555 Labour

GLOSSARY

Agency shop/the RAND formula: type of union security clause. Employees are not required to join the trade union but non-members must pay the union an amount equal to the dues paid by members.

Arbitration: dispute resolution mechanism where there is an arbitrator or panel of arbitrators. The arbitration process is set out in the collective agreement (it will specify whether individual or panel. If panel, there's one arbitrator submitted by employer/1 by union/1 agreed to).

Bargaining agent: a TU acting as agent for, or as a body involved in, collective bargaining. See: 1(1)(v).

Bargaining rights: rights of workers to negotiate w/ the employer concerning terms & conditions of the employment. ALSO includes the right of the bargaining unit to choose the bargaining agent..

Bargaining unit: Group of employees of an employer who are part of the unit that organize, become certified, and have a relationship with the bargaining agent. See: LRC 1(1)(y)

Certificate: doc issued by Labour Relations Board in AB to provide rights to union or bargaining agent wrt recognition of its rights → doc that grants rights to union or bargaining agent.

Closed shop: type of union security clause. A person must be a member of the union before being hired by the employer and must remain a member in good standing as a condition of employment. Dues are obligatory.

Collective agreement: Contract b/w employer and bargaining agent/union containing the terms & conditions of employment. See: LRC 1(1)(f).

Collective bargaining: to negotiate w/ view to the conclusion of the collective agreement; process for employer and union to negotiate terms of the collective bargaining agreement (i.e., the contract)

Discipline provisions: mostly talk about ***just cause*** → termination or discipline has to be rendered for cause

Dues check off: type of union security clause. Compulsory deduction of union dues upon written authorization of the employee, subject to religious belief exception.

Grievance: type of pleading filed by the union *or* the employer. Grievances can be (1) individual – i.e., deal with one employee & their rights; (2) policy – i.e., deal with group of employees.

Lockout: employer closes place of employment & suspends work. See LRC 1(1)(p).

Maintenance of membership: type of union security clause. New employee need not join the union but those who are already members must maintain their membership and pay dues as a condition of continued employment

Management Rights: sets out rights of employer wrt making decisions related to day-to-day work

Rand formula: rejected mandatory union membership BUT approved an automatic dues cheque-off (i.e., you automatically elect to pay dues if you become a member).

> [70] The Rand Formula, of course, is the historic Canadian union security compromise between the competing principles of freedom of association and exclusive bargaining authority: see *UAW v. Ford Motor Company,* reproduced at Canadian Labour Law Reporter ¶ 1245 (Rand J.). It requires an employer to remit union dues or funds equivalent to union dues to the union on behalf of all employees in the bargaining unit, but does not require employees to become members of the union. The Rand Formula avoids compelling employees to belong to an organization they do not wish to join, while giving the bargaining agent income security and avoiding the divisive phenomenon of "free riding," in which all members of the bargaining unit get the benefits of collective representation while only some pay its costs. It is so obviously a reasonable compromise between these legitimate competing policy issues that it is widely sought as the minimum union security provision that a bargaining agent will accept. For the same reason it has been made a statutory minimum union security provision in several provinces and the federal jurisdiction.

(quote from *GCIU v Southam*)

Right to reinstatement: if member can prove there was not just cause for their dismissal, they have a right to have their job back

Strike: stoppage/cessation of work, refusal to work, or refusal to continue working by 2 or more employees acting in combination for the purposes of compelling their employer to agree to better terms & conditions of employment. See LRC 1(1)(v).

Term: start and end date to collective agreements followed by renewal and negotiation)

Unfair labour practice: violation of the LRC done by the union or the employer. Complaint is brought to the Labour Board for adjudication & Board determines whether there has been an unfair practice.

(Trade) union: organization of employees w/ constitution, rules, or bylaws. It has, as one of its objects, the regulation of relations b/w employees and employers. See: LRC s1(1)(x).

Union recognition: recognizes union as the exclusive bargaining agent, management can't negotiate personally with ppl

Union security arrangements/security clauses: the ways in which unions negotiate payment into their collective agreements

Union shop: type of union security clause. All current and future employees must join the trade union within a specified time after they are hired and must remain as members in good standing as a condition of continued employment. Dues are obligatory.

INTRODUCTION

Labour Law Background

- **Contractual**: all employment is a matter of contracts
- **Collective contract**: labour law deals with the collective contract b/w employees and employers
- **Legislative framework**:
  - Employment: *Employment Standards Code*, RSA 2000, c E-9 ("*ESC*") → applies to unionized and non-unionized workers and employers
    - Employment Standards Office → deals with administration of the ESC
  - Labour: ***Labour Relations Code*, RSA 2000, c L-1 ("*LRC*")**
    - This is the legislation we will deal with.
    - Labour Relations Board Office → entity that administers & enforces LRC.

Employment Contracts

- b/w employer & employee
- Subject to *ESC* and *Alberta Human Rights Act* (*AHRA*)

Alberta Human Rights Act (AHRA)

- **Prohibits discrimination** on enumerated grounds:
  - race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person
- *AHRA* **applies** to:
  - **all employers, employees,** and **unions**.
  - **decisions to employ** or continue to employ
  - any **term** or **condition** of employment
  - employees seeking **accommodation** on one of the enumerated grounds
- Complainants can enforce rights either through Human Rights Commission and Tribunal or through arbitration process
  - Commission may defer complaint to arbitration process when employee subject to collective agreement
  - NOTE: there is **concurrent jurisdiction** in AB between Human Rights Tribunal AB & arbitrators
- **Cannot contract out of AHRA in CA**
- **Role of Arbitrators**: can enforce & apply human rights issues → often this will happen in unions where there are greater resources (i.e., time & money) available to advance the issues than a single employee does.
- **EXCEPTION to *AHRA*:** Employers can discriminate if it is a **Bona Fide Occupational Requirement ("BFOR")**
  - **TEST**: For discriminatory standard to be BFOR, it must be
    - for a **purpose rationally connected** to job
    - adopted in **honest** and **good faith** belief

        - **reasonably necessary** for legitimate work-related purpose
        - **impossible to accommodate** without **undue hardship**
            - This is the biggest point for analysis → ask → would it cause the employer undue hardship to accommodate that requirement?

Personal Information Protection Act (PIPA)

- Governs the **collection**, **use**, and **disclosure** ("**C/U/D**") of **personal information**
- **General rule: must have consent for C/U/D**
    - **EXCEPTION** – when employers can C/U/D w/o:
        - For the purposes of **establishing, managing, or terminating** employment/post-employment **relationship**
        - C/U/D is **reasonable**
        - **Individual notified** of C/U/D and purposes
- Competing privacy rights vs. labour rights
    - Application in labour law:
        - Applies to surveillance in the workplace and disciplinary investigations
        - Arbitrators may apply PIPA to exclude evidence from surveillance or investigations

Occupational Health and Safety (OHS)

- **Cannot** contract out of OHS
- **Provides rules** for occupational health and safety in the workplace
- **Creates obligations** for both employers and employees
- Substantive rules contained in "OHS Code"

Labour Relations Code (LRC) – 4 overarching principles

Four overarching **principles** in the code:

1. Employees **may elect to associate and bargain collectively** rather than individually.
2. The LRC sets out the **process for collective bargaining**.
    - **Collective bargaining**: process for employer and union to negotiate terms of the collective bargaining agreement (i.e., the contract)
3. Employees gather with those of like community of interests (**bargaining units**) → we want the employees to have something in common that relates to their interests
4. Employees **select a Union** to become the bargaining agent for the bargaining unit.
    - There may be multiple unions vying for membership of the employees.

Features of Collective Agreements

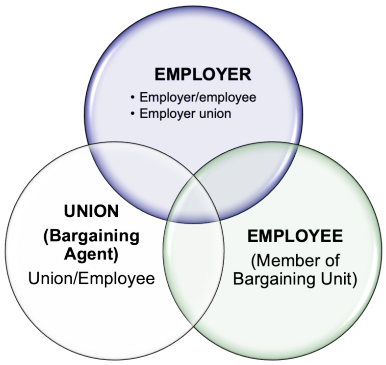
- **Union recognition**: recognizes union as the exclusive bargaining agent, management can't negotiate personally with ppl
- **Term**: start and end date to collective agreements followed by renewal and negotiation)
- **Management Rights:** sets out rights of employer wrt making decisions related to day-to-day work

- **Grievance Process**: method to initiate grievances until they are resolved through discussion and agreement or referred to arbitration
- **Discipline provisions**: mostly talk about **just cause** → termination or discipline has to be rendered for cause
    - **Right to reinstatement:** you have a right to reinstatement in most cases in the union context (if you can prove there was not just cause, you have a right to have your job back) → this is a major diff b/w employment contracts and collective agreements

Principle underlying Labour Law/the Course

- **Labour is fundamental to identity** *(**Ref re Public Service**)*
    - "A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth" *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.).
- Personal issues at stake in labour disputes often **go beyond the obvious issues of work availability and wages**. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to **self-understanding**, as well as to the ability to **influence one's working and non-working life**. Moreover, the **imbalance** between the **employer's economic power** and the relative **vulnerability of the individual worker** informs virtually all aspects of the employment relationship: see ***Wallace v. United Grain Growers Ltd***., [1997] 3 S.C.R. 701 (S.C.C.), at para. 92, per Iacobucci J.

HISTORICAL OVERVIEW OF LABOUR LAW IN CA



General Background

- Labour law is **political** and **policy-driven**
- It's a comparatively "new" area of law, and it has had to struggle for recognition: it is an area of law that was "born in the streets"
- We are in the middle of a "turning point" in labour law – **collective bargaining as fundamental freedom under the *Charter***
- Right to strike is constitutionally protected (SCC in ***SK Fed of Labour***)

Timeline of Key Events

1. 1872: The fight for a shorter work-week
    a. Toronto print workers walked off the job; refused to work 10 hours/day, 7 days/week.
    b. John A MacDonald passed Act that recognized unions (it was previously illegal to strike)
2. 1919: The Winnipeg general strike
    a. More than a strike against one employer
    b. General strike: workers across all labour sectors went on strike altogether (this effectively brought Winnipeg to a standstill)
    c. Culmination: bloody Sunday (RCMP rode in on horseback and fired at crowd)
3. The birth of Unemployment Insurance
    a. Came after the Depression
    b. "On to Ottawa" trek by people in Unemployment Relief Work Camps
4. 1945: Windsor's Ford strike
    a. Pre-1945 → no mechanism for union to collect dues at pay, so unions had to go and try to get money from members in person
    b. Went on strike for 99 days.
    c. Post-1945 → Rand decision/formula
5. The Rand decision
    a. **Rand formula**: rejected mandatory union membership BUT approved an automatic dues cheque-off (i.e., you automatically elect to pay dues if you become a member).
    b. Everyone who benefits should pay → if you benefit from union pushing higher wages, you should pay. This made for more harmonious labour practices & ensured the union had money to fund strikes/arbitration/etc.
6. 1956: Founding of the Canadian Labour Congress
    a. Country-wide org to help unions work together toward common goals.
7. 1965: Public service workers win bargaining rights
8. 1960s: The right to safety at work and occupational health and safety legislation
9. 1971: Maternity benefits
10. Other types of parental benefits (e.g., adoption) ongoing.

Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27 – stages of history + *Wagner Act*

1. Supreme Court of Canada finds that s. 2(d) of the Charter protects procedural right to collective bargaining
2. Right to collective bargaining predates statutory labour relations regimes
3. In the course of its analysis, majority review history of labour relations

Repression (Middle Ages to 1870s):

- Law limited workers' rights to unionize and bargain collectively
- **Common law**
    - Doctrine of "criminal conspiracy" – agreement whereby employee refuses to work expect at stipulated rate amounted to criminal conspiracy
    - Trade societies were "conspiracies in restraint of trade"
- **Legislation** prohibited 2 or more workers from combining in attempt to increase wages, decrease hours of work, or persuade anyone to leave or refuse work.

- E.g., *England's Combination Acts* (1799 and 1800) made it a criminal offence to be a member of a union, to call a strike, or to contribute money for union purposes
- E.g., *Combination Act* (1825) eased up a bit: no longer criminal for trade unions to negotiate wages/hours of work, but offence to induce employees to join labour organization or to strike, and no obligation on employers to recognize unions

Tolerance (1870s to 1930s):

1. English Royal Commission on Trade Unions (1867) – recommended better legal recognition for unions
2. Legislation introduced to immunize unions from criminal conspiracy laws
3. In Canada, as recently as 1872, charges for criminal conspiracy laid against Toronto Typographical Union
4. Led to the Trade Unions Act (1872) – no worker could be criminally prosecuted for conspiracy for attempts to increase wages, decrease hours of work or improve working conditions
5. Still the "economic torts" loomed large (i.e., could still be liable if the union goes on strike)
    a. Tort of economic interference
    b. Inducing breach of contract (e.g., union goes on strike & employer loses a contract)
6. **Legislative vacuum**: there was no legislative obligation upon employers to "recognize" (i.e. bargain with) unions
    a. There was no legal status for unions wrt to their status as bargaining agent → as a result, unions had a lot less power.
7. Employers could refuse to hire union members, or just refuse to bargain with unions altogether (today: this would be "**unfair labour practice**")
8. The result? A bloody mess. Literally. And economically. Unprecedented number of "recognition" strikes (e.g., Winnipeg General Strike, Lawrence Textile Strike). Massive economic disruption.

Recognition

1. US introduced 'game-changer' legislation with the National Labour Relations Act (1935) ("Wagner Act")
    a. If an employer coerces, intimidates, interferes w/ the choice, that is an unfair labour practice.
    b. This is the first leg of its kind in North America
2. And so "modern model" of collective labour relations was born
3. Developed in the context of depression, economic strife caused by strikes was damaging to capitalist economy that was already weak
4. Industrial clashes of 1930s

The *Wagner Act*

Objectives of the *Wagner Act*

1. **Industrial Peace** → needed to moderate "industrial warfare" that was damaging economy, and resulted in political turmoil, violence and uncertainty
2. **Collective bargaining** → Act sought to enhance by providing mechanisms for CB
3. **Sought to redress unequal bargaining power**
4. **Free choice** → protect workers' choices to associate among themselves, and to chose who would represent them/bargain on their behalf
5. **Remedy underconsumption** → stimulate economic recovery and prevent future depressions by increasing worker purchasing power *this is for the benefit of employers
6. **Industrial democracy** → intended to promote "democratic" workplace – sense of worth and participation

Main Components of ***Wagner Act***

1. Entrenched **right of employees to belong to TU of their choice** (and trade union, period)
2. **Prohibited unfair labour practices** (acts of coercion or intimidation by employers to discourage union activity)
3. Imposed **duty to bargain in good faith** with unions on employers
4. **Established National Labour Relations Board** – administrative body to investigate unfair labour practices, supervise certification votes, therey removing labour law from judiciary
    a. Certification vote: results in a union becoming (or not becoming) certified as the bargaining agent.
    b. This moved labour adjudication from the court's jurisdiction to the board's jurisdiction, making it **more accessible & quicker** to get a resolution.

Canada Adopts "Wagner" Model

- By end of 1930s in Canada, most provinces had passed similar legislation
- Characteristics of "Wagner Model" can still be seen today in Alberta's Labour Relations Code

International Covenants

- By 1972, Canada had acceded to/ratified three foundational international covenants with language protecting collective bargaining:
    - *The International Covenant on Economic, Social, and Cultural Rights*, 999 UNTS 3
    - *The International Covenant on Civil and Political Rights*, 999 UNTS 171
    - *The International Labour Organization's Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, 68 UNTS 17

Discussion: What are some shortcomings in the employer/ee relationship? What might need "fixing"

- **Power imbalance**/inequality in bargaining power
- **Financial resources** (discrepancy b/w employee/rs)
- Recognition of **seniority** & **tenure** in consideration of promotion, selection to new positions, termination (e.g., if made redundant through organizational restructuring, termination as a disciplinary action)
- **Right to reinstatement** → unions have negotiated a right to reinstatement.
    - If employee terminated wrongly, they can get their job back.
- Limited mechanism for **dispute resolution**
    - Collective agreement outlines dispute resolution process to address inequities.
    - Provides mechanism for quick resolution of matters.

7 Fundamental Principles of Canadian Labour Legislation

These principles guide all legislation in *LRC* & *Canadian Industrial Relations Code*

1. Employee **freedom of association** (right to belong to union) and union recognition
    a. Individual bargaining prohibited.
2. **Compulsory bargaining rights** for certified trade unions
3. **Postponement of right to strike** until after government intervention through conciliation
    a. To have a legal strike, you must have access to conciliation through the LRC. Legal strikes offer protections
    b. Illegal strikes (AKA "wildcat strikes") have consequences such as fines, arrests, etc.

4. **Prohibition of** range of **unfair labour practices** by employers and unions (there are consequences for contravention)
5. Establishment of **legal status** and **enforceability of collective agreements**
    a. Collective agreements are contracts, so they follow the general principles of contract law (i.e., legal status & enforceability)
6. Provisions for **resolving disputes** without resorting to strikes → peace & stability in the workplace
7. Establishment of **regulatory bodies** with investigative and control powers over labour relations (e.g., Labour Relations Board in AB, Canadian Industrial Relations Board)

TRADE UNIONS AND EMPLOYER ORGANIZATIONS – LEGAL STATUS OF UNIONS

What is a Trade Union?

Trade union: "trade union" means an **organization of employees** that has a **written constitution, rules or bylaws** and has as one of its objects the **regulation of relations between employers and employees** (Section 1(x) of the *LRC*)

Unions have different def'ns for locals (can be restricted by region, workplace, job, etc.)

E.g., United Food and Commercial Workers Union (UFCW) → AB has a local, other provinces have a local & these locals report to national and national in turn reports to international
E.g., United Nurses of Alberta → locals are divided into different types of nurses

Sections of the LRC:

Right to belong to a TU, Division II, s 21

21(1) An employee has the right
(a) to be a member of a trade union and to participate in its lawful activities, and
(b) to bargain collectively with the employee's employer through a bargaining agent.

Division III, ss 24 –29

Filing requirements, s 24

A trade union **must file** with the Board a **copy of is Constitution**, bylaws or other constitutional documents

It must also file the **names and addresses of its executives** (i.e., president, secretary, officers and other organizers) and the **names of the officers** who are authorized to sign collective agreements.

Suspension or expulsion from trade union, s 26

Members of the trade union **cannot be expelled or suspended** or be the subject of **disciplinary action** or **penalty** for any reason other than a **failure to pay the periodic dues assessments and initiation fees** required to be paid by all members **unless**:

- **personally served** or by doubly registered with specific charges in **writing**
- **reasonable time** to prepare the person's defense
- afforded a **full and fair hearing** including the right to be represented by counsel
- That person has been **found guilty** of the charges, and or has **failed to pay a monetary penalty after** being given **reasonable time**

Deduction of union dues, s 27

Unions are entitled to **deduct union dues directly off of a member's check** *(recall: this wasn't historically the case, but now it is)* → Employers can't deduct off employee's pay check UNLESS its a deduction for union dues.

An employee may provide written authorization for the employer to deduct wages and amounts payable to the employee for union dues and initiation fees not exceeding one month of dues

The employer shall **remit to the trade union** named in the authorization the **dues deducted for the proceeding month** by the 15th day of each month and a written statement of the name of the employee for whom the deduction was made, and the amount or percentage of the employees wages

Obligatory union membership permitted by code, s 29

Nothing prevents a trade union from entering into a collective agreement whereby **all employees are required** to be members of the trade union.

Union has ability to **negotiate exclusive rights to all employees** of a particular employer – SO, you **cannot opt out of the collective agreement** if a union has negotiated this into the agreement (most unions have this in the agreement)

EXCEPTION – if an employee because of his or her **religious convictions** objects to joining the trade union or objects to paying the dues or assessments of trade union, the Board may order that the provisions of the collective agreement not apply to the employee so that the employee is not required to join the union and instead the parties may agree on a charitable organization to whom the dues are to be permitted, or failing such agreement the Board may designate a charitable organization.

Capacity of trade unions, s 25

for the purposes of this act a trade union is capable of:

- **prosecuting** and **being prosecuted**, and
- **suing** and **being sued**
- a trade union and its acts are not unlawful by reason only that one or more objects or purposes are in restraint of trade.

Union Security Arrangements, s 27

Union security arrangements/security clauses: the ways in which unions negotiate payment into their collective agreements

There are **five** approaches to union security arrangements/union security clauses:

1. **The union shop**: **all** current and future employees **must join the trade union** within a specified time after they are hired and must remain as members in good standing as a condition of continued employment. **Dues are obligatory**.
   - E.g., Safeway is a union shop (excl. management)
2. **The closed shop**: a person **must be a member** of the union **before being hired** by the employer and must remain a member in good standing as a condition of employment. **Dues are obligatory**.
   - E.g., Carpenter's Union, Boilermakers Union
   - Process: register in the Carpenter's Union & then get access to the "job board" to get employed by employers offering on the job board.
   - Religious exception likely still applies here, but prof wasn't sure what that would look like.
3. **Agency shop/the RAND formula**: employees are **not required to join** the trade union but **non-members must pay the union** an amount equal to the dues paid by members
   - Now required in Alberta if requested by the Union that employers will allow for the agency shop arrangement (s 27(5))
   - Because non-members benefit from the union, they still have to pay the dues.
   - It's more of a response to people not wanting to be in a union. This way they don't have to be in the union but the union still has an income
4. **Maintenance of membership**: **new employee need not join** the union but those who are **already members must maintain their membership** and pay dues as a condition of continued employment
5. **Dues check off:** s 27 provides for **compulsory deduction of union dues** upon **written authorization** of the employee, subject to religious belief exception.

Legal Status of Unions

- Historically, at common law, trade unions were treated as unincorporated associations.
- They were not natural persons or legal persons (i.e. corporations), so it was difficult for an employer to sue unions. Having said that, companies regularly attempted to take legal action against unions, usually the organizers/individuals (torts, etc. – *recall history*)
- **Under s 25 of the Code**, **unions now have the capacity to sue or be sued or be prosecuted for the purposes of this act**
- Some uncertainty as to whether a trade union can be sued in its own capacity for reason other than a breach of the code – see this in statutory language and SCC decisions (*Berry v Pulley*, *Maritime*, *Fullowka*)

VIDEO: "The Structure of Unions"

Maritime Employers' Association v ILA Local 273 et al (1978), [1979] 1 SCR 120 – TUs = legal entities & therefore can be subject to injunctions

F:
- This involved a legal strike, during which harbor police established a line at the entrance to the port.
- Members of three other stevedores (loading and unloading cargo) union refused to cross picket lines (in solidarity w/ the other employees) which effectively shut down the port → Refusing to cross the picket line amounted to illegal strike and as a result the Court issued an injunction against the union to cease and desist the illegal strike (i.e., the members of the other stevedores)
- The union appealed the injunction arguing that an injunction could not issue against unincorporated trade unions

H:
- Court noted that unions are given a lot of rights under labour legislation and the rights and obligations **can only be carried out by legal entities**. **As such the unions were legal entities capable of being subject to an injunction.**
- The Court did not determine whether or not the legal entities might be subject to an action outside of the exercise of their rights under the Code

Liability of Trade Unions (see s 25)

Recall: s 25 – capacity of trade unions

Criminal Contempt

United Nurses of Alberta v Attorney General (1992 SCC)

R: unions can be held liable for breaching statutes *(this is because they have legal status and therefore corresponding obligations)*

F:
- Nurses engaged in a wildcat (i.e., illegal) strike when nurses were prohibited from going on strike b/c they provide an essential service (NOTE - the law has changed b/c it violates the Charter to prohibit striking. Now, nurses have to sign an agreement when they wish to strike that outlines a plan for how to handle a strike while still providing essential services using a rotating strike)
- The Board found UNA unlawfully threatening a strike. The Board issued a directive ordering UNA to cease and desist threatening an unlawful strike, and not to hold a strike vote.
- On the same day, members voted to strike; UNA served strike notice.
- Board declared that UNA had violated directive and gave notice orders would be filed with the Court
- Notwithstanding, UNA struck. It was a highly publicized strike with many press conferences and media attention. President of UNA acknowledged that UNA was in breach of orders.
- AG brought a motion against the union for criminal contempt of court and it was fined $250,000 and 10 days later a further $150,000.

I: Can a union be held liable for criminal contempt?

H: Yes – can be liable for criminal contempt at common law.

A:
- Cited *Maritime Employers* case for the principle that unions can be sued for breaching a statute

- Notes that s 25 of *LRC* makes unions capable of suing or being sued
- Common law denied unions legal status to impede the effective enforcement of collective agreements (**this no longer applies**)
- **Along with legal status for collective bargaining purposes, unions have corresponding obligations.**
- **If unions exercise rights unlawfully, the Court can impose all remedies available**.
- Note – tension b/w whether this was criminal or civil contempt
    - Some members of the court thought it was civil contempt b/c "more than public conduct is necessary to transform a defiance of a court order into criminal contempt."
    - Other members said it was criminal contempt because it constitutes a public act of defiance → since members were arrested, it looks more crim.

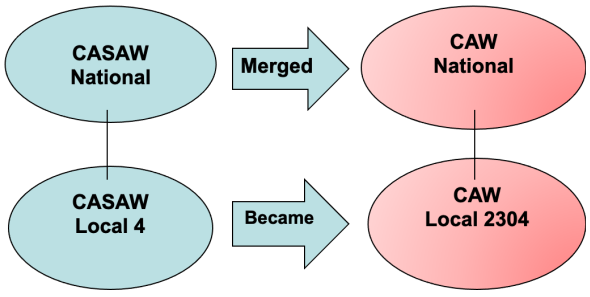
Fullowka v Pinkerton's of Canada Ltd, 2010 SCC 5

R: Locals can be separate legal entities. Fact-specific **TEST** to determine whether locals and nationals are separate:
- Relevant **statutory framework**
- Union's **constitutional** documents
- Provisions of applicable **collective agreement**
- **Merger documents** (if applicable)

R: Issue of vicarious liability depends on whether the conduct of the union members occurred during discharge of assignment given to them by the union

R: no liability conferred for unions that have failed to prevent torts of others that are beyond the union's control

F: Giant Mine murder in 1992.
- During a prolonged strike the employer brought in replacement workers, and although this is legal in Alberta (and NWT) it nevertheless resulted in significant violence on the picket line.
- Roger Warren, one of the striking miners, broke into the mine and planted a bomb inside. The bomb detonated as a man car full of replacement workers traveled down the track. Nine of the replacement workers were killed & Warren was convicted of nine counts of second-degree murder
- union was the Canadian Association of Smelter and Allied workers, and two years after the fatal explosion this union merged with the Canadian Auto Workers union also known CAW (and now known as Unifor, after recent merger with CEP)
- As a result of the death the plaintiff sued many parties in tort, including the government, the security company it hired, and the unions.



I:
1. Was the local a separate legal entity from the national union?
2. When are unions vicariously liable for the torts of the members?
3. Are the unions liable for inciting the mass murder perpetrated by Warren?

A:

Locals can be separate legal entities:

- TJ previously considered the national & locals as one legal entity → SCC rejects this, saying National Union and Local Union are separate legal entities
- Court cites previous SCC jurisprudence, including ***Berry*** & ***Maritime Employers***
- **Local Unions may have separate legal existence from affiliated National Union**
- To determine whether locals and nationals are separate, courts will consider:
  - **Relevant statutory framework**
  - Union's **constitutional documents**
  - Provisions of applicable **collective agreement**
  - **Merger documents** (if applicable)
- Court finds CASAW Local 4 separate from CASAW National
  - This could be different in other cases, depending on **facts**
  - Here, the **statutory framework** indicates Local 4 is separate (Local 4 certified bargaining agent under Canada Labour Code, with exclusive bargaining authority;
  - The **Collective agreement** also indicates Local 4 separate (Local 4 only party to collective agreement with employer, and recognized as exclusive bargaining agent)
  - **Constitutional documents** confirm Local 4 is separate from National
    - Deals with establishment of local unions
    - Consistently differentiates between national and locals
    - Funds and assets of local belong to local
    - Local can make bylaws as long as not inconsistent with constitution
    - Autonomy of local to be fostered and encouraged
  - **Merger Agreements** between CASAW National and CAW National relevant in this case
    - Assets and other rights to remain with Locals
    - Merged local has autonomy to make decisions on local union matters
    - Merged locals has right to secede and take assets

Vicarious liability is not automatic (dependent on whether conduct occurs during discharge of assignment given to them by union):

- On the facts in this case, national not vicariously liable
- Leaves open possibility that national vicariously liable for actions of local if national "controls" local
- **Unions are not vicariously liable for the torts of their members automatically** – there is not the kind of control over unity of purpose for there to be *prima facie* vicariously ability. Differs from the employment relationship with respect.
- If a member of the union is given a specific task to do on behalf of the union and commit a tort in the course of that assignment then this may result in vicarious liability. **Issue of vicarious liability depends on whether the conduct of the union members occurred during discharge of assignment given to them by the union**
- The murders in this case were not committed in the course of this sort of assignment – member clearly acting on his own

Not liable for inciting mass murder

- there can be indirect liability for tort of another where a defendant incites the other person to commit a tort
- **unions cannot be liable simply for taking actions that led to a strike and organizing the picket line** → these acts themselves did not pose any threat to the replacement workers
- while the union had knowledge that violent acts might occur, this was not enough to attract liability – **no liability can attach for failing to prevent torts of others that are beyond the union's control**

Berry v Pulley

Principles:

F:

- Pilots for Air Canada and five regional airlines including, Air Ontario, were all members of one union, CALPA . Under the unions' merger policy the president could issue a merger declaration whereby even if there was no merger in the corporate sense, it still triggered a merger process whereby the seniority list of Air Canada and the five regional airlines, were integrated.
- An arbitration was held to determine how the seniority list would be integrated.
- Air Canada pilots wanted the seniority lists from the regional airlines to be "endtailed", resulting in all pilots from regional airlines being lower in seniority than the Air Canada pilots. The arbitrator decided against this – as such, some Air Canada pilots had less seniority than other regional airline pilots. **Air Canada pilots refused to abide by their arbitration award and formed their own Union**.
- Ontario pilots brought an action against the Air Canada pilots in their personal capacity. The action was framed in tort, alleging conspiracy, interference with economic relations, and interference with contractual relations. The Air Ontario pilots also brought an action for breach of an alleged contract and Union Constitution.

I: Can union members sue other union members for breaches of the union Constitution?

A:

- Traditionally unions had no legal status, and as a result of this members could not sue the union itself
- In response, the common-law developed a "legal fiction" to enforce duties of unions to their members.
  - The Union Constitution bound the individual members to each other in a "web" of contractual relations. Each union member owed contractual duties to each other member
  - In the modern context where unions have been recognized by legislation as entities with rights and obligations, this legal fiction is no longer necessary. Unions can now enter into contracts directly with each member and his contract is shaped by the union Constitution and by the provisions of statutory labor relations scheme.
  - It is no longer necessary or desirable to maintain the legal fiction of a web contractual relationships between members of the union
  - **Union members would not reasonably expect that they can be held personally liable for breaching the union Constitution** – makes more sense that the union would be responsible
- Tort claim may exist between union members
- four principles to keep in mind from this case:
  1. Unions can enter into membership contracts directly with each of their members
  2. Terms of these contracts are shaped by the union Constitution overlaid by provisions of labor legislation
  3. Union members have no contractual obligation to other union members under the Constitution
  4. Union members can be liable in tort to other union members

Employer's Organizations

- S. 1(n) – group of employers who form organization to collectively bargain (as employers)
- Board has determination power
- Employers have right to belong to EO and bargain collectively through EO
- EO can also sue, be sued, prosecute, be prosecuted – in short, same sort of status as unions
- Particularly important in context of construction industry – registration

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FEDERAL VS PROVINCIAL JURISDICTION

Anticipate a fact pattern that applies the analysis we do today.

- Approximately 10% of Canada's workforce is federally regulated
- **Federally regulated employees** in Alberta are **NOT** governed by *Alberta's Labour Relations Code*; they are governed by the ***Canada Labour Code***
- *Canada Labour Code* is a comprehensive "umbrella" statute with different "parts" that govern unionized and non-unionized employees (it's like Alberta's Employment Standards Code, Occupational Health and Safety Act and Labour Relations Code all rolled into one)

Labour Relations Code (LRC)

4(2) This Act does **not** apply to…

(c) employers and employees in respect of whom this Act does **not apply** by virtue of a **provision of another Act** [i.e., piece of legislation]… *(i.e., federally regulated employees do **not** apply to the LRC, but CLC)*

Canada Labour Code (CLC)

Labour standards are important for our purposes, not the OHS or other requirements.

Applicability, *CLC*, s 4

This Part applies in respect of employees who are **employed on** or **in connection with** the **operation of any federal work, undertaking or business**, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

- Employed on ≠ employed by, instead it can "be in connection with"
- If they're employed by, on, or in connection with the operation of federal work, undertaking or business

Federal Work, *CLC,* s 2

2 In this Act,

federal work, undertaking or business means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with **navigation** and **shipping**, whether inland or maritime, including the **operation of ships and transportation by ship anywhere in Canada**,

(b) a **railway, canal, telegraph** or other work or undertaking connecting any province with any other province, or **extending beyond the limits of a province**,

(c) a **line of ships** connecting a province with any other province, or extending beyond the limits of a province,

(d) a **ferry** between any province and any other province or between any province and any country other than Canada,

(e) **aerodromes, aircraft** or a line of **air transportation**,

(f) a **radio** broadcasting station,

(g) a **bank** or an authorized foreign bank within the meaning of section 2 of the Bank Act,
(h) a work or undertaking that, although wholly situated within a province, is before or after its execution **declared by Parliament** to be for the **general advantage of Canada** or for the **advantage of two or more of the provinces**,
(i) a work, undertaking or business **outside the exclusive legislative authority of** the legislatures of the **provinces**, and
(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act;

Process to Determine Jurisdiction

Is the labour question federal or provincial? Look at s 2 of the *Canada Labour Code* & the following checklist:

- ☐ banks
- ☐ marine shipping, ferry and port services
- ☐ air transportation, including airports, aerodromes and airlines
- ☐ railway and road transportation that involves **crossing provincial** or **international borders**
- ☐ canals, pipelines, tunnels and bridges that **cross provincial borders**
- ☐ telephone, telegraph and cable systems
- ☐ radio and television broadcasting
- ☐ grain elevators, feed and seed mills
- ☐ uranium mining and processing
- ☐ businesses dealing with the protection of fisheries as a natural resource
- ☐ some First Nation activities
- ☐ most federal Crown corporations
- ☐ private businesses necessary to the operation of a federal act

If something falls in one of these checklist areas, you should go through the above analysis

*****keep in mind that jurisdictional issues can be "tactical" depending on whether federal or provincial legislation allows for more favourable outcome*****

- NOTE - you can file in both jurisdictions. If one doesn't work out, then at least you have the other.

Tessier ltee c Quebec (Commission des lesions professionelles), 2012 SCC 23 – provincial jurisdiction

R: Federal gov't has jurisdiction to regulate labour relations in two circumstances:

1. **Direct**: Is the the employment related to a work, undertaking, or business within the legislative authority of Parliament? If not, then ask:
2. **Derivative**: (**FUNCTIONAL TEST**) is it an integral part of a federally regulated undertaking? (i.e., a derivative jurisdiction)
    a. **Essential operational nature** of a work, business, or undertaking is assessed to determine if that ongoing nature renders the work integral to a federal undertaking

b. Focus analysis on **relationship b/w the activity, particular employees under scrutiny, and the federal operation** that is said to benefit from the work of those employees.
c. Whether workers working on the federal undertaking are working in an integrated fashion w/ other employees or are a separate & distinct unit that can be carved out? Relationship is to be considered from the perspective both of the federal undertaking and that of the work said to be integrally related, **assessing the extent to which the effective performance of the federal undertaking is dependent on the services provided by the related operation, and how important those services were to the related work itself**
d. NOTE – **exceptional aspects of an enterprise do not determine its ongoing character**/essential operations.

F:
- Tessier rented out heavy equipment and cranes
  - Provided technical, operational, supervisory, and consulting services with crane leasing
- Operations located entirely **within Quebec**
- Some of its cranes used in **stevedoring activities** (i.e., it was used in shipping)
  - Only 14% of Tessier revenue and 20% of salaries paid to employees were from stevedoring activities (note – these are low)
- Tessier employees involved in stevedoring were **fully integrated** with the **rest of the company** (i.e., there was no subsidiary unit for stevedoring; it was fully integrated)

Proc Hist:
- Tribunal-level:
  - Tessier applied to Quebec's OHS agency, the CSST, for declaration that Tessier was federally regulated
  - Argued that stevedoring activities are part of federal government's jurisdiction over shipping
  - CSST found that Tessier was provincially regulated
- Superior court: held it was federal jurisdiction
- Queen's Bench equivalent in QB: held it was provincial jurisdiction

I: Can the feds have jurisdiction over labour relations?

H: Yes – "In short, if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification. Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province."

A:
- Presumptively, provinces have jurisdiction over labour relations
  - Section 92(13) of the *Constitution Act*, 1867

Parliament has jurisdiction to regulate labour relations in **two** circumstances:
1. **Direct**: Employment relates to **work within** legislative **authority of Parliament**
2. **Derivative**: Employment is integral part of federally regulated work

Application of Functional Test:
- Analyze the enterprise
  - consider only ongoing character → does the work, business, or undertaking's "essential operational nature" bring it within a federal head of power?
  - The true function–or is its essential operational nature–is **cranes**, not shipping. This doesn't anchor Tessier's enterprise to the federal head of power "shipping"
- **STEP 1: Is there direct jurisdiction?**
  - Stevedoring not itself subject to federal regulation directly
    - Does **not** engage in transportation activity that crosses interprovincial boundaries
  - SO, Stevedoring work or undertaking is only federally regulated if its integral for federal work or undertaking (i.e., step 2 of the test)
- **STEP 2: Is there derivative jurisdiction?**
  - When considering derivative jurisdiction:

    - Focus is on **relationship** between activity, particular employees, under scrutiny, and federal operation that is said to benefit
    - Not considering whether "stevedoring" is integral to federal head of power (i.e. shipping)
- SCC notes that it has previously applied derivative jurisdiction in cases where:
    - Services provided to federal undertaking formed **principal part of employer's activities** (e.g., if 90% of services provided to the federal undertaking of stevedoring);
    - Services provided to federal undertaking performed by employees who form a **functionally discrete unit** (e.g., if the stevedoring unit was separate from the rest of Tessier's work force)
- *Note – This was the first time the Court applied derivative jurisdiction where employees performing services to federal undertaking integrated with employer's other, provincially regulated activities* → precedent setting case b/c having two different codes applying to the
    - **In short, if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification. Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province**
- Important to distinguish affect of integration when applying direct jurisdiction test rather than derivative jurisdiction test
    - If Tessier was a direct federal undertaking, integration would mean <u>all</u> of its activities were federally regulated
- Core factors in *Tessier*:
    - Tessier **primarily** a heavy equipment **rental company**
    - <u>Some</u> of its activities supported federal undertakings
    - **Essential operational nature is local**
    - Tessier **provincially regulated**
- Application of the test (my summary): Essential operational nature is local: the activity is primarily local & the majority of its efforts are provincially regulated activities. The portion of the activity that falls under a federal undertaking is relatively minor compared to the overall operation. As a result, Tessier's employees are governed by provincial OHS legislation.

Northern Air Solutions Inc v UFCW, Local 175, 2015 CIRB 773: paras 1-43 – federal jurisdiction

R: Three ways that an entity can find itself within federal jurisdiction (citing *Tessier*, but in Tessier 1 & 2 were truncated):

1. The entity itself is a core federal undertaking (**direct**)
2. Entity operates in common with another core, federal undertaking as a single, indivisible, functionally integrated unit
3. The entities activities are vital, essential, or integral to core federal undertaking (**derivative**)

F:

- The employer, Northern Air Solutions, operated an <u>air ambulance</u> service in Ontario
- Northern Air Solutions also offered <u>chartered flight service</u>
- Northern Air Solutions employed pilot, co-pilots, paramedics, maintenance workers, and office staff
- UFCW Local 175 <u>applied for certification</u> with the CIRB for bargaining unit comprised of most of Northern Air Solutions employees, including paramedics
- Northern Air Solutions objected to the CIRB's jurisdiction over the air ambulance business and the inclusion of paramedics
    - BUT, Northern Air Admitted that airlines generally are federally regulated
    - Northern Air was basically trying to say the airline part was federally regulated but the air ambulance was provincially regulated → since paramedics provide health services and NOT air services or transportation services, they shouldn't be federally regulated
- Section 2(e) of the *Canada Labour Code* states that federal work, undertaking, or business includes

"aerodromes, aircraft, or a line of air transportation"
- However, again, **labour relations is presumptively within provincial jurisdiction**

I: Does Northern Air's operations (flying ambulance) fall under federal or provincial jurisdiction?

H: Federal undertaking as per the "functional test"

A: The CIRB applied the "functional test"
1. Is the entity itself is a core federal undertaking?
   - CIRB finds that unique character of Northern Air's air ambulance services is the **transportation of patients by plane**
   - For whom or what it flies does not alter that Northern Air is in the business of air transportation
2. Does the entity operate in common with another core, federal undertaking as a single, indivisible, functionally integrated unit?
   - Because employer is engaged in a federal undertaking, CIRB does not consider whether employer may be federally regulated under the other steps
   - Employer mistakenly focused arguments on whether air ambulance services were vital, essential, or integral to federal undertaking
3. Are the entities activities are vital, essential, or integral to core federal undertaking?
   - Court does not proceed

NHLPA v NHL et al, 2012 CanLII 58944

F:
- Respondents: Oilers, Flames, National Hockey League
- NHLPA (union) wanted the ALRB to assert jurisdiction in order to declare the NHL lockout illegal as the **statutory requirements in AB LRC had not been satisfied** → players walked off and refused to play until their wages were revisited, and then the NHL locked them out.
- NHLPA wanted a cease & desist of the lock out and an order for training camp to open
- Not your "typical collective agreement" because individual employees work through agents directly with the teams to negotiate salary and terms of contract

I: Does ALRB have jurisdiction to grant a C&D or an Order?

H: Board declined jurisdiction → Code doesn't apply here.

A:
- This case demonstrates that jurisdictional disputes are often tactical
- No clear jurisdictional ruling in the past – parties had taken "tactical" positions to advance their position in the circumstances
- Board based its decision on the "statutory language" → statute says the board "may" exercise its discretion
  - In face of this permissive language (i.e., "may"), a board may choose not to intervene if it makes labour relations sense not to → in this case, the board decided not to intervene.
  - The Board refused to jump in as a referee here because league-wide structure of lockout & wanted to discourage tactical positions on jurisdiction

Contrast to similar situation in BC w/ the Canucks team:
- Similar certification was brought forward & the BC labour board said that it wasn't within their jurisdiction to grant certification.

ALBERTA LABOUR RELATIONS BOARD

Overview: Alberta's *Labour Relations Code*

Preamble: Identifies four governing principles (rationale)

Themes: worth and dignity of Albertans; fair & equitable resolution of matters related to terms & conditions of employment;

1. **Mutually effective relationship between employees and employers** is critical to capacity of Albertans to prosper in competitive worldwide economy (*both parties have shared interest in the workplace's success)*
2. Employees and employers best able to manage affairs where statutory rights and responsibilities are **clearly established and understood** *(clear communication)*
3. Legislation supportive of **freedom of association**, and free collective bargaining through **trade unions when chosen by employees**, are important components of Alberta's social and economic well-being
4. **Public interest in Alberta served by encouraging harmonious, mutually beneficial relations** between employees and employers through freely selected bargaining agents, through balanced, **fair and constructive** collective bargaining, and through **fair, equitable, and expedient resolution of matters** arising with respect to terms and conditions of employment

Code Maintains Main Components of *Wagner* Model

- Establishes right of employees to belong to trade union of their choice (Div. 2)
- Establishes framework for legal status of trade unions (Div. 3)
- Provisions for certification of unions (Div. 5)
- Provisions for facilitating and protecting good faith collective bargaining (Div. 10)
- Legislated dispute resolution mechanisms: strikes, lockouts, compulsory arbitration, etc. (Div. 3, 14, 15.1, 25)
- Establishes framework for collective agreements and rights arbitration (Div. 14.1, 21, 22)
- Prohibition on unfair labour practices (Div. 23)
- Creation of Labour Relations Board (ALRB) to adjudicate complaints and administer legislation (Div. 1/throughout)
- Modification to bargaining rights (Div. 7) *(e.g., successorship of union to new company when previous company is bought out)*
- Termination of bargaining rights (Div. 8) *(e.g., how employees get rid of their union, replace their union)*
- Construction Labour Relations (Part III)

Labour Relations Board

Composition & Quorum

- Board comprised of:
    - Members appointed by Lieutenant Governor in Council (i.e., Cabinet)

        - One ‘Chair’ (Currently Nancy Schlesinger)
        - Full-time and part-time Vice-Chairs
        - Members
        - Staff:
            - Director/Manager of Settlement
            - Legal Counsel
            - Labour Relations Officers
            - Executive Assistant to Chair
            - Officers (essentially investigators of the board)
- Quorum for Decision:
    - Panel comprised of chair or vice-chair, and 2 other members
        - Chair decides composition of panel
    - Majority rules: chair or vice-chair breaks tie
    - Panel has representation from management/industry side and union side
    - Chair or Vice-Chair may hear some matters alone (*Code*, s 9(10)) – particularly if there are time restraints & in order to avoid delay.

Jurisdiction

Rationale for labour relations disputes going to the Board rather than the Courts:

- **Specialized subject matter**
- **Expediency**
- Perception of **historical bias of Courts** against organized labour → historical perspective suggests it is better to have a labour board w/ specialized knowledge because they know best

Jurisdictional Limits of **Administrative Tribunals**

- The Board is an administrative tribunal & tribunals **only have power granted by governing legislation**
    - Board administers three pieces of legislation:
        - *Labour Relations Code*
        - *Public Service Employee Relations Act*
        - *Police Officers Collective Bargaining Act*
    - Board has **limited *Charter* jurisdiction** → so it can deal with some *Charter* issues, but it doesn’t have the same jurisdiction as the Court, so sometimes issues are raised with the Board in first instance and then sent to the Court.
        - E.g., Nurse Practitioners were not able to unionize, but Kelly’s office brought a *Charter* challenge & Board found nurse practitioners’ *Charter* rights were infringed by disallowing their ability to join unions

Subject matter jurisdiction under the *Code*:

- Board has **very broad jurisdiction**
- A few powers are reserved to the Minister, but most of the legislative role is delegated to the Board to make decisions.
    - E.g., Minister does appointment of compulsory arbitration boards
- Courts retain **limited power** to restrain picketing (*Code,* s 91):
    - **Courts have power to restrain picketing IF (test for when they can restrain picketing):**
        - **There is a reasonable likelihood of danger to persons or property; OR**
        - **Resorting to the board is impractical in the circumstances**.

- E.g., Coop Refinery strike in SK & picketing in solidarity happened in AB → question was whether the AB board had jurisdiction to deal with this? → while the SK Board had jurisdiction in SK, it was unclear if AB did.

- Board has **exclusive jurisdiction** to exercise powers conferred on it under the Act, and to **determine all questions of fact or law that arise in any matter** before it, and Board's acts and decisions are **final** and **conclusive** (subject to the Board's ability to reconsider its decisions) – may not be appealed to a Court (*Code*, s 12(4))

Roy v ATA and Westwind School Division No 74 (ALRB) – test for religious exemption

R: Test for Religious Exemption: religious objector bears onus to satisfy Board that…

(1) They are an **employee**;
(2) There is a **collective agreement**;
  (a) Board only has jurisdiction conferred on it by legislation it administers
(3) Collective agreement **contains provision requiring**:
  (a) **mandatory membership** in union; or
  (b) **payment of dues** and assessments to union
(4) Religious belief or conviction is **sincere**;
(5) Belief or conviction is **religious in nature**, not merely general objection to unions;
(6) Their **belief is the cause of the objection** to unions; and
(7) Any **re-directed dues or assessments will be paid to a charity**
  (a) If employee and union fail to agree on charitable organization, Board may do so (Code, s. 29(3))
    - Must be registered as charitable organization under Part I of Income Tax Act

F:

- Roy, a teacher at Westwind School Division, objected to belonging to ATA or paying dues on the basis of religious beliefs → she sought exemption pursuant to s 29(2)
- ATA applied to summarily dismis Roy's application.
  - Argued Baord didn't have jurisdiction to grant remedy sought by Roy.
  - *Teaching Profession Act* required teachers to be members of ATA & pay dues.
    - If she wasn't a teacher, she probably wouldn't have had an issue with her exemption. But since the *Act* required her to be a member, she had issues (and for this reason, the Board said they didn't have jurisdiction

Religious Exemption Provision (s. 29(2)): if Board satisfied employee has religious objection to joining trade union, or religious objection to paying dues or other assessments to trade union, Board may order provisions of collective agreement do not apply to employee (Labour Relations Code, s. 29(2)) → Employee then not required to be member of trade union, or pay dues or other assessments to union

I:Whether religious exemption under s. 29(2) also applies to statutes, rather than merely collective agreements?

H: Board does not have jurisdiction. Application dismissed.

A:

- Union security requirements contribute to economic health of unions, but infringe on individual freedoms – reason for religious exemptions. Exempting teacher from membership in Association would impact applicability of statutory scheme to teachers and impact D's role as regulator of teaching professions. Obligation to pay dues found in Teaching Professional Act, so Board does not have jurisdiction to grant exemption.
- Board only has jurisdiction conferred on it by legislation it administers
- Limited to remedy available under s. 29(2)
  - Section 29(2) refers to exempting people from "collective agreement" obligations

- Obligation of teachers to join ATA and pay dues found in TPA, in addition to collective agreement
- ATA also professional regulatory body
  - Board does not govern relations between professionals and statutory regulatory bodies

Powers (*Code*, s 12)

- Receive applications, references, complaints
- Conduct inquiries or investigations
- Require, conduct, or supervise votes (incl. certification votes, ratification votes, strike/lockout votes)
- Adjudicate: Make or issue orders, decisions, directives, declarations
  - Interim or final
  - May apply to file orders with Court to be enforced as a Court order
    - Breach of Order = contempt
- Make its own procedural rules
- Investigative Powers (*Code*, s 13): inspect, make copies of documents, inspect any place other than private dwelling

Issues Board Decides

- Whether person is *employer* or *employee*
- Certification
- Whether collective agreement has been entered into
- Whether a person bound by collective agreement
- Whether person is party to collective agreement
- Whether collective agreement is in effect
- Whether a group of employees is appropriate collective bargaining unit *(this sometimes happen when there are new types of employees are introduced)*
- Whether a strike or lockout is lawful
- Whether employer or union has engaged in unfair labour practice
- Regulating picketing
- Duty of Fair Representation
  - Union did not file grievance when they should have
  - Union missed timelines
  - Union was discriminatory or biased

Board's Role in Arbitration

- Board has limited role in dealing with disputes arising out of collective agreement – typically, disputes heard by **grievance arbitrators**
  - Buuuuut… Board has some powers to deal with **undue delay of grievance**:
    - Board can get arbitrator to make the decision quicker
    - If employer/union can't agree, an application may be made to Board to mediation services department of the labour ministry → In this case, there's effectively a "draw" of the various government approved arbitrator
- NEW – **Judicial review of arbitration decisions are heard by the Board** (*Code*, s 145)
  - Pre-2017 → arbitrators decisions had to be judicially reviewed in the courts, but now the Board has the jurisdiction to review in the first instance.

Which Issues Doesn't the Board Decide?

1. Complaints brought under *Employment Standards Code*
   - If you appeal decision of the Employment Standards Officer and it doesn't go how you want, when you appeal again it goes to the *Board* (which is kind of weird since if its an ESC issue the complainant isn't in a union)
   - This is an example of how the Board's jurisdiction has been increasing.
2. **Interest arbitration**
   - **Interest arbitration** is a mechanism used to establish terms of the collective agreement (alternative to strike)
3. **Wrongful dismissal**
   - **EXCEPTION**: wrongful dismissal in the **context of unfair labour practice complaint**.

Marshalling Proceedings, IB 26

Marshalling: Regulating access to multiple decision-makers that have jurisdiction over employment-related disputes

- In labour disputes, there are often multiple forums that can address the same issue, so marshalling helps to direct complainants to a single forum *or* how to decide which forum will proceed.

Four **PURPOSES** of Marshalling (*Code,* s 67.1(3)):

- to **avoid duplicate** or unnecessary proceedings,
- to ensure that any necessary preliminary issues are dealt with first and in the **appropriate forum**
- to **avoid** the litigation or **re-litigation** of matters already decided in another forum or that can reasonably and fairly be determined in another forum, and
- where a trade union that is subject to a duty of fair representation is involved in one or more of the proceedings, to **clarify the extent of the trade union's duty of fair representation** in relation to the various proceedings in issue as they proceed.

REQUIREMENTS for Marshalling Application to be made:

1. Must be a **unionized** workplace
2. Proceedings must arise out of **common circumstances**: (s 67.1 (4)).
   - Including common legal issues, factual circumstances, or both
   - However, do not need to wait for multiple proceedings to be filed

Which proceedings can overlap & therefore who is affected by marshalling powers?

- Labour Board
- Grievance Arbitrators
- Human Rights Commission
- Employment Standards
- Workers Compensation and Appeals Commission
- OHS
- OIPC
- School Act Board of Reference

Who can't be affected?/Which proceedings cannot overlap/

- Courts
- Professional disciplinary bodies
- Hearings under *Provincial Offences Procedure Act*
- Proceedings under *Ombudsman Act*

What can the Board do?

- Direct **consolidation** of grievances (**s 67.1(10)(a)**)
- **Direct forum** that issue should be decided in, or **which should go first** (**s 67.1(10)(b)**)
- Set conditions under which proceedings will proceed (**s 67.1(10)(c)**)
- **Stay proceedings** (**s 67.1(10)(d)**)
- Make **any other order** by consent, or as may be "just and equitable" (**s 67.1(10)(e)**)
- **EXCEPTION**: Does not necessarily affect decisions of the Director of the *Alberta Human Rights Commission*, but it will affect the tribunal (*Code,* s 67.1(11)(c)) → this was repealed.

AHS, the Employee, AUPE and the Alberta Human Rights Commission – four step analysis for marshalling orders

R: Four step analysis for marshalling orders

1. Board must determine if there are **common factual circumstances or legal issues** to the proceedings involved(s 67.1(4))
2. If there are legal issues or factual issues that are common, THEN board must **analyze the purpose factors in s. 67.1(3)(a), (b), (c), and (d)**: The purpose of a marshalling order is:
   - (a) avoid duplicate or unecessary proceedings
   - (b) ensure any necessary preliminary issues are dealt with first and in the appropriate forum
   - (c) to avoid litigation or re-litigation of matters already decided in another forum or that can be reasonably & fairly determined in another forum
   - (d) IF a trade union is involved in one or more proceedings, it must **clarify** the extent of its duty of fair representation in relation to the various proceedings in issue as they proceed.
3. The Board then **reviews the remaining factors in 67.1(9)(b), (c), and (d)**: Chair holds a hearing for the purposes of determining the following:
   - (a) whether & how subsection 3 (i.e., the previous step) applies to the proceedings in issue
   - (b) IF one or more individual employees wish to pursue matters in a forum other than a grievance arbitration → board should review whether there are issues that need to be determined about the scope of the bargaining agent's duty of fair representation
   - (c) IF bargaining agent pursues an issue through **arbitration** on behalf of employee that raises issues or factual matters that may **also** be the subject of additional proceedings → employee understands that determination in the one proceeding may preclude the matter being dealt with in another AND that bargaining agent has sufficient instructions from the employee to do the proceeding & resolve the issues in a way that fairly represents the employee's interests.
   - (d) "whether an employee's right to fair representation with respect to any human rights issue, including any duty to accommodate, has been, or will be, appropriately investigated and protected if the matter is to proceed by arbitration rather than through a complaint under the Alberta Human Rights Act."
4. **If the Board is considering making an order,** it must also **consider the factors in s. 67.1(11)**: When conducting proceedings, chair must take into account:
   a. The purpose of proceedings is to **enhance fairness, cost, & efficiency** while ensuring the interests of the parties are protected;
   b. Process under this section should be **expeditious** & should not cause overall delay in resolution of the proceedings;
   c. *AB Human Rights Act* director may be informed/influenced by board proceedings (but not bound to them)

F: AUPE employee w/ chemical sensitivities.
- AUPE filed a grievance WHILE employee filed a human rights complaint for failure to accommodate chemical sensitivities.
- Board stayed human rights complaint.

H: Marshalling Order

A:
Application of four step analysis:
- Board finds that there are common legal and factual issues as the grievances and complaint arise out of the same circumstance
- Granting the order would avoid duplicate proceedings and potentially avoid litigating the AHRC complaint
- Employee's rights to be fairly represented are protected by grievance procedure, and whether the grievance will affect human rights claim will depend on response of Director to grievance
- The order will be most efficient while protecting the Employee's rights

General analysis:
- Union raised several arguments, which the Board dismissed on the basis that they do not respond to the factors in s 67.1
    - Mostly the arguments allege the AHRC is a better forum for parts of the employee's complaints
- Nonetheless the Board addresses arguments
- Board finds that arbitrators equally appropriate as AHRC to address complaints
- Board grants order consolidating grievances
- Board orders that grievances proceed first, and that the parties inform the Director of the AHRC of the progress of grievance proceedings

Board's Powers

1. Supervise: votes (certification, ratification, strike/lockout)
2. Investigate (s 13): has power to inspect, take copies of documents, can inspect any place other than a private dwelling
3. Adjudicate: can conduct hearings, make determinations, issue directives, decisions, orders, etc.

Board's Remedial Powers, *Code*, s 17

- Order party to cease doing act complained of
- Order that union/employer bargain in good faith
- Orders relating to conditions under which bargaining is to take place
- Certify or revoke certification of a union as bargaining agent
    - Requires requisite votes
- Automatically certify trade union as bargaining agent for unit of employees without a vote
    - Amended by Bill 32 – typically need a vote now
- Reinstate employee to employment
- Order employer to pay employee compensation for time during which suspended/discharged
- Costs for frivolous, vexatious, abuse applications
- Give priority/expedite complaints where employee allegedly terminated for unfair labour practice
- Decline to dismiss application for lack of particulars, prior to pre-hearing disclosure

Board's Jurisdiction over *Charter* Challenges, *Code*, s 12(4)

- S 12(4) gives board jurisdiction to determine all questions of fact and law that arise before it

- Labour Relations Board and labour arbitrators have jurisdiction under *Administrative and Jurisdiction Act* – Designation of Constitutional Decisions Makers Regulation to decide questions of constitutional law
    - Must give notice of question of constitutional law to Federal and Provincial Attorney-General
- *Cuddy Chicks v Ontario* (LRB) (SCC)
    - Facts: Union filed certification application for employees at chicken hatchery, but Labour Relations Code excluded agricultural workers. Union challenged statutory exclusion under Charter, s 2(d)
    - Issues: Does ON Labour Board have jurisdiction to deal with Charter issues?
    - Held: SCC found Labour Relations Board have jurisdiction to decide Charter issues but it has restraints
        - But, power to grant declarations of invalidity and power to trike down reserved to Courts under *Constitution Act*, s 52
        - Board may refuse to apply statutory provision, but can't invalidate it
        - Basically, they can just say "ya that was against the charter"

Procedure before Board, *Code* ss, 16, 14(5)

- Board has power to make **its own procedure** (*Code* at s 16 and *Rules of Procedure*)
- **Upon receipt of a complaint, Director Settlement can:**
    - **Appoint officer** to **investigate** and issue **report**
    - **Refer** matter to offer for **settlement negotiations**
    - **Refer** matter to **Chair**, who may direct a **hearing or settlement negotiation**
    - **Reject complaint** for being outside jurisdiction or outside 90-day limitation period for bringing complaint
    - **Require** further **particulars**
- Board may **compel witnesses** by issuing '**notices to attend**'
- Board may **compel production of documents**
    - Including pre-hearing production
- Parties may be **represented by lawyers or lay advocates** (labour relations managers, etc.)
- More **informal** than conventional trial, though same concept
    - Opening statement, direct examination, cross examination, closing statements
- Board **not bound by formal rules of evidence** (*Code*, s 14(5))
    - May accept evidence that, in its discretion, considers proper
    - Evidence need not be admissible in Court

Board's Reconsideration Power, *Code* s 12(4)

Board may reconsider its own decisions (*Code*, s 12(4)) by forming a panel, essentially making a **first right of appeal**

- Board **generally dismisses** application for reconsideration **where application not supported by previously unavailable evidence** *(it's not inclined to hear an application for reconsideration on basis of new evidence)*
- **Board may reconsider decisions that:**
    - **Conflicts** with other **decisions**
    - **Conflicts** with other **statutes**
    - Contain **substantial error of fact or law**; and
    - Contain **reasonable apprehension of bias**

Board's Enforcement Power: if directive or order not complied with, Board may file copy with Court clerk, *Code*, s 18(6)

- Directive or Order then becomes **enforceable as judgment or order of Court** → allows for contempt remedies if someone doesn't follow the directive/order turned judgment/order
- E.g., where board orders workers in an illegal strike back to work & those workers refuse.

WHO IS AN "EMPLOYEE" & EXCLUSIONS UNDER LRC

There will definitely be a question on the exam where you have a person and determine whether or not they are an employee under the Code. If you're an employee under the *Code*, you can be a member of the union and therefore *Code* applies to you. If you're not an employee under the *Code*, you cannot be a member of the union & therefore *Code* does not apply to you.

Application of the *Code*, s4

LRC applies to **every employer and employee** and is **binding on Crown** in right of Alberta, except for the following **exceptions** where the Code does **not apply (s 1(1)(l)**: (*Code*, s 4) ***(know this section well**)***

(1) Employer and employees, as defined **in *Public Service Employee Relations Act***

- *Public Service Employee Relations Act,* s 1(m) – which details government employees, Crown corps, AGLC, Workers Comp Board, Alberta Innovates, etc.
    - A **corporation**, **commission**, **Board**, **council**, or other body, where **all or a majority of its members** or directors:
        (1) Are **designated by an Act** of Legislature
        (2) Can be **appointed or designated by Lieutenant Governor** in Council, **or** by **Minister** of Crown in right of Alberta; or *(whether power of appointment or designation is exercised or not)*
        (3) Are in **part designated by Act of Legislature**, and in **part** can be **appointed or designated either by Lieutenant Governor** in Council or **Minister** of Crown in right of Alberta, whether power is exercised or not, or is only partially exercise
- PSERA has its own bargaining unit and its own set of rules so we don't deal with it here → the employer is the gov of AB under PSERA.

(2) Employers and employees to whom Code does not apply **by virtue of the provision in another Act**

- I.e., federal employees → here the *Federal Code* applies.

(3) Municipal police officers subject to terms of *Police Officers Collective Bargaining Act*

(4) Employees **employed on farm or ranch**, as set out in *Code*, s 1(1)(l)(iv)

- This provision has changed a lot in previous years.
- 1(1)(l)(iv): **farming or ranching operations means** the production of eggs, milk, grain, honey, diversified livestock, operation that produces fish, or any other primarily agricultural operation (i.e., catch-all clause), but **excludes** greenhouse, nursery, sod farm, mushroom farm

(5) Employees employed in **domestic work in private dwelling**, or to their employer while employer is ordinarily resident in dwelling and acting in capacity of their employer Housekeepers

- The "Nanny" provision

Employer

Employer: person who **customarily** or **actually employs** an employee

- **Customarily**: doesn't really need to have that employees at that time, so long as employees are customarily employed.
    - This can happen in successorship → Buddy 1 buys business from Buddy 2 and business stops for a minute & results in the employer not employing people in a certain time, but they are still an employer

Employee

Employee: person who… (*Code*, s. 1(1)(l))

(1) Is **employed to do work**; and

(a) **Includes** '**dependent contractors**': person performing work or services for another for compensation or reward, on such terms and conditions that dependent **contractor is in position of economic dependence** and under obligation to perform duties (*Code*, s. (h.01) – this is a recent addition to the Code from the Notley gov't

(i) Relationship more closely resembles that of employer-employee than independent contractor (there's a relationship of *dependency*)

(ii) Whether contract of employment is present is irrelevant

(iii) Whether or not individual uses own tools, vehicles, equipment, machinery, materials

(b) Does **not** include:

(i) Persons performing '**managerial functions**'

- Manager is not defined in Code & there is no statutory criteria
- Criteria comes from Board jurisprudence
- Information Bulletin #22 "Determinations" identifies a list of **factors**:
    - **Supervision**: does person exercise supervisory responsibility over other employees? How many employees? How significant is supervision?
    - **Hiring and Promotion**: does person make hiring and promotion decisions, or at least make effective recommendations to immediate superior who has right to hire/promote?
    - **Discipline and Discharge**: what is extent of person's role in making disciplinary and firing decisions?
    - **Assigning/Directing Work**: Is person responsible for operation of an organizational unit? Who has ultimate authority for assigning work and ensuring the quality of work meets expectations?
    - **Independence**: does person exercise considerable managerial discretion?
    - **Labour Relations Input**: does person represent management in responding to grievances and interpreting collective agreement? Does person have meaningful input into management bargaining proposals?
    - **Supervising Subordinate Supervisors**: does person oversee junior supervisor who is in bargaining unit?
    - **Evaluating Employee Performance**: does person have important impact on another's career through employee evaluation? Are evaluations acted upon?
    - **Ordering Overtime or Granting Time Off**: What is financial impact of these decisions? Does person exercise independent discretion?

- **Policy Setting**: What role does person have in establishing or altering company policy?
- **Job vs. Function**: Board examines person's functions in their entirety (Re Central Park Lodges)
- **Job Titles**: Board not influenced by title alone, but instead looks at what duties the person performs (Re Central Park Lodges)
- **Professional/Technical Roles**: whether additional responsibilities are true managerial functions, or merely natural reflection of greater experience and skill

- To define a manager, the Board applies the **"prime function" test** (see *Central Park Lodges*)
- **Policy rationales** for keeping the exception narrow: Prevents conflict of interest since managers make hiring/firing & disciplinary decisions; a narrow exception category is conscious of the erosion of union rights because it keeps the employer from eroding the union simply by creating new titles and "sprinkling" of managerial tasks.

(ii) Person employed in a **confidential capacity in matters relating to labour relations**
- **Policy rationale**: Prevents conflict of interest in collective bargaining contexts
- See *ATU*

(iii) Person who **is member of medical** *(i.e., doctors)*, **dental, architectural, engineering, or legal profession** qualified to practise under the laws of Alberta **and is employed in the person's professional capacity**,
- Note – there is movement by some professions to get rid of the exclusion

(iv) Person employed on a **farming or ranching operation**…whose employment is **directly related to the farming or ranching operation**

(2) Who **receives or is entitled to wages**

(a) **Includes**: **salary, pay, overtime pay**, or any other remuneration for work or services however computed or paid (*Code*, s. 1(AA))

(b) Does **not include tips or other gratuities**

(c) Employees may be paid by third-parties and not employers (*Airport Taxi Service*)

Employer vs Manager, *Code* s 11(4)

Labour Relations Board has exclusive jurisdiction to determine whether person is employer or employee under Labour Relations Code (*Code*, s. 11(4))

UNA, Local 176 & Central Park Lodges Ltd., Re (ALBR) – test to determine whether employee or manager

Prime function test: what is the *essence*, or *prime function*, of the job?
Consider the **indicia of management** to find out if the employee's *prime function* is managerial:
1. Power to hire
2. Power to fire
3. Responsibility for performance appraisals
4. Control over/responsibility for discipline & grievance process
5. Collective bargaining involvement

Ask myself: was there training about the various indicators? Did the employer provide information about the indicators? What was included in the training? Was the training meaningful?

F:

- Employer did a re-org & decided to replace RNs with LPNs & created a nurse manager position.
- Employer assigned RNs to instead be 'nurse managers' (some were "regular" and some were "casual" positions)
- Union sought determination that all nurse managers fall within its bargaining unit.
    - Evidentiary issue → newly created position meant it was difficult for board to assess facts (the impacts of the new position were anticipatory so there weren't facts available yet)
    - Consider: some of the "checklist factors" are also hard to assess in new bargaining relationship (i.e. whether employee plays a role in bargaining, CA administration or grievance process)

I: Is the newly created job of 'nurse managers' captured by the managerial exclusion and therefore excluded from the bargaining unit?

H: No – Nurse managers are employees & included in bargaining unit.

A:

Board analyzes the role of Nurse Managers as a whole, not just whether individual of management are present. They consider the employee's "**prime function**" by looking at Nurse Managers' performance of indicia of management in this context:

1. Hire
    - Nurse managers *did* have the ability to hire others & played a key role in hiring casuals *but* this was more of a 'team effort' & there was no "managerial" influence
    - Not all Nurse Managers were as involved in hiring as others.
    - These factors did not weigh in favor of nurse managers being excluded from bargaining unit.
2. Fire
    - Nurse managers ability to fire was 'artificial' – had not yet happened and unclear whether they could.
    - Board says the **ability to fire not a necessary condition of managerial status** – decisions of that magnitude may be made far up managerial chain
3. Performance appraisals
    - Nurse Managers also carried out performance appraisals
    - However, appraisals were done on a regular intervals and using a standard form
    - BUT nurse managers had no responsibility to ensure appraisals were carried out
4. Discipline & grievance process
    - Evidence that Nurse Managers involved in minor discipline up to suspension, and participate in Step 1 of grievance procedure
    - Some of the Nurse Managers who gave evidence clearly did not understand the procedure
    - Board inclined to infer that management had trivialized discipline and grievance procedure *(while the Central Park did claim Nurse Managers were involved, it seems like they had no procedural involvement & actually had no idea what to do in the case of discipline & grievance – NMs weren't trained)*
5. Collective bargaining involvement
    - Some Nurse Managers testified that they would be involved in collective bargaining, but there had been no bargaining since creation of Nurse Managers, so no evidence of actual bargaining
    - Any role for Nurse Managers in bargaining would have been limited compared to other duties

To the extent nurse managers perform duties that are 'managerial', they are minor or peripheral. Instead, the prime function of NMs is patient care.

Board Findings:

- Delegation of power to discipline was a 'sprinkling' of managerial functions designed to exclude nurse managers from bargaining unit.
    - Bad faith to intentionally "sprinkle" managerial functions
    - This doesn't satisfy the prime function test.
- **Primary function** of nurse managers is to ensure proper patient care & it does not matter that it is not "hands on" patient care.
- Board Officer's report indicates that Nurse Managers perform lots of indicia of management, but this changes when reviewing Nurse Managers actual role

- Performance of professional duties do not attract managerial exemption
  - **"care must be taken not to confuse professional duties, even those which involve a substantial supervisory component, with managerial duties**" – especially in health care context
  - Nurse managers are performing professional functions associated with status as registered nurses.
  - performance of professional duties, including those with supervisory component, does not constitute 'managerial duties'

Confidential Capacity Exception

- Merely having access to confidential information or the fact that that information is seen or heard by the employee from time to time is not enough to justify the exclusion. Consider whether the information is kept under lock and key, if password-protected, is not known or able to be accessed by other employees, and whether access to the material forms part of the employee's regular duties.
- **Confidential information <u>must be related to</u> labour relations** – it is context specific.
  - E.g., payroll person → has information about salary & benefit information but this wouldn't count b/c it's not related to labour relations and doesn't give the payroll person enough info to influence proceedings.
- Again, the policy reason underpinning this exception is conflict of interest.

ATU 569 v City of Edmonton et al – Confidential Information Exception

R: In determining whether "confidential information" exception applies:

1. Competitive position of employer (against other employers) is irrelevant;
2. Person has access to confidential labour relations information, including:
   a. Contract negotiations or bargaining strategy
   b. Board hearings; or
   c. Disposition of grievances
   d. **BUT** information re personnel, payroll, trade secrets are **irrelevant** as these are part of employee's regular duties.
3. Access to the above confidential information must be part of regular duties (**<u>not</u>** incidental)
   a. If the employee's main function is unrelated to industrial relations matters, cannot be excluded.
4. Litmus test: whether disclosure of information would have adverse impact on employer's interest from industrial relations standpoint.

F: ATU applied to the Board to determine whether people in certain classifications at Edmonton Transit were 'employees'. City of Edmonton argued managerial and confidential capacity exclusions applied.

I: Are employees in certain classifications are 'managers'? Whether persons are in 'confidential capacity'?

H: Employees = scheduling/shift designer, senior dispatcher.
Not employees = safety officers, service inspector, LRT inspector.

A:
Union brought 'test cases' before the Board.
There are three types of confidential information:

1. competitive information/trade secrets
2. personnel information (payroll, etc.); and
3. **Labour relations–contract negotiations, bargaining strategy, etc (this exemption is only concerned with labour relations)**

Following individuals found to be employees:

- Scheduling/shift designer

        - Responsible for scheduling for routes, designs work shifts, investigates and tests new routes, addresses union issues regarding scheduling
        - Spends 2%-3% of time in collective bargaining years costing out proposals for scheduling changes
        - Duties are technical, but not managerial
        - Costing out proposals at bargaining is confidential information regarding labour relations, but it is only incidental to regular duties
    - Senior dispatcher
        - Responsible for supervising dispatchers, evaluating dispatchers (including power to warn and discipline), assigning work shifts
        - Acts as part of team of Senior Dispatchers to interview and hire dispatchers
        - Discipline, hiring, and firing do not form substantial part of job

Not Employees:

- safety officers:
    - Responsible for safety issues, investigating accidents, evaluating operators
    - Recommendations from evaluations accepted by Divisional Superintendent about 50% of the time
    - Recommendation could result in discipline for operator
    - Primarily involved with operator conduct, and recommendations are customarily effective
- service inspectors:
    - On call to respond to incidents
    - Write up incident report, which may affect operators
    - Conduct approximately 50 performance appraisals per year
    - Recommendations accepted 98% or more amount of the time
    - Have major role in evaluating employees, which puts them in conflict with employees in the bargaining unit
- LRT inspectors:
    - Similar to Service Inspectors but only responsible for LRT
    - Responsible for central control plant
    - Discipline employees much less frequently because much fewer operators
    - Management's only presence on LRT system much of the day

Professional Employee Exception, *Code* s 1(1)(l)(ii)

There are essentially five professions excluded by the *Code*, s 1(1)(l)(ii)

1. **Medical**
2. **Dental**
3. **Architectural**
4. **Engineering**
5. **Legal**

The person must be a **member of the profession**, which means they are **registered with the governing body** such as the college or the law society, qualified to practice under the laws of Alberta, **and actually employed in the person's professional capacity**.

Question of qualification, registration, and actual job functions and duties. Status and fact-based inquiry.

Employee vs Independent Contractor

United Food and Commercial Workers Union, *Local 1118 v Associated Cab (Alta) Ltd* (ALBR) – *Sagaz* test to determine whether person is employee or independent contractor

R: TEST To determine whether employee or independent contractor → primary question is **whether the person is engaged in business on her own behalf or on behalf of someone else, including:** *(Sagaz Industries)*
(non-exhaustive list; SCC says there is no universal test & other facts may be important in other cases; relative weight of each depends on circumstances)

(1) Level of **control** over worker's activities
- Whether person must be **affiliated** with employer to earn income (*Associated Cab*)
- Whether person must pay **weekly fee** to employer (*Associated Cab*)
- Whether **employer directs 'when and where' person is to perform** (*Associated Cab*)
  - If individual retains absolute control as to when and for how long he will work, proper inference is he is an independent contractor.
- Whether employer responsible for **disciplining** employees (*Associated Cab*)
- Whether employer and individual have **written agreement** (*Associated Cab*)
- Whether employer stipulates **attire** to be worn (*Associated Cab*)
  - Whether employer has ability to send person home if not dressed appropriately

(2) **Ownership** of **equipment**
- **Providing own equipment** establishes **greater risk of loss** and **chance of profit** than typical employee (*Associated Cab*)
- Whether person responsible for **maintenance of equipment or vehicle** (*Associated Cab*)
- Whether person responsible for **daily expenses** of equipment
  - Gas, maintenance, insurance, repairs, etc.

(3) **Ability to hire** his own **helpers** (and **who pays** the helpers)

(4) Degree of **financial risk** taken by worker

(5) Degree of **responsibility for investment and management** held by worker; and
- Whether person advertises separately, without reference to company (*Associated Cab*)

(6) Worker's **opportunity for profit**
- Employer relationship possible, even where wages come from third-party (Airport Taxi Service)

F:
- Union applied for certification as bargaining agent for 'all limo drivers/operators'. Union argued owners/operators were employees, not independent contractors.
- 17 limo drivers employed by Associated Cab, but less than 40% support the application
- Also 39 individuals who own and drive limos as independent contractors (according the Officer) so not employees. If Officer is wrong, then would be 40% support
- Bargaining unit sought to include all limo drivers: employees and owner/operators
- **Owners/operators earn income in 3 ways**:
  1. Code 8s (**pre-arranged pick-ups** by their own customers or referrals)
  2. **Queueing at the airport** in accordance with licensing allocations (4 companies licensed) – controlled by Airport
  3. **Company's dispatch system** – not obliged to book into this, but can pass on or refer the calls
- **Remuneration**: each week attend at company's office and are given statement outlining expenses that are owned (limo payments, stand rent, collision insurance, etc.
  - If after "charge slips" are tallied the total is more than amount owing, then cheque for the difference is issued
  - Company makes **no deductions** for income tax, EI, CPP or benefit plans and not covered by WCB
- Owners/operators can also be paid in cash by passengers and company doesn't know what this amount is, nor do they get a cut of it, nor does it have to be reported
- Decision as to which days and hours of work is solely that of individual owner/operator
- Airport, not company, stipulates attire to be worn,

- Owner/operator in charge of vehicle maintenance
- Company may send the owner/operator home if not dressed appropriately
- Airport polices violations of agreement with it and the Company by the owner/operator
- No evidence of Company disciplining employees
- Owner/operators advertise separately on their own without reference to Company
- No written agreement

I: Are limo owners/operators are employees or independent contractors?

H: Application dismissed. Owners/operators of limos are independent contractors, not employees *(Only 17 employees were in the bargaining unit & there was no evidence of 40% support)*

A:
- Airport Taxi Service (upheld by ABQB) – found taxi drivers were employees
    - Also confirmed that the definition of "wages" in the Code allows for employees to be paid by third parties and not employers

Board adopts *Sagaz* analysis
- In taxi industry, drivers are not paid by their employer or company with whom they are associated: they are paid by passengers
- "employment relationship no longer avoided on basis that owner/operator receives wages from fare-paying passengers
- Owner/Operators had to have affiliation with Company to access Airport
- Owners/operators provide their own limos – chance of profit/risk of loss
- Total flexibility over hours of work
- City By-law imposes most "terms" one would see in employer/employee relationship
- No written agreement or discipline process with company (but could be sent home to change)
- No evidence that company's power to limit number of drivers was actually being exercised
- Board notes **control lacking by Company**
- Most of **control comes from other parties**: mainly, airport and city bylaw
- Drivers have control on profit – less they work, less they make
- **Distinguished from *Airport Taxi*** where:
    - If driver refused to show up in queue, they could be terminated
    - Employer had exclusive license to operate taxi service at Airport
    - Employer controlled the queue, whereas here Airport does
    - Employer imposed progressive discipline
    - Many drivers did not own taxi
    - Maximum fees were set by Employer

* This case could be different if heard today because of the dependent contractor provisions in the *Code* today

United Association of Plumbers v Midwest Pipeline (ALBR) – Adams & Montreal Locomotive factors to determine employee vs independent contractor + wages

R: To determine existence of employer-employee relationship, apply Adams Factors:
(1) Party exercising direction and control over employees performing the work;
(2) Party bearing burden of remuneration;
(3) Party imposing the discipline;
(4) Party hiring employees;
(5) Party with authority to dismiss the employees;
(6) Party perceived to be employer by the employees; and
(7) Existence of intention to create employer-employee relationship

R: *Montreal Locomotive Factors:* to determine whether person is employee or independent contractor, consider worker's
1. Control

2. Ownership of Tools *(may not be relevant here since most contractors own their own tools)*
3. Chance of Profit *(Whether they made more if they worked more; made less if they worked less)*
4. Check the Loss

R: A corporation cannot be an employee – definition in Code does not extend to bodies corporate
- Code may apply to proprietors of corporations if employees under Code

R: Incorporated workers may be employees: intervention of broker, agency, or corporation in wage flow from employer to employee does not negate or prevent employer-employee relationship

R: Worker, unincorporated or incorporated, is 'employee' for collective bargaining purposes where he: (Canapipe Construction)
1. Operates employer's equipment
2. Owns equipment and is paid wages separately from employer's rental of their equipment
3. Owns own equipment and is paid one sum for both equipment and services performed

F:
- In the context of a certification application, a dispute arose as to whether or not rig welders were employees under the code.
- There were both incorporated and unincorporated rig welders
- Board Officer excluded the incorporated rig welders but included the unincorporated rig welders
  - Incorporated welders (worked under the company #) would invoice *Midwest*, had their own WCB coverage, and insurance.
- Both parties (i.e., union & employer) objected.
- The rig welders, both incorporated *and* unincorporated:
  - Used their own equipment
  - Were hired without bids or tendering
  - Did not have to provide proof of bonding or insurance
  - Were paid biweekly at a flat rate of $38.00 per hour, which was not negotiated
  - Provided gas, but employer provided all other consumables
  - Did not have holdbacks from pay for builders' liens
  - Could not subcontract
  - Only got paid if they worked
- Regardless of whether the welder was incorporated or unincorporated, the employer:
  - did hiring and firing
  - Hired and disciplined helpers for welders
  - Set the hours of work, orchestrated work and established rules
  - Disciplined rig welders similar to hand welders
  - Told welders what to do and where and when to do it

I: Are incorporated or un-incorporated welders are employees?

H: Application granted. All welders are employees.

A:
The Board referred to two sets of factors: **The Montréal Locomotive Works factors** and the criteria quoted by **Adams**, author of the seminal textbook Canadian Labour Law. Unincorporated rig welders were employees based on factors:
- Board essentially follows previous decision *United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v Canpipe Construction Ltd.* [1972] CLLC P 16,059
- **Employer had control,** and welders had **no chance of profit** or **risk of loss**
- Ownership of equipment and method of compensation for use of equipment **not sufficient** to create sub-contractor relationship
- The Board found that there was **no meaningful difference between the employees who provided their**

services through a company and those who were not incorporated. The **only real difference was a question of wage flow, that is, whether the pay was sent to the company and then paid to them that way, or whether the individuals were paid directly by the employer**.
    - The employer always bears the ultimate burden of remuneration
- The Board also stated that the Code does not apply to corporations, but it may apply to individuals that are the proprietor of the corporations if they are employees under the Code
- In every case, the board must examine the way the providers of work and the recipients of the work interact. This involved an examination of any differences that are based on corporate status.

Dependent Contractors

(h.01) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence on, and under an obligation to perform duties for, that person which more closely resembles the relationship of an employee than that of an independent contractor;

See also s. 35.01 of the Code

Misc Teamsters, Local 987 v Sysco – factors to determine whether independent or dependent contractor

R: Factors to determine whether someone is an independent or dependent contractor:

1. **Context**
    - How the **industry** operates *(does the work available to individual depend on employer's reputation?)*
    - **Type of work** involved and its source
    - Nature of **operations** *(is the indiv is **integrated** into employer's business? Do they use employer's **uniforms**? Is indiv's **equipment identified** with employer? Does the employer provide training?)*
2. **Entrepreneurial Initiative**
    - Individual's opportunity to **make profit through exercise of independent entrepreneurial judgment** *(If individual does not personally perform work, but provides services through labour of employees or sub-contractors, individual not a dependent contractor)*
    - Individual's opportunity for **economic mobility** *(does the indiv advertise or solicit customers elsewhere?)*
    - Individual's opportunity to **work for <u>other</u> customers** *(does the amount of work required practically precludes possibility of alternate work?)*
3. **Level of control**
    - **Organization of employer's operations** and degree to which contractors are continuing part of it *(does the employer generally expect the contractor to work on daily basis? Are contractors generally available for work during working hours? Is there evidence of long-term, stable relationship between parties?)*
    - **Contractua**l arrangements between parties and others
    - **Type and extent of control** and direction exercised **by employer** with respect to: hiring, firing, discipline, work assignment, hours of work, etc. *(does the employer specify insurance requirements? Does the employer retain a degree of control over equipment used by indiv? Does indivi have ability to organize time and manner of daily work? Must employer approve indiv's requests? Can employer discipline individual?)*
4. **Economic dependence**
    - Nature and manner of **compensation**, and how compensation is determined *(does the employer determine pay structure?)*
    - **Percentage of income** individual derives **from employer** *(most of indiv's income must come from relationship w/ employer to be dependent)*
5. **Comparison to others**

F:
- Two certification applications filed by the Union
    - Application 1: October 2018 → described bargaining unit as all drivers, including dependent contractors, working out of *X* address
    - Application 2: November 2018 → described bargaining unit as all drivers, including dependent contractors and driver helpers, working out of *X* address.
- Proposed bargaining unit comprised of "Independent Cartage Agents"
- ICAs employed pursuant to ICA Contracts

I: Board addresses several questions:
- Can ICAs (i.e., independent drivers)who operate through closely held corporations be considered employees?
- Can ICAs who employ or contract drivers or helpers be employees?
- Can ICAs who do not perform driving services be dependent contractors?
- Are ICAs and other drivers "dependent contractors"
- Is the bargaining unit appropriate?
- Are ICAs in other provinces in the bargaining unit?
- Is there evidence of employee support?

H: ICAs and drivers are dependent contractors of Sysco

A:
ICAs who operate through closely held corporations can be employees
- Definition of "dependent contractor" refers to "person", which can mean a legal entity

ICAs who employ or sub-contract drivers or helpers may be employees
- Depends on context in which helper and/or driver are engaged by ICA and nature of relationship with employer
- Helping to lighten load vs generating income?

ICAs who do not perform driving services for Sysco cannot be dependent contractors
- Definition of "dependent contractor" requires the person to perform "work or services" for another person for compensation

Determining whether ICAs and drivers are dependent contractors
- Must consider terms and conditions of work
- Terms and conditions include both legal and practical impediments
- Individual performing work or service must be in a position of economic dependence on the purported employer that more closely resembles employment relationship than independent contractor arrangement

Quiz

Which of the following are employees under the Code?

An electrician who is "lead hand" for maintenance workers in a manufacturing plant
- Supervises other electricians to ensure work done appropriately
- Spends majority of day observing work of others, but will directly perform electrical maintenance as well
- Must report incidents or misconduct to plant manager, but does not discipline other employees
- Comments on other electricians performance for the purposes of annual evaluations
- *Here, the electrician is an employee.*

Office Manager
- Has access to and regularly reviews employee personnel files containing personal, confidential information and discipline
- Works adjacent to offices of senior management and may overhear conversations about labour relations issues

- During collective bargaining, may be assigned to send documents to bargaining committees, such as employee lists, benefits packages, etc.
- *Employee knowledge is incidental. Employee does not make decisions in bargaining & knowledge on labour relations is not a prime function of their job. Here, the confidential information is not integral to labour relations AND it would not be adverse to the employer if the union was aware of the information.*

General Labourer
- Works in an abattoir for the production of beef
- *Employee*

Dentist
- Works as an associate for an annual salary in a dentistry office owned and operated by multi-national health care company
- *Excluded by **professional exclusion***

Labour Relations Specialist
- Gathers information for the purpose of responding to grievances from the Union
- During collective bargaining, may be required to assist with the development of bargaining proposals
- *Excluded because they deal directly with labour relations.*

Interpretation Bulletin #22: Employee Determinations

Three types of employees

(1) Full-Time Employees: employed on regular basis
    (a) Includes shift workers scheduled for full-shift for a full period
(2) Regularly Scheduled Part-Time Employees: employed on regular basis, but do not work full-time
    (a) Includes person working only on weekends
(3) Casual Employees: work irregularly or on call-in basis
    (a) Includes person with right to refuse work and generally not directed to be at work on specific day/time

Board may decide if employee is member of a specific bargaining unit

When determining which bargaining unit an employee may fall into, Board considers:
1. Unit description;
2. Nature and organization of employer's business;
3. Employee's Prime Function; and
    - What functions does employee perform?
    - What skills/tools/materials does employee use?
    - Whether employee completes work or merely assists?
    - What percentage of time the work involves in total duties?
4. Job qualifications (Re Central Park Lodges) to the extent that they help Board determine what a person is doing

CERTIFICATION

Organizing the Workplace

Organized: in this context means a campaign by a union to become certified bargaining agent for either:

1. A previously **non-unionized workplace**; *OR*
2. A workplace where the employees are **represented by another union**
    - This is called a "**raid**": an attempt by one trade union to induce members of another trade union to support the new union (subject to the provisions and limitations in the Code)

Other Ways to Become a Bargaining Agent:

- Voluntary recognition: Union may ask the employer to "voluntarily" recognize the union by agreeing to bargain with it
    - Before legislative certification process, this was the only option for unions
    - This is less secure than union certification → here, an employer could unilaterally end union recognition.

Organizing Campaign: Union representatives or employees of the target employer will attempt to have other employees sign union membership cards or petition in support of Union

- Usually secret
- **Cannot** campaign at employer's **place of employment during normal hours** of work (*Code*, s 151(d) → prof says "you can't organize on company time" (but if the union comes up, it's not an unfair practice to just discuss the union, but you shouldn't actually organize)
    - **UNLESS** employees reside on employer property *OR* employees reside on property that employer or third-party controls access to
    - If employees reside on employer property or property that employer or third party controls → provisions in *Code* for access

What employers can say/do during organizing campaign:

- *Code* **prohibits** employers from interfering with employees' choice of bargaining agent
    - ***Code*, s 148** prohibits an employer from interfering with the **formation**, **administration** of a trade union, or the **representation** of employees by a trade union
- It is **NOT** an unfair labour practice to express the employer's views provided there is no: coercion, intimidation, threats, promises, or undue influence
    - E.g., it's fine to send out a mass email saying "we think a union is a bad idea because…", but it's not okay to threaten to fire someone who wants to join the union.

Certification Application

- Governed by Division 5 of *Code*
- When the Union determines that its organization effort has reached an appropriate stage, it will **submit an application** to the Board for certification
- Once this application is filed, it generally proceeds quickly:
    - Must be completed within 6 months (*Code*, s 34(4)) → this quick timeline doesn't really help employees in their organizing efforts
    - Previously, strict statutory timelines

Requirements for Certification App (*Code*, ss 32–22)

(A) Complete and file Application Form

- http://www.alrb.gov.ab.ca/forms.html
- Application for Certification form is mandatory.
- Content of App for Cert:
    - "Common name" section is for the name you call the business (that isn't the legal name)
    - Make sure the legal names are correct (i.e., do a corporate search for business info *or* look at a pay stub for the name & make sure it's an active corporation in AB).
    - Make sure union name on App is the same name on the union card.
    - Trickiest part of the App → defining scope → who is the union applying to represent?
    - If the trade union was previously certified, the board will usually just accept the app since it's already been found to be a valid union.
    - Proof of support → at least 40% → must be in either petition form *or* membership card form (**BUT not both**)

(B) Accompanied by signed declaration of Union officer

(C) Proof of 40% Support, *Code*, s 33

Application for certification requires evidence of at least 40% are in agreement:
(a) at least 40% of the employees ***in the unit*** applied for, or indicated their support for the union, by
    (i) **maintaining membership** in good standing in the trade union, or
    (ii) **applying for membership** in the trade union and paying on their own behalf a sum of not less than $2 **not longer than 90 days** before the date the application for certification was made,
(b) at least 40% of the employees ***in the unit*** applied for have, **not longer than 90 days** before the date the application for certification was made, **indicated in writing** their selection of the trade union to be the bargaining agent on their behalf. *(i.e., the petition provision)*

General notes about s33:

- Proof of 40% (at least) support amongst employees in the bargaining unit that the Union is applying to represent (NOT 40% of all "employees", just 40% of proposed bargaining unit)
- Membership vs petition in s33 is an **either/or** decision (can't use both in the app, only one)
    - Membership evidence is most prominent in construction.
    - Actual membership isn't as common today because $2 is required (you'd have to collect the money, show it's actually from the person, account for the money & who it's from). As a result, petition evidence is more common.
- Petition cards → more common than a full petition because there's a lot of sensitive information & then everyone can see everyone else's signatures & information. With a card, it's just one per person.
    - More recently, petition cards are electronic & instead of a witness, the organizer verifies (*Masterpiece*).
- 90 day time limit makes organizing challenging
- **Support is determined at the time of application**
    - Employee's last expression of support before the application is filed → if an employee contacts the board *before* the application is filed, the board will take that communication as

the final communication. ***BUT*** if an employee contacts the board *after* the application is filed, this expression is not considered.

Board & Employer Roles after Submission of Certification Application

(A) Notice of Application for Certification

After receiving the certification application, the Board notifies the employer imeediately.

(B) Employer posts notice at workplace

Employer must post a notice at the workplace advising employees that an application for certification has been made (and information for those who object that they may contact the Board). The notice includes a date by which opposed employees must contact the Board.

(C) Statutory Freeze, *Code*, s 147

- As soon as employer receives a Notice of Application for Certification, it is **prohibited from changing** the rate of pay, rights or privileges the terms and conditions of employment from date of application to: the date of the Application's refusal by the board; ***OR*** until 30 days after date of certification (when a new freeze begins until collective bargaining process is completed)
    - **Exceptions** to the Statutory Freeze include:
        - Established custom or practices
        - Consent of union
        - In accordance with collective agreement (if one is in effect) *this only happens in the raid situation

What does the employer know?

- They do NOT get to know whether specific employees supported the application.
    - They do NOT get to know the percentage or number of votes in favour
    - *Code*, s14(6): bargaining unit ppl applied for & employer says whether they agree to it or not
- Certification votes are done by secret ballot.
- CanNOT ask about an employee's vote

Certification Process

(1) Application Process (see above)

(2) Investigation by Board Appointed Officer, *Code*, s 34(1)

A Board officer is then appointed to investigate the application.

Board will investigate to determine whether: (*Applicant is trade union; Application is timely; Unit applied for, or one reasonably similar, is appropriate for collective bargaining; Employees in the proposed unit have voted in representation vote to select the trade union as a bargaining agent; Application is not prohibited by s 38)*

1. Applicant is a trade union (*Code*, s 32(1)(a))
    - **Trade union status** determined w/ reference to def'n in the Code: an organization of employees that has a written constitution, rules or bylaws and has as one of its objects the regulation of relations between employers and employees (Definition s 1(x))
        - ➢ If you've been certified before, Board assumes you are a trade union → this makes this part easier.
        - ➢ BUT… make sure the union is *actually* a trade union in AB (sometimes they are federal unions, and so we will need to ensure they are a unit for the purposes of this analysis).

2. Application is timely (*Code,* s 37)
    - **No application for certification without Board consent:** (*Code*, s37(1))
        - **UNTIL** 60 days after complying with s 24(1) (i.e., requirement to file Constitutional docs, contact info, etc.); *or*,
        - **DURING** strike or lockout in effect
            - ➢ You'll want to be sure the union is a trade union before you start organizing b/c you only have 90 days where your petitions or memberships are valid AND you only have 60 days after complying with s 24(1) → this leaves 30 days to get Board consent if your union isn't actually a trade union in AB.
    - **Rationale** for timeliness limitations:
        - Protect union from being raided at certain vulnerable times & protect employers from "repeat attacks"
        - "open periods" when certification allowed
    - **Certification application may be made during six "open periods": (*Code*, s 37(2), Information Bulletin)**
        1. **No collective agreement in place or certification** covering employees in the bargaining unit (s 37(2)(a))
        2. If bargaining agent is **certified**, **but no collective agreement in place**, new certification application **cannot be made until 10 months has passed from date of certification** of current bargaining agent (s 37(2)(b))
            - Once you first become bargaining agent, you have to make a collective agreement w/ the employer.
            - Sometimes in the first collective agreement situation, employers will want to fight & there may, as a result of the disagreement, be delays in bargaining
        3. Bargaining agent has been **certified**, and **certification has been reviewed** by a Court, and **Court has not quashed certification**, a new certification application **cannot** be made **until 10 months** has passed from **final disposition** of question by Court (s 37(2)(c))
        4. if collective agreement for **2 years or less** is in force, certification application can be made **only during 2 months preceding end of the collective agreement** (s 37(2)(d))
        5. if collective agreement with term of **longer than two years** is in force, certification application can be made within 1**1th or 12th month of the second or subsequent year**, **as long as** (s 37(2)(e)(i)(ii)):
            - (i) application is more than 10 months before the end of the term (see s. 37(3)); *or*
            - (ii) certification application can also be made within 2 months immediately prior to the end of the term of the collective agreement
        6. When an **employer services notice** to terminate a **voluntary recognition** → s 43(2) provides that s 37(2)(d) or (e) (Open Period 4 or 5 above) limitations **do not apply**.

        - Normally, open period is only the last two months (as per Open Periods 4&5), but here, previously recognized union has additional time to submit certification – not just 2 months (this helps the incumbent union that's been in place)
    - **Closing the Open Periods** (*Code*, ss 37(4–5))**:** allow for the s 37(2)(d) and 37(2)(e) open period to close **if the union and employer reach a new collective agreement before the open period starts** but the **Board has to be satisfied that**:
        - Employees in the unit **were informed** that by entering into a new agreement they will **close an open period**; *AND*
        - A **majority of** employees in the **unit voted** to **enter** into the new agreement.
            - BUUUUT, historically, boards had jurisprudence that increased employee choice by preventing closure of statutory periods → as above in i, ii, this has changed.
    - **Additional timeliness considerations:**
        - **Consent required for substantially similar applications before filing if the application was previously refused**: If an application for certification as a bargaining agent has been refused by the Board or withdrawn by the applicant or remains before the Board but without being actively pursued by the applicant, the applicant shall not, without the consent of the Board, make the same or substantially the same application until after the expiration of 90 days from the date of the refusal or withdrawal (*Code,* s 57(1)(a))
        - (bizarre section that hasn't been used lol) If a union is guilty of an unfair labour practice complaint, they can't file another certification application for 6 months w/o consent of the Board (*Code,* s 57(2)). Circumstances that would constitute unfair labour practice for the purposes of this section:
            1. Certification application is refused, withdrawn, or not actively pursued;
            2. Complaint is made with regard to the applicant Union; and
            3. Board satisfies itself that applicant failed to comply with Code in respect of the Complaint
        - *Code*, s 54(2)(c) Unions whose certification has been revoked (revocation) through decertification vote – no longer the bargaining agent
            1. THAT Union cannot apply for certification over same or substantially same unit with same employer until at least 6 months have passed
        - **Build-Up Principle**: Board has additional discretion to *refuse* a certification *application* if, on the date of the application, the *number of employees does not constitute a substantial and representative segment* of the working force
            - ➢ No "magic number" but it has to be ***significant***, ***actual*** (not hypothetical), & ***imminent*** **increase**
            - ➢ **Representative**: consider not just numbers, but also **job functions**

3. Unit applied for, or one reasonably similar, is appropriate for collective bargaining (*Code*, 34(1))
    - A **bargaining unit** is the group of employees who can be grouped together for collective bargaining (*Interpretation Bulletin #9*)
        - Note the language of the statute requires **"an"** appropriate bargaining unit – this does not mean "the most" appropriate or "the ideal" bargaining unit
        - Organizing goal: make it big enough that it's a significant unit, but not so big that we run into issues of having too many competing interests.

- Common issue: Union creates a bargaining unit for *all* employees in a particular location without realizing there is a second location in which there are other employees in the same business but different location.
- Organizing tip: be conservative in what you apply for as a bargaining unit.
- Board can amend bargaining unit description to make the unit **provincial** so long as this doesn't significantly change the unit described in the Certification Application (Board prefers provincial bargaining units if at all possible)
- Employers often **object** to decisions about the scope of a bargaining unit to try to decrease union support *or* employers object to prevent more employees from being within the scope of the unit.

- Most challenging part of the Certification App
- **Factors to consider** (not one is determinative; see *Interpretation Bulletin 9*):

1. **Community of Interest**→ Do employees in the proposed unit have **common interests**?
   - Common skills and working condition
   - Perform similar work
   - Do they work together/close functional relationship?
   - Similar or conflicting goals in collective bargaining?
   - Essentially, do they care about the same things when it comes to working conditions and the terms of their employment?
   - When the "we" can't agree on "what do we want from the employer" this is problematic from a bargaining perspective?
2. **Bargaining History**: *(more important in raid situations or in subsequent applications)*
   - (1) History of collective bargaining with employer?
   - (2) Does employer already bargain with several bargaining agents (i.e. already a union presence in the workplace)?
   - (3) Viability of particular collective bargaining structure in the past
   - (4) Pre-existing bargaining unit preferred if incumbent union
   - Why does this matter: concern that the application would "carve out" a group of employees from an existing, viable bargaining relationship (remember – certification application not just in context of non-unionized workplaces)
3. **Nature of Employer's Organization**
   - If employer operates in several locations, Board will consider the **degree of integration and interdependence**
   - *E.g., If employees are highly mobile between departments/locations, then a departmental or location-specific unit is not likely appropriate*
4. **Viable Bargaining Structures**
   - Larger bargaining units tend to promote more effective bargaining and representation than smaller units
   - The Board's general preference/approach is that **the larger the unit proposed, the more likely it will be appropriate**, subject to the limiting factor of community of interest
   - Remember first principles: collective bargaining is about evening out the unequal power balance – the bigger the "us" the less mighty the "them"
5. **Avoidance of Fragmentation**
   - Board strives to avoid fragmentation: It is more **difficult** from an **administrative perspective**, and more **costly** for an employer to administer multiple bargaining units simultaneously
     - Concerns re multiple strikes

- "leapfrog" negotiations may promote industrial instability and limited periods of industrial peace

6. **Agreement of the Parties**
   - Board gives some weight to agreement re proposed unit b/w Union & employer
   - Agreement between the parties is not dispositive however: If the unit proposed is otherwise inappropriate based on the applicable factors, it's a no-go
7. **History of Difficulties with Organizing** (see *MacKenzie Catering*)
   - If an industry has been historically difficult to organize, the Board will take this into account
   - Balancing the purpose of the Code which is to facilitate collective bargaining, with ensuring a stable/viable collective bargaining structure so that the employees have meaningful access to benefits of collective bargaining
   - The Board will find a smaller unit appropriate where employees may otherwise be denied access to collective bargaining (and have in the past)
   - Note → this is rarely determinative b/c it's hard to bring this evidence
8. **Board Policies** (*Interpretation Bulletin #9*):
   - (1) **Full-time and part-time employees included** in the same **'all employee' unit**
     - **Rationale**: allows vulnerable workers (i.e., often part-time workers) protection in larger bargaining unit & the strength that attaches to a large unit.
     - Casual workers are included in the all employee bargaining unit, ***but*** casual workers have limited powers of support and vote (i.e., it depends on whether they are at work on the day of the vote or not).
   - (2) **Avoid Tag-Ends**: small portions of workforce that would remain unorganized if proposed unit was found to be appropriate
     - Tag-ends in industrial plants:
       - Board will usually exclude "office and clerical" employees & quality control employees from "production" or "plant" unit.
         - For quality assurance, ask whether the worker is doing quality assurance for the *thing being produced* or for *what the workers are doing* → if it's for what the workers are doing, they'll probably be excluded.
       - Only include both plant and office employees *if* union can demonstrate support with <u>both</u> plant and office employees
   - (3) **Sector-Specific Considerations/Presumptions**:
     - Board has policies establishing common units for certain industries, e.g.,:
       - Retail → Board generally wants *all* the retail locations in a particular city to fall within a bargaining unit.
       - Security Guards → Security guards presumed to be separate from an all employee unit.
       - Manufacturing
       - Medical and Health Laboratories
       - Mining
     - Bargaining units may be established by legislation (this is often used for public sector bargaining units, construction, healthcare)

4. **Majority of ballots cast in bargaining unit, i.e., majority vote** (Employees in the proposed unit have voted in a representation vote to select the trade union as bargaining agent) (*Code*, s 58)
    - This is a "**representation vote**" (*Interpretation Bulletin 14*)
        - ➢ Subject to the Board's "Voting Rules"
        - ➢ Secret ballot vote
    - **Majority of eligible employees who vote determines the outcome of the Cert Vote**
    - Board Officer prepares Notice of Vote and Voters list, which are posted at work site
    - Most representation votes occur at the worksite pre-pandemic, but during the pandemic, mail-in ballots were more common (and more time consuming due to the wait associated with letter mail). Note – for Calgary & Edmonton, we're moving back to in-person but outside of these centres, Board is sticking with mail-in voting.
    - If there are disputed ballots: placed in sealed envelope pending outcome of hearing
    - No Electioneering allowed around voting poll
    - Who gets to vote? → Voting Rule 16 ***exam question***
        - (1) Employees at work on date of *application*; AND
        - (2) Full-time or regular part-time employees who are not at work on date of *application* but who:
            1. Worked any time during 30 days before application; AND
            2. Are likely to return in the 30 days after the application
            3. But note → Employees on parental leave also get to vote
        - Casual employees (*Bosco Homes*)
        - Employees who quit or are terminated after the certification application is filed (*Athabasca Northern Railway*) '
5. No other bars to certification under s 38 (undue pressure from employer or union) (*Code*,
    - No certification if trade union is employer dominated (s 38)
    - No certification if picketing resulted in union membership (s 38)
    - **Policy rationale**: ensuring that it's the employee's "free choice"
6. NOT EXAMINABLE – Dependent Contractors, *Code* s 35.01
    - If unit applied for includes DCs, and there is no other unit of employees certified by a bargaining agent, Board assesses application as usual
    - If existing unit, Board must determine whether more appropriate to modify existing unit
        - Board has broad powers to deal with modification
    - Board may determine whether DC is covered by existing agreement
        - Must be clear and explicit language

(3) Officer Issues Report

Comes out shortly before the end of the notice for objection the employer posted in the workplace upon hearing of the Certification Application.

Usually quite short.

(4) Both parties have opportunity to object via written submissions

(5) Objections addressed at hearing

(6) Vote* *(*can be sooner in the process)*

- The **only prerequisite** to the vote is that 40% of the bargaining unit they applied for supports
    - I.e., Workers may proceed with a vote before hearing
- The idea is that the sooner you do the vote, the better b/c it's more conducive to employee choice
- Must have 50% support at vote (ie. majority wins)

(7) Board Grants Certificate, *Code* s 39

When the Board is satisfied with respect to the matters referred to in section 34(1) and satisfied, after considering any other relevant matter, that the trade union should be certified, the Board shall **grant a certificate** to the applicant trade union **naming the employer and describing the unit** in respect of which the trade union is certified as the bargaining agent.

Note – Board considers whether unfair labour practice complaints made in granting the certificate.

(8) Certificate Issued

- Certificate with bargaining unit description and date is issued in triplicate
    - Union gets a copy
    - Employer gets a copy
    - The Board retains a copy
- One can request copies of Certificates from Board, which keeps these on file

Steelworkers, Local 722 v Handleman Co of Canada Ltd, [1988] ALRBR 431 (Canning) – timeliness bar doesn't apply to all unions, just repeat offenders

R: Consent of Board is NOT required to file an application shortly after the Board rejects a sister local's application *(Code,* s 49(1)*)*

- There is no universal 90-day ban on all unions making application after an unsuccessful attempt
- Two locals are not one applicant if they are independent and well-established
- Generally, if you have different applicants w/ different bargaining unit scopes, the locals will be different. BUUUUT, just make sure the locals are substantially different.

Did NOT discuss this in class – Board may dismiss application for abuse of process

- Board does not apply principles of law of equity (ex. clean-hands doctrine)
- If consent of Board required, applications for consent must be granted before certification application is made
    - May not apply for certification and consent at same time

F:

- United Steelworkers (Local 6034) applied for certification and the Board refused to certify it.

- One month later, a second local (Local 7226) applied for certification of same group of employees and also applied for consent under now s. 57(1)(a)
- Employer argued that Board's consent was necessary under s. 57 as 90-day period had not yet expired since first unsuccessful application

H: Board ruled in favour of Union → Locals were separate legal entities & so the Local that hadn't previously filed could file.

A:

- No previous application had been made by second local, it was open to make an application without consent – separate legal entity
- Situation may be different if second local had been set up to circumvent 90-day rule, or if organizing drive involved multiple locals, but no evidence of this
- Absent "mischief" certification applications by different locals of same union not subject to 90-day prohibition
- **The Board notes that applications for consent must be granted before the certification application is made**
    - In this case Local 7226 applied for certification and consent at the same time

Noranda Mines Ltd v The Queen et al, 1969 CanLII 104 (SCC) – build-up principle

R: SCC has confirmed Board entitled to consider fact that number of employees in proposed unit did not constitute substantial and representative sample of work force to be employed in the future
- Selection of bargaining agent too early could lead to unit being more susceptible to employer influence
- When operations begin, workforce may comprise different kinds of employees

Board must balance right of present employees to be represented by union and right of future employees to select a bargaining agent

Board has exclusive jurisdiction to determine whether proposed unit is appropriate for collective bargaining
- Board's decisions not subject to appeal by the Courts
- Board not subject to any directions – may consider any factors it considers relevant

Balance required for build-up principle, which makes it difficult to appy

F:

- Union brought application on November 28, 1968 to certify unit of "all employees at Noranda's Potash Division, except managers, superintendents, foreman, office staff, clerical staff, plant security…"
- On date of application, unit contained 23 employees BUT, evidence given that by December, 1969, unit would contain 326 *(there **will be an increase***)

Proc Hist:

- Board dismissed application on the basis that unit was not appropriate at the time application brought
- Board said it must balance the right of present employees to be represented by trade union and the right of future employees to select a bargaining agent
- Allowed on appeal.

I:

H: SCC confirmed that Board entitled to (and should) consider the fact that the number of employees in the proposed unit did not constitute a substantial and representative sample of the work force to be employed in the future

Selection at early stage could be more susceptible to employer influence → if you do it too early, it's easier for an employer to have a "quiet word" with 1-2 employees about which union they should choose if there are only 4-5 employees in the workplace.

Also work force when operations begins might comprise different kinds of employees than will later be employed

A:
- Union brought application on October 20, 1994 to certify unit of all employees at Marmot Basin Ski Resort
- At the time of application, only 16 employees
- Employed doing maintenance, clerical, or various labour jobs
- By December 1, 1994, seasonal staff would be employed, and bargaining unit would contain about 200 employees
- Also many other classifications

Mineworkers, Local 1656 v Rocky Mountain Ski – build-up principle from SCC applied in AB

R: build-up principle requires a **substantial** and **representative** complement of employees in place *before an application for certification will be considered*

F:
- Union brought application on October 20, 1994 to certify unit of all employees at Marmot Basin Ski Resort
- At the time of application, only 16 employees who were employed doing maintenance, clerical, or various labour jobs
- By December 1, 1994, seasonal staff would be employed, and bargaining unit would contain about 200 employees (Also many other classifications)

H: Board dismissed application on the basis of build up principle:
- Less than 1 month
- Number of employees will increase 10x
- Will encompass several classifications not represented at time of application

A:
Board determined it had jurisdiction to apply **build-up principle**
- build-up principle requires that there be a substantial and representative complement of employees in place before an application for certification will be considered
  - Can be either "any other relevant matter" (now s. 39) or part of the consideration of appropriate bargaining unit (today this is *Code*, s 34(1)(c))
- Board will consider affect application of build up principle would have on current employees
- If group of employees would be denied opportunity for representation for an extended period of time, interests of future employees are adequately protected by revocation provisions
- One option is for union to apply for a unit other than all employees unit

MacKenzie Catering, [1997] Alta LRBR 81 (Howes) – "an" appropriate unit

R: Onus on party objecting to appropriateness of unit

F:
- Employer operated 22 camps in Northern Alberta providing meals and housekeeping services
- Its Solv-Ex Camp outside of Ft. McMurray was the largest – it employed 27 people
- The Union applied for a bargaining unit that included only the 27 employees at the Solv-Ex camp – not the remaining 21 camps
- Employer argued for an employee-wide unit on the basis that employees performed the same tasks, and transferred regularly throughout the different camps

- The evidence didn't bear this out (no transfer provisions in contract, transfers were more of a "problem solving" mechanism than common practice)
- This case is helpful because the Board goes through and applies each factor (except history of bargaining and agreement)
- Also applies two additional factors:
  - Difficulty of organizing in the industry
  - Desires of the employees and employer

I: Is the Solv-Ex camp of 27 employees an appropriate bargaining unit notwithstanding the existence of several other camps run by the same employer?

H: The Board found that the Solv-Ex camp of 27 employees was an appropriate bargaining unit → It was unique enough to be distinct from other camps: Different (i.e. more) positions; More employees; and Separate management structure

A:

1. Community of Interest
   - Employees at all sites share community of interest, including employees at Solv-Ex.
   - We only need ***an*** appropriate unit & Solv-Ex is ***an*** appropriate unit, so community of interest is satisfied.
2. History of Bargaining → Not applicable
3. Fragmentation
   - Board prefers larger rather than smaller units, but assess each application on its own
   - Smaller unit appropriate in some cases, particularly where employees otherwise denied access to bargaining
4. Nature of Employer's Organization
   - Evidence did not reveal integration
   - Solv-Ex operated separately from other sites
5. Difficulties Organizing
   - Court could see Union having difficulty organizing remote sites
   - No other units certified for this employer, few in industry
   - But the Union did not bring evidence of difficulty in industry generally, so this wasn't determinative.
6. Agreement of Parties → Not applicable
7. Desires of Employees
   - Indicated in application for certification
8. Viable Bargaining Structure
   - Large enough unit to be viable, not too large to create tag ends.
   - Employer focused on size of unit within overall workforce (16%), not whether unit itself would be viable
   - Description of geographic limitations sufficient to indicate who was in the bargaining unit

CEP, Local 448A v Weyerhaeuser, [1998] Alta LRBR 492 (Wallace) – community of interest & functional integration

R:

Must balance access to bargaining and industrial stability (*Island Medical Laboratories*)

- Concerns about industrial stability progressively grow as more bargaining units are certified for employer

For first certification, Board only requires the unit has 'rational and defensible' boundary

- **Board skeptical of unit that arbitrarily excludes groups of employees who share interests, terms and conditions of employment, and working environment**
- **Concerns about fragmentation for first agreement merely speculative**

F:

- Employer operated integrated sawmill/planer mill, pulp mill, and woodland operations
- Union applied for certification of *just* pulp mill employees

- Employer objected that bargaining unit was not appropriate → argued for all employees union or at least pulp mill & sawmill *(this was a strategic argument on employer's part to try to get the union to fail)*

I: Is a bargaining unit of just pulp mill employees appropriate?

H:

A:
For a first certification, Board only ensures that bargaining unit has a "rational and defensible" boundary (page 524)
- Board looks skeptically at bargaining units that arbitrarily exclude groups of employees who share interests, terms and conditions, and working environment
- Concerns about fragmentation for first agreement usually speculative

Board considers **community of interest** as encompassing **four factors**:
1. Similarity in skills, interests, duties and working conditions;
    - Similarity with employees in sawmill, but question is not whether all-employee unit would be appropriate but whether the unit applied for is appropriate.
    - Enough commonality amongst pulp mill employees that they had a community of interests (we aren't concerned about commonality b/w pulp & saw mill, just whether the proposed unit is appropriate)
2. Physical and administrative structure of the employer;
    - Pulp mill was physically & administratively separate from sawmill and woodland operations
    - Shared policies, but separate management
3. Functional integration **most determinative*
    - Group of people with a **profound state of cooperation** should be included in the same bargaining unit (e.g., wages, responsibilities, etc.). Here, we want to be careful that we aren't excluding workers in a profound state of cooperation with workers in the bargaining unit (but this isn't about administrative integration, it's about how they are impacted by one another in their overlapping duties and roles)
    - Concerned about functional integration between employees, not departments
    - Arbitrary to exclude employees who are a "profound state of co-operation" with and dependence on others – can lead to instability
    - Some integration here, but very few employees have shared duties or overlapping roles
    - Majority of employees here did not interchange
4. Geography
    - Pulp mill workers are not geographically separate
    - This factor does not form part of Board's rationale for finding unit appropriate

Board also looks at the following factors:
- Employee mobility
    - Where there is significant mobility between employees in and out of proposed bargaining unit, Board will find community of interest amongst larger group
        - About 15 employees out of 660 transfer each year & Board says this is "not close" to causing it to question appropriateness of unit
- Viability
    - Includes 360 of 660 non-management employees
    - Tag-ends included (55 admin employees) does not affect viability
- Management of Industrial Disputes
    - Boards concerned about *proportionality* in a dispute
        - However, not a problem per se that one group going on strike can cause layoff of other employees
        - If there is a dispute and a strike, employers have workarounds available to them.
        - If it was, instead, a small group of 20 people who had a very specialized role & their strike could lead to all of the other employees being out of work during a strike, then this would work against the bargaining unit.
    - The bargaining unit applied for is very large, as it is over half of non-management employees

- Also, strike in pulp mill would not cause immediate shut down of other parts of operations

Southland Transportation Ltd., [1997] Alta LRBR 443 (Wallace) – appropriateness of bargaining unit

R:

Unit's definition affects the union's bargaining power – disparate interests within unit makes it difficult for union to effectively represent the collectivity (Kidd Creek Mines Ltd)

- Too much attention to minority interests makes it difficult for union to make coherent package of proposals
- Too little intention to minority interests creates internal strife

Undue fragmentation must be avoided – too many small units results in: (Kidd Creek Mines Ltd)

- Unnecessary work stoppages
- Impeded movement of employees between jobs
- Jurisdictional disputes over assignment of work
- Increased costs of negotiating and applying several collective agreements

Principles of Bargaining Unit Appropriateness: (Island Medical Laboratories Ltd)

Two fundamental principles in determining bargaining unit appropriateness:

1. Access to Collective Bargaining → Most important principle for initial application
2. Industrial Stability → Most important principle for second or additional application

Test for determining appropriateness of unit is 'community of interest'

1. Appropriate unit must have a rational and defensible boundary
    - Board skeptical of: (Weyerhaeuser Canada)
        - units that appear to arbitrarily exclude employees who share same interests, terms/conditions of employment, working environment
        - employer claims that unit is inappropriate, if at first glance it appears to be rational, defensible, and viable
            - appropriateness objections cannot be used as clock for employer objections to collective bargaining, in general
2. Initial application for certification, 'community of interest' determined by:
    - Similarity in skills, interests, duties, working conditions – less likely to have conflicting interests during collective bargaining;
        - Whether members all perform similar job functions
        - Whether employees have common generic skills in common: leadership training, first aid training, safety skills (Weyerhaeuser Canada)
        - Whether all employees focus on production of same product (Weyerhaeuser Canada)
        - Whether all employees work in same building under similar OHS conditions (Weyerhaeuser Canada)
        - If employee has two functions, determine their 'prime function' → Whether minor function would create conflict of interest?
        - Employees may have different interests, not all of which conflict (Weyerhaeuser Canada)
        - More modern view is to focus on viability
    - Employer's physical and administrative structure;
        - Whether members of unit interact with common manger
        - Whether members employed to fulfill employer's obligations to same customers
        - Whether employees hired with understanding they will be reassigned to other locations (MacKenzie Catering)
        - Whether unit includes employees physically separated from other parts of operation (Weyerhaeuser Canada)
        - Whether unit has distinct management group, unique from other parts of operation (Weyerhaeuser Canada)
    - Functional Integration: extent to which unit would create situations where employees crossing boundary

between union and non-union workforces; and (Island Medical Laboratories)
- (1) Arbitrary to exclude employees who are in a state of cooperation with and depend on each other → Lead to instability
- (2) Functional integration must be on regular or day-to-day basis – based on managerial policy
- Whether integration is merely seasonal assignments or rotational roles (Weyerhaeuser Canada)
- Not merely holiday relief or replacement of sick employees
- Existence of pool of relief workers does not constitute functional integration (Good Samaritan Society)
- Continuous work process (assembly lines), overlapping or shared duties, team processes
- Whether supplies moved between sites (MacKenzie Catering)
- Whether small amounts of crossing boundaries may be dealt with in collective agreements
- Whether employees perform dual duties between different workforces or departments (Weyerhaeuser Canada)
- Seniority Scheme: whether vacancies filled from within same department, or employees brought in from other departments (Weyerhaeuser Canada)
    - Difference between 'functional relationship between departments' and 'functional integration between employees'
        - Functional relationship between departments is expected in any business

- Geography
    - Geographical separation of employees favors smaller bargaining units (Weyerhaeuser Canada)
        - Natural tendency to identify and share common goals with employees in same location
- If industry/sector is traditionally difficult to organize, 'community of interest' factor relaxed
    - (i) To establish industry/sector is traditionally difficult to organize, evidence should show low-union density in the industry, which reflects structural or systemic aspects of workforce that make it difficult to organize, considering:
        - Board's own records – collective agreements and certifications
        - Evidence of individuals with experience in industry/sector; and
        - Whether workers are seasonal or transient (MacKenzie Catering)
        - No evidence pulp-mill industry is difficult to organize (Weyerhaeuser Canada)
        - Expert evidence of industry/sector
    - (ii) Existence of multi-union bargaining structures in other employers is evidence that more than one bargaining unit is acceptable (Weyerhaeuser Canada)

3. Second or additional stage of certification, where already at least one collective bargaining regime in place, 'community of interest' determined by:
    - Presumption against multiple bargaining units – presumption increases with # of units
    i. Similarity in skills, interests, duties, working conditions;
    ii. Employer's physical and administrative structure;
    iii. Functional integration;
    iv. Geography
    v. Practice and history of current collective bargaining scheme; and
    vi. Practice and history of collective bargaining in industry/sector
4. If application received where existing units already in place, determine whether to:
    i. Grant certification to new unit; or
    ii. Enlarge, vary, or merge existing units
        - (1) Applicant must apply for existing unit; or apply for a larger unit (Crest Motor Hotel
        - (2) Determine whether to enlarge, vary, merge existing units by considering: (s. 142)
            - Whether one or more bargaining units no longer appropriate;
            - What would constitute new or appropriate bargaining unit; and
                - Consider six 'community of interest' factors
            - Evidence of potential or actual industrial stability

Test for bargaining unit appropriateness – reject bargaining unit if, on balance, offends public policy considerations: (Southland Transportation) → Goal is to ensure unit not fraught with labour relations difficulties – not to find best possible bargaining unit

1. Whether unit boundaries drawn so employees have reasonable access to collective bargaining
    - Discourage units so large they are effectively impossible to organize
2. Certainty: whether unit boundaries certain enough to not create undue number of disputes over who is in and who is out of unit
    - Home Base: location where management directs workforce's daily activities
        - Mobile employees who seek and take instructions from more than one of employer's locations have a 'home base' if:
            - One location predominates; or
                - Unit may be based on location of main dispatch (Southland Transportation)
            - Employees' identification with one location reinforced by other factors: garaging of vehicle; physical contract with managers at location; strong administrative connection
    - If union seeks unit defined by something fluid, like dispatch location, it accepts risk that employer may change location for valid business reasons
        - If employer collapses home base to undermine bargaining unit, unfair labour practice provisions of Code may apply
3. Whether unit is viable for collective bargaining
    - Whether unit large enough to be viable (MacKenzie Catering)
    - Whether unit unique enough to be distinct from other locations of employees (MacKenzie Catering)
    - Whether unit would create tag-ends who would not obtain own bargaining rights (MacKenzie Catering)
    - Whether unit includes most of highest-skilled and highest-paying jobs (Weyerhaeuser Canada)
    - Indicates substantial bargaining power
    - Relative weakness of remaining unorganized employee group does not bear of viability of larger and more powerful unit (Weyerhaeuser Canada)
4. Whether unit boundaries consistent with employer's operational structure
    - Should not unduly interfere with employer's operations
5. Internal Cohesion: sufficient 'community of interest' so collective bargaining not impaired by conflicting interests
    - Should not exclude employees who share high degree of collective bargaining goals and interests of those inside the unit
    - Whether members of unit interact with common manger
    - Whether members all perform similar job functions
    - Whether members employed to fulfill employer's obligations to same customers
6. Whether unit structure promotes long-term industrial stability
    - Avoid serious fragmentation of employer's workforce
    - Whether unit has ability to put other employees, outside of the unit, out of work through work stoppages (Weyerhaeuser Canada)
        - If history of industrial instability connected to a small bargaining unit, Board may alter or limit that bargaining unit through its 'reconsideration power' (Weyerhaeuser Canada)
        - However, most employers operate in manner that other employees affected by labour disputes (Weyerhaeuser Canada)
    - Picketing Concerns: whether picketing by unit would cause other workers to feel intimidated (Weyerhaeuser Canada)
        - Whether employer could simply open access in another part of the site

F:

- Employer operated school bus service in Calgary and surrounding area
- Teamsters Local 362 applied to become bargaining agent for unit of employees described as:
    - *All school bus drivers working out of Cochrane, AB branch (216 Griffin Road) except dispatcher, office clerical, supervisors, and those above.*
    - Presumption: managers aren't in the bargaining unit, so we don't have to exclude them.
- Board Officer amended the description of the bargaining unit to read: *All employees working out of Cochrane*
    - Both employer and union objected to amended unit
        - Employer operated school bus service, charter bus services to schools, and highway commuter

bus service
    - Employer had bus yards in Calgary, Okotoks, Strathmore, High River, and Cochrane
    - Employer had three dispatch points: 2 in Calgary and 1 in Cochrane
    - Union, on the other hand, was upset b/c now there were a *ton* more people in the bargaining unit (incl mechanics & other types of drivers)
    - "Out of Cochrane" was confusing b/c 14 of the 72 drivers potentially in the bargaining unit lived in Calgary
        - 8 were "park-outs", parking their vehicle at home
        - 6 picked up buses from Calgary yard
        - Only 36 of 72 picked up buses in Cochrane yard
        - Others had very little to no physical contact with Cochrane yard
    - Employer argued that:
        - Bargaining unit description too vague
        - Community of interest considerations favour all drivers unit, or all employees unit
        - Cochrane-based unit would seriously conflict with Employer's operational structure
- All 72 routes operated pursuant to contract with Rocky View School Division contract
    - All these routes dispatched from Cochrane
    - Operational contact between 72 drivers and employer ordinarily through Cochrane dispatch or Cochrane management

I:

H:
- Application didn't fail, but union ended up losing the vote.

A:
- Board reviews policies and principles on appropriateness of bargaining unit
- Two fundamental principles: access to collective bargaining and industrial stability
    - Access to bargaining more important for first certification application
    - Industrial stability more important in subsequent applications
- Presumption against multiple units
    - Presumption increases with number of units certified

Board finds description sufficiently certain
- Mobile employees have a "home base", which is where management directs daily activities & NOT where employees store their vehicle or physically check in
- If employees take directions from multiple locations, will still have home base if one location predominates

Community of Interest
- Community of Interest would support an "all employees" unit as proposed by employer but also supports smaller unit
- Community of Interest primarily useful in identifying <u>conflict of interest</u> within bargaining unit and identifying groups who have been <u>arbitrarily excluded</u>
- Usually community of interest would support multiple units

Nature of Employer's Operations
- Three main factors reflecting operational structure:
    - Physical and administrative structure
    - Functional integration
    - Geography

Functional Integration
- Functional integration concerned with integration of employees, not departments
- Only four employees drive routes out of both Calgary and Cochrane
- Only 1% of routes operated by relief employees from Calgary dispatch over 6 month period

- Relief issue can be dealt with in bargaining

- The Board's change of bargaining unit meant:
  - Mechanics excluded
    - Although only 3, they are not an unacceptable "tag-end"
    - Remaining employees unorganized, and mechanics could be appended to other unit
  - Commuter bus drivers also excluded
  - Board amended description of unit as follows: *All school bus drivers working out of the Cochrane depot*

Bosco Homes, [2001] Alta LRBR LD-030 (Wallace) – voting rights of casual employees

R: Board's discretion to refuse certification or revocation under Code, s. 37 should be used sparingly
(1) Intentionally scheduling casual workers to work on same day application made does not constitute offensive trade union conduct
- **Casual workers can have interest in workplace that is disproportionate to hours worked**
- **Provides certainty in Voting Rules regarding eligibility**

(2) Power may be used when:
(a) Employer's selective layoffs or terminations impact voting constituency (Cobra Maintenance)
(b) Impact of casual workforce on vote is grossly disproportionate to their interest
(i) Test: whether existing workforce caught by application is seriously unrepresentative of workplace that will be in place shortly afterwards
- **Not determined by closeness of vote result**
- **Allowing 45 casual voters, out of 190 employees, is not seriously unrepresentative of workplace**

F:
- Union filed its application on the date that 75 casual employees attended a meeting, for which they were paid → this would allow them to take part in the vote/meet the 30-30 rule
- Employer argued this was gerrymandering and the Board should refuse the application

I: Should the Board refuse the application because a low-level manager called a mandatory meeting the day the application was filed, thereby making all the casual employees eligible to vote?

H: Board summarily dismissed employer's objections → Board will only deviate from Voting Rules in limited circumstances

A:
- Voting Rules strike a balance between recognizing casual employees as employees but giving them less of a role in representational votes
- Certification should only be denied in "extreme cases" of vote manipulation where employees eligible to vote is seriously unrepresentative
- Employer objected to two employees' votes being counted on the basis that they had resigned their employment between the application and the vote

Athabasca Northern Railway, [2006] Alta LRBR LD-025 (Asbell)

- Employer objected to 2 employees' votes being counted on the basis they'd resigned their employment b/w the application and the vote.
- Board summarily dismissed employer's objections.

- Board will only deviate from voting rules in limited circumstances.

Implications of Certification, *Code*, s 40

Exclusivity, *Code* s40(1)

Union becomes the **exclusive bargaining agent** for employees in the bargaining unit:

- If a union has *ousted another* union, then the previous union is replaced by the incumbent union – the employer may only negotiate with the certified bargaining agent.
- Employer is prohibited from bargaining with any other union.
- Also means that employer cannot negotiate with individual employees.

Party to Existing Collective Agreements, *Code* s40(3)

The new union **becomes a party to any existing collective agreement** for the bargaining unit.

- BUT: can also terminate it by giving the employer 2 months notice
- **Exception:** *doesn't apply to VR Cert situation – don't want disruption when continuity of same bargaining unit (s 40(4))
    - If you are a voluntary recognized unit & employer gives you notice they'll no longer recognize you, they have to do that 6 months before the end of your collective agreement. The *Code* allows the union w the 6 months notice to do a certification application during that period – this gives the union four additional months compared to s37. Here, the existing union cannot use s40(3) to end the collective agreement
- **Exception**: doesn't apply in construction

Duty of Good Faith, *Code* ss 59–60

Both union and employer are **bound by duty to bargain collectively in good faith**.

Union Gains Protection from "Open Periods"

Union gains protection from "Open Periods"

- Recall timeliness requirements for certification applications
- Union has certain **"peace" periods** when it is free from attempts to raid (this is where that idea of *protection* comes from)

VOLUNTARY RECOGNITION

Voluntary recognition: Another way union can be recognized as the bargaining agent. With voluntary recognition, union may ask the employer to "voluntarily" recognize the union by agreeing to bargain with it and enter into a collective agreement. Before legislative certification process, this was the only option for unions.

Note: voluntary recognition is less safe for unions & confers power in employer's hands (they can end when they choose at end of collective agreement; whereas, employer doesn't get a say in ending certification)

Code, Division 6, s 42–44

42 Subject to this Act, an employer has the right to bargain collectively with a **voluntarily recognized** trade union **acting on behalf of the employer's employees or a unit of them**

- Employees **must** be in support of the union.
- Employer agrees to uncertified union (i.e. one that has not gone through the formal Board supervised vote) to become the bargaining agent for employees in the bargaining unit

Don't worry about s 44.

Key Differences b/w Voluntary Recognition & Certification

1. Before collective agreement is entered into (i.e., when parties are in the process of bargaining first agreement), there is **no obligation** on part of the employer to **bargain with an uncertified union or recognize union as bargaining agent** – all voluntary. In contrast, Certification through the *Code* requires the employer bargain with the certified union & recognizes the union as the bargaining agent.
2. Employer can terminate VR– once CA entered into with uncertified union, employer cannot refuse to bargain, but can terminate voluntary recognition on 6 months of notice before expiry of CA, and thereafter refuse to bargain with or recognize the union: s. 43(1)
    a. [6 month grace period gives the union a chance to make certification application before the expiry of the CA]
3. Scope of Bargaining Unit is defined by **agreement b/w employer & union**

Risks: Sweetheart Deals

This risk arises when employers voluntarily recognizing a union that is prepared to make a "**sweetheart deal**" → i.e. enter into a Collective Agreement on **terms that are worse** than those a certified bargaining agent may be able to negotiate

Board can intervene in instances of a sweetheart deal as per s 133(1) → Board can void any CA if trade union is dominated by employer

Board has mitigated this through the holding in ***Raydon Rentals***: in order for Collective Aagreement negotiated by a voluntarily recognized union to be valid, the Union must be acting on behalf of employees during the collective bargaining process AND via vote (listen again @ 4:23pm)

Re Raydon Rentals, [2005] Alta LRBR 324 (Casey) – support of majority of employees required in VR

R: VR can't be used to avoid the need for a union to have **support of a majority of employees** because a union's right to bargain flows from **employees' choice**. In VR, there's no formal requirement to demonstrate support, but the Union will usually show support by getting the employees to **ratify the collective agreement**.

Things to look for: employees have solicited support of union, union has involved employees in trying to bargain, ratification of collective agreement *(but note that ratification alone may not be determinative as unions should engage employees throughout the collective bargaining process)****, etc.***

F:
- Union was certified bargaining agent for group of Finning Employees
- Finning owns Raydon and arranged for Raydon to purchase a group of stores
- During collective bargaining with Finning, Union stated that negotiations would not end without addressing Raydon employees → Union wanted Raydon to either fall under the Finning Employee agreement or for Raydon employees to get in union → Finning agreed to voluntarily recognize Union as bargaining agent for Raydon employees
    - Raydon and the Union entered into a collective agreement
    - BUT no vote was taken at the time of voluntary recognition or ratification of the collective agreement for Raydon
    - Employees were told they had to sign Union membership cards or they would be terminated
    - This went on for 3 years until some employees brought a revocation application to end bargaining rights of the union → this led to the question of whether or not there was voluntary recognition in the first place.
        - *Could the union have done something different so this question wouldn't arise? →They could've certified or gone to the Board to get a ruling on whether or not they fell under Finning's certificate*

I: Was there a valid voluntary recognition in the first place?

H: No collective agreement in effect → Voluntary recognition is absent therefore revocation is moot.

A:
Advantages of voluntary recognition:
- Parties come together on amicable terms rather than as adversaries
- Parameters are determined by the parties rather than third party
- Avoid expense and delay

Disadvantages of voluntary recognition:
- Risk of sweetheart deal
- Influence employees against other union who is attempting to certify a group of them
- Union foisted on employees

Further analysis:
- In this case, no evidence of employee support
- Membership card evidence not helpful because employees told they had to sign up or would be terminated
- The fact that collective agreement in operation for 3 years not sufficient
    - This would encourage sweetheart deals
- Board declared that no collective agreement in effect

Gateway Casinos v UFCW

Three ways to end: (1) 6 months notice (i.e., 6 months from end of collective agreement, s 43); (2) raid; (3) revocation

R: Section 50(b) refers to "bargaining rights" as "arising as a result of the employer's having voluntarily entered into a collective agreement with the trade union…" → SO **no bargaining rights exist until the collective agreement is negotiated and ratified** (here, employees still have final say in whether they are being represented because the employees must ratify the collective agreement before bargain rights are created)

F: Employer voluntarily recognized a union as a bargaining agent for a group of employees. Union provided evidence of majority support amongst employees. BUT before bargaining began, certain employees brought a revocation application. The Union applied to summarily dismiss the revocation application on the basis that no "bargaining rights" existed yet.

H: Bargaining rights don't exist yet, so the revocation application is dismissed.

COLLECTIVE BARGAINING & DUTY TO BARGAIN IN GOOD FAITH

Collective bargaining is the **negotiating process** between a union and employer for the purpose of arriving at a collective agreement.

Collective agreement is "an **agreement in writing**" between the employer and the union that contains the **terms and conditions of employment** (note – all collective agreements are publicly available through the Board)

Starting the Process: Notice to Bargain, *Code,* ss 59(1–2)

59(1) (FIRST AGREEMENT) if **no collective agreement in place** → collective bargaining process begins by employer or union **serving the other party with a notice** to commence collective bargaining.

- NOTE - this *applies only to certified units*, not voluntary recognition.

59(2) (RENEWAL OF AGREEMENT) if **collective agreement is already in force** → either party to the agreements may **serve notice to commence** collective bargaining on the other and this notice must be provided **between 60-120 days prior to the expiry of the (current) collective agreement**.

- BUT – check the term clause of the agreement to make sure you are correct about when the notice to commence the renewal can be brought. Make sure that you serve **notice to bargain** in time!!!
    - There's been two cases in AB where there was a rollover of the CA when the bargaining agent failed to serve notice to bargain in time. We haven't seen failure to file in time other than this in AB, so it's unclear what exactly would happen if one failed to file in time (it's possible you would have to go through the 59(1) process for a **new CA**).

Requirements for Notice to Bargain, *Code,* s 61

61(1) must include name & addresses of **persons resident in AB** (usually 1-3 ppl) who have **authority** to bargain collectively, conclude agreement, and sign an agreement.

61(2) Response must include the same information from the other party.

61(3) Parties must list other **members of bargaining committee**.

61(4) for the purposes of 61(3), **notice must include at least one person, from each side**, on whose behalf negotiations are being conducted *(this usually ends up being a rep chosen, like a person high-up in the process or – more often on the employer side and not often on the union side – a lawyer)*

- On union side → union member, higher ups
- On employer side → highest up person in the unit or HR/labour dept if it's a larger company

61(5) any **changes to bargaining committee** must be given **in writing**

61(6–7) Parties must advise the others of any **ratification procedure** and **any changes** to that procedure thereafter.

- Common on employer side → sometimes there's a responsibility for ppl not at the bargaining table to ratify (e.g., a board of directors needs to ratify the agreement)

Service during Bargaining (*Code,* s 63; *Rules of Procedure,* rules 11, 19)

63 service necessary throughout bargaining (i.e., application for mediation, strike or lockout notice, etc.) → make sure to file ***within*** bargaining time frame *(particularly important in renewal where you would lose protection of Code if you don't get the notice in on time – lots of agreements say failure to renew will result in a roll-over of agreement from year to year, but this isn't always the case)*

- Notice: sets out parties
- Serving notice: can leave at the place of business with someone 18+, personally serve, or send by registered mail (s 63) *OR* can send by fax if you call ahead & let them know (**R 11 – BUT canNOT send strike notice by fax)**

R 19 waiver of non-compliance

Bargaining Process, *Code,* s 60

Commencement of Bargaining, *Code,* s 60(1)

60(1) when a notice to commence collective bargaining has been served, the **parties must** (**within 30 days or less** of service):

(a) **(parties or authorized reps) meet and commence bargaining in good faith** (**subjective duty**); and

- ➢ One of the most critical issues in labour law
- ➢ **Purpose**: highlight & help to resolve the tension b/w philosophies of freedom of contract & policy of avoiding **industrial conflict** (i.e., strike and lockout)
- ➢ **Temporal scope**: commences upon service of notice to bargain & continues until (1) agreement is reached, (2) union bargaining rights are terminated (i.e., decertification), or (3) some other end to the dispute under law). Therefore, obligation continues through a legal strike, lock out, and/or statutory freeze (s 147).
  - For a first contract, statutory freeze is 120 days; in renewal agreement, statutory freeze flows through entire period of bargaining until there's a strike, lockout *(note – no essential service question will be on exam related to the statutory freeze period)*
- ➢ Relevant vocabulary:
  - **Surface bargaining**: situations where a party goes through motions of bargaining with no real intent to conclude an agreement (e.g., not providing dates, not providing enough dates, not having someone at the table with any knowledge about the issue in question); (surface bargaining not permissible; contrast to hard bargaining)
  - **Hard bargaining**: a party using its economic power to attempt to negotiate an agreement that accords with the best interests of that party, and taking an aggressive bargaining posture on terms of substance (contrast to surface bargaining; hard bargaining is permissible)

- **Receding horizon**: situations where one party reneges on its previous position, or where the party continues to move the target so that an agreement is never actually reached. E.g., introducing new proposals at a late stage of the bargaining.
- **Bargaining to impasse**: bargaining an issue without conceding until the point of industrial conflict (i.e., strike). Board says you can bargain whatever you want but if a party holds the position to the point of putting the union on strike or locking out the employees, this is improper.

➢ GCIU Southam Inc:
➢ UFCW v Gainers:
➢ Edmonton City (Howes):
➢ AUPE v VS Services:
➢ Finning v IAMAW Local 99:

(b) make every **reasonable effort to enter** into a collective agreement (**objective duty**)

Exchange of Proposals, *Code,* s60(2)

60(2) bargaining agent and the employer must **exchange bargaining proposals within 15 days** after the **first time they meet for the purpose of collective bargaining** or within any longer time **agreed on** by the parties.

Proposals can be very detailed or they can be more general, but be careful not to be so general that it is unclear to the other party what it is you are looking for (appropriate level of generality e.g., "we want 5 shop stewards; we want representation at X level")

Breach of *Code*, s 60(3)

60(3) failure to comply with 60(1) or (2) is a breach of the *Code*.

Remedies for s 60 Breach, (*Code,* s17(1)(c))

17(1)(c) if a party fails to comply with section 60, the board may:

i. **issue a directive** directing the employer or union **to bargain in good faith** and make **every reasonable effort to enter into a collective agreement;**
ii. **prescribe** the **conditions** under which bargaining may take place
    a. Examples include: Board telling parties the dates & times for bargaining (e.g., 10 days in a row, until agreement is made), who must/n't attend, how discussions/negotiations should occur, etc.

First Contract Arbitration Process (relatively new to AB), Division 14.1, *Code*, s 92.2–92.3

Purpose: get around disputes the first time parties are negotiating (i.e., first time parties are going through *Code* s 59(1) – first agreement). Makes sure the parties are deciding for themselves so that both parties are satisfied & empowered (not just decided by the Court)

- Given the purposes, it can be used (and is used) by unions or employers

92.2 If the **collective agreement can't be reached within 90 days** from service of bargaining notice, day bargaining started (if no service), or since lockout/strike notice was served, a party can **apply to the Board for assistance** in settling the terms of the first collective agreement (e.g. mediation, set conditions for bargaining). As long as the board gets the application within the statutory freeze period ends (i.e., 120 day period in s147(2)), the Board must direct the period be extended until 92.2 measures are successful or until the Board directs otherwise.

92.3 If efforts from 92.2 are unsuccessful, the Board ***may* send parties to arbitration** to declare dispute be resolved by arbitration *(if you are a union, keep an eye on this clock. If you don't apply within the 120 day freeze, the freeze will extend, so this is a great option to get things settled)*. Requirements for arbitration to be sought:

1. Arbitration is **necessary**
2. Employer or trade union has **failed to comply with the Code** (i.e., Refusal to meet; refusal to recognize authority of party to bargain collectively;, or failure to make reasonable efforts to conclude a CA)
3. **No other remedy would suffice** to counteract effects of failure to comply with the *Code*.

Relevant Cases:

GCIU v Southam Inc, [2000] Alta LRBR 177 (Wallace)

Southam may have unfolded differently now that we have legislation re avoidance of industrial conflict. Today Code s27(5) requires that Rand formula be included if (union?) demands → so a lot of issues of bargaining to impasse re Rand formula are non-issues since Rand formula is protected in the Code.

R: Process of collective bargaining must respect the three objectives of duty to bargain in good faith:

1. **Recognition** of the trade **union** as the **exclusive bargaining agent** (i.e., legitimation of union in the workplace)
2. **Full and rational discussion** of the issues (i.e., minimize disputes)
3. **Serious efforts to reach** a collective **agreement** as the end result (i.e., it's about *how* we bargain, not what we bargain)

If any of the objectives are offended, the Board can require the agreement removes something or adds something (but there is a *very* small range of items that the Board can order be added/removed)

Principles flowing from the objectives – parties (usually employers, but occasionally unions)...

- Are required to provide **solicited disclosure** of the information that is necessary to understand a position and provide a response;
- Are required to provide **unsolicited disclosure** of decisions that have significant impact on bargaining unit (see Gainer case)
- Must not deliberately misrepresent material facts
- Must thoroughly explore positions and engage in full rational discussion
- Must not dictate representatives of the other party
- Must not engage in surface bargaining
- Cannot bargain to impasse illegal or improper demands (e.g., union can't insist employer overbargain certificate & employer can't insist

R: Board considers totality of conduct to determine whether the party intends to reach a collective agreement (i.e., objective 3). Certain facts can support an inference that one party does not really intend to reach a collective agreement, e.g.:

- history of unfair labour practices
- tabling of proposals that appear to lack any business justification or otherwise appear to be so unreasonable as to be "tailor-made for rejection" (e.g., failure to include *anything* about wages)

- a refusal to grant a clause that is standard in the relevant industry (***Royal Oak***)

R: Duty to bargain in good faith does not require any particular form of agreement (e.g., union may not be successful in negotiating better terms, terms of the agreement may not be fair, and parties are entitled to economic power bargaining → Board will not weigh in b/c this isn't what the duty to bargain in good faith is about).

R: any issue may be bargained (or not bargained) **except** demands that are **illegal or improper** cannot be bargained to impasse (but can be bargained up until the point of impasse)
Examples of illegal/improper: crossing picket line if employee (amnesty argued on part of employer - but not permitted for employer to do that), arguments about Rand formula, exclusion of arbitration, etc.

F:
- Union was organizing a new unit under the employer (there were four units in total under the employer, which meant it was pretty fragmented)
- Union said employer was slowing down bargaining because another unit was also in the process of bargaining.
- Union argued the employer was not permitted to bargain to the point of impasse that certain terms and conditions of employment, benefits holidays and severance, remain entirely outside the collective agreement.
- *Note – there was a previous bad faith bargaining complaint before this iteration of bargaining*.

I:
1. Is it bad faith for an employer to refuse to include certain items in a collective agreement?
2. Is it bad faith for an employer to bargain a RAND formula clause to impasse? (see para 70 – recall Rand formula clause means that employees have to pay dues but don't have to actually be a member of the union since you get the benefit of the union even if you aren't a member)
3. Reasonableness of the information and explanation provided to support the employer's positions

H: Board did not fail to bargain in good faith by maintaining that some terms wouldn't be included in collective agreement. However, the employer did not provide **rationales** for its positions, which was a failure to bargain in good faith.

Employer breached its objective duty to bargain in good faith when it failed to make reasonable efforts to reach a collective agreement (employer stalled bargaining).

Remedy:
- The Board directed the employer to bargain in good faith and make every reasonable efforts to enter into a collective agreement.
- The Board also imposed a schedule of 4 days of bargaining and the particular dates on which the bargaining would occur.
  - This was frustrating for the union b/c it took months for the decision to come out & there was never really an actual cost for the employer. **This is a reason for bringing first contract legislation.**
- Prior to the commencement of the bargaining, the Board directed the employer to table a written proposal of all outstanding issues in dispute as well as its justifications for its position on wages and union security.

A:
"Tailor-made for rejection" – Example in *Southam*
-

Further analysis
- Canadian labour boards are reluctant to dictate the subject matter of negotiations, either by requiring that certain issues be bargained or by banishing certain issues from negotiations → so it was fine that the employer was bargaining to point of impasse re certain terms & conditions of employment, benefits, holidays, severance (contrast to US where there are requirements of what should be present).
- The employer did not fail to bargain in good faith merely by maintaining its position that certain terms would not be included in a collective agreement.
  - It was taking a substantial position on terms and conditions of employment, and that certain entitlements

would not be provided. That is a position that many employers take while bargaining and there may be sound business reasons why they may seek to do so
    - Board rejects union argument that whether or not bargaining a RAND formula to impasse is bad faith bargaining will depend on the circumstances. Here the evidence showed that it was standard for production employees of other newspaper operations, that those employees had mature bargaining relationships, and were in jurisdictions where the RAND formula was required.
    - Royal Oak Mines does not mean that a first collective agreement must adhere to industry standard terms.
    - Also premature because of insufficient communications up to that point in bargaining
- The union did successfully argue that the employer breached its objective duty to bargain in good faith when it failed to make reasonable efforts to reach a collective agreement.
    - Employer could counteract the unions' tactic of cooperating in bargaining, but all parties owe duty to bargain in good faith in each bargaining relationship
    - The employer persistently failed to engage in timely, informative and rational discussion.
- **Detailed justifications for positions for terms of the Collective Agreement are required:**
    - **(1) In creation of a first contract**: More often in first collective agreement negotiations than in mature bargaining relationships simply because the parties are not familiar with each other's views on recurring issues.
    - (2) When one party seeks a major change from the status quo.
    - (3) Where a party seeks to depart from collective agreement provisions that are standard in an industry or where the rationale for party's proposal or objection is not self-evident.

Failure of employer to include rationales for its positions:

- Employer did not meet its obligation of rational discussion on the RAND formula issue. There was no evidence advanced as to its rationale.
- The employer also failed to provide a rationale for its position on failing to provide wage rates. Collective agreements almost universally feature wage provisions that standardize employee compensation.

Employer did not actually try to complete the agreement

- The employer tried to slow down negotiations because of the unions' cooperation with one another. It intentionally slowed down negotiations and provided an extremely tardy response to the union's request for information about wage rates.
- There is no excuse for the delay in over 10 months in supplying wage information.

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UFCW v Gainers, [1986] Alta LRBR 529 (*Sims*) – key aspects of duty to bargain in good faith

R: Key aspects of duty to bargain in good faith:

1. **Duty of solicited disclosure**:The obligation to **disclose pertinent information** requested by trade union
    a. a party may not withhold information relevant to collective bargaining without reasonable grounds
    b. an employer who deliberately withholds data that a union needs to intelligently appraise a proposal on the bargaining table is not making every reasonable effort to conclude a collective agreement
    c. Anything the union may be concerned about will be asked about asap (usually they'll bring it up at the first meeting so that they can determine relevant issues or anything the employer may be avoiding providing)
2. **Avoid misrepresentation** *(this relates to the above point – since employers avoid misrepresentation, you want to ask them pertinent Qs asap)*
    a. misrepresentation is the antithesis of good faith
    b. It destroys the rational basis upon which to inform collective bargaining decisions are made
    c. Undermines framework for collective bargaining
3. **Unsolicited disclosure** → There is a **positive obligation on employers to disclose information**, whether or not it is solicited by a union, in circumstances **where decision has been made that will have a significant impact on the employees affected**. This decision must be disclosed to the Union during negotiations.

a. Employers must communicate decisions that have been made, as well as "de facto management decisions" – mere possibilities that employer is "thinking seriously" about need not be disclosed.

——— additional rule following the key aspects: ———

4. Before either side begins the use of their economic weapons (strike and lockout) they should have tabled proposals that explains their own position and should have received and explored positions of the other side.
   a. **It is intolerable to have a strike or lockout without the issues having been defined and explored. This process is a two-way street**.
   b. Premised on the idea that it's impossible to negotiate w/ someone if you have no idea what they want.

Note: Board has power to create a Dispute Inquiry Board if there's a dispute to try to keep the dispute from spreading and impacting other people/other areas of industry

F:

- The union and employer were engaged in collective bargaining, and when negotiations broke down, the union went on strike and the employer locked out.
- At the time the strike began, the employer had not yet tabled any proposal and did not do so until 2 weeks after the strike commenced.
- 2 weeks after the strike, the employer applies to wind up the employees' pension plan. The union did not learn of this until after a Disputes Inquiry Board was convened.

I:

H: The Employer breached its obligation to bargain in good faith by failing to disclose plans to terminate the pension

- Duty of solicited disclosure: Union had requested information about the plan, and so the duty of solicited disclosure applied
- Duty of unsolicited disclosure: applied because termination of pension plan would have significant affect on the bargaining unit and the decision had been made
- Misrepresentation: The fact that employer's proposal, that was eventually tabled, did not include a proposal to terminate the pension plan is a misrepresentation

A:

- Here the union asked about the pension plan and employer evaded the question, this was misrepresentation *and* failure to disclose pertinent information. PLUS, they
- The Board cites ***DeVilbiss*** for a number of basic propositions:
  - An employer **cannot enter into negotiations with a view to ridding itself of the trade union** – it must accept the status of the trade union
  - **Employers can't enter into negotiations with no intention of signing CA** → The freedom to join a trade union would be "an edict writ on water" if an employer could enter into negotiations with no intention of ever signing a collective agreement
  - The **principle of voluntarism** is key: the legislation is based on the premise that the parties are best able to agree to the terms and conditions of the workplace
- Board also highlights that there is a major public interest in ensuring that the economic battle does not begin unless and until the parties have made every reasonable effort to enter into a collective agreement.
  - One of the purposes of the duty to bargain in good faith is to protect this public interest

Conciliation: legislation formerly allowed for the Board to appoint someone to assist with solving problem. However, now we really rely on the principles of good faith.

Edmonton City, [1995] Alta LRBR 102 (*Howes*) – duty of unsolicited disclosure

R: duty of unsolicited disclosure

F:
- During bargaining the employer made a decision to engage in a significant restructuring
    - Affected classifications, wages, layoffs, etc.
    - Approximately 90 employees affected
- Employer told union about reorganization the day before they told employees but no details
- Union learned of details at same time as employees
- Union **brought a complaint alleging breach of the duty to bargain in good faith** (vis-à-vis duty of unsolicited disclosure)

I: Did employer breach duty to bargain in good faith by failing to provide unsolicited disclosure?

H:

A:
- **Didn't breach unsolicited disclosure duty by Aug 4 or early December:**
    - Employer had not made a decision by August 4, 1994 when it had made plans to investigate reorganization. Nor did employer make a decision by early December, when it had conceptual structure to present to General Manager but not classifications, pay rates, or probable impact
- **Employer had not yet breached unsolicited disclosure duty by January when detailed decisions were made and were merely awaiting final approval**
    - Employer had made a final decision by January 4, 1995 when it had class levels, descriptions, pay rates, and timelines for implementation. They were just awaiting General Manager's final approval, which was given on January 17
    - Employer had bargaining dates with union on January 30 and 31, but planned on announcing reorganization on January 19
- **Employer breached unsolicited disclosure duty before Jan 19** →Employer had obligation to disclose details of reorganization to union **before January 19** b/c they had more final decisions before they announced
    - Communication on January 17/18 not sufficient because no details provided

REMEDY: Order to bargain in good faith and make full disclosure about reorganization
- Reorganization not unwound

AUPE v VS Services, [1986] Alta LRBR 235 (*Lucas*) – introduction of new proposals

R: Changing agreed to items is a breach of duty to bargain in good faith.

R: Opening clauses for which there had been proposals that had previously been withdrawn is a breach of duty to bargain in good faith.

R: introducing entirely new proposals to an CA is not a breach of good faith because they can still be negotiated & discussed.

F:
- Agreement between employer and union mirrored, in some ways, a "Master Agreement" between union and Government of Alberta
    - **Me too agreement**: when gov't or a big industry gives something to their biggest bargaining unit, they have to do the same for all others (basically if a CA grants X thing to the biggest bargaining unit, it will likely be adopted by all smaller units in the industry). Me too agreements are most common in the context of wages.
- Bargaining proceeded between employer and union before Master Agreement finalized
- During bargaining the parties signed off on some articles and bargained away other proposals
- **After Master Agreement finalized employer attempted to introduce new proposals** that:

- (1) changed agreed to items;
- (2) Opened clauses for which there had been proposals that had previously been withdrawn; and
- (3) Were entirely new

H: The introduction of the first two kinds of new proposals was a breach of the duty to bargain in good faith

A:
(1) changed agreed to items; → breach of good faith
(2) Opened clauses for which there had been proposals that had previously been withdrawn; and → breach of good faith
(3) Were entirely new → introducing entirely new proposals was okay because they could still be negotiated & discussed.

Finning v IAMAW Local 99, [2005] Alta LRBR 356 (*Wallace*) – employer makes complaint against union for breaching *Code* (failure to make reasonable efforts); not every change amounts to breach of the *Code*

R: Not every change in position will be a breach of duty to bargain in good faith – changes to positions must breach actually breach duty of good faith in s 60.

R: Board intervention in bargaining should not be too easy to obtain → Limited to cases where change in positions is genuinely destructive of bargaining, i.e., changes in position that "effectively destroy decision-making framework."

To determine whether the position effectively destroys the decision-making framework (i.e., a position that destroys all of the work previously done in the bargaining process), Board will consider many factors, but primarily **significance of the change** and **stage of bargaining at the time the change is proposed** (significant new proposals at late stage will require "compelling justification"). If the decision-making framework is destroyed (wrt the balance of significance & stage of bargaining when proposed), the Board will not allow that party to forward that position.

F:
- Parties commenced bargaining for a renewal of the collective agreement in January 2005
- Mediator was appointed in July 2005
- By October, parties had met approximately 27 times
- On October 14, Union made several proposals that Employer felt escalated previous Union positions or introduced new proposals (This was last mediation session before strike)
- Employer filed unfair labour practice complaint
- Union had increased wage offer from 4.5%, 3.5%, and 3.5% per year to 6%, 5%, and 5%
- Board found that previous offer was tied to getting favorable contracting out language
- Therefore, it was not an "escalation" for the Union to increase its wage demand in exchange for withdrawing proposals on contracting out language
- However Union also did the following escalations:
  - Attempted to re-propose clause on insurance for employee tool boxes
  - Remove agreed to Letter of Understanding on alternative shift schedules
  - Introduce a new demand on guaranteed 12-hour shifts in Oil Sands operations (escalation, but Board found it was based on a rumour)
  - Change demand for increase on pension contributions from 6.5% to 6.75% (escalation)
  - After agreeing to employer paying 90% of health premiums, proposed employer pay 100%

I: Were the proposals a breach s 60?

H: Board found that all proposals (aside from wage increases) were late additions or changes to proposals. While all

were escalations, none were a breach of s 60.
A: - Union proposals, collectively and individually, are not major - Re-opening of signed off items is "irritating", but not a significant expansion of dispute - It is also important that this matter was not close to resolution - New proposals pale in comparison to wages, contracting out, shift schedules, which were still in dispute - Court looks at the whole context, not just a snippet of the context. Here, the Court saw that bargaining had begun & two major changes happened in the workplace during bargaining (i.e., (1) employer purported to contract out 2 major components of the business – see Finning v Machinists in Successorship classes – this created distrust and fractures in the workplace and b/w employer/union and employees; (2) employer's chief spokesperson was new so there was no trust between the parties since employees/union didn't really know the spokesperson) → these circumstances made it so that s 60 (i.e., good faith duty) wasn't breached.

UNFAIR LABOUR PRACTICES (ULPS; UNFAIRS)

ULPs purpose: provide a "safe space" for unions and employees so that employees are free from undue influence or interference by an employer **or** union during certification & the CB process *(and strike)* when parties are particularly vulnerable

Timeliness of ULPs, s 16(1–2)

16(1) **employer, employers' organization, employee, trade union** or other interested person may **make a complaint in writing** to the Board that there has been or is a failure to comply with any provision of this Act.

(2) The Board ***may* refuse** to accept any **complaint** that is made more than **90 days** after the **complainant knew**, or in the opinion of the Board **ought to have known**, of the action or circumstances giving rise to the complaint.

- Discretionary power, but Board tends to apply the 90 day limit strictly.
- Board has a test to determine whether they'll accept a complaint or not.

(3) Reference section (ref to Board)

Examples of ULPs in the *Code*

Employer ULPs (ss 60, 147, 148, 149, 154)

1. Breaching Duty to Bargain in Good Faith (s 60)
2. Altering terms of employment during "statutory freeze" (s 147)
3. **Interfering with formation or administration of trade union, or the representation of employees by trade union (main breach)** (s 148)
4. Discriminating against, coercing, etc. employees for trade union activity (s 149)
5. Dispute Related Misconduct (s 154) → e.g., bringing in people to break a strike by violence, infiltrate the ranks of the strikers to spy on them or start violence on the picket line to create an incident, surveilling a picket line (quite common)

Union ULPs (ss 60, 151–152, 153, 154)

1. Breaching Duty to Bargain in Good Faith (s 60)
2. Prohibited practices by trade union (ss 151–152) (note: s 151 is like s 149, but wrt TU not employer; s 152 more common in construction union)
3. Union's Duty of Fair Representation (s 153) (not of the same type of ULPs we discuss this week, but we will discuss again at the end of the term)
4. Dispute Related Misconduct (s 154)

Far fewer cases of ULPs being brought to the board than employer ULPs, but most common in situations of multiple competing unions.

Parties that May Commit Employer ULPs, s 148(1)

- ULPs can be committed by:
  - an employer
  - "someone acting on behalf of an employer"
  - May be a member of management, a supervisor, or a third party
  - **BUT** Unfounded employee perception that person is "close to" management is not enough
- See ***CROPAC*** – consultant who didn't work for the employer completed actions which found the employer in breach of s 148 b/c their actions were such that they were done *on behalf of the employer*.
- Example: ***Eaton Centre*** → TU tried to organize store in Eaton Centre & owner of Eaton Centre wouldn't allow TU on-site. This breached s 148(1).

Employer Prohibited Practices in s 148(1)

Interference w/ formation or representation, Financial Contributions by Employer (s 148(1))

148(1) No employer … shall
- (a) … **interfere with**
  - (i) the **formation or administration of a trade union**, or *(interpreted narrowly to deal with internal)*
  - (ii) the **representation of employees by a trade union**; *(objective test → you do <u>not</u> have to show employer <u>intended</u> to interfere w/ representation of TU)*

  or
- (b) **contribute financial** or other support to a trade union.

Provision	**Policy Rationale**	**Examples**	**Cases**
148(1)(a)(i) No employer shall interfere with **formation** or **administration** of a TU	Prevents **employer domination of the union**. Unions must have separate and distinct identity from management in order to **avoid conflicts of**	Management encourages formation of union/employee association set up by its employees (esp. in an attempt to avoid certification attempts by more established unions) Management interferes w/	

	interest in CB.	union dues	
148(1)(a)(ii) No employer shall interfere with **representation** of employees by a TU *(OBJECTIVE application → intention of employer irrelevant, only effect is relevant)*	Employees should be **free to choose** whether to be represented by a union in the absence of intimidation or other tactics by employer (two-fold: TU's ability to get support of employees + employee's freedom to choose if they want a TU)	Employer organizing decertification drive, intimidation tactics such as phone calls/emails/etc, "spying", threats of layoffs or plant closures, surveilling union organizers, "moles", bargaining directly with employees, screening potential hires for union affiliation	*Extra Foods*
148(1)(b) No employer shall provide **financial or other support** to a TU	**Employer cannot use its economic power to interfere** with trade union formation or representation to facilitate representation by its preferred union	Employer communicating its preference for certification of one union over another, granting VR to one union in face of another union's organizing drive	

Defences to s148(1) & Permitted Activities, s 148(2)

- **Donations** to trade union **for welfare of members** of TU/dependents (i.e. scholarship funds)
- Permitting employee/union rep to attend to business of union during working hours w/o wage deduction is permissible
- Providing free transportation to union reps for collective bargaining purposes is permissible
- Permitting trade union to use employer's premises for union purposes is permissible
- **Expressing employer's views as long as they do not use coercion, intimidation, threats, promises or undue influence**

Employer Prohibited Practice in s 149

Generally looking for an "anti-union animus"

Contrast to s 148 – intention needed

3 Elements:

1. must be by **employer** or someone acting on **employer's behalf**
2. employer must have engaged in **specific acts enumerated in (a)-(g)**
    a. Common to list ***several*** ULPs in s 149 + s 148 breaches too (this is desirable)
3. if there is a **purposive element**, (i.e. "because"/reason for) → **MUST** establish that employer did certain things (i.e. discharge or discipline) for a **specific purpose** (has testified in proceedings)

Reverse Onus, s 149(2)

Respondent has burden of proof to prove it did not act with anti-union animus on a **dismissal** when there is a complaint that the Respondent has breached s 149(1)(a), (c), (d), (f). (Reverse onus used to be wider but the UCP narrowed it)

Enumerated Breaches

149(1)(a, c, d, f) ⇒ s 150 reverse onus applies when **DISMISSAL** is at play.

Refusal to Employment, s 149(1)(a) *one of the most common*

149(1)(a) Employers/those acting on their behalf shalt not refuse to employ, continue to employ or discriminate in regard to employment or any term or condition thereof because a person is:

- A member of a union or has applied for membership (i) – most common
- Indicated their wish to be a union member in writing (ii)
- Has testified or participated in (or may do so) a proceeding under the Code (iv)
- Has/is about to make a "disclosure" in accordance with proceeding under the Code (v)
- Participated in a legal strike (vii)
- Has exercised any right under the Code (viii) – most common

Impose Conditions Restraining Code Rights, s 149(1)(b)

Employers/those acting on their behalf shalt not impose any **condition in employment contract that restrains/has effect of restraining an employee** from exercising rights under the *Code* (one of the most common)
Purpose: avoid contracts that prohibit TU membership, but can also apply if an employer tries to change an employee's contract during/leading up to the CB process
E.g., moving someone to a different shift or lodges

Compel an Employee to Refrain from Membership in TU, s 149(1)(c) *one of the most common*

Employers/those acting on their behalf shalt not seek by intimidation, dismissal, or threat thereof, or other threat, imposition of pecuniary or other penalty to compel an employee to refrain from becoming or ceasing to be a member, officer or representative of a trade union (MOST common)

Usually has a dual aspect – harms one employee specifically, but that harm also intimidates other employees

Penalties for Ppl Refusing to Perform an Act Prohibited by Code, s 149(1)(d)

Employers/those acting on their behalf shalt not suspend, discharge or impose any financial or other penalty on employee, or take other disciplinary action against an employee by reason of that employee refusing to perform an act prohibited under the Code.

Bargain with a different TU than Currently Represents Employees, s 149(1)(e)

Bargain collectively with a union when it knows that another trade union already represents that bargaining unit.

Discipline Employees for not doing the job of a striking employee, s 149(1)(f)

Discipline someone for refusing to do a striking employee's job.

Discipline Complaint-Makers, s 149(1)(g)

Discriminate or discipline someone for making a complaint or participating in a Board proceeding.

(comes up in one of the cases)

Defence of Right to Dismiss, s 150

Nothing in this Act detracts from or interferes with the right of an employer to suspend, transfer or lay off employees, or to discharge employees for proper and sufficient cause. (examples of meeting the Right to Dismiss: serious workplace violence, significant posts on social media making accusations about/toward the employer, etc.)

BUT cannot rely on this if anti-union animus was a factor in the decision to terminate, even if there was just cause! SO if there was even a "taint" of anti-union animus in the decision to terminate, you can't rely on this defence at all. Even if there is "proper cause" to fulfil s 150, Board may still find s 150 doesn't apply (see four examples in ***Widewaters***)

Example: Brooks Meat Packing Plant firing when they fired a union ring leader → she got her job back. CONTRAST, in ***Cropac***, one of the TU ring leaders got fired (BUT they were involved in a serious workplace accident that was totally unrelated to their union participation)

See ***Widewaters*** for failure of s 150 (right to dismiss) → employer didn't follow the process necessary to fulfil the right to dismiss.

Trade Union Prohibited Practices, s 151

3 Elements:

1. Conduct must be of a trade union or person acting on its behalf
2. Engaged in conduct enumerated in (a)-(i)
3. Actions carried out for a specific purpose (i.e. encouraging or discouraging membership or activity in and for a trade union)

Prohibited Practices Outlined in s 151(1)

(a) Compelling an employer to bargain if the TU is **not** the **bargaining agent**

(b) Bargaining collectively with an employer **if another TU is the bargaining agent**

(c) **interfering with** formation of an **employer's organization** *(not super common, mostly in construction)*

(d) ***engaging in a certification campaign **at the employer's place of business during working hours of the employee** to **persuade them** to become or cease to be a member*** *(note – this is strictly applied. E.g., a union leaving pamphlets in the lunchroom wouldn't be a problem, but leaving literature at the nurse's station where they work at during their shift would be prohibited. E.g., chill discussions during work hours about the union are fine, but asking someone to sign the union card is prohibited)*

(e) …

(f) ***coercing, intimidating, threatening, promising or unduly influencing** employees to join a trade union***

Reverse Onus on TU, s 151(3)

New Amendment - hasn't been dealt w/ by the Board yet. Not clear how it will apply.

TU must prove they did not use coercion, intimidation, threats, promises, or undue influence of any kind with a view to encouraging or discouraging membership or activity for a union.

TU "Internal" Prohibited Practices, s 152

A trade union shall not expel or suspend a person from membership or deny membership in a discriminatory manner or take disciplinary action or impose a penalty on a person.

Board doesn't have jurisdiction unless union member first appeals through union's appeal procedure.

Cases

Stuve Electric (No 1), [1989] Alta LRBR 69 (Sims) – application of 148 & 149 (in an obvious case – contrast to subtleties in Cropac)

R: S 149(c) – seeking to compel employees to refrain from or cease to be member of a union, requires 3 elements:

1. **actions must be by employer or persons acting on its behalf (the "who")**
2. **proof of actions by the employer or persons acting on its behalf (the "what")**
3. **"purposive element" – for purpose prohibited by Code (the "why")**

F:

- Union applied for certification for a bargaining unit containing 33 employees
- At time of application, had 52% support. Signed up 3 additional employees after submitting App
- Certification vote held 9 days later, and did not get a majority
- Union alleged that activities of employer carried out during the time between application and vote were ULPs
- Employer activities:
  - Owner (Stuve) stated in presence of employees that he will "have to lay off all union guys"
  - Owner told supervisor to get list of union employees
  - Owner or Supervisor contacted each employee to ask if they supported the union. Owner had another one-on-one meeting with employees ("eyeball to eyeball")
  - When one employee said he did support the union, he was told he'd have to look for a new job. Said similar things to other employees.
  - Stuve told employees if certification happened he would have to "close the doors"
  - Employer held a meeting in which he invited employees to sign an anti-union petition (and planned to use in the Board meeting to contest certification)
- Union argument re employer ULPs:
  - Breach in s 149(c): seeking by intimidation or threats to compel employees to refrain from becoming or ceasing to be members of union
  - Breach in 149(g)(i): threats or coercion because employees may testify or otherwise participate in proceeding under the *Code*
  - Breach in 148(1)(a)(ii): interference with representation of employees by trade union
- Employer defense: Employer raised "free speech" defence under s 148(2)(c) – the defence failed due to coercion, intimidation and threats involved

I: Were there ULP breaches on the employer's part? Can the Employer use the free speech defence?

H: Yes, employer breached all three sections union argued. Board says employer's free speech defence fails.

Remedy wasn't dealt with here, but was in ***Stuve No 2***

A:
Board found that employer did seek to discourage employees by threats of dismissal to refrain from becoming or cease to be members of a trade union

1. Owner and supervisor were acting on behalf of employer
2. Both threatened dismissal when saying things like the shop would be closed, union employees would have to find other jobs, etc.
3. This was for the purpose of preventing employees from supporting the union

Board commented on free speech defence:

- The defence should **balance right of free speech** *against* **freedom to select union** representation
  - Employers not required to sit bound and gagged during organizing campaign
  - But employees are not like "*Burns' wee timorous beasties scared off by the slightest expression of employer opposition*"
  - However, **free speech must be tempered** because **employer** has **power**
  - Certain conduct *can* be coercive or unduly influencing
- Communications from employer in this case went beyond expression of views
  - "**Pervasive and deliberate**" **threat to fire** all union supporters was **threatening, intimidating and coercive** → this applies to people to whom threats were made and to those considering union support
  - Employee **meetings were** equally **coercive** (employees really had no option but to agree to sign the anti-union protest since their jobs were on the line)

Employer breached (today called) s 149(g)(i)

- Attempted to influence anti-union petition through threats of dismissal
- It does not matter that threats were made to influence rather than punish ⇒ **intention irrelevant here**

Stuve Electric (No 2), [1989] Alta LRBR 272 (Sims) – Remedies for Breach of ss 148, 149

Remedies

1. **Second representation vote**
2. **Cease & desist order**
3. **Notice to employees advising of ULPs**

BUT these remedies don't really fix the problem because it comes too late and doesn't adequately address the issues found.

Board can order other remedies (see ***Extra Foods***), but they are less common.

Application of Remedies:

- Union sought to have Board grant certification remedy for employer's ULPs, BUT Board not authorized to certify a union (or revoke its certification) unless the majority of employees voting at a representation vote in favour of the certification or decertification (s 17(2))
- **Board ordered second representation vote**, with former employees – vote not on employer premises and no management/employer reps could attend
- **Cease and desist order**
- **Notice to employees advising of ULPs**

Widewaters (No. 1), [2018] Alta LRBR 20 (Gray)

R: Board uses reasoning from other Canadian Boards re reverse onus. Employers must establish:

1. **The <u>reasons given</u> for the discharge are the <u>only reasons</u>**
2. **These reasons are <u>NOT tainted by anti-union motive</u>**

Union and employee are not required to establish any *prima facie* case

How we determine if the employer has satisfied the reverse onus of establishing the above:

1. **Knowledge of the union organizing?**
2. **Credible reason for termination?**
    a. **Here we can look at inferences the board makes.**
3. **Pattern of anti-union activity?**
4. **Credibility of reasons for termination?**

F:

- Doncaster was outspoken union supporter (he even had a union tattoo)
- When Doncaster started work he was told discipline would be progressive (you'd know what you did wrong and be able to fix it)
- Doncaster requested days off over September long → Employer said unions were "scum of the earth" → Doncaster said he agreed with the union but had nothing to do with it.
- Timeline:
    - Sept 1: Doncaster begins assisting Union with organizing campaign
    - Sept 10: Doncaster received written warning on Sept 10 for being late for work on Sept 8
    - Sept 19: Union gets wind that employer knows about the organizing.
    - Sept 21: Employer terminated Doncaster "for absences on Sept 9 and 10"
        - Employer later alleged termination was for lates on Sept 16 and 17
- Result: Organizing drive falls apart when Doncaster is terminated, so they didn't receive the 40% required for application.

H:Employer failed to establish that it did not discharge Doncaster because he engaged in organizing on behalf of the Union

- Board finds that Employer violated s. 149(1)(a)(ii) – written intention to support a union, 149(1)(a)(viii) – right to organize & be member of union, and 149(1)(c) – threatening & intimidating to terminate for trying to organize a union
- Board likely would have found violation of s. 148(1)(a)(ii), but it was not included – i.e., interfering w/ representation of union ⇒ Board didn't recognize b/c there wasn't an Application for 148(1)(a)(ii)

A:

Reasons for Legislative introduction of the reverse onus:

- Tough to know the actual reason an employer terminated someone, but employers need to be able to explain why they terminated someone. Reverse onus gives the employer onus to go first to prove right to dismiss.

Board still applies **previous principles** used to determine whether discharge constituted violation of Code:

1. **Anti-union animus** does not need to be primary or dominant motive, **only one factor**
2. **Board will draw inferences** about employer motivation
3. Board **<u>not</u> concerned about** whether "**just cause"**, but is looking for **unusual or atypical conduct** which ***<u>is</u>* circumstantial evidence of anti-union animus** (AB is a jurisdiction that doesn't consider just cause, but other jurisdictions do)

Four possible factual scenarios

1. Employer establishes **credible reason for termination** and **<u>lack</u> of knowledge** of union activity
2. Employer establishes **credible reason for termination** and **knowledge** of union activity
    a. *Harder for employer to establish*
    b. *Look for evidence of managers bad-mouthing the union to demonstrate credible union*
3. Employer does **<u>not</u> establish credible reason** for termination but **<u>no</u> knowledge** of union activity
    a. *If employer <u>infers</u> knowledge, they will use that as evidence of knowledge.*
4. Employer does **<u>not</u> establish credible reason** for discharge and **has knowledge** of union activity
    a. *Hardest for employer to establish – easy to show breach of code.*

Analysis on Doncaster's termination:

- No credible explanation for termination

- Reason for termination was Doncaster's lates, but the employer provided different dates
- Given lack of credible explanation, requirement to establish Employer's knowledge of union activity is diminished, but evidence gives rise to inference employer knew of union organizing and Doncaster's role in it
- However, no pattern of anti-union activity.
- Doncaster more credible than employer witnesses (particularly b/c of the employer's changing story of the dates of lates)

Widewaters (No. 2), [2018] Alta LRBR 260 (Gray) – directed certification remedy

R: Determine an appropriate remedy taking a contextual approach focusing on:

1. Consequences of wrongful conduct (***Royal Oak***); AND
2. How those consequences may be remedied *or* counteracted considering policy objectives of the Code (***Royal Oak***).
3. Then, tailor a specific remedy aimed at overcoming those consequences (***Widewaters No 2***)

R: To receive a directed certification remedy, the union must establish the **campaign** was **harmed** by a ULP in such a way that employees are not able to exercise free choice. If the harm by an employer "poisoned the well", Orders other than certification would not be appropriate. Employer "cannot rely on notion of democratic selection of bargaining agent while simultaneously destroying ability to fairly determine question."

H:

- Board directed that Union be certified as bargaining agent
- Board also gave Union access order to Employer lunch room during working hours to speak to employees during coffee break (for one week) & management was not allowed to attend
- Also require employer to give Union contact information for employees

A:

- Board applies ***Royal Oak*** principles on determining appropriate remedy
  - Take a **contextual approach** that focuses on the **consequences of the wrongful conduct** AND **how those consequences may be remedied** or counteracted considering the policy objectives of the Code
- Board rejects test in TAS under pre-1988 legislation
- **Board must assess consequences of employer's conduct and tailor a specific remedy aimed at overcoming consequences**
- Board should not be focused on severity of employer's actions or on the likely success of the campaign but for the ER's actions
- **Union must establish campaign has been harmed by ULP**
- Effect on employees is considered objectively
- Board finds that **termination** of Doncaster **had chilling effect on organizing** campaign
  - Campaign in "nascent stages" and had not reached all employees
  - No new memberships after termination
- **Although no pattern of anti-union activity, termination of Doncaster was profound**
  - The termination meant that the organizing question of "do you want to be represented by union?" changed to "do you want to be fired?"
  - Employees not able to exercise free choice
- **After an employer has "poisoned the well", other orders, like an access order and a directed vote, would not be effective remedy**
  - Board cites Preamble of legislation and states that principles of freedom of association and employee choice of a trade union must be given content
  -
  - **Certification is not permanent, and can be revoked after period of time** ⇒ so if the employees are unhappy about the certification, they can revoke it.

BUT, see Bill 32: Direct Certifications (s 17(1)(c.1)) – unclear if this changes *Widewaters* No 2

s 17(1)(c.1) If a **prohibited practice results in** a **representation vote** that does **not** reflect the **true wishes of employees**, Board can:

1. Order **another representation vote** with conditions
2. **Certify** the Union **IF NO** other **remedies** would be **sufficient**
3. **Refuse to certify** the Union if no other remedies would be sufficient

Unclear whether this changes the standard in Widewaters

CAW v EDO Canada, [1992] Alta LRBR 202 (Asbell) – free speech defence

Test to rebut free speech defence: Were the employees capable of expressing their true wishes in a representation vote?

- This is an objective test looking at likely effect of the employer's conduct on an employee of average intelligence & fortitude (look at all the facts & circumstances)
- Burden of proof on party alleging the breach.

F:

- Employer sent two letters to employees 4 days and 1 day before a certification vote
  - The letters refuted alleged statements made by the Union during the organizing campaign and suggested employees ask the Union a number of questions about the details of the Union being the bargaining agent
- The Union sent a letter the day before the vote to address the employer's letter
- Of the 60 employees who cast valid ballots, 30 vote in favour and 30 voted against certification
  - The certification application was dismissed.
- The Union brought an application *after* the vote was counted alleging that the employer interfered with the representation of employees by the Union and coerced or intimidated the employees with the letters (Board is critical b/c TU didn't file ULP before the vote)
- The Employer relied upon the free speech defence

H: Letters were a legit form of employer expression:

- Although references to job security, not abundant nor coupled with references to plant closures (didn't cross the line by saying "you will lose a job" and there weren't many references to job security)
- Questions about Union dues and Constitution are simply an invitation to employees to ask questions of the Union
- References to problems the Union had with other employers were from newspapers and so in public domain

It was acceptable for Company to try to persuade employees of its views

Extra Foods, [2008] ALRBD No 2 (Asbell) – rare remedy of costs

R: Remedies:

1. **Mandatory meetings for employees in presence of union to counteract employer "pre-screening" and "rigging" the work force for 12 months.**
2. **Union presence at all job interviews for 12 months – regardless of outcome of the vote.**
3. **Legal costs – $10,000**

UFCW 401 v Canada Safeway, 1997 Alta LRBR 137 (Blair)

R: Employers are entitled to communicate w/ employees about their positions in bargaining process, but they can't go around the TU when doing this AND when they do communicate it needs to be factual and done through the TU. Employer has to give TU time to interpret & prepare response to an offer before communicating directly w/ employees about it (Failure to give the TU time puts the union at a disadvantage & makes them look disorganized)

F:

- Approximately one day before a strike, the Employer provided its final offer to the Union. At the same time, the employer sent a summary of the offer to employees
  - The summary was accurate with regard to the information it contained, but omitted some aspects of the offer → this made the summary look better than it was.
  - The Employer distributed the summary by placing it in stores and having managers meet with and phone employees to advise that the summary was available
- TU complained that the timing of the offer and the fact that it omitted important details interfered with its ability to represent its members and was a breach of the duty to bargain in good faith
  - TU also complained that the captive audience meetings with managers were coercive (note – this complaint was dismissed without much analysis). **Note – you usually have to be very careful w/ captive audience meetings as they are often coercive**

H: Employer interfered w/ its ability to represent its members.
No breach of duty of good faith.

A:

- Nothing unlawful per se about placing offer before employees or making final offer on eve of strike
- However, Employer required to give Union time to interpret and prepare response to offer before communicating directly with employees about it
- The timing of the offer unfairly maximized the Employer's tactical advantage
- By communicating offer to employees prior to Union having opportunity to digest it and provide an informed response, Employer was attempting to circumvent the Union and bargain directly with employees
- This **interferes with the Union's representation of its members**
- However, it is not a breach of the duty to bargain in good faith
  - No evidence that employer did not want agreement

United Food and Commercial Workers Canada Union, Local 401 (Re), [2018] Alta LRBR LD-072 (Johnson) – ss 151 (d, f); reverse onus applies on 151(f)

R: To establish 151(d) violation, there has to be an **actual attempt at persuasion.** "Waving a union flag" is *not* sufficient to constitute persuasion. Establish with 2 steps:

1. There must be evidence of the content of the discussions at a bare minimum; AND
2. If those discussions occurred, there needs to be an actual attempt to convince the other person in the conversation to do something.

R: To establish 151(f) violation:

- The act must be **MORE** than a **mere expression of opinion, or a negligent or foolish misstatement**";
- There **MUST** be:
  - (1) An element of **intimidation** or **coercion**
  - (2) **Deliberate action** to either **encourage or discourage membership or activity in** or for the TU.

F:

- Employer brings ULP against Union alleging breach of ss 151(d), (f) during organizing

- Union's organizer posing as customers to organize
- Union organizer posing as a poker player
- Clandestine strategy to organize ees
- Harassed ees at home and in the lunch room

- Union applies for summary dismissal (s16(4)(e)) – ULP is vexatious, inappropriate, w/o merit
  - Here, even if what the ER said was true, there would be no breach of the code.

H: Complaints dismissed. ER asserted TU exploited public nature of business not a violation of 151(d) – need to know who was contacted and what was said. As for 151(f), a mere call to employee home not enough & there was no evidence of content of the conversation.

Cropac Equipment Inc (RE), [2021] ALRBD No 114 (Gray)

H:
Employer breached Code by holding captive audience meetings with employees before certification vote. Undue influence over employees

Employer breached Code when terminated an outspoken Union supporter even where there would have been some cause for discipline.

LRB Complaint, Fill in the Blanks

- Note: there is no required form for ULP, but usually they look like this example:

UNFAIR LABOUR PRACTICE COMPLAINT

Pursuant to Section 16(1) of the Labour Relations Code RSA 2000 c. L-1 (s 16(1) gives ability to make a complaint to Board)

I. COMPLAINANTS:
Camp Workers Union (the "Union") and Tom Jones (when the complaint relates specifically to one EE, we list them as a complainant along with the TU)
MAILING ADDRESS:
64 Sutherland Drive, Edmonton, AB T2L 16S

CONTACT PERSON:	LEGAL COUNSEL:
Fred Smith	Kara O'Halloran
PHONE: 780-633-5512	Chivers Carpenter
FAX: 780-263-1212	PHONE: 780-439-3611
	FAX: 780-439-8543

II. NAME OF EMPLOYER AGAINST WHOM THE COMPLAINT IS BEING MADE (RESPONDENT):
Employer XY
MAILING ADDRESS:
123 4th Avenue, Edmonton, AB T6E 0A1

CONTACT PERSON:	LEGAL COUNSEL:
Mohammed Aliaha	Jason Littlechild
PHONE: 780-987-0943	PHONE: 780-482-9223
FAX: 780-234-6565	FAX: 780-324-0921

III. SECTIONS AND SUB-SECTIONS WHICH ARE ALLEGED TO HAVE BEEN VIOLATED
The Union and Tom Jones allege that Employer XY have violated Sections 148(1)(a)(ii) – the representation of employees by a TU; 149(1)(a)(ii, viii), 149(1)(c), 149(1)(b) of the Code.

Note that 149(1)(a)(iv) is usually about testifying in front of the board for something random but related at maybe a different baord

IV. PARTICULARS

1. Employer XY provides catering services to various Oil Boss Lodges within the Regional Municipality of Wood Buffalo. Lodges include: Silver Creek; Fireleaf; Gold Lake; and Beaver River. Mohammed Aliaha is a vice-president of Employer XY and Phil Brooks is the Manager.
2. The Union began an organizing campaign with respect to employees of Employer XY at the Silver Creek Lodge on or about September 20, 2021. There are approximately 25 employees in catering at the Silver Creek Lodge.
3. Tom Jones has been employed as a camp cook with Employer XY since March 11, 2020. He has only ever worked at the Silver Creek Lodge. He worked at the Silver Creek Lode on the day shift. Mr. Jones has been an outspoken supporter and organizer for the Union and was known to associate with other Union supporters such as Sharice John.
4. On or about October 2, 2021, Mr. Jones attended a meeting in Ms. John's room where the Union was discussed, and they handed out Union petition cards. A service attendant, Sarah Mason was at the meeting. Following the meeting she told Mr. Jones that she thought the Union was a bad idea and was going to tell Mr. Brooks.
5. On October 4, 2021, the Employer sent an email to all employees advising they understood an organizing drive was underway and while it was the employees' choice, they strongly encouraged employees to ask questions of the Union and really consider if they want a Union. (this shows that there was ER knowledge of the TU organizing)
6. After the Employer's email, Mr. Jones has been transferred from one site to another. Mr. Jones was transferred as follows:
    a. On or about October 5, 2021 Mr. Brooks called Mr. Jones while he was on his offs days and told him that when he returned on his next rotation, he was being transferred to the Fireleaf Lodge. Mr. Jones objected. Mr. Brooks told Mr. Jones that he was the Manager and could move him wherever he wanted and if Mr. Jones did not go to Fireleaf he would not have a job. When the Silver Creek Lodge Head Chef, George Ansil, found out that Mr. Jones was being transferred, he requested the Mr. Jones remain at Silver Creek. (the move is unsupported by business sense – no explanation for the move)
    b. When Mr. Jones reported for his next rotation on or about October 10, 2021 he was sent to the Gold Lake Lodge. He was assigned the night shift. He only worked one shift before going off sick. Mr. Jones has a medical condition that prevents him from working nights and this was known to Mr. Brooks (he was put on a night shift even though Brooks knew he couldn't do it and he hadn't done it; night shifts are usually smaller so that may remove him from his peers). Mr. Jones told Mr. Brooks this when Mr. Jones started work in 2020.
    c. Mr. Jones returned to work on or about October 15, 2021 and was sent to work at the Beaver River Lodge. He was again assigned to the night shift. Mr. Jones worked there until the end of his rotation, October 20, 2021.
7. On October 20, 2021 before Mr. Jones left the site, Mr. Jones came upon Mr. Aliaha and Mr. Brooks. He overheard Mr. Aliaha say he was glad talk of the Union had died down and thanked Mr. Brooks for his good work in dealing with it. That night, Mr. Jones rode the bus back to Fort McMurray with several employees, including Ms. Mason. He reminded those on bus to return their petition cards to him (Ms. Mason was likely on the bus since they're on the same shift, so she likely told the bosses).

8. The next day, October 21, 2021, Mr. Jones received a call from Mr. Brooks who told him another employee had accused him of sleeping on the job. Mr. Jones stated this was not true. (No description of who accused him, why they're credible, etc. – rush to fire like in Widewater No 1)
9. On October 22, 2021, Mr. Brooks called Mr. Jones and informed him he was terminated for sleeping on the job.
10. Mr. Jones had no prior discipline.
11. The Union has been unable to sign any further cards after Mr. Jones' termination and some employees have told them they are afraid to talk to the Union.

You can use the particulars to get records in the future, so make sure the particulars are detailed.

V. SUMMARY & BASIS OF THE APPLICATION (usually short and only a couple paras)

1. Employer XY has clearly indicated it doesn't want to have a TU
2. Discrim against Jones by moving him to diff place, diff shifts, etc.
3. By discrim & terminating, breached X sections.
4. By moving & terminating Jones on this grounds, ER sent message to Jones & other EEs that if they act like him they'll be terminated.
5. Actions are designed to thwart TU's efforts.
6. Result has been end of TU organizing drive.

VI. SPECIFIC REMEDIES REQUESTED

1. On the basis of the above, the Union seeks the following remedies:
    a. directed certification,
    b. reinstatement of Mr. Jones and made whole,
    c. employer cease & desist, notice to employees,
    d. costs for the TU in respect of the organizing drive & within application (so time they wasted in trying to sign up & the legal costs) – note, costs are unlikely but were awarded in egregious ULPs like in *Extra Foods & European Cheesecake Factory (where there were several ULPs in a row)*
2. Any other order and direction that is appropriate in the circumstances.

STATUTORY FREEZE PERIODS

Statutory freeze period: period in which ER's can't make changes to terms of employment either express or implied.

- In determining a breach of statutory freeze periods, we look to the goals in the *Code* → Protect employee rights to join, participate, and bargain collectively through a TU
- Statutory freeze is defined broadly to include various types of conduct.

Purpose: prohibit changes to employment conditions during certain times in a bargaining relationship/**maintain the status quo** to prevent changes to the workplace that would be destructive to bargaining relationship & threaten the TU; **temper employer's unfettered management rights** which could otherwise be used to **destabilize employee support for a TU.**

Freeze durations vary among provinces.

Four freeze periods, *Code*, s 147

1. **CERTIFICATION FREEZE**, *Code* s 147(1): filing of a certification application starts this freeze & it lasts **until its dismissal *or* 30 days after certificate** is issued
    a. E.g., a raise during a certification campaign breaches the statutory freeze provision under s 147(1).
2. **FIRST AGREEMENT FREEZE**, *Code* s 147(2): if notice to bargain is served within 30 days of certification, a **further 120 day freeze occurs** while negotiations for a first agreement are underway (used to be 60 days).
    a. Freeze under s 147(1) is automatically extended through s 147(2) IF TU served Notice to Bargain within 30 days of certification. Here, the freeze lasts an additional 120 days.
    b. BUT NOTE that extension is possible with a s 92.2(4) Application for first contract **arbitration** within 120 day period contained in s 147.2 until "processes under the Division have concluded or the Board directs otherwise" (i.e., until the first contract arbitration is done; ***CUPE, Local 8 v Alberta Public Laboratories Ltd***) ⇒ purpose is to prevent a strike since strikes are hostile & damaging to the workplace (we will talk about this in a subsequent lecture)
3. **RENEWAL AGREEMENT FREEZE**, *Code* s 147(3): begins with notice to commence bargaining to renew a collective agreement and ends only with conclusion of renewal agreement, decertification, or beginning of strike/lockout
4. **ESSENTIAL SERVICE WORKERS**, *Code* s 147(4): where there is an essential services agreement in effect during a strike or lockout, statutory freeze in #2 or #3 continues to apply to essential service workers (if life is at risk, statutory freeze continues to apply during the strike or lockout period – it doesn't end with a strike like in 147(3)).

Defining the "Freeze"

1. Employer **cannot** alter the rates of **pay**, any **term or condition of employment**, or any **right or privilege** of any of those employees or the TU (s 147)
2. Freeze is **construed broadly** → includes unwritten policies & practices too.
3. BUT Employer can still operate its business as long as it does so in accordance with its usual, past practices (i.e., "business as usual") OR (if the ER hasn't done something like the purported breach before) it must fall within reasonable expectations of employees to be acceptable.

United Steelworkers v AltaSteel Ltd, [2014] Alta LRBR LD-016 – breach of freeze example

- F: Employer had practice of including TU in safety investigations, but for a two month period during bargaining, the ER did not include TU in all safety investigations
- H: The right of the Union to participate in safety investigations was altered in breach of statutory freeze

Three Exceptions to the Freeze

Freeze will **NOT** be breached in the following situations:

1. Change is in accordance with the **established custom or practice** of the employer (business as usual, business as before, or reasonable expectations of employees if it's a first change);
2. **Consent** of the bargaining agent; and
3. Change is in **accordance with the CA in effect** (uncommon)

Elements of the Freeze (**TEST**)

1. Employer's action must involve an **alteration to employment terms or employee rights or privileges**
    a. Onus on TU
2. Falls within applicable **time periods** in Code (30 days, 120 days, before renewal, strike or revocation)
    a. Type of freeze is important here since each type has its own appropriate timing.
    b. Onus on TU
3. **None of the exceptions apply** (i.e., it isn't business as usual, by consent of union, or permitted by collective agreement)
    a. Onus shifts to employer to prove an exception applies

**note: TU doesn't need to prove anti-union animus/that the breach intended to harm the TU.

UFCW Local 401 v European Cheesecake Factory – Cert Freeze & First Agreement Freeze

Older case (1993), but still cited.
Several ULPs were filed (interference, layoffs for TU sympathizers, etc.)
Pay attention to the dates → does the certification fall within the time frame that creates the First Agreement Freeze

R: freeze following a certification application is designed to **prevent employer interference with the right to organize**

BUT employer can still respond to business demands & needs **IF**:
1. **Communicated** to employees **before freeze began**
2. The changes in accordance with "**business as usual**"
3. First time event, Board will look at "**reasonable expectations** of the parties"

R: freeze period after notice to bargain is designed to **provide a period of relative stability during bargaining**

BUT, employer can still apply the "**business as usua**l" concept in this freeze period.

F:
- Union applied for certification on January 26, 1993 (certification freeze begins); was certified as bargaining agent on February 9, 1993 (certification freeze will continue until March 9); and served notice to bargain on March 1, 1993 (this is when first agreement freeze begins b/c it's within 30 days from certification)
    - Employer laid off 4 employees during certification campaign
- Employer also made changes to several policies during the certification campaign, including:
    - Wearing jewellery at work
    - Providing a doctor's certificate
    - Attending at a company doctor
    - Vacation scheduling
    - Scheduling hours of work

I: Did the changes to policies breach statutory freeze?

H: Only breach of freeze is vacation scheduling which did not have a legitimate business reason.

A:

Jewellery Policy? → Business as usual
- Policy had existed for years, but not enforced.
- Employer courting new customers, and those customers required strict enforcement of hygiene policies, including jewellery → legitimate business reason made out

Medical Certificate Policy? → Business as usual
- Employer started enforcing existing medical certificate policy more vigorously
- Conflicting evidence about whether absences increased or stayed the same during certification campaign, but written policy did not change. Conflicting evidence + written policy = Board went with *unchanged* written policy.

Attendance at Company Doctor Policy? → Business as usual.
- Previous policy required employees to report at work injuries and advised employees of medical clinics nearby. BUT, policy changed to require employees to go to a specific doctor at a specific clinic.
    - On one occasion, employee injured at work taken to doctor named in new policy.
- Evidence pointed to the fact that the particular doctor would respond to these ERs more quickly.

Vacation Scheduling? → NOT business as usual
- Employer <u>unilaterally</u> implemented 2 week vacation shut down and required employees to take vacation at that time (employees had previously been allowed to choose whether to take vacation during shutdown, employer ignored special circumstances, refused the 1 week spread by unilaterally making a 2 week spread, refused to consider requests for extended vacations) → evidence that ER had previously done all of this.
- Company's witness admitted that they knew they were going to make these changes but didn't advise EEs b/c they knew they were going to be in the freeze period.

Work Scheduling? → business as usual
- TU obtained notices to attend for a number of employees to participate in ULP hearing. In response to that, ER told EEs hours of work would change because of Board hearings
- It is not a breach for the employer to reschedule hours of work to maintain production levels (particularly b/c it is a small plant and the work of employees is closely related, so there are legit business needs for production)

Re Southam

F:
- Union became certified bargaining agent for group of employees at the Calgary Herald (owned by Southam)
- During the certification campaign and/or within the 30 days following certification, the employer made three changes to which the TU brought a complaint.
- The Union brought a complaint of a breach of s 145 (now s 147 – certification freeze):
    1. ER denied one EE a vacation request during the Christmas vacation scheduling period
    2. ER also required that EE to begin working weekends when he had not before
    3. ER required other EEs to work a Friday night shift when working a weekend shift

I: Did the three changes fall under the "business as usual" exception to statutory freeze breaches?

H: Employer's usual right to manage is limited by statutory freeze provisions. Employer must cease and desist breaches

A:
- Step 2 of test: No dispute that subject matter of complaint occurred during freeze

- Step 1 of test: Change to vacation and work scheduling falls within the purview of the statutory freeze provisions
- Step 3 of test (i.e., exceptions):
    - No consent to the change.
    - Doesn't fall within CA
    - Only question is **whether changes fell within "business as usual"**

Vacation Scheduling? → Business as usual.
- ER used same practice as previous 2 years. EE had participated in that process 2 years & complied this year.

Weekend scheduling? → Not business as usual b/c there was a long standing practice & not within reasonable expectation of employees
- Employee in that classification had never been asked to work weekends
- No evidence of legitimate business need.
- Significant departure from reasonable expectation of the parties.

Friday Night Shift? → Not business as usual
- Since 1994, employees working weekend shift worked their regular Monday to Friday day shift. Only in November 1998 was change made
- **"Grumblings" of** junior **employees** working Friday night shift **not legitimate business reason for change**
    - Grumblings had existed for weeks, so no new need for change in November

IUOE Local 955 v Teamco Construction Services – raise during freeze

R: Business as usual looks at past practice, but sometimes there are situations where the situation at issue has never happened before. IF IT'S A FIRST TIME OCCURENCE, the occurrence needs to fall within the **reasonable expectations** test.

F:
- After union applied for certification, crane operators quit and employer had difficulty hiring new operators
- Employer had to pay new operators more than the amount paid to current operators
- Employer gave retroactive increase to all existing crane operators
- Employer had previously implemented similar salary increases for welders and foremen, when it had difficulty recruiting
- At the representation vote, it was a tie between supporting and opposing certification & so the application was dismissed
    - However, Union brought an application alleging breach of the statutory freeze as well as certain unfair labour practices
    - Union requested another vote be held if it was successful

I: Was the raise an established custom or practice and therefore not a breach of the statutory freeze period?

H:

A:
- Board cites past jurisprudence about "reasonable expectations approach"
    - **Reasonable expectations:** "The **standard** is an **objective** one: what would a reasonable employee expect to constitute his or her privileges … in the specific circumstances of that employer."
        - incorporates "practice" of employer in managing its operation
- **Statutory freeze does not prevent employer from raising wages to recruit staff. Market conditions are important, and salaries may need to be adjusted to meet demands of candidates**
    - The fact the employer had previously offered raises for foremen and welders was also taken into

consideration.
- If this is considered a "first time event" it would also be within the reasonable expectations of employees
- Employees testified that they would expect that they would be paid same level as other employees with similar skills
- Employees aware employer was having difficulty recruiting
- Both business as usual and reasonable expectations test met

UFCW Local 503 v Wal-Mart (SCC) – purpose of stat freeze in first cert context + continued employment is a term of employment

R: Purpose of stat freeze in first cert context → not just about maintaining the status quo but also to facilitate cert & ensure negotiation of collective agreement in good faith.

R: Freeze is meant to limit primary means available to employers to influence employees' choices

R: Continued employment is a condition of employment.

F:
- UFCW became certified bargaining agent for employees at Wal-Mart in Jonquiere, QC.
- During bargaining, Wal-Mart closed the store even though the store was performing well.
- Closure of the store led to the termination of all employment contracts.

I: Was the store closure a breach of statutory freeze?

H: There was a breach of the statutory freeze because it was a change to the terms & conditions of employment (condition of employment includes continued employment).

Remedy: Court directed parties back to the arbitrator to decide. Abitratory couldn't order re-opening of the store, but could order damages.

A:
- Court confirms it's not concerned with anti-union conduct
- While closing of a store may seem to be outside the scope of the statutory freeze period definition – continued employment **is** a condition of employment.
- Employer can still terminate for legitimate business reasons, but this was not a legit business reason.

UFCW Local 401 v Westfair Foods, [2009] Alta LRBR 286

- Employer raised wages of meat cutters during collective bargaining
    - Renewal freeze applies
- Collective agreement stated that employer would not pay "less than" the amount in wage table
- Employer argued that change was consistent with collective agreement (i.e., calls on an exception – consistency w/ CA)
- Board says that **a Collective Agreement must unambiguously permit the employer's actions taken during statutory freeze – vagueness is not acceptable**, but it can be express or implied.

THE COLLECTIVE AGREEMENT (CA)

Governed by ***Code,* Division 21–22**:

s 128 [CA IS A BINDING LEGAL CONTRACT] **binding** on employer, bargaining agent, and every employee in unit

s 129 deemed term of 1 year if unspecified (but most agreements have specified 2-3 year term)

s 130 ["BRIDGING" PROVISION] terms of CA deemed to continue from service of notice until: (1) new C/A; (2) termination of bargaining rights (revocation); or (3) strike or lockout.

s 131 signing requirements

s 132 filing requirements

s 133 **employer dominated** CAs can be **declared void** (Application required)

McGavin Toastmasters Ltd v Ainscough

R: It's "not possible to speak of individual contracts of employment where there is a Collective Agreement" - **Common law concepts, such as fundamental breach and repudiation, do not apply when there is a CA in place** (implications: constructive dismissal). These concepts aren't compatible with a CA. - Unlawful strike will not terminate employer/employee relationship in the context of a CA.
F: ● Employer planned to close plant in Vancouver. In protest, employees went on (illegal) strike ● Employer closed plant and refused to pay severance pay on the basis that employees had repudiated employment contract b/c of their illegal strike → Collective agreement in effect prohibited strikes/lockouts (this wouldn't be *Charter* compliant now) ● Employees brought action in Court for payment of severance pay according to terms of CA
I:
H: The unlawful strike didn't terminate the EE/ER relationship b/c a CA makes it such that common law concepts don't apply. The proper forum would have been applying to the Board to address the illegal strike.
A: ● Interestingly, employer didn't make an App to declare strike illegal & then fine employees for violating work order or being in contempt of Court. Instead, they just argued they didn't have to pay severance.

Contents of a CA

- Wages
- Hours of work/Scheduling
- Vacations and holiday pay
- Union security
- Seniority
- Vacations
- Lay off and recall
- Promotions and job postings

- Benefits and pension*
    - *Note: can be directly part of the CA *or* incorporation only by reference (e.g., it's possible ER may want to change benefits plans w/o offending CA)
- Grievance/arbitrations
- Term
- The above is a non-exhaustive list. Discretion of TU & ER in determining the contents.

Enforcement of a CA (usually wrt arbitration), *Code* Division 22

s 135 CA must include a **dispute resolution process** (e.g., contraventions of provisions in a CA, interpretation of CA, whether something should be subject to arbitration, etc.). Usually the dispute resolution process involves arbitration, but some CAs have different methods (e.g., prevention of classes of employees from bringing disputes to arbitration like contract employees or probationary employees → there may be a unique dispute resolution mechanism for them)

s 136 Model clauses to use in CAs.

ss 137–138 Appointment of Arbitrator/Arbitration Board (Mediation Services – separate from Board but part of Ministry of Labour – may provide a list of 5 names of arbitrators from a roster, either party may strike 1 name, & remaining list chosen on role of dice)

s 139 Ineligibility of nominees (ppl on arbitration board aren't disqualified from being a nominee for arbitration unless directly affected by grievance of the parties)

s 140 Speeding up decision (if it's necessary to get a decision fast, parties can involve the board to exercise their power in speeding up the decision)

s 141 **Majority decision and award** governs. If there's no majority decision, the Chair will decide.

s 142 arbitrators **CANNOT alter terms** of CA ⇒ **EXCEPTION:** can substitute lesser form of discipline, extend timelines, grant remedy under any employment statute

s 143 Powers of arbitrator ⇒ Now can order prehearing production, receive evidence in videoconference or electronic form, and can attempt to mediate in any stage of the proceeding

s 144 arbitrator's award is binding

s 145 review of arbitrator's award (30 days) → Now heard by Labour Relations Board

s 146 Enforcement of award

Grievances

A party who believes CA has been breached can file a "grievance"
Generally, three kinds of grievances

1. **Individual**: Alleges breach of agreement affecting particular employee (usually discipline grievances, but can be related to vacation or other privileges; sometimes relate to human rights grievances; harassment grievances; safety grievances)
2. **Group**: The same as individual grievances, but for a *group* of employees
3. **Policy**: Alleges breach of agreement that may not affect any particular employee yet

Questionable about whether it makes sense to have a distinction b/w the three types of grievances b/c now arbitrators can order individual, group, and policy damages
Note: Sometimes the CA will have different initial steps for review of individual vs policy grievances

Usually 3 steps in grievance:

1. *Union brings grievance informally to ER or file the doc w/ the Board*
2. *Informal Meeting w/ ER & TU to discuss ways to resolve*
3. *Formal review stage re how to resolve grievance (usually upper mgmt & TU)*
    a. *Sometimes policy go straight to formal review (i.e., skip first 2 steps)*

Grievance Arbitration

- In Alberta, grievances typically heard by private arbitrators who are appointed by parties.
- Before arbitration, there is usually a procedure in CA for resolving grievance (see italics above)
- If not resolved by grievance procedure, the parties appoint either a single arbitrator or an arbitration panel
- Powers of arbitrator determined by CA and ***s 143***
    - Arbitrators have wide powers, often akin to a court (e.g., order attendance of witness/summons of witnesses, direct production of docs, control own procedure, get involved in mediation at any stage of the proceedings)
- Grievance arbitration hearings:
    - now happen anywhere (online), but historically at hotel boardroom or law office boardroom.
    - Occasionally held at court house (but rarely b/c this would require arbitrator to make arrangements)
- Decisions can be rendered on the spot, but usually reserved
- Bottom line decision: can be requested if urgency. Here, arbitrator gives decision ASAP w/ reasons to follow.

Review of Arbitration Decisions

- Recent change to powers of the Board to review Arbitrator's decisions → jurisdiction of review of arbitration away from the Courts and toward the Board
    - This change has been limited by ***s 145*** of the Code → ****Court still retains jurisdiction to review all matters outside of the scope of s 145**** but the scope of s 145 is so broad that it's very rare for something to fall outside of s 145 and therefore require going to Court
- Example: ***UNA and Alberta Health Services***, Re, 2019 CarswellAlta 1135 (see paras 28-29)
    - Deals with jurisdiction relating to voluntary interest arbitration regarding collective agreement terms – which falls to Court for judicial review – s 127 of the Code applies when outside scope of s 145.
    - If party wants to appeal decision of arbitrator in context of voluntary interest arbitration re CA terms, it **must be sent to the Court** (falls outside of s 145) ***RARE***

Weber v Ontario Hydro – Court's jurisdiction when CA in place

R: Labour arbitrators have <u>exclusive jurisdiction</u> over any matters dealing with the interpretation, application, administration, or violation of the CA

- When deciding whether the dispute, in its essential character, arises from an interpretation, application,

administration, or violation of the collective agreement look at 2 things:
1. Factual nature of dispute
2. The terms of the Collective Agreement (Does the CA touch on the issues arising in the dispute?)

F:
- While employee was away on sick leave, employer hired private investigator to determine whether employee abusing leave
- Based on information from private investigator, employer suspended employee for abuse of sick leave
- Employee brought tort action and claimed violation of Charter rights for employer surveillance → SCC dismissed.

I: What jurisdiction does a court have when a collective agreement is in place?

H: Majority of SCC finds that only exclusive jurisdiction model is consistent with labour relations legislation

A:
Three potential models of jurisdiction
1. **Concurrent jurisdiction**
   a. Regardless of whether matter arises from employment relationship, **both courts and arbitrators have jurisdiction concurrently**
2. **Overlapping jurisdiction**
   a. If issues go beyond the traditional scope of labour law, ***part* of the dispute can be brought before a labour arbitrator and *part* before a Court**
3. **Exclusive jurisdiction**
   a. If the facts of the dispute in their essential character arise from the interpretation, application, operation, or violation of the collective agreement, **labour arbitrator has exclusive jurisdiction**

Application to case:
- In this case terms of Collective Agreement very broad
- Employer prohibited from "unfair treatment"
- Dispute in its essential character arose from interpretation, application, operation, or violation of CA
- Court action dismissed
- SCC also dismissed Charter application on the basis that labour arbitrators have jurisdiction to provide Charter remedies

"Other" Actions by Arbitrators, *Code* s 142(4) & Equitable Principles

- Arbitrators can now apply other "enactments relating to employment matters"
  - i.e. the Alberta Human Rights Act, Occupational Health and Safety legislation, etc.
- **s 142(4):** Arbitrator can **apply and give relief** in accordance with employment-related legislation notwithstanding any conflict between the legislation and the collective agreement
  - E.g., remedies under OHS, remedies for human rights breaches, etc.
- Codifies ***Owens v Parry Sound***, 2003 SCC 42 → **arbitrators can apply other enactments in relation to employment matters**
- **Arbitrators can also apply principles of equity (including equitable estoppel)**

Nor-Man Regional Health v MAHCP – arbitrators can apply equitable principles

R: Arbitrators can apply estoppel using the following steps:

1. **Representation** by one party through their conduct or words
2. **Reliance** by one party on the representation
3. Reliance was **to their detriment**
4. Note that arbitrators don't have to apply estoppel in the same way the Court would → they have a lot of

leeway to do what's best for labour relations

Once applied, **estoppel ends upon renegotiation** of the CA.

R: Arbitrators can apply equitable principles to provide appropriate remedial doctrines: "Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they **require the flexibility to craft appropriate remedial doctrines** when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord."

F:

- Employer denied employee with 20 years of service a bonus week of vacation provided by the Collective Agreement
- Employer's consistent practice was to not count time employee spent as a "casual employee"
- Employee grieved and arbitrator found that language of Collective Agreement granted casual employees same vacation rights as regular employees but that union estopped from relying upon strict language of agreement

A:

- Arbitrator not required to apply legal test for estoppel in the same manner as courts
- Arbitrator must apply estoppel in a manner consistent with labour relations legislation, the principles of labour relations, the nature of the collective bargaining process, and the particular grievance

Application of estoppel:

1. TU had never challenged ER wrt interpretation of CA
2. ER relied on the TU's representation that they wouldn't challenge.
3. ER wasn't able to negotiate new language

Management's Rights

- Typically, CA will contain a **management's rights clause** reserving all rights to manage business to management except as limited by the agreement
- Exercise of management's rights, such as right to discipline and implement workplace policies, have been regulated by arbitrators over the years
    - E.g., is the exercise of discipline reasonable? → arbitrators address this.

WM Scott & Company CFAW, Local P-162

R: Arbitrator can substitute a lesser form of discipline for a discipline identified in the CA. In so doing, the arbitrator must analyse 3 questions:

1. Has the employee given **just and reasonable cause** for some form of discipline?
2. If so, was the employer's decision to dismiss the employee **excessive** in all the circumstances of the case?
3. If discharge was excessive, **what alternative should be substituted**?

In asking those questions to determine if the discharge was appropriate, arbitrators should look at several factors:

- Seriousness of the offence
- Premeditated or momentary lapse of judgement
- Employee's length of service
- Disciplinary history
- Consistency of discipline

F:

- Employee had phoned newspaper and made very negative comments about employer
- Procedural history:
    - Issue: Was the employee's comments to the newspaper defamation?
    - Majority of arbitration board found that she did this intentionally to defame her employer

○ Union and grievor appealed to BC Labour Relations Board
I: If the arbitrator finds the discipline is too harsh, could it apply a lesser form of discipline?
H: There is jurisdiction for arbitrator to substitute a lesser form of discipline.
A: ● Common law concepts of termination do not apply when there is a collective agreement, so the employer loses the right to unilaterally terminate the employee with notice or pay in lieu thereof ● Legislation overrules SCC decision in Port Arthur Shipbuilding that says that if the employee had given some cause for discipline arbitrators have no jurisdiction to overturn employer's decision on discipline imposed

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Lumber and Sawmill Workers' Union Local 2537 v KVP Co

R: If a rule is negotiated between the parties, arbitration boards will enforce it (*This would now be subject to human rights legislation) If a rule is unilaterally imposed by the employer, arbitrators will only enforce it in certain circumstances The presence or lack thereof of a management rights' clause does not affect this
Unilaterally imposed rules must meet the following criteria 1. The rule must not be inconsistent with the collective agreement 2. The rule must not be unreasonable 3. The rule must be clear and unequivocal 4. The rule must be brought to the attention of the employee 5. The employee must be notified of the consequences of the breach of the rule 6. The rule must have been consistently enforced
The rule must be considered <u>as written</u> not as employer may apply it
F: ● Employer unilaterally introduced policy that if an employee had more than one garnishee summons, the employee would be terminated ● The grievor, an eight year employee with an unblemished record, was terminated after he received three garnishee summons ● The union and grievor grieved the termination
I: Only question was whether rule was reasonable and whether it was consistent with the agreement
H:
A: The rule was not reasonable ● Very little impact on operations of employer ● Imposed very serious penalty ● The rule was not consistent with recognized reasons for terminating employee The rule was also inconsistent with the Collective Agreement ● Agreement contained seniority clause that made promotion, protection from lay off, etc. based on seniority ● Seniority could only be lost in limited situations, including if the employee was discharged for just cause ● A rule that provides for termination for a minor offence is not consistent with seniority clause

UFCW 401 v Sobey's West Inc

R: Board's power to review arbitrator decisions:

Board's power to review decisions is limited by s. 145
Only two grounds upon which Board can set aside arbitrator's decision

1. A party was denied a fair hearing
2. The award is unreasonable because of a lack of intelligibility or transparency, or because it falls outside the range of possible outcomes that are defensible in respect of the facts and law

No standard of review analysis required

F:

- 45-year employee, with clean record terminated after admitting to make tea at Starbucks kiosk in Safeway on a few occasions and eating some marshmallow snacks
- Employee was also dishonest about taking a bag of chips
- Arbitrator determined that termination was reasonable penalty
- Union brought application for review to ALRB

I:

H:

- Board will not parse individual statements in arbitral decision
- As a whole, arbitrator balanced seriousness of misconduct with circumstances of individual grievor
- Arbitrator considered and applied labour arbitration jurisprudence from across Canada
- Decision reasonable
- Union submitted arbitrator placed too much importance on statements and testimony of grievor, and not enough on long service
- This would require re-weighing of evidence, which Board will not do on review
- The Board cannot substitute its view of trustworthiness of grievor

A:

- PROCEDURAL FAIRNESS
    - There is no "standard of review" for procedural fairness
    - Question is not whether it was reasonable or correct, but whether procedure was fair
- Section 145(3)(b) adopts "reasonableness" standard of review from Dunsmuir
    - This test will continue to be applied by the Board
    - The Board will never apply a standard of correctness
    - The change of forum from QB to LRB does not mean Board should be less deferential
    - However, Board can bring labour relations expertise
- Arbitrator noted that retail employers particularly vulnerable to employee dishonesty
    - Did not hold termination automatic
- Arbitrator applied WM Scott factors
- Despite grievor's long service and clean record, he could not be trusted in future because of dishonesty about chips and repetitive nature of thefts

Standard of Review & *Vavilov*

So, does the Vavilov framework in some way supercede or modify the Dunsmuir test?
Answer: "Nothing in Vavilov requires the Board to revise its current approach to the review of arbitration decisions under section 145(3)." See: Northern Weldarc Ltd. v International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union No. 805, 2020 CanLII 36830 (AB LRB)

RESOLVING BARGAINING DISPUTES W/O STRIKE OR LOCKOUT

Alternative Dispute Resolution Methods

Five types of dispute resolution other than strike/lockout

1. Mediation
2. Proposal/Recommendation Votes
3. Interest Arbitration
    a. First contract arbitration
    b. Voluntary Interest Arbitration
    c. Compulsory Interest Arbitration
4. Disputes Inquiry Board
5. Public Emergency Tribunal

1. Mediation, *Code* Division 11, s 64–66

After notice to commence bargaining has been served either party or the **Minister may** request the Director of Mediation Services to **appoint a mediator**, **informally** (**s 64**) *OR* **formally** (**s 65**)

If **Division 15.1** applies, Director may only appoint a mediator if there is a filed essential services agreement, an exemption, a compulsory arbitration declaration, or consent.

65(3) The mediator shall, in any manner that the mediator considers fit, **inquire into** the **dispute** and **endeavour to effect a settlement**.

65(5–6) Generally, **after 14 days** if the mediator is not able to effect a settlement, the **mediator will either recommend terms or "book out."**

66 Parties can accept terms within the time limit set by mediator → If one side accepts and the other does not, the one accepting can request a vote by the other party.

There is a 14 day "cooling off" period after the happening of one of the following:

1. The mediator books out;
2. The date the mediator sets for acceptance or rejection of recommended terms; or
3. The date on which parties are notified of the results of the vote on the terms.

2. Proposal Votes, *Code,* Division 12, s 68–69

68–69 Can be a vote on one party's **most recent offer** (**s 69**) *OR* the **mediator's recommendations** (**s 68**).

69(2) Offer, if accepted, **must** be **capable** of forming **CA**.

69(3) Each party may apply **only once** during each dispute for a proposal vote. This can only be done after proposals have been exchanged.

3. Interest Arbitration, *Code,* Divisions 15; 16; 14.1

a. Voluntary Interest Arbitration, *Code,* Division 15

- Parties may voluntarily agree to appoint of single arbitrator or 3 person arbitration board to determine matters in dispute
- If arbitrator or arbitration board is not able to effect a settlement, will make an award
- Award is binding and is included in terms of collective agreement

b. Compulsory Interest Arbitration, *Code,* Division 16

- Only applies to firefighters and ambulance attendants
    - And essential service workers, including employees of approved Hospitals and regional health authorities, in certain circumstances
- Similar to voluntary interest arbitration
- Statutorily prescribed items that arbitration board must consider and may consider (**s 101**)

c. First Contract Arbitration, *Code,* Division 14.1 (NEW)

- For a first collective agreement, either party may apply to the Board for assistance after either:
    1. 90 days from when noticed served/bargaining commenced; or
    2. There is a strike or lockout
- If the statutory freeze is still in effect, the Board may extend it
- Board will first attempt to mediate dispute
    - If mediation attempts are unsuccessful, Board may require the dispute to be determined by arbitration
    - Board may decide to arbitrate itself or appoint an arbitrator/arbitration board
    - Arbitrator cannot alter previously agreed upon items
    - Term of agreement cannot exceed 18 months and cannot be retroactive beyond the earlier the date bargaining commenced or notice was served
- NEW in Bill 32 – **Before ordering first contract arbitration, the Board must**:
    1. Be satisfied that **arbitration is necessary**
    2. ER or TU must have **failed to bargain in good faith** in one of the specific ways described **in s 92.3(b);** and
        - ➢ *Note: pre-Bill 32 did not require wrongful action*
    3. **No** other **remedy** would be **sufficient**

AUPE v Signature Living (Rocky Ridge) – application of s 92.3

R: The **Board has discretion** under **s 92.3(2)** to **consider** "**any other factors relevant to the dispute**" including: ➢ Whether the employees provide *essential services* ➢ *Acceptance or rejection* of a *mediator's report* ➢ Whether there has been "*bad faith bargaining*" ➢ The *public's interest* (context of pandemic relevant)
B/G: Request for first contract arbitration. First decision of ALRB interpreting **s 92.3**.
H: TU's application granted and dispute directed to first contract arbitration

4. Disputes Inquiry Board, *Code,* Division 17 – RARE

Minister of Labour can appoint a **Dispute Inquiry Board** (DIB) which is similar to mediation. DIB has 20 days to attempt to resolve dispute, & if the dispute cannot be resolved, the DIB must make recommendations → vote on recommendations **required**.

5. Public Emergency Tribunal, *Code,* Division 18 – RARE

Lieutenant Governor (LG) in Council can make orders **IF** dispute between parties **threatens health or property** in certain circumstances

- ➢ Can **require parties to cease all action**s and **follow procedure directed** by LG in Council
- ➢ Can **appoint Public Emergency Tribunal** that can **set terms of agreement**.

STRIKES & LOCKOUTS

Requirements for Lawful Strike/Lockout, *Code* s 73–s 74

5 things that have to occur **BEFORE** a legal strike (**s 73**) or lockout (**s 74**):

1. no collective agreement in force (**except s 130** – bridging provision for terms of CA to remain in force b/w expired CA and new CA)
2. strike/lockout **vote** must be held, and results must be **current** (**s 73(b), s 74(b)**)
3. strike/lockout **notice** must be given
4. strike/lockout must **commence in accordance with notice** (you have to strike/lockout in the location/time as set out in the notice)
5. **IF** there is a Disputes Inquiry Board, the time limits in **s 105(3)** must have expired (i.e., 10 days after Minister serves copy of recommendation on parties, or 72 hours after results of vote on recommendations of DIB are released) **rare that these provisions are engaged*
6. **IF** essential services industry is in question (see **s 95** for criteria – includes post-secondary faculty associations), Step 6 is necessary & you:
    a. must have agreement ***OR*** get an exemption from the Commissioner (App + submissions about the bargaining unit not threatening life, personal safety, public health, or administration of the rule of law); and
    b. no declaration of compulsory arbitration

Strike/Lockout Vote, *Code* s 73(b) & s 74(b)

73/74(b) strike vote held under this Division

i. that remains **current** (i.e., within 120 days of when you go on strike)
ii. for which the results have been **filed** with the Board (Board supervises but Applicant runs the vote)
iii. that resulted in a **majority** in favour of a strike/lockout

Timing of Strike/Lockout Vote Application, *Code* s 75

75 on application to the Board, but **only IF**:

1. **No CA in force** subject to **s 130**
2. **Mediator** has been **appointed** **s 65**

3. "**cooling off**" period in **s 65(7)** has **expired** [14 days] **but less than two years** have passed **since expiry of "cooling off" period**

75(2.1) **BUT** application and **preparations** for the vote **can be taken in anticipation** of/*before* a mediator appointed under s 65 and before the cooling off period expires (*so you can apply for a vote during the cool off period, but the proposed date has to fall after expiry of 14 day cool off period)*

Voting Rules, R 24 [**TIMELINE FOR APPLICATION FOR STRIKE/LOCKOUT VOTES**]:

- TUs → must apply for strike votes **at least 7 calendar days** before planned voting date
- EOs → apply for lockout votes **14 days before** planned date
- Single ERs → polled **as soon as possible** after application
- Director of Settlement, **may**, with consent of other party, **reduce the 7 & 14 day requirements**. Absent consent, Board has to approve the reduction.

"Current" Definition, *Code* s 77

If no strike or lockout occurs within 120 days after the day on which the strike vote or lockout vote was conducted → the **strike or lockout vote is deemed to be void**, and no person shall strike or lock out unless a new strike vote or lockout vote has been conducted in accordance with this Division.

No vote may be taken after 2 years of expiry of cooling off period → upon 2 years after expiry of cooling off period, the dispute deemed to no longer exist.

Eligibility to Vote, s 76(2–3)

76(3) results of strike/lockout vote determined on basis of **majority** of those who actually vote

76(2) [ELIGIBILITY] "those employees of the employer(s) **affected by the dispute**"

- **76(5)** [DEF'N OF "**AFFECTED BY THE DISPUTE**"] Those employed in unit **affected** by the dispute **employed at any time during 60 days preceding the date fixed** for the strike vote.

Strike/Lockout Notice, *Code* ss 73/74(c), 78–80

Personal service on ER/TU (AND mediator) giving **at least 72 hours of notice** of the:

1. Date
2. Time
3. Initial location at which strike will commence

79 parties can **agree to amend** the strike notice, but **must notify mediator** of amendments

Strike Must Commence in Accordance with Notice, s 73(d), 78–80

80 if a strike or lockout does not occur or is not permitted to occur on the date, at the time and at location specified in notice (or amended notice) the notice becomes ineffective.

78 Another notice must be served in accordance with s. 78 before strike or lockout

Def'n & Scope of Strike,

3 Elements of a Strike, *Code* s 1(v)

1. Refused work by way of (i) cessation of work, (ii) refusal to work, OR (iii) refusal to continue to work
2. Concerted action: 2 or more employees acting in concert or in accordance with common understanding
3. Purposive/subjective: actions must be **for purpose of compelling employer to agree to certain terms or conditions** of employment (or to aid other employees in doing so)

V.S. Services Ltd. (Alberta Hospital) v Health Care Employees Union of Alberta

R: "Strike" has a broad definition, includes reduction of output, and other activities that involve less than a total withdrawal of services.
A strike can include any situation where employees deliberately do not work in the way they have agreed.
Includes intermittent activity too – no requirement in Code that strike be continuous, in fact, s. 78 suggests otherwise.

Purpose of strike notice:

1. Give ER warning where the TU will first take action
2. Brief pressure cooker negotiation → time is of the essence.
3. Post-valid notice, parties are free to use whatever "economic weapons" they wish to bring about

F: TU served a proper strike notice, strike commenced & employees walked off the job. Following that they returned to work, BUT when they returned to work they maintained the overtime ban. ER argued the overtime ban was a new strike w/o proper notice

McGavin Foods Ltd – test to find strikes

Reconsideration of Board's "cease and desist" order which was issued to stop an illegal strike
Remember the Board's reconsideration power? 12(4)

Step 1 of strike test: def'n of "work" for the purposes of strike under the *Code* are broad (can include unexpected work tasks, not just what workers are ordinarily scheduled to do → even where there are CAs in place, new forms of work can arise)

HOWEVER, Employees do not strike illegally when the work they are refusing to do is that which they can legally refuse to do (i.e. unsafe work)

Step 2 of strike test: Once it is established that employees have refused to work when work is scheduled, there is an **onus on employees** to come forward with a credible and convincing explanation for their conduct. Absent such evidence, the Board can **draw inference** that employees have acted in concert. In this case, EEs have the **evidentiary burden to rebut** that inference.

In absence of other compelling evidence, the Board is usually prepared to draw an inference of concerted activity where employees belonging to one union refuse to cross lawful picket lines of another.

Refusal by group of employees to cross a lawful picket line does give rise to inference of concerted action (which can be rebutted by credible evidence)

Step 3 of strike test: acts must be done for the **purpose of compelling employer to agree to terms or conditions**

of employment, or to **aid other employees** in so doing (BUT this burden isn't on EE since it would be tough to prove. Again, Board can infer intention & EEs have burden to rebut inferences).

NOTE: in general, when group of employees refuses to cross a picket line, generally infer that they do so in belief that their support for the picketing will, directly or indirectly, put pressure on the employer in the dispute to settle with striking employees

R: Employees who fail to perform work because they are honouring a picket line are not protected by any general law (discipline, etc.), and this conduct can be considered an illegal strike – there is serious incentive for unions to negotiate such clauses for contractual protection

R: PARTIES CANNOT CONTRACT OUT OF THE "NO STRIKE" PROVISIONS OF THE CODE in their CA. BUT an illegal strike during the term of a CA may expose the participants to disciplinary sanctions, and the union to claims for damages (not to mention fines under the Code).

R:

F:

- The bakers (represented by one union) were on a legal strike and set up a legal picket line
- The drivers (represented by another union) refused to cross the bakery employees' picket line.
- The collective agreement contained a provision (Article 20.02) stating that "the Company shall not require any employee who is a member of the union to cross any lawful picket line."
    - The employer's position: these employees are engaging in an unlawful strike
    - The union's position: these employees are acting in accordance with the collective agreement
- The union filed a grievance and also sought reconsideration of the Board's decision

I:

1. Is this a strike?
2. If so, does the Board have discretion to decline to issue a cease-and-desist order in light of the Collective Agreement?
3. Is Article 20.03 of the Collective Agreement, which states that the company shall not require any employee who is a member of the Union to cross any lawful picket line valid in law? → Should not be declared void.

A: Board starts by reviewing 3 elements of a strike

Refused Work

- Union argued that "work" for the purposes of definition of strike under the *Code* cannot include work scheduled by an employer contrary to a valid CA
    - Board rejected this argument: "work" aspect of strike definition must be given its own, free-standing statutory meaning. The role of the agreement may be evidentiary, but not definitional.
    - There is a difference between how "work" may be defined/construed in CA and the statutory meaning of "work" for purposes of definition of strike
    - "work" for purposes of this definition = work that is that which the employee would ordinarily be expected to do
    - HOWEVER, Employees do not strike illegally when the work they are refusing to do is that which they can legally refuse to do (i.e. unsafe work)
- The meaning to be given to "work" in the definition of strike must be a meaning that can apply when there is AND is not a collective agreement in place – definition cannot depend on c/a
- Even where c/a in effect, new forms of work may arise that aren't covered by the agreement. This can still be work, which, if refused, will amount to illegal strike.

Concerted action

- Specific evidence of concerted action is often very difficult to obtain.
- Once it is established that employees have refused to work when work is scheduled, there is an onus on employees to come forward with a credible and convincing explanation for their conduct.

- Board will draw inference that employees have acted in concert, and therefore illegally.
- Employees have "evidentiary burden" to rebut inference
- **In absence of other compelling evidence, the Board is usually prepared to draw an inference of concerted activity where employees belonging to one union refuse to cross lawful picket lines of another**.
- In other words, refusal by group of employees to cross a lawful picket line does give rise to inference of concerted action (which can be rebutted by credible evidence)

Purposive, or subjective, element of intent

- The definition of strike in Alberta requires a subjective element or purpose. The acts must be done for the purpose of compelling employer to agree to terms or conditions of employment, **or to aid other employees in so doing**.
- Not essential for employer to call evidence about state of mind of absent/refusing employees: prohibitively difficult to do this
- In most circumstances, a reasonable inference of intent can be drawn in the circumstances, which results in shifting of evidentiary burden to union to proffer evidence that rebuts the inference.
- Board will usually infer, among those who refuse to cross a picket line, an intention to force employer to agree to terms and conditions of employment.
- There may be other issues at play to rebut the inference (personal safety) but **in general, when group of employees refuses to cross a picket line, generally infer that they do so in belief that their support for the picketing will, directly or indirectly, put pressure on the employer in the dispute to settle with striking employees**.

Contractual Clauses

- Here, Article 20.03 purports to remove certain conduct from what would otherwise be an illegal strike
- PARTIES CANNOT CONTRACT OUT OF THE "NO STRIKE" PROVISIONS OF THE CODE
    - But, an illegal strike during the term of a collective agreement may expose the participants to disciplinary sanctions, and the union to claims for damages (not to mention fines under the Code)
    - These provisions have no effect on the legality of a strike, but may provide employees or union with defence to disciplinary sanctions and damages claims
    - May affect rights of the parties vis-à-vis one another, but will not render an illegal strike legal

Def'n & Scope of Lockout

Lockout Def'n, *Code* s 1(p)

1. Closing of place of employment by an employer;
2. Suspension of work by an employer;
3. Refusal by an employer to continue to employ employees;

For purpose of compelling employees to agree to terms/conditions of employment

Calgary Co-Op – lockout analysis

R: There are both objective & subjective components to determining if there's a lockout.

1. **Objective component:** closing place of work, suspending work, or refusing to continue to employe employees
    a. THREATS to reduce hours or roll back wages satisfy the objective component.
2. **Subjective component:** The purpose must be to compel employees to agree to terms/conditions of employment
    a. Simply implementing changes for the purpose of addressing financial needs ≠ lockout
    b. Crossing the line to make THREATS & provide COMMENTARY about withdrawing work = lockout

c. ER can't communicate with EE without TU first b/c this undermines TUS authority (Co-Op gave proposal to employees before giving it to the Union)

F:

- During term of Collective Agreement, Employer initiated discussions with Union to reduce labour costs
- No agreement was reached
- Employer distributed proposal to employees that if amendments to agreement not agreed to, Coop would unilaterally achieve savings by reduce hours of senior employees and hire new employees
- Union complained that this was a threat of an illegal lockout
    - Although this just a "threat", analysis about the definition of lockout is the same.

A:

- Board confirmed the objective and subjective components
- "Suspension of operations" includes reducing hours
- "Refusing to continue to employ" can include refusing to continue to employ on same terms and conditions as before
- **Objective element was met** by employer threatening to reduce hours of work and salary
    - Proposal to reduce hours was a threat to suspend work
    - Proposal to roll back wages was threat to refuse to continue employing employees on previous terms
- Employer may make many decisions that have the effect of denying work to employees, but **not every decision that results in denial of work will be a lockout** – lay-offs due to market slow-downs, plant closures, etc. : these are not lockouts.
- Needs to be subjective element too
- Subjectively, original purpose was legitimate aim to address financial issues, but purpose changed when it presented proposal on "take it or leave it" basis – at this point, subjective element of lockout also established
- Fine line between forecasting the inevitable (i.e. if x doesn't happen, you'll lose your jobs") and engaging in open, non-unilateral discussions?
    - Not a lockout if employer is simply implementing changes to address financial need
    - Board did not address employer's argument that changes threatened were in accordance with CA
- Employer may communicate with employees during bargaining BUT may not do so in a way that undermines TUS authority – Co-Op gave proposal to employees before giving it to the Union

Employment Status of Strikers & Replacement Workers, s 89

89 you are **still an EE even if you cease to work as result of lawful strike or lockout** → collective agreement ends, BUT the employment relationship does not b/c the terms of the CA are still in force.

90 In AB, employers **may hire replacement workers during a strike** BUT EEs have entitlement to resume their employment in preference to replacement workers (subject to some qualifications).

Illegal Strikes/Lockouts

A strike or lockout that does not satisfy the prerequisites in the Code:
71 –cannot threaten to strike or cause a strike unless that strike is permitted by the Code
S. 72 – cannot threaten to lockout or cause a lockout unless that lockout is permitted by Code
some are more obvious than others (i.e. wildcat walkout vs. technical, inadvertent breach)
S. 154 – see also dispute related misconduct (will talk about this more in picketing context)

Process for Restraining Illegal Strikes/Lockouts

S. 91 – Court has limited jurisdiction to intervene to restrain an illegal strike or lockout

Must apply to Board except in limited circumstances
Only if reasonable likelihood of danger to person or property or resort to Board is impractical
Cannot get ex parte injunctions (s. 92)

Board's Remedial Powers

86 IF there is an illegal strike, threat of illegal strike, illegal picketing, or illegal refusal to work → **Board can make declaration and direct what action parties must take**

88(2) directives can be filed by the Board on its own motion with the Court and enforced as a Court Order (i.e. contempt applications and remedies available)

Offence & Corresponding Penalty for Illegal Lockouts, s 159

159 – an employer or employer's organization that commences or causes a lockout contrary to the Act is guilty of an offence and liable to a fine not exceeding $1000 for each day that the lockout continues.
A person other than an employer or employer's organization who commences, causes or consents to a lockout contrary to this Act is guilty of an offence and liable to a fine not exceeding $10,000

Offence & Corresponding Penalty for Prohibited Strikes, s 160

160

- A trade union that causes a strike contrary to this Act is guilty of an offence and liable to a fine not exceeding $1000 for each day that the strike continues
- An officer or representative of a trade union who strikes or causes or consents to a strike contrary to this Act is guilty of an offence and liable to a fine not exceeding $10,000
- A person who is not a trade union or an officer or representative of a trade union who strikes or causes a strike contrary to this act is guilty of an offence and liable to a fine not exceeding $1000

PICKETING & FREEDOM OF EXPRESSION

Picketing

Picketing: def'n from CL (not defined in labour legislation) → conveying a message to convince someone to change something (messages vary – e.g., trying to encourage coworkers not to go into the place of work, trying to encourage customers not to provide patronage to the place of work).

Purpose is twofold (***Pepsi-Cola***):

1. to convey information about a labor dispute in order to gain support for its cause from other workers, or clients of the struck employer or the general public
2. to put social and economic pressure on the employer, and by extension its suppliers and clients

Regulation of Picketing, *Code* s 84–84.1

84, 84(7) Picketing is **prohibited <u>except</u>** when done in accordance with **s 84** & **s 84.1** (secondary picketing).

84(1) 5 Criteria for picketing:

1. Must be a **legal strike/lockout** in effect
2. Picketing must occur **at place of employment***
3. Picketing must be **in connection with a labour dispute**
4. Picketing must be **peaceful** and without "wrongful acts"
    - ➢ *Concern: 84(3.1) is new legislation obstructing/impeding someone from crossing = wrongful act. We still aren't really sure what a "wrongful act" is yet.*
5. Picketing must be for the **purposes in ss 84(1)(a) – (c)**.

Primary vs Secondary Picketing

Primary picketing: picketing at the employee's place of employment, permitted under s 84 of the Code.

Secondary picketing: picketing at a place other than the employee's place of employment.

84(2) "**Place of Employment**" includes premises (i.e., secondary picketing locations):

(a) Where **work that is normally done** by striking or locked-out employees **is being performed during strike/lockout**;
(b) The employer uses to **further a lockout or resist a strike**; or
(c) At which a **third party assists the employer** in furthering a lockout or resisting a strike by **performing services for the employer it does not normally provide** (i.e., ally strike; these places may be subject to **secondary picketing**)

84.1(1) A person or trade union **shall not picket at the premises** referred to **in section 84(2)** *(i.e., the allied places/secondary picketing sites)* **unless permitted to do so** pursuant to an order of the Board made under subsection (2) and subject to any determinations or declarations made by the Board in the order.

- Kara says that she thinks 84.1 is contrary to Charter → 2(b) freedom of expression & 2(c) freedom of assembly.
- Contrary to ***Pepsi-Cola***

84.1(2) On the application of a person or trade union wishing to picket at any premises referred to in section 84(2), the Board may

(a) permit picketing at the premises,
(b) determine the location or locations on the premises at which the picketing may be conducted, and
(c) make any other declarations with respect to picketing at the premises that the Board considers advisable.

s 84.1(1) Application (IB #17)

- Make written application to Board – include details of where you want to picket and what part of 84(2) applies
- If contested by employer or affected party Board will try and have hearing in 48 hours

- BUT you can't make until your strike notice is given (72 hours before strike starts)→ introduces timing problem. If you can't apply for secondary picketing site UNTIL you've submitted your strike notice & Board will supposedly deal with contested apps within 48 hours

Wrongful Acts, *Code* s 84(3–4), s 154

84(3) Picketing must be conducted without wrongful acts

84(3.1) NEW – Obstructing or impeding someone who wishes to cross a picket line is a wrongful act *(this creates an issue b/c 84(1) says you can impede someone from crossing a picket line while s 84(3.1) says you can't. One of the keys to effective picketing is the ability to impede crossing a picket line through persuasion. Unclear whether this section is constitutional b/c impeding crossing is really about persuasion)*

84(4) Attempts to persuade are not wrongful acts Dispute Related Misconduct *(contradicts s 84(2.1))*

154 Prohibits "dispute related misconduct" & "strike breakers"
"**dispute-related misconduct**" means a course of conduct of incitement, intimidation, coercion, undue influence, provocation, infiltration or any other similar course of conduct intended to prevent, interfere with or break up lawful activities or likely to induce a breach of the peace in respect of a strike or lockout.

Board Regulation of Picketing, *Code* ss 84(5–6)

Board takes an approach of ***regulating*** picketing, and NOT prohibiting it.

84(5) Board has authority to regulate picketing
- Anyone affected by picketing can apply to the Board to regulate picketing (but it's almost always done basically immediately by the ER)
- Board can issue **order to specify number of picketers**, as well as **time and place** of picketing, or **anything they consider advisable**
- Board responds to Applications SUPER QUICK (e.g., 4 hours notice is typical)

84(6) When the Board makes a determination or order under subsection (5) it shall consider the following:
(a) the directness of the interest of persons and trade unions picketing in respect of a labour dispute or difference;
(b) violence or the likelihood of violence in connection with picketing in respect of a labour dispute or difference;
(c) the desirability of restraining picketing in respect of a labour dispute or difference so that the conflict, dispute or difference will not escalate;
(d) the right to peaceful free expression of opinion.

Other Options for Parties in Picketing

Picketing protocol: picket captains in charge of any issues that arise & make sure that picketing follows a fair organization. Often, both sides like to have discussions with the cops re the picketing.
Consent Directives

Effect of Directive or Order, *Code* s 88

Board order can be filed with Court
Enforceable as judgment or order of the Court
NEW – upon request of a party Board shall file it

Expiry of Strike/Lockout, *Code* s 90

Strike/lockout ends after 2 years, at which points EEs have to talk to the ER to get their job back.
NOTE – this is very rare.

Cases

The three SCC cases deal with the possibility of a TU raising a *Charter* challenge on legislation they argue breaches s 2(b).

Cessco Fabrication & Engineering Ltd. v International Brotherhood of Boilermakers, Local 146, [2020] Alta LRBR LD-086 (Schlesinger) – getting around s 84(3.1) using s 11(3) Report

R: Chair can issue a report & the Board can adopt the report as their decision in order to direct the parties to act in certain ways as per s 11(3) of the Code (which contemplates a process that combines both adjudicative and resolution elements. "This process permits the Board to confirm a report as a decision of the Board without having the matter proceed to a formal hearing.")

F:
- TU and ER made applications related to conduct on the picket line
- There was a prior consent directive but ER withdrew consent after Bill 32 was proclaimed (i.e., s 84(3.1))
- TU brought Constitutional challenge
- The chair then issued a report that contained picketing guidelines. The Employer then applied to have the Board confirm the report as a decision of the Board, which was the subject of this hearing.

H: Board granted App to confirm the Report w/ picketing guidelines as a decision of the Board.

UFCW v. K-Mart, 1999 CanLII (650) (SCC) – permissible leafleting *vs* picketing

If you're just leafleting, you can do this anywhere (vs picketing where you must do it in line w/ s84(1–2)

R: Freedom of expression is fundamental to freedom & should therefore **only be restricted in the *clearest* of circumstances**.

Freedom of expression in labour relations context is about the fundamentally important relationship ppl have to work (para 25):
- Importance of work to an individual's self-worth and well being
- Impact of work on an individual's dignity and self respect
- Critical for vulnerable workers
- Essential component for labour relations

R: Distinction b/w conventional picketing & leafleting: Leafleting = informed/rational persuasion VS picketing = coercion

- Conventional picket lines act as a **signal not to cross a barrier** & are more of a natural response not based on rational discourse // IN CONTRAST, leafleting seeks to persuade the public through **informed and rational discourse**
- Although both may result in a loss of business for the employer, picketing does by coercion and leafleting by rational persuasion
- Leafleting may be similar to conventional picketing if the leafleters impeded access to the targeted premises or if the leaflets were directed towards workers rather than consumers

R: Rules for conduct/content to be considered leafleting (and NOT picketing):

1. the **message** conveyed by the leaflets must be **accurate**, **not defamatory** or otherwise unlawful and **must not entice people to commit unlawful or tortious acts**
2. the leaflet must **make clear who the dispute is with**
3. Shouldn't be conducted in a **coercive**, **intimidating**, or otherwise **unlawful** or **tortious** way
4. **Must not involve a large number of people** (b/c this can create an atmosphere of intimidation)
5. Must not **unduly impede access** to or egress from the premises
6. Must **not prevent employees of the neutral site from working** and must **not interfere with other contractual relations of suppliers** of the neutral sites ⇒ leafleting to customers only

F:

- Certified w/ 2 K-Mart stores & then went to other K-Marts talking about K-Marts alleged unfair labour practices & asking ppl not to shop there.
- TU challenged def'n of picketing under their legislation (remember – BC is the only jurisdiction that defines picketing and now it says that picketing doesn't include leafleting).

I/H: Did the BC definition of picketing violate s.2(b) of the Charter by prohibiting union members from peacefully distributing leaflets at a secondary site in the context of a labour dispute? → Yes & not saved by s 1.

A:

- Attending at a specific location in order to promote a boycott has long been a right enjoyed by many groups **outside the labour context** such as political, social, religious and economic interest groups. Having this restriction on only labour/TU speech is problematic.
- In any labor dispute it is important that the public be aware of the issues. **Leafleting is an activity that conveys meaning, information, and promotes dialogue** & shouldn't be restricted for only labour/TU speech b/c it;s used in several other circumstances (like political, social, etc.)
- Leafleting not similar to conventional picketing b/c leafleters did not impede access to targeted premises & leaflets were directed at consumers & not workers.
    - The justification of the legislation must occur against a backdrop of what occurred in this case

RWSDU v. Pepsi-Cola, [2002] 1 SCR 156 – Charter values + lawful conduct

How to interpret law in compliance with Charter values

R: Picketing can't be defined since the types are so diverse, but it **always involves expression**

R: The Supreme Court held that what matters is not the distinction between primary picketing and secondary picketing, but rather **whether the conduct engaged in is lawful or unlawful**. In other words, it's not about the location where the picketing takes place, but rather it is about the **nature of the picketing activities and whether they are lawful**.

Main principles:

1. **Total protection from econ harm is <u>not</u> the goal**
2. **Innocent 3rd parties should be shielded from undue harm. What undue harm means in context is conduct that is tortious or criminal, in other words unlawful.**
    a. **Wrongful Acts in Tort:**
        i. trespass
        ii. intimidation
        iii. nuisance
        iv. inducing breach of contract/economic torts
        v. defamation
        vi. Misrepresentation
        vii. Conspiracy
    b. **Criminal Acts**
        i. Mischief
        ii. Intimidation, watching and besetting
        iii. Assault
        iv. Theft
3. **Protection from economic harm is an important value capable of justifying limitations on freedom of expression. Yet to accord this value absolute or preeminent importance over all other values is to err.**

F:

- During a lawful strike and lockout, the union engaged in a variety of picketing activities, and these activities eventually spread to secondary locations, such as
    - retail outlets where Pepsi was delivered
    - outside of the hotel where replacement workers were staying
    - outside of the homes of Pepsi's management personnel
- Pepsi sought and obtained an injunction prohibiting the union from engaging in picketing activities at secondary locations.

H:

- Peaceful picketing outside hotel and convenience stores was not illegal
    - Hotel is fine (in contrast to home) b/c you can't really tell *who* someone is picketing since a bunch of ppl live there, noise won't be such a big deal in front of hotels which are usually in busy places.
- Aimed at discouraging people to buy Pepsi
    - This is not intimidation because no unlawful act
    - No interference with contractual relations because no evidence of a contract
- Picketing at homes was illegal (it can cause intimidation, private nuisance ⇒ torts)

A:

Court avoids clearly defining picketing:

- Says picketing represents "a continuum of expressive activity" (traditional picketing to boycotts to demonstrations etc)
- Picketing includes a broad range of activities
- BUT it **always involves expression**

Balance picketing & econ harm:

- Balance expressive activity of picketing & protection of third parties from economic harm
- Court says all work stoppages inflict some economic harm that can extend beyond employers to harm to customers, suppliers, the public, etc.
    - HERE, the protection we are concerned about is **undue harm**

Def'n of undue harm: Court considers three possibilities wrt secondary picketing:

~~1. Absolute bar on secondary picketing~~
    a. Court rejects. It's not this one b/c it discounts freedom of expression

~~2. Bar on secondary picketing exception for ally employers~~
    a. Court rejects.

3. **Permitting all secondary picketing except picketing that amounts to tortious or illegal conduct (i.e., undue harm)**

- Charter's protection of freedom of expression means that picketing should be legal, subject to limitations to protect third parties
- Both the illegal per se and ally doctrine possibilities are opposite to this
- Wrongful action model more flexible and rational and focuses on what is important
- Wrongful action model eliminates primary/secondary distinction

Court says the relevant Q is whether picketing is lawful, not where the picketing takes place.
- Nothing in this case affects the validity of any legislation (in SK) b/c it deals with the common law where no legislation has been enacted. However, Court confirms that legislatures must act within the broad parameters of the Charter & CL needs to fit within the *Charter*.

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] 3 SCR 733

R: Must balance the interests in *PIPA* against the *Charter* rights/values in relation to freedom of expression & picketing
- "The personal information was collected by the Union at an open political demonstration where it was readily and publicly observable. Those crossing the picketline would reasonably expect that their image could be caught and disseminated by others such as journalists, for example. Moreover, the personal information collected, used and disclosed by the Union was limited to images of individuals crossing a picketline and did not include intimate biographical details. No intimate details of the lifestyle or personal choices of the individuals were revealed."
- "The price PIPA exacts, however, is disproportionate to the benefits it promotes. PIPA limits the collection, use and disclosure of personal information other than with consent without regard for the nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information. … PIPA does not provide any way to accommodate the expressive purposes of unions engaged in lawful strikes."

R: Draws on K-Mart saying that "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations"

R: Picketing is not a problem unless tortious or criminal (restates Pepsi-Cola)

F:
- During Palace Casino strike @ WEM, union took photos and videos of picketing and those crossing picket line
- Signs at picket line said images would be placed on www.CasinoScabs.ca and would also be used and disclosed on posters
- *PIPA* applies to both TUs & ERs. Generally, you aren't supposed to collect, control, & disclose personal info w/o a person's consent (subject to exceptions like for legal proceedings).
  - Ppl who had their photos taken complained to the Privacy commissioner.

Proc Hist: Privacy Commissioner ruled that taking & posting photos/recordings of people crossing the picket line wasn't allowed under *PIPA*. COA overruled. SCC agreed.

H: Held that Alberta's Personal Information and Protection Act (PIPA)'s limitations on a union's ability to collect, use, or disclose personal information during a strike violated the freedom of expression protection under the Charter of Rights and Freedoms.
Declared PIPA unconstitutional and gave the government a year to comply with the Charter.

A:
[30] Expressive activity in the labour context is directly related to the Charter protected right of workers to associate to further common workplace goals under s. 2(d) of the Charter: Ontario (Attorney General) v. Fraser, 2011 SCC 20 (CanLII), [2011] 2 S.C.R. 3, at para. 38. As the International Labour Organization observed, "[t]he exercise of freedom of association and collective bargaining is dependent on the maintenance of fundamental civil liberties, in

particular, . . . freedom of opinion and expression":

PIPA Revised, *PIPA* s 14.1 (in response to AB v UFCW)

14.1(1) Subject to the regulations, a trade union may collect personal information about an individual without the consent of the individual for the purpose of informing or persuading the public about a matter of significant public interest or importance relating to a labour relations dispute involving the trade union if

a) the collection of the personal information is reasonably necessary for that purpose, and
b) it is reasonable to collect the personal information without consent for that purpose, taking into consideration all relevant circumstances, including the nature and sensitivity of the information.

(2) Nothing in this section is to be construed so as to restrict or otherwise affect a trade union's ability to collect personal information under section 14.

COMMON EMPLOYER DECLARATIONS (s 47)

Common employer declaration: 1+ businesses are carrying on under **common control & direction** & are therefore **"one" ER for purposes of the Code**. Following a "spin off", TU hcan apply for CED to get bargaining relationship w/ all ERs jointly for a single unit of EEs. Purpose = ensure established bargaining rights are not terminated b/c of corporate reorganization/split. Often brought along w/ sucessorship Apps.

Note: there is a bit of a timing requirement, but it's a vague requirement/not a bright line. The Board uses their discretion to determine if the TU brought a CED App soon enough (like in ***Stanley*** where the Board said it wasn't brought soon enough to get a CED).

Test for CED

Step 1: Satisfy four statutory conditions

Four statutory conditions required for a CED:

1. Applicant = affected ER or TU;
2. activities of entities are associated or related;
    a. Board looks for factors such as: type of product companies produce; target market of companies; mode of obtaining new business; purpose of establishing business (is it duplicative?); type of work; capital assets; personnel/labour force (do the ppl doing the work have the same skills & abilities as the other ppl doing the work?); common ownership (i.e., subsidiary corporate structure); common management (e.g., Board of Directors duplicated, executive duplicated); do companies share assets?; similar services or products
3. common control or direction of the EEs; and **bulk of the analysis here*
4. > one entity.

Step 2: Discretionary or mandatory?

47(1) Board has **discretion** to order depending on whether there is a **valid labour relations purpose** for granting a CED

47(2) BUT CED is **mandatory when** there is **anti-union animus**

Common Situations Leading to CED

1. "**double breasting**": ER creates a spin off company that performs the same or similar work but the new entity is non-unionized.
2. **contracting out/in situations**: unionized ER contracts in our out a portion of its operations to a non-union subcontractor and the TU seeks to bind the sub-contractor to its bargaining relationship by asking the Board to declare the subcontractor and the unionized employer to be "common employers" – uncommon (union should not be able to indirectly obtain what it could not through certification)

Premetalco – contracting out

R: In contracting out situations, look carefully at the nature of the work (what type of product is being made? Is it large? Rare?)
F: ● Premetalco owned factory to produce heat exchangers, which operated as Exchanger Industries ○ Exchanger made large, custom heat exchangers ○ TU certified as BA for "all employees of Exchanger Industries Division at the Calgary Shop except office and construction" ● Premetalco purchased Thermotech Ltd. Thermotech transfers property to Premetalco. ○ Thermotech Ltd. continued to exist but only as a shell for litigation purposes ○ Thermotech operates as division of Premetalco. ● When purchased, employees at Thermotech not unionized ○ Thermotech produced smaller, stock heat exchangers ● Business was good at Exchanger & Premetalco made capital improvements to expand production ○ Exchanger also hired more employees ○ No employees from Thermotech transferred to Exchanger ○ Premetalco started doing some Exchanger work at Thermotech ● TU brought common employer application ○ Premetalco argued that activities were not being carried on through two or more corporations, just two divisions ○ Premetalco also argued that Board should refuse to exercise discretion to grant common employer declaration
H: Board refuses to exercise discretion b/c it does not have a valid labour relations purpose: - Application does not seek primarily to defend bargaining rights - TU did not have majority support amongst Thermotech employees (Not necessarily required) - TU attempting to expand bargaining rights beyond single plant certificate
A: Board repeated 4 statutory elements for common employer applications & states where the Board has discretion, it looks at whether there is labour relations purpose to merging entities, considering whether common control

undermines or is likely to undermine bargaining rights.

1. Applicant = affected ER or TU;
2. Activities of entities are associated or related;
    a. type of products they are making & for what purpose (Pre=huge heat exchangers; Therm=small heat exchangers. Here, they are making different products for different purposes, so this is true double breasting & allowed b/c both are doing different things).
    b. Look at whether they're sharing assets → they are kind of here, but really it's all separate
    c. Look at whether there's a diversion of work → no diversion of work
3. common control or direction of the EEs; and
    a. In Diamond International Trucks, Board found that two intracorporate divisions could be common employers
    b. Board does not decide this issue, but states that, for future cases, the Board questions whether two divisions of same company could be common employers
    c.
4. > one entity
    a. Really two separate entities given how separate the activities are.

The two divisions should **not** be common ERs because:

- Not consistent with purpose of common employer applications (i.e. no need to pierce corporate veil)
- Not necessary because TU could bring unfair labour practice complaint or application for reconsideration
- Creates a paradox; two divisions either common or separate, but not both
- Stretches meaning of word "persons"

NOTE - the law now is really that two divisions **can** be common ERs.

IAMAW Local 99 v Finning – CED & successor ER

Went through all of the steps

R: When analyzing **common control & direction, primary focus is day-to-day management of the EEs.** High level, strategic control is still a factor (just not #1)

R: common ownership does not necessarily indicate common control or direction; not every wholly owned subsidiary is under common control & direction.

R: Board does **not** consider contingencies/speculation when making CEDs.

F&A: Complicated corporate structure w/ Finning Int'l & Finning CA. Had a "CRC" factory in Edmonton & decided to close it & hire OEM under a 10 year Customer Service Agreement w/ Finning CA to do the CRC Work. TU of Finning EEs applied for CED & Successorship

- OEM had great deal of operational independence; Customers Services Agreement did not provide unusual level of control
- Dispute over whether Joint Venture Agreement provided Finning greater control
- Joint Venture Agreement gave power to manage Joint Venture business to boards of Matrix and OEM
    - Boards of Matrix and OEM each had two directors, McLaughlan and Lynn Patrick & all of their decisions had to be unanimous.
    - Day-to-day authority of OEM was delegated to Reman Ventures Inc, subject to overall control of the Boards of Matrix & OEM.
    - Joint Venture Agreement provided both Finning and McLaughlan (Matrix owner, which holds OEM) with significant power
        - Representative of Finning, Lynn Patrick, had a blocking vote, and so too did McLaughlan
        - Finning, through Rebuilding Enterprises, could terminate the Joint Venture Agreement, but so could McLaughlan through Reman Venture
    - Finning could also replace McLaughlan as Director of OEM and Matrix
    - BUT Joint Venture Agreement provided Finning <u>less control than typically exists in parent-subsidiary relationship</u>

- Though Finning may have ability to step and exercise day-to-day control, **this had not happened**

I: Does Finning control OEM such that they are controlling the EEs of OEM?

H: No – although they could step in & exercise control, the evidence indicated they have not done so. Board doesn't order CED. Further, the other factors aren't satisfied (no sharing of management, few Finning EEs were hired by OEM/no transfer of EEs.

After Board Hearing: sent to Court. OEM found to be a successor of Finning, but CED failed.

Central Web Offset

R: Principles of reconsideration

- Power to reconsider is plenary independent power
- Gives ability to adapt to **changing conditions** (e.g., Ed no longer in operation = change in condition)
- Board can use power of reconsideration to respond to developments not addressed by other areas of the Code
  - BUT this power cannot be used to avoid or shortcut express requirements of the Code. **BA must still enjoy majority support**
  - Can be invoked outside of window periods.

Successor employer provisions apply when there is a transfer (i.e. an **acquisition coupled by a relinquishment**) of a business ⇒ acquisition (transfer of assets from Ed to Central) + relinquishment (Ed no longer operating)

F:

- Through a series of corporate transactions Ed Webb Printing (unionized) became owned by Central Web Offset (non-unionized). Companies were in similar business, but Central Web was much bigger (160 EEs vs 21 EEs in Ed Webb). As a result of a variety of setbacks Ed Webb was not as profitable as Central Web Offset hoped, so Central Web decided to sell off a key asset of Ed Webb's business, including its printing press.
- Printing Press sold to third party & after printing press sold, Central Web closed Ed Webb business.
- As a result of closure, the following occurred:
  - Paper supplies at Ed Webb were transferred to Central Web
  - Ink held on consignment returned to the ink shop.
  - Lease for Ed Webb's building was surrendered to landlord
  - Ed Webb name/logo was discontinued and not used
  - Ed Webb's work was transferred to Central Web without interruption
  - Receivables taken over by Central Web
  - Sale of proceeds from printing press went to Central Web
- Very few EEs transferred as a result of closure, but Central Web hired 17 new employees
- TU brought several complaints, alleging that
  - Central was a successor employer;
  - Central was a common employer; and/or
  - Ed Webb's certificate should be reconsidered
  - Also brought several unfair labour practice complaints

H: Central Web is successor employer, bound by existing certificates, and collective agreements. Board reserved wrt other remedies (didn't consider if there's a dues that should've been appropriated to the TU). May have to have a vote about whether employees in unit would continue to be represented by union.

A: Who are the 2 Entities? → Central Web (unionized) & Ed Webb Printing (non-unionized)
Background/rules/law/principles:

- Successor and common employer provisions aimed at preserving bargaining rights and preventing erosion due to changes in legal identity of employer
- Successor employer provisions apply when there is a transfer (i.e. an **acquisition coupled by a**

relinquishment) of a business ⇒ acquisition (transfer of assets from Ed to Central) + relinquishment (Ed no longer operating)

- Common employer provisions apply when associated or related activities carried on through common control and direction
- **Successor and common employer provisions overlap often when there is a <u>transfer of corporate assets</u>**
- Reconsideration also overlaps when there is intracorporate transfer of assets
    - Successor and common employer originally contemplated to overcome changes in legal personality
    - However, both successor and common employer declarations have been granted in intracorporate transfer situations
- Same set of facts can lead to a successful: successor application; CED App; or Reconsideration App.

Analysis of the Facts:

- Ed Web and Central Web are **<u>not</u> common employers**
    - Decision to transfer Ed Web's operations was not motivated by anti-union animus, but legitimate business reasons
    - No labour relations purpose to extending Ed Web's bargaining rights to Central Web if Ed Web went out of business
        - Not like cases where the employer is dormant and can be resurrected
- **Central Web <u>is</u> a successor employer**
    - Successor ERs can be found in cases of intracorporate, non-arms length transfers, which justify highest level of scrutiny
    - Successor possible when: Transfer of assets + relinquishment (i.e. winding up to the point where that company no longer exists)
        - Central Web began appropriating Ed Web's "soft assets" almost immediately after sale and gradually appropriated them all, culminating in acquisition of the Trader publications contract
        - Although not many hard assets transferred, the "lifeblood" of Ed Web's operations did transfer
        - On its face, this does not appear to be a "sale" or transfer of the business
        - Ed Web's hard assets were mostly disposed of (& **not** transferred to Central Web)
        - Case is complicated by the fact that transfers occurred over a long period of time
            - Transfer of sales employee in 2004 was particularly important because sales representatives are main point of contact with customers
        - Other transfers:
            - Managerial talent also transferred
            - Line Manager moved to Central Web
            - Executive management ceased applying efforts to Ed Web's business
            - Transfer of proceeds from sale of Ed Web's printing press not as important.
            - Central Web already had a printing press
            - Transfer of sale proceeds more important where the funds were used to buy new equipment
            - The fact that the printing press was sold to third party is less important in context of non-arms length transaction
        - Trader's contracts most important factor
            - These were valued at $8 million in transfer shortly before Central Web acquired Ed Web
            - Although the documentation is not clear, it is apparent from the business realities that Central Web acquired Trader's contracts from Ed Web

SUCCESSOR ERs & TUs

Successorship is a remedy in operation of law → dues should have continued through the transfer SO ER will be responsible for the lost dues since the **date of transfer**.

CED is a remedy in declaration → dues weren't "missed out on" since the TU stopped receiving dues, instead dues are **only missed out on since the date of application by the TU**.

Review: Modification of Bargaining Rights

Code, Division 7 ⇒ processes for changing existing bargaining rights due to changes in ER or TU

Three applications for dealing w/ **changes in ER operations**:

1. Reconsideration of the certificate
2. Successor ER
3. Spin-off (Common ER)

Review: CED Principles

1. **CED** means that one or more businesses are carrying on under common control and direction and are therefore "one" employer for purposes of *Code*
2. **Purpose**: ensure established bargaining rights not eliminated because of corporate reorganization or split
3. TU has bargaining relationship with all employers jointly for a single unit of employees

4 statutory prerequisites for CED:

1. Is there an ER involved?
2. Are the activities the ERs are doing associated or related?
3. Common control & direction? **key focus here in case law → focus is on **day to day operations** instead of high level control (e.g., focus on the daily, not the board of directors)*
4. > 1 business

Decision based on 4 statutory reqs:

1. Anti-union animus ⇒ board MUST grant
2. No anti-union animus ⇒ Board has discretion to grant CED Declaration based on whether it makes labour relations sense

Successor Union, s 49

S 49(1) [LEGAL CHANGES TO TUs] When TUs merge, amalgamate, or transfer, successor union acquires rights, privileges and duties of predecessor under the Code, Board may declare that the successor TU has acquired the rights, privileges and duties under this Act of its predecessor.

- Must apply to the Board for declaration

Successor ERs

- Companies may be transferred or merged
- At CL, contracts only bind the parties who signed them (i.e., privity of contract)
    - Cannot assign employment contracts
    - The implications of this in the labour relations realm is that **organizational changes** (i.e. mergers, acquisitions, etc.) **could compromise an existing bargaining relationship or CA**
    - SO, successorship is an option to avoid the compromising of the existing bargaining relationship/CA.

Successorship (ERs), s 46

s 46 modifies common law prohibition on assignment of employment contracts by **providing statutory protection of TU's right to bargain** (certification rights), **maintaining existing CA** (representation rights), and **continuing any proceedings** under the Code (employers can't "merge" their way out of ULPs)

Three elements of successorship under **s 46**:

1. Sale, lease, transfer or other **disposition**
2. of a **business** or part of a business
3. so the **control** of that business **passes to the purchaser**

Notes re s 46:

- "Business" is not defined
- It is a combination of physical assets and human initiative
- Often referred to as a "going concern" or "functional economic vehicle'

IAMAW Local 99 v Finning

Labour Board → reconsideration of LB → QB → COA (b/c COA weighed in, it's the leading successorship case)

R: Principles of successorship provisions

- Purpose of successorship provisions is to address the mischief in successorship, i.e., the disruption of bargaining rights from change in ownership
- Bargaining rights attach to the business not the employer, employees, or work
  - Business = broad; combination of physical assets & human initiative that's a dynamic activity, going concern, or a functioning economic vehicle through which work is done/functions are performed.
  - "Contracting out" does not result in a successorship
- To determine whether succesorship has taken place, Board **must determine "fundamental components" of business** and see **whether those exist in new employer's operations**
  - Note: Fundamental components will vary by industry
  - Board will consider factors listed in IB #21
- Whether "part of business" transferred depends on **whether transferred operation is a business capable of being functional economic vehicle**
  - Must be **relinquishment by transferor** AND **acquisition by transferee** (note: acquisition must be from the transferor to transferee)

Hartland Pipeline Services – successorship found – What is a "business" or "functional economic vehicle"?

- *Hartland Pipeline Services Ltd (Re)*, [2001] Alta LRBR 296, the Board confirmed transfers of work in progress and accounts receivable are not necessary elements in a transfer of a business and a business does not need to be profitable to be disposed of and acquired (paras 116-118).
- Board determines: Parkland 2000 is a successor employer of Parkland 1988 & that the predecessor's business (1988 & 1983) is transferred through to Parkland 2000.
  - Even though IPEC buys Parkland, they still use the Parkland name (1983, 1988, and 2000) & so are carrying on that same good will.
- Even if a business is not profitable & being disposed of, it can **still be a succesorship**.

- **"It is sufficient that the transaction has put into the hands of the transferee an economic organization with the ability to obtain new work and carry it out" (para 118).**

Successorship Factors, IB #21

Factors for determining whether sale, transfer or disposition occurred:

- Fixed assets (buildings, machinery, fixtures)
- Goodwill (e.g., in *Stanley*, the companies used the "Stanley" name in HUGE font and the other company in tiny font & both companies stood at the same booth at a trade show).
- Logo/trademark
- Customer lists (e.g., in *Stanley*, there were 3 major customers listed on both companies' lists)
- Accounts receivable (e.g., if money from the sale of printing press in *Central Web* was transferred from Ed Webb to Central Web, this would've pointed toward successorship)
- Existing contracts
- Inventory (e.g., was product transferred from one business to another?)
- Non-compete agreements
- An agreement to maintain a good name
- Business know-how and reputation embodied in key personnel (e.g., in *Stanley*, they transferred one of their key technicians & in that industry there are very few of these specialized technicians)
- Work (e.g., in *Stanley*, STS started bidding on work that Stanley had previously done although STS had no experience in it before that point; e.g., in *Stanley*, within 1 year STS had landed some big ultrasonic jobs even though they claimed that they hadn't moved into that market)
- Location (this was the only thing that didn't change in *Stanley* lol – BUT Board said that wrt this industry, location isn't important. Instead, *where the work* is performed is key → so, in *Stanley*, since work is performed on the field, the location of the office wasn't relevant).

Other considerations:

- The Code's successorship provisions do not specify a transferor. They only require that "**a business …is sold…or otherwise disposed of so that the control, management or supervision of it passes to the purchaser …or person acquiring it**" (s. 46, ***Hartland Pipeline Services Ltd (Re)***, [2001] Alta LRBR 296).
- In ***Finning International Inc***, 2007 ABCA 319, the Court of Appeal made it abundantly clear that the **elements of the business do not need "to originate 'from the business'" for a successorship to occur** (e.g., in *Finning*, it was only a portion of the business that was contracted out to OEM through a joint venture relationship with Reman)

When a Successorship Order is Issued

If a successorship order issued, the **successor employer assumes the bargaining rights and obligations of its predecessor** ⇒ trade union continues as bargaining agent, and existing certificates, collective agreements and proceedings under the *Code* continue

Board begins with presumption that <u>BU continues to remain appropriate</u> *until* Board is convinced it's not.

QCCC v Stanley Technical Services and Stanley Inspection [2022] Alta LRBR LD-071

(for your information – optional)

- Stanley Inspection (SI) (union) was effectively closed and remained dormant with equipment and personnel being transferred to newly created Stanley Technical Services (STS).
- Both companies are subsidiaries of Stanley Inspection US.
- Nature of the work:
- Both companies performed NDT work in oil and gas industry
- SI performing work ultrasonic work on large scale pipelines
- STS started by performing radiography work on small scale pipelines, but shortly moved into the ultrasonic market and began working on large scale pipelines.

Successorship was found:

- "SI's business was effectively transferred to STS, giving it a functioning economic vehicle to pursue NDT work.
- SI was then allowed to falter despite its bare existence being maintained."
- Court mentioned how you need a special license to do this work and STS was using SI's license.

Mergers vs One-Time Reorganization

- A **one-time reorganization** typically involves the **permanent transfer of a workgroup from one BU to another**. These types of transfers normally involve the movement of a single program or service to another site.
- **Mergers** involve the successor employer **realigning** its **structure and services for management and operational integration** of the corporate functions creating **intermingling** between previously separate **BUs**. The Board will assess each case to determine the degree of integration and intermingling.

Mergers

80/20 Rule and "run off" votes:

- Sometimes mergers involve merging of unionized and non-unionized employees, or merging of multiple bargaining units represented by multiple unions
    - **IF** one union represents an **overwhelming majority (i.e., OVER 80%)** of employees, the **majority union will become the bargaining agent** for the consolidated unit without a vote (applies whether minority of employees unionized or not) = 80/20 rule
    - **IF** less than 20% are represented, there will be NO TU ⇒ Unionized employees joining a non-union majority will cease to be governed by collective agreement: successorship preserves existing bargaining rights; it does not expand them
    - IF between 21%-79% are represented by the TU, there will be a **run-off vote** ⇒ representation vote needed
- Competing unions wanting to avoid vote may apply to Board to hold a joint certificate (they will need clear agreement between them for administering the single bargaining unit)

Remedy

- The Board has observed **successorship occurs by operation of law** *vs* a declaration which is only confirmatory (*Central Web Offset Ltd*, [2008] Alta LRBR 289, para 164; *Hartland*, para 102).
- **IF** the Board declares an employer to be a successor employer it is **bound by an existing bargaining certificate, collective agreement, and proceedings**.
- **Declaration is effective as of the date of the disposition or merger** (which can occur over time) ⇒ This may precede the date of the application

Goal of Preserving Bargaining Rights – *Central Web Offset*

- Successor and common employer provisions aimed at **preserving bargaining rights and preventing erosion** due to changes in legal identity of employer
- Successor employer provisions apply when there is a transfer (i.e. an acquisition coupled by a relinquishment) of a business
- Common employer provisions apply when associated or related activities carried on through common control and direction
- **Successor and common employer provisions often overlap when there is a transfer of corporate assets**
- Reconsideration also overlaps when there is **intracorporate transfer of assets**
    - Successor and common employer originally contemplated to overcome changes in legal personality
        - However, both successor and common employer declarations have been granted in intracorporate transfer situations

DUTY OF FAIR REP (DFR)

DFR Complaint EE files against TU under s 153(1). Arises as a perceived failure of TU to appropriately representation EE (usually related to settlement that EE doesn't like or if TU won't open a grievance). All grievances are filed by the TU & they decide which grievances go ahead & which don't. Majority of DFR complaints are dismissed (usually b/c EEs don't understand how the process works & think they are seeking an appeal)

> **LIMIT**: S 153 DFRs do **NOT** include disputes with WCB or insurers (absent specific provisions under the CA) or professional regulatory bodies.

***Code* 153(1)** [DFR] obligation of the TU to represent its members wrt their rights and privileges under the CA (i.e., only applies if a CA is in place, not during bargaining process – but Board interprets bargaining process narrowly to avoid abrogating EE rights). The exclusivity granted to the TU means that it has the discretion and responsibility to enforce employees' rights (individuals usually don't have the same ability to pursue their own remedies) ⇒ w/ responsibility comes accountability.

Prof uses IB #18 as a checklist when she receives a DFR.

In determining DFR Complaints, Board considers **whether the process was fair**.

Fairness = key principle

Fairness is…	Fairness is NOT…
1. Exercising discretion in **good faith** 2. Being **objective** 3. Being **thorough**, by examining the matter and considering the significance of the grievance for the individual and TU 4. Being **competent**, or at least not seriously negligent	1. Being arbitrary 2. Discriminating 3. Being capricious 4. Being wrongful 5. Being motivated by ill will 6. Acting in bad faith **use these as a guide for if a TU could be liable*

Union Duties

TU DUTIES DURING GRIEVANCES *(* = most important)*

1) Ensure those involved have **appropriate training** to deal with matter*
2) **Fully Investigate** the matter (corresponding duties follow): *(this is usual where TUs breach*)*
    1. Listen & understand grievor's issue – ***communication** is key throughout process*
    2. Get documents (e.g., schedules, videos, pay stubs, etc.)
    3. ID relevant CA clauses and legislation
    4. ID relevant issues (e.g., termination case → discipline record? Penalties for wrongs?)
    5. ID names and contact info of witnesses
    6. Interview witnesses and ID factual differences
    7. Get ER's version of events
    8. Get ER's documents
    9. Go back to grievor again with issues
    10. Give grievor a chance to respond to ER and witness versions of events.
3) Keep good **records**: Detailed, Legible, Dated, Note taker identified, know who collects records & where they are kept, secure (governed by *PIPPA*). This will help TU defend itself.
4) Comply with any **time limits**
5) Seek **assistance** where **necessary** (e.g., staff reps w/ significant knowledge, lawyers)
6) Consider the **facts** *and* the **law**
7) Ensure that Grievor has a chance to address those making the decision
8) Duty applies to conduct of the Arbitration
9) Duty applies to decision on whether to seek Board Review of an Arbitration Decision.

ACCEPTABLE RESPONSES TO GRIEVANCES: TUs have multiple balancing acts to perform, and can legitimately include the following in decisions to pursue matters:

1. promises made to the Employer not to advance certain interpretations of the Collective Agreement
2. adverse effects of a victory on others
3. Costs

ARBITRARINESS OR CAPRICIOUSNESS PROHIBITED i.e., **prohibited from** giving only superficial attention to the matter and not investigating OR deciding without concern for the employee's needs and interests

Member Responsibilities in Conducting Grievances

Members' responsibilities in conducting grievances:

- Report issues to the Union
- File grievances
- Cooperate with the Union (NOTE – rudeness is not a failure to corporate)
- Minimize their losses
- Complainants have an obligation to raise concerns if they are feeling pressured by ER (TU can't read minds).
- No breach of duty where TU did not pursue grievance when Grievor refused to undergo an IME (medical exam).

DFR Time Limits

90 day period to file a DFR (discretionary – since most DFRs don't have counsel, Board is willing to modify slightly. E.g., someone has mental illness & is a few weeks late vs someone who filed 10 months late & has no reason). **Late filing must include reasons**.

Complaint Process

1. **FILE** using Mandatory Form
2. **REVIEW** by board to determine whether a complaint is accepted/rejected.
3. **TU** provides **RESPONSE** to the Complaint
4. **Complainant RESPONSE** to TU's Response
5. **DOCUMENTARY REVIEW** by Administrative panel of the Board. At this stage, complaint is **usually dismissed** (expect copy). Occasionally, it will be forwarded on for hearing.
    a. Merit? → likely forwarded.
    b. Factual issues that Board can't determine by documentary evidence? → likely forwarded

16(7.2), 16(7.3) ⇒ TU must produce all arguably relevant docs
(7.2) The Board may decline to dismiss an application on a preliminary motion alleging a lack of a sufficient prima facie case, or insufficient particulars or evidence, if in the opinion of the Board, it would be inappropriate to dismiss the application prior to the pre-hearing disclosure of relevant documents or other pre-hearing procedures.

(7.3) In exercising its discretion under subsection (7.2), the Board shall consider whether information relevant to the application is peculiarly within the knowledge of the respondent or other persons and not generally available.

Responding to a Complaint

RESPONSE TO COMPLAINT MUST be **comprehensive**, including:

- **How** and **when** TU knew of the concern/issue
- Steps taken to **investigate** & evaluate
- Any **attempts at resolution** of the issue
- **Reasons** for conclusion reached or action taken or not taken
- **Communication** w/ **complainant**

COST CONSEQUENCES possible for failure to provide detailed response: costs against TU

PRODUCTION REQUIREMENT (***Kanee***): Provide **all relevant and material** documents. (In ***Kanee***, TU objected to providing TU rep's notes, emails between reps, witness statements provided by the ER (arguing these would prevent people from emailing/notetaking/providing witness statement). Board still ordered production).

EXCEPTION: TUs can assert **privilege** to avoid production (but if they don't produce, can't rely on it if they need it + providing privileged documents from lawyers can prove the TU *was* procedurally fair)

ER ROLE: w/ the new production requirement, ERs have been **removed from the matter at the outset**. BUT ***IF*** matter is sent on to hearing, the ER will be given notice b/c if the Board finds against the TU, its remedy may affect the ER as much as the TU.

DFR Remedies, *Code* s 153(2)

153 (2) **NO** TU DFR **LIABILITY** FOR FINANCIAL LOSS TO EE WHEN:

(a) TU acted in **good faith** in representing the employee, or
(b) loss was the **result of EE's own conduct**.

REMEDIES FOR SUCCESSFUL COMPLAINTS: Successful complaints do NOT result in upholding a grievance b/c Board cannot rule on the merits of the grievance itself. Possible Remedies include:

- Extend time limits of the grievance procedure. Time limits can be extended only where:
    - Loss of employment or substantial amounts of work for employee
    - Reasonable grounds for the extension
    - The Employer will not experience substantial prejudice. (s.153(3))
- Direct matter be properly assessed
- Direct matter proceed directly to Arbitration (usually in Arbitration, arbitrator will address if TU or ER is liable to pay damages).
- Send direct to hearing w/ counsel of the grievor's choice paid for by TU
- Declare the Union violated its duty
- Damages for lost compensation (not punitive, general or emotional)
- Direct the TU to fully investigate

Settlement Offer from TU to EEs, *Code* 153(3.1)

New section!!
153(3.1) DFR complaints can be summarily rejected by the Board where the complainant refused to accept a fair & reasonable settlement. (see ***Howell***)

SETTLEMENT OFFER: TU can make **1 offer** up until **2 weeks after Dispute Resolution.** Offer may involve ER (if that's necessary for the offer to function), can have monetary damages, and **must include all aspects** of the offer (e.g., release). Offer is **without prejudice** (except for the Board determining whether or not the offer itself was reasonable).

TIMELINE: Dispute Resolution → 2 weeks for TU to make settlement offer → (possible) Hearing

Difficult Issues

Duty to Accommodate: Applies to Union's process
Complainant and The Alberta Union of Provincial Employees, [2015] Alta. LRBR 42 (Asbell)
"… inflexible adoption of the union's regular procedures in the face of apparent mental health issues, without considering steps that could reasonably accommodate those issues, is potentially both arbitrary and discriminatory. These circumstances may require a union to be willing to go above and beyond what might occur in a regular case in terms of its efforts, its explanations, and its patience."

Competing Interests between grievors (eg. different claims for accommodation or promotions)

Internal DFR Appeal

Internal DFR "appeal" processes must
(1) assess fairly merits of grievance;
(2) investigate grievance and sufficiency of previous investigation;
(3) assess rights under Alberta Human Rights Act or other employment law. (s.153(6))

Approved union procedures **must** be used by members before they can file a DFR complaint with the Board.

Board Guidelines for Internal Union Appeal:
- Process: send copy of the Procedures and Rules to Board with verification it has been adopted.
- Include relevant forms and templates
- A description of how Members will be made aware of the process.
- Importance of Procedural Fairness
- Member should know case against them and be given opportunity to address.
- Provide written decision to the member

Post Internal DFR Appeal
- Get initial internal DFR within the 90 day time limit.
- Wait for internal appeal decision.
- THEN you can go back to the Board.
    - s153(4)(b): 45 day time limit (hard limit to appeal the DFR internal appeal)

REVOCATION (DECERTIFICATION/DECERT)

Division 8

Application for revocation can be brought by EE in BU, TU, or ER (almost always EEs in BU)

52(5) ER or former ER can apply for revocation IF:
1. ER & bargaining agent have **not bargained collectively for** a period of **3 years**
2. No CA **after** the date of **certification**, or
3. **3 years from** date CA entered into **terminates**.

To do so, they have to prove that the TU has abandoned its rights

52(2) TU can bring Revocation App **any time when no CA is in effect**.

52 EEs in BA can bring Revocation App:
- W/ 40% support of EEs in BU
- During the open periods:
    - Not during lawful strike or lock out w/o Board's permission
    - 10 months from date of certification if no C/A, anytime if VR and no CA
    - 10 months after Court disposition of question regarding review of certification
    - 2 months preceding expiry of CA with term of 2 years or less
    - 2 years or more: 11th or 12th month in any subsequent year (provided at least 10 months prior to the end of the CA) or 2 months preceding expiry

EE Application must **NOT** be (Board will investigate to ensure the conditions are satisfied – checking where petition signatures were signed, where kept, etc. → if kept in management office, less likely to be voluntary):
1. Management's idea;

2. Discussed with anyone from management;
3. Encouraged by threats, rewards, or benefits from management; NOR
4. Funded by management.

S 53 Requirements

- Timely
- 40% employee support to get a vote – indicated in writing
    - Petition must be clear → i.e., include the ER, TU, Local # "We the undersigned employees of FedEx have signed the petition for revocation of the bargaining rights of CUPE Local 1234"
    - NO TIME LIMIT on evidence for petition
- Majority of EEs who vote determines whether decert is successful
- Voting rules 16 and 17 apply – who is in the unit
    - BUT no time limit on petition evidence (unlike in Cert) → b/c of this, there are a lot of counter petitions in decert situations.
- 53(2)

S 54 effect of successful revocation application:

- Employer not required to bargain collectively with trade union
- CBA in effect becomes void
- Trade union cannot negotiate (VR) or apply for certification until 6 months from date of revocation
- S. 57 – employees whose application is unsuccessful must wait 90 days to bring new revocation application – unless consent

Cases

UFCW & Lansdowne Foods, [1992] Alta LRBR 413 (Sims)

R: Petition must be a **genuine and voluntary expression of the wishes of the employees**, free from employer interference. **5 requirements for petition**:

1. **Authentic**
2. **Understandable** (heading must clearly state what it's for & with NO editorial comments)
3. **Fairly presented** to employees (make clear petition is to revoke bargaining rights and not about "just seeing our options"/"making TU see our side")
4. **Freely signed** (no intimidation, threats, coercion, etc.; no ER meeting w/ EEs saying "sign this or else")
5. **Free from actual or perceived employer interference** (e.g., letting EEs sign on company time, raid situation, anything perceived as being a ULP → e.g., from the case: EE goes to ER and says they want to get rid of the TU but wants to get rid of the lawyer, ER says "I can't help but here's a list of lawyers" → this was a perception of interference; family member of ER has the petition)

F:

- The Union filed complaints of ULPs against the Employer
- Complaints alleged that ER failed to bargain in good faith by not meeting and not providing information
    - Safeway divested & there were a bunch of ULPs that emerged out of that
- Revocation vote happened, then it was sealed (b/c of the issues), and then evaluated.
- Board upheld complaints and issued some remedies, but reserved jurisdiction on other potential remedies regarding revocation application

I:
1. What evidence will invalidate petition evidence as a free and voluntary expression of employee wishes?
2. What evidence will be considered as "any other relevant matter"?
3. How will Board apply remedies for ULPs in the context of revocation applications?

H:
Board set first revocation vote aside & ordered that a representation vote proceed approximately 5 weeks later UNLESS (1) CA reached; (2) strike vote held; (3) lockout poll held

ERs conduct would've frustrated the TU's ability to avoid revocation. SO, Board issues remedies to try to repair the damage by the ERs ULPs.

A:
- Signatures aren't necessarily involuntary, but can serve to explain *why* an EE wants to get rd of a TU
  - Labour relations context is rarely relevant and admissible regarding voluntariness. Only evidence of direct employer involvement that would lead an employee to believe management was involved is relevant.
  - Unfair labour practices, by themselves, do not affect voluntariness
  - In the case: Involvement of supervisor who fell short of management did **not** invalidate petition
  - In the case: EEs seeing other signatures on the petition did **not** invalidate the petition.
- Even if requirements for revocation are met, Board has jurisdiction to consider any other relevant matter,i.e., ULPs! However, ULP does **not** prevent employees from applying for revocation.

Revocation of VR, s 43

43 Employer can revoke voluntary recgonition **not less than 6 months before end of agreement**. If Union doesn't certify the bargaining rights will be lost on expiry of the collective agreement

Gateway Casinos v. UFCW, [2011] CanLII 75699 (AB LRB) (Asbell)

R: VR Doesn't arise until you enter into a CA → so you **can't bring a revocation application before you have a CA** (because you don't have a VR)

F:
- ER voluntarily recognized TU as bargaining agent for group of employees through agreement.
- TU provided evidence of majority support amongst the employees
- Before bargaining began, certain employees brought revocation application
- Union applied to summarily dismiss application on the basis that no "bargaining rights" existed yet

A:
- Section 50(b) refers to "bargaining rights" as "arising as a result of the employer's having voluntarily entered into a collective agreement with the trade union…"
- No bargaining rights until collective agreement negotiated and ratified
- Employees still have final say in whether they are being represented because the employees must ratify the collective agreement before bargain rights are created