**Labour Law**

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# THE COMMON LAW CONTRACT OF EMPLOYMENT

## Introduction

### Christie v York

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

### Bhaudaria v Seneca College

**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**.

**Lecture**: general principle that CL is based on braod concept of freedom of contract. court has been prepared to recognize some new torts in the employment area, but not where there is some other parallel statutory procedure that is meant to provide a remedy

## EMPLOYEE STATUS

There is a diff between employee and independent contractor. Predominant test is **control test –** if worker is under control of ER then EE

- May look at factors such as:

* + what control do they have over **terms and conditions** of work? Who is setting hours, wages, tasks you perform
	+ who **owns the tools** that you use to do the job?
	+ who **bears the benefit of profit or the risk of loss**? (employees don’t typically have profit or loss)
	+ what **percentage of the income that the person is earning comes from that prospective employer**?

### Kahn-Freund

Old employment model was when the ER possessed the technical knowledge and told the EE what to do. Increasingly industrial labourers have knowledge their ER does not have. This makes it complicated to delineate who is an independent contractor, who has been contracted by the other party to perform work which that party does not know how to do, and an employee who has been hired to work for the employer in an employment relationship. - movement towards an organization model instead – does worker form part of the employers organization?

### Langille & Davidov

* 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 ->** eg if you don’t own your own tools, you can’t take them and work elsewhere. One example of dependency**)**
* This test has changed over the years -> now recognized that often employment relationship exists witout direct control – eg bc the EE is a specialized professional, the work requires use of discretion, or the work is performed off ER’s premises -> courts have shifted to bureaucratic/adminsitrative control instead, eg the power to discipline workers,
	+ in QC there is a shift to subordination analysis -> whether worker is able to freely and fully pursue their goals

**in short – determination of employee rests on: control and economic dependency**

* Business integration or organization test is also used in some cases (whether W’s work is integrated into ERs business) sometimes used boils down to the same 2 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.

## TERMS OF THE CONTRACT

* Court says you can enter into contractual arrangement as long as it doesn’t go against statute, or public policy
* And the terms have to be genuinely agreed to: can’t have undue influence, misrepresentation (i.e. just the general doctrines of contract)
* This can be problematic in employment context because the terms tend to be dictated, standardized, and the employee may not get them, and they may change during the term of employment - might be changed unilaterally

### Ellison v Burnaby Hopsital

**F:** After 25 years of employment, EE was dismissed and her position was abolished. One year before she was dismissed, ER introduced new benefits policy, which included severance package which was much less than what she was entitled to under common law. The EEs were given copies of the new policy, but not consulted on it.

**I:** Can the employer rely on this new policy? **H:** no

**A:** If it’s a contract you have to show both parties accepted it**. Before a policy can form part of a contract of employment there must be evidence the policy was accepted by both the employer and the employee as a term of the contract**, and the onus in this respect rests on the party seeking to rely on the policy as a term of the contract. (see page 92)

* “P glanced at the policy, but did not in any way comminicate to the D that she accepted the statements as terms of employment”

## Judicial Supervision of the Contract

Contract of employment for indefinite period is terminable only if reasonable notice is given. Principle applies to EEs engaged for indefinite period, does not apply to fixed term contracts. EE whose contract is not revnewed at the conclsion of fixed term is not dismissed or terminated, rather her employment simply ceases in accordance with the terms of the K.

### Coccel v Ontario Gymnastics

**F:** Coccel was working for a temporary one year contract, the contract said that on termination she will be given the severance pay provided in the employment standards act. Statute required min is 8 weeks severance. She worked on temp contract from 1981-1997 in 1997 they offered her three months severance. Coccel was on temp contract that was repeatedly renewed, sued for wrongful dismissal and argued that her notice should have been 1 year, and that clause in K was not valid.

**I:** Is she a temp employee, and therefore not entitled to CL reasonable notice? Or is her repeatedly renewed temporary contract really an indefinte contract entitling her to reasonable notice

**A:** The juge says that she is not really a temporary employee, she is an employee on indefinite terms, it keeps getting extended. The court says this is a contract that contemplates renewal, not really a fixed term contract, so not truly a fixed term one-year contract.. **It is sufficiently ambiguous to really treat that as on ongoing relationship to which the common law would apply.**

* TJ found it was actually an indefinite employment contract, not a true fixed-term K. **Meaning given to the arrangement/contract should reflect the parties reasonable expectations and true intentions.** Where K admits of two or more reasonable constructions, **that which produces the most fair result must be taken to reflect the true intentions of the parties.**
* It is legal to make a contract like this but its terms have to be crystal clear given the serious consequences for the employee, this circumstance is not clear enough to disentitled her to the CL notice she should get
* Duty to mitigate financial loss resulting from

## Reasonable Notice of Dismissal

At common law, contract of employment is terminable only with reasonable notice of payment in lieu of notice.

* one month per year, this is kind of a rule of thumb but usually tops out around a years notice

### Cronk v Cdn Gen Ins

**F:** EE dismissed at age 55. Clerical position. Worked for ER for 29 years. ER downsizes and EE’s position is eliminated. Not likely she has any career prospects. EE gives her 9 months; EE asks for 20 months - amount that is typically given to managers who are dismissed

**I:** 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:** The fact that she is a lower level employee means that she gets less protection

* **At trial the judge stated:**Consider the *Bardal v Globe and Mail Ltd* - *“Reasonableness of notice must be decided with reference to each particular case,* ***having regard to 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. 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.

**- Court of Appeal:**Wrong for trial judge to rely on stats. His result could disrupt practices of commercial world. ERs need certainty of the cost of downsizing, and certainty of legal advice. Character of the employment (clerical; low-level) does not entitle an EE to a lengthy notice period.

Common Law Take away: CL contract of employment is almost unlimited in terms of what parties can agree too, but there are some regulations, statutes provide floor for workers, and CL doctrines provide some protections for workers

 – CL entitlement to reasonable notice of termination or pay in lieu of reasonable notice is essentially the biggest right that CL gives in practical legal terms to employees that are not unionized. They also have employment standards act and human rights legislation

## TERMINATION THE CONTRACT – CONSTRUCTIVE AND WRONGFUL DISMISSAL

Wrongful dismissal comes up in three circumstances:

1. ER dismisses the ER without alleging cause and without giving notice or wages in lieu of notice,
2. EE quits in respone to a repudiatory breach of the employment contract by the employer, and sues for damages
3. the employer summarily dimisses the employee, alleging cause that is not proven, or
4. the employee is dismissed in breach of a statutory rule governing the employment relationships

### Farber v Royal Trust: Constructive Dismissal

Constructive dismissal: if ER commits a repudiatory breach of express or implied terms of the employment contract, EE can terminate the K and sue for damages.

**F:** EE’s position was dissolved, he was offered job managing a lesser branch, for commission rather than salary. Sued for constructive dimissal

**I:** Does this constitute constructive dismissal? **H:** Yes

**R:** Must ask **whether unilateral changes imposed by ER substantially altered the essential terms of EEs contract**. Look at whether, at the time the offer was made, a reasonable person in the same situation as the EE would have felt that the **essential terms of the employment contract were being substantially changed.**

* SCC: Doctrine we have to apply is ‘fundamental breach’
	+ Does it amount to a substantial change to the essential terms of the K
		- Wages, level of authority/responsibility, opportunities for advancement, not collateral matters
	+ Not a bad faith test, but bad faith may impact damages awarded to EE
* On these facts:
	+ Substantial change: a demotion
	+ Essential feature: **how he is paid** (straight commission or salary/commission mix – less security), less responsibility, at the time reasonable person would’ve guessed it would result in substantially less pay too
	+ So they reject the after-the-fact evidence about the branches improvement, this wasn’t reasonably foreseeable
	+ His willingness to manage a better branch doesn’t alter the result of the test either; willingness to accept replacement position is not yardstick of plaintiff's rights
	+ Appropriate period is one years notice
* So just b/c employee quits in formal sense doesn’t mean its not constructive dismissal

### McKinley v BC Tel: Just Cause

* if EE commits a **breach that is severe enough to constitute a repudiation of the employment contract**, ER has just cause for dismissal. ER entitled to treat contract as terminated, and to dismiss the EE without notice or pay in lieu of notice. Contextual analysis

**F:** Man came back to work after taking disability leave. He told ER he needed workplace accomodation and overstated the side-effects of his medication, it was not really the case – overstated the extent of his needs. When ER discovered this they fired EE.

**I:** Was this dismissal for just cause? **H:** No, this does not rise to the level of dishonesty that would break down an employment relationship

**A:** *General comments on misconduct*: consider if EEs misconduct is impossible to reconcile with the EEs obligations under the employment contract. Consider the particular circumstances about alleged miscoduct -> whether the evidence demonstrated EE misconduct and whether, in the circumstances, such misconduct sufficed to justify the employees termination without notice

*On employee dishonesty:* Even when it comes to dishonesty you have to look at extent of dishonesty and the effect it has on employment relationship*.* Whether the employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct

* The test is **whether the EEs dishonesty gave rise to a breakdown in the employment relationship**  - just cause for dismissal exists where the *dishonesty violates an essential condition* of the employment contract, breaches the *faith inherent to the work relationship*, or is *fundamentally inconsistent with the EEs obligations to his or her employer.*
	+ - Instruct jury:
			* 1) Does evidence establish deceitful conduct on BoP?
			* 2) If so, does the nature/degree of this conduct warrant dismissal?
				+ This is a question of fact – assessing seriousness requires the facts to be considered and balanced
	+ If grounds for termination are not specified in K you have to take a contextual approach
	+ For some types of dishonesty its clear – theft, misappropriaton, fraud etc.
	+ But for others you really have to look at impact on relationship
	+ Principle of **proportionality** is relevant- look at severity of conduct relative to santion imposed

## EXTENT OF FINANCIAL COMPENSATION

If ER dismisses without cause, dismissal is a wrongful. Requires payment in lieu of notice. Notice period governed by the contract of employment or common law.

* Therefore the EE can recover **for wages and benefits that he would have been legally entitled to during the contractual notice period.** As long as the period specified in the contract is in accordance with statutory minimums this governs – regardless of whether it reflects the actual period that it takes the employee to find a new job.
* *Ceccol* – the duty to mitigate requires EE to make reasonable efforts to obtain alternative employment

### Wallace v UGG

**F:** company convinced long time EE (Wallace) at competitor to come work for them. EE agreed on the condition that he would have job security, and on assurances that he would have a job until retirement. 14 years later he was summarily dismissed with no explanation. Caused emotional and psychological problems for Wallace he eventually became bankrupt. He was depressed and unable to find new work. At trial he was awareded damages on 24 months notice period and aggravated damages.

**I:** (for these purposes) What damages is Wallace entitled to for this dismissal?

**R:** There is no compensation for mental distress resulting from dismissal, there must be an independent tort committed by ER to get mental distress damages. BUT where there is bad faith conduct in the dismissal, this may warrant compensation for a longer notice period

**A:** In order to get damages beyond reasonable notice:

* + - * You need *independent actionable wrong* - like a tort or breach of term of contract
			* BUT if manner of dismissal has caused mental distress the court can extend notice period to take into account bad faith in the manner of discharge; this is not an independent tort.
			* No punitive damages- the conduct did not meet the standard of harsh, vindictive, reprehensible and malicious

What about notice period damages?

* + - * Factors set out in *Bardell:* must look **at particular case**, with regard to **character of the employment**, the **length of service**, **age** of servant, **avialbalility of similar employment**, having regard to **experience**, training and qualifications of servant
			* These factors are not exhaustive, Canadian courts have added other factors
				+ Ex. you can consider the inducement to leave previous secure/stable employment (reliance & expectation interest), was there callous treatment, implied term of good faith/ fair dealings, work is important to individual (their sense of identity), law should minimize economic damage when they are dismissed – **power imbalance that characterizes the employment relationship is greatest at the time of rupture of the employment relationship, incumbent upon employer to minimize the damage and dislocation (economic and personal) to employee**
				+ As a result, bad faith on part of ER can warrant extra time on notice period – eg telling other employers that the EE committed theft without basis, or firing someone right after they return from disability for depression -> circumstantial
				+ Jurt feelings from dismissal doesn’t warrant damages, but bad faith in the course of dismissal may increase notice period
			* These kind of damages are available even if they can’t show their ability to find new work was negatively impacted (poor treatment *per se* is sufficient); idea is that these should be easy to avoid
			* Iacobucci: not going to recognize bad faith discharge as tort or contract action – **injuries arising from fact of dismissal not compensable**; but injuries such as embarrassment, humiliation, and damage to self-worth- arising from bad faith conduct in *manner* of dismissal is another factor that is properly compensated for by an addition of the notice period. At TJ’s discretion.
			* These came to be called ‘Wallace damages’, they were argued all the time

### Honda v Keays

Retreat from the Wallace principles – damages based on forseeability and actual damage suffered

**F:** Honda fired Keays – he had disability and was on insurance. Honda wanted him to see their doctor, wouldn’t engage with his lawyer, etc. Eventually relationship falls apart, he is fired.

**I:** Should he be entitled to reasonable notice, “Wallace” damages, punitive damages?

**A:** SCC:no punitive damages, Wallace damages shouldn’t have been awarded – just gets the original 15mos

* basic principle: EE entitled to damages resulting from ER’s failure to give proper notice. No damages available to the EE for the actual loss of job and/or pain and distress that were caused from dismissal.
* However, aggravated damages may be awarded in wrongful dismissal cases where the acts were independently actionable (narrowly interpreted in *Wallace* as requiring an independent tort)
* Further, in contracts it was found that damages are recoverable for a contractual breach if the damages arised naturally from the breach itself, or were reasonably in the contemplation of both parties (was it foreseeable that breaching the contract would cause the damages?)
* In the case of employment, damages from termination of employment contract only arise if it was foreseeable that terminating the contract would cause damage. B/c the possibility of termination is built into all employment contracts, there would not ordinarily be contemplation of psychological harm resulting from the dismissal – so generally mental harm resulting from being fired is not compnesable

**R: To be compensable, the ER must have done something more that could foreseeably cause mental distress,** such as the conduct in Wallace, ERs conduct must be **unfair**, or in **bad faith** by being, for example, **untruthful**, **misleading** or unduly **insensitive**”

* If parties comtemplated at the time of K that a breach in certain circumstances could cause the P mental distress, P is entitled to recover
	+ In such circumstances, **it is not a bump-up of reasonable notice period, but rather, if mental distress was in contemplation of parties, damages should be awarded though forseeability concept in negligence and should reflect the actual damages**.
* Further, the damages must represent **actual damages.** some showing of bad faith doesn’t automatically bump up notice requirement; need to show *actual* damage and that it breached terms of contract
* **Here**, at time of contract there is possibility for dismissal, therefore not reasonable contemplation that dismissal would lead to psychological damages -> normal distress and hurt feelings not compensable
* Punitive damages:
	+ **damages must be awarded only in "exceptional cases" where the employer’s "advertent wrongful acts…are so malicious and outrageous that they are deserving of punishment on their own."**
	+ **Damages for conduct in manner of dismissal are strictly compensatory – need to avoid double-punishment, or double-compensation**
	+ Finally, no compensation for discrimination -> must be dealt with under human rights regime
* Moved away from idea of independent actual wrong – really just a question of reasonable foreseeability and actual damage suffered

# STATUS UNDER COLLECTIVE BARGAINING LAWS

## INTRODUCTION

* only employees can bargain collectively (not independent contracts) (dependent contractors can according to BC Code)
* only get labour relations benefits if the purpose of the organization is to represent workers collectively
* most of the time we use the Rand formula: i.e. you have to pay union dues but don’t have to a member to work there (prevents free-riders).

## WHO IS AN EMPLOYEE

This is based, not so much on doing work for wages paid by the employer, but on indicia of dependency and control. If those are present, they will be considered to be dependent contractors and thus employees for the purpose of collective bargaining.

### NLRB V Hearst

**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.

**A:** 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

**-** Ask: as a matter of economic fact, are these the kind of people that the act itself was targeted at? are they subject to evils Wagner Act was directed at (and are the Act’s remedies appropriate to preventing those evils from befalling the worker); need to take a purposive approach.

* + Regular and continuous work, Rely upon the earning for support of themselves and families, Total wages are dictated in large part by newspaper who prices, fix their market, and control their supply, Equipment provided by newspaper, Hours of work determined by newspaper, they are supervised by newspaper
	+ Go through factors of economic dependence:
		- **Who owns tools, Who bears risk of loss/chance of profit, Where is control of the r/ship evident**
	+ The news boys are really under newspaper control; can’t be thought of as independent contractors in true sense –even though they didn’t get their cheque from Hearst

- So this case highlights that there are class of workers between independent contractor and employee

### Winnipeg Free Press (dependent contractor)

BC Code

* *"dependent contractor" means a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an EE an IC.*
	+ Act is saying there are people that look more employees than independent contractors and they are to be treated like employees

***Winnipeg Free Press***

**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.

* + Most important factor is the nature and degree of detailed control over the person claiming they are an employee
	+ 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.**
	+ Factors in favour of finding them employees/dependent contractors:
		- Hours are set by Winnipeg Free Press
		- Limited opportunity to increase profit/recruit
		- Some assistance in finding substitutes
		- Sets price of paper (no negotiation)
		- Control what the deliverers are carrying
		- There is a depot, staffed by district manager, from which they pick up papers;
		- Although customers failure to pay would be deducted form carriers compensation, in the end they would get the money back
		- Some ability to discipline carriers

**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.

## NEAR EMPLOYEES

### Teamsters v Tecumseh

**F:** A group of firefighters who were volunteer firefighters sought to unionize. Issue is whether they can?

**A:**  They are employees, and entitled to unionze. Despite being volunteers, they have many hallmarks of employment relationship.

* The essence of employment relationship is the exchange of labour for consideration. In this case, that is present
* Consider these factors: **pay and benefits, manner of recruitment, discipline and direction**
* No scheduling, and people not obligated to show up. Every other aspect also resembles typical employment relationship:
	+ Fire fighters recruited through formal process, which assess skills, aptitude and availability
	+ Appointed by town council
	+ Formal training is provided on an ongoing basis with testing of competence
	+ No one has ever been terminated for fialure to attend the training – regular absences would be cause for concern and action
	+ Chief has power to discipline and recently suspended 2 fire fighters – power dynamic classic for employment relationship
	+ Fire fighters are directed in their work in a hierarchical manner

## EXCLUDED EMPLOYEES

* **Professions:** Some professions may not bargain collectively – eg professionals may be excluded – lawyers, dentists, doctors, but some may – nurses, engineers, teachers -> Raises question of whether CB is becoming preserve of employees that already enjoy privileged economic position. Increasing, rather than decreasing, inequality?
* **Managers:** assumption of adversarial relationship btw management and union, managers excluded (not always clear distinction
	+ Purpose is “to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or empoyees in the bargaining unit.”

### Children’s Aid Society

**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. Approve overtime, schedule, have access to personnel files. They consult with managers, and are responsible for performance review of EEs.
	+ Mischief towards which the section is directed would be engaged if they were EEs.

## EMPLOYER’S INFLUENCE

* ER cannot be involved in creating union, generally unions must exclude managers – however they can include them so long as union is not dominated by managers -> this distinction is less clear as new workplace models that are not based on adversarial workplace relationships develop

# THE RIGHT TO JOIN A UNION (UNFAIR LABOUR PRACTICES)

## INTRODUCTION

4 steps to certification:

* Step 1: Organize support
	+ Union must be able to demonstrate the support of a min of 45% of EEs in the proposed BU
		- This enables unions to certify even if there are people who are not willing to put their name on a card
* Step 2: Apply for certification
	+ Union files an application for certification with the BC Labour Relations Board
* Step 3: Certification vote – within 10 days of application for certification
	+ Secret ballot vote is held
	+ All EEs in BU are eligible to vote
	+ Union must receive a majority of votes case in order to be certified
		- This means union can be certified without majority of BU, There is some discretion if the turnout is too low
* Step 4: Board Hearing
	+ Labour board will hold a hearing to determine if the union has majority support
	+ Employer can raise objections at this time (eg some voters were not eligibile or some signatures false)
	+ If all procedures followed, ballots are counted

An **unfair labour practice** is when ER dismisses or punishes EEs because of membership in union

- First kind is dismissal based on anti-union animus

* burden is on ERs to show they did not have anti-union animus -> difficult for workers to prove it so it’s a reverse onus
* In BC the provision also contains a clause that says that nothin in sub 6(3) is meant to interfere with the rght of an ER to terminate an EE for proper cause
	+ ultimately the ER has an over-riding ability to discharge for proper cause regardless of what else might be going on
	+ Difficult question for board of what happens when there is cause for dismissal and anti-union animus
* Second kind – **non-motive unfair labour practices**
	+ some labour codes prohibit conduct that interferes with a union, regardless of motive -> looks at effects. Issue, how do you tell what is just a legitimate business interest rather than an unfair labour practice?

## NON-MOTIVE UNFAIR LABOUR PRACTICES

### International Wallcoverings

* **Facts**: During the strike the ER is lawfully using replacement workers (*BC doesn’t allow temporary replacement workers because it promotes violence during labour disputes, but its allowed in ON*) ER was bussing in workers from secret location. EE’s confront the scabs, two assaulted the men and one damaged van. ER dismisses them, saying they had no right to confront scabs. The union files a complaint saying that dismissing them was part of an attempt to undermine the union.
* **Issue**: Was this unfair labour practice or legitimate business decision? Fired them with no individual consideration, and fired all involved.
* **Ratio:** 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.**
	+ Consider “whether the adverse impact on union activity was counterbalanced by a sufficient or legitimate managerial, entrepreneurial or collective bargaining justification.” Where balance is equal – motive would be determining factor.
* **Holding**: 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.
* **Analysis:** as part of its decision board looks at conflicting authority on issue of motive

*Goldhawk*

Looks at *CBC* case, which tries to apply this non-motive unfair labour practice to quite a different context

* CBC tried to tell him he cant be president of union and host Cross Canada checkup (news show)
* Goes to SCC, who says **take a balancing approach- look at ERs legitimate interests and the effect on the union, and decide whether this amounts to unfair labour practice**
* **what is the degree of impact on union, how forseeable is that? What is the ERs reasons and how legitimate are they? Finally, is there anti-union animus operating?**
	+ - * LRB said union president needs to be able to communicate with members; and union needs to be able choose president from all it’s members; problem that CBC didn’t accept the compromise
			* CBC has to give evidence about how its own legit business efforts can’t be accommodated in these circumstances
			* so have to look at employers legit biz interests and their affect on the union
			* had CBC shown compelling business reasons for it’s interference?
				+ There were other ways of dealing with perception of bias -> unfair labour practice

In Kennedy Lodge Nursing Home the board rejected the Union’s argument that the employer’s contracting out of services was the same as Westinghouse. Board said desire to save money alone does not constitute the required anti-union animus. [but doesn’t undermine the code’s provisions and purpose of protecting collective bargaining rights?]. Langille argues that in Kennedy Lodge **by collapsing the distinction between anti-union and economic motives, employers who act rationally, and on a cost-savings basis, are protected from the Code, and the code’s provisions against anti-union animus.**

S 6(3) – consequences for individual employees being disciplined or discharged because of union involvement

* this does require anti-union motive
* this is presumed until disproven by employer

## THE STATUTORY FREEZE

Legislation provides for a two-stage statutory freeze prohibiting the unilateral alteration of terms and conditions of employment during the certification process and then during much of the bargaining process after certification. Aims to restrain employer conduct that may have the effect of undermining the union’s organizing or negotiating efforts. Anti-union motive NOT required – so even valid business purpose can violate freeze. Supplements rather than supplants unfair labour practice provisions.

Statutory freeze– Labour code s 32 (certification freeze) + 45 (bargaining freeze) (cert freeze does not prevent dismissal for just cause)

* freeze ERs ability to change rates of pay and terms of employment
1. **Certification freeze:** freeze applies once application for certification has been filed, ER has to freeze terms of employment until the application has suceeded or been dismissed
2. **Bargaining freeze** - from the point that the union is certified and the duty to bargain is triggered, until the union is in the lawful strike position (After certification, cannot change terms for 4 months or until CA executed. After notice to bargain served, cant change terms until CA concluded or strike/lockout is commenced or CA is concluded)
	* + Can only change terms of employment with boards approval, some provinces don’t let you apply
		+ Once notice to bargain has been served, must begin bargaining with 10 days (s 47)
* difficult bc no employment situation is totally frozen, ER usually making business decisions and frozen all the time
	+ - good faith business decisions may be suspended druing process -> directed towards facilitating bargaining rather than preventing “victimization” by anti-union ER (*Royal Ottawa Health Group*)

### Simpsons

* **Classic test: business as usual (or before) test:** ER not precluded from doing things were expected (giving bonus each December).
	+ (In fact in Canadian Imperial Bank of Commerce and Union of Bank Employees board found failure to give established annual wage increase contravened the freeze.)
	+ simpsons modified this test

**F:** Union has just been certified, is in bargaining period. ER in financial difficulty, laidoff 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:** Does this violate the statutory freeze?

* + business as usual test is unworkable - where you’re dealing with unusual circumstances (and normal ones too) better to ask about reasonable expectation of parties (e.g. where there is steep drop in profitability it is reasonably expected that employer would lay off some workers – probably yes) an objective test from the perspective of the reasonable employee
	+ would 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**.
	+ in BC generally deal with through system of advanced justification 🡪 go right to Board
* Case shows limitations of business as usual test
* But does it weaken the statutory freeze protection for employees?
	+ **Note:** in BC you can dismiss someone during the statutory freeze, so long as there is “proper cause” -> choices case says this is not just cause, it is simply cause that is not anti-union animus

### Royal Ottawa Health Care

**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:** Both business as usual and reasonable expectations test are flawed.

* **Motivation for the rule is to prevent 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.
* New approach must bolster purposes of statutory freeze -> bolster the bargaining process, reinforce status of union as bargaining agent and provide a firm starting point for CB
* Necessary to pay particular attention to how the proposed change on employment conditions ***relates to collective bargaining***:
	+ Is the kind of a thing that would typically be the **subject of collective bargaining?**
	+ Would the changes if implemented **unilaterally unduly disrupt, vitiate or distort the bargaining process?**
		- Ie is it the kind of thing about which an employer would normally be required to bargain? If yes then it is the kind of thing that “should” be frozen
	+ Does it **treat employees as collective or is it directed at individual?**
		- Eg reclssifying an individual as opposed to introducing a new classification system, granting a promotion as opposed to creating new promotion process
		- If it affects collectivity, it is the kind of thing that should be bargained about, and “likely to be the kind of thing that employer cannot unilaterally implement during the statutory freeze”
		- Change to “terms and conditions of employment rights, privileges or duties” required consent of bargaining agent
		- May continue hiring and firing, etc – daily stuff of individuale employer-employee interactions

## EMPLOYER SPEECH

There are restrictions on what ERs can say about union (BC is most generous)

**Section 8:** right to communicate (Protects free speech of all parties)

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

**Section** **9:**  A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

* Prohibits coercion or intimidation that has the effect of affecting someones choice as to whether or not to join a union.

Recognizes imbalance of power is such that anything ER says about union will be understood by the EEs as pressure not to support the union

* The question is **when do we cross the line from expression and intimidation**, can ER say anything negative about a union?

### Wal-Mart v United Steel Workers

**F:** Union drive was happening in Windsor Wal-mart. Wal-mart had morning meeting where they allowed anti-union employee to speak, but not pro-union employees. Wal-mart set up anonymous question box and then responds to it. One question they refuse to answer is whether store would close if they unionize 🡪 says it would be inappropriate to comment. Union argues refusal to answer question left employees to conclude that the store would in fact close if union drive was successful.Management also circulated in at least one conversation said benefits would be revoked if union was successful; i.e. made threat going to economic security. Support for union declined significantly during this time. By time of certification vote the union was badly beaten.

**I:** Is this permissible employer speech? **H:** No

**A:** can’t allow time for one anti-union EE to give views (and not make clear they are doing it independently) and not provide time for the other side. Board notes that management did not distance themselves from her comments, to make clear they were not the companies views.

* Circulating managers to approach employees and ask if they had question was a risky strategy. Designed to identify union supporters and communicate their message. But circulating of managers which was not what ultimately violated the code
* opening question box and then refusing to answer the one question everyone wanted to know 🡪 “risky strategy”; Benedet calls it impossible strategy:
	+ can’t say we’re not going to close ( a lie)
	+ can’t say we are (because links security of employment to unionization)
* Remedy: **automatic certification**
	+ could say we’re going to toss out vote; give union opportunity to counteract some of the things Walmart said; extend drive; post notice saying Walmart was found in violation
	+ more powerful remedy is automatic certification 🡪 and this is what they did here
	+ environment has become so poisoned against unionization that no amount of organizing campaigns could counteract Walmarts unfair labour practices
	+ but puts union in tough position; they still have to be able to bargain; and not in good position if you can’t threaten to strike
	+ [and some cases you can put first collective agreement to arbitration to give union foothold; treats collective bargaining as social good; not really how it’s treated in BC’s code]
	+ [backlash to this decision was so strong that automatic certification provision was removed from code –still have one in BC]

### RMH Teleservices

**F:** ER had huge meetings with EEs in which it spoke out against the organizing campaign, and broadcast anti-union slideshows throughout the day on the walls of the workplace, and gave out gifts with anti-union messages. Basically ran campaign about organizing drive.

**R:** ER can express anti-union sentiments, but it cannot be in a way that is coercive. In this case, EEs have to be able to turn away from them. If EE is forced to listen -> coercive -> prohibited

**A:** captive audience meetings are not prohibited but they attract a high degree of scrutiny- that means some meeting that employee cannot turn away from. Here it crossed line from communicating information and being coercive

* Employees did not really have freedom to turn away without being noticed
* **A campaign against unionization is not in and of itself coercive,** Employers can express views against unionization without automatically being considered coercion [*BC Code – more like US approach*]
* In this case the slideshows were persistent and you cant turn away from them, that’s what makes it coercive
* RMH gives some hints about which **things are going to cause problems** for employers
	+ You **can express opinion** in direct communication with employees
		- **Problem when attendance is mandatory,** or **voluntary but its noticeable if you leave**, or messages that it is **not easy for employee to turn away from**
	+ **Cannot link your statements against unionization to the employees job security**
	+ Employees **must be given reasonable opportunity** to respond, make inquiries, etc
* Where the employer speech becomes “forced listening” it can render otherwise permissible expression coercive and intimidating. Both content and method used must be considered.

In this case: 1. the meetings were okay, hundreds of people were there so no one would have noticed if they left. 2. Slideshows were prominent and persistent – EEs could not turn away from them –that is coercive. 3. Gifts were coercive

- captive audience, vulnerable employees, right before certification. POINT IS: you cannot link unionization to job security whether express or implied. Doesn’t answer issue of: what if this was in a letter or something, if there is no forced listening component. Realistically that would probably be an unfair labour practice

***Westcor***:

* Employer wanted to spearhead a decertification campaign, held an unofficial vote in favour of pursuing decertiication
* The board said the ER crossed the line
* Even though the company was on the verge of going out of business, that doesn’t mean ER can run decertification campaign

### Cdn Fibre

Whether a meeting is voluntary must be determined from perspective of EE. Not enough for ER to say that EEs are free to leave. In this case, the EEs found out when they got there that it was optional, but it would have been obvious if they left, it was on lunch hour.

### Peter Ross

Threats to job security do not need to be direct in order to be coerced or intimidating. A threat, whether implied or actual is a prerequisite for conduct to be characterized as coercion or intimidation. IN this case ER clearly conveyed his view that it would likely be more difficult to secure contracts for the ER is EEs unionized.

## SOLICITATION ON EMPLOYER PROPERTY

* Part of the issue is how do the union organizers get access to the employees?
* as a general rule ERs can limit organizing to non-work hours and non-work locations (eg lunch room ok, assembly line not ok)
	+ cant take up work time or work space to solicit employees for unionization
* Basic points: **employer can limit to non work areas and times to not interfere with functioning of business**; but there can be dispute over what this means; and **there may be grounds for the employer putting on greater restrictions if they can be justified**; so employer has significant amount of control over solicitation on their property; and no obligation to provide information on workers – privacy issues too; sometimes challenging to find out who are the workers and how can we contact them

**Section 7: Limitation on activities of trade unions**

**7**  (1) Except with the employer's consent, a trade union or person acting on its behalf must not attempt, at the employer's place of employment during working hours, to persuade an employee of the employer to join or not join a trade union.

(2) If employees reside on their employer's property or on property to which the employer or another person has the right to control access or entry, the employer or other person must on the board's direction permit a representative authorized in writing by a trade union to enter the property to attempt to persuade the employees to join a trade union and, if the trade union acquires bargaining rights, after that to enter the property to conduct business of the trade union.

(3) If directed by the board and on request by the trade union representative, the employer must provide the representative with food and lodging at the current price and of a similar kind and quality as that provided to the employees.

### Canada Post

**F:** This case addresses whether unions can solicit employees to join the union on the employer’s property. LCUC was trying to raid CUPW. Employees tried to solict at worksites other than the site they worked at and were prohibited. ER was concerned about mail safety, privacy, etc. Court noted that solicitation on work hours is illegal, can only solicit on breaks – eg coffee breaks, lunch breaks, before and after work. This can only be limited if the ER can prove compelling and justifiable business reasons.

**I:** Do employees, who work for an employer operating at several locations, have the right to solicit membership of their co-workers in the same bargaining unit during non-working hours at the company’s work locations other than at their own work place?

**H**: yes they can, they are not strangers to the workplace

**R**: EEs have right to solicit in their workplace and workplaces associated with their workplace An ER may limited solicitation if there is a compelling business reason for doing so. There must be actual adverse impact.

**A**: Membership soliciation is an integral part of the expression of freedom of association in the Code and, in should only be restricted for compelling and justifiable reasons, including safety and security concerns

* soliciting at sites where the EE does not work is not prohibited by the code when carried out by those directly affected in collectively choosing a bargaining agent, whose task will be to negotiate the terms of employment of the group of EEs included in the BU
* therefore a *prima facie* interference
* however there must be a balance between employers interests and freedom of association
* *Bell Canada* test for justifying infringment of the code was compelling and justifiable business reasons
	+ This has been defined as “detrimental effect”
* In this case, **to deny employees at different worksites from soliciting each other would be to deprive employees the right to participate in the formation of the trade union of their choice**. In contrast, employer id not point out any adverse effect on business

## UNION UNFAIR LABOUR PRACTICES

* Unions are prohibited from coercing employees into joining union, Cannot use physical threats or threaten economic reprisals

## REMEDIES FOR INTERFERENCE

*Royal Oak Mines*

* labour boards have wide discretion to devise remedies
* may order anything “equitable”, but must be rationally connected or related to the breach and its consequences
* may make orders to remedy breaches adverse to the objectives of labour code
* if it **is not rationally connected then outside jurisdiction and patently unreasonable**
* labour boards have unique expertise to develop remedies, court should defer to boards remedial orders made within jurisdiction
* *Re Tandy Electrionics:* remedies are reasonable so long as they are **compensatory and not punitize and flow from the scope, intent and provision of the act itself**
* *Baron Metal****:*** Costs awarded on occasion, to compensate unions for legal costs of wasted organizing costs resulting from unfair labour practices. Not usually done because they create tension in the relationship

Scope of board to order remedies can be in dispute - the court may say that the board has ordered remedies beyond what it can usually do

* In BC main section is section 14(4), but not the only one

**Section 14**

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

(a) make an order directing the person to **cease** doing the act,

(b) in the same or a subsequent order, **direct any person to rectify the act,**

(c) in the case of an employer, include a direction to **reinstate and pay an employee** a sum equal to wages lost due to his or her discharge, suspension, transfer, layoff or other disciplinary action contrary to section 6 (3) (a) or (b),

(d) in the case of a trade union, include a **direction to reinstate a person to membership in the trade union** and pay to that person

(i)  a sum equal to wages lost due to his or her expulsion or suspension contrary to section 10, and

(ii)  the amount of any penalty, levy, fee, dues or assessment imposed on him or her contrary to section 10,

(e) in the same or a subsequent order, **direct the employer not to increase or decrease wages, or alter a term or condition of employment** of the employees affected by the order for a period not exceeding 30 days without written permission of the board, and the board may extend this order for a further period not exceeding 30 days, and

(f) despite section 25 (3), if the employees affected by the order are seeking trade union representation and the board is of the opinion that the union would likely have obtained the requisite support had it not been for the act prohibited by section 5, 6, 7, 9, 10, 11 or 12, c**ertify the trade union.**

Some other options:

* Some LB have power to grant interim relief. This is useful b/c sometimes ER conduct goes so far that any attempt to organize has been thwarted by the employer. Could stop conduct before damage is done
* Text book says ERs may be ordered to provide opportunity for union to communiate with EEs, provide information, post a bulletin about right to unionize – other remedies w/ case law examples – see p 260

### National Bank

**F:** In three day interim between cert freeze and bargaining freeze, the bank closed the unionized branch, and transferred accounts to a non-unionized branch. The Board granted a series of remedies under the federal labour code.

* The Board found this was motivated by anti-union animus: decided to 1. certify the union at the other branch were the accounts had been moved to, 2. gave the union special access to the employees at that other branch, 3. Ordered the bank to **send a letter to all EEs in Canada saying that ER had violated the code, and that EEs are entitled to join a union**, 4. required ER to **set up a trust fund** to be administered by the union and the ER, to be used in pursuit of the objectives of the labour code, on behalf of all employees

**I:** Were the remedies appropriate? **H:** Not all of them were

**R: Must be a relationship between the act alleged, its consequences, and the thing ordered as a remedy.**

**A:** The last two remedies weren’t connected the the ERs action here, the remedies were getting pretty far from the violation itself

* trust fund did not remedy or counteract the harmful consequences of closing the branch
* the Court said that the board can’t go beyond the violation, board was seen as overstepping its boundaries with those decisions
* this is an example of some remedy for “runaway shop”, another is to give the former employees first access to the new plant

### Plourde

What happens if employer goes so far as to close down workplace completely?

**F**: Wal-mart EEs certfied union, Walmart closes the store. Nearest stores are too far away to say employees could go work there

**I**:what remedy can flow from this type of action? If they close for anti-union reasons then the labour code is being violated, but in what way? What should the remedy be? Who bears the burden of proof in proving anti-union motive?

**R:** 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.

**A**: two provisions in QLC that could be triggered:

* s 12 -> prohibits interference with activities of a trade-union - union must prove interference
* 15 -> deals with targeting individual for participating in trade-union
	+ provides for reinstatement and back pay
	+ union tries to argue that this is the section that ought to apply here, argues Plourde was dismissed when they closed the store
* Majority found that section 15 depends on existence of workplace to be reinstated to. The appropriate section for this issue is interference with a union, but must show that the ER committed an unfair labour practice, must show anti-union animus on BoP
* the issue here is there is no right answer, the board doesn’t really say what they should have done

**hallmarks of unfair labour practice: captive audience, no right of reply, you can see who is at the meeting and not at the meeting, and remarks that link unionization to job security – these are RED FLAGS**

# ACQUISITION AND TERMINATION OF BARGAINING RIGHTS

## THE WAGNER ACT MODEL

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.

* 2 principles: majoritarianism and exclusivity
	+ **Exclusivity**: Only **one union** can represent a bargaining unit
	+ **Majoritarianism**: If majority of employees support the union then the union is certified to represent everyone in the bargaining unit, regardless of how they voted and whether or not they are a member of the union. Individual EEs can not bargain with employer.
* There are risks to fragmentation and risks to having large bargaining units that include many workers
* If you have multiple unions and bargaining units in a workplace that can cause problems – strikes may be more frequent because diff groups are in strike positions at diff times, union may have less bargaining power, and may lead to disputes over who is entitled to each job
* The unit generally sweeps everyone in except managers – ie part time, full time, different kinds of jobs - all those people in same unit -> seen as being administratively efficient, only have to bargain with one unit
* Also allows for lateral mobility amongst employees, can transfer more easily from one job to another if all covered by same unit
* However, if the union does not get majority support, there is no union at all, no industrial democracy

### Adams

* 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 non-union 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. If union is not certified then ER control legitimated
	+ 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.
* This system in which union will either be fully certified or not at all, and if you don’t have it there is no other option – so ERs wanted this, easier to avoid unions

### Jacoby

Greater trade -> greater mobility of capital. Hastened spread of MNCs that operate in, and depend on, the economies of many world regions.

* Globalization has mostly negative effect on organized labour’s bargaining power & political influence. Downward pressure on wages and E’ment (race to the bottom). Reduces demand for manual workers (organized)
* employers shift to technology-intensive goods -> boosts employment in non-manual industries. This is bad for unions –these industries are harder to organize
* because of globalized markets, harder to maintain wage standards, makes it less useful to employers as wages now competitive – before taking wages off the market was useful to ERs, now if you cant do that unions have less appeal to ERs
* Gov’t EEs are virtually the only group free of the threat of relocation, hence better unionization in the public sector.

### Arthurs

Globalization -> workers across the globe are effectively forced to compete for jobs, must underbid their rivals in other countries by promising to be more productive, work harder and more cheaply, be less assertive about rights.

* has also dilluted idea of community of interests among workers -> don’t share language, culture, employers
* more and more self-employed people – less security and less solidarity
* therefore “increasingly difficult for workers in globdal economy even to identify their common adversary, let alone to define common expectations, claim common entitlements, or implement common strategies”

Summary: Globalization means unions **can no longer offer to “take wages out of competition” to employers**. **Threat of re-location saps unions bargaining power**. Only government employees are immune to this threat. **Workers across globe become rivals for work, forcing them to underbid one another.** Very difficult (if not impossible) to bring them altogether under overarching legal regime. Globalization **attenuates connections between workers and employees and dilutes notion of community of workers** (Jacoby, Arthurs)

## THE APPROPRIATE BARGAINING UNIT

* BU is group of EEs defined on basis or ER for whom they work and positions they occupy
* BU serves as:
	+ 1. electoral constituency for purposes of certification/decertifciation,
	+ 2. basis for collective bargaining (all EEs in the BU will be covered in the CA)
* Key question is whether there is a “community of interest” among employees in question. But not the only factor. Weiler decribed the ideal bargaining unit as one that is broad enough to include all of the employees of a single employer. Administratively more efficient, facilitates bargaining. Doesn’t impede mobility of employees. Makes strikes/lockouts less likely where there is one set of negotiations.

### Metroland Printing

**F:** Union is seeking broad based unit that would encompass: sales employees, p/t, f/t and casual employees, students, etc. Employer is opposing the broad unit, and one group of employees didn’t want to be part of the unit

**I:**Who should be in the bargaining unit?

**R:** Workers can form bargaining unit if they have a community of interest, and the unit will not cause serious labour relations problems for ER

**A:** Board says: there is a two part test to be applied:

* Is there a sufficient **community of interest** amongst the workers in the proposed bargaining unit
	+ ie do they *care about* and *benefit* *from* the same kinds of things
* 2. **Will this unit cause serious labour relations problems for the employer**?
	+ If yes to 1 and no to 2 = proposed unit is appropriate for collective bargaining
* Board notes that there was a time when part time employees were routinely excluded from the bargaining unit on the assumption that they did not share a community of interest with the employees
	+ Board says we no longer assume that is the case, there is no reason they cant be seen as having a community of interests
	+ Was notion that there interests were at cross-purposes in various ways. But Board says thinking has evolved. Disparate groups have been placed together with no negative consequences. So COI (or at least strictly defined) less important than it once was.
		- E.g. idea that they are in adversarial/antagonist relationship
	+ Also issue if one group is much larger than the other 🡪 interests of smaller group gets wiped out
	+ Board said here most F/T started as P/T 🡪 no reason they can’t be seen as shared community of interest 🡪 all you need is shared interest and shared employer. No reason that difference that exist will lead to serious labour relations problems
* **There is a presumption that workers have a community of interests if they share a workplace with the same employer**
	+ Board has recognized that EEs share COI simply by being employed by same ER in same workplace and that EEs with diff terms and conditions of employment can effectively bargain together
		- Basically – EEs of same ER will generally be found to have sufficient COI unless placing them together will cause labour relations problems for ER
	+ The larger unit allows for more job movement, it’s a better approach
* Even though the other group doesn’t want to be in the unit, they are still included – cannot make exception
* The fact that they don’t want to be part of the unit is not determinative

### Island Medical Laboritories

Key principles underlying determinations of appropriateness are industrial stablity and access to collective bargaining.

**Factors to consider in determing community of interests:**

1. similarity in skills, interests, duties and working conditions
2. the physical and administrative structure of the emplyoer
3. functional integration and
4. geography

(These may be related to faciliate access to collective bargaining in tradtionally difficult to organize sectors)

### Sidhu & Sons

* puts the island medical test into action

**F:** Union wants to organize seasonal agricultural workers - applying for **bargaining unit of only the SAWP** **employees** who are employed at the nursery**.**  There are other employees who work at the nursery who are not SAWP workers, they are Canadians**.**

**I:** Is this is an appropriate unit for collective bargaining, or is the appropriate unit all of the workers who are doing these jobs for the employer, regardless of what program it is**?**

**A: Board**: the work they are doing is exactly the same, they have to be in the same bargaining unit, only distinction is their status

* **Reconsideration Panel**: overturns original decision, if anyone is traditionally difficult to organize its TFWs; board focused on nature of work to exclusion of all other factors; turn it back to the original decision-maker
	+ “we do not agree that classification of employees is only distinguishable in a significant way on the basis of their work characteristics”
	+ The diff between SAWP and diomestic workers are real, simply because they arise from stuff other than job duties does not make them different from fundamental standpoint
	+ Looks at IML test and says there is a distinct community of interests of this group, rooted in their employment status and the aspects of their terms and conditions of employment that are unique to them -> these fall within “interests” crtieria of IML test
* **Board reconsiders**: grants certification but on conditions; can’t bargain on work jurisdiction -> cant take work away from people who are not part of the unit, or reallocate the tasks in a way that favours them and disfavours the other people. Limited certification

## PART-TIME EMLOYEES

### CIBC

Reasons for excluding casual workers from bargaining unit:

* if casuals were majority of workforce and not interested in bargaining, full time employees may not have access to CB
* could have negative impact on CB process because casuals are different interests – bargaining strength of full time EEs could be dilluted
* hesitant to grant rights to casual workers who have small connection to the industry

however, casuals are EEs in the code, and they have rights and protections under the code, so how to balance rights of casual workers with those of f/t workers? – look at context of the case

* identify a real community of interests between casuals and other EEs in the BU.
* Another important consideration is the **continuity or pattern of employment of casuals in the workpace**
* “if an ER has created a regular standby pool of EEs upon which it relies to do its extra production work or fill in for regular staff on an ongoing basis, this pool of EEs should be viewed as an integral part of the ER’s workforce”

## BARGAINING RIGHTS

### Determining Support – union support models and critiques

Three canadian models for determining support for union:

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

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

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

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| * **Acquisition of bargaining rights**
* **18** (1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for a unit appropriate for collective bargaining, **a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may apply to the board to be certified for the unit.**
* (2) If a **collective agreement is not in force** and a trade union is certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may, subject to the regulations, apply to the board to be certified for the unit if either
* (a) 6 months have elapsed since the date of certification of a trade union for the unit, or
* (b) the board has consented to an application before the expiry of the 6 months.
* *Another union can apply to displace a union if CA is not in force if 6 months have elapsed since cert*
* (3) Unless the board consents, a trade union is not permitted to make an application under subsection (2) during a strike or lockout.
* (4) Despite this section and section 19
* (a) a trade union that is a party to a collective agreement, but is not certified for the employees covered by it, may apply to be certified at any time, and
* (b) a council of trade unions comprised of trade unions that are parties to collective agreements may apply to be certified at any time in place of those trade unions.
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| **Change in union representation****19**(1**) If a collective agreement is in force**, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit **during the seventh and eighth months** in each year of the collective agreement or any renewal or continuation of it.(2) Despite subsection (1), an application for certification may not be made within 22 months of a previous application under that subsection if the previous application resulted in a decision by the board on the merits of the application.(3) Unless the board consents, a trade union is not permitted to make an application under this section during a strike or lockout. *If CA is in force, union can raid during 7th and 8th months of CA* |

**Weiler:** vote system vulnerable to unfair labour practices - the time between certification request and vote gives so much time to ER to turn workers against the union, allows time for unfair labour practices like dismissing union reps. The card system is better -> rest on more realistic appreciation of tangible value of certification, and permits a true reading of EEs sentiments about union represenation

* draback of card system: doesn’t convince ER that EEs reallly support union, unlike vote. Nova Scotia has instant vote for this purpose

**Rose and Chaison**: low union density is self-reinforcing -> 1. unions with reduced memberships and facing intense ER opposition have had to cut back on organizing staff and resources, and redirect efforts to protecting past bargaining gains. 2. Declining density rates mean the unions have less dues income to mount organizing drives, 3. Low union density increases incentives for ERs to remain non-union to maintain competitive positions

Switch in Canada from card to certification procedure: negative impact on union organizing:

1. Fewer certification procedures,
2. Different characteristics of applicants and certified units: with the vote rather than card system, there are lower levels of organizing and lower success among vulnerable employee groups (p/t workers, workers in hard to organize industries, private sector)
	1. **Slinn:** voting procedure relative to card procedure favours industrial jobs, larger units, f/t EEs, public sector, it is harder for service industry, p/t EEs and small businesses. IE traditional union environments fare decently with voting system but harder to organize and vulnerable groups do not.
3. Lover certification success rate
4. More effective unfair labour practices (not more common just more effective – the vote procedure gives more time for ER practices to impact EE decision making and unions strength)
5. Role of delay: key cricitism of vote is that it takes longer for cert application to be processed, giving ERs more time to influence EEs. Quick vote is proposed solution -> statutory requirement that vote happen with certain number of days (eg BC system)

### Open Seasons

* Union that failed majority support is barred for a certain time from applying for certification again
* To give newly certified unions a chance to get established, most statutes allow 10 or 12 month period after certification to reach CA w/ ER
	+ During this time other unions may not displace union, EEs cannot apply to displce BU
* time at which decertification or raids can happen are known as the “open season”
	+ If union concludes a CA, application to terminate its bargaining rights can be brought by another union or by EEs in the BU, but only during certain periods (open season)
	+ In BC and ON, it can happen in 7th and 8th month of the CA – this is the time in which decert could be filed or raid could take place

### Decertification

* section 33: if 45% of EEs sign application for decert, a decertification vote must happen within 10 days. If majority support union, borad must reject applicatinon to decertify. If majority support decertification, board must allow application. (may order another vote if less than 55% of workers voted) (This application may not be within 10 months of the certification of the union)
* Only employees are allowed to apply for decertification – not managers (*Courtesy* Chrysler) or replacement workers (*Kelly’s Ambulance*)

#### Kelly’s Ambulance (Nova Scotia)

**F:** During lockout ER hired replacement workers. They are temporary (you cant fire workers for being part of a strike or lockout). Temporary workers apply for decertification of the BU

**A:**The board said no, they cannot be part of the bargaining unit for the purpose of decertification. Temporary workers only last as long as the strike/lockout, so they are not members of the BU. – they cant apply to decertify union that has been locked out. It is the actual workers who apply for decertification.

#### Courtesy Chrysler

**F:** Employer interference in decert. The EE who spearheaded the campaign claimed to act independently of ER influence, he said he didn’t like unions or unionization drive, and feared threat to forced employees to accept rollback. Board was suspicious though of him - he hired an expensive management side law firm. Turns out the EE was working too closely with the ER to be legitimate

**R: ER has to be strictly neutral in decertification campaign**. You can bring an action against ER for participating in decert campaign.

**A:** Question is whether there is sufficient evidence of employer interference to vitiate the voluntariness of the vote

* Test of interference is objective**:**
	+ **1.** Is there conduct on the part of ER from which **reasonable EEs would infer ER support for the certification?**
	+ **2.** Would thislikely **have an impact on whether the vote expresses the true wishes of employees in the unit?**
* Board must exercise discretion to determine whether it shall revoke or confirm the certification in these cases
* IN this case, board ordered the vote to be a nullity, and prevented any decert applications for 6 months (provided for in s 33)

#### Wescor

**F:** ER was directing decert campaign. ER said they had right to free speech, should include free speech about decert. Sent letter to employees saying it was a good idea; promised employees there would be no wage reduction for two months; took a straw vote to get a sense. The letter indicated that if they remained a union shop, the ER would have to reduce wages, and company viability would be questionable.

**A:** Board said decert had to be initiated by emplyoees, cannot be intiated by or openly supported by the ER.

**R: ER cannot initiate or support decertification campaign.**

* If improper influence, the question is whether the EEs wishes can be represented in a vote.

The interesting thing in this case is the remedy

* EEs should be given the decision. Board order them to haves 2 paid meetings with union reps, union should be given 15 days of access to lunchroom to speak with employees, and then hold another vote. There was genuine concern about union and certification – so the Board tried to determine employees’ true wishes.

### Alternatives to Wagner Act Model

* Alternatives to exclusivity& majoritarianism
* Recognize minority unionism
	+ 35 percent want to be unionized, they get unionized
	+ they might not have right to strike in same way or full benefits, but at least they’d have some presence in the workplace
	+ would allow the union to have continuing presence in workplace
	+ depending on how it works there could be a sort of free-rider problem
	+ on other hand could give union a toe-hold
* Craft / Occupation Unionism
	+ Instead organizing to workplace, organize according to profession or craft
	+ Can be really good for workers that move around a lot 🡪 see this in construction industry
	+ But tends to work better w/ skilled workers doing similar job; as opposed to fast-food workers that come and go
	+ Can also become quite exclusionary depending on whose in 🡪 history of racial discrimination in craft unions
* Sectoral model (type of Craft unionism)
	+ Broad-based bargaining across workplaces
	+ Have union that binds sector
	+ Useful way of taking wages out of competition and focusing on other factors 🡪 tends to decrease contracting out
	+ Argument that fast-food workers are ripe for this model
	+ Employers would have to figure out how to bargain together

\*arguably, if CB is to remain meaningful, it must somehow take place within larger structures that encompass not only a plant’s core workforce but all of the workers who contribute to the productive process, including those who work for other companies and perhaps those that work in other countries (see pp 321-22). This is because the old models are quickly changing with technology, globalization.

* Job rights must transcend the old paradigm of static production in traditional bargaining units, must be based on skills and knowledge that can be used inisde and outside those units – North American system is not easily amenable to that model

# Related and Successor Employers

When business is transferred from one ER to another, the bargaining rights flow: The collective agreement and certification survives.

The **difference** between successor ERs and related ERs:

* **Successor**: business is sold to new ER, same rights under collective agreement
* **Related**
	+ ER carries on business through more than one ER; or
	+ Business is sold to new ER (like successorship) but the selling ER keeps considerable control over the new EEs with the new ER
	+ Same rights under collective agreement

Related employers: section 38, Successor employers: section 35

## RELATED EMPLOYER

### White Spot

**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.
* **A:** labour board jurisprudence usually views franchisor and franchisee as common employers, notwithstanding separate ownership and management, on the basis of the degree of control exercised by franchosors over franchisees activities through franchise arrangements. “common control and direction” tends to extend to this relationship
* Issue is therefore whether franchisor has sufficient control to justify a declaration

**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. Basically, WS is calling the shots – Gillies may not have the authority to agree to some demands.

* Union wants to be bargaining with the entity that has authority to make decisions about working conditions, doesn’t want white spot to have autority to make decisions over employees that they cannot bargain over

## SUCCESSOR EMPLOYER

In the absence of any statutory provision to the contrary, the concept of the “corporate veil” means that a change in the ER’s corporate identity puts an end to any statutory bargaining rights by which the “old” ER was bound, and to any collective agreement negotiated pursuant to those bargaining rights.

* As a result, all Canadian labour relations statutes now have detailed provisions intended to give significant **protection to existing bargaining rights** where a business has been sold or transferred to a new ER - i.e. the current collective agreement remains
* **general rule** is that when ER A is unionized and sells to ER B, ER B is bound by ER A’s collective agreement.

### Ajax

**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 determining whether there was a successorship consider:

* was **something relinquished by the predecessor business and obtained by the successor?**
* The court will take a **broad view about what constitutes the sale of a business;** it will look for **discernable continuity and stability in the workforce.**

**A:** This is a remedial section, intended to preserve bargaining rights. So it must have broad and liberal interpretation. The transfer does not have to take any particular legal form. 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

* This case shows that boards have shown some flexibility in finding a sale of a business even in situations where there has been no apparent exchange between predecessor and successor.
* “what was transferred was not just the work formerly done by the Chaterways employees nor the employees themselves. There was the added value that came with the continuity, experience and stability of this work force. Hence, there was a reasonable basis for the finding th what was transferred to Ajax was a significnat part of the business which Charterways conduted for Ajax.”

**Section 35** only applies when the labour board finds that the transaction in question **constitutes the sale of a business**: **s. 35(1)**

* Some factors are (*Lyric Theatre* cited in ***Re Zellers***):
	+ transfer of assets;
	+ transfer of goodwill;
	+ transfer of a logo or trademark;
	+ transfer of customer lists;
	+ whether the same employees are performing the same work
		- in zellers it was not a successorship, because the business was not really sold. Targetsimply acquired the right to select a number of leasehold interests held by Zellers. Target did not carry on Zellers business, they merely took their location and started their own business. This was indicated by the fact that none of the customer information was transferred to Target. It acquired pharmacy records, but none of the other indicia of a sale such as goodwill, customer lists, accounts receivable, etc were present.
* Labour boards will take **a broad view** of what constitutes the sale of a business; it will look for **discernable** **continuity** and **stability** of the workplace (***Ajax***: “contracting in”: ER B ends contract with ER A and ER A hired B’s EEs = sale of a business)

# NEGOTIATING A COLLECTIVE AGREEMENT

**Bargaining Duty:**

1. duty to bargain in good faith (subjective element),
2. duty to make “every reasonable effort” to reach a collective agreement (objective element)

Ideal is that bargaining results in negotiated agreement

* To bargain, one party serves the other notice of intent to bargain, then obligation to bargain – ideally reach an agreement

If it doesn’t work, either side can apply to board for conciliation (kind of alternative dispute mediation); supposed to assist parties reach agreement -> Conciliation may produce agreement

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

But it can also result in back to work legislation

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

**Section 55:** parties can apply if they have never had a prior collective agreement, and the union took a successful strike vote.The procedures are set out in the code: both parties must present issues and their positions, if conclusion is not reached in 30 days it can go to arbitration, allow parties to strike/lockout, or further mediation.

## THE BARGAINING FREEZE

After notice has been given, there can be no changes to terms and conditions of employment – similar to cert freeze. The point is to give a clear idea of bargaining position.

* For first agreement, freeze starts at certification and ends 4 months after certification or when CA is executed
* In other contexts, freeze begins when bargaining notice is served and ends when: a. strike/lockout starts, b. collective agreement has been signed or c. bargaining rights are terminated.

## THE DUTY TO BARGAIN

Requirement to Bargain in Good Faith (s 11) -> This is what is supposed to induce parties to bargain

**Cox:** Requires ER to recognize union, avoids recognition strikes, enables unions to exist so they cannot be broken up by ER refusing to recognize them, implements basic philosophy of the act by requiring collective bargaining (as opposed to with individuals)

* Key role because it’s the only thing that gives any weight to duty to recognize the union 🡪 Duty to bargain triggers requirement to engage with union as agent of employees
* But real debate about how much law should enquire as to what’s going on 🡪 i.e. the substance of proposals
	+ Saying not making concesssions is bad-faith?
	+ Evaluating substance of offer?
* Requirements are often procedural: e.g. boards have required:
	+ Requirement to disclose information that is necessary to bargaining (in order to make rational proposal)
	+ So duty to bargain includes duty to share information necessary to engage in bargaining
* Another distinction boards have drawn
	+ Hard bargaining (permitted) v surface bargaining (not permitted)
	+ So this distinction is getting into substance
	+ Classic case on this distinction is Canada Trust Co.

**Hard bargaining** is a legal form of bargaining in which the parties are expected to act in their individual self-interest and in doing so are entitled to take firm positions which may be unacceptable to the other side. This is **allowed**.

* If the ER has a rational basis and economic justification for taking hard positions, the ER’s conduct is properly characterized as hard bargaining in pursuit of its own self-interest and legitimate business objectives (***Trustco***)
* Bargaining **permits** a just result but **does not compel** it (***Trustco***)

**Surface bargaining** is where the parties merely go through the motions by preserving the surface indications of bargaining but with no intention of reaching an agreement. This is **bad faith bargaining** and **prohibited**

* The test from ***Radio Shack*** is that the board will look at the **totality of the evidence**, including the adoption of an inflexible position on issues central to negotiations
	+ Merely tendering a proposal that is obviously unacceptable is not sufficient
* Superior economic position of ER is not bad faith bargaining (***Trustco***)

### Noranda Metal

**F:** ER sent letters to each EE to pressure union to change position on fringe benefits. Union asked ER to disclose the costs of benefits. ER refused- said it only has to bargain on the extent of benefits, not the cost of benefits. Union alleged this violated duty to bargain in good faith

**A:** This violates duty to bargain in good faith. Scope of duty to bargain determined on a case-by-case basis, but basic principle is that deliberately withohlding relevant factual data is not “making every reasonable effort” to conclude an agreement. In this case, ER raised the issue of benefits, made it a public obstacle to settlement, and then refused to participate in more discussions about it. Violation of duty

- withholding relevant information is not making every effort to reach an agreement

### Radio Shack

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

**F:** Union had received automatic certification because the ER had engaged in prior unfair labour practices—failing to reinstate an EE contrary to board order, circulating anti union petitions, warning it would move out west if union was certified, statements to EEs disparaging board’s procedures, distribution of free anti-union t shirts to EEs. Notice to bargain served. Sent EE a memo ridiculing the union’s request for names, classifications, and seniority dates for EEs, and details of fringe benefits. Sent another memo ensuring the EEs that despite the unions demand for a union shop clause, no EE would ever have to pay dues to work at the ER. Right after first bargaining session, ER sends EEs another memo commenting on issues discussed at the bargaining table. Put forward counterproposals prohibiting the unions from publicly mentioning the ER without prior authorization, would have allowed grievances over any mention of the ER to go immediately to arbitration. THEN ER sends in a new bargaining team and they reach some agreements. Four issues left outstanding. Team tells the union to strike to make more progress. ER uses scabs. Union complains of surface bargaining.

**I:** Breach of duty to bargain in good faith? YES

**R:** Where the ER has clearly demonstrated anto-union sentiments, and then adopts hard line approaches and makes no effort to compromise, and does not testify to justify their positions, it is essentially clear that they are not engaging in good faith bargaining. Requires an analysis of what the perspective of the ER was at the time.

* Eg Where the ER adopting an anti-union security clause position has played **no significant role in unlawfully contributing to the absence of support**, the position is unobjectionable. But **where an ER adopts this stance after having engaged in the kind of pervasive unlawful conduct that the ER did here, the ER has failed to bargain in good faith.** 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?
* Consider whether the ER adopted a position which the union cannot accept, making it impossible to reach an agreement
* Offering what the statute requires as a bare minimum in the area of union security is not always bargaining in bad faith. But when considered in the light of other employer actions, it can be one of the most coercive elements of a scheme to discourage and undermine trade union support.
* To the extent that absolute rigidness is inconsistent with good faih bargaining and reasonable effort, it should be clear from our reasoning that we are of the view that an employer can be no more rigid and unbending on union security that ER can be on any other issue
* Where ER was engaging in bad faith bargaining, onus is on them to prove change of heart. Cant disguise bad faith bargaining as “hard bargaining” permitted under code

**I:** What is surface bargaining?

**R:** TEST: SURFACE BARGAINING**:** describes **going through the motions or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union.** Distinct from **hard bargaining – parties are entitled to take firm positions which may be unacceptable to the other side.** The Act allows for the use of economic sanctions to resolve these bargaining impasses. Merely tendering a proposal which is unacceptable (predictably so) is not sufficient, standing alone, to allow the Board to draw an inference of surface bargaining. Inference will be drawn from the totality of the evidence including the adoption of an inflexible position on issues central to the negotiations. Test is met here.

### Canada Trustco

**F:** Union organized 2 branches, are in negotiations with employer for CA. ER refused to offer anything more than what non-union employees get. This would be bad for union, union members would feel they are paying dues for nothing. One of basic advantages of union is grievance procedure, just cause termination, etc. ER would not agree to that.

**I:** So is that bad faith bargaining or hard bargaining? **H:** Not bad faith

**R:** Bad faith means you just go through the motions without really trying to make an agreement, that is different from bargaining for an agreement on your own terms.

**A:** Union said this is surface bargaining – union has no real opportunity to challenge any existing practices or make any gains over status quo, that ought to be understood as surface bargaining.

* LB said no, it is not bad faith bargaining to act rationally in uyour own self interest, bad faith bargaining is different from just being powerful enough to get an agreement on your own terms.
* Board says you need some consistentcy in your proposals, if they are totally off you may have suspicion that bargaining isnt really going on, but outcome of bargaining is still dependent mostly on strength of union. (eg, if your offers get progressively worse)
* Significantly board says that **collective bargaining does not compel some form of just wages or redistributive justice.**
* **Rational discussion, power, and persuasion are effective tactics to gain one’s bargaining objectives. So is economic pressure**. Collective bargaining permits the outcome of a just wage or distributive justice, but does not compel it. Under the statute, **the only obligation is to endeavor to conclude a collective agreement, and if that is the true intent, neither the content nor the consequences of that agreement are of any concern to the Board.** It is OK to pursue one’s own self-interest and legitimate business objectives in the course of collective bargaining—this is hard bargaining and is permissible.

***Critique of this – Langille and Macklem***

* 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

**F: T**his case arose out of the “giant mine disaster” . There was a lengthy and bitter strike occurred, and replacement workers were brought in. Led to an explosion in the mine and someone was killed. One of the workers was charged and convicted for explosion, but there were questions as to whether other workers were involved. In the case SCC considers duty to bargain in the context of employers to agree to several outstanding items

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

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

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

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

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

How do you strike balance between making CB a guarantee (compelling gain) and turning LB into interest arbitration/conciliation (these are different mechanism and are not supposed to supplant parties bargaining ). Scope of duty to bargain has a procedural component and substantive- must have intention to reach agreement and come to table, but in terms of how much the board will intervene in the substance of proposals, it is still an evolving question

## DISCLOSURE OF DECISIONS

* Is there duty to disclose changes during bargaining?
	+ Eg are you obligated to share potential plans to sell plant?
	+ Union would want this, they want to know what their bargaining propsects are – no point in bargaining for wages if workforce might disappear, then you would be more likely to argue for bumping rights, severance, etc
	+ If you don’t know this info you will be bargaining about the wrong things, and get gains that are not gains at all
* If employer why wouldn’t you want to disclose this information? - They might not be final decisions, don’t want this broadcast to union

### Westinghouse

**F:** ER did not disclose that they were planning to close plant and move to a town with less union density, and the union didn’t ask. Board found that this move was motivated by anti-union animus and was an unfair labour practice

**I:** Is failure to disclose was a violation of the duty to bargain in good faith? **H:** No

**R:** Absent request by union, there is no duty unless the decision is final. Basically, ER doesn’t have to disclose any decisions that are not final unless the union asks.

* Two part rule:
	+ 1. If Union asks you have to answer truthfully
	+ 2. If they don’t, only a duty to disclose if decision is final
* Difficult issue because very little scope for mid-contract bargaining; so once it’s signed its hard to do anything (BC has some provisions for big changes to circumstances)
* Decision attracted criticism: based on presumption union will act irrationally and impede CB in some way 🡪 but critics say in fact that the opposite is true 🡪 union will procede on all the wrong things
* But **point is that Westinghouse gives us a pretty narrow test**
	+ Langille: this case creates an incentive to the employer to remain silent, make bargain, reveal later. But non-disclosure is in conflict with the duty to bargain in good faith. If something (e.g. relocating) is a legitimate subject of collective bargaining, how can there be a duty to disclose this only after the decision has been finalized?

### Consolidated Bathurst

Board reconsiderd westinghouse

**F:** In this case ER announced that plant is closing a few weeks after the agreement is signed.

**R:** The duty to disclose an unconfirmed decision depends on how fundamental the decision is. If the decision is very fundamental, then it must be disclosed even if it is just a possibility. If it is a relatively insignificant change, then ER can wait until it is final. Sliding scale - more important, lower level of finality necessary for disclosure to be required, less important the decision, the ER is entitled to wait until it is more final before disclosing to union.

**A:** The Board extends westinghouse slightly. They don’t want people to delay their decisions until after bargaining is done.

Rather, this is a sliding scale, the more fundamental the decision, the less certain it has to be. If decision is very significant, like shutting down plant, then the idea of it may create duty to disclose, if less important, lower duty unless final.

* Issue is how to tell if decision is really important or final?
* If you don’t make a clear obligation on ER, then there is an obligation for union to ask, there has to be a long list of things that union will ask, try to ask as many potential plans as are possible

## REMEDIES

**PROHIBITED REMEDIES**

***Radio Shack*** (above)outlined its position on the breach of duty to bargain:

(1) a remedy should not be seen as a penalty, i.e., **not punitive**

* Monetary relief should only be 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

(2) a board **should not simply impose a collective agreement** on the parties by way of remedy, as this would exceed its statutory mandate and would deviate from the principle of free collective bargaining

**ALLOWED REMEDIES**

Instead, the board should 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:** In addition to usual remedies, the employer was required to put earlier offer back on table and add a back to work protocol that would include arbitration clause that was the subject of the impasse

**I:** Jurisdiction of this remedy was challenged 🡪 said this interferes with process of collective bargaining

**R:** The general rule from ***Royal Oak*** is that remedies granted by the Board will not be patently unreasonable if they are

1. **rationally connected** to the breach;
2. **consistent** with the **policy objectives** of the Labour Board
3. **Not punitive** in nature (consistent with ***Radio Shack***); and
4. In **compliance with the *Charter***
* And here they weren’t simply imposing, they were going back to look at past offers, and they even left some issues to arbitration
	+ Broad remedial jurisdiction of boards: parliaments intention to give board necessary flexibility to fashion remedies that will address broad spectrum of factual situations and problems that can arise in labour relations context
	+ **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. In this context, it is not unreasonable or outside discretion to include clauses in agreement.

**Buhler Versatile case**:

**F:** Board gave remedy after finding ER had engaged in aggregious bad faith bargaining. Each successive offer was worse than the last one, and ER had provoked a strike, had encouraged EEs to go on strike as a way of undermining the union

**Remedy:** When there is a **serious breach** of the duty to bargain in good faith that **caused a union to go on strike**, the board may grant a remedy in the form of **salary missed for going on strike** (***Buhler Versatile* (2001) ManLRB**)

* “Serious breach” in ***Buhler Versatile*** was when the ER kept offering worse and worse deals each time the union rejected their offer and eventually went on strike
* **JB:** Careful – Board should not award this remedy if it would **financially cripple the ER**: this may enter the realm of punitive damages

# INDUSTRIAL CONFLICT

## INDUSTRIAL CONFLICT

* Ultimate means of dispute resolution is economic sanctions
* If union can not win a strike or lockout, unlikely to get favourable agreement (or even agreement at all)
* But small minority of bargaining rounds result in strikes or lockouts
* Cannot strike for reocognition, cannot strike during the CA. Can only strike during bargaining
* Ability to win a strike depends in part on ERs ability to replace strikers with new workers – this depends on general employment market
	+ The context determines how many strikes happen, b/c ppl don’t usually strike unless they think they can win

**ARGUMENTS FOR AND AGAINST STRIKES**

**Against:**

* Some have said legislatures should ban strikes and substitute form of third party arbitration with outcomes based on **justice** not sheer economic power
* List of reasons this has been rejected: absence of agreed standards on which to base awards, the inability of arbitrators to take account of athe economic variables relevant to wage setting in a predominantly market economy, and the danger that the results will be less acceptable to the parties – also government concerns about leaving public wages in the hands of arbitrators

**For (Weiler):**

* Striking is an important way to resolve impasse and facilitate willingness to bargain.
* The ability to compromise simply would not be there unless the parties were both striving mightily to avoid the harmful consequences of a failure to settle.
* Striking is critical to free collective bargaining.
* The immediate parties know best what are the economic circumstances of their relationship what are their non-economic priorities and concerns, what trade offs are likely to be most satisfactory to their respective constituencies.
* Striking allows parties to set price of labour at level they find mutually acceptable – free of legal controls.
	+ Necessary for union strength – if ER makes a change union cannot accept, only power the union has to change it is the collective right to refuse to work on those terms. Strikes are harmful to both parties, so threat of strike plays major role in CB

**PROHIBITED STRIKES**

Canadian labour legislation prohibits two kinds of strikes

* **Recognition strikes**: If a group of EEs want to form a union, there are certification procedures in place
* **Mid-contract strikes:** If an EE has complaints about egregious ER conduct, there are arbitration or grievance procedures in place
	+ Also, ER cannot lock out EEs while collective agreement is in force: **s. 57(2)**

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| **s. 57: Strikes and lockouts prohibited during term of collective agreement**1. An employee bound by a collective agreement entered into before or after the coming into force of this Code must not strike during the term of the collective agreement, and a person must not declare or authorize a strike of those employees during that term.
2. An employer bound by a collective agreement entered into before or after the coming into force of this Code must not during the term of the collective agreement lock out an employee bound by the collective agreement.
 |

## CONSTITUTIONAL RIGHT TO STRIKE?

Rejected in the Labour Trilogy: 2(d) only protects individual rights, and right to strike is collective

* Dunmore retreated from this idea, said 2d can protect activities that are inherently collective. Charter should be interpreted in light of international jurisprudence. (Aff’d in Health Services)
* Tension between international jurisprudence and right to strike under labour relations legislation (e.g. Sympathy striking)
* Employer can impose new terms unilaterally at certain times and under certain conditions (see 7:422)

## LEGAL FORUMS

### Strikes

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| **Section 1: "strike"** includes a cessation of work, a **refusal to work or to continue to work** by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is **designed to or does restrict or limit production or services, but does not include**(a) a cessation of work permitted under section 63 (3), or(b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Code,Includes broad range of tactics. LRB charged with determining whether regulator prerequisites to a lawful strike have been satisfied (i.e. where ther strike is timely).i.e. A strike has **two elements**:1. A strike must have **conduct that** **adversely affects work or production**; and
2. That conduct must be taken pursuant to a **common understanding**
 |

* Strikes are regulated – can only strike for negotiation of CA – cannot strike for reocgnition or to enforce terms of CA
	+ Exception: if ER makes a technological change, duty to bargain may arise which may result in legal work stoppage
* Includes variety of employee pressure tactics that fall short of a complete shutdown – job actions include rotating strikes , go-slows, work-to-rule campaigns, coordinated sick days, picketing or mass resignations. Purpose is to disrupt amount of work done or induce people to cease doing business with ER

#### Labour Code Strike Procedure

The procedural requirements for a legal strike is as follows: (s 59(1))

**(1) Bargain collectively** in good faith to the point of impasse (i.e. failure to come to agreement)

**(2) Strike vote**: majority of EEs must vote in favour of a strike (s 60)

* **JS**: In reality, unions want more like 90% of workers: They want to show solidarity because union is going to use a variety of factors to pressure the ER to fold

**(3) Serve written notice on ER (**s 60(3)(b))

**(4) File notice on Board** (so the ER and Board is not surprised) (s 60(3)(b)(ii))

**(5) Wait at least 72 hours** and **no more than 3 months** before going on strike (s 60(3)(b)(iii))

* Purposes of waiting period:
	+ Gives EE time to **plan** **their strike**;
	+ Gives ER time to **plan their reaction** to the strike;
	+ May be a **safety concern** (e.g. a machine needs to shut down);
	+ Gives time for ER to **apply to board** and say certain workers are essential service workers (e.g. plant will blow if workers leave)
	+ Allows ER to apply for appointment of a mediator under **s. 74** of the *LRC*

**(6) ER can request a last offer vote under** **s. 78**

* ER can apply to board and argue that the last offer was fair and reasonable and that union rejected it; “we think if it was presented to the EEs directly, they would accept the offer.” Board can give it to bargaining unit and they vote on it
* Only in minority of provinces
* Controversial: unions don’t like it because it bypasses the idea that they should bargain with the union instead of individual EEs. It is good however because it is a check on unreasonable behaviour by the union

**Labour Board:**

* Legality of a strike depends on whether statutory requirements have been met
* Resopnsibility for determining whether strike has occurred, and whether it is timely, lies with the labour board
* Labour board may order cease and desist order against striking EEs
* In Ontario, CA can also contain no strike clause; it is up to arbitrators to deal with these clauses through the grievance procedure
	+ Arbitrators can award damages for violating no-strike clause and can sometimes prohibit recurrence of industrial action
* Unlawful strike or lockout can lead to proceedings in: civil courts, labour relations board, criminal courts, or arbitration claim for damages

## DEFINING STRIKE ACTIVITY

The definition of “strike” in section 1 raises the question of what kinds of conduct fall within the definition of a strike. The definition must be interpreted **broadly** (***Graham Cable***:intentionally slowing down operations). This is necessary because:

* The changing economy means unions need ways other than the traditional strike to put economic pressure on ERs
	+ This is especially relevant in industries where replacement workers are readily available
* Traditional strikes could deprive the union over long periods of time (no income during traditional strike; with alternative striking, some income can still be generated)

What does it mean to be “in combination or in concert or in accordance with a common understanding”?

* Actions by EEs that are allowed in their collective agreement (like refusing to work voluntary OT in ***Sask Wheat Pool***)may constitute a strike when done in combination if it constitutes concerted activity designed to restrict output (***Sask Wheat Pool***)

Benefits of actions being a strike: protected from ER discipline by the Labour Code

Disadvantages fo actions being considered a strike: prevented from doing this when not “timely”

### Graham Cable

**F:** Union was in a legal strike position. Engaged in job action that was not traditional strike, but involved speed up/slow down approach that interfered with business operations. Graham Cable disciplined the employees, required workers to sign a document saying “I am here to work as per my work duties” – those who did not sign were not allowed in.

**I:** What is a strike under the Code? (If the activity constitutes strike -> protected, and discpline = unfair labour practice)

**R:** **A strike is coordinated employee activities that are designed to disrupt the employer’s operations.** The definition of strike should be interpreted broadly. If union is in legal strike position, ER cannot discpline EEs for participating in legal strike.

**A:** protection for strike activity very broad under code

* + Strikes have been defined on case-by-case basis – so far strikes include: refusing to work overtime, refusing to accept supervisory assignments, concerted work to rule, booking off sick or being otherwise unavailable for assignments
	+ Key is whether activities are done **in combination or in concert with a common understanding** and **are designed to restrict or limit output.** -> *Eg Canada Post Corp:* strike declared when CUPW refused to carry mail bearing ten cent stamps over christmas
	+ these activities when practiced **at a legal strike time** **are protected by the code**
	+ Particularly in industries where replacement workers are readily obtainable, rotating strikes, overtime bans, work to rule campaigns, slow-downs and other 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.

### Sask Wheat Pool

**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. There was no evidence that the union coordinated the OT denial

**I:** Is this a strike without evidence of coordination? YES

**R:** Coordination does not need to be directly proven, circumstantial evidence may suffice. Circumstantial evidence indicated that union organized the denial, amounting to a concerted refusal to accept OT. In normal environment sufficient number of EEs would have accepted OT - 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.

## SYMPATHETIC ACTION (REFUSING TO CROSS A PICKET LINE)

When can EEs refuse to cross a picket line when they themselves are not in a legal position to strike?

* 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

### Maritime Employers Assn

**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? **H:**  Yes

**R:** Union submits that union solidarity is a universally accepted principal. Couldn’t be purpose of code to define strike as refusal to cross picket line. Board finds **the objective definition of strike encompasses refusing to cross a picket line. No room to import a qualification which would exclude a stoppage of work resulting from 1 circumstance only, namely the honouring of a picket line by the EEs.**

* no room for doubt that the definition of strike is objective, no need for intention to harm ER, simply needs objective cessation of work for common understanding (doesn’t matter the motivation for the common understanding, no longer needs to be for purpose of compelling ER to accept terms of employment)
* common understanding may encompass the union principle of not crossing picket line, ie solidarity

### Nelson Crushed Stone

**F:** Union members refused to cross another union’s legal picket line against a common ER. The CA between the ER and the non-striking union had a provision stating it won’t be a violation of the agreement if an EE refuses to cross a legal picket line.

**I:** Can a collective agreement expressly permit the employees covered by it to refuse to cross a lawful picket line?

**A:** in all cases, the Q is whether the refusal to work on the part of the EEs is in combination, in concert, or in accordance with a common understanding. Defintion of strike is not restricted or qualified by the purpose underlying the work stoppage. Board does not allow the parties to qualify the no-strike povision deemed to be contained in every collective agreement.

**R:** The CA cannot make an unlawful strike lawful, cannot contract out of the Labour Relations Code. Clauses that allow for unlawful stoppages of work with a common purpose when such stoppages are prohibited by the code 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.

* Exception: BC CODE: Allows for the negotiation of a clause not to cross a picket line; and allows “hot cargo” clauses (refusing to do work coming from an unfair ER). 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

Can ee’s refuse to cross another union’s picket line? First look to CA, if permitted under CA, then look to labour code. If permitted under both, okay (in BC, okay). If CA does not allow sympathetic strike, then violation of CA, go to grievance arbitration

A “**hot cargo clause**” is a provision in a collective agreement that purports to allow EEs to **refuse** any goods or products of an ER who is being struck. In most jurisdictions, respecting a “hot cargo” clause amounts to a strike, unless of course, the labour statute exempts it

**Section 70(1)** of the code allows the Board, upon a complaint, to issue a declaratory opinion that hot cargo clauses are enforceable, void and unenforceable, or unenforceable for a certain period of time. The board will consider (**s. 70(3)**):

1. The extent to which the ER has been affected by the clause; and
2. The intent and purposes of the clause and the necessity for reasonable protection and advancement of a trade union or ER.

If the Board issues a declaratory opinion declaring hot cargo clauses void and unenforceable, or unenforceable for a certain period of time, the board may take steps to ensure that those affected by the declaration are **informed** of the terms of the opinion: **s. 70(2)**

* **JB:** Hot cargo clauses in BC are **generally upheld**: see e.g. *Re Victoria Times Colonist Group Inc.* (2005) BCLRB

## STRIKE PROHIBITION AND POLITICAL PROTESTS

Whether a purposive restriction should be read into the definition of a strike has been controversial over the years. Should it matter *why* workers are striking?

* In addition to sympathy striking, another reason why workers may engage in a strike not directly relating to collective bargaining is as a form of **political expression** or **protest.** The BCLRB held in *BC Hydro* (1976) that a work stoppage during a “National Day of Protest” did not fall within the definition of a strike
* i.e. A political protest during collective bargaining is ok and will not be deemed an unlawful strike because it is not a strike at all

**However,** the decision was based on the old section 1 definition of “strike” that contained a purposive element that was subsequently removed in 1984 (“for the *purpose* of compelling their employer to agree to terms or conditions of employment”)

* From my understanding, **a work stoppage due to political protests in BC would be a strike**
	+ Textbook said that in jurisdictions where the definition of a strike had no purposive component (like BC now), stoppages on the “National Day of Protest” were invariably held to be strikes
	+ i.e. Union EEs engaged in a political protest will be deemed to be striking and could be penalized for unlawful striking if it is during a time in which they aren’t allowed (e.g. collective bargaining)

More recently, unions have challenged the prohibition of political protest strikes during the term of a collective agreement as a violation of *Charter* rights, particularly, the right to freedom of expression. These arguments have failed.

## REGULATING LOCKOUTS/CHANGES WITHOUT CONSENT

A lockout is defined in **section 1** as the ER closing a place of employment, a suspension of work or a refusal by an ER to continue to employ a number of his or her EEs, done to compel his or her EEs or to aid another ER to compel his or her EEs to agree to conditions of employment

Subject to timeliness reqiurements – generally subject to same timeliness requirements as strike (first must collectively bargaing, then vote, then give notice to union and Board, then wait 72 hours before lock-out)

However, unlike the definition of a strike, the definition of a lockout includes a **purpose limitation** -> must be done to compel employees or aid another employer to compel their employees to agree to terms or conditions of employment.

* + Must seek to **influence employee and union views on collective bargaining issues**
	+ This purposive element distinguishes lockouts from situations in which the ER closes down certain operations in the ordinary course of business; it must seek to influence EE and union views on collective bargaining issues
		- Otherwise, layoffs would look like a lockout

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

## EMPLOYER ECONOMIC WEAPONS

* Legislation usually structured so that the end of the statutory bargaining freeze ends coincides with the commencement of the legal strike and lockout period. So in addition to the right to lockout the employees, the employer has another weapon at its disposal, *once the right to strike or lock out arises.*
	+ the employer has the **right to make changes to the terms and conditions of employment without the union’s consent**
	+ This right is *subject to the unfair labour practice provisions* - including duty to bargain and the prohibition against punishing or otherwise discriminating against employees for exercise of lawful rights. Economic weapons cannot be used with anti-union animus or in a way that suggests they have no intention to reach agreement
* unilateral alteration of working conditions could amount to breach of duty to bargain, but according to *Paccer of Canada Ltd,* **the duty to bargain only requires that the ER give the union an opportunity to accept the proposed unilateral before implementing them, and that the ER otherwise show a wilingeness to conclude a CA.**

### Westroc

**F:** Union trying to prolong negotiating period, ER suspected they did so in order to be able to strike with other plants, who were still in the term of their CA. ER was trying to bring negotiations to a close ASAP. After exahaustion of conciliation ER locks out employees, hires replacements and resumes certain operations. Union complains that lockout and hiring of replacements constituted breach of OLRA.

**R:** A lock out is legal if it is for the purpose of achieving collective bargaining goals. It is not legal if it is aimed at dissuading EEs from exercising their rights to strike, negotiate, etc.

**A:** The act contemplates timely lockouts aimed at inducing EE agreement over terms and conditions of employment.

* A lockout aimed at dissuading EEs from exercising rights under the Act is never lawful.
	+ However, **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**.
	+ Collective bargaining lockout is legal because its purpose is to achieve a CA
* 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 showed no failure to bargain in good faith, etc.
	+ Board will be especially vigilant in scrutinizing for anti-union animus in context of first agreement; here there is a longstanding relationship and no evidence of animus .
* **NOTE:** This case & rationale may not apply in BC because **Temporary workers are not allowed in BC**

# PICKETING

**Signal Effect Picketing** – only allowed during legal strike period, at ER or ally

**Information Picketing** – Okay anytime

**s. 1: Definitions**

* **"picket"** or **"picketing"** means attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to *persuade anyone not to*
1. enter that place of business, operations or employment,
2. deal in or handle that person's products, or
3. do business with that person,

and a similar act at such a place that has an equivalent purpose;

* This has been struck down as unconstitutional though; but still there

Strikes and picketing are not the same thing, but they overlap. Picketing is protesting, strike is action aimed at impacting employer’s business. Sometimes picketing has other purposes, and sometimes strikes don’t involve picketing (like other job actions described above)

* must codes are silent on picketing, in many provinces the regulation of picketing is left to the court
* if the ER is unhappy with union picketing, must go to court and argue that some kind of tortious or criminal activity is being committed, and get courts to issue and injunction
* BC Labour Relations Code is exception – attempts to give power to labour board – has definition of picketing and has some provisions in section 65 that talk about ability of board to regulate picketing, but Board doesn’t have total power over picketing

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| **65**  (1) In this section:**"ally"** means a person who, in the board's opinion, in combination, in concert or in accordance with a common understanding with an employer assists the employer in a lockout or in resisting a lawful strike;**"common site picketing"** means picketing at or near a site or place where(a) 2 or more employers carry on operations, employment or business, and(b) there is a lockout or lawful strike by or against one of the employers referred to in paragraph (a), or one of them is an ally of an employer by or against whom there is a lockout or lawful strike.(2) A person who, **for the benefit of a struck employer**, or for the benefit of an employer who has locked out, **performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, must be presumed by the board to be the employer's ally unless he or she proves the contrary.**(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, **may picket** at or near a site or place where **a member of the trade union performs work under the control or direction of the employer** if **the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.**(4) with permission from the board, union may picket: (s 6: board must define site or place for this kind of picketing)(a) (if ER goes and works elsewhere to avoid picketing, may picket that other location) (3), or(b) (May picket ally)(7) If the picketing referred to in subsection (6) is common site picketing, **the board must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike,** or an operation of an **ally** of that employer, *unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4),* in which case the board may regulate the picketing as it considers appropriate. |

bascially: union can picket their own employer if they are lawfully on strike or locked-out, and can picket another ER location where work is being done or an ally to the ER with permission from the board.

* Other than that, any picketing of any kind (including leafletting), is prohibited – that means leafletting own ER when not in legal strike position, or leafletting 3rd party (such as another chain of your company, or central labour relations location like local Mill)
	+ Questions about legitimacy of this restriction from *Kmart* (informational picketing is allowed under *Charter*), *Pepsi Cola* (secondary picketing of any kind of protected by *Charter* in Saskatchewan) and *Canfor* (informational picketing is allowed in BC)
* this section gives **board** **jurisdiction** to regulate picketing
* including: limiting so third parties arent unfairly impacted, and to limit secondary picketing to entities that have been declared to be an ally of the primary employer
* general clause in 67 – except as provided in code a person must not picket in respect of a matter to which code applies
* so basically code limits what you are allowed to picket

### Canex Placer

Background: **Section 65** gives authority to the Board to regulate picketing.

* Industrial regulation aspects fall under boards jurisdiction while courts are charged with its criminal and civil law features. The code gives to the labour board to ability to regulate the timing and the location of picketing, and whether you are legally allowed to picket at all (what, where and when of picketing).
* It is not possible as a matter of constitutional division of powers to take away ability to enforce criminal law and torts. The “how” of picketing – eg are assaults happening on the picket line? Trucks vandalized? That jurisdiction still remains in the common law.

**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. If you are concerned about picket line violence, even in BC you can go to the courts and get an injunction

* **in BC the labour board can determine the where and when or picketing, but what actually happens on the picket line is determined in courts**

## PRIMARY AND SECONDARY PICKETING

**S 65: defines some other terms 🡪 gives board jurisdiction to regulate picketing 🡪 limits secondary picketing (defines allies), and protects third parties (common-site picketing)**

* + Ally: person who in boards opinion *assists the employer in resisting lawful strike or assists in lockout*
	+ Common Site Picketing: *picketing at location with multiple employers*
	+ Can only picket to the extent that the code permits
		- So s 1 and then s 65-67 are the key provisions

Distinction between primary and secondary picketing

#### Primary Picketing

* + You’re the one on strike and you’re picketing at employers premises
	+ Direct picketing of your employer at their place of business
	+ Potential conflict between property rights and picketing
		- Sometimes to effectively picket you have to be on their private property (raises issues of trespass to property)
		- Being required to stay on public property might not work
	+ Courts alow wide scope for primary picketing, if picketing is docused directly on the business of the struck employer and affects third parties only in their dealings with that employer, it is allowed. Limted by tort and criminal law –assault, nuisance, trespass outside scope of picketing, but some interference with civil and legal rights of ER will be expected.

### Harrison v Carswell

**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. Laskin for minority said the law of trespass ought not to extend to that kind of behaviour - just walking back and forth on property should be allowed

* after this case, most labour relations statutes were ammended to overrule that section
* in BC: section 66

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| **66**  No action or proceeding may be brought for(a) petty trespass to land to which a member of the public ordinarily has access,(b) interference with contractual relations, or(c) interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business opportunity or other economic loss arising out of **strikes**, lockouts **or picketing permitted under this** **Code** or **attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace**. |

* So BC statute permits primary picketing on employers private property, and most provinces overrule Harrsion where picketing is reasonable, despite statute.
* peaceful picketing on property is often necessary to bring the message home

#### Secondary Picketing

* picketing someone who is not a party to the labour dispute
* classic example: picketing a customer of employer
* eg when picketing pepsi, you picket the retail stores that sell pepsi
* there are reasons to limit it because it has potential to broaden dispute, no ability to bring that dispute to an end

### Hersees

**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.

**A:** Hersse had cotract with ER, union tried to induce H to breack that contract. The picketing was likely to cause damage to H, was not only for the purpose of obtaining or communicationg informatino. Picketing is unlawful. Secondary picketing of any form should be prohibited as it is likely to injure the right to trade freely, a more important right than picketing.

**OVERTURNED BY STATUTE IN BC:** Ally picketing is OK with a Board order (s. 65(4)(b)). Formerly most expansive in Canada

Classic decision on secondary picketing

*Led to ally exception****:***

BC decided to partially overrule Hersees and permit secondary picketing in limited circumstances – that is where secondary employer is an ally of the primary employer. Ally is someone who provides assistance to a struck employer for the purpose of helping them resist the strike. That purposes is important, they **don’t want anyone who does business for their own benefit included, the purpose has to be helping the struck employer**. Work has to be being shifted to the ally as a way of getting around the strike itself – eg the other business agrees to take over the work and complete it so the other employer doesn’t lose the contract, the work gets done, and time is not lost in the strike. Not a huge exception to the ban on secondary picketing, but an important one

What is an ally? *Consolodated Bathhurst –* 4 cardboard companies struck, customers started buying from 5th cardboard manufacturer. Not an ally – was not doing this work to emable ER to continue its business, rather was a natural option for custmoers to turn to. **“NO alliance will usually exist where the impetus for substitutions comes solely from the customers of the struck primary employer and the services are not undertakin for the primary employer’s account or his name”**

### K-Mart, 1999

*Does prohibiting secondary picketing violate freedom of expression?*

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| **F:** Union went to K-Mart location, and handed out leaflets , they say “we are on strike against Kmart at X locations, please boycott Kmart”. These actions fell within the BC codes definition of picketing in section 1*.* (That definition is pretty broad – attending at or near a persons place of business, for the purpose of persuading or attempting to persuade anyone not to do business with that person)**I:** Is secondary picketing expression protected by the *Charter?* Union argued that this is expression, the fact that it has to do with labour relations doesn’t change the *Charter* right.**A: Point 1:** The definition of picketing is overbroad, and can prohibit expression that is protected by the *Charter.* The kind of communication that involves handing out leaflets saying, don’t do business with this entityisexpression protected by the Charter, the code cannot prohibit this kind of expression. Court struck down the defintion of picketing and declared it of no force or effect*.***Point 2:** There is **a distinction between “informational picketing**” and **“signal effect” picketing*** + **Informational picketing** – distribution of information at or near commercial premises, designed to *provide public with information about an issue -* That is at the core of freedom of expression and is clearly protected by *Charter*
	+ **“Signal Effect” picketing** – **a real strike against the secondary location**. If union set up strike against Kmart at the third location that is different*.* That is not really the communication of information***,* it is a clear signal that has almost automatic effect, and almost crosses the line into activitiy that has a coercive effect.** This is not something the Charter has been engaged to protect

**H:** They can leaflet in the parking lot of Kmart, but cant set up a full picket line**R:** The definition of picketing is overbroad, and may prohibit some kind of expression that is protected by the *Charter.* * The *Charter* protects informational picketing – that is distributing information about an employer (leafletting basically), but it does not protect “signal effect” picketing, which is a strike intended to signal to people strike is in place – that is almost coercive and not protected by *Charter.* Basically, the code can prohibit secondary picketing that looks like a strike, but cannot prohibit secondary leafletting.

**Note:** SCC gave BC sometime to redefine picketing*,* but BC never did that – so the current defintion of picketing is unconstitutional.Kmart found that BC code was unconstitutional in so far as it prohbited secondary leafletting to ERs who are not allies. Did not find it unconsitutional re “signal effect” picketing. Pepsi cola stated that secondary signal effect picketing should also be legal barring tort or crime. After Kmart BC Board permitted secondary informational leaffleting but continued to proscribe secondary “conventional” labour picketing (p 472). After Pespi Cola it is not clear whether prohbition on any secondary picketing in the statute is constitutional |

### Pepsi-Cola (Sask) (2002)

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| **F:** This is the case that challenges the *Hersees* ban on secondary picketing under s 2(b) (from a province that applied hersees, and said no secondary picketing at all).**I:** Does prohibiting secondary picketing violate the *Charter*? provided opportunity to consider whether secondary picketing violates it at all**R:** “All picketing is allowed, whether primary or secondary, unless it involves tortious or criminal conduct”- picketing is *prima facie* legal, and can by limited to protect third parties**H:** Pepsi-cola is only entitled to an injunction where it has been subjected to a tort or crime, not where its been the target of peacful picketing. IN this case, the picketing was peaceful – aimed at supporting the strike and harming business of Pepsi by discouraging people from buying pepsi. There was no intimidation or other tort. No injunction**A:** Overrules Hersees entirely, they say at common law, all secondary picketing is permitted by the *Charter*, unless it amounts to a tort or a crime. So, in Sask you can secondary picket as much as you want to long as actions are lawful and not tortious* purpose of picketing: to convey information about a labour dispute in order to gain support for its cause, and to put social and economic pressure on the ER. It takes many different forms, but in all its forms it involves expression action.
	+ Free expression is one of the highest constitutional values - protected by charter & foundation of democratic society
* This right must be balanced against third parties who may suffer econpmic harm from picketing, their rights must be considered
* secondary picketing is *prima facie* legal, and limitations may be justified in interests of protecting third parties
* “hersees doctrine casts the economic protection of third parties from the effects of labour disputes as the pre-eminent concern of the law, regardless of the resulting incursing on free expression” – does not consider public interest in free expression and societal debate on working conditions and labour conflict
* heierarchy of rights cannot be justified in context of the charter and contemporary labour relations

Problems with Hersees:* rights of third parties are not more important than right to free expression, hersees also mistakenly characterised the right to trade in the struck good as “fundamental”, the argument glosses over the fact that third parties are also harmed by primary picketing, contravenes *charter* by sacrificing an individual right to the perceived collective good rather than seeking to balance and reconcile them
* hersees doctrine was very inflexible, and irrational -> the “wrongful action” approach gets at the heart of heart of why picketing should be limited, and is sufficiently flexible to accound for expressive rights
* the hersees doctrine is examine at p 463-464

Does this offer adequate protection?– yes, the exception for tortious and criminal conduct covers a lot, covers trespass, nuisance, intimidation, defmation & misrepresentation, torts protect things like free access to private premisesPrimary/Secondary Picketing Distinction* this distinction was arbitrary and should be abandoned. It is not useful

Signal Effect Picketing: eliminates the signal effect/informational picketing distinction * prior justification for limiting signal effect picketing is that it has a coercive impact -> goes beyond expression and becomes coercion, court says this may be exaggerated
* second issue is with idea that coercive effect makes signal effect picketing less worthy of protection, disagrees
* signal effect is still communication, no reason why expression in labour context should treated as fundamentally less important than in other contexts, this amounts to a special rule for union speech – should not be treated as less important

**Notes:** Courts ruling the common law doctrine that prohibted secondary picketing was inconsistent with *Charter* may create tension with statutory schemes that treat secondary picketing less favourably because it is secondaryWhat Happens in BC?We still have a limitation on secondary picketing, you can only secondary picket allies of the employer, including informational picketing. After *Pepsi*, BC is the most restrictive on secondary picketing.* Issue remains: are we violating the Charter? The SCC gives a hint in its decision – they say in some jurisdictions the balance may be struck differently, a balance could still be saved under s 1. They hint that s 1 balancing may be possible for a BC type restriction
* Court noted “nothing in these reasons forestalls legislative action in this area”
* *Overwaitea* (2003): the board should not cease to disctinguish btw informational and signal effect picketing and allow signal effect at secondary locations, unless a direct *Charter* challenge is brought
 |

### Prince Rupert Grain

**F:** Union members refused to cross secondary picket line during collective agreement (not lawful strike time)

**I:** Did the secondary picketers commit tort of interference with contractual relations, rendering an injunction possible?

**R:** No. Breach of contractual relations requires the tortfeasor to induce parties to not work, which in itself caused the ER to breach other contractual relationships. In this case, there is only evidence of the contractual relationship with union members being breached. Issue – did they induce breach of contract in form of CA? – no, CA allowed for EEs to not cross picket line.

### Canfor (2007)

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| This case attempts to answer these questions about what kind of secondary picketing is permitted in BC after all these SCC decisions**F:** HEU protests at a Mill (seoncdary picket), protest escalates to full picket line.**A:** prohibition on picketing still applies despite lack of statutory definition of picketing after Kmart - after Kmart it is up to the Board to determine definition of picketing. * If the activity is picketing, it is not allowed at the secondary location, pursuant to the code.
* The Board accepts that “signal effect” picketing is different from political placarding, They find the protest was picketing under the guise of political protest. Nonetheless an official picket line, therefore not allowed according to BC Code
* “this is not to say that any time a group of people congregate at the entrance of a unionised workplace bearing placards, such conduct necessarily constitutes picketing within meaning of Code. However, **where there is evidence such conduct is intended to, or does, cause union members to “down tools” or not attend work, then prima facie the conduct constitutes picketing within meaning of the Code”**
* the infringment on freedom of expression is justified under section 1
* it becomes signal effect picketing – and that became obvious because it had instant effect on mill workers
* **board said prohibiting signal effect picketing where it occurs outside the context of legal strike is okay – you can only do signal effect as part of a lawful strike at your employers property**
* other than that, seondary picketing is limited to informational picketing.
* This is a limitation on section 2(d), but it is justified under section 1

this remains the best decision we have about how to understand the BC statutory scheme* in BC today for provincially regulated ERs, you cant apply Pepsi directly – absent a direct constitutional challenge to the ally doctrine
* Currently: In BC we onlypermit **1. Primary picketing on the ER that is part of legal strike, 2. Secondary picketing if part of a legal strike and secondary party is an ally, and 3. Informational picketing that is not part of a legal strike so long as it is not tortious.**
* **signal effect picketing is only permitted if it is primary picketing of ER, and secondary picketing of an ally, AND part of a legal strike,** informational picketing is allowed
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### Common Site Picketing

Where more than one ER carries on a business at the same site (i.e. a “common site”), the Board can restrict picketing so that it affects only the ER involved in the labour dispute or the ally of that ER (**s. 65(7)**)

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| **s. 65(1): Picketing*** **"common site picketing"** means picketing at or near a site or place where
1. 2 or more employers carry on operations, employment or business, and
2. there is a lockout or lawful strike by or against one of the employers referred to in paragraph (a), or one of them is an ally of an employer by or against whom there is a lockout or lawful strike.

**s. 65(3): Picketing**A trade union, a member or members of **which are lawfully on strike or locked out**, or a person authorized by the trade union, may picket **at or near a site or place where a member of the trade union performs work under the control or direction of the employer** if the work is an **integral and substantial part of the employer's operation** and the site or place is a site or place of the lawful strike or lockout.**s. 65(7): Picketing*** If the picketing referred to in subsection (6) [Board allowed to make an order] is common site picketing, the board **must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike,** or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4), [primary and secondary picketing] in which case the board may regulate the picketing as it considers appropriate.
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#### Vancouver Island University

**F**: Academic teaching staff were on strike. Picketed every building on campus because IT staff work in all of them, and wanted to picket the external roads, which would cut off access to the entire campus.

**I:**  Where can union picket?

**A:** Four part analysis to justify picketing under s 65(3):

* 1. Member works at the location,
	2. The work is under the control and direction for the ER,
	3. The work is an integral and substantial part of the ERs operation,
	4. The site or place is a site or place of a lawful strike or lockout.
* Dispute over 3: **Does the work performed by IT operators constitute and integral and substantial part of the ERs operation?**
	+ yes, computer systems are vital and critical to the university. This analysis is the role the work plays in the ERs operation, not how many people work at the site. You don’t need to have a lot of workers working in the location for it to be a substantial and integral part**, the question is, *is what they do in the building a substantial and integral part of the employers operations*?**
* **Roads issue:** VIU argues a UBC case, UBC went to the labour board and got an order prohibiting picketers from picketing at all the perimiter of the campus. Labour board rejects the analogy – distinguishes between UBC and VIU. The difference was that private homes are on the UBC campus, there are public services like police, fire stations, hopsital, and these need access to the campus. VIU doesn’t have these kind of services that make full perimeter picketing of the university inappropriate.

### Summary: Lawful Picketing v Unlawful Picketing

**What about secondary picketing where you are in a lawful strike position?**

* if you are in a lawful strike, Pepsi says secondary picketing is protected by 2(b), unless it is tortious or criminal
* the problem is that in BC secondary picketing during a lawful strike is limited to allies of the struck employer
	+ this is more restrictive than *Pepsi* – that leaves open the question as to whether that provision is constitutional or whether it is too narrow, but we don’t know the answer to that question yet (SCC in ***Pepsi*** hinted in *obiter* that it may be justified under s. 1, i.e. constitutional)

**In the purely picketing category – what about picketing that is not during a lawful strike?**

* either because you are in an unlawful strike (wildcat strike), or you are not doing anything unlawful but you just want to picket
* the *Canfor* case is helpful for this in BC – it is there that the BC board has drawn the distinction between informational picketing or leafletting, as distinct from signal effect picketing
* the BC board seemed to adhere to that position, said hospital workers who were picketing at a secondary site, not on a lawful strike, can still picket so long as it is restricted to an information picket line, but when it becomes a signal effect picket they are not protected by the charter - basically says that to signal effect picket you have to be on a lawful strike

# CIVIL REMEDIES

Knowing which is the appropriate forum is not so straightforward. 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 (court);
* 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; law is murky regarding where to go first if you have a dispute arising out of a strike or picketing.

***St. Anne*** gives three main points regarding remedies:

* Courts issue interlocutory injunctions
* Boards issue cease and desist orders
* Arbitrators issue damages

***St. Anne*** also said that Courts enforce law in the *LRC* and issue injunctions, but breaches of specific collective agreement terms should be dealt with by the Board or the arbitrator

### St. Anne Nackawic Pulp and Paper v. Canadian Paper Workers Union *(1986) SCC*

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| **FACTS** | The union represented two bargaining units: mill workers and office workers. The office workers went on a legal strike and picketed the mill. The mill workers, who could not legally strike because their collective agreement was in force, went out with the office workers out of sympathy (illegal strike). The ER obtained an interlocutory injunction against the mill workers. After contempt of court order, the mill workers went back to work, but then went on an illegal strike again. Another contempt of court issue was ordered and the mill workers went back to work. The ER claimed damages against the union for losses during the mill workers’ strike. The lower court awarded damages for the illegal strike in breach of their collective agreement. SCC considered whether the lower court could grant an injunction to enforce the no-strike clause in the collective agreement, and whether it could award damages. |
| **ISSUE** | What are the remedial powers of courts, boards, and arbitrators? Did the court exceed its jurisdiction? |
| **HELD** | The court did not exceed its jurisdiction re: injunctions but did re: damages. Judgment for ER. |
| **ANALYSIS** | * Courts issue interlocutory injunctions
* Boards issue cease and desist orders
* Arbitrators issue damages
* Courts enforce law in the *LRC* and issue injunctions, but breaches of specific collective agreement terms should be dealt with by the Board or the arbitrator
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**Sections 136** and **137** of the *LRC* purport to abolish the courts’ authority to grant injunctions in labour matters, instead giving that jurisdiction to the labour board.

* However, the courts may still grant injunctions when the conduct complained of “causes immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property”: **s. 137(2)**

The general rule from ***ICBC*** is that the BC board has jurisdiction over disputes in the *LRC* (like picketing) but the court has jurisdiction to deal with **tortious** or **criminal conduct**

* On an injunction application, the court has to look at the ambit of the collective agreement and the essential nature of the dispute that comes before the court (dispute in ***ICBC*** was on of trademark which brought it into the court’s jurisdiction)
* In granting an injunction, the court will go through a **balance of convenience analysis**, balancing the hardship on the ER for not issuing an injunction, and the hardship on the union in granting an injunction (***ICBC***)

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| ICBC**F:** The Board issued an interim essential services order (an order maintaining a certain level of essential services during a strike or lockout). EE went on strike but to abide by the essential services order and instead of going to the picket line, they reduced their working hours. The union notified the ER and its EEs that it would change the trademarked phrase “Building Trust. Driving Confidence) in its email signature to various pro-Union messages including a link to the union website. In response, the ER shut down the email service and said they had to use fax instead. The union argued unfair labour practice as a violation of statutory free speech and that the court didn’t have jurisdiction because has to do with regulation of communication during a labour dispute. The ER filed for an interlocutory injunction because of trademark infringement and said they had jurisdiction because it was tortious conduct.**I:** Does the court have jurisdiction? If so, should an injunction be granted? **H:** Yes**A: The Board has jurisdiction over picketing and other things dealt with in the *LRC*, but the court has jurisdiction to deal with tortious or criminal conduct*** Here, this is trademark infringement issue, tortious, and therefore in the court’s jurisdiction
* In granting an injunction, the court will go through **a balance of convenience analysis**, **balancing the hardship on the ER for not issuing an injunction, and the hardship on the union in granting an injunction**
	+ Here, balance of convenience fell in support of ICBC
	+ Without the injunction, ICBC would suffer monetary damages as well as damages to its goodwill

The injunction would only be a monetary loss to the union because it would have to pay to communicate its message rather than rely on ICBC’s email system |

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| **s. 136: Jurisdiction of board**1. Except as provided in this Code, **the board has and must exercise exclusive jurisdiction** to hear and determine an application or complaint under this Code and to make an order permitted to be made.
2. Without limiting subsection (1), the board has and must exercise exclusive jurisdiction in respect of
	1. matter in respect of which the board has jurisdiction under this Code, and
	2. an application for the **regulation**, **restraint** or **prohibition** of a person or group of persons from
3. ceasing or refusing to perform work or to remain in a relationship of employment,
4. picketing, striking or locking out, or
5. communicating information or opinion in a labour dispute by speech, writing or other means.

**s. 137: Jurisdiction of court**1. Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.
2. This Code must not be construed to restrict or limit the jurisdiction of a court, or to deprive a court of jurisdiction to entertain a proceeding and make an order the court may make in the proper exercise of its jurisdiction if a wrongful act or omission in respect of which a proceeding is commenced causes **immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property.**
3. Despite this Code or any other Act, a court must not, on an application made without notice to any other person, order an injunction to restrain a person from striking, locking out or picketing, or from doing an act or thing in respect of a strike, lockout, dispute or difference arising from or relating to a collective agreement.
4. A court of competent jurisdiction may award damages for injury or losses suffered as a consequence of conduct contravening Part 5 if the board has first determined that there has been a contravention of Part 5.
 |

***Allen*** in the next section found that if the essential character of the dispute arises either explicitly or implicitly from the interpretation, application, administration, or violation of the collective agreement, the dispute is within the sole jurisdiction of an **arbitrator** to decide, and not the courts

* However, this rule does not apply where the EE and ER made an individual contractual arrangement **before entering into the employment relationship** (e.g. an arrangement that the EE would continue to be paid the same salary as a previous job, or that the job would last a certain number of years); AKA a “pre-employment contract”

### Summary

**Board:** Broad remedial powers available in *LRC* (**s. 14(4)** and **s. 133(1)**) and injunctions except those within court jurisdiction

**Courts: *Limited*** power to grant **injunctions**

* Power to grant all injunctions as given by ***St. Anne*** was ***overridden*** by sections 136, 137 of LRC
* **When court can grant injunctions:**
	+ **Tortious** or **criminal conduct** (***ICBC***)
		- Court will look at ambit of collective agreement and essential nature of the conduct (***ICBC***: trademark)
		- Balance of convenience: harm on ER for no injunction vs. harm on union for granting of injunction
	+ May still grant injunctions when the conduct complained of “causes **immediate** **danger** of **serious** **injury** to an individual or causes **actual** **obstruction** or **physical damage to property**” (sounds to me like torts of personal injury/trespass and criminal behavior): **s. 137(2)**

**Arbitrator**: **Damages** for disputes with collective agreements (e.g. damages for losses due to illegal strikes/picketing): ***St. Anne*** and ***Allen***

* Essential character must be from the interpretation, application, administration, or violation of the collective agreement
	+ No cause of action if EE and ER made a pre-employment contract (***Allen***)

## EMPLOYER DISCIPLINE OF STRIKERS

It is an unfair labour practice to discipline EEs for participating in a legal strike.

### Rogers Cable

**F:** ER imposed discipline on 8 EEs for participating in a legal strike. They had also done other stuff like breaking mirrors on company vehicles and cutting cables, threatening people with knives.

**I:** Can ER discipline employees for conduct in a legal strike?

**A:** Union said no discpline permitted during strike, ERs only recourse for picket line conduct is civil or criminal law.

**R: Once a strike is over there is nothing to prevent ER from disciplining EE for conduct during work stoppage, cant be disciplined for exercising rights under the code, but can be disciplined for other conduct.**

* EEs may be accountable for conduct if they have participated in acts of violence of wilful damage against property of ER. The employment relationship is there despite the fact that the contract has expired – still employer and employees. Can’t discipline for participation in picket line alone or lawful activities associated with strike, but can discipline for unlawful acts.

## JOB RIGHTS OF STRIKERS

No right to strike in labour code, but there is a right to participate in the lawful activities of unions, from statutory prerequisites that allow a strike, and from prohibition of ER retaliatory action to punish strikers. Extent of protection depends on whether the strike is called in compliance with labour relations legislation.

### Royal York Case

**F:** Royal york sent striking workers a letter that said come back to work or you lose your job

**I:** Can they dismiss strikers?

**A:** Section 1(2) of the ON labour act presereves the relationship of ER and EE in case of strike, even if contractual relationship may have been terminated at CL because of strike. Union cannot discipline or dismiss union members for particiapting in lawful union activities.

Obiter discusses hiring of replacement workers. Not relevant in BC because code prohibits hiring even temporary replacement workers. Employment relationship between ER and EEs continues throughout the strike.

## REPLACEMENT WORKER LAWS

When code has anti-strikebreaker provision, typically only EEs who may fill striking employees work are those who are managers (therefore not in the BU) and were working in the struck operation before the beginning of the current negotiations.

* limited redress for ERs breaking these provisions and hiring replacement workers – proseuction leading to fine or non-binding report
* BC prohibits replacement workers in **section 86**
	+ Replacement worker: any who 1. is retained after the date on which notice to bargain is given or on the date which bargaining commences, 2. ordinarily works at another of the ERs places of work, 3. is transferred to a strike or lockout location after notice to bargain is given, 4. is employed by or engaged by the ER, or supplied to the ER by another person, to perform the work of an EE in the strike or lockout unit or the work ordinarily done by a person who is performing the work of an EE in the strike or lockout unit.

## ESSENTIAL SERVICES

There is widespread concern that the public will suffer undue hardship from stoppages by certain strategically placed groups of workers

* Health care workers (most common), Policing, Public transit, Electricity/water supply, Garbage collection, Snow clearing, Teaching

The main rule is that **essential service EEs do not have a right to strike**.

* the concern with being labelled as essential is that employer may be able to weather the strike as their operations can continue if the essential services are mandated to continue working

In BC, the parties negotiate between themselves and try to agree on what services are essential. If they are unable to come to an agreement, they can go to the labour board, have a hearing, and the Board will decide what workers are essential an what terms ought to apply. The general criteria for essential services is whether the dispute poses a threat to (**s. 72(1)**):

* **Health**, **safety**, or **welfare** to the residents of BC; or
* The **provision of educational programs** to students or children under the *School Act* (teachers, not professors)

Sometimes the legislature will overrule the board regarding whether services are essential

* eg teachers: labour board consistently said teachers were not performing an essential service, in 2001 the legislautre declared educational program delivery to be an essential service
* *School District v Bulkley Valley Teachers Assn* – risk that students would lose their school year led labour relations board to hold that a strike by their teachers would pose a threat to the health, safety or welfare of the residents of BC, within the meaning of section 72 of the code.
	+ - Later s 72 was ammened to allow the government to order the labour board to designate as essential any services necessary to “prevent immediate and serious disruption of the provision of educational programs”

**Section 72**: if a dispute arises after CB has commenced, the chair may investigate whether the dispute poses **a risk to health, safety, welfare or education of British Columbians**. If it does, the chair reports to minister. If the minister considers there to be a threat, may direct the Board to designate those services as essential.

* 72(8): if the board designates facilities, productions, and services as essential services, the ER and the trade union must supply, provide or maintain in full measure those facilities, productions and services and mut not restrict or limit a facility, production or service so designated

**Section 73:** The parties must comply with these designations

## INTEREST ARBITRATION

How to resolve disputes if you cant strike, three options:

1. **Canadian approach - arbitrator can choose whatever terms**
2. **Final offer selection –** arbitrator chooses either union or ERs final offer with no adjustments
3. **Choice of procedures**- used in BC. Under choice-of-procedures system, one of the parties can specify at some point prior to or during negotiations whether an impasse will be resolved through a work stoppage or arbitration. In BC, the union can specify at some point prior to or during negotiations whether an impasse will be resolved through a work stoppage or arbitration

Abritration reduces settlement rate.

1. It has a lower cost of non-settlement than strike system so there is less threat in not settling
2. Parties may fear that concessions will work against them, so they make more conservative offers (chilling effect)
3. Parties may get into the habit of not negotiating, making their bargaining less efficient (narcotic effect)

Interest arbitration more common in public sector:

* This is often due to the concern about essentiality of public workers, and the concern that political and economic pressure generated by striking would place too much power in hands of public sector unions.
* Where one party is government, arbitrators have said they will not consider employers ability to pay. Idea is they have other means of generating revenue; shifting budget. Highlights that public sector bargaining is uneasy fit in *Wagner* model -> Further, public sector workers are often deemed essential services; so they have to use interest arbitration; but government can override arbitrated decision.

# THE INDIVIDUAL EMPLOYEE

Once a union has acquired majority support and has been certified or recognized as a bargaining agent, the **ER is precluded from bargaining with any other union** or any other person or organization on behalf of any EEs in the bargaining unit, unless and until the union's bargaining rights are terminated pursuant to statute

Also, an **ER may not bargain directly with individual EEs** where there is a statutory bargaining agent.

It follows that **EEs cannot sue an ER for wrongful dismissal**. The union must take this step.

* Advantages: Union pays for it and EE is reinstated if they win
* Disadvantages: What if union does not choose to file a grievance? Then the EE is out of luck (e.g. union may refuse to handle the grievance if facts are not on union’s side and therefore not worth the time and $$)

Areas where individual rights may conflict with collective interests under the collective bargaining regime:

1. The **displacement of the regime of individual contracts** when a union acquires bargaining rights,
2. The union’s **authority in negotiating a collective agreement,**
3. **The union’s authority in processing grievances** under that agreement

### 1. The displacement of the regime of individual contracts when a union acquires bargaining rights

* ER cannot bargain with any other union or any other organization on behalf of any EEs in the BU, unless the union’s bargaining rights are terminated pursuant to statute, ER may not bargain directly with individual EEs where there is a BU
* *Sydicat catholique v Compagnie Paquet*: no room left for private negotiation between ER and EE. To the extent of matters covered by the CA, freedom of contract btw master and individual servant is abrogated. **The CA tells the ER on what terms he must in future conduct his master and servant relations** – **the terms of employment are defined for all EEs, whether or not they are members of the union**

#### McGavin v Toastmaster

**F:** EEs went on illegal strike, and the ER closes the plant while they are on strike. CA has obligations to pay severance if the plant closes. ER says those obligations have disappeared- EEs have repudiated CA by going on strike.

**I:**

1. Whether there was *repudiation by each EE of his contract* of employment?

2. Whether the concerted *refusal to work terminated it* and whether the company did so?

3. Whether the *unlawful strike constituted a breach of a fundamental term of the K* of employment, disentitling them to benefits of CA.

**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 employment, severance pay and other negotiated matters
* 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.** The Court says that the contract rules of fundamental breach and repudiation do not have any role in labour relations.
* Did they quit their jobs? No, they took job action which may warrant some action against them, but does not end employment relationship

**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.

### 2. The Pre-eminence of Grievance Arbitration

#### Allen v Alberta

* **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:** Application or violation of a collective agreement should be dealt with exclusively under the grievance procedure established 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.**
	+ “If the essential character of the **dispute arises from the interpretation, application, administration or violation of the collective agreement,** the **dispute is within the sole jurisdiction of an arbitrator** to decide”.
	+ Courts don’t have jursidiction to determine severance entitlements, can only be resolved at arbitration
		- **Note:** this rule held to not apply where ER made indivdual contractual arrangement before entering into employment relationship

# UNION DUTY OF FAIR REPRESENTATION (DFR):

Section 12 of the Labour Code: unions owe a duty of fair representation to their members, must act in a way that is not arbitrary or in bad faith/

Applies to union members are any non-members in the bargaining unit (keep in mind that successful section 12 complaints are very rare)

Unions have obligations in **negotiations** and **administration**?

* negotiation: negotiating fair terms
* adminsitration: grieving fairly and dealing with workplace fairly

**Section 12:**

* (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.

## DUTY OF FAIR REPRESENTATION

### Steele v Louisville & Nashville Railroad Co

**F:** P = black firefighter. Denied membership in the union and union bargained for a CA that woud exclude black workers.

**I:** Is this a violation of the duty of fair representation? (the black workers were not in union, so does duty extend to them?)

**A:** Union must represent all members of the bargaining unit, regardless of union membership. The exercise of a granted power to act on 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.

**Ratio:** **Duty of fair representation requires union to represent all people in the bargaining unit fairly, and can not discrimiante on the basis of union membership. Union is required to represent all workers, even if some are not members of union, so long as they are members of BU.**

## DUTY OF FAIR NEGOTIATION

Some of the most difficult DFR cases have involved decisions made by unions in the negotiation or renegotiation of collective agreement provisions – especially decisions that have affected the often-divergent job security interests of different groups within the bargaining unit.

* The union must negotiate **fair terms**
* This is done by **balancing the competing interests** of the EEs and making a reasonable decision that is not arbitrary, discriminatory, or in bad faith
	+ ***Bukvich***: economic reasons and seniority outweighed junior EEs’ interests; Board was deferential to the wishes of the majority

### Bukvich

**F:** EEs are dependent contractors, they are drivers for ER. Issue was that there was not enough driving work for all drivers. Union neogitaing a a lay-off clause, which says people will be laid off in reverse order of seniority. Applicants were the juniors here and they got laid off.

**I:** Does this violate duty of fair representation?

**A:** No, the duty is designed to prevent invidious favoritism.Where there is economic justification and the decision is rational, it doesn’t violate the duty. Truck drivers were in a no-win situation, and the union could prefer to adopt a political, seniority based model to determine who would get to keep their jobs. It **is not whether this is a right or wrong decision, but whether this is a decision that could reasonably be made. So long as the proper procedures are followed, the duty of fair rep is not violated.**

* duty requires union to turn its mind to the circumstances of those who may be adversely affected by its decision. Must weig competing interest of EEs and make a considered judgment, procedure and result of which must not be abr, discrim, or in bad faith.
* Union must be a forum for reconciling sometimes irreconcilable interests and must act as spoesman for the interests that carry the day.
* The decision must be reasonable – ie it must be a rational application of the relevant factors, after considering all legitimate interests

### Atkinson (Re)

**F:** Company was purchased by another company, represented by CLAC. Issue was how to deal with seniority – dove-tail or end-tail? CLAC holds a vote, Northwest (the buying company) has 24 members; McCrae has 5 members. Obviously end-tail wins.

**I:** Does this violate duty of fair representation?

**A:** Yes. CLAC agreed to represent all employees; no reason to end-tail; dove-tail had been practice in past mergers; and can’t just say you’re going to take a majority vote; doing this was preferring interests of existing members over new ones when they’d agreed to represent all members equally. Board says: they could have agreed to dove-tail; or they could’ve gone to Board and get direction about how to merge, and whether the workers should all be amalgamated into same unit; but they said they would take the new workers on and represent them equally.

* Board looked at Bukvich and said that there was no reasonable rationale for end-tailing, did not show a consideration of all interests
* Fundamental problem was that CLAC assumed role of exclusive bargaining agent for Macrae EEs, but subordinated their interests to the will of the majority. CLAC’s actions were arbitrary and discriminated against complainants

## DFR IN THE ADMINISTRATION OF A COLLECTIVE AGREEMENT

When can a union refuse to bring a grievance to arbitration? Factors (***Rayonier***):

* **Subject matter:** How critical is the subject matter of the grievance to the interest of the EE?
* **Validity of claim:** How much validity does this claim appear to have?
* **Previous practice** and **reasonable expectation of EE:** What is the previous practice respecting this type of case and what expectations does the EE reasonably have from the treatment of earlier grievances?
* **Contrary interests:** What contrary interests of other EEs or the bargaining unit as a whole have led the union to take a position against the griever and how much weight should be attached to them?

### Rayonnier Canada v Int Woodworkers of America

**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? Does the union have a duty to refuse to proceed with a grievance the affected EE wants to pursue?

**R:** Union maintains control over grievances subject to duty of fair rep. Necessary for union to be able to say no to EEs in order to function successfully and maintain good industrial relations – not bring frivolous claims or claims with no merit

* 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, union must 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 language 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.

### Judd

Addresses what kinds of things would lead to successful complaint. S 12 not a mechanism for expressing general dissatisfaction with union. Meant for *narrow set of circumstances*: discrimination, arbitrary, bad faith, not representing everyone. It cannot be invoked anytime union makes decisions that are not in your intersts. Look at all the Unions conduct from beginning to end of grievance process 🡪 not isolated acts .

* **Bad Faith = e.g. representation with improper purpose**
	+ conspiracy with ER to have EE fired (does not include reaching same view as ER), intention to deceive employee (if dishonesty impacted ability to rep in good faith), personal hostility
* **Discriminatory Representation = e.g. discrimination on grounds broader than HR code, like personal favouritism**.
	+ But not discriminatory just because it leaves some employees in better position and others in worse position
* **Arbitrary representation = e.g. blatant or reckless disregard for the interests of the employee (greater scrutiny to more important interests)**
	+ Decision arbitrary where it is **not based upon any reason and exercise of judgment,** or where it is based on judgment but ignores interests of EE. Not arbitrary if union makes sure it is *aware of circumances*, the *possible merits of the grievance,* puts its mind to the case and ***comes to a reasoned decision whether to respond***.
* **Union must:**
	+ **1. Take reasonable efforts to ensure it is aware of relevant information (investigation)**
	+ **2. Make a reasoned decision ->** Reasons will help with finding reasonableness**,** but not required. may balance interests of EEs
	+ **3. Not carry out representation with blatant or reckless disregard (**does not include honest mistakes**)**

Judd on Section 13

**Section 13 of Labour code** limits DFR complaints – allows **Board to proceed with s 12 complaint only if it discloses “a case that the contravention of s 12 has apparently occurred”** – if sufficient evidence board must go on to adjuciate on the merits.

* But, Labour Boards sometimes proceed with *insufficient evidence* from unrepresented litigants who do not fully understand procedure. Board says this is ***not appropriate*** – legislature intended to narrow section 12 complaints, special mandatory threshold for these complaints. This intention should be given effect.

*Should EEs be able to bring complaints themselves? – re-read if theres time*

Bernard Adell in his excerpted essay suggests that individual employees be allowed to bring their grievances when the union is unwilling and when it affects their critical interests. Says it would not unduly undermine the union – e.g. by taking away their ability to reach agreements w/ employer that guarantee grievances won’t be filed. (p 618)

# UNION SECURITY AND UNION DISCIPLINE

## UNION SECURITY

There are different kinds of union security clauses that can be negotiated into the agreement. They determine the relationship between representation and membership.

* Level 1:
	+ Voluntary Check-Off
		- Required if union requests as statutory minimum **(see s 16),** Permits ER, **if the EE agrees**, to transfer dues directly from pay cheque to union. Amounts to an ER accounting mechanism for payment of union dues
		- This is voluntary, so people can choose to have their union dues taken off. Does not provide the union with much securirty (ensurance that employees will participate in union, enabling union to function)
* Level 2: Rand Formula (Agency Shop)
	+ **Dues are deducted as a mandatory deduction from every employee in the bargaining unit**
		- Whether they consent or not; whether or not they are member of union
		- In Federal Jurisdiction *this* is the statutory minimum level of union security
		- If under BC jurisdiction you can bargain for this (not prohibited, not required)
	+ Solves the free-rider problem - Compromise: **voluntary to join union but paying dues is mandatory**
	+ Exception: s 17 of Code - Exempts employees that have religious conviction that causes them to object to joining union or paying union dues

Union shop/Closed shop

* Closed shop: you have to be in union to get the job
* Union shop: once your hired you have to join the union in order to keep your job
	+ These are permitted in BC (s 15) if negotiated by the parties, union can agree to have an open or closed shop
	+ The only province to make it mandatory if union requests it is Saskatchewan

## UNION DISCIPLINE

A union may want to discipline EEs in a number of situations, for example, if the EEs do something to undermine the union (like collusion with management) or if they fail to pay union dues.

The general rule is that unions can discipline according to the union’s constitution, the labour code, and the collective agreement.

* Unions must follow the rules of **natural justice** when disciplining EEs: **s. 10(1)**

BC Code: **section 10** allows board to review union discipline of members, **section 15** allows inclusion and enforcement of union security clauses (requiring membership in the union in order to work in the workplace), but cannot exclude people from union on the grounds of other trade union membership, **section 12** prohibits a union from acting in a manner that is arbitrary, discriminatory or in bad faith in representating any of the EEs in the bargaining unit.

IN BC it is required that union disciplinary hearings comply with principles of natural justice – see section 10(1)

Coleman and Office and Technical Employee’s Union: requirements for union:

* members have right to know accusations against them and have particulars of charges, must be given reasonable notice of charges prior to any hearing, must be specified in the constitution and must be constitutional authority for ability to discipline, entire trial procedure must be conducted in accordance with the requirements of the constitution, right to a hearing, to introduce documents, cross-examine and make submissions, trial must be without bias, verdict based on evidence, **serious matters (eg expulsion or removal from office) involves a right to counsel.**
* BC code also prevents unions from disciplining, determining membership, imposing penalty, etc, in a discriminatory manner, or penalizing someone because they refused to participate in activity prohibited by labour code (10(3)

Penalizing EE for breaking strike:

* generally accepted that union may expel or discipline members who break strike. In some workplaces, expelling a member from the union means they cannot work there (closed shop).
* Some codes have job status protection – eg *Canada Labour Code* prohibits union from requiring ER to dismiss EE because they have been expelled from the union for reasons other than failure to pay dues
* To determine the status of EE who breaks strike, **necessary to examine the union’s constitution and membership rules**, the **union security provisions in the collective agreemen**t, and the statutory provisions on internal union affairs in the particular jurisdiction

Unions Can Discipline:

* According to terms of:
	+ Union Constitution
	+ Labour Code
	+ Collective Agreement
* Circumstances where union might want to discipline:
	+ During strikes, Not paying dues, Subverting union procedures
* What kinds of procedures are required before union can discipline?
	+ S 10: when union carrying out own internal procedures they must follow rules of natural justice
		- Generally taken to mean: right to procedural fairness, including reasons, impartial and unbiased decision maker
		- So can complain to board about this in BC

### Speckling

**F:** Union announced a ban on voluntary overtime. There are a lot of people on lay-off and membership should stop accepting overtime, put pressure on employer to recall people form the lay-off list. Union had passed this as a policy pursuant to legislation. Speckling disagreed. Union decided that they would fine people who took overtime the amount of their overtime + 50$ -> the penalty is not enormous. Speckling, and he refused to pay the fine. Union said if you don’t pay we will suspend your membership in the union, which means you wont work here anymore (closed shop) - they asked the employer to dismiss him, but the ER said would not dismiss him for refusing to not work overtime. The union then filed a greivence under the union security clause saying, you have to fire him because he is not in the union, that’s what the clause means. Agreed that Speckling could stay on if he paid fine, but he refused, was dismissed.

**I:** Is ER obliged to dismiss Speckling? **H:** Yes

**R:** Union is entitled to enforce union rules and fine members, so long as it is consistent with section 12. In a closed shop, greater scrutiny over union treatment of EE. **Union must have a cogent rationale for disciplining EE**

* **Upholds the ability of the union to enforce its security clause, even if that results in a dismissal of the employee where they have violated the constitution and been expelled from membership.**

**A:** S. 12 applies to how the union exercises their exclusive bargaining agency, it cannot be exercised in manner that is arbitrary, discriminatory or in bad faith. So the board looked at whether the union acted arbitrarily or in bad faith in how they dealt with Speckling

* **T**he board says: if the section 12 complaint is based on the employee being fired because they no longer fall under union security clause, that will demand a bit more scrutiny**.**
* Not a matter of correctness of decision, rather was it arbitrary or in bad faith
* So long as you can show a cogent rationale for preferring collective interest over individual interest, it will not be challenged
	+ S 12 cannot allow for inquiry into merits of union’s disciplinary process. Not an inquiry into whether the constitution was violated or breaches of natural justice were committed, but **whether the union acted in a manner that was arbitrary, discriminatory, or in bad faith**. The process leading to the EEs loss of membership in good standing is not w/in scope of s 12.
	+ To bring a case that principles of natural justice were violated or union constitution broken, must go through section 10.

### Birch

* **F:** Two workers crossed picket line during lawful strike and go back to work. They are suspended from membership for each day they cross, and they are fined. The two members refuse to pay the fine. Union goes to small claims court to try to collect the fines owing. The workers woud have made about $300 more by working rather than making strike pay.
* **I:** Do workers have to pay fine? **H:** No
* **A:** The suspension from the union is not challenged but they cant collect that fine, court found it was “unconscionable”
	+ What makes a contract unconscionable?
		- The stronger party took advantage of their greater power, and contract must be substantially unfair
	+ What makes this contract unfair? – the employees had unequal bargaining power relative to the union – it is a contract of adhesion
		- The employee has to take the union contract as they find it, that leads to inequality of bargaining power
		- And that agreement is substantially unfair -> the court did not find that fines are always unconscionable, but the problem here was that the fine was so high, it was gross pay rather than what they would have actually made
		- being kicked out of the union for three years is already a substantial penalty -> stigma and loss of union membership benefits

**R: If the union is going to penalize people it ought to be proportional to the actual loss to the union**.

* An issue with this logic is that the cost to the union is much higher because the strike is undermined. The union said that they were fining them how much their work was worth to the employer – this is how much the employer is prepared to pay out to have them in the workplace, the union said they were measuring the worth of the employee to the employer
	+ Board: “basing the fine on the value of the work to the ER does not make an excessive fin justifiable. It is the circumstances of the EE that determines whether the fine meets the test of substantial unfairness”
	+ Union solidarity is an important feature of collective bargaining, and unio can protect it, but not in a way that is very unfair
	+ **Dissent** said that there is innequality of bargaining power, but the employee is nto being taken advantage of.
		- The amount of the fine is not so high that it is unreasonable

## ROLE OF UNIONS IN SOCIETY

Unions lobby for the adoption of legislation that directly favours union interests, such as amendments to labour relations statutes, and for the adoption of social and economic policies that favour workers, minorities, and the non-working poor.

* Many unions, both federally and provincially, have chosen to align themselves with the New Democratic Party (NDP), either formally or informally

The court in ***Lavigne*** found that the use of Rand Formula union dues for purposes other than collective bargaining **does not violate sections 2(b) or 2(d) of the *Charter*.**

* Wilson J said s. 2(b) is not infringed because EEs are not restricted in any meaningful way from expressing contrary views

LaForest J, in his concurrence, listed two rationales:

1. **Industrial democracy**: It is important to democracy to not limit the uses to which contributed funds can be put; similar to the government being able to use our tax money against our wishes
2. **Economic resources for unions:** Supporting pro-union political parties are beneficial to the union as a whole and its individual members

### Lavigne

**F:** Lavigne argued that his rights under 2(b) and (d) were violated when the union uses his dues for political causes. L worked at community college, and community college is government for the purposes of the *Charter*, so *Charter* applies.

**I:** Does this use of funds violate section 2 rights? **H:** No.

**R:** SCC that 2(b) is not violated, L is able to express a contrary view. This expression is at the core of what we expect unions to do, there is nothing problematic about unions diong this.

* Wilson says: in many cases when unions engage in political activitiy, they are furthering the economic interests of their members (eg supporting the NDP). Can still campaign for measures that enhance the dignity of working people
* “it is a **built in feature of the Rand formula that union acitivities represent only the expression of the union as the representative of the majority of EEs. Not the voice of one and all in the BU**”
* Laforest adds: If union is deciding what causes to support by majority vote, that promotes industrial democracy.
	+ Also allows union to advance economic interests
* Court does suggest that the right to freedom of association might include a right not to associate – that is an important holding

### Advance Cutting

**F:** Ontario workers were going to Quebec to work construction. Quebec 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 QC because certificates were distributed regionally.

**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 Construction 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.

The difference between this case and *lavigne* was that **in that case, lavigne was not required to join the union, so he was free not to associate with the union despte the fact that his money went towards their expression.** In this case, the EEs are obliged to join the union, so they are forced to associate with an ideological group against their will -> violates right not to associate.

# CONSTITUTIONAL ISSUES

## SECTION 2D

### Deslisle and Dunmore

***Alberta Reference***– no right to organize, section 2d is an individual right, does not protect things that are inherently collective.

***Delisle*** - took the same approach but they open the door. In *Delisle* court says no right for police to organize. They also shut down section 15 argument by saying, occupation is not an analogous ground, and **in any case these are not vulnerable workers**. Leaves the question of what happens if workers were vulnerable workers?

***Dunmore***: Court says these are *vulnerable workers that will never have any say over their working conditions unless they can unionize.* Where exclusion from statutory regime effectively prevents people from exercising right to associate, it violates s 2d.

* + - * + this is basically a limited right to unionize – there is a right to come together in pursuit of collective goals
				+ Have to show that exclusion from legislative regime is a substantial interference with activity under s 2d
* Exclusion from statutory regime makes their exercise of this right impossible. SCC recognizes that **some inherently associational activities can be protected by s 2(d), not just about individuals coming together and doing lawful activities**.
* Some activities are **inherently associational, and this under-inclusive law violates the *Charter***. At least for these vulnerable groups, right should include right to organize. Industry is not so fragile that workers can’t have any say over their working conditions.
	+ unionization is an inherently collective activity.
	+ *Delisle* stated s 2d does not guarantee access to a particular labour relations regime where the claimants are able to exercise their s 2d rights independently
* **Section 2d requires single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?**
	+ W/out gov protection, vulnerable EEs exposed to unfair labour practices. There is a statute that protects unionization – must be asked whether, in order to make the freedom to organize meaningful, s 2(d) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups.
* Exclusion from protective regime may in some contexts amount to affirmative interference w/ the effective exercise of protected freedom. Underinclusive state action falls into suspicion where it substantially sustains the violation of fundamental freedoms
	+ Technically better to deal with underinclusion under s 15, but not appropraite where the underinclusion results in effective denial of a fundamental freedom such as the right of association itself
* Activities EEs seek are to exercise collective activities, such as making collective majority representations to one’s ER. These activities are guaranteed by the purpose of s 2(d), which is to promote the realization of individual potential through relations with others, and by internatinoal labour jurisprudence, which reocnigzes the inevitably collective nature of the freedom to organize.

### BC Health Services

**Short Version:**

- Health Services holds that section 2(d) includes a right to collective bargaining. Right to process of CB, not a particular outcome

- For a limit on CB to be unconstitutional, interference must be **substantial.** 2-part test to determine if the infringement is substantial

* Is the matter important to the process of collective bargaining and the capacity of union members to pursue collective goals?
* If so, does the measure negatively impact the collective right to good faith negotiation and consultation?
	+ **Section 2(d) is breached where the matter is important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation**

Fundamental Principle: S 2d protects the capacity of members of labour unions to engage in collective bargaining on workplace issues. It does not cover all aspects of “collective bargaining”; all that is protected is the right of employees to associate in a process of collective action to achieve workplace goals. Does not protect a particular outcome.

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| **F:** Gov adopted new employment act regarding health services workers. Union contested Part 2, which introduced changes to basic workplace rights such as contracting out and job security. It “invalidated important provisions of the collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues”. Passed w/out consultation with unions.**I:**Does section 2(d) protect collective bargaining? **H:** Yes**R:** S 2d protects unions capacity to engage in CB on workplace issues. Does not cover all aspects of “collective bargaining”, **but protects the right of EEs to associate in a process of collective action to achieve workplace goals.** Does not protect a particular outcome1. Section 2(d) is breached onlywhere the matter **is 1. important to the process of collective bargaining and, 2. has been imposed in violation of the duty of good faith negotiation**

**A:** Four propositions to support the claim that 2(d) includes collective bargaining**1.** **The past reasons for excluding collective bargaining from 2(d) no longer apply*** + In labour trilogy, SCC held that 2d did not extend to collective bargaining. The prior reasons for that should be rejected

*Prior Reasons:*A) The rights to strike and bargain collectively are modern rights created by legislation, not fundamental freedoms* Court rejects this reason: CB has historic importance and was not created by statute; it existed before hand and was simply protected by statute. Entrenchment of CB into statute demonstrates its importance, does not detract from fundamental nature of CB

B) Recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government relations –(claim that regulation of labour should be left to legislature)* + - *Alberta Reference* case - judges don’t understand labour relations, shouldn’t be getting involved - should be governed by policy makers
		- *Response:* judges should exercise restraint, but to declare a judicial “no go” zone for an entire right pushes deference too far

C) Freedom of association applies only to activities which can be performed by individuals – this is rejected by *Dunmore,* no longer applies* Some collective activities may by be incapable of being performed by an individual
* *Dunmore* advocated a contextual and purposive approach to 2(d), was clear in that government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-related interests violate the guarantee under s 2(d)

D) s 2(d) was not intended to protect the “objects” or goals of an association* CB has always been distinguishable from its final outcomes, It is possible to protect the procedure of CB without protecting the outcome

**2. Collective Bargaining Falls Within the Scope of 2(d)-** Purpose of charter guarantees are consistent with at least some protection for CBa) Canadian Labour History Reveals Fundamental Nature of Collective Bargaining* + Right to bargain long recognized as a fundamental right, pre-dating the charter, this suggests the framers meant to include it under 2(d)
	+ There has been a historical process of inclusion: Canadian workers did not have rights. Workers started using tactics like striking to force ERs to recognize unions and bargain with them – Canada finally adopted Wagner Act model to recognize fundamental need for workers to participate in regulation of their workplace - this confirmed the right to CB

b) Charter era: things like the *Labour Code* indicate 2(d) was intended to include CBc) International agreements that Canada is part of protect CB as part of freedom of association.d) Interpreting 2(d) as including a right to CB 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*, right to bargain collectively enhances those goals by giving them the opportunity to influence the workplace, a major element of their lives**3. Section 2(d) of the *Charter* and the Right to Collective Bargaining*** Section 2(d) should be understood as protecting the right of EEs to associate for the purpose of advancing workplace goals through CB

What does this entail for employees and employers?* Applies only to government - - in this case it is the government legislation that is being challenged
* protects the process of seeking to achieve goals through associational activity, It does **not** protect the *goals* of the activity, only the *process*
* Gov EEs have right to unite, present demands, and engage in discussions re workplace goals. This **imposes duties** on gov to meet and discuss with them
* 2d protects only against laws which have the *effect* of “**substantial interference**” with associational activity
* Not every interference will be important enough to invoke the *Charter*
* *“To constitute substantial interference, the intent or effect must* ***seriously undercut or undermine the activity of workers*** *joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their ER” (92)*
* The question in every case is **whether the process of voluntary, good faith collective bargaining between employees and employer has been, or is likely to be, significantly and adversely affected**
* This requires two inquiries, both must be proved to make out an infringement: substantial interference test

*1****. Is the matter important to the process of collective bargaining and the capacity of union members to pursue collective goals?**** If it is a matter that is not very important to the union, it may not discourage them from proceeding with CB **if it goes to the core in that it denies consultation about working conditions**, for example, it may be substantially interference

*2.* ***If so, does the measure negatively impact the collective right to good faith negotiation and consultation?**** ER must commit time and engage in meaningful discussion, no duty to reach an agreement or accept any particular provisions
* When content of the bargaining shows **hostility** from one party toward the CB process -> breach of duty to bargain in good faith

***If important and negatively impacts good faith negotiation -> breach of 2(d) ->*** Only where the matter is both important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation, will s 2(d) be breached.**4. Application to the case at bar**1. The *act* interferes with CB: interferes with matters of substantial importance to EEs, fails to safeguard the basic processes of CB

*Are these matters important to CB?* Yes* Provisions dealing with layoffs, contracting out, and bumping, deal with matters central to freedom of association
	+ Layoffs and contracting out: May impact ability to retain secure employment, essential element protected by union
	+ Bumping rights are integral part of the seniority system, which is of significant importance to the union
* Transfers and reassignments are not important- they are relatively minor modifications

*Do these provisions preserve the processes of collective bargaining?* No* measures involve virtual denial of right to process of good faith bargaining
* E.g. absolute prohibition on contracting out eliminates any possibility of consultation
* This is a significant interference with the right to bargain collectively

*Justified under section 1?* No- not minimally impairing and cannot be saved1. Workers had a right to negotiation in good faith about changes to their collective agreements, and consultation where the changes to the CB where the changes were substantial. Here gov has broken the CA and made unilateral changes, banned further negotiations on significant issues like contracting out. This violates those rights.

**Benedet:** this is important: if you’re just allowed to make union ER can just ignore you; can say we have no obligation to recognize you; point of Wagner act was to avoid striking and unrest for recognition; so fundamental part of the process is the duty to bargain. Simply being allowed to join a union doesn’t get you very far**Section 15 analysis**: the distinctions in the Act relate essentially to segregating different sectors of employment, the differential or adverse effects of the legislation on some groups of workers relate to the types of work they do, not the kind of people they are. There is no evidence of stereotypical application of group or personal characteristics. No s 15 violation |
| ***Dissent:*** Only if there has been interference with a process of negotiation should the court turn to the issues importanceThe substantial interference test is problematic* First inquiry: The matter affected is not the threshold issue when a claim is being evaluated under s 2(d) – the primary focus of the inquiry should be whether the legislative measures infringe the ability of workers to act in common in relation to workplace issues
* Second inquiry: The focus is not on the impact on the right but on the manner in which the measure is accomplished, it also considers the circumstances such as spiraling health care costs which are better placed in a section 1 analysis

A better test: Two inquiries: The first is into whether the **process of negotiation between ERs and EEs or their representatives is interfered with** in any way, and the second into **whether the interference concerns a significant issue** in the labour relations context.allows court to focus on substance of the right rather than indirectly protect the substance of the clauses in collective agreements |
| **Questions:** What is the relevance of vulnerability of workers? Court excluded section 15 analysis, yet only cases that have been successful in establishing section 2d claims have involved vulnerable workers (farm workers in *Dunmore,* women/immigrant workers in *Health Services*) |

### Fraser

**Short Version:**

In Fraser, the court considered whether the AEPA, the act which governs agricultural employment, was constitutional. The act gave the employees the **right to join an organization and make representations to their employers regarding the work environment**. **ERs obligated to provide the employees with notice that they had read their representations.** **No requirement to consider them and negotiate in good faith.** *Health Services* requires legislation governing employment to require employers to negotiate in good faith on matters of importance to the workplace. The court found that the AEPA was constitutional, even though it did not include this explicit requirement. They found that **the good faith obligation was implicit in the** act. This conclusion was based on 3 conclusions: 1. A statute should be interpreted in a way that gives meaning and purpose to its provisions. 2. Parliament and legislature are presumed to intend to comply with the *Charter* and 3. The Minister expressed an that the legislation intention ensure that freedom of association is meaningful.

***Ratio:*** An act that does not include an explicit obligation to negotiate in good faith on matters of importance can be constitutional if that obligation is implicit. (the judgment does not say how to determine whether it is implicit, however I assume the three reasons given in this case could be applied elsewhere)

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| **F: 1994**: NDP extended collective bargaining to agricultural workers. 1995: Conservatives repeal extension to farm workers. 2001: *Dunmore* strikes down the 1995 law, says farm workers have to be included in the right to organize. 2002: Agricultural Employee Protection Act - legislation said that the ER must allow agricultural workers to form and join an employee’s association, and give the association the opportunity to make representations respecting terms and conditions of employment, and it must listen to those representations or read them.**I:** Does the act meet the constitutional standards established in *Health Services* and *Dunmore*? (Does the legislative scheme render *the pursuit of workplace goals impossible*, therey *substantially imparing the exercise of the s 2(d) associational right?*) **Holding:**Act is constitutional**R:** The requirement to bargain in good faith is met, as it is an implicit requirement of the Act**A:** Union argued act violates section 2(d), because to meet the constitutional requirements the act must have 1. Statutory protection for majoritarian exclusivity (single bargaining agent), 2. A statutory mechanism to resolve bargaining impasses and interpret collective agreements, and 3. A statutory duty to bargain in good faithJudicial History* *Dunmore:* right to associate to achieve workplace goals in a meaningful and substantive sense is protected 2d - extends to collective goals
	+ 2(d) guarantees freedom of associational activity in pursuit of individual common goals -> these goals extend to some CB activities. The right requires a process that permits the meaningful pursuit of these goals. A a process that renders impossible the meaningful pursuit of collective goals substantially interferes with the exercise of the right to free association, it negates the very purpose of the association and renders it effectively useful
	+ *Dunmore* established that claimants must demonstrate the substantial impossibility of exercising their freedom of association in orer to compel the government to enact statutory protections
* *Health Services:* legislation and gov actions that repealed collective agreements and substantially interfered with possibility of meaningful CB constituted a limit on 2(d) - barginaing activities protected by 2(d) include good faith bargaining on important workplace issues
	+ this requires parties to meet and bargain in good faith on issues of fundamental importance in the workplace, people have a right to pursue worplace goals and CB activities related to those goals. 2(d) requires parties to meet and engage in meaningful dialogue, but it does not require a particular model of bargaining nor a particular outcome
* 2(d) protects right to associate to achieve collective goals, laws that make it impossible to achive collective goals have the effect of limiting freedom of association – 2(d) protects CB in a derivative sense, CB right derives from right to associate to achieve collective goals – it does not protect any particular kind of bargaining. Therefore, no particular model of achieving collective goals is protected, issue is whether the legislative scheme renders the pursuit of workplace goals impossible, therey substantially imparing the exercise of the s 2(d) associational right

**Application**Question is **whether the AEPA makes meaningful association to achieve workplace goals effectively impossible – if it makes good faith negotiation effectively impossible then it infringes 2(d)*** Does the AEPA provide a negotiation prcoess that supports EEs right to make representations and have its views considered in good faith?
* The act says ERs must give EEs reasonable opportuntiy to make representations repsecting the terms and conditions of employment, and ER must give acknowledgment of having read them - there is **no obligation to respond to the representations or engage with them**

Court finds: They do not expressly refer to requirement to consider representations in good faith, but **by implication they include such a requirement**. This conclusion is absed on three considerations:1. A statute should be interpreted in a way that gives meaning and purpose to its provisions. So to fulfill the purpose of reading or listening, the employer must consider the submission in good faith, without a closed mind
2. Parliament and legislature are presumed to intend to comply with the *Charter*
3. Expresed intention of the Minister in debates on the legisation – she stated that the **intention is to ensure that freedom of association is meaningful.** Gov therefore must have intended that achieve whatever is required to ensure meaningul exercise of freedom of association
* Evidence shows that union attempted to engage employers in CB activities, and on each occasion ER ignored or rebuffed further engagement - ER have refused to recognize their association and have refused to meet and bargain with it
	+ Court finds this history does not establish that 2(d) has been violated. Union has not made a significant attempt to make the act work, process has not been fully explored and tested. The tribunal can deal with violations by the ER.

**Conclusion:** the AEPA does not breach s 2(d) of the CharterSection 15: no discrimination - the *AEPA* does not provide all the protections that the LRA extends to many other workers, however, a formal legislative distinction does not establish discrimination. There is no substantive discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage***Concurring Decisions:*****Rothstein:** The act is constitutional. *Health Services* was wrong in constitutionalizing an obligation to bargain in good faith. 2(d) allows individuals to associate and engage in associational activities, but it does not impose duties on others, such as a duty to bargain in good faith*Response to Rothsteins arguments:*Rothstein argued that *Health Services* represents a “radical departure” from previous jurisprudence and was wrongly decided, *Health Service*s should be overruled. The short answer is that *Health Services* should not be overturned.* Caution should be taken in overturning precedent: Rothstein’s arg doesnt meet high threshold required to overturn precedent of the SCC
* Arguments on the jursiprudence: *Health Services* is consistent with jurisprudence. The triology did not negate the current state of the law, and *Dunmore* supports it – *Health Servicies* simply enunciates the principles already established in *Dunmore*
* Purpose of S 2(d): Individual vs Collective Rights: Rothstien argues the recognition of a constitutional right to CB is not supported by the pupose of 2(d) because it assigns collective dimension to individual rights
	+ *Health Services* stated 2(d) as an individual right that may require the protection of group activity- *HS* was constistent with the previous cases on the issue of individual and collective rights- recognized that **2(d) is an individual right, but that to meaningfully uphold this right, 2(d) may require legislative protection of group or collective activities**
	+ Bargaining is a derivative of association, not a free-standing right, so it does not matter that the bargaining right is not available to individuals, it is available as a derivative of individual right to association
* The argument that section 2(d) is a freedom, not a right: Rothstein thinks *HS* wrongly converts a negative freedom into a positive right, but a bright line between the two is impossible to maintain.
	+ *Dunmore* and *HS:* freedom to associate may require state to take positive steps- dvision between rights and freedoms is not so rigid
	+ *HS* does not impose a duty on private employers- duty is on the state to impose statutory obligations on employers as a result of a positive right against the state to a process of CB in good faith
* Argument that *HS* privileges Particular Associations : Rothstein argues the effect of *HS* is to privileges particular associations, because the court must consider what goals are acceptable and what are not. However, *Dunmore* does not say the right must be content-neutral, it says that it must be interpreted in conjuction with international and *charter* values
* Argument that *HS* removes judicial deference to the legisation: Rothstein argues that *HS* undercuts judicial deference courts owe to legislature in labour relations. This rests on argument that *HS* enshrines Wagner model, which it never did- courts may still defer to legislature on particular laws, but they can still make decisions about the scope of the right and its protection, more generally
* Rothstein also criticizes particular arguments from *HS:*
1. reference to canadian labour history and internaional law - disagrees with the *HS* discussion of labour history, court says its about current charter values and guarantees, not pre WWII history.
2. Disagrees that IL supports a finding that 2(d) includes right to CB. Court says, charter must be interepreted in light of Canada’s international commitments, which support right to CB (eg the ILO).
3. He criticizes use of Charter values – court says value-oriented approach is endorsed by jurisprudence

*Conclusion:* Decision in *Health Services* is consistent with precedent, Canadian values, international commitments, and purposive interpretation of *Charter* guarantees, it should not be overturned***Dissent (Abella)***: Agrees with the majority’s assessment of *Health Services,* and conclusion that CB is protected by 2(d). Disagrees over whether the AEPA meets the *Health Services* standard. Majority stretches the interpretive process in a way that converts clear statutory language and legislative intent into a completely different scheme – the AEPA does not protect, and was never intended to protect, CB rights* The act itself requires nothing more than that the ER listen, read, and acknowledge receipt of the representations
* Compare to the linguistic markers set out in *Health Services* - language used is **negotiate, meet, good faith, engage, exchange, dialogue, consultation, discussions, consideration, accomodation, union – the act has none of these, not even the word “bargaining”**
* The AEPA was a good faith implementation of the *Dunmore* version of s 2(d), but it is not sufficient given the revised scope of the right established in *Health Services*
	+ In negotiating, ER gave union opportunity make oral representations but said it had no obligation to bargain towards a CA. This is *consistent* with the text of the act. **The explicit failure by text and by design to include a process of collective bargaining, let alone in good faith, is a violation of 2(d)**
* The absence of a statutory enforcement mechanism and of majoritarian exclusivity is also an infringment
	+ *Dunmore* extended protections to anything essential to the meaningful exercise of the right, this now extends to CB as per *HS*
	+ There is no point in having a right in theory – it must be realizable, there must be an enorcment mechanicm to resolve bargaining disputes and ensure compliance if and when a bargain is made
	+ a statutory mechanism for enforcement does exist, but that doesn’t help if it cannot address the rights guaranteed in *HS* – the tribunal should not be asked to interpret the statute in a manner that contradicts the statutory language and legislative intent
	+ SO: should ER be required to bargain only with the union selected by a majority of ths EE (majoritarian exclusivity) – Yes, it is essential to meaningful exercise of bargaining rights, lack of exclusivity allows ER to promote rivalry, and divide the workplace, undercut credibility of the union. This inevitable splintering of unified representation is particularly undermining for vulnerable employees – agricultural workers are among the most economically exploited and politically neutralized individuals in our society

Not Justified by Section 1: “Preventing all agricultural workers from access to a process of CB in order to protect family farms, no matter their size or character, is ths antithesis of minimal impairment” |

### CUPE v New Brunswick

Excluding casual workers from memberhsip in a union under the labour relations act violates section 2(d). It interferes with their ability to collectively bargain. The fact that casual workers can form a casual worker association does not rectify this problem, they are a vulnerable group of EEs, so pursuant to *Dunmore,* there is a positive obligation on the state to include them in protective labour statutes.

## SECTION 2B

### BCPSEA v BCTF

**F:** Teachers posted flyers and disrtibuted to parents info about gov cutting funding, increasing class sizes. Administrators removed it. BCTF filed griavane about school boards removal of flyers from union bulletin baords and files intended for parents. Argued schools board’s actions were contrary to *Charter* and s 8 of *Labour Relations Code*

**A:** School board can only limit this expression if teachers political expression in the workplace is not constitutoinally protected. If it is, then this is a violation of that protection. Cannot be the case – discussing political issues relevant to school adminstration with parents serves at least on of the values underlying s 2b. Expresison has a wide definition and wide breadth – political expression is not excluded because of the role or the location of the person exercsing the right.

* could be limited under section 1 – objective is to ensure public confidence in school system and ensure parent-teacher meetings are effective, but not minimally impairing – blanket prohibition was not minimiually impairing. Teacher should be allowed some scope to discuss class sizes in meetings about childrens education – if teachers failed to actually discuss the actual child in these meetings, disciplinary action may be warranted. But blanket prohibition on any conversation about this matter is overbroad.
* **Dissent:** promotion of political agenda should be limited in schools . when teachers collectively use school property to espouse or advocate for a paritcular political agenda, an open and supportive environment conducive to the sharing of ideas is undermined. Discussing class sizes does not do this – it may inspire confidence in system. The provision is overbroad in this respect. However, it is not overbroad to prevent teachers from posting political messages in the school

# EMPLOYMENT DISCRIMINATION

## MEIORIN GRIEVANCE

**F:** Female firefighters did not meet fitness test, prevented from working as firefighters. The test was based on male standard, no evidence that this standard was required in women to enable them to do their job.

**I:**Is this discrimination?

**H:** To determine whether a person has been discriminated against, decision-makers must undergo a two-step process:

1. Claimant must establish a *prima facie* face of discrimination - made out claimant experiences adverse treatment on a protected ground,. Generally speaking, if an EE is unable to complete a required work task as a result of one an enumerated grounds -> adverse treatment.
2. Once established, onus shifts to ER to show that discrimination is a BFOR: A three-step test:
3. First, ER must show that it **adopted the standard for a purpose rationally connected to the performance of the job**. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose.
4. Second, ER must establish that it **adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.**
	1. If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory animus, then it cannot be a BFOR.
5. Third, ER must establish that the **standard is reasonably necessary to the accomplishment of that legitimate work-related purpose**. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
	1. the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

**R:** Claimant established prima facie case discrimination. Gov satisfied the first 2 steps of the BFOR analysis. However, **failed to demonstrate that this particular aerobic standard is reasonably necessary to identify those persons who are able to perform the tasks of a forest firefighter safely and efficiently.** Did not establish that it would experience undue hardship if a different standard were used.

**A:** Employers designing workplace standards owe an obl**igation to be aware of both the differences between individuals, and differences that characterize groups of individuals.** They must build conceptions of equality into workplace standards.

* To the extent that a *standard unnecessarily fails to reflect the differences among individuals*, it violates human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible.
* In determining BFOR, some of the important questions that may be asked in the course of the analysis include:
	+ Has the ER investigated alternative approaches that do not have a discriminatory effect, such as individual testing against more individually sensitive standard?
	+ If alternative standards were investigated and capable of fulfilling the ERs purpose, why were they not implemented?
	+ Is it necessary to have all EEs meet the single standard for the ER to accomplish its legitimate purpose or ***could standards reflective of group or individual differences and capabilities be established?***
	+ Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
	+ Is standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies? (**if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR.)**
* Two problems with the government firefighting testings procedures:
1. they were largely descriptive, and merely describing the characteristics of a test subject does not necessarily allow one to identify the standard minimally required for the safe and efficient performance of the job
2. Studies **failed to distinguish female test subjects from male test subjects, who constituted the majority of the sample groups.** The record therefore **did not permit a decision as to whether men and women require the same minimum level of aerobic capacity to perform a forest firefighter's tasks safely and efficiently.**

**Lecture Notes**:

* Early discrimination law developed 2 different tests to be applied to direct discrim and adverse effect discrimination
* They said if it is direct discrimination the only way to justify it is if it is a BFOR (bona fide occupational requirement) – no need to accommodate, you can exclude directly if it is a BFOR
* For adverse effect, the justification is that accommodation would be undue hardship for the employer
* The problem is that it is not always easy to categorize different kinds of discrimination as falling in one category or another
	+ Example: alcohol/drug testing – does this discriminate against EEs on the basis of disability (drug or alcohol addiction)
	+ One way to look at this is to say it is a neutral rule that applies to all EEs, accommodate these workers to undue hardship
	+ OR: you can say this is targetting alcohol and drugs, it is direct discrimination, so the question is, is it a BFOR? – if so you can just exclude these people from the workplace - there is no accommodation requirement
* This was dealt with in *Meiorin,* set out new unified test for discrimination
* They said it no longer matters whether the discrimination is direct or adverse effect, the test is now:
	+ 1. Is there a prima facie case of discrimination of either case?
	+ 2. Can it be justified:
		- A. was the discrimination adopted with a rational connection to the job?
		- B. did the employer have an honest and good faith belief that the standard is necessary (subjective- tests the bona fides)
		- C. is standard reasonably necessary for the job?
			* as part of this test we ought to question the standard itself, Instead of saying standard is fine, we should question whether these standards really are required for doing particular jobs – maybe the standard has all kinds of assumptions embedded in it. In *Meiorin* the issue was that the structure was based on the male norm, so it was not an acceptable standard - Real focus: are fitness tests themselves inherently discriminatory
* Accodomation question: the issue with accomodating a few people who are adversely affected by neutral rule is that it doesn’t actually address discrimination. It makes an exception, expects people to assimilate into the larger group. The appropriate approach should be to develop a standard that accomodates all people, rather than make exceptions to a fundamentally discriminatory standard
	+ “under the conventional analysis, if a standard is classified as being neutral at the threshold, its legitimacy is neber questioned. Focus shifts to whether an individual can be accommodated, but the formal standard remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how different individuals can fit into the mainstream represented by the standard”
* Meiorin basically established a low prima facie test and a high accomodation standard

## SEXUAL HARASSMENT

Sexual harassment = form of sex discrimination

### Janzen v Platy Enteriprises Ltd

Sexual harassment is sex discrimination. Discriminatino does not require uniform treatment of all members of a particular group. It is sufficient that ascibring to an individual a group characteristic is one factor in the treatment of that individual. Arg. That discrimination requires identifcal treatment of all members of the affected group is dismissed in *Brooks* (pregnancy case) – reasonsing similar, “only a woman could be subject to sexual harassment by a heterosexual male”. That some women are not harassed is not a defence, the cruial fact is that it was only female employees who ran the risk of sexual harassment. (like brooks).

* Sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex. – one of the purposes of anti-discrimination legislation to remove such denials of equality of opportunity.

### Shaw v Levac Supply Ltd

**F:** Shaw worked for Leva, frequently teased by a male co-worker. She complained to management and was ignored. Teasing including: mimicking speech, teasing her about weight, suggesting she was incompetent

**I:** Is this sexual harassment?

**A:** To express or imply sexual unattractiveness is to make a comment of a sexual nature. The comments were “sexual put-downs”, indicating she is not sexually desirable. Even if the harassment is not sexual, if it is harassment because of someone’s gender it is discriminatory.

**Eg:** repeated sabotage by male EEs of a female co-workers safety equipment, due to resentment of a woman in the workpace, has been reocgnized as a form of sexual harassment. – claimant must prove a link between harassing conduct and her sex.

## DISABILITY DISCRIMINATION

Disability discrimination unique because it is so diverse, and can change over time. Disabilities may get better or worse, can be permanent or temporary, and anyone can acquire a disability.

### Shuswap Lake v BC

**F:** Nurse diagnosed with bipolar, had manic episode at work. Made a mistake with some medication. ER said if doctor could not guarantee that relapse would be predictable, should would be fired. Could not be guaranteed.

**I:** Would accomdation of her mood disorder would impose undue hardship on the employer?

**A:** Claimant was educated, in treatmet, showed willingness to agree to broad range of conditions, and continued to show willingness for whatever the employer felt it needed. She worked in a context in which there were available accomdative measures that had been working. ER standard was a standard of perfection, it was uncompromisingly rigid standard that was impossible for her to meet

* However, ER had serious concern about the tolerance for risk within the workplace. Patients saftey is a very legitimate concern
* The question then became: how do we balance these two compelling interests?
	+ Placed a series of conditions on the EE – need to manage illness in a responsible way, reinstated on the basis of those conditions. Reinstates her with a long list of conditions – to monitor herself, continue treatment, etc. ER is supposed to provide coworkers with ability to recognize her illness – indicates accomodating duty is on the EE and the ER.
* Conditions on page 828

### McGill University Health Centre v Syndicat des employes de l’Hopital general de Montreal

**F:** EE was on disability leave. The CA had an amount of time that ER was required to maintain an EEs job before they could let her go. After that time passed, she was let go. Union alleged that ER failed to accommodate EE, amounting to disctimination

**I:**Is it discriminatory to rely on a clause in the CA in determining accommodation rather than a case by case basis?

**R:** The parties to a CA may negotiate amount of time of absence when termination will be acceptable. However, this period is just a factor to consider when assessing the duty to accommodate, it **does not definitively determine the specific accommodation measure to which an employee is entitled, since each case must be evaluated on the basis of its particular circumstances.** Cannot be less than what is available under human rights legislation. Consider CA but cannot apply it mechanically.

- undue hardship resulting from the EEs absence must be assessed globally starting from the beginning of the absence

- Must also consider EE’s ability to facilitate accommodation, if there is no chance of EE retunring anytime soon, this may be undue hardship

**A:** The fact that the time is in the CA indicates that the ER and the union conisdered the characteristics of the enterperise and agreed that, beyond this period, the ER would be entitled to terminate the sick person’s employment. This was more than statutory requirement in *Human Rights Code –* therefore *a priori* not suspect. However, **the scope of the duty to accommodate varies according to the characteristics of workplace, specific needs of each EE and the specific circumstances in which th decision is to be made**. **Reasonable accommodation is therefore incompatible with the application of a general standard** – the arbitrator is entitled to review the standard and ensure that it is consistent with duty to accommodate. ER cannot apply termination of employment clause without considering EEs specific circumstances.

* ‘termination of employment clause will be applicable only if it meets the requirements that apply with respect to reasonable accommodation, in particular the requirement that the measure be adapted to the individual circumstances of the specific case. If the period provided for in the termination of employment clause is less generous than what EE is entitled to under principles applicable to the exercise of human rights, the clause will have no effect… the **clause should provide for a generous accommodation likely to meet the needs of as many EEs as possible.”**
* Determining undue hardship resulting from EE absense must be viewed globally, from the beginning of the absense. Assess circumstances in light of all the events. Arbitrator was right to consider the fact that EE had no prospect of returning to work, **EE has a role to play in the attempt to arrive at a reasonable compromise, in this case EE had no propsect of returning to work, this cant really be accomodated**. If EE thought the time in CA was insufficient, and that she needed more time in which she would be able to return, she needed to provide this information to the arbitrator as a reason to extend time beyond CA.

### Hydro-Quebec v Syndicat des employe etc

**F:** non-culpable absenteeim. Due to illness, etc, EE missed 960 days of work in 7 years of employment. Doctors notes said she would be unable to work regularly without absenteeism. She was dismissed.

**I:** Can ER dismiss EE for chronis absenteeism, where that absenteeism is non-culpable?

**R:** The ER can dismiss EE for absenteeism that results from disability if they have tried to accommodate that EE, the EE is unable to work even under these accommodations in the reasonable future, and any additional accommodations that would enable EE to work amount to undue hardship. A complete restructuring of business operations, or substantial hampering of business if EE cannot work indefinitely amounts to undue hardship.

- follows McGill, **that undue hardship looked at globally in all circumstances**, not from the point at which termination occurred.

**A:**  Standard for proving undue hardship: don’t need to show it is impossible to accommodate, but that accommodation will amount to undue hardship. Purpose of duty is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted wihtout undue hardship. Purpose is not to comletely alter the essence of the contract of employment, that is, the EEs duty to perform work in exchange for remuneration. 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 EEs workplace or duties to enable the EE to do his or her work. “If the characteristics of an 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”

### Central Okanagan School District v Renaud

**F:** Custodian is a 7th day adventist and physician has a Friday night shift as part of it. ER offers a four day work week in order to get around this, this would require some modification to the CA, the union says no and refuses to ask anyone if they will switch shifts with the grievor.

**I:** What is the scope of the duty to accommodate religious beliefs of EEs, and to what extent is that duty shared by ER?

**R:** Duty to accommodate is on the ER, the EE and the union. Union may be liable for failure to accommodate if it has been involved in developing the impugned rule or practice, or if it impedes the ERs efforts to accommodate. If union opposes an accommodation that does not amount to discrimination against other EEs, they have no met duty to accommodate.

* EE must also participate in accommodation – has a duty to facilitate the implementation of a proposal for reasonable accommodation. EE cannot expect perfect solution, if they turn down solution that is reasonable in the circumstances, the ERs duty is discharged

**A:** Undue hardship means that some level of hardship is allowed, that means some financial cost may be incurred before it is undue harship. Further, accommodation may impact other EEs rights

* union liable for discrimination only where it is party to discrimination.
* May become party in 2 ways:
	+ 1. By participating in the formulation of the work rule that has the discriminatory effect,
	+ 2. If union impedes reasonable efforts of ER to accommodate. If acccmodation is only possible with unions cooperation, and the union blocks the ERs efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination.
		- When union considers reasonable accommodation, their focus is on the effect on other employees. The duty to accommodate should not subsittue discrimination against other EEs for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Test of undue hardship as it applies to a union will often be met by showing prejudice to other EEs. This is a high standard, but it is required to remove discrimination and promote religious freedom in the workplace.

## SYSTEMIC DISCRIMINATION

Systemic discrimination refers to web of factors which lead to the udner-representation of particular groups in the workforce, or overrepresentation in low-level jobs. EG – stats canada – immigrants earn way less than canadian born workers

**Hum & Simpson:** women, aboriginal peoples, persons with disabilities, and visible minorities are disadvantaged under federal employment equity legislation. Black, latin american men born in canada earn less. Other visible minorities there is no difference until citizenship features. Is this disadvantage from immigration circumstances or race? To achieve racial equality in the workplace there needs to be focus on enabling immigrants to participate in the workforce.This may require a focus on helping immigrants adjust and integrate. There is also still a huge amount of anti-black racism, including against Canadian-born black men. This is a huge problem.”Persistent disadvantage of black men in Canada (and now Latin American men) should neither be submerged in a multicultural discourse nor confided exclusively within a ‘visible minority’ context.”

Section 15 has not included the requirement to institute employment equity legislation, no duty to combat systemic discrimination.

# EMPLOYMENT STANDARDS

Statutory regulation of employment relationship. Sets a floor of rights for all workers, unionized or not. This is rooted in basic recognition of inqueality of bargaining power (recongition of basic ILO principles – labour is not a commodity, people have right to certain level of compsenation on the basis of human dignity)

* many EEs cant access collective bargaining effectively, this sets a floor of right for negotiations that may lead to more just outcomes. you can say it takes certain things out of competition – cant compete over basis standards

Also look at globalization – this makes it posisble to move work to other jurisdictions where standards are not as onerous, you may be trading off rights for some for jobs for others

How do you avoid race to the bottom in employment standarsd in a globalized environment?

* employment standards legislation is criticized for being a one size fits all approach
* the model may not take that into account – doesn’t match certain kinds of industries
* putting these rights into statute does not ensure that people who have these rights violated will be able to do anything about it
* also issue of coverage – many areas of employment are excluded from the act – listed in act and regulations

### Renaud

**F:** Person working as a caregiver for a man who is a ventilator dependent quadroplegic. there are times when he may not need care, but needs someone to be there in case of emergency

**I:** is the caregiver entitled to be paid for the hours she is on call, not just the hours she is providing care?

**A:** if she is then she would get additional hours and overtime, there is a lot of money at stake. Renaud points out that if she is covered she would earn about $600 per day when the minimum daily wage is $70 per day for live in workers.

- issue comes down to whether she is an employee under the ESA. There are various categories in the work that cover these care workers

Eg residential care worker, Eg night attendant, live-in personal support worker. There is also the category of “sitter” – a person employed in a private residence solely to provide services of attending to a child, disabled or infirmed person - does not include- nurse, domestic, live-in, etc. Sitters are wholly excluded from employment standards act. Tribunal finds that she is not any of those definitions, and is just an employee covered by ESA. On appeal they find that she is a sitter, does not get ESA protections

Who can you exercise employment standards rights against?

* Difficult in vertically integrated industries. E.g. the garment industry.
* Ontario case on this 🡪 J Crew

J Crew is at top. They contract with various other companies to produce clothers. These companies in turn contract with other sub-contractors. Until finally there are individual sewers hired to produce clothing. Worker in this case is an immigrant from China, she does not speak English. Hired by company called Eliz World 🡪 doing work out of home and producing garments on piece-work basis. Doing this for a number of large clothing brands. She is claiming that she was not paid wages she was actually owed. There were times where she should’ve been paid overtime/vacation time and wasn’t. Special rules for piece workers but they are entitled to certain portions of the act. Has about 5 000 in claims she wants to bring. But not only wants to bring it against direct employer but also up the chain against J Crew. Also looking to be certified as representative plaintiff in class action. J Crew has the money (makes the class action work) and they are the ones that are really calling the shots and what the conditions are going to be 🡪 they have control. If they instruct Eliz World to behave in certain way things will change. And they’ll only do that if they have some liability. Better for them to have as many layers between them and bottom to insulate their liability.