Law 415: Labour Law

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# background

### Fudge: The New Workplace

* Improvements in 50s & 60s came from efforts of unions & social market parties in context of favourable labour market conditions
	+ Labour law developed to accommodate the model of a sole male breadwinner supporting a family
	+ State provided further assistance in the form of family allowance, etc
	+ Fordist model of development- retirement a real possibility; leisure time important
	+ Homogenous workplace
* 1970s-1980s; period of stagflation; a decline in the birthrate; and the women’s movement. Rise of neoliberalism and the view that every person should be a worker.
* 1980s- Feminization of labour. Unionization peaks in 1982 at 40%. Prohibitions against sexual harassment, etc.
* Globalization & neoliberalism- focus on free trade, deregulation, and privatization. Requires flexibility of the workforce and corporations in structuring operations. Fordist paradigm of the mass of workers performing a standard set of skills is becoming obsolete. Rise of the service sector. Decline in social programs
* Flexibility of Canadian labour market: union density slowly declining. Morel likely to be unionized in public sector than private; if older. Outsourcing fuels disintegration of vertically integrated firm; women & minorities more likely to perform precarious work. Virtually no ladders into better jobs for them. New jobs are more likely to be part time, low paying, less unionization density.
* Minorities/change in labour supply: paid less, less job security, higher unemployment;
* Women in workforce- not match by shift in unpaid domestic work to men. Hard to find balance.
* Courts are moving towards making collective bargaining/striking etc a constitutional right but union representation is declining
* Time has come to institutionalize a new standard employment relationship that achieves traditional goals of protecting EEs against economic and social risks, reducing social inequality, and increasing economic efficiency. Should also provide equal access for women and men to the employment system, supports lifelong learning and the new patterns of the life-course, and accommodates diversity without penalty. Hope to revitalize labour law’s distinctive contribution, which is to strengthen the bonds of social solidarity against the fragmentation of the market.

### Arthurs: The Transformation of work; Disappearance of workers and the future of workplace regulation

* Forms of workplace regulation that seemed to serve us well in that period no longer do- We may face a future without labour law/ workers/ and the working class
* Developments over the past 30-40 years have increased the precarity of employment; created conflicts or magnified differences amongst workers in individual workplaces, undercut labour solidarity and union strength; and shifted the balance of power in favour of employers
* People no longer define themselves as ‘workers” or members of the working class. Workers as a political movement have disappeared.
* 1990s-2000s-
	+ Pace of technology development increases.
		- Intensifies division of labour, geographical dispersal; thus attenuating social relations & social ties btw workers.
		- Polarizes skilled and unskilled workers.
		- High skills move towards self-management, and unskilled are increasingly monitored.
		- Accelerating change in content of all work making job specific knowledge less important.
	+ Shift in employment from manufacturing to service sector
	+ Employers see flexibilization of the workforce as important creation of part time, seasonal and short term jobs
	+ Gender, age and race of the workforce has changed. Members of different groups compete for work and wages, and blame “the others” if things go wrong. Hard to maintain solidarity
	+ Globalization leads to outsourcing and a race to the bottom.
* Laws and policies based on paradigm of full time long term male worker no longer serve us well:
	+ EX: administration of law and policies adjusted to accommodate non-paradigmatic workers becomes more complicated for ERs and Govt
	+ EX- Movement btw jobs makes collective bargaining at the workplace level more difficult
	+ EX- Labour law may need to take account of sectoral differences
	+ EX- Transnational union activity is hard to square with law across jurisdictions
	+ EX- Laws will need to change to consider maximum hours of work/overtime in light of technological changes allowing work from home; laws must respond to technology allowing workplace surveillance.
* Options for change:
	+ Develop a human rights model to replace labour law model
	+ Embrace neoliberalism’s potential; let laissez fair do its work and ERs will treat EEs better bc it’s in their best interest
	+ Resuscitate or reinvent the labour movement to suit the new workplace

# (B) The common law contract of employment

### Langille & Davidov: Beyond employees and independent contractors

* **Common law rights (reasonable notice) and obligations (restriction on competition); statutory protections (ESA), and labour relations acts generally only apply to EEs**
* EE/IC distinction in labour and employment law is best understood as distinguishing btw those who need a particular sort of protection from those who are in a position to protect themselves
* Fourfold test to distinguish EEs from ICs (control; tool ownership; chance of profit; risk of loss) boils down to two questions:
	+ **W controlled by ER/client (includes control over activities; and administrative control (ability to discipline, promote, etc))**
	+ **W economically dependent or independent (examines the degree of dependence of the worker vis a vis ER as a matter of economic reality)**
* Business integration or organization test (whether W’s work is integrated into ERs business) sometimes used boils down to the same two questions.
* New problems arise bc EEs that need protection do not always have an identifiable and specific employer (i.e.- freelance journalists)
* Globalization brings pressures towards outsourcing and subcontracting. Leads to many dependent self-employed EEs that need protection- for example, truckers; construction workers.

## establishing the employment relationship

* ER/EE relationships governed by CL of K- offer; agreement; consideration. Bargain = exchange of capital for labour
* However, doesn’t work like a normal K: ER sets terms; EE accepts them. Not a true bargain. Balance of power inevitably favours ER.

### Seneca College v. Bhadauria (1981; SCC)

* **F:** Indian woman w/ PhD in math can’t get a teaching position at the college. Never given an interview. Claims it’s because of race. Want to pursue action in court instead of the HR regime.
* **I:** Does legislative intervention pre-empt court’s attempts to change the CL doctrine in order to right wrongs they had earlier condoned (i.e.- no CL action for failure to hire because of freedom of contract)? YES
* **R:** Action cannot succeed because of comprehensiveness of the HRC in its administrative and adjudicative features. A refusal to enter into contract relations, or a refusal to even consider the prospect of such relations has not been recognized as giving rise to any liability in tort*.* Option is **foreclosed by legislative initiative that overtook the existing CL and established a different regime which does not exclude the courts, but rather makes them part of the enforcement machinery under the code**.
* **\*\*\*EXCEPTION\*\*\*:** *Cognos:* a tort claim may lie if an EE is hired under false pretenses (leaves a good job, and the new job is not what was claimed)

## (II) Terminating the Contract Of Employment

* CL affords EEs right not to be terminated except with **notice or just cause. Reinstatement is not a legal right.**
* CL generally gives more notice than the ESA
* Wrongful dismissal claims are really only affordable for highly paid EEs
* Repudiatory breach of EK by ER = constructive dismissal; can amount to wrongful dismissal
* If K has no express provision on the amount of notice, courts usually decide what they consider to be a reasonable notice period bc there is no evidence that the parties intended some other notice period.

### Cronk v. Canadian General Insurance Co. (1984, OCA)

* **F:** EE dismissed at age 55. Clerical position. Worked for ER for 29 years. ER downsizes and EE’s position is eliminated. Not likely she has any career prospects. EE gives her 9 months; EE asks for 20 (= to men in managerial positions).
* **I:** To what extent should an EE’s position in the hierarchy of a company play a role in setting the period of compensation to which the EE is entitled when dismissed without cause?
* **R:** ***TRIAL****:* Reasonableness of notice must be decided with reference to each particular case, having regard o the character of the employment, the length of service, the age of the servant, the availability of similar employment, having regard to the experience ,training and qualifications of the servant. *HERE:* EE was 55 years old and ought to be retiring, not searching for more work; her lack of education will make it hard to find work; she devoted her entire career to the ER. Gives her the upper limit of 20 months.
* **R:** An interruption in service does not wipe out the first period of employment for calculating reasonable notice entitlements.
* **R:** General rule that managerial EEs should have longer notice periods based in EE’s rank & specialization making # of similar positions smaller; and greater stigma in being dismissed as a manager. Unspecialized workers would have a larger range of similar jobs available; would face less stigma. HERE- all EEs face stigma; stats show clerical workers actually have a harder time finding new employment, and higher education makes finding new employment easier. Therefore, fired low-level EEs should not be afforded less notice requirements.
* **R:** ***CA:*** Wrong for trial judge to rely on stats. His result could disrupt practices of commercial world. ERs need certainty of the cost of downsizing, and certainty of legal advice. Character of the employment (clerical; low-level) does not entitle an EE to a lengthy notice period.

## (III) Wrongful Dismissal

* **If EE commits a breach severe enough to constitute repudiation of the EK, the ER has just cause for dismissal**. ER can treat K as terminated, and dismiss he EE without notice or pay in lieu of notice.
* ER can also **sue for damages** for losses caused by the dereliction of the duty (🡨 seldom done)
* Reinstatement not common outside of federal jurisdiction, where the federal arbitration panel can award damages or reinstatement for wrongful dismissal.
* **Usually, EE can sue for damages (notice), not reinstatement**.
* EK can set up reasons for dismissal, but this is not common (for example, you may not always want to fire an EE even if the EK says the EE can be terminated for that reason)
* Threshold for just cause is high—favours EE.
* Near Cause: argument that some circumstances just fall short of just cause, warranting a reduction in the length of the notice period. SCC rejects this idea. No gradations of cause because work is too integral to the human experience.
* *Wallace:* If the manner of termination is degrading, the EE may be entitled to further damages.

### McKinley v. BC Tel (2001, SCC)

* **F:** EE terminated after 17 years service. Had been on medical leave. Pressured him to return to work. He told them he wasn’t ready. **They found a letter showing he knew he may have been able to work if he took Beta Blockers.** Ere claimed EE deliberately withheld the truth re: his ability to return to work without incurring health risks.
* **I:** When is an ER justified in summarily dismissing an EE as a result of **dishonest conduct**? Is dishonesty, in and of itself, sufficient to warrant an EE’s termination, or whether the nature and context of such dishonesty must be considered in assessing whether just cause for dismissal exists?
* **R:** Whether an ER is justified in dismissing an EE on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. **The test is whether the EE’s dishonesty gave rise to a breakdown in the ERelationship.** Could also say that just cause exists where the **dishonesty violates an essential condition of the EK; breaches faith inherent to the work relationship; or is fundamentally or directly inconsistent with the EE’s obligations to his or her ER**. ER can impose lesser sanctions for less serious types of misconduct; **proportionality** is key. Balance the severity of the conduct and sanction imposed in light of importance of work to the human experience.
* **HERE:** While EE didn’t disclose all material facts, that wasn’t required. Jury could have reasonably found that dishonesty did not undermine the EK. No basis to interfere with jury verdict that the respondents had not proven just cause warranting dismissal.

# (C) The Right to Bargain Collectively: s.2(d)

## (I) Principles of Collective Bargaining

* Individuals have less bargaining power than ERs. Bargaining together attempts to equalize the bargaining power
* Before 20th century, associations were viewed as criminal organizations that aimed to restrain trade. Most strikes in the early 20th century were for recognition.

### Wagner Act Model (USA)

* Gives the right to form a union and bargain collectively
* No individual bargaining where a union is accepted by majority vote
* Presumes one union per bargaining unit (different from EU where a number of unions form the bargaining unit)
* Contemplates the possibility that EEs may choose not to unionize (In EU, idea of industrial democracy means unionization is presumed)

### Adams: Industrial Relations under Liberal Democracy; North america in Comparative perspective

* Democratic justification for Collective Bargaining: In industrialized world, principle is accepted that EEs should be able to influence the conditions under which they work. Usually done through bilateral union-management process of collective bargaining.
	+ North America is unique in relying almost exclusively on collective bargaining to make the principle of participation operative.
* Economic Justification for Collective bargaining: Collective bargaining should be a right because individual EEs have little bargaining power compared to the forces of the huge modern ER organization. Unions & bargaining offset this. Therefore, if EEs don’t want to engage in bargaining, they don’t have to.
	+ Contrast with Europe- no European country bases its regulations on this theory. CB is accepted as the appropriate means for deciding conditions of Ement.
* Certification: North America is unique in requirements that unions must be certified as bargaining agents in discrete bargaining units before an ER must recognize & negotiate with them.
	+ Voluntary recognition of unions was initially preferred, but ERs wouldn’t do it.
	+ Canadian use of card signing campaigns (*not in BC)* allows certification without ER finding out a campaign is underway.
* Bargaining Structure: In NA, units are usually a group of EEs working in a single plant; or a class of EEs working in all of the ER’s plants. In Europe, most common to have agreement for all EEs of a certain class who work for any ER who is a member of an ER’s association.
	+ Decentralized bargaining good for EEs who are closer to bargaining process, and for ERs who can tailor agreement to specific plant.
	+ Broad-based bargaining results in more public scrutiny and consequences for public and economy being considered. Decentralized can result in no one taking responsibility for public welfare.
* Union Density: Much more dense in Europe than NA.
* Content of Agreements: NA agreements much longer and more detailed because the agreement only applies to one plant.
* Bargaining Process: in NA, matters not covered in agreement can be decided by management without consultation. In EU, parties will try to come to an agreement w/in term of agreement (*Exception- some federal jurisdictions where technological change may lead to re-opening negotiations)*.
* Contract Ratification: In EU, union can accept agreement on behalf of workers. In NA, workers must vote. If they turn down the agreement, the parties must resume bargaining under very difficult conditions.
* Legal Status of Collective Agreements: In NA, CA takes away individual EE’s righto bargain alone and bring grievances solo. (*except federally where you can grieve wrongful dismissal solo).* Not the case in EU.

## (Ii) Excluded Employees & the Right to Bargain

### BC Labour Relations Code Overview

* Covers BC/Non-federal workers
* **Entirely excluded occupations: managers, military, professionals, agriculture in Ontario (pre-dunmore)**
* Some occupations can form unions, but not bargain
* Some can form and bargain, but not go on strike- police; firefighters

**\*\*\*ARISING ISSUE\*\*\*: Does denial of the right to bargain collectively constitute interference with freedom of association under the *Charter*?**

### Labour Trilogy [bad law]

* **R:** Section 2(d) does not protect the right to join a union, bargain collectively, or go on strike. One only has the right to come together to do collectively what they could do individually. Since none of the foregoing could be done individually, they are not protected by 2(d)

### Delisle v. Canada (1999, SCC) [bad law]

* **F:** RCMP seeks right to bargain collectively.
* **I:** Does 2(d) mandate allowing the RCMP to bargain collectively? NO
* **R:** Section 2(d) does not impost on parliament a positive obligation of protection or inclusion. The RCMP are a well-represented group with some representation; **if the workers were more vulnerable, then the right to unionize may have been protected.** 2(d) doesn’t include the right to form a specific type of association defined in a particular statute; that would stop parliament from being able to regulate as it wishes.
* **DISSENT:** A complete exclusion from the coverage of the statute was not a reasonable limitation within the meaning of section 1 because the prohibition was overbroad- could have still had a secure police force if the RCMP could bargain, but had other limits placed upon them.

### Dunmore v. Ontario (2001, SCC)

* **F:** Ontario ag. Workers briefly had right to unionize & UFCW gets certified. Right to unionize repealed and re-enacted labour statute. Agricultural workers no longer have the right to form a union. Challenge legislation under 2(d)
* **I:** Is the exclusion of agricultural workers a violation of their freedom of association & equality rights under the *Charter?*
* **R:** To establish violation, must demonstrate that the activities are protected by 2(d), and that the legislation has, in purpose or effect, interfered with the activities. **Certain collective activities must be recognized if the freedom to form and maintain association is to have any meaning** (i.e.- making collective representations to an ER; adopting a majority political platform, federating w/ other unions). **Exclusion from a regime, may, in some instances, amount to an affirmative interference with the effective** **exercise of a protected freedom**. A failure to include ag. Workers in a protective regime affirmatively permits restraints on the activity the regime is designed to protect. **Underinclusion can orchestrate, encourage, or sustain the violation of fundamental freedoms.** Without inclusion, the agricultural workers simply cannot exercise their right to unionize. Puts a chilling effect on union activity. Agricultural workers are a vulnerable group; they have the right, at least to form a union to put themselves forward politically.
* **NOTE:** *No right to recognition of the union- only the right to form a union; remedy wasn’t “reading in” of agricultural workers; sent it back to the legislature to enact new legislation.*
* **Post Dunmore:** AEPA passed; follows Dunmore by giving the right to form a union, but no more.

### Health Services & Support- Facilities Subsector Bargaining Assn v. British Columbia (2007, SCC)

* **F:** Liberals wanted to cut health services spending. Decided to contract out the services, but the union rates would still have to be paid and there was a no-contracting-out clause. Liberals passed Bill 29, bringing an end to the agreements; prohibiting “No-K-Out” clauses. Many workers lost their jobs. Unionized EEs brought a challenge under 2(d).
* **I:** Ripping up of agreements violate freedom of association? YES
* **R: 2(d) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues, subject to section 1.** Based on four reasons:
	+ the reasons evoked in the past for holding that 2(d) doesn’t extend to collective bargaining no longer stand—**can protect the “procedure” of bargaining without mandating constitutional protection for the fruits of the process**. Thus, characterizing bargaining as an object does not provide a principled reason to deny it protection.
	+ **Interpretation of 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada’s historic recognition of the importance of collective bargaining to freedom of association.** Right to bargain has long been recognized as a fundamental right pre-dating the charter, which suggests the framers meant to include it in the protection found in 2(d)
	+ **Collective bargaining is an integral component of freedom of association in international law**, which may inform the interpretation of Charter guarantees.
	+ Interpreting 2(d) as including a right to collective bargaining is consistent with, and promotes, other Charter rights, freedoms and values. **Human dignity, equality, liberty, respect for autonomy and enhancement of democracy underlie the *Charter*, and right to bargain collectively enhances those goals by giving them the opportunity to influence the workplace.**
* **The right to bargain collectively is *limited* because the right is to a process (not a substantive outcome) and not to any particular model or bargaining method. The interference must be *substantial*—**so substantial that it interferes not only with the attainment of the members objectives (which are not protected), but with the very process that enables them to pursue those objectives by engaging in meaningful negotiations with the ER. **To show *substantial interference,* the intent or effect must seriously undercut or undermine the activity of EEs joining together to pursue the common goals of negotiating workplace conditions and terms of E-ment with their ER.** Inquiry will be contextual and fact specific; **TEST:** the question in every case is whether the process of voluntary, good faith collective bargaining between EEs and the ER has been, or is likely to be, significantly and adversely impacted. This requires two inquiries- first, into the importance of the matter affected to the process of collective bargaining, and to the capacity of the union members to come together and pursue collective goals in concert. The second is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
* **HERE:** Sections interfere with the process by disregarding past processes, pre-emptively undermining future processes, or both. Provisions dealing with K-ing out, layoffs, and bumping deal with matters central to the freedom of association—all central to union’s purpose and important to union (not so with transfers and reassignments, which are relatively minor modifications to in place schemes for transferring and reassigning EEs). Take into account gov’t financial situation ; however, measures denied the right to a process of good faith bargaining & consultation—act precludes consulting with union prior to layoffs, bumping, or K-ing out. Infringes charter, not saved by s.1.

### Fraser v. Ontario (2008, OCA)

* **F:** Challenge of post-Dunmore legislation re: agricultural workers can unionize but not bargain.
* **I:** Violate 2d?
* **R:** AEPA violates section 2(d) rights of agricultural workers and cannot be saved by s.1. w/out statutory duty to bargain in good faith, there is no meaningful collective bargaining process.
* **On reserve @ SCC**

### Mounted Police Assn v. Canada (2009, OSC)

* **R:** Provision establishing a separate EE relations scheme for RCMP members, violated s. 2(d) and cannot be saved under s.1 b/c **staff relations representatives program did not provide for a constitutionally adequate process of collective bargaining—have the right to form an assn. free of mgmt. influence or interference**. The SRRP is not an independent association formed or chosen by RCMP members, and the interaction between the SRRP and management cannot reasonably be described as a process of collective bargaining.
* **Response:** New legislation will create a separate collective bargaining regime for RCMP members

### CUPE v. New Brunswick (2009, NBQB)

* **F:** Union challenged provisions of the Public Service Labour Relations Act that excluded casual EEs (employed for less than 6 months) from the definition of EE, making them ineligible for collective bargaining. Expert evidence showed part-time labour was growing, composed mostly of women, 25% designated casual although working full time, younger workers almost entirely casual. Casual gets lower pay and benefits, no job security.
* **I:** Does exclusion of casual EEs from the PSLRA (& denial of right to bargain) violate 2(d)? YES
* **R:** Province attempting to create a sub class of EEs in a way that has interfered with their fundamental rights under 2(d). **Casuals are a vulnerable group as were agricultural workers.** The province as ER has subjected the casuals to practices that are unfair. **Charter imposes a positive obligation to extend protective legislation to unprotected groups—exclusion of casuals has had the effect of infringing their rights under s. 2(d) of the Charter**
* **NOTE-** In my view, good example of how the SCC may reason in Fraser.

# (D) Status under the legislation

## (I) Who is an EE?

* Entitlement to bargain collectively is reserved for “EEs”
* Some EEs are legally ineligible because they are in certain occupations- predominantly professions, agriculture, and domestic service.

### Excluded EEs: BCLRC, s. 1

* Managers
* Essential Services
* Student Workers (?)
* People with sensitive information (Is this appropriate anymore given adversarial process is under fire?)
* Certain occupations 🡪 professions, agriculture and domestic service

### Certification: BCLRC, s. 24 & 25

* 24- Application for certification with **45% of the EEs in the unit members of the union,** Must order representation vote **within 10 days from the date the board receives the application for certification.** If less than 55% of the EEs cast ballots, can order a new vote
* 25- If a majority of the votes are in favour of the union, and there is an appropriate bargaining unit, then the board must certify the union.

### National Labor Relations Board v. Hearst Publications (1944, USA)

* **F:** Newsboys wanted to form a union. Hearst argued that they were not EEs and thus not covered by the legislation. Newspaper vendors on the street who sold newspapers published by hearst in kiosks on the side of the street.
* **I:** Are Newsboys EES? YES
* **R:** have regard to history, purpose and terms of the legislation. Goal of the act is industrial peace via self-organization and collective bargaining. **Only partial solutions would be provided if large segments of workers were wholly excluded because of a technical legal position**. Recall newsboys are subjected to evils the act was designed to prevent. Newsboys work continuously and regularly, rely upon earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their market and control their supply of papers. Their hours of work and efforts are supervised and prescribed by the publishers or their agents. Sales equipment furnished by publishers. They are therefore EEs.

### Winnipeg Free Press v Media Union of Manitoba

* **F:** Papers delivered in the early morning. Collection of accounts done by pre-authorized credit cards. Young carriers no longer employed. Carriers must attend at a specific depot each morning to pick up their papers. Must have an automobile.
* **I:** Are the deliverers EEs, Dependent contractors, or independent contractors?
* **R:** Test for independent Kers = control, tool ownership, chance of profit, risk of loss. Nature and degree of control is most important. Now test is expanded to consider other factors:
	+ **Use of or right to use substitutes**
	+ **Ownership of instruments, tools, etc**
	+ **evidence of entrepreneurial activity**
	+ **selling of services to general market**
	+ **economic mobility or independence, including freedom to reject job opportunities or work**
	+ **evidence of variation in fees charged**
	+ **independent business on own behalf/integration into ERs business**
	+ **degree of specialization skill or expertise**
	+ **control of manner and means of performing work**
	+ **magnitude of the contract amount**
	+ **whether they work under conditions similar to persons who are clearly EEs.**
* **HERE:** There were factors weighing both ways. There was a high degree of control over their work, the most important factor. Free press can discipline, etc. They are really dependent contractors.

### Fownes Construction Co (1974, BCLRB)

* **F:** B hires C to do certain work. C hires D and E to do some of that work
* **I:** Is C still an EE of B for the purposes of collective bargaining legislation? YES
* **R:** Not really a dependent contractor, because he does not “perform work or services” in a manner analogous to an EE. Regardless, **there is nothing illogical about finding that an individual is, at one and the same time, both an ER and an EE. An individual can also be both an ER and a dependent Ker.** It will turn on the facts of the case.

### Discussion PRoblem #1: Old Dutch Potato Chips

* **F:** Old Dutch Potato Chip distributors are given potato chips, which they sell. They pay OD for the chips and then keep the profit. OD controls the routes; non-compete clause; OD sets the price; Distributors assume the risk of unsold product (vulnerable); subject to performance reviews; selected from relief drivers who are EEs; Old Dutch helps them find clients. BUT Assume risk of unsold product, distributors place orders for product; hire casual labour; have to pay their own insurance, etc; provide own trucks; set own hours; can increase their product.
* **I:** Dependent Contractors or Independent contractors?
* **R:** Appeared that OD was trying to structure the system to avoid CB. **ASK: are the distributors in the labour market or the product market?** If they are in the product market it is NOT ok for them to bargain collectively as it would violate competition law (price fixing). Although the distributors are not paid any money, they work for compensation from OD and are in a position of economic dependence.

## (II) Managerial Employees

### Children’s Aid Society of Ottawa-Carleton (O.L.R.B.)

* **F:** Application for certification. Bargaining unit applied for = group of persons employed as supervisors-- Front line management and supervise EEs in the bargaining unit directly. They report to assistant directors who report to an executive director. Allege both supervisors and assistant directors ought to be included. ER says supervisors are not EEs within the meaning of the OLRA.
* **I:** Are the supervisors and ADs EEs?
* **R:** Purpose of exclusion of managers is to **ensure persons in bargaining unit aren’t in a conflict of interest btw their responsibilities and obligations as managers and their loyalty to the union**. ER has onus of establishing that the supervisors perform managerial functions. Board will consider three criteria:
	+ Discipline & Discharge
	+ Labour relations input
	+ Hiring, promotion, and demotion
* The level of power or authority must be one of “effective determination.” Issue is of potential, not actual conflict of interest. Must be applied with flexibility, taking into account the administrative structure of the ER and the size of the operation. If supervision only = supervising work, not as much of a problem b/c it does not have an effect on the labour relations management side. Distinguish- Supervision that involves provision of technical or professional advice to less skilled EEs and Administrative supervision.
* **HERE:** supervisors are involved in hiring casual and contract staff, and the promotion of staff to permanent positions; have control over performance reviews; involved in discipline. Mischief towards which the section is directed would be engaged if they were found to be EEs.

## (III) Qualified trade Unions

* 1(1) of the BCLRC defines a trade union as ***”:*** Local or Provincial organization or association of EEs, or a local provincial branch of a national organization, that has as one purpose the regulation in BC of relations btw ERs and EEs through collective bargaining, and includes an association or council of trade unions, but NOT one dominated by the ER
* Section 3(1) of *CLC* defines a trade union as “any organization of EEs, or any local thereof, the purposes of which include the regulation of relations between ERs and EEs
* Organization must meet certain requirements of form to be recognized as a trade union under labour relations legislation

### United Steelworkers of America v. Kubota Metal Corporation & employees association (1995, OLRB)

* **F:** USA signed up EEs and applied for certification. ER already had an “EE’s Association Committee” which had a 20 year history of negotiating EAs with the ER. Committee intervened to oppose the USA’s application.
* **I:** Was the Employee’s association committee a trade union? NO
* **R:** **Trade unions must originate and operate at arm’s length from the ER. If it receives ER support, it cannot be certified to represent EEs nor enter into a collective agreement binding the EEs**. Definition requires the union be an organization. New members must know that he is entering into a contractual relationship with the other members of the union and **that the terms are spelt out in the union’s constitution**.
* **HERE:** The committee had no regular meetings with EEs, had no existence apart from the persons who serve on it. No constitution or bylaws. EEs do not pay dues or fees—committee relied on the ER for all of the activities in which it was engaged.

# (E) The Right to Join a Union

## (II) Certification & Unfair Labour Practices

* Unfair labour practices are prohibited during a certification/organizing campaign.
* Union can complain via grievances before the labour board
* Unfair labour practices during the campaign can cause a “chilling effect” that is difficult to correct even with a labour law remedy.
* If a decision to discipline an EE during a certification campaign is based on an anti-union animus, it will be an unfair labour practice.

### BCLRC- Employer acts during certification campaign

* (non-motive) 32(1): no strikes or lockouts or altering terms/conditions of employment without board permission during an application for certification.
* (non-motive) 32(2): Does not affect the right of an ER to suspend, transfer, lay-off, discharge, or discipline for proper cause ( **saving clause--** *note that proper cause is a lower standard than just cause that is more concerned with process than reasons*)
* (MOTIVE) S.6(3)(a)- Discharge, etc, **because the person is or proposes to become or seeks to induce another person to become a members of a trade union; or participates in the promotion, formation or administration of a trade union. –** (*Illicit motive required here)* – reverse onus because of s.14(7)
* (non-motive) S.6(3)(b)- Must not discharge, suspend, transfer, or otherwise discipline and EE except for proper cause if the unions is conducting a certification campaign

### Duchesneau v. Conseil de la Nation huronne-Wendat (1999, CIRB) – 6(3)(a)(ii) (probably)

* **F:** Federal code. EE of first nation support program. Leads organization campaign. Was providing personal services to clients & was paid on the side. Tried to cover it up. Fired and criminally charged, but the criminal charges were dismissed pre-trial. EE submits all EEs did these side deals, and it was condoned by the ER. Union says there’s anti-union animus.
* **I:** Was EE dismissed for just cause? Was there an unfair labour practice? How do you establish motive?
* **R:** **Even if anti-union animus was only a proximate cause for the [dismissal], the employer will be found to have committed an unfair labour practice**. ER cannot be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.
* **HERE:** ER failed to discharge the burden of proof. On balance, **Board does not find it probable that the complainant’s union activities had nothing whatsoever to do with the ER’s decision to suspend and terminate employment.** ER didn’t really seek to determine all the relevant facts in connection with the matter. Evidence ER did know that the side deals were happening before. ER was clearly anti-union. Concern the termination of the leader could have a chilling effect motivated decision.
* **\*Practice note:** ERs should always deal with discipline immediately because it will be more difficult to do so if a campaign starts.

### Discussion problem #2: Choices market; White Spot

* **F:** ER operates 4 organic supermarkets; strict anti-theft policy including eating deli food without paying first. Union begins organizing drive. Private security firm hired shortly thereafter to monitor EEs. One posed as new EE. Not told of organizing drive, though a flyer re: store’s opposition was posted on a board. Saw Norm consume a burrito and juice without paying. Norma said he wasn’t aware of taking anything. Dismissed. Later said that he paid earlier, he didn’t explain at the time because he was a union organizer.
* **I:** Just dismissal? YES
* **R:** **A strict policy that has been enforced in the past, and proper cause allows termination during an organizing campaign**. Shows that the ER saving provision has some pull in BC
* **NOTE:** Dismissed EE may still have a CL action for wrongful dismissal if he had no notice because it wasn’t “just cause”—the “proper cause” standard is lower.

## (II) interfering with Unions

### BCLRC: s. 6(1) & 6(3)- Unfair Labour Practices

* (non-motive) 6(1): General provision making it an **unfair labour practice to interfere with the administration or formation of a union**. Focus is on the effect (problems with union forming) rather than the cause. **Arising Issue: is anti-union animus necessary here?**
* ((a) = motive; (b) = non-motive) 6(3): ER must not discharge/discipline EEs: b/c of (a) (b) during certification campaign without proper cause; restrain union involvement through K of E; By intimidation, dismissal, etc, to compel or induce union involvement; contravene 68 (replacement workers); refuse to a Rand formula
* S.14(7)- reverse onus on employer to prove the act was not contravened

### Canadian Paperworkers Union v. International Wallcoverings (1983, OLRB) (6(1))

* **F:** Company kept operations going during a legal strike by using agency-supplied strikebreakers who were picked up at a secret location each morning and driven to the plant in special vans. The strikers learned where the strikebreakers would be picked up and showed up there. An altercation ensued. Nine strikers were dismissed. 3 kicked, punched or assaulted strikebreakers; one attacked and damaged the van but did not threaten as the company alleged; three were at the restaurant but did not participate. Two were found not to be at the restaurant at all. All nine were dismissed.
* **I:** Was the interference contrary to the provision prohibiting interfering with a trade union?
* **R:** If motive isn’t inferred into the interference test, it’s too broad and would eliminate any need for the purposive test. If motive is analyzed, the test becomes too narrow. As such, **the tribunal will balance the intended consequence against employee rights against the business ends to be served by the employer’s conduct**.
* **HERE:** It was fair to dismiss the EEs who participated in the assault. There were unfair labour practices with regards to the EEs who were not there, the EEs who attended but did not participate because the ER’s objective was to chill the activity, which was more severe then the minor participation. No unfair labour practice with regards to the people who participated in the assault.

### Westinghouse Canada LTd. (1980, OLRB) (6(1))

* **F:** ER closes a centralized manufacturing plant and opened several plants in other locations. Didn’t tell the union of his plans. Old plant was unionized, and the new ones were deliberately located where there was little trade union presence.
* **I:** Unfair labour practice? YES
* **R:** Board found there was anti-union-animus. **Improper to respond to increased costs of operating with a union by moving b/c it undercuts the right to engage in collective bargaining.** If ER had have complained to the union and met with an unsympathetic response, the answer may be different.
* **NOTE-** Confined to the facts of this case

### Kennedy Lodge Nursing HomE (1980, OLRB) (6(1))

* **F:** ER contracted out its entire housekeeping and janitorial functions; laid of 16 of 65 EEs represented by the union. This was to save money.
* **I:** Is this distinguishable from *Westinghouse*? YES
* **R:** ER motivated by correcting the imbalance btw cost of labour and profits is not precluded from the act by taking that action. **Business operations are not frozen by the collective relationship so long as the action taken is not motivated by the accomplishment of an unlawful objective**. In *Westinghouse*, there was evidence that company explicitly set a non-union operation as its goal. Not the case here.

### Plourde v. Wal-Mart Canada Corp. (2009, SCC) (6(3))

* **F:** ER closes store in Jonquiere, Que. During collective bargaining with the union for a first collective agreement. Plourde argued that the loss of his job caused by the ER closing the store should be understood as a dismissal motivated by anti-union animus. Claimed under s. 15, prohibits an ER from dismissing an EE for exercising his rights under the *Code (Similar to our 6(3)).* Note provision contains a presumption of anti-union animus that the ER must discharge, and offers reinstatement among the Board’s remedies.
* **NOTE:** He probably wanted to put it under our 6(3) because then a reverse onus would apply, making it easier to establish there was a breach.
* **I:**
* **R MAJ:** Provisions re: dismissal limited to the situation of an ongoing business rather than a free-standing power to award dmgs against ERs for anti-union conduct associated with a closed business. If an ER for whatever reasons decides to close shop, dismissals that follow are the result of ceasing operations, which is a valid economic reason even if the cessation is based on socially reprehensible considerations.
* **DIS:** Dismissal resulting from a genuine closing may be scrutinized for anti-union motives b/c that view is more consistent with the prior jurisprudence, history of the legislation, and the purpose of the legislative scheme. Not allowing this action deprives EEs of protection of their rights when that is most needed.

## (III) Bargaining Freeze

* Freezes prevent the unilateral alteration of terms and conditions of employment during the certification process (s.32—but recall proper cause saving provision), and then during much of the bargaining process after certification (s.4\_\_).
* Aims to restrain employer conduct that may have the effect of undermining the union’s organizing or negotiating efforts.
* The freeze operates in addition to other statutory unfair labour practice provisions, and supplements rather than displaces them.

### Simpsons Ltd. v. Candian Union of Brewery (1985, LRBR (N.S.))

* **F:** ER = national department store chain in financial difficulty. ER gave layoff notice to more than 1/10 of its workforce, including a number in a newly certified unit. Functions of some were contracted out. Union says that was a violation of the statutory freeze. No anti-union animus
* **I:** Breach of the freeze provision? YES & NO
* **R:** “Business as usual” test is unworkable. Test for whether you’ve breached a freeze is whether the reasonable expectations of employees have been breached. Objective standard- **what would EE expect to constitute his or her privileges in the specific circumstances of that employer**. Usual practices will always be w/in reasonable expectations. **If there’s a pattern of contracting out, then contracting out is expected and OK. If no pattern, no contracting out. In bad economic times, one-off lay-offs may be in reasonable expectations**.
* **HERE:** Given the company’s dire financial circumstances, lay-offs should be in reasonable expectations. However, as there was no pattern of contracting out, the contracting out was a breach.

### Ontario Public Service Employees Union v. Royal Ottawa Health Care Group (1999, OLRB)

* **F:** Hospital admitted it reduced the level of EE benefits during the negotiation of a collective agreement (bargaining freeze in place). Said this was bc of financial considerations. Union complained that hospital violated the freeze.
* **I:** Violation of the freeze?
* **R:** **Motivation for the rule is an unexpected shift in the starting point or basis for bargaining during the initial stages of that bargaining**. Business as usual doesn’t work bc once bargaining starts, business *isn’t* operating as usual. Reasonable expectations test doesn’t’ work because it isn’t’ clear how employee expectations might be ascertained & EEs reasonable expectations would be that the union would be bargaining for any changes at all. **The freeze provisions should be read in light of the need to bolster the bargaining process, reinforce the union’s status, and provide a firm starting point for collective bargaining**.

## (IV) Employer Speech

* What can an ER say to its EEs re: unionization during an organizing campaign?
* Boards = skeptical of captive audience meetings & forced listening.

### S.8 & 9 of BCLRC

* 8: Person has freedom to express view on any matter, including matters relating to ER, trade union, or representation by trade union, so long as there is no intimidation or coercion.
* 9: Person **must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or continuing or ceasing to be a member of a union**.

### United Steelworkers v. Wal-Mart

* **F:** Attempt to unionize WM in Ontario. Mgmt. met to determine how to counteract it. Regular morning meetings btw all staff held regularly. Told staff mgmt. from out of town was there to answer questions. Then circulated through the store. ER allowed a senior EE to give a non-union speech at a meeting, but did not give a pro-union EE a chance to respond. Set up a question box. Asked if store would close and refused to answer. Support for union fell from 44% to 21%.
* **I:** Was this appropriate ER speech? NO
* **R:** RE: EE speech- concerned that ER did not distance itself from EE’s comments, and did not allow union supporters to speak. Following speech, other EEs would have likely concluded she was concerned for her job security if union was successful. Would also prob conclude that her views reflected the ER’s. Company sought to intimidate or unduly influence EEs contrary to the Act. Cannot allow an EE to make a speech containing the subtle threats to job security at a meeting run by management, fail to distance itself from them, and then silence union supporters. Chilling effect!
* **R:** RE: outside mgrs.: **Mgrs. repeatedly engaging EEs in conversations about the union goes beyond mere assistance to EEs and becomes an extremely effective tactic of intimidation or undue influence contrary to the Act.** ER cannot hide behind open door policies when the effect of the open communications is to put undue influence on EEs concerning their selection of a trade union. Repeated and persistent personal contact not requested by EEs not OK.
* **R:** RE: question box: Given Wal-Mart culture, expectation that EEs questions would be answered, and circulating mgrs. **Constantly asking for questions, refusal to answer a crucial question re; store closures would be taken to mean store would likely closed**. *Tribunal limits this to the facts of this case.* Company intentionally fuelled EE concerns.
* **REMEDY:** Certified the union. Note the remedy has since been taken away in Ontario, but we have it here. **Note** practical problems with remedy- union won’t have groundswell of support going into first negotiation. Here, union was decertified bc it didn’t have enough support.

### Canadian Fibre (2008, BCLRB)

* **F:** Union alleges a series of ER meetings during organizing drive = captive audience meetings w/ forced listening. EEs were told they could leave at any point.
* **I:** Captive audience? YES
* **R:** **Meeting can be captive audience even if ER tells EEs attendance is voluntary.**
* **HERE:** Given small number of ppl at meeting, unlikely an EE would feel comfortable leaving unless certain the ER wouldn’t think that meant he/she was a union supporter. Therefore captive audience meetings.
* **I:** Forced listening? YES
* **R:** ERs forcing EEs to listen to anti-union views to influence their decisions would diminish the liberty, dignity, and autonomy of the EEs. It is disrespectful.
* **HERE:** RMH case- **Continuous display of slide shows during working hours at EEs workstations. They were prominent, persistent, and impossible to miss**, so EEs had to view them or consciously look away. No difference from being forced to watch or listen to a message.
* **NOTE:** Emboldened by health services. In BC, we’re more generous re: employer speech.

## (V) Solicitation on ER Property

* How should labour legislation balance EEs rights to act collectively with the ER’s right to control conduct on its premises?

### Canada Post Corp (1995, CIRB)

* **F:** Raid- one union trying to displace the other. LCUC alleges ER contravened code by refusing to grant access to EEs from other than the LCUC work locations. LCUC EEs wanted to canvas co-workers at other locations during non-working hours on ER premises. ER concerned with security, and obligation to act neutrally in context of a raid.
* **I:** Breach of the code?
* **R:** **Must consider whether the ER has demonstrated a valid & compelling business reason for restricting access.** Absolute rule of non-admittance is not compatible with the code, nor with the jurisprudence of some other labour relations boards. Code does not prohibit solicitation. Therefore, the Board finds that the ER, by preventing members from other locations from meeting with fellow EEs during non-working hours and in non-working locations within CPC premises violates the code. **The bargaining unit is nation wide- not allowing access would deprive EEs of the right to participate in the formation of the trade union of their choice.** EEs at one location are not strangers to any other work location such that they can be treated as strangers with whom the ER has not relationship.

## (VI) Remedies for interfering with Right to Organize

* Fast remedies are often key because union activities are often time-sensitive
* Usually provides for both quasi-criminal and administrative remedies
* Reinstatement & lost wages common when practice is suspending or dismissing an EE.
* S. 14 of labour code: Common Remedies:
	+ Damages (cost of organizing)
	+ Notice of unfair practice posted in the workplace
	+ New vote
	+ Access to EE lists
	+ Access to premises on company time
	+ Reinstatement/compensation for individual EEs
	+ Automatic certification
	+ Cease & desist orders

### Westinghouse (1980, OLRB)

* **F:** Runaway shop case.
* **Remedy:** Board directed ER to give EEs of the old plant a right of first refusal on the new jobs, with no loss of seniority or fringe benefits, and to pay a relocation allowance to those EEs that chose to move. Also order to give the union a list of those employed at the new plant, access to bulletin boards, and to permit union reps to address EEs during working hours. He union also got compensation for expenses incurred in organizing the new plants.

### National Bank of Canada and Retail Clerks (1982, CLRB)

* **F:** Union certified. CLC imposed statutory freeze from date of the application for certification until 30 days after. They gave notice to bargain which led to another statutory freeze. In the three days between the freezes, the bank officials met and changed a plan to reduce services to a plan to close the branch and transfer accounts to a non-unionized branch. There was some intermingling of EEs btw the two branches. Motivated by anti-union animus
* **REMEDY @ trial:** Decided that the union would be the bargaining agent at the new branch; ordered giving a list of EEs at the new branch, to allow the union to hold meetings at that branch, a bulletin board in the staff area, and to pay all the costs of the boards, etc. Also directed the ER to send a letter to all EEs across Canada saying it had violated heir rights and that it recognized that they had the right to organize and that the managers had a responsibility to recognize that right. Put $ in a trust fund to promote the Code’s objectives.
* **SCC:** **Must be a relationship between the act alleged, its consequences, and the thing ordered as a remedy.** Here, the trust fund does not remedy or counteract the consequences harmful to realizing the objectives resulting from the closure of the branch. The letter remedy should also be set aside.

### R. v. K-Mart Canada (1982, Ont. CA)

* **F:** ER put EEs on voters list who were not bona fide EEs. Undercover EE gave false evidence detrimental to the union and lied about being a bona fide EE of the ER. Later certification vote revealed clear EE preference for the union. Laer, the union couldn’t negotiate a K with the ER. Crown appealed a fine imposed on an ER for the Criminal Code offence of conspiring to effect an unlawful purpose (that purpose being to commit unfair labour practices prohibited by provincial labour relations legislation). Argued the fine was too light in the circumstances.
* **I:** Appropriate fine?
* **R:** Increased the fine to $100,000. Should courts impose jail sentences on company officers who engage in this sort of conduct?

# (F) The Acquisition and Termination of Bargaining Rights

## (I) Acquisition of Bargaining Rights

* Voluntary recognition is possible, but not common
* This resulted in the development of the Wagner act—a statutory procedure (certification) allowing the union, upon proving it has majority support, to become the exclusive bargaining agent for the EEs and compel the ER to bargain with it on their behalf.

### Adams: Union Certification as an Instrument of Labour Policy: A Comparative PErspective

* Other countries don’t divide the labour force into tiny bargaining units, and do not require unions to gain a majority of support in the bargaining unit to gain government support for recognition.
* Certification is good for the nonunion ER seeking to maintain the status quo
	+ ER can contest EE representation campaigns
	+ Dissipates pressure that existed in early 20th C. for the general enfranchisement of the industrial citizenship- certification legitimizes industrial autocracy- no need for industrial democracy if you have no union.
	+ Outlaw of company unions means ER are relieved of the duty to address the democratic void in industry
* Has resulted in environment where few workers can have a say in their conditions of employment.

### Jacoby: Social Dimensions of Global economic integration

* Greater trade begets greater mobility of capital. Hastened spread of MNCs that operate in, and depend on, the economies of many world regions.
* Globalization has mostly a negative effect on organized labour’s bargaining power and political influence. Downward pressure on wages and Ement (race to the bottom). Reduces demand for manual workers (organized) while boosting Ement of non-manual industries (harder to organize).
* Gov’t EEs are virtually the only group free of the threat of relocation, hence better unionization in the public sector.

### Arthurs: Reinventing Labor Law for the Global Economy

* Race to the Bottom permitted by globalization
* Globalization attenuates the connection btw EEs and ERs and dilute the notion of community of interest among workers.
* Workers no longer share common interests and characteristics.
* Workers are more often self-employed, reluctant parties to psychological contract of discontinuous, serial, and contingent jobs.
* Increasingly difficult for workers to identify their common adversary, let alone to define the common expectations, claim common entitlements, or implement common strategies.
* Hard for labour movement to negotiate difficulties of organizing across jurisdictions due to competing legal regimes.

## (II) The Appropriate Bargaining Unit

* Bargaining unit = group of EEs defined on the basis of the ER for whom they work and the positions they occupy
* Bargaining Units serve two purposes:
	+ Electoral constituency for the purposes of certification and decertification
	+ Basis for collective bargaining (b/c CA covers all EEs in the BU)
* Parameters of the unit affect ER-Union relationship by:
	+ Multiple bargaining units in the same workplace can result in disputes over who does what job/what agreement covers what work
	+ Economic pressure- One union shop can be disadvantageous to the ER—too much power; lots of bargaining units may mean lots of strikes; more units means more chance to compare what you get with your neighbour. Greater unrest.
	+ Compression of wage differentials within the unit can facilitate administration for ER
* Larger bargaining units result in administrative efficiency and greater mobility within the company (Paul Weiler)

### ICBC and Cupe (1974)- Paul Weiler

* Preferred unit is a broad one comprising all of the EEs of a single ER. This is administratively efficient, and often facilitates collective bargaining for both parties. It does not impede lateral mobility of EEs, and it allows for a common framework of Ement conditions. May also promote industrial peace and stability by making strikes and lockouts les likely than if there were several sets of negotiations

### Metroland Printing, Publishing & Distributing (2003, OLRB)

* **F:** Union sought a broad based bargaining unit, including casual, PT, and student EEs. ER disputed that. The two people in the advertising department wanted to be excluded
* **I:**what is the appropriate bargaining unit?
* **R:** Two part test: (1) Sufficient community of Interest- EEs share a community of interest by being employed by the same ER in the same workplace, and EEs with quite different terms and conditions of employment can effectively bargain together. *See CoI Factors in Island Medical, below.* (2) no serious labour relations problems for the ER. Differences amongst EEs must not result in problems if they are grouped together; consider here that broad based is better administratively and contributes to labour peace. **Should no longer be assumed that PT EEs have a different community of interest than full time EEs** (b/c no longer clear PTs may try to take hours from FTEs, or have less connection to the workforce and not support strikes, etc). Makes no sense to hive off the solo EEs- EE wishes balanced against the Board’s aversion to fragmentation and the viability of the bargaining unit as a whole.

### Island Medical Laboratories (BCLRB 1993)

* **R:** Key principles underlying appropriateness are industrial stability and access to collective bargaining. **Generally, industrial stability is best served by a single bargaining unit**. However, you can hive off a smaller subset if proposed members have sufficient community of interest. TEST in BC for Community of Interest: Consider four factors: (1) Similarity in skills, interests, duties, and working conditions (2) The physical and administrative structure of the ER (3) Functional Integration (4) Geography. Factors may be relaxed to facilitate access to CB in traditionally difficult to organize sectors.

### Sidhu & Sons Nursery Ltd (Re) (2009, BCLRB on review)

* **F:** Union argues that seasonal agricultural workers program EEs (SAWPs) constitute a distinct and separate classification from domestic farm workers, & have their own community of interest that they can have their own bargaining unit. (Note- ER probably wanted one unit so that seasonal workers would make certification less likely).
* **I:** Should the SAWPs have their own bargaining unit? YES
* **R:** Previous decision focused virtually solely on the bargaining unit work performed, and did not allow for proper evaluation of the unique nature of the circumstances of the SAWPs**. Normally, if work cannot be distinguished btw bargaining unit and non bargaining unit, it is determinative of there not being a distinct CoI between the two groups. However, here, the workers have a distinctiveness resulting from their unique Ement status and terms and conditions of employment (governed by SAWP program), as well as unique position re: Employer giving rise to separate collective bargaining interests**.

## (III) Timeliness of Applications

* Union can apply at any time to be certified as a bargaining agent for a unit of EEs not already covered by collective bargaining.
* Various statutory rules try to promote stability by stopping constant applications to certify/decertify the union
* Union will be decertified and collective agreement becomes void if it is established at any time that the certification was obtained by fraud.

### BCLRC: Certification campagins and timliness (not on Exam)

* **S. 19:** If a union is unsuccessful in a certification campaign, it must wait 22 months before trying again
* **S. 19:** The decertification/raid “open season” is in the 7th/8th month of each year of the collective agreement
* **S.32:** An application for decertification cannot be brought until 10 months after certification (to give new unions a chance to get established)

## (IV) Successor and Common Employers

### Successor ERs

* Generally, the “corporate veil” means that a change in the ER’s corporate ID ends statutory bargaining rights by which the Old ER was bound, and any agreement negotiated
* All jurisdictions therefore have detailed provisions giving significant protection to existing bargaining rights where a business has been sold or transferred to a new ER—in short, the collective agreement attaches to the new ER
* Board have been flexible in finding a sale of a business even in situation where there has been no apparent exchange between the predecessor and the successor.
* Contracting out will not result in successorship.

### Ajax (town) v. CAW Canada (Ont. CA, 1998- affirmed by SCC 2000)

* **F:** Case of “contracting in.” Ajax had contracted out their city busses. They later decided to make the bus service a city-run service. The former ER had been unionized.
* **I:** Does the collective agreement attach to the city? YES
* **R:** In virtually all jurisdictions **something must be relinquished by the predecessor business and obtained by the successor to bring a case within these sections**. Here, Charterways’ relinquished its workforce, most of which was then acquired by Ajax. Acquisition presents a “transfer” to the Town of the workforce. **It’s skilled and stable workforce was Charterways’ most valuable asset. Transfer of that asset was akin to transfer of a business as a going concern**. Attaches to the city.

### Common ERs

* Two businesses are treated as the same ER for labour relations purposes

### White Spot v. BC (1997, BCSC)

* **F:** White spot has both franchises & corporate restaurants. Some locations are unionized and others are not. 17 locations are covered by a collective agreement. One is sold to Gilly. Collective agreement will attach to Gilly, but when it expires, the union wants to negotiate with White Spot, Not Gilly (wants Gilly treated as a separate, not common employer)
* **I:** Are White Spot & Gilly common ERs?
* **R:** Will be treated as common ERs if there is common control and direction. It is important that the union is able to negotiate with the body that dominates the franchise relationship so that it can bargain effectively. Control exercised by franchisor & whether it’s sufficient is a conclusion of fact based on the evidence. Not necessary to show bad faith by either party- the only issue is the degree of control.
* **HERE:** there is common direction and control b/c White Spot controls menu prices & food items; Gilly must use white spot approved suppliers and delivery & white spot negotiates prices with those suppliers; Gilley pays White Spot a marketing fee that markets Gilley’s (& other) restaurants; White spot requires that a franchisee have a WS trained GM.

## (V) New Models of Representation

### Minority unionism

* % of EEs that support the union are part of the union, the rest are not.
* + : Gets a union presence into the workplace, and others may choose to join later
* - : Could be divisive and lead to many strikes

### Craft Unionism

* Union for a particular craft, and ERs hire from those (“Hiring Halls”)
* Often used in the construction industry
* Portable benefits can be organized that travel job-to-job (ER-to-ER)
* Union is dedicated to the industry
* Valuable with skilled workers
* Was historically quite racially and sexually exclusive

### Citizen Unionism

* Unions are political actors that should lobby generally for workers’ rights with the government and ERs
* Issue: How will they make money?

### Ready, Roper & Baigent: Recommendations for Labour Law Reform in BC

* Argue for Sectoral Organization in under-represented industries
* Currently used in sports, forestry
* Existing models are designed for large industrial operations with full-time workforces. It is impractical and unacceptably expensive for unions to organize and negotiate collective agreements for small groups of workers in the service sector.
* Best to find a new model that would allow EEs in those sectors to band together to bargain collectively.
* Model would only be available in sectors that are determined, by the LRB, to be historically underrepresented by trade unions and where the average number of EEs is less than 50. A sector would have to have a defined geographical area, and similar enterprises within the area where EEs perform similar tasks.
* Union with requisite support at more than one work location within a sector could apply for certification of the EEs at those locations. Union would have to show support at each location, prevail in a vote amongst all EEs at the work locations. If successful, they would be certified for bargaining within the sector. Collective bargaining would then occur between the union and the various ERs. A standard collective agreement would be settled and other EEs from other locales could be brought in to that agreement.
* **Comments:** Positive is that it would be clear what new voting EEs would get when they vote. This could encourage unionization in the service sector. Negative is that the small businesses wouldn’t get a chance to negotiate those first agreements. It could also really hurt small business’ ability to compete with the big chains.
* **Proposal died a quick death.**

# G.) Negotiating a Collective Agreement

## I.) Statutory Timetable & Freezes

### Timetable & Duty to Bargain

* (1) Either EE or ER serves notice to bargain (either after certification, or after existing agreement has expired/within certain period before its expiry date)
* (2) Service of notice to Bargain triggers statutory “duty to bargain” s.11 of Labour Code—in good faith, and making a reasonable effort to reach a collective agreement. Breach may result in UFLP complaint. Also triggers bargaining freeze.
* (3) Duty remains in place until they reach a collective agreement
* First contract- can result in “first contract arbitration”- imposition of terms if parties cannot reach it themselves
* Once agreement reached, no legal striking; changes to agreement only through agreement; grievances to deal with interpretation;
	+ Exception- if a new technological change changes practices, CLC allows for reopening of duty to bargain if that will impact terms and conditions or security of Ement

### The Bargaining Freeze

* Prohibition on changes in terms and conditions of employment after the notice to bargain has been given.
* IN BC- s.45(2)- freeze runs until there is an actual lawful strike or lockout. If union is not ready to strike when the law allows strike action to be taken, the employer must institute a lockout if it wants to bring the freeze to an end
* OTHER PLACES: Freeze in place only until a strike or lockout would be lawful

## II.) the Duty to bargain in Good Faith

### S. 11: Labour Relations Code- Requirement to bargain in good faith

* (1) Trade union or ER must not fail or refuse to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement
* (2) If a trade union and ER have concluded a CA outside BC, it is invalid in BC until a majority of EEs in BC covered by the agreement ratify it

### Purposes of duty: Cox: *The Duty to Bargain in Good Faith*

* Reduces the number of strikes for union recognition
* Prevents anti-union tactics of breaking up weak unions by refusing to recognize them
* Implements the basic philosophy of the act by imposing the duty to engage in collective (not individual) bargaining
* Enables EEs and ERs to dig behind their prejudices and exchange their views with the result that agreements are reached on many points and force them to compromise on the others.
* Each side gains an understanding of the industrial climate

### United Electrical, Radio & machine Workers v. DeVibliss (canada) (1976, OLRB)

* **R:** freedom to join would be meaningless if an ER could enter into negotiations with no intention of ever signing an agreement. They will likely reach an understanding of each other’s concerns and be able to resolve their differences without recourse to economic sanctions if they have to bargain. **Two principle functions: Reinforces the ER’s obligation to recognize the bargaining agent, and the duty fosters rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict**

### Canadian Association of Industrial, Mechanical and Allied Workers v. Noranda Metal Industries (1975, Can LRBR)

* **F:** Union requested information on the cost of a benefit package to the ER. The ER said the information was confidential.
* **I:** Does the DtBiGF require withholding information like this? YES
* **R:** **A party commits an unfair labour practice if it withholds information relevant to collective bargaining without reasonable grounds**. One would hardly say that an ER who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making “every reasonable effort” to conclude a collective agreement. This is particularly true where, as here, the ER is using that information as grounds for being unable to accept an agreement. (HERE- ER said the price was prohibitive, but withheld the price)

### United Steelworkers of America v. Radio Shack (1980, OLRB)

* **F:** Union had received automatic certification because the ER had engaged in prior unfair labour practices—failing to reinstate an EE contrary to board order, circulating anti union petitions, warning it would move out west if union was certified, statements to EEs disparaging board’s procedures, distribution of free anti union t shirts to EEs. Notice to bargain served. Sent EE a memo ridiculing the union’s request for names, classifications, and seniority dates for EEs, and details of fringe benefits. Sent another memo ensuring the EEs that despite the unions demand for a unions shop clause, no EE would ever have to pay dues to work at the ER. Right after first bargaining session, ER sends EEs another memo commenting on issues discussed at the bargaining table. Put forward counterproposals prohibiting the unions from publicly mentioning the ER without prior authorization, would have allowed grievances over any mention to go immediately to arbitration. THEN ER sends in a new bargaining team and they reach some agreements. Four issues left outstanding. Team tells the union to strike to make more progress. ER uses scabs. Union complains of surface bargaining
* **I:** Breach of duty to bargain in good faith? YES
* **R:** No doubt that prior to the new team coming in, there was a failure to bargain in good faith. Absence of direct testimony from ER was persuasive here because of the rigid stances they took. **Where the ER adopting an anti-union security clause position has played no significant role in unlawfully contributing to the absence of support, the position is unobjectionable. But where an ER adopts this stance after having engaged in the kind of pervasive unlawful conduct that the ER did here, the ER has failed to bargain in good faith.** The position on union security was part and parcel of a longstanding scheme to undermine the statutory role of the complainant as exclusive bargaining agent. Discouraging a rand formula was coercive to EEs because what EE would come forward to ask for a deduction of union dues knowing the ER’s position?
* **I:** What is surface bargaining?
* **R:** **TEST: SURFACE BARGAINING:** describes **going through the motions or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union.** Distinct from **hard bargaining – parties are entitled to take firm positions which may be unacceptable to the other side.** The Act allows for the use of economic sanctions to resolve these bargaining impasses. Merely tendering a proposal which is unacceptable (predictably so) is not sufficient, standing alone, to allow the Board to draw an inference of surface bargaining. Inference will be drawn from the totality of the evidence including the adoption of an inflexible position on issues central to the negotiations. Test is met here.

### Canadian Union of Unitered Brewery, Flour, Cereal etc workers v. Canada Trustco (1984, OLRB)

* **F:** Union organized 2 branches. First branch’s agreement, only mildly more than the non-union branches. In other branch, ER said they wouldn’t give much more than in the first collective agreement. The union complained of surface bargaining.
* **I:** Bargaining in good faith? YES
* **R:** **Rational discussion, power, and persuasion are effective tactics to gain one’s bargaining objectives. So is economic pressure**. Collective bargaining permits the outcome of a just wage or distributive justice, but does not compel it. Under the statute, **the only obligation is to endeavor to conclude a collective agreement, and if that is the true intent, neither the content nor the consequences of that agreement are of any concern to the Board.** It is OK to pursue one’s own self-interest and legitimate business objectives in the course of collective bargaining—this is hard bargaining and is permissible.

### Critique of the duty to bargain in Trustco- Langille & Macklem*: Beyond Belief: Labour Law’s Duty to bargain*

* A conception of the duty to bargain that assumes or rests upon a supposed distinction between bad faith and self interest is bound to fail because there is no such distinction.
* The rational and powerful ER will always be willing to sign the CA that maximizes his self-interest. **A powerful, rational, anti-union ER can always plead self-interest and escape the strictures of the duty. This threatens the integrity of legislative schemes designed to encourage the practice and procedure of CB by subjecting their dictates in situations of this sort to an overriding defence of self-interest.**
* Nothing in the logic and rhetoric of our conception of the duty to bargain would prevent an ER from, for example, seeking to conclude an agreement where the standards are lower than other branches.

### Royal Oak Mines v. Canada (Labour Relations Board) (1996, SCC)

* **F: Goes to addressing the concerns raised above:** Giant Mines Disaster; bitter strike. ER brings in replacement workers. Explosion at mine by striking EE kills scabs. Tons of conspiracy theories, lawsuits, etc. EE and ER had to negotiate in this context. Board found the ER wasn’t bargaining in good faith b/c it refused to bargain until after discipline, etc. was dealt with. Board ordered the ER to put on the table a tentative agreement it had put forward earlier, with the exception of four items on which the ER had changed its position. Parties given a 30 day period to settle those items, after which compulsory arbitration would result.
* **I:** Duty to enter into bargaining in good faith is measured on a subjective standard, while making of a reasonable effort to bargain should be measured by an objective standard. **When examining on the objective standard- reasonable effort to conclude an agreement-, the board may look at comparable standards and practices within the particular industry. This prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.** Putting forward a proposal, or taking a rigid stance that the other party could never accept because the term is generally acceptable and included in other collective agreements in comparable industries throughout the country, must constitute a breach of the requirement.
* **HERE:** The mine imposed an unreasonable condition to the collective bargaining process, accordingly, the decision to hold them in breach of the duty to bargain was not patently unreasonable.
* **NOTE:** This may be in part based on the extreme facts of this case.

### CAW Canada v. Buhler Versatile (2001, MLB)

* **F:** Alleges the BVI failed to bargain in good faith and failed to make every reasonable effort to conclude a collective agreement with the Applicant union. CAW was concerned about the save of a plant to BVI. Regardless, BVI became party to the collective agreement. BVI says “my first offer is always my last offer.” ER offered less each time they met with the union, whereas union kept offering concessions.
* **I:** Bargaining in good faith? NO
* **R:** OK for parties to engage in hard bargaining to persuade the other side to accept their position. This is not the case here. BVI consistently displayed an unwillingness to enter into any rational and informed discussions and provide supporting arguments throughout the negotiations. **Consistently offering less satisfies the board that BVI breached the duty to bargain in good faith by purposely avoiding attempts to find some common ground to resolving the outstanding issues**.

## III.) Disclosure of Decisions or Plans Substantially Affecting the bargaining Unit

### Westinghouse Canada (1980, OLRB)

* **F:** During negotiations for the renewal of a long-standing agreement, the company had been considering a plan to move one of the manufacturing operations covered by that agreement from its existing location in a highly unionized area, to several less unionized areas of Ontario. Move was an “unevaluated likelihood” during the period of the evaluations. Union did not ask whether the C had any relocation plans, and company did not mention the matter. Move announced shortly after the renewal agreement was signed.
* **I:** Breach of the duty to bargain in good faith?
* **R:** C committed an unfair labour practice by moving the plant but dismissed the complaint of failure to bargain in good faith. **Duty to bargain places an obligation on the ER to respond honestly to union inquiries at the bargaining table about the existence of company plans that may have significant impact on the bargaining unit, but does not place the ER under a duty to reveal, on its own initiative, plans that have not yet ripened into at least de facto final decisions.**

### Critique of Westinghouse: Langille: *Equal partnership in Can. Labour Law*

* It is much easier to get away with an agreement saying nothing about issues like plant shutdown or contracting out if the probability of such occurrences is perceived as low.
* Westinghouse gives ERs an incentive to remain silent, lock the union into the agreement, and then reveal the plans or act upon them.
* Non-disclosure is in direct conflict with the DtBIGF. Non disclosure is generally accepted unless there is a duty to disclose. Offends principle in DeVibliss to foster rational discussions.

### IWA v. Cosolidated Bathurst Packaging (1983, OLRB)

* **F:** Union sought to persuade the ER to tighten provisions in the expired agreement re: plant closures and severance pay. Union dropped the demands, and the old provisions were renewed. Company did not indicate that its Hamilton plant might or would be closed during the term of the agreement. A few weeks after the agreement was signed, the ER announced that it was shutting down its Hamilton operation one month later. Union complains of breach of obligation to bargain in good faith
* **I:** Breach of duty? YES
* **R:** **A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities.** Disclosure encourages the parties to focus on the real positions of both the EEs and the ER. Hopefully greater sharing of info will lead to greater understanding and less industrial conflict. Requesting info is still important, otherwise it would be too hard for ERs to know their responsibilities. However, a second and more limited way the bargaining duty requires disclosure arises out of its good faith purpose and does not require a specific request. **It is tantamount to misrepresentation for an ER not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment such as a plant closing and which the union could not have anticipated**. Where a decision to close a plant is announced on the heels of the signing of a collective agreement, the timing may raise a rebuttable presumption that the decision making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. The more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between proposals and decisions. **Failure to disclose highly probably decisions or effective recommendations fundamental to the employment relationship may be tantamount to misrepresentation.** Moreover, if the decision is being made because of **costs it really ought not be made until discussed with the union** to see if adjustments can be made.
* **HERE:** a de facto decision had been made, so there was a breach
* **REMEDY:** can’t really order the plant to be re-opened; Ordered the ER to indemnify the union for the damages it suffered from the loss of opportunity to negotiate on the matter of the plants closing.

## IV.) Remedies for Violating the Duty to Bargain

### Radio Shack On Remedies

* **Remedy should not be seen as a penalty**
* Monetary relief was only awarded as compensation to an injured union for **pay increases and other benefits it had failed to win because of the ER’s actions, and not as punitive damages for the ER’s breach** of the duty to bargain.
* Imposing an agreement exceeded the statutory mandate and would deviate from the principle of free collective bargaining;
* Instead it would use cease-and-desist orders; orders to bargain in good faith; order to publish retractions of false or prejudicial statements; orders to pay the injured party’s negotiating costs

### Royal Oak Mines

* **F:** Found that the ER was rejecting union proposals that were reasonable. Put a former proposal in place, and a grievance procedure, and told the union to vote on it.
* **I:** Is this remedy appropriate?
* **R:** The Board’s order must remedy or counteract any consequence of a contravention or failure to comply with the code—this means that the remedy must be rationally connected or related to the breach and its consequences. **A remedy will be patently unreasonable if it is (1) punitive in nature; (2) infringes the Charter (3) No rational connection and (4) where the remedy contradicts the purpose of the code**
* **HERE:** Board was obliged to take into account the long violent and bitter history of the dispute. The facts were so extraordinary that, if it were necessary, the Board was justified in going to the limits of its powers in imposing a remedy. A cease and desist order would have been a waste of time, as they would never agree on their own. Rationally connected and all good

### Buhler Versatile

* **F:** Each offer was worse than the last; said first offer = last offer. Found surface bargaining
* **Remedy:** Immediately compensate each EE that was a member of the bargaining unit when the strike commenced for all lost wages and employment benefits they would have earned had the strike not occurred. Award of several million dollars- largest award ever

## V.) First Contract Arbitration

### Traditional v. Principled Arbitration

* **Traditional Bargaining = “positional” or “adversarial” bargaining. Only enough info is conveyed to let the other side know what one wants**; the negative implications which one’s demands may have other the other side’s interest are hidden and understated.
* Principled or Mutual Gains bargaining:
	+ Emphasizes the importance of negotiations based on information, persuasion and co-operation. Coercion viewed as dysfunctional and counterproductive
	+ Allows the parties to include mutual benefits when they focus on interests, not positions
	+ Bargainers have to separate the problems to be resolved from the people negotiating the issues
	+ Parties don’t commit themselves to specific and detailed demands. Each negotiator is able to discuss and examine a variety of options before deciding what course of action to pursue.

### Last Offer Arbitration

* Each party puts forward their own proposed agreement; arbitrator must pick one over the other.
* Incentive for each party to be reasonable with their demands.
* Generally not used for first K arbitration

### First K Arbitration

* If parties do not reach a settlement in negotiations for the first collective agreement after certification, interest arbitration will occur.
* Arbitrator generally draws up the terms based on submissions
* Gives parties a start, so they have a starting point at the next negotiation.

### Yarrow Lodge Ltd v. HEU (1993, BCLRB)

* **R: Criteria for deciding whether to impose a first contract under s.55 of the LRC**
	+ Bad faith or surface bargaining
	+ Conduct of the ER demonstrating a refusal to recognize the union
	+ A party adopting an uncompromising bargaining position without reasonable justification
	+ A party failing to make reasonable or expeditious efforts to conclude a collective agreement
	+ Unrealistic demands or expectations (intentional, or because of inexperience)
	+ Bitter and protracted disputes in which the parties will be unable to reach settlement

### Jean Sexton: First K Arbitration: A Canadian Invention

* Objectives are to end the current dispute and allow the parties to get used to each other and law the foundations for a more mature and enduring relationship
* In BC, first K arbitration acts as a deterrent to union recognition conflicts. Not used frequently and only really used for bad faith bargaining
* Federally, similarly used very little.
* Quebec- totally different- used frequently. Mostly concentrated in small bargaining units. Usually impose only parts on an agreement. The more time passes and the more cases are referred, the more successful the remedy will be not only in putting an end to the current dispute but in terms of getting the parties to a more mature an enduring relationship. The deterrent effect is greater when first K arbitration is known and used. In Quebec, no one from either MGMT or unions requested the provisions be eliminated from the code or made ineffective.

### Interest Arbitration

* Parties cannot reach an agreement; each side makes submissions and the terms are set by an arbitrator
* Often results in steady gains for unions
* Can have a “narcotic” effect, where the parties do not work had to reach an agreement.
* Often used in public sector. Open question whether the arbitrators should consider “ability to pay” when arbitrating CAs for the government—the government could always raise taxes. Government has legislated out of CAs because the arbitrator did not consider ability to pay.

# H.) Professional Responsibility

### General

* More than any other area, this is a polarized environment
* Rare for ER side lawyers to switch to EE side
* Many lawyers approach the line re: professional conduct
* Arising issue: What should you do if your client asks you the help them commit unfair labour practices?

### LSUC v. Rovet (1992, LSDD)

* **F:** Counsel advised ER/client to bring in workers to enlarge the bargaining unit to fight certification campaign. Rovett back-dated correspondence and made misrepresentations to the labour board. Complaint to the law society. Uncovered that he was also cheating the firm out of client money.
* **R:** Convocation gives him one year suspension. Dissent would have disbarred him.

# I.) Industrial Conflict

## I.) Social Significance & Policy perspectives

### Paul Weiler: *Reconcilable Differences: New Directions in canadian Labour Law*

* The law must work to prevent economic sanctions (strikes). The law has already banned strike action as the means of settling recognition disputes.
* Basic assumption of our industrial relations system is the notion of freedom of contract between the union and the ER. Powerful arguments in favour of that policy—the terms and conditions of Ement are purchased by ERs and are provided by EEs.
* Freedom to agree entails the right to disagree, to fail to reach an acceptable compromise.
* Means of resolving disputes is a serious social issue because the tacit premise underlying the system is that both employment status and collective bargaining relationship will persist indefinitely through one series of negotiations after another.
* Only right that ERs and union have in response to employer pressure is the collective right to refuse to work on the terms, to withdraw their labour rather than to accept their ER’s offer. This is what a strike consists of. It’s important to solve deadlocks in a collective bargaining relationship
* Credible threat of the strike to both sides can play the major role in our system of collective bargaining.
* We have prohibited strikes at many points in the system because we have concluded that there are better techniques for performing that task of dispute resolution: grievance arbitration. But so far we have not been able to agree on an acceptable alternative for contract negotiation disputes, and thus the strike continues to be the indispensible lesser evil in that setting.

### Role of the Strike in resolving disputes

* **Private Industry:** places economic pressure of the ER in the form of loss to customers, both immediately and potentially long term. Pressure is put on the EEs in the form of lost income, and because damaging the business could harm their employment security later
* **Public Sector:** ER tends to save money with a strike, and there is less worry of loss of business because of public sector monopolies. The pressure is supposed to come politically from taxpayers that want the services back. But, practically, public pressure is more often on the union, not the government.

## II.) Constitutional Right to Strike

### Reference Re: PSER (Alberta) (1987, SCC)- Alberta Reference; Labour Trilogy

* **F:** Alberta legislature removed the public sector right to strike. Union had complained to the ILO, who censured the Alta government.
* **I:** Does s. 2(d) (freedom of association) protect the right to strike? NO
* **R:** **S. 2(d) does not protect the right to strike**. 2(d) does not provide greater constitutional rights for groups than for individuals; it simply ensures that they are treated alike. Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. It also protects activities which are lawful when performed alone when performed in a group. **Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual. As it is not lawful for an individual to cease work during the currency of their K of employment, and because there is no analogy between the cessation of work my a single EE and a strike conducted in accordance with labour legislation, ‘striking’ is not lawful when done alone, and therefore not protected by 2(d)**
* **DISSENT:** (Dickson): There is a clear consensus in international law that the essential activities of labour unions- collective bargaining and the right to strike are protected by freedom of association documents. Our constitutional law ought to be informed by international law. Under our existing system of industrial relations, effective constitutional protection of the associational interests of EEs in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to section 1 of the charter. The very nature of a strike, and it’s raison d’etre is to influence and ER by joint action which would be ineffective if carried out by an individual. It is precisely the individual’s interest in joining and acting with others to maximize his or her potential that is protected by s. 2(d) of the Charter.
* **NOTE:** The two other rights- to join a union and to bargain collectively- have now been found to be protected under 2(d). Raises questions as to whether this right will now be held to exist.

## III.) Legal Prohibition of Strikes & other Economic Sanctions: The Peace Obligation

### General

* Pre-WWII, strikes were used often to resolve virtually all types of employment-related disputes- from recognition to negotiation of terms, to reinstatement of discharged EES, the enforcement of CAs, and the drawing of jurisdictional boundaries between unions.
* During WWII: Continuous war production was necessary. More intensely regulated system of collective bargaining emerges. Use of strikes strictly limited to disputes over the negotiation of a collective agreement. Strikes banned in all other circumstances.
	+ Exception: federal code allows ER to give the union advance notice of technological change during the lifetime of the CA, and a duty to bargain then arises over matters arising out of such change, and the bargaining can eventually result in a legal work stoppage.
* Legal requirement the parties talk to each other before resorting to a strike or lockout.

### BC Labour Relations Code- Part 5- Getting to a legal strike position

* 57: (1) EE in CA **must not strike during the term of the CA,** and a person must not declare or authorize a strike of those EEs during that term; (2) ER must not lock out an EE bound by the CA during the term of the CA.
* 58: **Each CA must provide that there will be no strikes or lockouts so long as the agreement continues to operate**, and is deemed to contain the provision if it doesn’t have one.
* 59: Can’t vote under (60) or (61) on the question of whether to strike or lock out until the trade union and the ER or their authorized reps have bargained collectively in accordance with the code. Must not declare or authorize a strike and an ER must not declare a lockout until 60 & 61 have been complied with.
* 60: **Procedure for declaring a strike:** No strike until there’s a vote, and the majority of those voting favour a strike. If the vote favours a strike, have to declare a strike within 3 months of the vote; and an EE must not strike until the ER & Board have had written notice, and 72 hours have passed since notice was filed with the board and served on the ER. If a mediator had been appointed under s.74, have to wait until 48 hours after the mediator to reports to the associate chair.
	+ PRACTICE NOTE: Likely not a good idea to strike with only a marginal majority victory on the vote; probably won’t wait 3 months before declaring the strike. Union wants the EEs on side to present a united front.
* 62: EE benefits continue while they’re on strike or lawfully locked out.
* 63: Code isn’t to be construed so as to prohibit the suspension or discontinuance by an ER of their operations, in whole or in part, for a cause not constituting a lockout.
* 78: ER can request a last offer vote before the commencement of a strike or lockout. If the ER requests that vote, and the vote is in favour of the acceptance of a final offer, and agreement is thereby constituted between the parties.

## IV.) Definition of Strike

### Communications, Electronic, Electrical, Technical & Salaried Workers of Canada v. Graham Cable (1986, CLRB)

* **F:** Union did not want to strike because managers could probably keep the organization running without the workers for a long time. Consequently, the slowed production in some areas and sped it up in others. ER said the EEs would be disciplined for these actions. If this was a strike, disciplining the workers would be an unfair labour practice.
* **I:** Is this a strike? YES
* **R:** **Strike is defined as (a) collective** **action (2) designed to restrict or limit output or production.** Particularly in industries where replacement workers are readily obtainable, rotating strikes, overtime bans, work to rule campaigns, slow-downs and many other more imaginative job related activities are becoming the strike weapon of the day. Union members do not loose their income. **These are unlawful when done when there is no legal strike position; only fair to say it’s a legal strike. ERs are not defenseless- they can always take action to lock-out the EEs.**

### OSSTF v. Grand Erie District School Board (1999, OLRB)

* **F:** Teachers were “working to rule” – no extra activities besides teaching. They were in a lawful strike position. ER argues that the work-to-rule activities were not protected “lawful activities” because the teachers were refusing to perform duties required by statute.
* **I:** Lawful strike despite in breach of statute? YES
* **R:** **Teachers are acting in combination or concert to limit output and therefore fall within the definition of strike**. Legal strike position. The fact that the duties the teachers are not performing are part of their statutory employment duties does not remove them from the spectrum of work activities which teachers can refuse to perform during a strike. If they were so removed, a total cessation of work would also not be possible. **Limitation on the right to strike cannot be inferred from the fact that an act includes some duties of teachers, principals, and school boards. A stark choice between total strike or no strike is not mandated by the statutory scheme. A concerted refusal to perform some duties prescribed by contract or statute cannot be unlawful when a concerted refusal to perform all of those same duties is conceded to be lawful.**

### BC Terminal Elevator Operations on behalf of Saskatchean Wheat Pool v. Grain Workers’ Union (CLRB, 1994)

* **F:** ER sought an unlawful strike declaration b/c EEs refused to work voluntary overtime following the temporary layoff of ten EEs in the bargaining unit. Collective agreement explicitly stated the EEs could refuse OT work.
* **I:** Strike? YES
* **R:** EEs engaged in a concerted refusal to work OT in circumstances where, in the normal course, a sufficient number would have normally accepted work. Union’s position OT when lay-offs were in effect was clear. Inferred that the union was the architect of the refusal. Actions which are acceptable for individual EEs, because of the collective agreement provisions, may constitute an unlawful strike when done in combination, in concert or in accordance with a common understanding that is aimed, in relation to their work, at restricting or limiting output.

## V.) The Strike Prohibition & Sympathetic Action

### Refusing to cross a picket line

* Generally, refusing to cross a picket line is a strike- it meets the two part test
* Under a former rule, there was a purposive element to the definition: “purpose of pressuring the ER to agree to terms and conditions of employment.” Crossing a picket line does not meet THAT definition
* BC CODE: Allows for the negotiation of a clause not to cross a picket line; the Board will enforce it. S.1(1) “strike” (b) excludes refusing to cross a picket line from the definition of strike
	+ Does not exist in the rest of Canada
	+ Only a very strong union would get that type of clause.

### International Longshoremen’s association v. Maritime ERs association et al (1979, SCC)

* **F:** Legal strike by police. Picket lines at entrance to the port’s facilities. Members of the locals refused to cross the police picket lines and shipping operations were shut down. The members and the police had different ERs.
* **I:** Illegal strike?
* **R:** Deletion of the qualification to the definition of strike that withholding of services be done to compel the ER to accept the proposed terms of employment. **The new objective definition of strike encompasses refusing to cross a picket line. There is no room to import a qualification which would exclude a stoppage of work resulting from one circumstance only, namely the honouring of a picket line by the EEs.**

### Hot Cargo/Hot Edict Clauses

* Refusing to deal with the goods/products of a striking union
* All provinces besides BC prohibit Hot Cargo clauses
* BC CODE: s. 70 Declaratory Opinion: If a declaration by or on behalf of a trade union or an agreement between one or more trade unions is substantially affecting trade and commerce in a commodity or is substantially affecting the business, the board may issue a declaratory opinion that the declaration, agreement or combination is void; unenforceable; or valid & enforceable. Board must consider the extent to which the ER has been affected, and the intent and purpose of this part and the necessity for reasonable protection and advancement of a union or ER.

### Victoria Times Colonist Case

* **F:** Union had negotiate a Hot Cargo clause. Telus goes on strike. Fed issues a “hot edict” against Telus print ads in an attempt to pressure Telus to bargain a fair agreement with its union. Hot edict delivered to the Times Colonist, union refused to handle newspapers containing Telus ads. Times colonist feared loosing revenue. Seeks unlawful strike declaration.
* **I:** Illegal strike? NO
* **R:** There is **no prohibition in the code of Hot Cargo clauses. There used to be, but the fact that the prohibition was removed shows that the hot cargo clause is legal**. Declares under s.70 that the combination is valid & enforceable. Hot cargo clause reserves right for members to refuse to execute any work coming from & destined for delivery to any department of the TC, etc. etc., and which is involved in a lawful strike or lockout. This is a matter that goes to arbitration.
* **Arbitration:** Not clear whether the actions fall within the clause, but ultimately fell on unions side (probably based on a purposive interpretation)

### nelson Crushed Stone & United Cement (1978, OLRB)

* **F:** Refusal by members of one union to cross a picket line maintained by members of another union legally on strike against a common ER, where the CA between the ER and the non striking union had a provisions stating it won’t be a violation of the agreement if an EE refuses to cross a legal picket line.
* **I:** No-cross clauses OK? NO
* **R:** **This clause cannot make lawful what would otherwise be lawful—a concerted refusal on the part of EEs to work when work is scheduled. Such clauses are invalid to the extent that they purport to contract out of the Labour Relations Act.** They may nevertheless limit the liability of EEs and the union under the terms of the CA. They may also persuade the Board to decline to grant consent to prosecute where the EEs or the union, relying on such a clause, engage in a strike.

## VI.) Lockouts

### Definitions of Lockouts

* 1(1)”lockout”: Includes closing a place of employment; a suspension of work or a refusal by an ER to continue to employ a number of his or her EEs, done to compel his or her EEs or to aid another ER to compel his or her EEs to agree to terms & conditions of employment
	+ NOTE: Definition has a purposive element
* Same timelines generally apply- ER can lockout when union is in a legal strike position. This is also when the bargaining freeze expires, allowing the ER to unilaterally alter the terms and conditions of employment.

### Westroc Industries Ltd. v. United Cement, Lime & Gypsum Workers International (1981, OLRB)

* **F:** ER believed the union was deliberately prolonging discussions in order to conduct simultaneous strikes in other locations where the collective agreements had later expiration dates. Company locked out the EEs. Company hired some replacements and resumed certain operations. Union complained that the lockout and hiring of replacements breached the OLRA.
* **I:** OK to lock out? YES
* **R:** The act contemplates timely lockouts aimed at inducing EE agreement over terms and conditions of Ement. A lockout aimed at dissuading EEs from exercising rights under the Act is never lawful. **Employers can lockout to apply economic pressure in order to achieve a collective agreement on the terms they want, and in the instant case, the ER continued to be driven by this purpose**. Replacement workers are also OK. **The temporary replacement workers may allow the ER to maintain key customers and, to some degree, ensure that locked out EEs will have jobs to return to**. Evidence here showed no failure to bargain in good faith, etc.
* **NOTE:** This case & rationale may not apply in BC because **Temporary workers are not allowed in BC**

## VII.) Legal Forums Regulating Industrial Conflict

### Courts

* Historically, regulated picketing and the conduct of disputes through tort law and injunctions. ER friendly

### Courts: Damages

* Damages are the conventional remedy for a civil wrong; have been awarded on occasion for labour disputes.
* The deliberate commission of a tort may give rise to punitive damages as well. They will discourage the D and others from repeating the tort.
* ERs rarely pursue such claims to judgment- existence of the suit is more often used by the ER as a bargaining counter to obtain a settlement- either for a lesser amount of damages or for favourable collective agreement terms.

### Courts: Injunctions

* Play a greater role than dmgs in industrial disputes
* Available quickly and with relative ease and because they immediately prohibit the industrial action in question rather than merely granting a monetary remedy long after the fact.
* In labour disputes, an interlocutory injunction generally disposes of the case
* Three Step Test (RJR MacDonald)
	+ Serious question to be tried
	+ Irreparable harm
	+ Balance of convenience.
* Controversial to grant these in labour disputes:
	+ Undue haste & ex partes applications
	+ Laxness re: proof (affidavits)
	+ Not normally appealable without leave, and leave is rarely granted
	+ Generally directed too broadly at individuals and their assigns agents, etc.
* Some legislature have reformed injunction procedures so there are greater safeguards for actions in connection with a labour dispute.
* BC Labour Relations code: abolishes the court’s authority to grant injunctions in labour matters, providing instead for regulation by the labour board. Courts may grant an injunction when the conduct causes immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property

### Labour Board

* Labour board decides if a strike is legal.
* Can issue cease & desist orders that can be filed with the court for enforcement

### Arbitrators

* Interpret provisions of the agreement and disputes arising out of the agreements. This includes the right to interpret the no-strike clause and award damages.

### Choosing the Appropriate Forum

* A strike or lockout, or an episode of picketing or other conduct that occurs during a strike or lockout, can give rise to proceedings in several forums- civil action; labour board proceeding; or an arbitration proceeding involving an ER claim for damages or an EE grievance against discipline imposed by the ER.
* There are no watertight compartments here; the law is murky regarding where to go first if you have a dispute arising out of a strike or picketing.

### St. Anne Nackawick Pulp & paper Co v. Canadian Paper workers’ Union (1986, SCC)

* **F:** Office workers went on a legal strike & picketed the mill; mill workers stayed out in sympathy (illegal strike). Company began a court action 3 days after the strike began, and obtained an IL injunction 2 days later. Mill workers stayed out until they were found in contempt of court. 2 weeks later they went out again. Did not return to work despite a contempt order. Company claimed damages against the union for the losses caused by the mill workers’ site.
* **I:** When can a lower court grant an injunction to enforce the no-strike clause of a collective agreement? When can they grant damages?
* **R:** The relationship btw ER and EE is properly regulated through arbitration, and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and covered by the collective agreement may nevertheless be the subject of actions in the court at common law. **Courts may not consider claims arising out of rights created by a collective agreement. There should be judicial deference to the arbitration process.** However, legislation still allows for court involvement, and it’s illogical to permit a union to plead that the ER should have gone to arbitration (not court) when the conduct in issue is the very conduct that the provision for arbitration and the statutory prohibition were designed to prevent. So… **Injunctions are still allowed. They do not purport to create a power in the courts to enforce the terms of collective agreements. They enforce the general law as embodied in the statute which includes both an express prohibition on strikes during the currency of a collective agreement and provision for binding and enforceable arbitration which, in many cases, would resolve the dispute underlying illegal strike activity. An injunction upholds the rights of an ER under a CA, and specifically enforces the individual obligations of the EEs on whose behalf the CA was negotiated.**

## VIII.) Strikes and Freedom of Expression

### WHERE ER = Government: BCPSEA v. BCTF (2005, BCCA)

* **F:** Government legislates and takes class size & composition out of collective bargaining. Passed back-to-Work legislation and imposed a collective agreement. Teachers issued a bulletin to parents that said “BCTF” on it, explained the legislation, its effect on the class size via teach fill-in-the-blanks. School board forbids teachers from raising the issue at parent teacher conferences and positing it on bulletin boards
* **I:** Do the ER actions (here, government actions) infringe s. 2(b) (freedom of expression)? YES
* **R:** The speech was on public property, and was not incompatible with the function or purpose of a public school. **The teacher’s expressions were political expression that would convey or attempt to convey meaning.** The materials speak to BCTF members’ concerns about government education policy and seek to build support among parents for its position on those political issues. **The directives restrict the content of the communication. 2(b) violation**. Moving to s.1, pressing substantial objective = ensuring the parent teacher interview meets its purpose = OK. Rational connection met. **FAILS ON Minimal impairment- A complete prohibition on an discussion of class size is an overreaction with the potential to undermine teachers’ dignity and professional status. Also no harm from posting materials from school boards, so no minimal impairment**.
* **DISSENT:** Upholds on s.1 except where teachers discuss class size with regards to a particular child’s circumstances.

### Purposive Element, Strikes & 2(b): BCTF v. BCPSEA (2009, BCCA- BC law)

* **F:** Teachers and hospital workers engaged in work stoppages on the anniversary of legislation that destroyed their collective agreements. Teachers didn’t go to work. Hospital EEs picketed. They did so with knowledge that they would be illegal strikes.
* **I:** Does the definition of strike violate s.2(b) because it includes strikes that are political protests? NO VIOLATION OF 2(b)
* **R:** Public sector bargaining has a different dynamic than the system prevailing in the “blue collar” private sector. Government can save money through strikes, and Gov’t is accountable at the ballot box for the quality and quantity of the services. Public sector EEs seek to influence to government to direct or allow the ER to make concessions. In that sense, **the public sector strike is more a political than an economic weapon. The protest strikes were political in the sense that they were aimed at the government but the legislation they were protesting changed the T&C of E and overrode collective bargaining protests. Illustrates the symbiotic relationship between govts and public sector ERs that blurs the line between bargaining and politics.**.
* **Irwin Toy Analysis re 2(b):** The activity is expressive & meet first stage of Irwin Toy. The purpose of the law is not to trench upon the s. 2(b) guarantee. Re: the Effect: **The strike exerts pressure beyond the formal public sector ERs to the governments that are their masters. It is a form of effective expression that is curtailed by its inclusion within the strike definition. This is a restriction on an effective means of expressive action and trenches on 2(b) guarantee.**
* **Section 1:** Objective is to create certainty and stability in the workplace during the term of the CA. Prohibition of midcontract strikes is rationally connected. Minimal impairment- **rejects a “significant disruption” model** because attempting to draw a line at a point of significant disruption would seek a balance that is at best elusive. It tempts a weighing of the merits of the protest against the harm to the public interest. The higher the threshold of significant harm, the more powerful the protest. **This is a political policy judgment incompatible with the neutral adjudicative function of labour boards & courts.** Teachers are free to protest outside of working hours, so it’s proportionate.

### Purposive element, Strikes & 2(b): Grain Workers’ Union v. BC Terminal Elevator Operations’ Association (2009 FCA- Federal)

* **F:** Board held that the unions had engaged in an illegal strike when they didn’t report for work because they were not willing to cross a lawful picket line established by members of another union in the course of a strike against their ER. Note that they would have been fine with discipline, but didn’t want the strike unlawful to there would be damages, etc., to the ER.
* **I:** Does the definition of strike violate s. 2(b) of the Charter? NO
* **R:** 2(b): **The communications had neither a social nor political purpose. It was an intrusion into a private contractual dispute. Nothing to suggest political motivations in this case.** Even though ER was a government agency, this does not result in a re-framing of the issues. Therefore, not even protected by 2(b)
* **DISSENT:** 2(b): Refusal to cross a picket line attempts to convey meaning, so it’s protected cmns. Purpose is not to restrict freedom of expression, but it has the effect of in fact limiting the EEs ability to express their support for other union members, which is political action. S.1 objective is avoiding social and economic costs of unpredictable interruptions to production and services. Clear rational connection. On minimal impairment, gave judicial deference and passed the stage. Re proportionality, unions are free to express a message in other ways, including joining them on the picket line outside work hours.
* **NOTE:** Differences from BCTF- because ER was not government, the EEs were not in a political process, the EEs were simply refusing to cross a picket line. No cross-clause in the agreement was unenforceable.

## IX.) Job rights of Strikers

### R. v. Canadian Pacific Railway (Royal York Case) (1962, Ont. HC)

* **F:** EEs on strike. ER sends letter to EEs saying to either get back to work, or resign.
* **I:** Can he fire them?
* **R:** The act forbids the ER to dismiss or threaten to dismiss members who strike because they engage in lawful union activities. **The relationship btw EE and ER continues notwithstanding a strike unless that relationship has been abandoned.** Otherwise, when a CA comes to an end, the ER could lay down terms the EEs could not be expected to accept with the consequence that if they went on strike they would lose all their pension rights, their insurance rights and seniority rights. That would destroy the security built up by old and experienced EEs and leave it subject to the ERs will.
* **OBITER at SCC:** Ok to hire permanent replacement workers- at the termination of the strike, the ERs are not obliged to continue to employ their former EEs if they have no work for them to do due to their positions being filled.

### Strike Breakers across Canada

* Professional Strike Breakers are illegal in most provinces
* TEMPORARY STRIKE BREAKERS: OK in most places; BC/Que: No temporary replacement workers, or certain classes of EEs to perform bargaining unit work. – see s.68 of the BCLC
* PERMANENT REPLACEMENT EEs: Generally not allowed, except Ontario where you can hire permanent replacement workers if the strike is longer than 6 months.

### Canadian Air Line Pilots’ Assocision v. Eastern Provincial Airways LTd (1983, CLRB)

* **F:** Company maintained operations by, among other things, hiring 18 new pilots to fill the strikers’ positions and promising those new EEs that they would keep their jobs after the strike. In CA, Agreed that all strikers would be on immediate layoff and would be recalled to openings in accordance with their seniority. Complained of unfair labour practice for refusing to continue to employ an EE because they participated in a lawful strike.
* **I:** Unfair labour practice?
* **R:** Because of the code, **EEs cannot be deprived of any term or condition of employment whatsoever because of participation I a lawful strike. If an EE is so deprived, a reason, other than the exercise of the right to strike, must be present.** Allows the ER to avoid the seniority provisions of the CA. So wrong!

### Weiler on Replacement Workers

* Allows the ER to test the value of the workers on the market and therefore test the union’s valuation of the EEs’ labour
* ERs right to hire replacement workers is reciprocal to the EEs right to take other jobs in order to protect themselves against their loss of income

### Sims Knopf, and Bloudin: Seeking a balance

* Anti-replacement EE legislation helps to avoid violent incidents that can arise when replacement EEs attempt to cross picket lines set up by striking or locked out workers. HOWEVER, violence can be avoided by reducing contact btw RWs and EEs. Is also limited by a clear statutory right to return to work.
* Fear anti-replacement workers leg will create an environment hostile to investment and scare away sources of capital, costing jobs and security. Not much data on this
* Evidence is inconclusive as to whether the presence of legislation affecting the use of strike replacement workers alters relative bargaining power. Some say no. Others say it leads to significantly higher wages and more frequent and longer strikes.
* Some ERs are more susceptible to competition from non-union competitors. This can alter the power balance and result in skewing wage settlements.
* Federally, replacement workers are only actually hired in 25% of cases.
* RECOMMENDATIONS:
	+ No general prohibition on the use of replacement workers
	+ Where the use of replacement workers is for the purpose of undermining the union’s representative capacity rather than the pursuit of legitimate bargaining objectives, this will be an unfair labour practice
	+ Remedial power to prohibit further use of replacement workers in the dispute.

## X.) Essential Services Legislation

### General

* Widespread concern that the public will suffer undue hardship from stoppages by strategically placed groups of EEs- health care, policing, public transit; water supply; garbage collection; snow clearing; teaching.
* Others think that too many services are thought to be essential.
* Can come through legislation, collective agreements;
* Que, BC, Feds = give an adjudicative tribunal the responsibility for regulating essential services stoppages in accordance with legislativlely specified criteria.

### BC Essential Services

* S. 72 & 73 of the LRC- Chair investigates whether the dispute threatens the health, safety, or welfare of BC residents; or the provision of educational programs to students under the School Act, and report to the minister. Then the minister , they can designate an essential service. S. 73 says that the union must comply with orders under s. 72, and the relationship between the parties will continue to be governed by the old CA
* Parties must try to agree on essential services levels.
* If they cannot decide on essential services levels, they can go to the Board to seek a declaration of what the levels will be
* Legislature can also step in to declare some services essential

# J.) Picketing

## I.) Jurisdictional Issues

### Jurisdiction over picketing

* Labour codes are generally silent, leaving the role of the courts open. Boards declare whether a strike is lawful. If it’s unlawful, then the courts regulate via tort or criminal law
* **In British Columbia**, we have a definition of picketing and regulations. We have also tried to give the labour board jurisdiction over picketing.

### BCLRC: Picketing

* 1(1) “Picketing”: Attending at or near a person’s place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to:
	+ (a) Enter that place of business, operations or employment
	+ (b) deal in or handle that person’s products
	+ (c) do business person
* 65: Picketing:
	+ (1) “ally” means a person who, in the board’s opinion, in combination concert or with a common understanding, assists the ER in a lockout or in resisting a lawful strike
	+ (1) “common site picketing” means picketing at or near a site or place where
		- (a) 2 or more ERs carry on operations, employment or business and
		- (b) there is a lockout or lawful strike by or against one of the ERs, OR one of the ERs is an ally
	+ (3) A trade union, members, etc., may picket at or near a sit or place where a member of the 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 (Primary picketing OK)
	+ (4) The board may, on application and after making inquiries, permit picketing
		- (a) at or near another site or place that the ER is using to perform work, supply goods, or furnish services for the ERs own benefit that, except for the lockout of strike, would be performed, supplied or furnished at the place where picketing is permitted OR
		- (b) at or near the place where an ally performs work, supplies goods, or furnishes services for the benefit of a struck ER, or for the benefit of an ER who has locked out
* S. 136: (1) Jurisdiction of Board (privative clause): The board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under the Code and to make an order permitted to be made. (2) Without limiting that, the Board has and must exercise exclusive jurisdiction in respect of an application for the regulation, restraint or prohibition of a person or group of persons from (ii) picketing, striking, or locking out.
	+ OUSTS courts from picketing regulation… BUT due to constitution, the court can still regulate illegal or tortious conduct- see Canex below

### Canex Placer Ltd. v. Canadian Association of Industrial, Mechanical & Allied Workers (1975, BCLRB)

* **F:** Strike at mine. Picketers totally blocked access to the mine by standing in the road and by uttering what the Board described as some isolated threats of violence.Company applies to Board for an order prohibiting the threats of violence and blockade.
* **I:** Does the Board have jurisdiction over this?
* **R:** The conduct violates the requirements of quite different areas of the law- criminal law, Highway Act, torts of assault and battery, and so on. **There are serious constitutional issues with granting the Board jurisdiction to enforce the general criminal or civil law, even if only in the labour relations conduct.** Before the Code is interpreted as taking that constitutional risk, there should be a clear statement of the legislature that this is its intention.

## II.) Primary Picketing

### Harrison v. carswell (1976, SCC)

* **F:** EE charged for trespass for unlawfully trespassing upon the premises of a mall after being requested not to enter or come upon the premises. Her ER was located entirely within the mall. She wanted to picket in the mall, which was private property.
* **I:** Can she picket on private property?
* **R:** Right to property is generally recognized as a fundamental freedom. This trump the right to picket. If that is to be overruled, it clearly must be done by statute.
* **DISSENT:** Picketer was entitled to the privilege of entry and to remain in the public areas to carry on as she did (without obstruction of the sidewalk or incommoding of others) as being not only a member of the public but being as well, an EE in a labour dispute interested in pursuing claims through a lawful strike.
* **REVERSED BY STATUTE:** S. 66- No action for petty trespass to land to which a member of the public ordinarily has access; interference with contractual relations; or interference with the trade, business, or employment etc. arising out of strikes, lockouts or picketing permitted under the Code, or attempts to persuade EEs to join a trade union made at or near but outside entrances and exits to an ER’s workplace.

## III.) Secondary Picketing

### Hersees (Pre-Charter)

* **F:** Union pressured a client to not deal with the ER by threatening secondary picketing of their premises
* **I:** Secondary picketing lawful? NO
* **R:** Secondary picketing is the same as inducing breach of contract, an actionable tort. Moreover, secondary picketing is illegal per se, as it could increase labour unrest
* **OVERTURNED BY STATUTE IN BC:** Ally picketing is OK with a Board order (s. 65(4)(b)). Formerly most expansive in Canada

### Kmart

* **F:** Lawful strike with two stores. EEs went to a third store to pass out leaflets. Leafleters were not skipping work. Conduct fell within the definition of picketing, so the BC code made the actions unlawful.
* **I:** Definition of picketing violates 2(b)? YES
* **R:** Leafleting is valuable political discourse that should be protected. **Individuals who are not on strike can leaflet. There is a distinction between signal effect and informational picketing. Informational picketing is protected. Signal effect picketing, however, has a coercive effect and isn’t protected.**
* **SO:** Overturned the definition of picketing. 10 years later, the definition still hasn’t changed.

### Pepsi-Cola Canada Beverages v. Retail, Wholesale & Department Store Union (2002, SCC)

* **F:** Legal strike and legal lockout. Strikers engaged in various types of picketing and other acts in support of their bargaining position. Some of those acts were clearly illegal because they involved violence or the picketing of private homes. Also did peaceful picketing of a number of retail stores selling Pepsi products but with no corporate connection to Pepsi.
* **I:** Secondary picketing OK?
* **R:** **Secondary picketing is generally lawful unless it involves tortious or criminal conduct**. Right to free expression informs development of the CL. **Picketing incorporates an expressive component; encompasses a broad range of activities from the traditional picket line, to the dissemination of information through other means.** Rejects making secondary picketing illegal per se (hersees); and the ally doctrine. Signal Effect picketing distinction not useful because a signal’s effect will vary from location to location; suggests signal effect picketing isn’t worthy of protection; it treats union speech differently from normal peoples’ speech; etc. **So while signaling concerns may provide a justification for proscribing secondary picketing in particular cases, but not as a general rule. Can’t get an inunction unless there’s an actionable tort**
* **NOTE:** Because of this, BC has now become the most regressive because we limit secondary picketing to allies. May be save-able under s.1. But who knows? Open to challenge.

### CANFOR (RE) (2007, BCLRBD)

* **F:** Internal review upholds original decision. C seeks declaration that HEU workers were picketing their mill illegally (which would allow them to sue for damages). Time of widespread labour unrest. HEU was legislated back to work, but didn’t return. They were hoping for solidarity, so picketed outside CANFOR’s premises. Totally unrelated ER (not an ally). Start with informational picketing. CANFOR OK’s it and the mill EEs kept working. Then the picketers changed the character to an official picket line. One shift refused to cross based on union rules. The mill had to close for he day, and CANFOR looses 1.4mil.
* **I:** Illegal picketing b/c not in a strike position?
* **R:** **the picketing provisions of the code continue to apply even though there is no definition of picketing. The distinction between informational and signal effect continues to be used to define what is and isn’t permissible picketing for the purposes of the code**. Where there is evidence that conduct is intended to, or does, cause union members to “down tools” or not attend work, then PF the conduct constitutes picketing within the meaning of the Code. **Also**: Unions are responsible for unauthorized picketing in breach of the code. **Where the activity is engaged in, a union may be held to have breached the Code if it fails to take appropriate steps in the circumstances to bring the unlawful conduct to an end as quickly as possible.**
* **HERE:** The conduct in the second and third picket lines objectively appeared to be picketing and was subjectively described and treated as picketing by the individuals. This constituted picketing within the meaning of the code.
* **RECALL:** This decision applies equally to primary picketing! The issue was that the union wasn’t in a legal strike position and therefore could not picket

### Prince Rupert Grain Ltd. v. Grain Workers’ Union (2002, BCCA- Federal code)

* **F:** Appeal from an injunction restraining picketing at a terminal in Prince Rupert. Unit of EEs was locked out by the ER. Respondent was handling grain that, but for the lockout, would have been handled at the Vancouver terminals. EEs filed an application saying that the respondent and ERs were one employer, and set up a picket line outside the terminal. EEs did not cross the picket line, and the picketing effectively shut down the respondent’s operations.
* **I:** Is the picket line contrary to the CLC?
* **R:** **Pepsi-Cola wipes out the distinction between primary and secondary picketing. Must show an independent actionable tort**. Inducing breach of K will usually fail because you have to show “unlawful means” and secondary picketing is lawful. **Signal effect picketing may constitute unlawful means if it goes beyond expression and becomes coercion, but to get an injunction the applicant will have to show a strong PF case of coercion. It is not automatically assumed to exist in circumstances like the present**. HERE there was no evidence of implicit or direct threats, menacing behaviour, mass picketing, harassment or any other form of coercion. Injunction won’t stand.
* **GOES to the LRB for judgment on the legality of the refusal to cross the picket line—i.e. if it’s an illegal strike**

## IV.) The Ally Doctrine

### Discussion Problem 5: Re Coquitlam (city)

* **F:** E-Comm provided cross-jurisdictional emergency communication. Ees receive 911 calls and dispatch. Municipality used them to receive calls. Fed-prov agreement required Coquitlam to provide CMNS operators to the RCMP. They are EE cities who work out of the RCMP detachment and dispatch RCMP in response to calls transferred from e-Comm. Prior to the strike, the RCMP had agreed with E Comm that their trainers would train the coquitlam communications officers in the use of the system at E Comm headquarters. RCMP decided to carry out the training at its premises because of the strike.
* **I:** Can the union picket the RCMP?
* **R:** RCMP is not an ally, and the union cannot picket. An ally is different from self-help which is what the RCMP was doing here**. A party can engage in self-help even if the collateral effect is assisting an ER to resist a strike.**

# K.) The Individual EE under Collective bargaining

## I.) Primacy of the Collective Agreement

### Bargaining w/ other unions or individual EEs

* Er precluded from bargaining with any other union or any other person or organization on behalf of any EEs in the bargaining unit, unless & until the union’s bargaining rights are terminated pursuant to statute.
* ER may not bargain directly with individual EEs where there is a statutory bargaining agent
* ONE EXCEPTION: If federal EEs are dismissed, they can submit their dismissal to arbitration without the union.

### McGavin Toastmaster Ltd. v. Ainscough (1976, SCC)

* **F:** There was a wildcat strike in response to the closing of a plant. While the EEs were on strike, the ER closes the plant. He contends he is not obliged to pay severance because the contract of employment was repudiated by the wildcat strike
* **I:** Any room left for common law of contract (i.e.- repudiation)? NO
* **R:** **In the face of labour legislation, union certification, and a collective agreement, it is not possible to speak of individual Ks of employment and to treat the collective agreement as a mere appendage of individual relationships.** The common law as it applies to individual employment contracts is no longer relevant to EE-ER relations governed by a collective agreement that deals with discharge, termination of Ement, severance pay and a host of other matters that have been negotiated between the union and company as the principal parties thereto. The act couldn’t operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists. A collective agreement does not equate to a bundle of individual employment contracts.
* **NOTE:** Although this was an ER trying to avoid the provisions of a collective agreement, it has clear implications for EEs trying to avoid the provisions of their collective agreements.

## II.) The Pre-eminence of Grievance Arbitration

### Allen v. Alberta (2003, SCC)

* **F:** Boiler inspectors represented by AUPE . Agreement provided for severance pay if an EE was terminated. Government privatizes services, so it gave the respondents notice of termination Govt and union negotiated a written settlement in the form of a letter of intent, to the effect that the EEs would be offered jobs, and if they accepted those jobs, they would lose their status as public servants and their entitlement to severance pay under the CA. Years later, the respondents asked for a declaration that they were entitled to severance pay under the CA (time limit for bringing a grievance under the CA had passed).
* **I:** Can the court consider the complaint? NO
* **R:** St. Anne Nackawic and following cases stand for the principle that, in accordance with the legislative intent evidenced by the labour relations schemes, application or violation of a collective agreement should be dealt with exclusively under the grievance procedure established in accordance with the agreement or the relevant labour legislation. **As a general rule, provided that they fall within the ambit of the CA, such disputes should be disposed of by labour arbitrators and regular civil courts do not retain concurrent jurisdiction over them.**

## III.) Duty of Fair Representation

### BC LRC: S. 12- Duty of fair Representation

* (1) A trade union must **not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the EEs in an appropriate bargaining unit**, or in the referral of persons to employment, whether or not the EEs or persons are members of the trade union or a constituent union of the council of trade unions.
	+ NOTE extends from negotiation of agreement, to administration of the agreement, and the ENTIRE bargaining unit
* (2) It is not a violation of (1) for a union to enter into an agreement under which an ER is permitted to hire by name certain members; a hiring preference is provided to trade union members resident in a certain geographic area; or an ER is permitted to hire by name persons to be engaged to perform supervisory duties.
* (3) An ERs org must not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the ERS in the group appropriate for collective bargaining.

### Steele v. Louisville (1944, USA)

* **F:** P = black firefighter. Denied membership. Sues for an injunction against the implementation of the collective agreement and for damages.
* **I:** Duty to represent?
* **R:** An organization must represent all its members, the majority as well as the minority, and is to act for and not against those whom it represents . The exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. **To represent minority union members fairly, impartially and in good faith, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the ER and to give them notice of an opportunity for hearing upon its proposed action.**

## IV.) The Duty of Fair Representation in the Administration of a collective Agreement

### Rayonier Canada v. International Woodworkers of America (1975, BCLRB)

* **F:** Anderson complained that the ER had violated the CA by denying him certain seniority rights due to him under the agreement—workers laid off, EEs higher on the seniority list were able to defer recall to take longer term contracts elsewhere. Deferring EEs then recalled before the griever. Union knew of and approved the practice. Said that the union breached its duty of fair representation by not carrying his resulting grievance to arbitration.
* **I:** Duty breached?
* **R:** Union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, unequal treatment based on factors like race or sex, or simple personal favouritism. A union cannot act arbitrarily, disregarding the interests of one of the EEs in a perfunctory manner. Instead, **it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.** When deciding whether to bring a grievance to arbitration, consider how critical is the subject matter to the interest of the EE? How much validity does his claim appear to have either under the lang of the agreement or the available evidence, and how carefully has the union investigated these? What has been the previous practice respecting this type of case and what expectations does the EE reasonably have from the treatment of earlier grievances? What contrary interests of other EEs or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them?
* **HERE:** Textbook case of when it’s appropriate to drop the grievance. Big benefit to the bargaining unit as a whole; would be a worse detriment to the other worker if this grievance were pursued; while the balance over-rode the immediate claim of the worker, it did so for the legitimate reason of advancing the more pressing needs of other EEs. Anderson did not have any contrary rights clearly conferred by the CA, and shouldn’t have had a firm expectation that he would be treated as more senior than N.

### K.H. v. CEP (re) (1997, Sask. LRB)

* **F:** KH dismissed after refusing to submit to an independent medical examination demanded by the ER because of interpersonal problems he’d been having with his co-workers. His own MD and the ER’s MD agreed he had depression, but disagreed on how best to treat that illness. Union investigated a series of grievances filed by KH, but decided in each case not to take the grievance to arbitration, partly because of its assessment that KH should have agreed to the independent medical examination.
* **I:** Did the union breach their duty by discriminating?
* **R:** In a unionized workplace, the trade union is bound by the duty to accommodate. Also the separate obligation not to discriminate in the duty of fair representation. **The duty of fair representation comprehends discrimination in the sense intended in the HRC. The duty to accommodate may be relevant in determining whether there is an expectation that a trade union will make adjustments in procedures or policies normally followed in order to prevent the discriminatory impact which their typical operation would have on members of classes enumerated in the code.**
* **HERE:** Though the process the union followed may have been more than sufficient to satisfy their duty to represent EEs fairly, it was inadequate to address the particular situation of KH, and had a differential impact on him which must be considered to constitute discrimination. By accepting progressive discipline by allowing the medical opinion of the ER’s physician to govern what happened, the union used the grievance procedure in a way that had a discriminatory effect of KH because of his medical disability. One must have sympathy for union—they approached their tasks in good faith, and reasonably conscientiously, and were no doubt frustrated by the difficulties and delays, Doesn’t matter.

### Knight: Recent Devt’s in the duty: curtailing abuse in BC

* Overwhelming majority of fair representation complains are ultimately rejected.
* Individuals and factions within unions make tactical use of the duty to advance their personal or political agendas at the expense of the union and its elected officers.
* Net effect is that significant amounts of time, energy and money are being spent prosecuting grievances, sometimes all the way to arbitration, that the union would otherwise settle or drop.

## V.) Union Security Provisions and the Role of Unions in Society

### Forms of Union Security Clauses

* Voluntary check-off: no need to join the union (no real security)
* Rand Formula : everyone must pay dues, but there’s no need to join the union
* Closed Shop: Must join a union to work there
* Rand and Closed shops have been challenged under the Charter.

### Lavigne v. Ontario PSEU (1991, SCC) – Rand Formula

* **F:** L was a community college instructor. He wasn’t a union member, but was required to pay dues (rand formula) he complained that the union was spending his dues on political and other causes. L objected to paying as compulsory association. Charter applied because the college was a government entity
* **I:** Violation of freedom of association & expression? NO
* **R:** 2(b) right not infringed because he is not inhibited in any meaningful way from expressing a contrary view as to the merits of the causes supported by the union. It is open to him to join the union and lobby from within. **Union involvement outside the realm of strict contract negotiation and administration advances the interest of the union at the bargaining table and in arbitration**. Stems from a recognition of the expansive character of the interests of labour and a perception of CB as a process which is meant to foster more than mere economic gain for workers. **Political involvement enhances not only the economic interests of labour but also the interest of working people in preserving some dignity in their working lives.** Laforest: **Important to democracy to not limit the uses to which contributed funds can be put**—allows for majority rule within the union that isn’t inhibited by what the government thinks the majority ought to want to put funds to.
* **RE:** 2(d): may offend freedom of association, but not here

### R. v. Advance Cutting and Coring Ltd (2001, SCC)- Closed Shop

* **F:** Ontario workers were going to Quebec to work construction. Quebec wanted to do something to help Quebec workers. Legislated that in order to work construction in Quebec, you had to join 1 of 5 unions to get a certificate of competency. Hard to get a certificate if not from Quebec because the certificates were distributed regionally. Big Split!
* **BASTARACHE (Maj. on 2(d); Dissent on s.1):** **Freedom of association includes the freedom not to associate. Legislation that compels association offends s.2(d). The compulsory unionization scheme established by the Construc**tion Act represents a form of ideological coercion. In light of the history of the Quebec union movement, unions are associated with an ideological cause.
* **LEBEL (Dissent on 2(d); Maj on s.1):** Freedom of association includes the right not to associate. However, there was no violation here- **The law did not impose much more than the bare obligation to belong to the union, and does not create any mechanism to enforce ideological conformity.** No evidence to support judicial notice of Quebec unions ideological coercing their members. That inference would presume that unions hold a single ideology and impose it on their rank and file, including the complainants. Such an inference would only amount to an unsubstantiated stereotype. **Even if there was an infringement, it would have been justified in light of the problems leading to the enactment of the construction act*.***
* **NOTE**: The split was over whether there was ideological coercion at play- shows that true ideological coercion is necessary to find an infringement of 2(d) by a closed shop legislation. You’ll need better evidence than in this case to get out of closed shop legislation.

# L.) Statutory Regulation of Employment

## I.) Employment Standards Legislation

### General

* Often conceived up as a “floor of rights” that can amount to the ceiling for may workers
* Unions with little bargaining power may find they cannot obtain better terms than those required by statute. Even strong unions may content themselves with what the legislation provides in certain areas, such as pensions, to seek better terms in areas of more immediate concern to their members (like wages and job security)
* What unions get through collective bargaining can find their way into the legislation.
* Going through the courts now: class actions for unpaid OT—for inappropriately designating some workers as managers, or just not paying them. Very different levels of success, event with class certification.

### Roy Adams: Employment Standards in Ont: An industrial realtions system analysis

* Has its own enforcement mechanism that is cost effective, but has historically been quite weak.
* Very few regular EEs ever file employment standards grievances. Instead, the great majority of complaints are filed by people who have left the ER against whom the complaint is filed.
* Often operates as a collection agency
* No effective disputes procedure available to unorganized EEs who have a disagreement with their ER about the application of employment standards. Many disputes are settled amicably, just as most grievances are settled in the first step of the grievance procedure. However, if an EE is unable to persuade the ER about the correctness of his/her position, then he’she cannot place much confidence in the available procedure to provide a just outcome.
* Three types of ERs that are hard to collect from:
	+ Sulkers- ERs that are sedentary and solvent. Sense of righteous indignation leads them to refuse any payment to the ungrateful or disloyal EE. ESB does not eventually collect in most cases
	+ Shysters- Deliberately sets out to defraud EEs. Procedures of the branch are very ineffective against them
	+ Bankrupted: When companies go insolvent, EEs often find it difficult to collect remuneration due to them. So does the ESB

### Coverage of the ESA

* (1) Covered by the ESA?
	+ S.3: Act applies to all EEs other than those excluded by the regs
	+ S.1(1) “employee”: Includes a person receiving or entitled to wages for work performed for another; a person an ER allows to perform work normally performed by an EE; a person being trained; a person on leave from an ER; and a person with a right of recall.
* (2) Excluded by the regulations?
	+ ESR, s. 31- Doesn’t apply to professions; s.32- doesn’t apply to students; sitters; Part 4 of the act (Hours of work and overtime) doesn’t apply to managers, teachers, resident caretakers.
* (3) ER have a variance from the ESA?
	+ ESR- s.30- to apply for a variance under s.72, deliver a letter to the director, signed by ER & majority of EEs affected by variance, including the provision of the act the director show vary, the variance, the duration, the reason, plus contact info for each signing EE and the ER
* (4) Union negotiated below the ESA
	+ Generally, ESA applies unless the CA deals with the matter; but unions can negotiate below; and the grievance procedure must be used to deal with ESA complains (s.3 of ESA)

### Hours of Work and OVertime

* Paradox of our times- Many Canadians work long hours while many others have no work at all
* Growth of part-time work. More jobs require shorter hours, and more jobs require longer hours.
* Gender bias to polarization- 2/3 of part time workers are women. 2/3 of those working 50 hours of work per week or more are men.
* Lots of unpaid overtime going on.
* Suggests a voluntary redistribution or reduction in work time, rather than a legislated more to a four or four and a half day work week… but suggests that this should be left open to EEs and ERs

### Specific Employment Standards

* Minimum Wage = $8/hour (ESRg s. 15(1)); Minimum wage = $6/hour for an EE with no paid employment experience and 500 or fewer hours of cumulative paid Ement experience with 1+ ERs (ESReg s.15(2))
* Max hours of work before OT applies = 8/day or 40/week. Then must pay 1 ½ times regular wage. (ESA s. 40)
* EEs must have at least 32 consecutive hours free from work each week, or pay 1 ½ times regular wage for hours worked in the 32 hour period they should have had free (s.36 ESA)
* Termination of Ement- after 3 months, liable to pay one weeks wages for compensation for length of service; after one year, 2 weeks wages; after 3 years, 3 weeks wages plus one additional week’s wages for each additional year of employment, to a maximum of 8 weeks wages. Liability discharged in the EE gets equivalent notice (s. 63 ESA)
* Child Labour- May not employ a child under 15 years old unless the parents consent. To employ under 12, need the director’s permission. Director can set terms and conditions of employment for EE under 12. ER must comply with those conditions (ESA s. 9)

# M.) Employment Discrimination

## I.) General Discrimination in Employment

### History of Anti-Discrimination Law

* Until 1970s- Newspapers had separate columns for “help wanted- men” and “help wanted – women”
* 1950s and 1960s: Discrimination law was quasi-criminal
* Has evolved into a compensatory regime: theory is now based on the moral equality of human beings and are found in the idea that no one should be denied opportunities on the basis of characteristics which are unrelated to his or her objectives. Such characteristics are with us from birth- race, sex, or those to which our society otherwise gives a high value, such as religion.

### Human Rights Legislation

* Applies to both government and private individuals
* Modifies freedom of contract: the freedom cannot be exercised discriminatorily
* Closed list of grounds for discrimination
* Incorporated by reference into collective agreements; arbitrators can apply HR legislation
* HR legislation can get you reinstatement even if one is not unionized

### Section 15 of the Charter

* 15(1) guarantees equality
* Grounds are open (i.e.- analogous grounds)
* 15(2) allows for affirmative action type acts
* In the employment context, can be used to challenge employment legislation, or when the government is the ER.

### Vriend v. Alberta (1998, SCC)

* **F:** Christian college fires a gay man. Complains under HR legislation that he was discriminated against for sexual orientation, which was not an enumerated ground. Said that the failure to include sexual orientation as a ground made the legislation discriminatory, and contrary to the equality guarantee in s. 15 of the *charter*.
* **I:** Violation of the charter? YES
* **R:** A positive act encroaching on rights is not suggested by the wording of the application section of the *Charter*; rather, the subsection speaks only of matters within the authority of the legislature. Positive obligation on the legislature that the *Charter* will be engaged even if the legislature refuses to exercise its authority. Sexual orientation is a ‘deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs,’ which makes it an analogous ground under the *Charter.* By excluding sexual orientation, the government has, in effect, stated that all persons are equal in dignity and rights except gay men and lesbians. Such a message, even if it only implicit, must offend s.15(1). This effect, together with the denial to individuals of any effective legal recourse in the event they are discriminated against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created constitutes discrimination. Appropriate occasion for the Court to read the words “sexual orientation into the relevant sections of the Act.

### Law v. Canada (Minister of Employment and Immigration) (1991, SCC)

* **F:** Equality in employment case- Denial to the P of survivor benefits under the Canada Pension Plan. She was 30 y/o, and the governing statute specified a minimum age of 5 for the receipt of survivor benefits by any one who, like her, had no dependent children and no disability.
* **R:** **S. 15 is designed to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society equally capable and deserving of concern, respect and consideration**.
* **HERE:** The minimum age requirement did not contravene s. 15, as it did not affect the P’s human dignity.
* **NOTE:** Now partly overturned in KAPP.

### Eaton v. Brant Country Baord of Education (1997, SCC)

* **F:** Child with cerebral palsy with no means of communication, visual impairment and used a wheelchair. Ontario special education tribunal decided to place the child in a special classroom rather than accede to her parents’ wishes that she receive her education in a regular classroom. Challenged scheme for violating s.15
* **I:** Violate s.15? NO
* **R:** **The discrimination does not lie in the attribution of untrue characteristics to the disabled individual. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation which results in discrimination against them.** The discrimination inquiry that uses the attribution of “stereotypical characteristics” reasoning is inappropriate here. By not allowing for the condition of a disabled individual, we ignore his or her disability and force the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of those characteristics, which is the central purpose of s.15 in relation to disability**.** Overall, identical treatment won’t always give you equality- equality can require differential treatment.

### Meiorin: BC PSERC v. BCGSEU (1999, SCC)

* **Law prior to this case:** Direct discrimination means there’s a BFOR/BFOQ test; Adverse effect, ER had duty to accommodate to the point of undue hardship. Was hard to classify it something was direct or indirect discrimination.
* **F:** Inquest recommends fitness testing for forest firefighters. Had UVIC do a study into what those fitness requirements ought to be. UVIC measures 02 use when fighting fires, then measured 02 when doing output similar to FFing to see if the person can get their 02 output to that level. Study didn’t differentiate between men and women and their output when fighting fires. M couldn’t pass the running portion of the test. Tried several times. Terminated. She had had no prior problems doing the job. The union grieves her dismissal.
* **I:** Discrimination? YES
* **R:** Abolishes distinction between adverse effect and direct discrimination: the test is the same no matter what the type of discrimination Unified approach- necessary to avoid the problematic distinction btw direct/ad. Effect discrim; requires ERs to accommodate, and takes a strict approach to exemptions from the duty, while permitting exemptions where they are reasonably necessary. **TEST to determine whether a PF discriminatory standard is a BFOR. ER may justify the standard by establishing on a balance of probabilities that: (1) Rational connection to job performance**  ID general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. Focus not on the validity of the standard, but the validity of its more general purpose. **(2) Honest/good faith belief the standard is necessary**  If the imposition of the standard was motivated by a discriminatory animus then it cannot be a BFOR. **(3) Standard is reasonably necessary to accomplish a legitimate job related purpose; consider here whether there has been accommodation to the point of undue hardship.** The standard must be reasonably necessary to accomplish the already valid purpose; ER must show it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. Must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual. ASK AT THIS STAGE: (1) Investigated alternate approaches without discriminatory effect? (2) Why were alternatives no implemented? (3) Necessary to have all EEs meet the single standard? (4) Way to do the job that is less discriminatory? (5) standard properly designed to ensure that the desired qualification is met without imposing an undue burden? (5) have EE and union helped to accommodate? If individual differences may be accommodated without imposing undue hardship on the ER, then the standard is not a BFOR.
* **HERE:** Ms. M has discharged burden of establishing, PF, the aerobic standard discriminates against her as a woman. Passes one & two- Purpose is ID EEs who can perform the job of firefighter; rational connection btw purpose and the standard; gov’t did a study and acted in good faith. STAGE 3: Significant problems with the study- only looked at description of what firefighters do and not the minimum standard. Didn’t’ distinguish female to male subjects to see fi the same standard should apply. Didn’t investigate discriminatory effect when M raised the issue. Fact she had previously done the job weighs heavily. Therefore, not clearly a BFOR.

## II.) Sex Discrimination

### Pregnancy- old law - BLISS v. AG of Canada (1979, SCC)

* **F:** Pregnant women get worse benefits than other EEs
* **R:** Discrimination on the basis of pregnancy was not discrimination on the basis of sex. Not all women get pregnant.

### Pregnancy- Newer Law - Brooks v. Canada Safeway (1989, SCC)

* **F:** Safeway’s accident and sickness plan excluded pregnant women from benefits during the period prior to the birth and for 17 weeks afterwards.
* **I:** does the plan violate s.15 of the Charter/human rights legislation?
* **R:** The plan treats pregnant women less favorably than non-pregnant EEs, and was therefore discrimination on the basis of pregnancy. This was not a prohibited ground of discrimination under the human rights statute. However, **discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.** Those that bear children and benefit society should not be economically or socially disadvantaged seems to bespeak the obvious. **Only women bear children. No man can become pregnant. It is unfair to impose all of the costs of pregnancy upon one half of the population**. Pregnancy-based discrimination does not affect anyone who is not a member of the group, even if it only affects a few members of the group.

### Sexual Harassment- Janzen v. Platy Enterprises (1989, SCC)

* **F:** 2 servers allege SH by cook. Manager takes no steps and contributes to the harassment.
* **I:** Sexual harassment prohibited? YES
* **R:** **Sexual harassment in the workplace = unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job related consequences for the victims of the harassment**. When it occurs in the workplace, it is an abuse of both economic and sexual power. It is a demeaning practice that constitutes a profound affront to the dignity of the employees forced to endure it. SH equates to sex discrimination. **Discrimination does not require uniform treatment of all members of a particular group.** It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. Only a woman could be subject to sexual harassment by a heterosexual male; it is not defence that not all female EEs were subject to sexual harassment **the crucial fact is that it was only female EEs who ran the risk of sexual harassment. No man would have been subjected to the treatment**. **Sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex.**
* **NOTE:** Other provinces have independently prohibited sexual harassment; we haven’t- it still arises out of the general prohibition of discrimination on the basis of sex.

### Shaw v. Levac (1991, Ont. Bd. Inq.)

* **F:** One woman was bullied for her weight- “swish swish”
* **I:** Sexual harassment? YES
* **R:** **To express or imply sexual unattractiveness is to make a comment of a sexual nature. It is sexual harassment if it is repetitive and has the effect of creating an offensive working environment**. She was harassed because she was a woman; the comments wouldn’t have been made if she were a man.
* **NOTE:** Criticized for taking sexual harassment too far. Some say it is just “harassment,” which is not prohibited, except for in Quebec (Anti-Mobbing Laws- no need for a tie to an enumerated ground)

## III.) Disability discrimination

### Lynk: Disability and the Duty to accommodate

* Persons with a disability have greater heterogeneity than virtually any other group covered by the legislation. The varieties of disabling experience are extremely wide
* The condition of disability is potentially quite mutable; a person with a disability may recover entirely, the particular condition may stabilize; or the intervention of modern medicine and technology may permit the EE to work productively with few or no limitations
* Modes of accommodation, short of undue hardship, required to extend equality to disabled persons are invariably broader and more complex than those required by other protected grounds

### Disability & Obesity

* Arises in the context of airline seats; or where an ER refuses to hire or dismisses on the basis of obesity.
* Not clear whether this is recognized as a disability- it’s emerging
* +: Creates remedies where none existed before
* -: sometimes obesity is the result of choice; those EEs should not be treated as disabled. Irony that no other disabilities are grouped on the basis of whether or not choice was involved.

### Disability and addiction

* Recognized as a disability to which the duty to accommodate applies
* Unlike with other disabilities, there seems to be a requirement that the EE go to treatment, and the ER pays and accommodates their “triggers,” etc.
* “last chance” agreements are used controversially.

### Shuswap Lake General Hospital v. BCNU (Lockie Grievance) (BCCAAA 2002)

* **F:** EE is bipolar; terminated for a series of medication errors while in a manic state. Dr. said there was no guarantee she would never relapse, but identified triggers (spring; etc.).
* **I:** Accommodated to the point of undue hardship? NO
* **R:** PF case of discrimination is made out—Er has refused to employ b/c she can’t ensure mgmt she will be able to accurately predict future relapses. Only challenge was to ER’s standard under the third part of the test. ER ought to have acknowledged the fact that relapse cannot be accurately predicted and ought to have engaged in a search for reasonable accommodative measures that would reduce risks to PT safety to an acceptable level. ER must point to evidence establishing that a serious or unacceptable risk would arise. If the risk is low, must show that the loss or injury would be serious. Evidence must clearly ID the risks and demonstrate that it is impossible to reduce those risks to an acceptable level through reasonable accommodative measures.
* **HERE:** Risk of disruptions could be easily and substantially reduced or diminished by providing an educational workshop on BMD to the grievor’s co-workers and supervisors, and instructing staff to ensure the grievor is removed from the unit if her behaviour displays indicators of relapse. Workplace provides certain implicit safeguards against risks due to the professional and team-based context of the work. Moreover, the grievor’s particular indicators of relapse were readily observed by her co-workers and reported to supervisory mgmt. and staff. Also, supervisors and mgmt. staff are available for reporting purposes; grievor has shown that she is receptive to colleagues’ observations of her conditions; it is possible to reduce the risk to an acceptable level. ER stopped investigating reasonable accommodative measures when they learned relapses could not be predicted. The focus on relapse prediction is too narrow of a standard and the standard of “no risk” was too stringent.
* **Accommodative measures:** reinstated- only works dayshifts; no excessive OT; educational workshop for supervisors and co-workers; Facilitated discussion of co-worker concerns about return to work; develop procedure for observing her and reporting signs of relapse; permitted absences; etc.
* **NOTE:** The considerations will likely apply in addiction cases— the standard of “no risk” is too stringent if the risks can be reduced to an acceptable level

### Hydro-Quebec v. Syndicat des EEs de Techniques Professionelles (2000, SCC)

* **F:** EE had borderline personality disorder; required frequent moves between departments because he or she could not get along with her co-workers. No cure. Would happen often, and there was not clear end in sight. Also had chronic absenteeism- 960 days of work between 1994 and 2001 (7.5 years).
* **I:** Accommodated to the point of undue hardship? YES
* **R:** Applies Meiorin: What is required is not proof that it is impossible to integrate an EE who does not meet the standard, but proof of undue hardship. The ER does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the E’s workplace or duties to enable the EE to do his or her work. With chronic absenteeism, if the ER shows that, despite measures taken to accommodate the EE, the EE will be unable to resume his or her work in the reasonably foreseeable future, the ER will have discharged its burden and established undue hardship. If the characteristics of the illness are such that the proper operation of the business is hampered excessively or if an EE with such an illness remains unable to work for the reasonably foreseeable future even though the ER has tried to accommodate him or her, the ER will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory.

## IV.) Who has a duty to accommodate?

### Central OK school district v. Renaud (1992, SCC)

* **F:** Seventh day Adventist; forbidden by religion from working on the Sabbath (sundown Friday to sundown Saturday). Appellant met with a rep of the school board to try to accommodate. ER said they needed union’s consent to get an exception to the CA. he didn’t have enough seniority to move to the “prime” positions. ER concluded the only practical alternative was to create a Sunday to Thursday shift for the appellant that required the union’s consent. Union refused accommodative measures. R was fired because he refused to complete his Friday shift.
* **I:** Is a trade union liable if it refuses to relax the provisions of a CA and thereby blocks the ER’s attempt to accommodate? YES
* **R:** Provisions of a CA cannot absolve the parties from the duty to accommodate. However, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof. Substantial departure from the normal operation of the conditions & terms of employment may constitute undue interference in the operation of the business. A union that causes or contributes to the discriminatory effects incurs liability. To avoid imposing absolute liability, a union must have the same right as an ER to justify the discrimination. It must therefore discharge its duty to accommodate. A union may become party to the discrimination by (1) participating in the formulation of the work rule that has a discriminatory effect OR (2) the union impedes the reasonable efforts of an ER to accommodate. A union which is liable as a co-discriminator with the ER shares a joint responsibility with the ER to seek to accommodate the EE. If nothing is done, both are equally liable. Normally the ER will be in the better position to formulate accommodations. The ER must initiate the process & take steps that are reasonable. If the proposal for accommodation violates the CA, and there are other measures that would not disturb the agreement, then the ER should adopt those measures and it is reasonable for the union to refuse. The union’s duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably be found. Also a duty on the complainant to assist in securing an appropriate accommodation.
* **HERE:** The measure proposed was not only reasonable, but the most reasonable option. Triggers union’s duty to accept reasonable measures. Union conceded that other EEs were not canvassed to ascertain whether someone would volunteer to take the shift. As such, the duty to accommodate was not discharged.

## V.) Systemic Discrimination

### Kelly: Visible Minorities: a diverse group

* People in visible minorities in Canada often share:
	+ Live in cities
* People in visible minorities often differ:
	+ age structures
	+ levels of education & attainment
* Visible minorities generally more highly educated than other adults, yet are less likely than others to be employed in professional or managerial occupations
* Visible minorities populations on the rise.

### CNR v. Canada (human rights commission) (1987, SCC)

* **F:** CN guilty of discrimination on the basis of sex in its hiring practices for certain unskilled blue collar jobs. Order established a requirement that at least one woman be hired for every four job openings until the goal of 13% female participation was reached.
* **I:** Appropriate order? YES
* **R:** Evidence established that recruitment, hiring and promotion policies prevented and discouraged women from working blue-collar jobs. Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. Exclusion from group fosters the belief that the exclusion is the result of “natural” forces- i.e.- that women just can’t do the job. When systemic discrimination is at play, orders like this may be the only means by which the purpose of the code can be met. In any program of employment equity, there simply cannot be a radical dissociation of “remedy” and “prevention.” There is no prevention without remedy. When a program is aimed at remedying past acts of discrimination, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is not to be done by the excluded group. Employment equity programs work by (1) countering the cumulative effects of systemic discrimination & rendering discrimination pointless; (2) by placing members of the excluded group into the heart of the workplace so they can prove their ability, thus addressing stereotyping; and (3) helping to create a “critical mass” of a previously excluded group which then eliminates the problem of “token-ness” and voiding placing the group at the periphery of the workplace.

# N.) Globalization

## I.) the crisis of Globalization & labour Law

### Various Cases and Globalization

* **Cronk:** Clerical EE losses her job due to downsizing
* **RadioShack:** officials of an MNC wage a vicious and protracted anti-union campaign from their head office in Texas
* **Buhler Versatile Inc:** Canadian entrepreneur began to run the business without much understanding of his collective bargaining obligations after US competition law administrators required the American company to divest itself of the company
* **White Spot:** Restaurant chain franchises out one of its locations, and the labour board had to decide how the restaurant would bargain (separately or together)
* **CNR:** Company had to take remedial measures to ensure the hiring of women. At the same time, the feds began to reduce its support for rail travel in favour of a user pay policy, resulting in the abandonment of many rail services & drastic reductions in CNR’s workforce

### Arthurs: Labour Law Without the State

* Economic spaces are no longer co-terminus with the nation state; they extend across trade blocks (NAFTA; GATT; EU; etc.)
* Political spaces are being dissolved- national sovereignties are shrinking and fracturing their power & delegating to regional claimants; meanwhile ,they’re giving up sovereignty to multinational organizations
* Judicial spaces remain formally aligned with political spaces, but supranational forums are being created.
* Overall, creates a “hollowing out” of the state. For labour law, this means:
	+ The “working class” as a political movement is divided within itself; unions have not preserved alliances with ethnic communities and not forging new ones with visible minorities; and genders and generations view each other as opponents for jobs.
	+ Labour market institutions- EI, WCB- are being criticized
	+ Elements of labour law are based on a paradigm of industrial employment that prevailed during the 1930s and 1940s. In the new economy, departures from old ideal-types of production, management, and E-ment are becoming the norm, and old law doesn’t always fit.
* Human labour is being replaced by machines
* Long production is being replaced by shorter runs of non-standard products. This affects workers individual and collectively. Workers must compete with each other for fewer jobs requiring specialized knowledge and education.
* We must be alert to the new economy and how it impacts employment. Because of the contemporaneity, complexity and open-endedness of the processes of change, the new economy, the new paradigm of employment relations, the new labour law are likely to be hybrids. They are likely to contain something of the past, present, and future, of supra-state, state, substate, and non-state institutions.
* FREE TRADE has affected labour and management…
	+ Many firms’ mgmt. does not have ties to Canada. No resident industrial relations manager with authority to decide how to handle grievances, what to do when confronted with an organizing campaign or a strike, or whether to comply fully or minimally with HR legislation. Instead, corporate policies are directed & administered from the USA, and reflect US experience and values.
	+ Canadian EEs will likely experience more determined ER resistance to unionism, less willingness to support the social safety net,
* CONCLUSION: some effort must be made to re-create something resembling state intervention at a level higher than that of the nation sate- a level more nearly commensurate with the regional and global markers within which key corporate decisions are being made.
	+ Problem is that this will infringe on national sovereignty; look like disguised protectionism; prevent developing countries from industrializing.

### Report of the working group on working time & distribution of work

* Unbroken rise in the labour force participation of married women. Women’s work on the job and at home has increased in the new environment
* Growing need and demand for parental or family-related leaves and more flexible hours of work
* Long hours are often the consequence of down-sizing.
* Levels of stress increasing for EEs, whether unemployed, precariously employed, fully employed, and working long hours.
* Older workers and small business disproportionately affected by technological change, and can’t keep up.
* Growth of non-standard work (service economy- part time, several locations, from home, irregular hours, etc.) . Most new jobs created are non-standard. “non-standard job of today likely to become the standard job of tomorrow.” Disparity between standard and non standard workers should be addressed and the conditions for those at the bottom should be improved.
* Growth of non-standard jobs are fuelled by the service economy; “just-in-time” production methods; heightened competition and the lean workplace; part-time work; temporary and contract work; the self-employed and return of homeworking.
* Problems that need addressing
	+ Protection from unemployment for part time workers?
	+ Home workers = dependent contractors? Home work and the potential for isolation and exclusion from the benefits of a normal employment relationship.

### Sims et al: Striking a balance

* Some changes and their consequences for labour relations
* Deregulation & enhanced competition:
	+ Elimination of subsidies introduces new international competition- EX- “Crow rate” abolished and new competition to grain trade
	+ Free trade results in removal of tariff and other barriers to doing business with or through USA- exposes Canadian business to the need to remain competitive with American companies
	+ Competition and deregulation breaks up traditional bargaining patterns: wage rates and operating costs are back on the bargaining table because the industry standards have change when international patterns are introduced
* Privatization & government cutbacks
	+ Government continues to transfer jobs to the private sector or eliminate them completely. Puts public sector unions in a defensive mode.
	+ Makes it more difficult for government and organized labour to communicate freely concerning the government’s role as a legislature. The government is wearing two hats in dealing with labour- legislator and policy maker on the one hand, and the largest ER, in cutback mode, on the other.
* Changes in Technology
	+ Many jobs becoming automated
	+ Increase in the ability of management to monitor and control how work is performed
	+ Rise of “just in time” delivery systems
* Compaction of work
	+ “doing more with less”
	+ Fewer EEs are doing more and more work.
	+ Can create a backlash against organized workers, who are seen by some as the fortunate beneficiaries of the polarization of jobs
* New Involvement of the parties
	+ Unions are accused of being the “new conservatives” for trying to preserve the status quo.
	+ Demands of ERs rather than the demands of unions are more often the focus of negotiations.
* MGMT style
	+ Restructuring lead to a reduction in the numbers of managers in many Canadian businesses
	+ ERs therefore more vulnerable to strike action
	+ Need for new, and often more collegial ways of getting things done
* Changes in union structures
	+ Many unions merging/amalgamating
	+ Larger unions can help with educating union members; also a sophisticated understanding of the industries in which they operate, giving a new depth to the bargaining process
* Styles of negotiation
	+ Growing recognition that the adversarial bargaining process isn’t very productive
	+ Old style doesn’t concern itself enough with long term problem solving
	+ Growing recognition that effective labour-mgmt relations requires an ongoing relationship built on mutual respect and continuous problem solving.
	+ Still impeded by unions wary of ERs engaging in dialogue only when they need labour’s cooperation because of problems ahead
	+ Also impeded by outdated public stereotype of labour mgmt. relations as being necessarily adversarial
* Global Competition
	+ Competitors all have different labour policies because of growing international competition.

### Arthurs: Reinventing Labour law for the Global Economy: Benjamin Aaron Lecture

* Five Components of the emerging global labour law:
	+ International treaties and conventions
		- EX- NAALC, the catalyst for greater cooperation amongst transnational unions
		- EX- treaty of Rome establishing the EU
	+ Dissemination of “best practices”
	+ MGMT constructing a kind of global labour law in the form of voluntary codes of conduct
	+ Unions still play a role
	+ New actors in the formation of global economy- NGOs, etc., Social movements often work with unions to arouse public indignation against abusive labour practices. Forces change.

## II.) the ILO

### Sengenberger: “Restructuring at the Global LEvel: The Role of International Labour Standards”

* Even when the treaty of Versailles was adopted (forming the ILO) in 1919, some states were opposed on the grounds that they would handicap them on the international market by increasing their costs relative to other countries not covered by the common rule
* Based on the principle that universal and lasting peace can be established only if it is based on social justice, and labour is not a commodity.
* Tripartite structure enables governments and woks’ and employers’ organization to share power in its decision making bodies. The Governing Body is the executive organ, and the International Labour Conference elaborates and adopts international labour standards. Once standards are adopted b the conference, member states must submit them within a year to their parliaments or other legislative authorities for the enactment of national legislation or action.
* Passes conventions- with a legal status similar to treaties; and Recommendations.
* Application of conventions is monitored through the ILO’s reporting and review machinery, involving the International labour office as the secretariat of the ILO, as well as tripartite committees of the Conference, and independent experts.
* Most ratifications are made by the industrialized or near-industrialized countries, while the developing countries have ratified far fewer conventions.
* Problems with two extremes: Setting standards which can be accepted at once by the greatest possible number of countries, with the risk that the common denominator is apt to result in a standard too low to produce significant progress; AND setting standards too high, so that they are not immediately practicable in most countries. As a consequence many standards are formulated in fairly general language, thus giving governments latitude either in scope of setting the standard, or the method of application.
* ILO tries to adhere to the principle of universality in setting and enforcing labour standards, and not admit regional standards for groupings of counties of different degrees of development. That would mean “substandards” for “sub-human people”

## III.) NAALC

### OECD: Trade Employment and labour standards

* NAALC links each of the NA countries’ labour laws to the regional trade agreement
* Promotes mutually recognized labour principles including core labour standards and other standards such as the occupational health and safety of workers and the protection for migrant workers
* Provides forum for a union in one country to complain about adherence to standards in another country.
* Dispute settlement process can be very lengthy; trade sanctions are only possible in areas of child labour, minimum wages, and occupational safety and health, but not for freedom of association, right to bargain collectively, and forced labour.
* The entire process has never been followed all the way through to the end to result in trade sanctions

### NAALC Secretariat, Communications submitted to the USNAO

* US NAO accepted for review a public communication alleging a failure by Quebec to provide an effective remedy for plant closings with anti-union motivations, and unwarranted delays in union certification procedures.
* Quebec quickly met with labour and came to an agreement to address the question legislatively; the unions withdrew the complaint
* *Note the deterrent role that the NAALC plays*

### Compa: NAFTA’s side agreement and

* NAALC is a viable new arena for creative action
* Workers, trade unions and their allies in the US, Can and Mexico can work together concretely to defend workers’ rights against abuses by corporations and governments
* 20 complaints and cases have arisen, embracing bargaining efforts, OHS, migrant worker protection, minimum employment standards, discrimination against women, WCB, and other issues.
* These cases allowed for building new international alliances- gives a concrete venue for international orgs to work together.
* Agreement does not create an international labour tribunal empowered to indirectly take evidence and overrule national courts, but it’s unrealistic to expect that
* The states open themselves to cross-border oversight mechanisms, with limited enforcement powers, while guarding sovereignty over key elements of their national systems.
* NAALC creates a series of sliding platforms crossing the pace of several countries where trade unionists and their allies can stand to direct fire at their own and others’ governments, MNCs, and corrupted unions.
* Actors can demand investigations, public hearings, and government consultations. Transnational advocacy networks have to work around the lack of “hard law” features that create accountability through trials of evidence, findings of guilt, and enforcement by state power, and instead exploit the potential for soft law mechanisms—the “mobilization of shame.”
* Washington Apples Case Example:
	+ Migrant workers work in Mexico processing apples. ERs crushed their efforts to form trade unions & bargain & have OHS protection, etc. US unions and Mexican unions worked together. Mexican unions signed the complaint; American NGO was the public face of a media campaign in the USA. Less than one month after the complaint was filed, the pro-government union federation CTM from Mexico filed its own NAALC complaint over treatment of migrant Mexican workers in Maine.
	+ Hearing of the case in Mexico city. Involvement of Anglo workers lent a powerful image of solidarity.
	+ Mexican labour department eventually issued a report demanding consultations between the labour secretaries of the two countries. Agreed on a program of public outreach and hearings in Washington where workers would testify.
	+ NAALC provided concrete means of pressing the apple growing industry to improve conditions or risk losing the Mexican apple market, pressing the government to conduct a thorough review of the complaint, issue a strong report seeking ministerial consultations; etc. etc.
* The instruments and institutions are flawed, but they create spaces, terrains, platforms and metaphorical foundations where advocates can unite across frontiers and to promote new norms, mobilize actors, call governments and industries to account, etc.