3)(e) & s. 68**;
—>ER agrees that it was using 4 individuals for work ordinarily done by EEs in BU [**s. 68(1)(f)**];
—>Union does NOT allege that the 4 individuals were recently engaged [**s. 68(1)(a)**]

- **Union's position** —>4 individuals ordinarily work at the ER's head office, thus precluded from performing BU work
- **ER's position —>**4 individuals ordinarily work at several of ER's worksites, thus entitled to perform BU work.

Issue: what is the proper interpretation of **s. 68(1)(b)**? **plain & ordinary language, BUT….absurdity?**
Law:

- ***Canadian Mini-Warehouse*:** Board has interpreted **s. 68** in its plain & ordinary language & has declined to adopt a purposive interpretation to avoid exceeding language used by legislature and/or jurisdiction conferred by the LRC.
- ***BC Hydro* [*Dunleavy*] (1994)**: LRB rejected BC Hydro's claim that the scope of a BU constituted a single "place of operations". Rather, where an EE "ordinarily works" is normally confined to the EE's geographic work location;

HOWEVER, the "place" where a manager/supervisor "ordinarily" works may extend to other locations regularly attended to directly manage and/or supervise EEs they are responsible for, thus within the ambit of **s. 68(1)(b)**
    - A reconsideration of the above decision clarified that a person's ordinary place of work is NOT dependent on whether the person is a manager or supervisor: "Regardless of a person's occupation within the ER, the issue is whether he/she "ordinarily works" at another place of operation."
- ***BC Hydro* [*Melin*] (1994)**: for the purpose of **s. 68(1)(b)** & **(c)**, a person's ordinary place of operations would include all work locations attended to by the person, regardless of frequency, as an ordinary part of the job.
- ***Certified Rentals* (1997):**
    - (1) it is NOT the amount of time ordinarily worked at a location which dictates how much time an individual may subsequently work at an ER's operations in the event of a strike or lockout;
    - (2) the plain, literal meaning of "another of the ER's places of operation" contemplates that an ER may have a consolidated or integrated operation (covered by one certification) and yet have separate branches or locations which constitute other "places of operation". **THEREFORE**, an EE who does NOT ordinarily work in one branch would be precluded from working in that branch during a strike/lockout.
- ***Davis Wire* (1998):** whether a person ordinarily works at another location is determined by examining the nature of work performed in different locations, time spent in different locations & other relevant facts relating to the work of the individual; **THEREFORE**, a person who spends a significant period of time working at two or more places of an ER's operations may have the right to work in more than one operation during a labour dispute.

Analysis (Majority):

- **S. 68** is part of the **unfair labour practice** provisions of the LRC that's intended to protect the BU's integrity & viability; HOWEVER, the LRC does not impose a blanket prohibition against replacement workers as the ER is entitled to operate during a labour dispute subject to the exceptions enumerated under **s. 68**.
- The Union's position accepts that there may be some situations where an individual ordinarily works at more than one location—> asserts these managers may not perform BU work at either location during the strike BUT may continue with their normal duties.
    - The majority tacitly agrees with the ER's characterization of the Union's plain interpretation as **absurd**.
- We accordingly find that the test in the ***Dunleavy reconsideration*** decision should be applied in the present case. In deciding whether the four individuals in question ordinarily spend a "significant period" of their time working at the struck service centres, we must have regard to the actual time spent at those locations, the nature of the work they do, the integration of their work with the service centres, and "other relevant factors.

Application to case at bar:

- 3 of the 4 individuals spend much of their time working in "a variety of places of operation", although the duration at any one worksite is definitely on the low end of the scale. Without more, we might well have found that they do not satisfy the ***Dunleavy*** test. The determining factor in our view is the overall nature of their work &, more specifically, their regular & direct involvement in the operation of the service centres.
- we have not considered ourselves bound by the outcome in the ***Melin*** decision. That case was heard prior to the ***Dunleavy reconsideration*** decision, & the panel may have misstated the test in **s. 68(1)(b)** by referring to "Melin's ordinary place of operations".

Ratio: we should follow prior Board decisions interpreting **s. 68(1)(b)**. The decisions include the ***Dunleavy reconsideration***, & allow persons who ordinarily work at more than one place of operations to perform BU work at those locations during a labour dispute. Such persons do not ordinarily work "at another of the ER's places of operations".

- **I agree with the dissenting decision re: plain & ordinary language as the interpretative basis. Majority decision appears to superficially agree, but injects a purposive interpretation to cure an absurd outcome?**

Dissent:

- The plain wording of the LRC leads me to conclude that if a person "ordinarily works at another of the ER's place of operations", they are restricted by **s. 68(1)(b)** from performing the work of an EE in the BU that is on strike or locked out at other places of operation.

- an EE will normally have one place they ordinarily work; **THEREFORE**, the Board should not apply a policy approach which exceeds the language chosen by Legislature and/or the jurisdiction expressly conferred upon it by the LRC.
- **IMPORTANT:** the ***Dunleavy test*** in part states "if an EE spends a significant period of his or her time working in a variety of 'places of operation' the EE may well have the right to work in more than one place during a labour dispute". In this case, applying the test allows the Regional Sales Managers (who normally attend at service centres only once a month and sometimes less) to do BU work at the struck locations: Irving and Neuman at three locations each, and Garson at four struck locations. In my opinion, this interpretation of the statute far exceeds what the Legislature intended when **s. 68** was enacted and does not protect the integrity and viability of the BU.

12. (Nov 28) Industrial Conflict — 7:700 Picketing — section 65

- Common law vs. Statute: BC LRC's picketing provisions are in force; the Union can ONLY picket during a lawful (timely) strike at a site where the struck work is done. If the Union pickets elsewhere, the strike will be held illegal.
    - IOW, common law is trumped by the LRC; BC has the most restrictive statutory provisions in Canada.
- Historically, courts drew a distinction between two types of picketing:
    - Primary picketing — if done at the struck ER's place of business
    - Secondary picketing — if done elsewhere (e.g., at the premises of a customer selling the struck ER's goods.
- Courts & LRBs tended to be more permissive of primary picketing than towards secondary picketing; HOWEVER, in
    - ***Pepsi-Cola* (2002)**: the SCC rejected the above distinction, instead crafting the "wrongful action" approach which treats all picketing as lawful unless it involves tortious or criminal behaviour.
- **S. 65(3)** outlines picketing elements (underlined) — a trade union, a member(s) 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 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 the lawful strike or lockout.

Canex v Local 10 (1975) CLRB — primary picketing; LRB has NO jurisdiction outside industrial relations
Facts: Picketing, during a legal strike, involved "isolated threats of violence" and complete blockage of mine access by standing across the road; ER applied for an order prohibiting such conduct.
Issue: Can board regulate this conduct? **NO.**
Ratio: LRB has power to regulate object, timing and location of picketing, while superior courts control the conduct of the picketing, including both criminal and tortious behaviour.

Harrison v Carswell (1976) SCC — primary picketing; Trespass Act; Shopping mall

- ***Harrison*** is overruled by **s. 66(a)** which precludes actions re: lawful picketing where the public ordinarily has access.

Facts: C, an EE of a tenant in a shopping mall managed by H, was charged with trespass after being requested NOT to enter
C's position —>the right to picket is of greater social significance than the proprietary rights of a shopping mall owner;
H's position—>H claimed a statutory right, under ***PTA***, to limit access to their property
Issue: Was C liable in trespass? **YES;**
Law: *R v Peters* (1971) SCC: the owner of a shopping mall has sufficient control or possession of the mall's common areas, having regard to the public's unrestricted invitation to enter upon the premises.

- **Manitoba's *Petty Trespasses Act* (PTA)**: any person who trespasses upon another's property, after being requested by the owner not to enter, is guilty of an offence
- ***GPSC v Waloshin***: trespass CANNOT be committed if the complainant does NOT have sufficient possession of the premises (e.g., shopping mall owner cedes possession to tenants, thus CANNOT sue in trespass).

Analysis/Ratio (majority): as a matter of policy, distribution of pamphlets or leaflets in the shopping mall or parking lot, even by tenants of the mall, was NOT allowed (no arbitrariness) & the absence of bad faith; **THEREFORE,** issue was

restricted to two competing interests, right to property (***PTA***) vs. right to picket **(LRC)**; shopping mall owners have a greater right to their property than the public/tenants (***Peters***).

Dissent: Without proper justification, a shopping mall owner CANNOT impose liability (trespass) on ANY member of the public using 'public' areas of a mall; RATIONALE—>C has a possessory right to the shopping mall as a tenant (***Waloshin***).

Hersees (1963) Ont. CA — secondary picketing; ally/third party picketing denied

Facts: Hersees sells products made by Deacon (ER); Union asked Hersees to stop selling products to struck ER else threatened to *picket* H as well; many civil actions, but only inducing breach of contract successful.

Analysis: picketing the third-party (Hersees) for dealing with struck ER aimed to induce a contract breach.

Ratio: there's no right to secondary picketing; even if right, yields to greater interests of the economic community

- IOW, secondary picketing is illegal *per se* – even if no illegal activity taking place.
- **Note:** This was relaxed where the secondary ER is an "ally" (**s. 65[1]**); previously, concept of ally was used to deny third-party (secondary) picketing because of tortious breach of contract.

Pepsi Cola V Local 558 (2002) SCC — wrongful action approach (i.e., no primary/secondary picketing distinction)

Facts: Legal strike/lockout between Pepsi distributors in Saskatoon & its EEs; People outside picketing pepsi products.

Issue: when might secondary picketing be legally conducted?

Analysis: ER's position, to limit secondary picketing:

1. doesn't take into account the *right of unions* to expressive activity under *Charter*.
2. forgets that third parties are hurt during primary picketing anyways.
3. there's NO *real reason to privilege BUSINESS INTEREST OVER Union rights* (***Hersees***) *without BALANCING*.
    - start with the assumption that freedom of expression (FOE) is protected unless justified —>wrongful action approach assures reasonable balance between FOE & protection of 3rd parties
4. The basis or purpose is *EXPRESSION*, which is meant to be **coercive** (eco & social pressure on ER and public).
5. Hard to restrict by *GEOGRAPHY*: hard to regulate, because some EE's using office or other facilities with other ERs.

Ratio: the distinction between secondary & primary picketing based on geography cannot stand; secondary picketing is generally legal unless there is tortious and/or criminal conduct;

- SCC endorses Weiler's view (i.e., the 'why/when' = the BOARD, and the 'how' = the Court).

Holding: injunction request denied as there was no tortious/criminal conduct; however, the Court upheld related injunction for picketing of Pepsi EEs' private homes

Prince Rupert Grain (473-474)
The Sovereign General Insurance Company, BCLRB No. B451/94

13. (Time Permitting)
7:523 Civil Remedies (426-430)
StAnne Nackawic (430-436)
Remedies in BC
Cascade Aerospace Inc. v. Unifor (Local 114),
2014 BCSC 1461
White Spot Limited, IRC No. C57/89
7:620 Employer Discipline of Strikers
***Rogers Cable* (439-441)**
7:800 Job Rights of Strikers
Royal York Case (475-477)
7:820 Replacement Worker Laws
"Seeking a Balance" (480-485)
7:900 Alternatives to Strikes (485-486)

7:910 Essential Services — sections 72 & 73

- Both Union and ER are legally obligated to provide the services as designated by the essential services legislation

7:920 Interest Arbitration (488-492)
Review and Discussion

14. (Time permitting)	**9:100 The Individual Employee Under Collective Bargaining** (589-594) **10:400 Union Security and Union Discipline** (650-652) *Speckling* (654-659) *Birch* (659-664) **10:500 Role of Unions in Society** *Lavigne* (665-668) *Advance Cutting* (668-673)