A GUIDE TO THE LAW OF
ORGANIZING IN BRITISH COLUMBIA

Leo McGrady, QC
Sonya Sabet-Rasekh
The cover poster is a copy of the original photo in our office reception. It was signed by Cesar Chavez during a visit to Vancouver to meet with the farmworkers organizers here in BC. It was also signed by the President of the Canadian Union, Raj Chouhan. It was given to us in the course of our work with the organizing committee.


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This edition is dedicated to my father John McGrady.

My father John picketing with my sister Margaret DeCourcy and my cousin Marg Hodgins in Toronto on October 28, 1997, during a wildcat strike of 126,000 Ontario teachers. We were very proud, that even at 82 years, he could reverse a life-long antagonism towards unions when he saw what Premier Harris was about to do to the teachers’ collective agreement – removing class-size clauses from their contracts, cutting prep time, allowing un-certified instructors to teach, and laying off as many as 10,000 teachers.
Leo McGrady Q.C. works with Sonya Sabet-Rasekh, James Baugh, and Michael Prokosh at McGrady & Company in Vancouver. The firm specializes in labour law, human rights, class actions, and libel law, all on behalf of unions, employees, media, and journalists.

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Sonya is a member of the Canadian Association of Labour Lawyers, the Canadian Bar Association, and the Trial Lawyers Association of BC.
Preface

Before becoming a lawyer, my experience with unions was limited. I grew up in a non-union working-class household in London and Toronto’s east-end. Neither of my parents had ever held union jobs, and both held unions in low regard. Their strong social justice views were informed by their religion rather than by their workplace or politics.

My view of unions changed when I worked during the summers, and when I left University for a time to earn money to continue my degree. I had the benefit of membership in two unions – United Rubber Workers, and Oil Chemical and Atomic Workers. Both have since become part of the United Steel Workers of America.

I had the benefit of being covered by collective agreements, but also worked alongside people who were workplace activists. I was able to return to school, and I also began to learn that in a unionized environment I had rights that did not depend on the good-will of my foreman or supervisor.

The idea of writing a guide to assist employees in organizing unions originated in volunteer legal work we did in the 1970s and 1980s for the Service, Office, Retail Workers’ Union of Canada (SORWUC) and its sister union the Association of University and College Employees (AUCE).

These unions were formed by working women themselves to organize primarily women working in jobs that had been overlooked or ignored by the more traditional unions.

Those experiences were followed by legal work and teaching for unions in the mining, smelter, and woods industries throughout BC and in the Territories in the 1980s and following decades.

The actual drafting of a manual or guide began in the early 1980s. I had the benefit of working in my office with an articling student, later an associate in my firm, Jeanne Meyers. Jeanne had many years of experience as a union activist and a passion for organizing. We shared most of the research and writing of the text.

The first edition was ready to go to a publication in the late spring of 1987. We had negotiated with a prominent law book publishing company in Toronto, Butterworths, to publish the book and to distribute and promote it as widely as possible.
Within several weeks of the final deadline for the manuscript to go to publication, the Social Credit government passed the *Industrial Relations Act*, to come into effect in July 1987. The legislation continued the gutting of many of the best features of the *Labour Code* passed by the NDP in the 1970s. It also totally changed the organizing landscape, forcing almost a complete rewrite of the text we have just proudly finished.

We continued with the project over the following two years and completed the rewrite in 1989. Butterworths remained with the project and did a remarkable job of publishing and promoting the book, not only in British Columbia but across the country.

It was well-reviewed and sold about 1100 to 1200 copies. Butterworths decided that it was a "bestseller" considering its target market and so celebrated it. It brought out to Vancouver a specially framed cover of the text, and took the firm out to dinner. The original text is still available in its original form in five or six libraries.

In the years since, we have received numerous requests to update the text. We came very close to a complete update in 2007 through the work of a fine associate lawyer, Janet Lennox. But we were not able to take it to final form.

With the assistance of Sonya Sabet-Rasekh, an associate with my firm, we have been able to reach that stage where we are now able to publish. Most of the updating has been done by Sonya.

The original intention was to publish it without copyright and distribute it freely online. We began to have second thoughts about that course when we saw Google Books recently advertising the 1989 edition for sale online and advertising it as new, and for a price three times what it originally sold for. We have decided to do what we could to prevent that, and so have copyrighted the text. While we are distributing it freely to union members and organizers, we are maintaining control over its copying and distribution.

We encourage readers to draw our attention to any topics that might have been inadvertently omitted, or worse, any errors or misstatements in the text.

In the meantime, if there is a question arising from the text in the course of your organizing that can be answered quickly, Sonya and I are happy to receive your emails or texts with the question. We will try and respond quickly.

Leo McGrady, QC and Sonya Sabet-Rasekh
October 15, 2016
Vancouver, British Columbia
Workers and unions are experiencing their most difficult time since the great depression of the thirties. On an international scale, the two events often seen as the inspiration for current Canadian labour policy are President Reagan's decertification of the Professional Air Traffic Controllers Organization in 1981, and Prime Minister Thatcher's routing of the National Union of Mineworkers in 1985. Canadian labour policy has forced unions to deal with high unemployment, public sector restraint, deregulation, and privatization - new phrases for the old practices of contracting out, technological change, lay-offs, runaway plants, and wage roll-backs.

Some would argue that labour policy responses are simply designed to force unions and workers to accept their fair share of restraint during difficult times. Others would argue that many employers are seizing the opportunity of the recession to increase their income by weakening their unions, or ridding themselves of unions altogether.

Despite management and government statements of being motivated by a desire to enhance individual employee rights, and to serve the public interest, few employees are deceived when they compare the resulting lower wages and benefits to the increase in profits on non-union jobs. For example, in 1985, the British Columbia Council of Carpenters examined nine Expo '86 contracts awarded by the Expo '86 Corporation to non-union firms. The difference in bids between the successful non-union bidder and the lowest union bidder was only 4.7 percent. The wage component of the successful non-union bid was 30 percent lower than the wage component in the unsuccessful union bid. One would have hoped that the 30 percent "saving" would have been passed on to the Expo '86 Corporation, and then to the taxpayer, rather than the 4.7 percent "saving". One could surmise that most of the 30 percent difference went to the contractors in the form of increased profits. In a later study of non-union contracts awarded at the Expo '86 site, it was demonstrated that employees received four million dollars less in wages working on non-union jobs than they would have in union jobs. Yet the government saved only 1.3 million dollars.1

In recent years, employers have become more astute. On occasion they have become ruthless in their opposition to unions. In the past ten years their ability to work with and through governments has become progressively more effective. Consequently, the law on union organizing is rapidly becoming more complex and hostile for employees and unions. This is occurring after a brief period in the 1970s, of either benign government neglect in some provinces, or varying degrees of encouragement in others. In British Columbia, the latter process culminated in the Labour Code of 1973, and the extension of collective bargaining rights to public service employees.

The process of union organizing has become, relatively, most difficult in British Columbia. In virtually every sitting of the legislature since 1976, the passage of new laws have eroded rights won by unions through collective bargaining action or political action. To resist these changes,

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many unions are spending more time and effort in both organizing employees into new certifications, and in maintaining a high level of support and organization after certification. It is precisely this kind of response which enabled the union movement in British Columbia to develop from a small percentage of the workforce in the 1930s to fifty five percent in the 1950s.\(^2\)

One recent study may be of assistance in organizing. It is entitled What Do Unions Do and was prepared by two Harvard University economists. The text summarized the result of ten years of research, analyzing both union and non-union operations. Their findings can be summarized as follows:

1. As a generalization, unions win wage increases superior to those granted to non-union employees.
2. Unions increase the percentage of compensation allotted to fringe benefits, particularly to deferred benefits such as pension and life, accident, and health insurance, which are favoured by older workers.
3. Unions are a force for equality in the distribution of wages among individual workers.
4. The presence of unions enhance the stability of the work force, by providing employees with a voice in determining conditions of employment, and by instituting grievance and arbitration procedures.
5. Unions often result in management being less paternalistic and less authoritarian in their management of the firm. In many sectors, unionized establishments are more productive than non-union establishments. High productivity is due in part to the lower rate of turnover under unions, improved managerial performance in response to the union challenge, and generally cooperative labour management relations at the plant level.
6. Most unions are highly democratic, with members having access to union decision making machinery, especially at the local level. While corruption exists in some unions, its occurrence seems to be concentrated in a few industries.\(^3\)

A similar, though less ambitious, study has been done in B.C. by Professor Robert Allen, an economist at the University of British Columbia.\(^4\) His conclusions include the following points:

1. There is considerable statistical evidence that unions increase productivity in manufacturing and construction.
2. Unions equalize the distribution of power between employers and employees.


\(^3\)R.B. Freeman & J.L. Medoff What Do Unions Do? (New York: Basic Books Inc. 1984) pages 20 -23. I have not attempted to summarize all of the strengths and weaknesses of unions referred to in the text. For further details, you may wish to consult the study itself.

3. Unions equalize the distribution of income and curtail sexual and racial discrimination.\(^5\)

4. Average wages are higher in unionized than in comparable non-unionized establishments.

5. Fringe benefits are more attuned to the needs of the older workers in unionized firms. In non-union firms, fringe benefits are more attuned to the needs of the younger workers.

6. Unionized firms adhere to the principles of seniority and lay-offs and promotion.

7. In unionized firms, workers within the same job classification usually receive the same rate of pay. In non-unionized firms, there are typically large variations in rates amongst individuals doing the same work.

8. Pay differentials between job categories are smaller in unionized than in non-unionized firms.

9. Grievance and arbitration procedures are universal in unionized firms, and are rare in non-unionized firms.\(^6\)

\(^5\) In fact, other studies show that unionization significantly improves women's earnings and decreases the wage difference between men and women. See for example Judge RS. Abella "Employment Equity" (1987) 16 Man LJ 186, page 196.

\(^6\) Union organizers may also find federal government publications of assistance in advising employees of what types of provisions they might expect in collective agreements: see Provisions in Major Collective Agreements in Canada Covering 500 or More Employees, July 1985, produced annually by Publications Distribution Centre Labour Canada, Ottawa, Ontario, KIA 0J2. For a business union perspective on organizing, see C. Gilson and I. Spencer "Trade Union Growth: A Marketing Model" (1987) 42 Industrial Relations 756.
Chapter 2

History of Certification

Before addressing the law on union organizing in Canada, it may be helpful to consider briefly the origins of the current law. An understanding of these matters is useful in making some of the numerous judgments required in the course of any organizing campaign. The history of the law of organizing can be conveniently divided into 6 periods: 1830 - 1944; 1945 - 1973; 1973 - 1976; 1977 - 1991; 1992-2001; and 2002 to the present.

With respect to the 1830 to 1944 period, workers had generally been free to organize, and to persuade employers to recognize their organizations. Their early circumstances have been best described by Professor A. Hickling:

The earliest unions of which there is clear record date back to the 1830s. Originating in the printing trades, and in the boot and shoe industry, they were small, local craft organizations which sought to achieve these objectives not by collective bargaining as we know it, but by regulating through rules binding on members inter se the terms and conditions upon which they would work. Wage scales were thus established for each community and limitations placed upon the number of apprentices who could be employed in any shop. These terms and conditions the union would then seek to impose upon all employers. Although trade unions existed, they still operated in the shadow of the criminal law.¹

The notion of certification by a labour board making formal employer recognition unnecessary, first emerged as part of a comprehensive Canadian labour policy in 1944. The essential outline of the organizing law remained unchanged until 1973.

In the third period, from 1973 to 1976, a number of dramatic improvements were made to the legislation in British Columbia, making it the jurisdiction with the most progressive organizing law in North America. The main features of that legislation were:

1. The addition of a clause in the 'Purposes and Objects" section of the legislation that required the Labour Relations Board to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees.
2. An expansion of the definition of the "employee" to include large groups of workers previously excluded from collective bargaining.
3. A reverse onus provision which placed the burden of proof on the employer in certain unfair labour practice cases making it easier for unions to succeed on these complaints.
4. Union access to the addresses and telephone numbers of unorganized workers.

5. Reduction in the level of membership support required for an application for certification to 35 percent.

6. First contract arbitration as a remedy for unfair labour practices.

7. Automatic certification where unions have achieved 55% sign-up.²

In 1977, the first of a series of restrictive amendments was passed. The result over the subsequent years has been to make organizing much more difficult. This erosion of union and worker rights was accomplished by the following amendments:

1. The 35 percent requirement for a certification application was raised to 45 percent.

2. The requirement that employers provide organizing unions with names and addresses of employees was revoked.

3. University faculty were denied collective bargaining rights.³

4. The right to automatic certification where unions obtained fifty-five percent sign up was revoked. A vote must now be held in every case.

5. Decertification applications were streamlined and simplified.

6. Employers are no longer required to remain neutral in the face of union organizing efforts. They can now actively campaign against the union, provided they do not exert "undue influence" or use "intimidation, coercion or threats".

Other than the brief period from 1973 to 1976, B.C. legislative policy at best has been lukewarm to union organizing, and at worst has been anti-union. In 1987, the Provincial government made significant amendments to the B.C. Industrial Relations Act (subsequently replaced by the Labour Relations Code) eventually resulting in the boycott of the Industrial Relations Council by many trade unions.

Further amendments to the B.C. Labour Relations Code in 2002 introduced two significant elements:

1) the expansion of the right to communicate, which no longer limits the employer’s right to communicate about the employer’s business – the employer may now express its views on any matter, including trade union representation, as long as it does not constitute coercion or intimidation; and

2) amendments to the purposes of the Code, that included describing them as “duties” and requires the “foster[ing] the employment of workers in economically viable businesses”.


³ University Act, RSBC 1979, c 419 s. 80. However, this provision was eventually repealed.
One further point remains to be made on the law of organizing and certification. The law is often described as one that bestows certain rights on employees and their union organizations. Mandatory certification procedures are said to have only one objective - to make recognition strikes unnecessary, and to force employers to recognize unions.

Several writers have argued that the historical record demonstrates that that proposition is not entirely accurate. While offering some protection from employer interference, the law has traditionally sought to limit employees' ability to effectively organize. One writer has described the origins of the law in this fashion:

_The history of Canadian labour legislation in this century suggests that its common legislative purpose has not been to protect the right to organize, in the broad sense. I would argue that the real effect of our legislative efforts has been to interfere with the right to organize by channeling and controlling the spontaneous organization of workers—either repressing it altogether or else institutionalizing it through organizations that have very restricted rights to mobilize workers. A Canadian paranoia about work stoppages seems to be built into labour legislation in all jurisdictions in Canada. My thesis on the history of labour legislation in Canada is that its main purpose has been to discourage labour disputes rather than to protect any right to organize. Moreover, the apparent protections of the right to organize, initially and through much of the history of Canadian labour legislation, were actually intended to discourage real unionization, or to limit its effects. More recently, where legislation has nominally encouraged the right to unionize, the same legislation has set up highly interventionist bodies that channel and control, reward and punish, in order to create a particular kind of labour movement._

Recent Supreme Court of Canada decisions within the past several years provide a silver-lining, though thin it may be. From its decision in _Dunmore v. Ontario (Attorney General)_\(^5\) in which the Court slightly cracked the door open regarding some constitutional protection for collective bargaining to its latest decisions in 2015 protecting the right to strike\(^6\) and the right to collective bargaining which includes employees’ choice and independence in their representation\(^7\), we see a gradual recognition of the importance of union organizing and ensuring its protection within the _Charter_. The question that remains is what, if any, effect and to what degree, the Court’s affirmation of the constitutional right to collective bargaining and the right to strike, will have on the regulation of organizing activity.

**Further Readings**


\(^5\) 2001 SCC 94.


Chapter 3

Constitutional Jurisdiction of the British Columbia Labour Relations Board
(Administrative Tribunals Act and Labour Relations Code)

General

Generally speaking, the province has the authority to pass laws with respect to labour relations. However, there are exceptions to this. In areas where the federal government has the power to legislate, such as banking, inter-provincial commerce, inter-provincial railways and buses, inter-provincial communications, inter-provincial trucking and transportation, and airlines, it also has the power to govern labour relations. If you are involved in organizing any industry or service that operates in more than one province, you should consider if the federal government has jurisdiction in this area and, if it does, the Canada Labour Code\(^1\) should be consulted.

Note that a company may be incorporated under either provincial or federal legislation. This does not affect the issue of whether a provincial or federal labour relations board will have jurisdiction. This does not affect the issue of whether its employees will fall under provincial or federal jurisdiction in labour relations matters. For example, in 2002, in Re Murrin Construction Ltd.\(^2\), the British Columbia Labour Relations Board dismissed the Construction and Specialized Workers’ union’s application for certification on the basis that the provincially incorporated construction company’s work was “vital, essential, or integral” to Canadian National Railway, a federal work or undertaking and, thus, was work under federal jurisdiction.\(^3\) Two years later, another union successfully applied to certify the same group of employees.\(^4\) The Board concluded it had jurisdiction because Murrin’s business had changed dramatically: it had not performed any work for the railway since November 2002 and had no reasonable prospect to do so in the foreseeable future.\(^5\) The company no longer performed work that was vital, essential or integral to a federal work or undertaking and thus, the certification application fell within provincial jurisdiction.\(^6\)

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3. Ibid. at paragraphs 2 and 87.
5. Ibid. at paragraph 5.
6. Ibid. at paragraphs 5 and 6.
The Administrative Tribunals Act

In 2004, the Legislature enacted the *Administrative Tribunals Act*\(^7\). Sections 44 and 45 deal with statutory tribunals’ constitutional jurisdiction, including their jurisdiction to address *Charter* issues. These provisions are not applicable to the Labour Relations Board.\(^8\) In consequence, the Board’s constitutional jurisdiction, unlike that of other statutory tribunals, has not been circumscribed by the *Act*. The Attorney General explained on Second Reading:

...The provisions in the bill allow tribunals to focus resources on their areas of specialized expertise so they can continue to provide high-quality services to the people of British Columbia. The provisions in the bill also recognize that the courts are the most appropriate forum for the determination of most constitutional questions.

I said that there are limited exceptions to this general policy. In this respect, the courts have indicated that the Labour Relations Board and the Securities Commission have the expertise necessary to address constitutional questions in the course of their proceedings. The deference that the courts are willing to accord to these tribunals is reflected in the bill...\(^9\)

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\(^7\) SBC 2004, c 45.

\(^8\) See section 115.1 of the *Labour Relations Code* - 115.1 Parts 1 - 3, Sections 34(3)(b) and (4), 43, 46, 46.1, 47(1)(c), 48, 49, 56, 57, 58(1) and (2), 59.1, 59.2, 60(1)(g) to (i) and (2), and 61 of the *Administrative Tribunals Act* apply to the Board.

Chapter 4
Trade Union

A) Trade Union

Definition under the Code

The Labour Relations Code defines “trade union” in section 1:

“trade union” means a local or Provincial organization or association of employees, or a local or Provincial branch of a national or international organization or association of employees in British Columbia, that has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining, and includes an association or council of trade unions, but not an organization or association of employees that is dominated or influenced by an employer;

In Re Harbour Electric, the Board interpreted that definition as follows:

To be recognized as a union, an organization must establish that there is a local organization of employees banded together in a contractual relationship with each other for common purposes and objectives, one of which is the regulation of labour relations. … Even if the organization is local or provincial in character, and has as one of its purposes the collective representation of employees within the province, the Board must also be satisfied that there is a viable entity capable of carrying out the obligations expected of a union.

Thus, there are four elements to the definition:

1. a trade union must be an organization of employees;
2. the organization must be local or provincial in character;
3. the purpose of the organization must be the regulation of relations between employees in the province through collective bargaining; and
4. an organization must not be dominated or influenced by an employer.

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1 BCLR No. 421/99 at paragraph 52.

**Employee Organization**

To be an organization, more than one individual must be involved. This is because “…a trade union, with all of its rights and obligations, should transcend the individual and have a substance and being greater than one individual.”

However, the Board has not established a threshold number of employees required to attend the founding meeting to adopt the constitution and by-laws by which the organization is formed. Not all potential future members need attend.

**Local Organization**

A trade union must be a local or provincial organization of employees or local of provincial branch of a national or international organization of employees. It cannot be a national or international organization of employees standing by itself.

Thus, for example, the Board deleted the Labourers’ International Union of North America as a party to the complaint in *Re Christopherson*, because the international union was not a trade union for the purposes of the *Code*. Vice-Chair Kearney explained at paragraph 3:

> The Board has previously held on a number of occasions that national or international organizations are excluded from the definition of “trade union” under the *Code: Deanne Henry, A. Gibson, and Gerry Nairn*, BCLRB No. 48/95.

The rationale for the local organization requirement is:

> …one of convenience in administration and enforcement of labour legislation by assuring the existence of some local legal entity amenable to such procedures as are contemplated by the Act.

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3 *Ferraro’s Limited*, BCLRB No. 359/84 at page 12 (Q.L.); reconsideration dismissed at BCLRB No. 444/84.


5 *Corcoat Engineering Ltd.*, BCLRB No. 115/74 at page 5 (Q.L.).


7 *Corcoat Engineering Ltd.*, BCLRB No. 115/74 at page 5 (Q.L.), citing the *Cohen Report* on Newfoundland’s *Trade Union Act*. 
Viability

The organization must also be able to act as the exclusive bargaining agent for the employees and carry out the duty of fair representation it owes to them. As the Board noted in *Jensen Mushroom Farms Ltd.*:  

…A trade union has broad powers and responsibilities under the statute: when the Board issues a certificate, it grants an exclusive bargaining agency…and imposes a concomitant duty of fair representation… It is reasonable for the Board to require clear evidence that there really is an organization in existence which is fully able to exercise that agency and discharge that obligation. …

The Board’s approach to viability is a purposive one. Its inquiry is meant “…to ensure that the organization has a cohesive structure so that it can act as an organized body to be able to function and to fulfill its duties as a trade union under the Code.” The Board concerns itself with practicalities:

- can [the union] do business with employers through collective bargaining and contract administration and can it effectively represent the employees so as to meet its duty of fair representation? Is it capable of carrying out its responsibilities and exercising the powers that flow from its status as a union?

Not Employer Dominated or Influenced

The prohibition against employer domination or influence is reiterated in section 31 of the Code:

31. Prohibited employee associations – An organization or association of employees

   (a) the formation, administration, management or policy of which is, in the board’s opinion, dominated or influenced by an employer or a person acting on his or her behalf…

   must not be certified for the employees, and an agreement entered into between that organization or association of employees and the employer is deemed not to be a collective agreement.

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8 BCLRB No. 53/80.


10 *Re NW Energy (Williams Lake) Corp.*, BCLRB No. 368/2003 at paragraph 132.

11 *Ibid.* at paragraph 133.
The Board will ask whether there is a sufficient arm’s length relationship so that meaningful collective bargaining can be undertaken. 12

In the seminal case of *McCoy Bros. Ltd.*, 13 the Board found that proposed employees’ association ran afoul of employer-domination requirement. The following factors were significant in the Board’s decision:

1. The company refused to meet with the union seeking to represent the employees – the Operating Engineers.

2. The employer indicated to some employees that he didn’t want to deal with an established trade union but favoured an employees’ association.

3. The employer stated that the company would never sign an agreement with the Operating Engineers and would rather close down its operations in British Columbia.

4. The company arranged for a “happy hour” at which substantial quantities of free food and liquor were consumed by the employees. The employer addressed the employees and provided them with information on an employees’ association at that event.

5. The employer promised that a wage increase would be easily negotiated with an association.

**B) Choosing Between an Established Union or a New One**

**The Basic Choice**

The first decision is between an already established union and a new one. If the choice is the former, the B.C. Labour Directory, published by the Ministry of Skills Development and Labour, could be consulted. Part I of the Directory lists unions in British Columbia in alphabetical order and contains membership and officer information as well as any affiliation to international or national labour groups such as the Canadian Labour Congress or the British Columbia Federation of Labour.

Alternatively, the union may be built from the ground up. While this entails a great deal of effort, the advantage lies in constructing an organization that reflects the work place, and the employees being organized. However, there are disadvantages of a home-grown approach, including the possibility that the organizing drive may not enjoy the benefits of assistance and advice or the legal and financial resources that can be provided by an

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13 BCLR No. 9/77.
established organization. As well, a new organization will have to establish before the Board that it ought to be afforded trade union status.

**Procedural Steps to Forming a New Union**

Employees should take the following procedural steps when forming a new union, recording minutes of any meetings:

1. A group of employees meet and resolve to form a union. Following parliamentary procedure (motion, seconded and voted on), they choose a committee to draft a constitution and by-laws for the proposed organization.
   - The draft constitution should include as one of its purposes or objectives the regulation of labour relations between the employer and the employees through collective bargaining.
   - The constituent documents should also address topics such as the election of officers, the calling of meetings, application for membership in the union, and membership dues.

2. Elect temporary officers (e.g. president, secretary) at this founding meeting.

3. After the founding meeting is adjourned, prepare membership cards. (See Chapter 11, *Signing up Members*, for more details.)

4. Once the committee has the constituent documents ready, call another meeting at which time the committee presents the proposed constitution and by-laws to the larger group. These are amended or accepted in whole by motion and vote.

5. Once the constitution and by-laws have been adopted, adjourn the meeting and circulate the membership cards so that members of the group can formally join the union. Follow the procedure set out in the constitution regarding applying for membership.

6. Establish membership dues.

7. Reconvene the meeting and have the interim officers accept the members.

8. Next, have the new members adopt the union’s constitution and bylaws by vote.

9. The interim officers resign, and the new members elect officers according to the procedure set out in the constitution and by-laws. The officers can be the same people as the interim officers.\(^{14}\)

Investigation of a New Union

When employees choose a new union, the Board will investigate whether the newly formed organization should be given trade union status for the purposes of the Code. The degree of scrutiny the Board will apply to this task will depend on whether the organization is entirely new or whether it is an offshoot of an already established body. Not surprisingly, the less known an organization is in British Columbia, the higher the scrutiny.\(^\text{15}\) Stricter standards are applied to homegrown unions “…because there are no safeguards as there are with the offshoot of an established and experienced national or provincial parent organization”.\(^\text{16}\)

The effective date for the Board’s assessment of an organization’s trade union status is the date of the certification application.\(^\text{17}\)

The questions the Board poses to new organizations are set out in Appendix A of its Application for Certification (Section 18) Form which is available on its website at: http://www.lrb.bc.ca/forms/.

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\(^{15}\) Re NW Energy (Williams Lake) Corp., BCLRB No. B368/2003 at paragraph 128.

\(^{16}\) Re Canada Bread Co., Ltd., BCLRB No. B119/2004 at paragraph 90.

\(^{17}\) Re NW Energy (Williams Lake) Corp., BCLRB No. B368/2003 at paragraph 126.
Chapter 5

Who is an Employee?

*(Labour Relations Code, Section 1 and Sections 28, 29, & 139(a))*

General

The *Code* sets out the following definition of employee in section 1:

“Employee” means a person employed by an employer, and includes a dependent contractor but does not include a person who, in the board's opinion,

a) performs the functions of a manager or superintendent, or

b) is employed in a confidential capacity in matters relating to labour relations or personnel.

Previous iterations of the *University Act*, RSBC 1996, c. 468 made the province’s labour relations statute inapplicable to faculty associations, with the effect of banning unions among university faculty. The Legislature has since reversed this policy. Faculty associations may now seek recognition as a union under the *Code* as did, for instance, the University of British Columbia Faculty Association in December 1999.1

However, staff of the Legislative Assembly may not unionize due to parliamentary privilege, specifically the Legislative Assembly’s right to regulate internal affairs free from interference.2 The Board concluded that it was “not unconstitutional nor unlawful to hire, fire or direct staff absent union representation”.3 Further, it noted that certifying the proposed unit of Hansard employees would put the proceedings in the Legislative Assembly at risk of strike or lock-out, thereby taking “…the control over internal affairs out of the hands of the Legislative Assembly and subject it to external interference from strangers, among others, this Board.”4

The *Charter* right of freedom of association did not assist the applicant employees for two reasons. First, the Board found that the *Charter* could not be raised to defeat parliamentary privilege.5 Second, the privilege asserted did not defeat the employees’

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2 *Re British Columbia (Legislative Assembly)*, B202/2003 at paragraphs 139 & 174.


4 *Ibid.* at paragraph 149.

right to associate. The Board observed that the employees already participated in certain collective activities and were not prevented from joining the BCGEU. The Board dismissed the BCGEU’s application for certification.

The union must sign up 45 percent of the employees in order to file an application for certification: section 18(1). In raid situations, the union must sign up a majority of the employees in an appropriate unit: section 19(1). A majority of those voting during a representation vote must vote for the union for it to obtain certification: section 25. Thus, the determination of who is an employee is a crucial one. Often that determination is a simple one, but on occasion it can be very difficult.

A union should always attempt to sign up a substantial number of union supporters over the 50 percent mark in case the Board determines that certain persons who are union supporters cannot vote because they are not "employees" within the definition, or the Board determines that persons who do not support the union are "employees" and able to vote. Unless the trade union has applied for a certification vote with minimum support, the Board will often defer such determination until after collective bargaining. This affords the parties the opportunity to reach agreements between themselves on exclusions to the bargaining unit.

The determination of employee status is occasionally complex. In Cranbrook and District Hospital, the Board discussed the issue:

> What are those features which go to make up an employee in the usual sense of the term? Someone is interviewed by an employer and hired for a job. He will work for some period of time and will be paid a fixed wage, computed hourly, weekly or monthly. He will perform tasks assigned by the employer and subject to the direction and supervision of the latter. This work is of benefit to the employer's business or enterprise. For that reason, it is worth the while of the employer to pay for the doing of it. If the work is performed well, it will be so evaluated by the employer, and result in the retention or even promotion of the employee. If the work is not performed well, he will be disciplined and perhaps even discharged, again by the employer....

> Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee. Sometimes employees are dispatched to an employer by someone else, and work only for short or intermittent periods (as in construction); some employees work on commission or on a profit-sharing basis (such as salesmen or

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6 Re British Columbia (Legislative Assembly), B202/2003 at paragraph 170.

7 Ibid. at paragraph 176.

8 [1975] 1 CLRBR 42 at page 50.
fishermen); some employees are subject to very little in the way of meaningful direction and control (such as professionals).

A) Employee vs. Independent Contractor

The definition of “employee” includes dependent contractor but not independent contractor. To determine whether a person is an employee or an independent contractor, the Board will consider the following factors, none of which is determinative:

1. nature of the industry;
2. nature of the employer’s operation;
3. type of work;
4. control and the manner and means of performing the work;
5. ownership of tools and equipment;
6. chance of profit/risk of loss;
7. use of substitutes;
8. exclusivity;
9. entrepreneurial activity;
10. economic dependence; and
11. integration into the employer’s business.9

The first three questions provide the background but generally do not assist in the Board’s determination of individuals’ employee status.10

In Re West Fraser Mills Ltd., the Board described the evaluation of the status of an employment vs. contractual relationship as follows:

11…At one end lies the “independent contractor”. At the opposite end is the "employee". A dependent contractor lies between those ends of the continuum. The key to locating the dependent contractor lies in their closer resemblance to the employee, both in terms of their economic dependence and the obligations under which they work.

12 At the independent contractor end of the spectrum is the relationship between two businesses. The Board has characterized the paradigmatic independent contractor as a person who functions on a "detached and independent basis". They are in business on their own account: they may advertise, perform services for a fee, invest capital in equipment and assume financial risk. They also benefit from the assertion of independent business judgment, entrepreneurial talent, professional skills and other forms of initiative. Their work is not integrated into the business they contract with but is ancillary to it: Pacific Press Ltd., BCLRB No. 4/77, [1977] B.C.L.R.B.D. No. 3, [1977] 1 Canadian LRBR 342; OK Builders

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10 Ibid. at paragraph 36.

Section 139(a) of the Code gives the Board exclusive jurisdiction to decide who is an employee. Potential sources of evidence on the issue may be found in:

- payroll records;
- insurance policies such as group long term disability policies;
- pension documents;
- government documents which name the employer such as T-4 slips or Records of Employment;
- employee evaluations;
- schedules;
- employee handbooks or policies;
- correspondence addressed to employees, particularly if it deals with discipline; and
- training records.

B) Employee vs. Dependent Contractor

Section 1 of the Code defines “dependent contractor” as:

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

A classic example of a dependent contractor is a contract truck driver.

11 BCLRB B75/2012.

12 Re V.I. Care Management Ltd. (Sunnyside Manor), IRC No. C158/89 at pages 2-3 (Q.L.); Application for Reconsideration dismissed at IRC No. C218/89; Columbia Hydro Contractors, BCLRB No. B36/94; Leave for Reconsideration denied in BCLRB No. B167/94 and Reid v. Vancouver (City) et al., 2000 BCHRT 30 at paras. 95 & 105, quashed in part on judicial review at 2003 BCSC 1348, appeal allowed in 2005 BCCA 418.

Section 28 permits the Board to certify a unit of dependent contractors or a unit partially composed of dependent contractors. It also allows the Board to vary existing certificates to include dependent contractors.

The Board’s approach to dependent contractors is explained in *International Paper Industries Ltd.* It is:

...based on the policy of the desirability of extending the process of collective bargaining to persons who have a compelling claim to the benefits associated with that process. Accordingly, individuals whose circumstances more closely resemble those of an employment relationship, than a relationship between two independent businesses, should have access to collective bargaining for the same reasons employees are entitled to access to the process of collective bargaining...  

The key elements to look for are economic dependence upon the employer and an obligation to perform duties resembling that of an employee. The factors the Board will consider in its determination are:

1. the way the industry operates;
2. the type of work involved and its source;
3. the nature of the applicant’s operations;
4. the organization of the employer’s operations and the degree to which the contractors are a continuing part of it (does the employer generally expect the contractors to work on a daily basis and are the contractors generally available for work during working hours; is a long term, stable relationship between the parties evident?);
5. any contractual arrangements between the parties and others;
6. the type and extent of control and direction exercised by the employer with respect to such matters as hiring, firing, discipline, work assignments, hours of work and so forth;
7. the nature and manner of compensation and how it is determined;
8. the percentage of income which the contractor derives from the employer (generally, the lion’s share of the contractor’s income must derive from the relationship with the employer);
9. the opportunity for the contractor to make a profit through the exercise of independent entrepreneurial judgment;

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16 *Ibid.* at paragraph 51. See also *Re West Fraser Mills Ltd.*, BCLR No. B75/2012 at paragraph 11.
10. the contractor’s opportunity for economic mobility and whether the contractor advertises or solicits customers elsewhere.\textsuperscript{17}

The Board opined in \textit{International Paper Industries Ltd.} that the first three factors were “not particularly helpful”\textsuperscript{18} Thus, while no single factor is determinative, the last seven will carry more weight.\textsuperscript{19}

\textit{Status of Uber Drivers}

The determination of employee/dependent contractor status as opposed to independent contractor status will be pertinent if and once Uber is introduced in British Columbia. Labour Board decisions across Canada on the certification of cab drivers have accepted the employee status of cab drivers. However, it remains to be seen whether similar findings will be made with respect to Uber drivers.

The key issue in these decisions concerning the status of cab drivers is the common factor of whether the relationship was one of economic dependence and control. The following situations supported a finding of employee/dependent contractor status:

1. A cab broker exercising “substantial direct control” over both drivers and single plate owner owner/lessee operations in that it imposed expectations and standards regarding uniforms, cleanliness and interactions with customers. The cab broker also suspended and terminated drivers and owners/lessees. Despite the fact that the drivers and owners/lessees did not directly receive compensation from the cab broker, the Ontario Labour Relations Board held that they were economically dependent on the cab broker – a great deal of the business was generated and allocated through the cab broker.\textsuperscript{20}

2. In Alberta, the Labour Relations Board held that even if cab drivers were nominally self-employed, the taxi companies’ control and supervision warranted treating them as employees who should have access to collective bargaining. Here, the Board applied a “liberal and purposive interpretation” of the \textit{Labour Relations Code} as remedial legislation that ought to be given an interpretation that is consistent with the values reflected in section 2(d) of the \textit{Charter} – the freedom to associate and organize.\textsuperscript{21}

\textsuperscript{17} \textit{Re International Paper Industries Ltd.}, BCLRB No. B113/2000 at paragraph 52. See also \textit{Re West Fraser Mills Ltd.}, BCLRB No. B75/2012 at paragraph 14.

\textsuperscript{18} \textit{Re International Paper Industries Ltd.}, BCLRB No. B113/2000 at paragraph 53.

\textsuperscript{19} \textit{Ibid.}


In contrast, owner/operator limousine drivers were found to be independent contractors and not employees in Alberta. A key consideration is that the control exercised by the company over the owner/operators was a result of what is contained in the city’s bylaws and in the licenses with the airport authority. Furthermore, the fact that the owner/operators provided their own limousines was a significant factor. They established their own hours and days of work, were able to develop their own book of pre-arranged passengers and were free to exchange customers with other drivers.22

C) Management Exclusion

The definition of “employee” in the Code excludes those who perform the functions of a manager or superintendent. The Board’s management exclusion policy, as articulated in Highland Valley Copper23 is guided by two fundamental principles: industrial stability and access to collective bargaining.24

Stability is promoted by an interpretation of “employee” such that the arm’s length relationship in collective bargaining is preserved. Employers, thus, have the benefit of the undivided loyalty of senior managers responsible for ensuring the work is done and compliance with the collective agreement. Unions have the benefit of not being dominated by senior management.25

Access to collective bargaining is promoted through section 29 of the Code, which permits certification of a unit of supervisory employees or a unit which is partly supervisory. As the Board notes in Highland Copper, the provision is “statutory recognition of the fact that the need for exclusion of senior management…does not lead to the denial of access to collective bargaining for ‘supervisory’ employees.”26 In this way, a simple conflict of interest, which would exist with any supervisory employee, does not trigger a managerial exclusion.27

The Board wrote in Highland Copper that the decision to exclude workers from employee status turned on the “measurement of the potential conflict of interest” based

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24 Ibid. at paragraph 98a. See also Langara College (Re), BCLRB Decision No. B227/2006 at paragraph 14.


26 Ibid.

27 Ibid. at paragraph 21.
on an “objective examination of actual responsibilities and authority”. The assessment must be made in the context of the particular industry, organization and managerial structures. The Board concluded “If the potential conflict of interest is sufficient to justify the need to grant to the employer the undivided loyalty of the individual in question, the individual is excluded from employee status.”

The two most significant factors in the Board’s assessment of the potential conflict of interest are:

1. discipline and discharge; and
2. labour relations input.

The Board may also consider whether the individual in question could hire, promote or demote others in the workplace to the extent that this is not dealt with under the discipline and discharge factor.

With respect to discipline and discharge, the individual in question must have the power of “effective determination”, which describes the power to impose substantially the ultimate discipline.

Labour relations input includes “input into collective bargaining, involvement in the grievance procedure, access to confidential personnel files, and involvement in essential service designations”. Labour relations input is still a factor to be considered in non-unionized workplaces and is apparent with respect to input in negotiations for rates of pay.

28 Ibid. at paragraph 98a.
30 Highland Valley Copper, BCLRB No. B298/98 at paragraph 98a (Leave for Reconsideration of BCLRB Nos. B254/96, B21/97, and B102/97).
31 Highland Valley Copper, BCLRB No. B298/98. See also Re Squamish (District), BCLRB No. B209/2015 at paragraph 51.
32 Highland Valley Copper, BCLRB No. B298/98 at paragraph 98a (Leave for Reconsideration of BCLRB Nos. B254/96, B21/97, and B102/97) and Re Squamish (District), BCLRB No. B209/2015 at paragraphs 53-55.
34 Vancouver General Hospital, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91) at page 33 (Q.L.).
D) Management Team Exclusions

Even if a person is not a manager, he or she may nevertheless be excluded for being part of the “management team”, that is to say so linked to core management that it would be inappropriate to include these employees in the bargaining unit. The classic example is the administrative assistant to the president of a company.

Other possible reasons an employee might be excluded on the management team principle include: personal or familial relationships, job duties that require the employee to act in an advisory role to management, or because of ownership or partial ownership of the business. For example, in Re Jacobsen Enterprises Ltd. (Lakewood Inn), the Board excluded the owners’ dependent son from the other workers in the bargaining unit, finding that the teenager’s “…community of interest, as a dependent living at home, is with his family and that his inclusion in the bargaining unit would present an obvious conflict of loyalties and interests…”

The Board does not automatically exclude an individual due to familial relationships. In determining whether to include an employee with a familial relationship with the employer, the test is potential conflict, not actual conflict – the degree of potential conflict decreases as the remoteness of the familial relationship increases. For instance, a potential conflict of interest is more likely to arise in a parent-child or sibling relationship.

The analytical lynchpin is whether the employee’s community of interest lies with management and not the bargaining unit.

The management team exclusion “…is to be narrowly construed and rarely applied.” This is to avoid excluding workers unnecessarily from the bargaining unit who otherwise meet the definition of “employee”.

36 Kootenay Savings Credit Union, BCLRB No. 94/76 at page 4 (Q.L.).

37 Ibid.

38 Vancouver General Hospital, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91) at pages 39 and 40 (Q.L.).

39 BCLRB No. B111/98.

40 Ibid. at paragraph 52.


42 Protec Installations Ltd., BCLRB No. B159/96 at paragraph 73.

43 Ibid. at paragraph 74.

44 Ibid.
E) Confidential Capacity Exclusions

The definition of “employee” in section 1 of the Code also explicitly excludes those “employed in a confidential capacity in matters relating to labour relations or personnel”. The Board explains the policy rationale underpinning this category of exclusion in Lake City Casinos.45

67 The Legislature's concern about confidential information relating to personnel arises from the fact that the disclosure of such information can adversely affect the relationship between an employer and its employees... If the persons holding this information are employees, a potential conflict of interest arises from the fact that they might become union officials with a limited immunity and corresponding discretion to use or disclose the information. ...

For a bargaining unit employee to be excluded, the confidential functions must be a substantial and regular part of the job.46 The employer must minimize the exposure of bargaining unit members to such confidential labour relations information.47

The test for determining whether an employee is working in a confidential capacity is described in Burnaby General Hospital:48

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

More recently, in Gateway Casinos and Entertainment Ltd., BCLRB No. B80/2011, the Board summarized the principles as follows:

1. Individuals captured by the exclusion have work that requires them to be regularly and substantially involved in confidential personnel matters. They are entrusted with confidential information about employees and must act on it discreetly. They will be responsible for making judgments about the information, rather than merely recording it or processing it.


46 The Corporation of the District of Burnaby, BCLRB No. 1/74 at page 10 (Q.L.).


48 BCLRB No. 50/78 at page 3 (Q.L.).
2. A person will not be excluded if an employer can rearrange its affairs so that the person does not have occasional access to, or involvement with, confidential personnel information. However, a clerical staff member may be excluded even if they do not make judgments about confidential personnel information, if their exclusion is necessary to have an excluded staff person to record and process confidential personnel information.

3. A potential conflict of interest arises where a person's work duties require them to have regular and substantial access to, and make judgments about, confidential labour relations or personnel information. Mere access to information that the employer wishes to keep confidential from the rest of the world is not sufficient. The confidential information must pertain to labour relations or personnel matters.49

Other matters which may be confidential are beyond the scope of this exclusion. For example, the Board held in Island Savings Credit Union that information concerning the credit union’s financial plans and business strategies did not need to be withheld from senior bargaining unit employees.50 In another case, the mere fact that an employee had access to confidential payroll information did not trigger an exclusion.51

As the Board explains in The Corporation of the District of Burnaby:52

...An employer has an interest in keeping all its confidential information from reaching the outside world but there is no reason to expect that being represented by a trade union makes any employee less trustworthy than one excluded from such representation. It is only where such knowledge of that information is of special interest to the union and the employer has a special need to keep it from the union – i.e. where it relates to labour relations – that the potential conflict of interest becomes compelling enough to require exclusion from the Code.

On the other hand, where the employee in question’s involvement with confidential financial information is so extensive that the job duties are more akin to chief financial officer to the employer, the person is properly excluded.53

F) Part-Time and Casual Employees

Part-time or casual workers can be included in the unit if they share a sufficient community of interest in the bargaining unit.54 For example, the Board held that in the

49 Gateway Casinos and Entertainment Ltd., BCLRB No. B80/2011 at paragraph 59.

51 Telecommunications Workers Union, BCLRB No. B392/99 at paragraph 17.
52 BCLRB No. 1/74 at page 10 (Q.L.).

53 Simon Fraser Lodge Inc., BCLRB No. B470/99 at paragraph 33.
case of an employer that had a large number of on-call employees, those workers who had worked more than 50 hours in the previous three months had sufficient community of interest to warrant potential inclusion in the bargaining unit.\textsuperscript{55}

The Board wrote in \textit{Christie Lites} that the 50-hour threshold was not a definitive threshold: “It could conceivably be a less restrictive test.”\textsuperscript{56} Nor was the three month time window a determinative time period.\textsuperscript{57} Rather, the Board’s assessment of whether a part-time or casual employee has sufficient community of interest to warrant inclusion in the bargaining unit turns on the particular facts.\textsuperscript{58} Factors which may guide the Board’s assessment include the relative permanence of the employment, the proportion of casual employees in the total work force, the nature and organization of the employer’s business, and each worker’s particular circumstances.\textsuperscript{59}

\textbf{G) Employees Away on Leaves}

The Board applies the “sufficient continuing interest” test with respect to employees who are away on leaves, including disability leave.\textsuperscript{60} The pivotal question in applying that test is “…whether the individual had a reasonable likelihood of returning to active employment in the foreseeable future”.\textsuperscript{61} The two most important factors in this determination are the length of the employee’s absence from the workplace and the objective medical evidence as to the employee’s prognosis.\textsuperscript{62}

\textbf{H) Laid Off Employees}

In circumstances where there is a reasonable expectation of recall, employees who have been laid off will be included in the bargaining unit. The Board's policy is that there must be a "continuing, tangible felt relationship" between persons on lay off and the employer at the time of layoff and continuing during the layoff.\textsuperscript{63} Another way of expressing this is

\textsuperscript{55} \textit{Ibid.} at paragraph 28.
\textsuperscript{56} \textit{Ibid.} at paragraph 29.
\textsuperscript{57} \textit{Ibid.} at paragraph 31.
\textsuperscript{58} \textit{P.H. Foods Ltd.}, BCLRB No. 77/84 (Appeal of No. 121/83) at page 4 (Q.L.).
\textsuperscript{59} \textit{Re Okanagan Valley Transport Ltd.}, BCLRB No. B108/96 at paragraph 17. See also \textit{Re Langley City Foods Ltd. (Market Place IGA No. 98)}, BCLRB Decision No. B151/2006.
\textsuperscript{60} \textit{4020 Investments Ltd. (Dufferin Care Centre)}, BCLRB No. B430/2003 at paragraph 77.
\textsuperscript{61} \textit{Ibid.} at paragraph 91.
\textsuperscript{62} \textit{Ibid.}
\textsuperscript{63} \textit{Britco Structures Ltd.}, BCLRB No. B62/84 (Appeal of Nos. 295/83 & 332/83) at page 9 (Q.L.).
that there must be a reasonable expectation that the laid off employees will be recalled to work.\textsuperscript{64}

An important consideration for the Board is the existence of recall rights within the governing collective agreement. However, even if the collective agreement specifically provides for recall rights, the Board must go on to consider whether, on the facts, there is a reasonable expectation of recall.\textsuperscript{65} Thus, where an employer has lost a contract and there was no potential for recall, the laid-off individuals’ ballots from a representation vote were not counted.\textsuperscript{66} Similarly, where business forecasts revealed there was no likelihood of recall, the Board excluded laid-off employees in its calculation of the union’s threshold support for certification.\textsuperscript{67}

On the other hand, in \textit{Cicuto & Sons Contractors Ltd.},\textsuperscript{68} the Board included ten laid off employees in the bargaining unit although they had no enforceable right of recall. The Board relied on the company's past practice of laying off employees for two or three weeks over Christmas and then recalling them in the new year.

I) Terminated Employees

Where employees have been terminated but have challenged the termination by filing grievances, the Board has held that they maintain a sufficient, continuing interest in the bargaining unit so as to be able to vote regarding certification or decertification.\textsuperscript{69} The Board wrote in \textit{Canadian Inn (Coast Hotels Ltd.):} “To hold otherwise may allow employers to terminate an employee for the sole purpose of disenfranchising that person from voting in a potential representation vote.”\textsuperscript{70}

J) Employees Working Out of Province

\textsuperscript{64} \textit{Ratliffe & Sons Construction Company Ltd.}, BCLRB No. 456/84 at page 5 (Q.L.).

\textsuperscript{65} \textit{Re O’Connor Resources Ltd.}, BCLRB No. B437/97 at paragraph 14.

\textsuperscript{66} \textit{Ibid.} at paragraphs 14-19.

\textsuperscript{67} \textit{Re Western Industrial Clay Products Ltd.}, BCLRB No. B314/99 at paragraph 46.

\textsuperscript{68} BCLRB No. 52/87 at page 5 (Q.L.); Reconsideration at C271/88, although not on this point.

\textsuperscript{69} \textit{Canadian Inn (Coast Hotels Ltd.)}, BCLRB No. 153/85 (Appeal of No. 128/85) at page 2 (Q.L.) and \textit{Re 7-Eleven Canada Inc.}, BCLRB No. B91/2000 at paragraph 258. See also \textit{Re Playtime Peardonville Ventures Ltd.}, BCLRB No. B155/2008 at paragraph 43.

\textsuperscript{70} BCLRB No. 153/85 (Appeal of No. 128/85) at page 2 (Q.L.).
Employees with a presence in another province may nevertheless be employees under the British Columbia *Code* depending on the frequency and the degree of work performed out of province.\footnote{Re Surerus Pipeline Inc., BCLRB No. B218/98 at paragraph 47; Leave for Reconsideration dismissed in BCLRB No. B171/99.}

This situation may arise in seasonal construction work. The test to determine employee status of individuals in the construction industry is not one of “sufficient continuing interest” but rather the 30/30 rule described in *B.A.T. Construction Ltd.*\footnote{BCLRB No. B444/94 (Leave for Reconsideration of BCLRB Nos. B102/93 and B178/83) at page 23 (Q.L.).} Under this rule, a worker has employee status if he or she is working for the employer at the time of the application to the Board. Those not working at the time of application will be held to be employees if they worked for the employer in the 30 days preceding the application and have a reasonable expectation of re-employment in the 30 days following the application.

For example, the Board concluded in *Re Surerus Pipeline Inc.* that certain individuals working on a project in Alberta were not employees for the purposes of a raid application.\footnote{Re Surerus Pipeline Inc., BCLRB No. B218/98 at paragraph 57; Leave for Reconsideration dismissed in BCLRB No. B171/99.} This was so despite the fact that the vast majority of the company’s projects were in British Columbia and that British Columbia was the home base of some of the individuals.\footnote{Ibid. at paragraphs 7 & 48.} The Board concluded that residency was not a determinative factor and noted that, in relative terms, the nine-week project in Alberta could not be considered a temporary assignment in the context of seasonal construction work.\footnote{Ibid. at paragraphs 48 & 49.} Applying the 30/30 rule, the Board found that all of the workers were in Alberta at the date of the application to the British Columbia Board and, further, all remained in Alberta for the second 30-day period, and for some time thereafter.\footnote{Ibid. at paragraphs 52 & 54.} Thus, they were not British Columbia employees and so could not vote.\footnote{Ibid. at paragraph 57.}

In *Re McAsphalt Western Ltd.*,\footnote{BCLRB No. B420/2001.} the employer unsuccessfully argued that as it was Alberta based, the British Columbia *Code* did not apply. The fact that the company had no office or assets in British Columbia and its crew were typically hired in Alberta and worked in or out of Alberta was not determinative for the Board.\footnote{Re McAsphalt Western Ltd., BCLRB No. B420/2001 at paragraphs 3 & 22.} Rather, the Board...
applied the “frequency and degree of work performed elsewhere” test and ordered the representation vote be counted. The Board noted that work was being performed in British Columbia at the time of the certification application and that the employer regularly worked in the province. It observed that in the event certification was granted and there was no work in British Columbia, then the certification would have no application.

K) Religious Exemption: Section 17

The question of religious exemptions does not arise in the immediate context of certification as an employee is free to join or not join a trade union during an organizing drive. However, once a trade union is certified, it may negotiate a union security clause which will require union membership as a condition of employment. Thus, the organizer may face questions from employees with regard to religious exemptions.

The Board will apply a subjective test in considering an application for religious exemption pursuant to section 17 of the Code, as described in Cathleen Marie Duffy:

(1) It is the applicant's personal religious convictions which are under scrutiny, not the tenets of his/her religion. The test is subjective. The objection to trade union membership must be founded on deeply held, personal religious convictions and not on social, political, ethical, moral, or philosophical grounds.

(2) The applicant's objection must be to trade unions generally, and not to a particular union or to a particular action or policy of a union.

(3) The applicant's convictions must be irreconcilable with membership in any and all trade unions.

The employee seeking the exemption bears the burden of persuading the Board, on a subjective basis, that objection to union membership is not based on particular causes or policies but, rather, relates to joining trade unions generally or the paying of dues or other assessments to unions generally. So, where an employee objected to paying union dues based on her union’s “support for homosexuality” as evidenced by its efforts to obtain benefits for same sex spouses, the Board denied her application for an exemption,

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80 Ibid. at paragraphs 21, 22, & 25.
81 Ibid. at paragraphs 22 & 23.
82 Ibid. at paragraph 24.
83 BCLR No. B339/95 at para. 21. See also Bulthuis (Re), BCLR No. B71/2012 at paragraph 22.
writing: “As the Applicant does not object to unions generally, but only to this Union for
its policy on homosexuality, the application for religious exemption from dues payment
is denied.”85

However, the Board has held that an application for an exemption will not fail because an
applicant relies, "in part, on opposition to union actions or policies". Rather, the Board in
_Bulthuis_86 adopted the principle in _Cathleen Marie Duffy:_

> An applicant may have other objections to trade union membership, but as long
> as the individual has a bona fide objection on religious grounds, he/she is entitled
> to the exception sought: Cliff Straub, supra. (para. 22).87

Prior to 1987, an employee exempted from union membership for religious grounds was
still required to pay union dues. This requirement no longer exists. An employee may
now be exempted from union dues provided that equivalent payments are made to a
charitable organization. Generally, so long as the charity is registered under the _Income
Tax Act_, the Board will respect the exempted employee’s choice.88

A person exempted under this section may not vote on any trade union vote, or any vote
under the _Code_. However, the union must still represent the exempted employee fairly in
employment matters.

85 _Re Sheppard_, BCLRB No. B143/97 at paragraphs 1, 7, & 14.
86 _Re Bulthuis_, BCLRB No. B71/2012 at paragraph 29.
87 _Ibid._
88 _Cathleen Marie Duffy_, BCLRB No. B339/95 at paragraph 27.
Chapter 6

Who is an Employer?

A) The True Employer Test

In determining who the true employer is, the Board will apply the following analysis:

Two questions must be addressed:

(i) into which organization or undertaking are the employees integrated? and

(ii) which organizing or undertaking holds fundamental control over the employees?¹

The first question focuses on the employees. The second focuses on the alleged employer.² The control inquiry focuses on control over employees and not on control over the performance of work.³

The indicia in *York Condominium*⁴ are relevant to answer these two questions. However, there may be other relevant factors, and the weight the Board will give each factor will depend on the facts and the statutory purpose for which the analysis is undertaken. The assessment must also reflect the nature of the industry.⁵

The seven *York Condominium* criteria to establish employer status are:

1. The party exercising direction and control over the employees performing the work.

2. The party bearing the burden of remuneration.

3. The party imposing the discipline.

4. The party hiring the employees.

5. The party with the authority to dismiss the employees.

¹ *Columbia Hydro Contractors*, BCLRB No. B36/94 at page 37 (QL); Leave for Reconsideration denied, BCLRB No. B167/94.


³ *Re JJM Construction Ltd./Millang Enterprises Ltd.*, BCLRB No. B16/96.


⁵ *Columbia Hydro Contractors*, B36/94; Leave for Reconsideration denied, BCLRB No. B167/94.
6. The party who is perceived to be the employer by the employees.

7. The existence of an intention to create the relationship of employer and employees.

**B) A Purposive Approach**

The Board will adopt a purposive approach to the interpretation of employer.\(^6\)

It has stated the purpose of its true employer policy is:

…to further a fundamental *Code* principle that employees who choose access to collective bargaining should be certified with and represented by a union which can engage in meaningful collective bargaining with the entity which exercises real control over the working lives of those employees. The policy is designed to allow the piercing of sometimes complex business relations to determine which entity the Union, on behalf of the employees, should bargain with, based on a labour relations judgment regarding where the real locus of power over the working lives of the employees lies.\(^7\)

**C) Naming the Employer in an Application**

In determining the proper employer to name in the application, the union may be hampered by incorrect information and the employer's unwillingness to cooperate. Where the employer is a corporation, a company search should be performed to ensure the employer’s name is accurately recorded in the application to the Board.

If an error is made, the union may apply to amend the employer's name on the application. Minor amendments are routinely granted.\(^8\) On the other hand, if the error is substantive rather than technical, for example the wrong company is named, the union may apply to withdraw its application, and submit a fresh one. Alternatively, it could apply for a substantive amendment to its application.\(^9\)

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\(^6\) *Columbia Hydro Contractors*, B36/94 at page 26 (Q.L.); Leave for Reconsideration denied in BCLRB No. B167/94.


Chapter 7

Common Employer

(Labour Relations Code, Section 38)

A union may be able to extend an existing certification by making an application under section 38. Section 38 is a discretionary provision, which allows the Board to look behind the corporate veil and prevent companies from defeating the purpose of the Code. As explained in Re Greater Vancouver Transit Authority1: “[T]he Board does not permit legal form to dictate or undermine collective bargaining or other Code rights.”2

Thus, for example, the common employer provision prohibits the transfer of work historically performed by one company to a second non arm’s length company to the detriment of the existing bargaining unit.3 It covers the situation where one company purchases a second company, rendering the second company a wholly owned subsidiary of the first.4 It also applies to the party with the real power which manifests itself at the bargaining table but then hides to avoid the day-to-day obligations, that is, the administration of the collective agreement.5

The four elements of a common employer declaration are:

1. More than one entity carrying on business;
2. The entities must be under common control or direction;
3. The entities must be engaged in associated or related activities or businesses;
4. There must be a labour relations purpose to be served by the declaration.6

Some of the indicia of common control or direction include:

1. common ownership;
2. financial control;

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2 Ibid. at paragraph 30.
3 Re Kadola’s Sales & Transport Ltd., BCLR No. B324/2003 at paragraph 46.
6 Ibid. at paragraph 122.
3. contractual arrangements;
4. control of labour relations;
5. common management;
6. interrelationship or interdependence of operations; and
7. the representation to the public as a single integrated employer.

A common employer declaration may serve the following valid labour relations purposes:

1. to prevent the erosion of bargaining rights;\(^7\)
2. to remove roadblocks to viable structures for collective bargaining;\(^8\)
3. to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them;\(^9\)
4. to ensure the real power honours the obligations it agrees to in collective bargaining;\(^10\)
5. to maintain the current collective bargaining structure;\(^11\)
6. to protect the union’s certification and bargaining unit.\(^12\)

The Board will not exercise its discretion to issue a common employer declaration where the applicant seeks to increase existing rights rather than merely preserve them.\(^13\)

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\(^8\) Re McEwen, BCLR No. B200/2004 at paragraph 134.

\(^9\) Ibid.

\(^10\) Ibid. at paragraph 139.


\(^12\) Re Kadola’s Sales & Transport Ltd., BCLR No. B324/2003 at paragraph 46.

Chapter 8

Successor Employer

(Labour Relations Code, Section 35)

If an employer sells, leases, transfers or otherwise disposes of its business or part of its business to another, collective bargaining rights and obligations continue. The Board has described the purpose of the successorship provision in section 35 as being “to preserve collective bargaining as a continuing living relationship and not a series of discrete vignettes”.1

The Board follows a two-step analysis to determine if there has been a disposition of a business under Section 35 of the Code:

1. The Board determines the nature of the predecessor’s business and the assets used;
2. The Board then determines whether “there is a discernible continuity in the business or part of it” carried on by the predecessor and now carried on by the successor employer.2

In determining whether there has been a discernible continuity in the business or a part of it, the Board considers a number of factors: “transfer of assets; transfer of goodwill; transfer of a logo or trademark; transfer of customer lists; transfer of accounts receivable, existing contracts or inventory; any promises to maintain a good name or refrain from competing; whether the same employees are performing the same work; whether there is a hiatus in the business between the two companies; and whether customers of the predecessor are now serviced by the putative successor.”3 Re Granville Island Brewing Co. Ltd.4 summarizes the rules governing successorships:

1. A transfer of employment from a predecessor to a successor is not automatic. Employees cannot be transferred against their will from a predecessor to a successor employer. This right and the rights that flow from it and described below are often called “Verrin Rights” in reference to a B.C. Court of Appeal decision called BCGEU v. Government of British Columbia, et al5 (“Verrin”) and the affected employee in that case.

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4 BCLR No. B322/96 at paragraph 24.
5 [1988] BCJ No. 2009. Verrin Rights have been held to apply in divestments of government agencies from the public service to the health sector: British Columbia Public Service Agency v. Public Service
2. When a business, or part of it, is sold, leased, transferred or otherwise disposed of, the predecessor employer’s employees may be terminated or laid off by the predecessor employer as a result and may choose to exercise whatever rights they have against the predecessor employer under the collective agreement in force at the time of sale, lease, transfer or other disposition.

3. If the predecessor’s employees wish to continue employment with the successor, they may exercise that option, and their employment will continue to be governed by the terms and conditions of their collective agreement to which the successor employer becomes bound.

4. There is no guarantee that an actual job will be available with a successor nor is a successor obliged to create work to accommodate the total employee complement which may result from a successorship.

5. If there are no jobs or insufficient jobs available with the successor employer, then which of the employees in the total employee complement resulting from the successorship actually work, and which may be obliged to rely on recall or other rights under the collective agreement, will be determined by the terms of the collective agreement (seniority, qualifications or bumping) subject to any direction which the Board may give under Section 35(3)(d) and (e) of the Code.

6. Nothing precludes the successor from not continuing the employment of employees in the total employee complement resulting from the successorship for bona fide reasons such as lack of qualifications or seniority as may be specified by the collective agreement, or lack of positions or jobs.

7. The successor employer may not use the process of successorship to weed out what it perceives to be the undesirable employees, thereby circumventing the just cause provision of the collective agreement to which it becomes bound.

Some of the discretionary remedies awarded by the Board on successorship applications under section 35(5) include orders to:

1. dovetail seniority lists;\(^6\)
2. re-post positions;\(^7\)
3. treat employees of the predecessor employer as internal applicants;\(^8\)

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\(^7\) *Re Terasen Gas Inc.*, BCLRB No. B82/2004 at paragraph 37.

\(^8\) *Ibid.*
4. modify the seniority accrual provision of a collective agreement;\textsuperscript{9} and
5. make a position available by the successor employer for an employee who had been improperly “weeded out”.\textsuperscript{10}


\textsuperscript{10} \textit{Re Granville Island Brewing Co.}, BCLRB No. B322/96 at paragraph 26.
Chapter 9  
Appropriate Bargaining Unit  

(Labour Relations Code, Sections 18, 20, 21, 22)

A) Introduction

When employees decide to unionize, this results in an application for certification by the union they have chosen to represent them. Certification is nothing more than recognition by the Board of the applicant union’s exclusive bargaining status for that group of employees.

One of the tasks the Board performs upon receipt of a certification application is to determine whether the group of employees the union seeks to represent is appropriate for collective bargaining purposes. The process of defining which specific employees should be included in the union is referred to as the determination of the appropriate bargaining unit.1

It must be remembered that the unit applied for need not be “the most appropriate bargaining unit”2, only “a unit appropriate for collective bargaining”.3

B) Its Importance to Organizing

Appropriateness is relevant to organizing because it will necessarily affect the union’s strategy. Clearly, organizing all of the employer’s businesses spread throughout the province is a very different task that organizing the employees at one location.

Also, the question of appropriateness is the threshold issue at a certification hearing. As the Guide to the British Columbia Labour Relations Code (May 2003)4 notes on page 15: “The Board usually determines the appropriate bargaining unit before it can decide whether or not the union has the support of a majority of employees in that unit.” If the Board considers the proposed unit inappropriate, it will dismiss the certification application.

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3 Labour Relations Code, RSBC 1996, c 244, section 18(1).

4 Available online at: http://www.lrb.bc.ca/codeguide/
C) All-Employee Units

The Board favours all-employee units because they further industrial stability in collective bargaining.\(^5\) Conducting one set of bargaining and administering one collective agreement as opposed to two or three is preferred. Further, with only one union in the workplace, labour disputes are contained more easily.

In addition, the all-employee unit is attractive with respect to the lateral mobility of employees. Transfer or promotion to other positions with the employer may be impaired by the pressure of more than one union, each with its own seniority and benefit structure. Another attractive feature to the Board is that all-employee units will more readily result in parity in benefits and other employment conditions for employees.

That said, the Board will adopt a more flexible approach if the application is an initial certification application. See below.

D) The Board’s Approach

The Board’s policy with respect to appropriateness is summarized in the seminal case of Island Medical Laboratories Ltd.\(^6\) (“IML”). The test is whether the employees have a “community of interest”.\(^7\) The six community of interest factors are:

1. similarity in skills, interests, duties, and working conditions;
2. the physical and administrative structure of the employer;
3. functional integration;
4. geography;
5. the practice and history of the current collective bargaining scheme; and
6. the practice and history of collective bargaining in the industry or sector.\(^8\)

The consideration given to those factors depends on whether the application is an initial certification application or a subsequent one.

\(^5\) Island Medical Laboratories Ltd., BCLRB B308/93 (Reconsideration of IRC. No. C217/92 and BCLRB No. B49/93) at p. 23 (QL).

\(^6\) Ibid.

\(^7\) Ibid. at page 21 (QL).

\(^8\) Ibid. at pages 22-23 (QL).
Initial Certification Applications

On an initial application, the principle of access to collective bargaining is the Board’s primary concern. It mainly looks at only the first four factors. Furthermore, if the unit applied for is in a traditionally difficult sector to organize, the community of interest test is “relaxed”.9

The Board will apply a “building-block approach” to initial applications for certification. This means that although the Board prefers all-employee units, its policy “is to allow smaller or less than all-employee bargaining units in the first stage of certification in order to facilitate access to collective bargaining”.10 Subsequently, the scope of the initial bargaining unit may be broadened through variance or consolidation applications under section 142 of the Code in order to “build” towards the establishment of all-employee units.11

Subsequent Certification Applications

On a second or subsequent certification application, the Board will consider all six IML factors. The principle of industry stability is the most important principle. There is a presumption against multiple bargaining units, which increases markedly with the number of units.12

The Effect of the Addition of Section 2(b) to the Code

In some certification hearings, employers have argued that the Legislature’s addition of section 2(b) to the Code signals that the overriding consideration in the Board’s determination of appropriateness should be industrial stability. That 2002 amendment requires the Board to exercise its powers and perform its duties in a manner that “fosters the employment of workers in economically viable businesses”.

The Board rejected the argument that it should depart from a “building-block” approach in Aramark,13 writing at paragraph 87:

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11 Island Medical Laboratories Ltd., BCLRB B308/93 (Reconsideration of IRC. No. C217/92 and BCLRB No. B49/93) at p. 22 (Q.L.) and Re Compass Group Canada (Health Services) Ltd., BCLRB B194/2004 at paragraph 44.


In our view, the addition of Section 2(b) to the Code has not changed the fact that a balance must be achieved when determining whether a bargaining unit is appropriate. Section 2(b) is one part of the equation and cannot be considered in isolation.

E) Special Considerations – Craft, Technical and Professional Employees

General

Section 21(1) of the Code permits the certification of units of employees who belong to a craft or group exercising technical or professional skills. As the Board summarized in Re Jurisdictional Assignment Plan Umpire:\textsuperscript{14}

...Under Section 21(1), the Board is required to first find that a group of employees that a union seeks to represent, belong to a craft or group exercising technical or professional skills that distinguish them from other employees, and if so, to then determine whether the proposed bargaining unit is appropriate.\textsuperscript{15}

Craft Units

Craft units often arise in the construction industry.\textsuperscript{16} As the Board observed in Re Globe Mechanical (1991) Ltd.: “The craft structure allows the craft unions to individually represent their component crafts, and together, through the Building Trades Council, to represent a workplace as a whole.”\textsuperscript{17} It wrote in Re Spacan Manufacturing: “The traditional craft structure is the principal organizational tool available to building trades unions.”\textsuperscript{18}

In contrast, craft units outside of the construction industry are rarely considered appropriate units.\textsuperscript{19} The construction industry is considered unique due to the project-driven nature of the work and the role of the craft unions in supplying labour to perform

\textsuperscript{14} BCLRB No. B498/2000.

\textsuperscript{15} Ibid. at paragraph 38.


\textsuperscript{17} BCLRB No. B283/2000 (Leave for Reconsideration of B28/99) at paragraph 20.

\textsuperscript{18} BCLRB No. B75/2003 (Leave for Reconsideration of B203/2002) at paragraph 38.

that work through hiring halls.\textsuperscript{20} If a tradesperson is working at a fixed industrial facility rather than at a succession of construction sites, the bargaining structure and the role of the union will be different. As the Board explained in \textit{Chimo Structures Ltd.}:\textsuperscript{21}

\textit{The Plumbers would have the Board treat the situation at Chimo Structures as though the work there were evolving and proceeding in exactly the same way as the work on a construction site. To accede to the Plumbers would require that all the trades involved at Chimo Structures could, potentially, lay claim to separate certifications and separate collective agreements. That each of the trades could be separated into a craft unit as they are in the construction industry.}

\textit{This would be in conflict with the Board's policy with respect to appropriate bargaining units. The proliferation of bargaining units in the on-site construction industry is an exception to the Board's policy.}

Construction trades people are not limited to craft unions, however. They may choose between a bargaining unit organized along craft lines and an all-employee (also called wall-to-wall) unit. Either is an appropriate model of representation.\textsuperscript{22}

Only a craft union, such as the Carpenters, can apply to certify a craft unit under section 21(1). A non-craft unit would need to apply for certification (not organized along craft lines) under the \textit{Code}'s general certification provision, section 18.\textsuperscript{23}

It must be remembered that there is nothing preventing a craft union from applying to represent employees outside of its craft. Thus, a craft union could apply to certify an all-employee unit provided this was not a veiled attempt at encroaching on the membership of other craft unions.\textsuperscript{24} However, it would need to do so via regular certification process under section 18 rather than under section 21(1).

Some of the advantages of craft certification are set out in \textit{Re Globe Mechanical (1991) Ltd.} at paragraph 20:

\begin{quote}
20 ...Craft units, for example, are an exception to the Board's preference for all-employee units. In certifying a craft unit, the Board is prepared to certify what might otherwise be an inappropriate bargaining unit given that it may encompass
\end{quote}

\begin{thebibliography}{99}
\bibitem{sears} BCLR No. 5/76 at p. 5 (QL); cited with approval in \textit{Re Sears Canada Inc.} BCLR No. B236/2001, (Leave for Reconsideration of B241/2000) at paragraph 23.
\bibitem{ibid1} \textit{Ibid.} at paragraph 23.
\bibitem{ibid2} \textit{Ibid.} at paragraph 22.
\end{thebibliography}
less than all the employees, and often consists of only a single classification. But for Section 21, a craft unit would likely not be certified. Likewise, a craft union applying to represent a craft unit is not caught by the build-up principle: see Cicuto, at 97-98. Further, an application for certification for a larger unit which seeks to absorb a craft unit is treated as a raid, and the applicant must therefore meet certain requirements that would otherwise not apply: Vertex, at 23...

In deciding whether or not to certify a craft unit, the Board determines if:

1. one or more employees belong to a craft…that distinguish the employee(s) from the employees as a whole;

2. the applicant union is one pertaining to the craft; and

3. the proposed unit is otherwise an appropriate unit.25

In Re Spacan Manufacturing Ltd.,26 the Board summarizes its analysis:

60 In considering the first test, the Board identifies the nature of the craft, determines what training and skills are traditionally integral to the performance of the craft, reviews the job functions of the employees over a reasonable period, and decides whether the employees are performing skills central to the craft...The second test involves an examination of the applicant union's historical role and capacity to represent or promote the interests of the employees in the craft...In Cicuto and Sons Contractors Ltd., IRC No. C271/88, (1989), 1 CLRBR (2d) 63 ("Cicuto"), the Council found that the third test is satisfied in every construction craft union certification application case by ensuring that the description of the proposed craft unit conforms to the relevant standardized unit description. The Council stated: "...all of the standardized craft unit descriptions which are used have been determined to be 'otherwise' appropriate for collective bargaining...” (p. 81).

New Craft Units

The Board has been reluctant to certify craft unions in industries without an established practice of craft certification. Thus, when the International Alliance of Theatrical Stage Employees applied for certification of audio-visual employees at BC Place, the original and reconsideration panels dismissed it, in part, because audio-visual employees were not

25 Island Medical Laboratories Ltd., BCLRB B308/93 (Reconsideration of IRC. No. C217/92 and BCLRB No. B49/93) at p. 23 (QL) and British Columbia Place Ltd., BCLRB No. 44/87 (reconsideration of B346/84).

26 BCLRB No. B203/2002 at paragraph 60. Leave for Reconsideration was granted in B75/2003; however, the reconsideration panel did not comment on the original panel’s summary of the law in paragraph 60.
within a traditional craft jurisdiction. In *Re Sears Canada Inc.*, the Board applied similar reasoning: “…the Board has never recognized ‘service technicians’ as a craft…”

This general policy is reflected in its jurisprudence that the craft certification provision was never intended to be used “…as a vehicle for ‘discovering’ new ‘crafts’ and creating exotic new bargaining unit descriptions”.

**F) Consolidation and Appropriateness**

*Employer-Initiated Consolidations*

An employer may apply to consolidate separate bargaining units under section 142 of the Code. The Board will examine the following three factors on such applications:

1. A determination that one or more bargaining units is no longer appropriate.

2. A determination of what would constitute “an appropriate” bargaining unit, employing all six *IML* community of interest factors.

3. Evidence of potential or actual industrial instability.

The final factor is the most important.

As the Board summarized in *Re Farmer Construction Ltd.*:

> IML requires evidence of actual or potential industrial instability. As noted in *IML*, "actual" instability can include such things as multiple strikes, illegal work stoppages, and jurisdictional disputes "which are a result (direct or indirect) of the existence of multiple bargaining units". Potential instability "must amount to more than mere speculation; it must be unrest or instability that is both immediate and likely."

It went on to conclude in paragraph 42 that “…evidence of jurisdictional disputes is not, alone, evidence establishing industrial instability under the *IML* test for consolidation…”.

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27 *British Columbia Place Ltd.*, BCLRB No. 44/87 (Leave for Reconsideration of B346/84).


29 *Canadian Kenmore Division of Paccar of Canada Ltd.*, BCLRB No. 22/79 at p. 5 (QL).


When There is a Change in Employer – Consolidation & Successorship

When deciding how to consolidate existing bargaining units where one employer takes over from another, the Board still uses the IML analysis. In *Re Nechako Lakes School District No. 91*, the Board summarized:

27 The approach taken by the Board with respect to consolidation issues in the context of a successorship was reviewed in *Justice Institute of B.C.*, BCLRB No. B446/95 at pages 21 through 24. It concluded:

When the Board is exercising its jurisdiction under the successorship provision to create an appropriate bargaining unit for the successor's operation it will be guided by the appropriateness principles articulated in IML, supra, and it will give special weight [emphasis in the original] to the existing collective bargaining relationships. This does not mean that special units will always be preserved following a successorship. It must be possible to draw a rational and defensible line around a special unit which is to be preserved. Moreover, the exercise of the Board's discretion in accordance with these principles may in certain circumstances lead to an alteration or restructuring of existing collective bargaining structures. (p. 25)

PRACTICAL TIPS

1. Keep in mind that the bargaining unit description will define the initial perimeters for the collective bargaining that follows. Take the time to draft a careful description.

2. Make the description sufficiently broad to encompass those appropriately within the proposed bargaining unit, but not so loosely drawn as to sweep in people beyond the unit’s bounds.

3. Be as factually accurate as possible. For example, don’t make reference to “dependent contractors” in the description if there are none at the workplace on the off chance that the employer may engage such contractors at some point in the future.

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32 BCLRB B480/98.
4. If using a geographical reference in the description, consider whether employees will be working off site. If they are, use the descriptor “at and from” before the address of the workplace.36

5. Focus the description on the employees in the proposed unit rather than on job descriptions. This is because certification attaches to a group of employees rather than to job functions.37 An example of an employee-centred description is “all employees at 1234 Trade Boulevard, Vancouver, British Columbia”.


Chapter 10

Freeze Periods and Unfair Labour Practices

A) Unfair Labour Practices During Organizing

By Employers

Overlapping Nature of Unfair Labour Practices

Many of the unfair labour provisions overlap in their treatment of various kinds of employer conduct. It is advantageous to list as many sections as are reasonably applicable in filing an unfair labour practice complaint. Particular attention should be paid to sections 6(3)(a) and (b). If the employer's conduct fits within these sub-sections, the union and the employee obtain the benefit of the reverse onus position in section 14(7). The reverse onus requires the employer to establish that it did not commit the acts complained of by the union.

Scope of Communications to Employees

In 2002, the Legislature amended sections 6(1) and 8 of the Code with the effect of expanding “a person’s” right to express “views” to employees on topics such as “matters relating to an employer, a trade union or the representation of employees by a trade union”.¹ These changes mean that employers are no longer “limited to a neutral and accurate description of the certification and collective bargaining process or to commentary on its business”.² However, to fit within the protective ambit of section 8, the conduct at issue must be a “view”. Surveillance of union organizers by security guards is not an expression of a view.³ Loud, abusive language directed at organizers also goes beyond the expression of a view⁴ as do inquiries by and through a manager intended to identify union supporters during an organizing drive⁵. Nor do pre-formulated questions for employees to ask the organizing union prepared by the employer fit within the right to communicate provision.⁶ Further, the views must not be coercive or intimidating.⁷ Finally, as section

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¹ *Labour Relations Code*, RSBC 1996, c 244, section 8.
² *Re Excell Agent Services Canada Co.*, BCLRB No. B171/2003 at paragraph 35.
8 is not referentially incorporated into section 6(3), employer speech covered by section 6(3), such as threats or improper promises of a benefit are not “views” protected by section 8 either.8

Improper Promises

Section 6(3)(d) of the Code prohibits employers, or those acting on their behalf, from making promises designed to induce an employee to refrain from becoming or from continuing to be a member of a union. For example, in Re Ridgeway Mechanical Ltd.,9 the Board found the employer made an improper promise when one of the co-owners, who was also part of the bargaining unit, suggested that if employees decertified, there could be the same or more money.10 The Employer's promise of "better benefits", which is financial inducement can constitute a violation of sections 6(1) and 33(6) of the Code.11

Intimidation and Coercion

Intimidation and coercion are covered by a variety of provisions in the Labour Relations Code including sections 5(1)(d), 6(3)(d), 8 and 9. There is no definition of these two words in the Code. However, the Board provided useful guidance in Re Excell Agent Services Canada Co.12 as to their meaning:

69 Intimidation and coercion...have been defined as the use of force, threats, fear or compulsion for the purpose of controlling or influencing conduct. A threat, whether implied or actual, is a prerequisite for conduct to be characterized as coercion on intimidation. There has to be some sort of unfairly forceful pressure or threat of adverse consequences. The context of the statements, the relative power of the parties, and the ability to take action that would adversely affect the employees if they do not act in the desired manner are relevant factors to consider when deciding whether a threat has been communicated. The Board is more likely to find coercion and intimidation where the party exerting the pressure has the capacity to take action that would directly affect the employees concerned…13

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7 Labour Relations Code, RSBC 1996, c 244, section 8.

8 Re Excell Agent Services Canada Co., BCLRB No. B171/2003 at paragraph 44.


10 Ibid. at paragraph 48.


The Board also considered what was not coercion or intimidation in *Excell*. Social pressure or misrepresentations alone absent some kind of threat does not cross the line.\(^{14}\)

Examples of employer conduct that the Board has found to be coercive or intimidating include:

1. comments that the employer would close if the IBEW were certified;\(^{15}\)
2. surveillance of organizers and employee interaction with organizers, either by managers or by security guards, absent a compelling reason for the surveillance;\(^{16}\)
3. a senior manager’s initiation of a physical confrontation with organizers (knocking leaflets out of their hands, shoving, swearing);\(^{17}\)
4. comments by an employer mine that the mine’s economic viability was tied to the involvement of Ledcor in a joint venture and that Ledcor would only participate if CLAC represented employees as this conduct “conveyed the implicit threat that the mine will close if employees vote for the CAW”;\(^{18}\)
5. dismissing organizers, and a friend of an organizer, without proper cause;\(^{19}\)
6. comments by a co-owner of a business that employees would lose the work gained from the connection between that business and their employer if they were unionized;\(^{20}\) and
7. comments made by one employee during a decertification campaign to her co-workers that the CEO of the care facility where they worked had said that they would keep their jobs if they decertified even though the union had not proven that the CEO actually made such a statement. The Board held that it would have been reasonable for the other employees to believe what the worker told them and

\(^{14}\) *Re Excell Agent Services Canada Co.*, BCLRB No. B172/2003 at paragraphs 83 and 88.


\(^{18}\) *Re Taseko Mining Ltd.*, BCLRB No. B335/2004 at paragraph 15.

\(^{19}\) *Re The Brick Warehouse Corp.*, BCLRB No. B309/2002 at paragraphs 43 and 61.

that while the worker herself “…was not making a threat, she was exploiting the
fact that employees would reasonably have felt threatened to secure support for
the decertification campaigns”.  

8. Comments made by the employer that unionization would negatively affect its
business, and therefore implicitly threatened the job security of the employees.
The Board held that although the threat to job security was implicit and the
remarks were an expression of the employer's honest beliefs, the implied threats
can be coercive and intimidating.

Intimidation is also a tort or a civil wrong. Lambert J.A. summarized the elements of the
tort in No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British
Columbia:

193 The ingredients of this tort are that the plaintiff must show that the
defendant threatened to commit an unlawful act; that the threat, if it had been
carried out, would have caused damage to the plaintiff, either directly or through
the conduct of others in their dealings with the plaintiff; that the object and effect
of the threat was to cause damage to the plaintiff, directly or indirectly; that the
threat was communicated to the plaintiff or others; and that in response to the
threat the plaintiff altered its economic affairs to its detriment as a reasonable
response to the threat to it or, alternatively, that in response to the threat to
others, those others reasonably altered their dealings with the plaintiff, causing
damage to the economic interests of the plaintiff.

An individual or a union may sue an employer in the BC Supreme Court for the tort of
intimidation. Jurisdictional issues may arise where the intimidation is prohibited by the
Code, as well as by common law.

Intimidation, in the context of labour disputes, may also be subject to sections 422 and
423 of the Criminal Code. However, these provisions are not invoked frequently.

Anti-Union Dismissal, Lay-off or Discipline

Subsections 6(3)(a) and (b) makes it unlawful for an employer, or a person acting on his
or her behalf, to:

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21 Re Kiwanis Intermediate Care Society of New Westminster, BCLR No. B89/2004 at paragraphs 2, 51
to 54.


23 2000 BCCA 463.

24 Ibid. at paragraph 193 (in Lambert J.A.’s dissenting Reasons, but not on this point); Leave to Appeal to
(a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person

(i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or

(ii) participates in the promotion, formation or administration of a trade union.

(b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when a trade union is in the process of conducting a certification campaign for employees of that employer.

Dismissal of employees for anti-union purposes is, thus, unlawful.25 Due to the reverse onus that section 14(7) of the Code places on the employer with respect to alleged violations of sections 6(3)(a) and (b), the employer must show that anti-union animus was not a factor in its decision.26

Because an employer will rarely admit that it is acting with anti-union animus, the Board will scrutinize the circumstances. It will look at:

1. The employer’s previous attitude towards and treatment of similar conduct.

2. The employee’s previous disciplinary record.

3. The seriousness of the offence.

4. The employee’s level of union activity and role in the union.

5. The employer’s knowledge of union activity.

6. The manner in which the employer investigated and carried out the discipline/discharge.

7. The existence or absence of reasonable justification for the discipline/discharge.

8. The parties labour relations and bargaining history.27

25 The Delta Optimist, BCLRB No. 26/80 at pages 11 to 14 (QL version).


The Board has described the dismissal of organizers as “one of the most egregious acts that an employer can commit during an organizing drive”. 28 Not surprisingly, the Board found that dismissal in such circumstances also constituted employer coercion and intimidation.29

Under section 6(3)(b), an employer may only discharge, suspend, transfer layoff or otherwise discipline an employee during a certification campaign for proper cause. In *International Brotherhood of Electrical Workers, Local No. 230*,30 the Board summarized the elements of proper cause at paragraph 38:

1. An employer must establish that it acted in good faith and free from anti-union animus contrary to the unfair labour practice provisions of the Code. This is a corollary of the proposition that the proper cause standard is designed to protect the employees right to participate in a union.

2. An employer must establish that the employee engaged in conduct that deserved some discipline.

3. The Employer must establish a reasonable relationship between the impugned conduct and the chosen disciplinary response. This determination requires consideration of all the circumstances, recognizing that the Board is more deferential to an employer’s decision than an arbitrator applying the just cause standard under a collective agreement. Relevant considerations include: steps taken to investigate; whether an employee was given an opportunity to respond to allegations; the employee’s past record of discipline, the rationale for the penalty chosen, the nature of the operation, the manner in which similar cases have been addressed it [sic] the past and the seriousness of an offence in the particular employment setting. ...

The purpose of section 6(3)(b) is “to protect a union in the run-up to an application for certification”. The provision allows an employee to sign a membership card without fear of the employer relying on its common law right to dismiss without cause before the union files a certification application with the Board.31

When relying on section 6(3)(b), the onus is on the union to show that a certification campaign was underway.32 At a minimum, this means the union must be engaged in “a

29 *Ibid.* at paragraph 49.
serious attempt to recruit membership to satisfy the requirements for a certification vote”.

An example of a violation of section 6(3)(b) is an employer’s refusal to recall a worker involved in an organizing campaign. The Board found a violation of section 6(3)(b) although it made no finding with respect to whether the employer had acted with anti-union animus.

Interference with the Formation, Selection or Administration of a Trade Union

Given the overlapping nature of the unfair labour provisions, it should be noted that employer conduct that is coercive or intimidating may also constitute improper interference with the formation or selection of trade union, contrary to section 6(1) of the Code. For example, the employer’s decision in Convergys and N.W. Art in Motion to surveil organizers was not only coercive and intimidating, it also had a chilling effect on the organizing drives - breach of section 6(1). Similarly, the comments made on behalf of the employer in Harbour Electric Ltd. to the effect that the business would close if the IBEW were certified were not only “by their nature” intimidating, “the suggested link between the IBEW and the threat to continued job security improperly interfered with the selection of a union contrary to Section 6(1)”.

However, coercion and intimidation is not a prerequisite to a finding of a contravention of section 6(1). The Board has found improper employer interference where:

1. the employer inquired as to whether employees had joined the union;
2. the employer prepared a petition opposing union representation and followed some employees out of the meeting room asking whether they were going to sign the document;

33 Ibid. at paragraph 18.
34 Re Madden Enterprises Ltd., BCLRB No. B367/2003 at paragraphs 1, 11 and 46.
35 Ibid. at paragraph 46.
38 The Delta Optimist, BCLRB No. 26/80 at pages 6 and 7 (Q.L. version).
39 Ibid. BCLRB No. 26/80 at pages 9 and 11 (Q.L. version).
3. the employer prepared a memo the day before the representation vote, which purported to compare existing working conditions with those that would likely exist if the workplace unionized, but which contained inaccurate and misleading statements designed to influence employees in their choice about union representation;  

4. the employer made a blanket prohibition on the disclosure of employee contact information upon pains of dismissal; employees were subject to dismissal even if they disclosed their own independently acquired knowledge about their colleagues or if they had the consent of their co-workers to pass along their contact information to the union;  

5. the employer attempted to discredit unfairly the union organizer by expressing the view, including at captive audience meetings, that the organizer was untrustworthy and was acting out of personal vendetta against the company;  

6. the employer declared the employee break room a “campaign free zone”;  

7. the employer brought in a blanket prohibition against the display of union insignia in the absence of a compelling reason;  

8. the employer held a captive audience meeting requesting that all employees in the bargaining unit attend, at the Employer's premises and on employer time, while management stood in the doorway during the meeting. The employer then conducted a survey to see if there was a "consensus" among employees about being a union or non-union workplace; and the employer’s failed to advise the union of new employees and to remit dues on behalf of employees.

Financial or Other Support

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Section 6(1) prohibits an employer or a person acting on its behalf from contributing financial or other support to a trade union. The collective bargaining relationship is premised upon an “arm’s length” relationship between employer and trade union, and this is reflected in section 6(1).

The question of improper employer support often arises in the context of a decertification campaign. For example, the payment of legal fees of the employees spearheading the drive for decertification by the employer may constitute a violation of sections 6(1) and 33(6)(b). This is particularly so where the payment of legal fees is part of a concerted effort to promote decertification efforts.

The Board held in Re Certain Employees of Starbucks Coffee Co. that questions relating to whether the employer had offered to or was paying the legal fees of the decertification camp were not subject to solicitor-client privilege. In a subsequent case, it ordered counsel for Starbucks to produce particulars of any payment or consideration for legal services it or a related company rendered to Certain Employees.

Other employer conduct that may constitute improper financial support include paying a former employee to organize a rival union that the employer prefers to the incumbent.

Employers are also prohibited from offering “other support” to a trade union under section 6(1). For example, the BCGEU alleged that the employer violated section 6(1) when it assisted CLAC in a raid campaign by providing its organizer with employee lists, work schedules and access to employees during work hours.

Retaliation

Section 5 of the Code prohibits retaliation to a person by any person for participating in a proceeding under the Code. It states:

5 (1) A person must not

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49 Ibid (Re Certain Employees of Starbucks Coffee Co.).

50 Ibid. at paragraph 50.


52 Re Chron Holdings Ltd., BCLRB No. B294/2003 at paragraphs 8 and 11.

53 Ibid. at paragraph 4.
(a) refuse to employ or refuse to continue to employ a person,

(b) threaten dismissal of or otherwise threaten a person,

(c) discriminate against or threaten to discriminate against a person with respect to employment or a term or condition of employment or membership in a trade union, or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Code or because the person has made or is about to make a disclosure that may be required of the person in a proceeding under this Code or because the person has made an application, filed a complaint or otherwise exercised a right conferred under this Code or because the person has participated or is about to participate in a proceeding under this Code.

Who is Protected?

Many of the unfair labour provisions afford protection not only to “employees” but also to “persons”. Sections 5(1), 6(3)(a) and 9, for instance, all cover “persons”. The meaning of "person" within section 6(3)(a), then section 3(3)(a), was considered in Kamloops News Inc., 54 to be broader than simply an “employee” within an appropriate bargaining unit. In that case, the Board held that the employer had committed an unfair labour practice when it discharged an individual who was not an “employee” within the meaning of the Code. The Board stated:

Section 3(3)(a) prohibits certain conduct directed against employees. An employer may not discharge, suspend, transfer, layoff or otherwise discipline an employee. An employer may not refuse to employ a person, presumably a prospective employee or a person applying for employment with the employer regardless of whether that employment falls in or out of the bargaining unit, because that employee participates in certain trade union activities. Does the section stop there? We think not. One might restrict the phrase “refuse to employ a person” as meaning “refuse to employ a person who, if employed, would fall within the bargaining unit and fall within the definition of ‘employee’ within Section 1 of the Code”’. But that is not what that subsection states.

In fact, "person" probably also includes a dependent contractor, but not someone covered by the Canada Labour Code: see section 1.

Acting on Behalf of the Employer

54 BCLRB No. 302/84 (Appeal of No. 285/83).
The prohibitions set out in sections 6(1) and 6(3)(a) are directed not only at an employer but also at "a person acting on behalf of an employer". The test in determining whether a person is “acting on behalf of an employer” is whether there is an objective evidentiary link between the person and the employer. 55 The Board found that an employee who, in his discussions with his co-workers, stated that the employer would close if the IBEW were certified was held to be acting on behalf of the employer with respect to unfair labour practices under section 6. 56 The Operations Manager encouraged the employee to make these types of comments to his co-workers during the certification drive. 57

However, the alleged violator need not be another employee. In United North Shore Transportation Society, 58 the Board considered the circumstances where an agent of the employer would be considered to be acting for the employer in committing an unfair labour practice under section 3(3), now section 6(3). In that case the employer society, a non-profit organization, functioned as an outreach committee of St. David’s United Church. Reverend Smith was the pastor at St. David's. A union was certified and entered into collective bargaining with the employer. The parties failed to reach a collective agreement.

The employer society took the position that if it met the union's demands it would be unable to function because of its limited budget. Reverend Smith met with all the members of the bargaining unit and advised them that the society would have to disband because of unionization. He told them they would be terminated and that the service to the handicapped would be discontinued. He later met with all the individuals and asked them to sign typed letters laying out their intention to revoke the union membership and seek decertification. An application for decertification was subsequently made to the Board. The employer society testified that Reverend Smith was not a spokesperson for the society, had no authority to interfere in collective bargaining, and he was acting contrary to the Director's decisions. The Board had this to say about Smith's involvement:

Reverend Smith’s conversations and his meeting with the employees and his involvement in the decertification application, as well as union membership revocation, contravenes s. 3 of the Code. While not conclusively proved in evidence, we find the ties between Reverend Smith and the Society very close. The Society’s secretary, Mrs. Woodworth, is also secretary to Reverend Smith. He no doubt knew through his secretary the problems which faced the Society in coping with the Union. But was his action in initiating conversations with the employees regarding decertification out of his own concern or after direction of McLeod [the Society's chief negotiator] or others? On the basis of the evidence presented, we


57 Ibid. at paragraph 100.

58 BCLRB No. L66/81.
have concluded that Reverend Smith was given some “advice and guidance” before he met with the employees. On the balance of probabilities we have also concluded that it was McLeod or other members of the Society who assisted Reverend Smith. While we can accept that Reverend Smith acted because of his deep concerns for the continuation of the Society’s operations and whilst he identified himself to society employees as a “go between” and “neutral arbitrator”, the conclusion must be reached that no matter how innocently he did so “he was acting on behalf of the Society”.

The union may proceed against that third party alone and not proceed against an employer.

By Unions

Introduction

The problem of illegal union conduct and corruption amongst union officials is a troubling one. Often its existence is denied or, when that proves unfeasible, unions insist they can best deal with the problem themselves, without outside involvement. Persons advancing contrary positions are often ostracized for “disloyalty”, or anti-union motives. On the other hand, suspicion of government-imposed solutions, e.g. trusteeships, is understandable. Historically, that involvement has been frequently used to weaken, rather than strengthen the union movement by ridding it of this misconduct. As justifiable as that suspicion may be, the problem of union misconduct and illegality remains. It is not being dealt with satisfactorily on an internal basis by unions. It remains a continuing problem for union organizers, despite the fact that studies have demonstrated that except for a very small minority all unions and their officers act democratically and honestly. While several of the incidents referred to below occurred outside of a union organizing campaign, each became well known in a particular community and is representative of the kind of cases that make organizing more difficult.

For example, the 1996 election victory of Ron Carey, a reform candidate, for the presidency of the International Teamsters was overturned after a kickback scheme was discovered. Under the scheme, several hundreds of thousands of dollars of union funds were contributed to political organizations who, in turn, donated to Carey’s re-election campaign.59

In March 2004, Byron Boyd, Jr. International President of the United Transportation Union pleaded guilty to labour racketing conspiracy.60 He, the former International


President, and two other union officials solicited and accepted cash payments for election campaigns and other purposes from U.S. lawyers who wished to be included in the union’s Designated Legal Counsel program. Under the program, designated lawyers represent unionized rail workers advancing claims for workplace injuries under the Federal Employers Liability Act. Under the amended UTU Designated Legal Counsel Rules of Conduct, requests by UTU members for political contributions is prohibited and must be reported to the new Board of Ethics immediately.

International President, Paul C. Thompson, who took over from Byron Boyd, Jr. spoke of the damage done to the United Transportation Union in the wake of the racketeering scandal:

...I would be less than candid if I did not tell you that these charges and guilty pleas are devastating to this organization and have placed a black mark on this union and on the DLC program.

While I do not know all the evidence, I have read the indictments and plea agreements, and I have spoken with many of our members, and I will tell you again that this entire matter has done great damage to this union and its credibility.

In Re R.C. Purdy Chocolates Ltd., the union was found to have relied on four forged membership cards in its 1997 certification application. The board cancelled its certification:

This is an unprecedented case. It is the first time since the Labour Code was enacted in 1973 that a certification has been shown to have been obtained with forged cards. When the Union was certified in 1997 the certification process involved a largely card-based system. ...

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61 Ibid.


64 Paul C. Thompson, UTU International President, “Strong Medicine for DLC Abuse” (Statement to UTU Designated Legal Counsel, March 14, 2004), available online: http://www.utu.org/worksite/print_news.cfm?ArticleID=12617

52 There is no dispute that the Union was certified on the basis of at least four forged cards. It did not demonstrate, or even ask us to assume, that only four cards were forged. ...when deciding whether the integrity of the card based system can be protected without cancelling the Union's certification, we have taken into account the Union's failure to provide direct evidence about how its membership evidence was procured even though, before opening its case, it conceded four cards were forged.

53 When deciding whether the integrity of the card-based system could be preserved without cancelling the Union's certification we have also taken into account Bocking's statements in the media on the eve of the hearing. To suggest, as he did, that the four employees were liars, when he had ample reason to think otherwise, was deplorable. Moreover, in our view, when such public statements are later shown to be false, they serve to undermine the integrity of the card based system.

54 We have also taken into account the Union's failure to promptly reveal to the Board its own concerns about the four cards. Instead, it put the Applicants to the strict proof of a fact that it did not seriously contest. If it ever had a reasonable basis for disputing that the cards were forged it did not reveal that basis to the Board. In our view, the Union should have revealed its concerns about the cards to the Board as soon as it came to have such concerns and its failure to do so also serves to undermine the integrity of the card based system: District 69 Health Care Society Operating Eagle Park Health Care Facility, BCLR No. B193/95.

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57 We are mindful of the negative impact that our decision to cancel the Union's certification will have on Purdy's employees and, for that reason, we do so reluctantly. ...

Union Retaliation

Section 5(1) has been referred to earlier in this chapter in the context of company unfair labour practices. It applies with equal force to unions. Although the wording of section appears, at first blush, to offer wide protection given its prohibition against retaliation “because a person has ... exercised a right conferred by or under this Code”, the Board has constrained the scope of the provision in its jurisprudence. In Re Construction Labour Relations Assn. of British Columbia, the Board summarized:

12 ...Section 5(1) protects the rights of all persons under the Code, including employers, to invoke or become involved in Board proceedings without fear of

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coercion or retaliation from any other person. However, it does not provide a
broad right of protection from coercion or retaliation from the exercise of any
right under the Code by any person, regardless of whether the exercise of that
Code right is related to Board proceedings. The protection is specifically tied to
rights exercised in relation to Board proceedings...

In this case, two glass installation companies joined the Construction Labour Relations
Association, an employers’ organization. The Association wrote to the union advising
that it represented the two employer glass companies and that they would no longer
bargain an independent collective agreement. The union wrote back stating that it would
suspend indefinitely enabling for all jobs under the collective agreements that the
individual glass installation companies had concluded with it the month before. The
Board dismissed the section 5 complaint, explaining that although joining an employers’
organization was a necessary step for the employers’ organization to obtain accreditation
and that accreditation was a proceeding under the Code, there was:

17 … there is nothing to suggest that [the] Employers joined the CLRA in
furtherance of an application for accreditation. The CLRA is not an accredited
employers’ organization. There is nothing in the submissions to suggest that
application for accreditation is contemplated in the foreseeable future.67

One example where a union ran afoul of section 5(1) is set out in Re Graham.68 After an
aborted raid attempt, the union fined Mr. Graham $10,000 after finding him guilty of
violating its constitution for having “created dissention [sic] among the members of the
Union…and espoused dual unionism or disaffiliation and engaged in activities to secure
the disestablishment of the Union as the collective bargaining agent”.69 After 60 days, it
also wrote to the employer asking that Mr. Graham be removed from his position due to
his suspension from union membership for non-payment of the fine.70 Under the security
clause in the governing collective agreement, union membership was a condition of
employment.71

The Board chastised the union observing that the right to change unions was a
fundamental right under the Code.72 After the raid was voluntarily terminated, the
incumbent union’s actions against Mr. Graham were “entirely retaliatory” and, thus, in

67 Re Construction Labour Relations Assn. of British Columbia, BCLRB No. B301/2004 at paragraph 17;
Leave for Reconsideration was granted but the application was dismissed on its merits: BCLRB No.

68 BCLRB No. B302/98.

69 Ibid. at paragraphs 30 and 49.

70 Ibid. at paragraph 50.

71 Ibid.

72 Ibid. at paragraph 84.
violation of section 5. Calling the $10,000 fine “horrendous and ill-considered”, the Board wrote:

159...The Union has managed, in its conduct of this matter, to transform itself into every union member’s archetypal nightmare. Its deliberate conduct in this matter designed to punish a member for attempting to exercise rights conferred under the Code and gain access to Board procedures, as well as to punish him for refusing to denounce a fellow member similarly situated, did nothing to advance the trade union movement and, sadly, reflects poorly upon it.

It set aside Mr. Graham’s conviction on the charges laid under the union’s constitution and the $10,000 fine and prohibited the union from taking further disciplinary action against him relating to the aborted raid attempt for a period of five years in the absence of leave of the Board. It also ordered the union to pay Mr. Graham’s reasonable costs and disbursements in relation to both the union trial and the application to the Board. These were later calculated to be approximately $9,700.

Discrimination Regarding Membership in a Trade Union

Section 5(1) specifically prohibits discrimination or threats of discrimination with respect to membership in a trade union. That prohibition is echoed in section 10 which forbids a trade union from refusing membership or making a special levy as a condition of admission to membership in the trade union or council of trade unions.

The Board offered the following guidance with respect to what is “discriminatory” in relation to organizing in Re Graham:79

78 The concept of "discriminatory" conduct has been examined by numerous labour tribunals, and has been most recently reviewed the Canada Labour Relations Board in Fortin and CUPW adopting and confirming the following inclusive definition originally set out by the Nova Scotia Labour Relations Board in McCarthy and I.B.E.W., Local 625, [1978] 2 Can LRBR 105 at p. 108:

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73 Ibid. at paragraph 119.

74 Ibid. at paragraph 129.

75 BCLRB No. B302/98 at paragraph 159.

76 Ibid. at paragraph 156.

77 Ibid. at paragraph 160.


79 BCLRB No. B302/98.
... the word "discriminatory in this context means application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the [applicable human rights legislation]; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made.

To this I add, paraphrasing the Nova Scotia Board, that a distinction will also be most clearly illegal where it is based on considerations implicitly or expressly prohibited under the Code.

Put more simply, the Board asks “Was [the membership] application treated in a like manner as others? If not, was there a good reason for treating it differently?”

It should be noted that a distinction in membership applications drawn improperly on human rights grounds such as sex, race, or age is not only prohibited by the Labour Relations Code but also section 14 of the Human Rights Code.

Another clear example of discrimination is a differential initiation fee structure which depends upon whether or not the person joins the union before or after certification. Section 10(3) of the Labour Relations Code operates to deem these differential fees to be discriminatory.

The Board has found unions to have acted in a discriminatory manner in relation to membership applications by:

1. deferring consideration of a worker’s membership application for several months pending the resolution of a claim for damages against the union arising from a section 12 complaint the worker had previously filed;
2. singling out a worker’s travel card for scrutiny and applying a stricter standard for its review not previously applied to applicants; and

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83 Ibid. at paragraphs 55 to 58.
3. requiring a worker to attend a hiring committee meeting as a pre-condition to accepting a transfer card.\textsuperscript{84}

\textbf{Coercion and Intimidation}

Like employers, unions are also subject to the prohibition against the use of intimidation or coercion. Section 9 provides that “a person”, which by its definition in section 1 includes a “trade union”, “must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become … or continue … to be a member of a trade union”.

Unions have violated section 9 when their organizers have made inaccurate statements regarding union security clauses. For example, in \textit{Re R.C. Purdy Chocolates Ltd.}\textsuperscript{85} organizers wrote in a bulletin to workers: “In all the collective agreements negotiated…, joining the union is a requirement of employment…If someone wishes to work at Purdy’s, they will have to join the union.”\textsuperscript{86} In a similar vein, organizers in \textit{Re Excell Agent Services Canada Co.},\textsuperscript{87} told workers that they could lose their jobs in two weeks if the union were certified and they did not sign a card.\textsuperscript{88} The Board concluded in both cases that the statements were not accurate as a union security clause had yet to be negotiated and that, taken from an objective standpoint, the misstatement could coerce or intimidate an employee into joining the union.\textsuperscript{89}

In \textit{Re Excell}, the union raised unsuccessfully the argument that because it had no ability to carry through on threats of loss of a job, its conduct was neither coercive nor intimidating.\textsuperscript{90} The Board observed that the test was not whether the speaker had actual authority to carry through on the threat but whether there was a reasonable apprehension that it could do so.\textsuperscript{91} Because reasonable employees would not have understood the workings of union security clauses, the organizers’ comments could reasonably have led some workers to believe the threat could be acted upon.\textsuperscript{92} Thus, the Board wrote:

\begin{footnotes}
\footnote{\textit{Re Rezansoff}, BCLRB No. B328/96 at paragraphs 1 and 38 to 41; Leave for Reconsideration denied in B398/96.}

\footnote{BCLRB No. B419/97.}

\footnote{\textit{Ibid.} at paragraph 13.}

\footnote{BCLRB No. B172/2003.}

\footnote{\textit{Ibid.} at paragraph 86.}

\footnote{\textit{Re R.C. Purdy Chocolates Ltd.}, BCLRB No. B419/97 at paragraphs 18 to 20 & \textit{Re Excell Agent Services Canada Co.}, BCLRB No. B172/2003 at paragraphs 87 to 92.}

\footnote{BCLRB No. B172/2003 at paragraphs 87 to 92.}

\footnote{\textit{Ibid.} at paragraph 94.}

\footnote{\textit{Ibid.} at paragraph 96.}

\footnote{\textit{Ibid.} at paragraphs 96 and 97.}
\end{footnotes}
Viewing the statements...from the perspective of [a] reasonable employee, it is conceivable that fear of loss of a job could influence an individual’s choice to join a union. I accept that under an objective test a message about a threat to job security could impair the ability of employees to decide.\(^{93}\)

Not all misstatements made by union supporters will constitute intimidation or coercion, however. For example, in *Re British Columbia Lottery Corp.*,\(^{94}\) a reconsideration panel of the Board set aside a finding of a section 9 violation. In this case, a union supporter overstated the protections against layoffs the Code offered workers upon certification.\(^{95}\) The reconsideration panel observed that there was no suggestion that the worker in question had any power to affect other employees’ job security or otherwise visit adverse consequences upon them if they did not agree with his advice.\(^{96}\) The panel concluded:

> While the e-mail undoubtedly addressed the employees’ fears occasioned by the announcement of layoffs, far from increasing those fears, it could at most have only provided a false sense of reassurance that certification would provide protection from layoff. As Wong's misstatement about the level of protection from layoff accorded by the Code was neither threatening nor fear-inducing, the mere fact that it was objectively likely to influence the vote is not in itself enough to transform it from a persuasive (albeit mistaken) statement by one employee to others into an intimidating or coercive one within the meaning of Section 9. In order to "cross the line", the employee misrepresentation must be "so outrageous or inflammatory that it places undue or excessive pressure" upon employees (*BC Housing*, page 11).\(^{97}\)

More recently in *Translink Security Management Ltd.*, the Board held:

> Even if I were to accept COPE’s assertions in this regard (which are disputed by the TPPA) I would find that they do not establish intimidation or coercion, but rather fall within the realm of puffery and salespersonship. The bargaining unit members are adults, not children, and it should not be expected that they will passively accept puffery, salespersonship or peer pressure: T. Jordan, para. 9 and Lansdowne Dodge City Ltd., BCLRB No. B165/97, [1997] B.C.L.R.B.D. No. 165, para. 46. There is an obligation on employees to make inquiries and render an independent decision.\(^{98}\)

\(^{93}\) *Ibid.* at paragraph 92.


\(^{95}\) *Re British Columbia Lottery Corp.*, BCLRB No. B289/2003 at paragraph 5.

\(^{96}\) *Ibid.* at paragraph 48.


\(^{98}\) BCLRB No. B76/2014 at paragraph 95.
Finally, it should be pointed out that the prohibition against intimidation and coercion may be invoked by one union against another. For example, the IWA unsuccessfuully argued that the HEU had violated section 9 when, among other things, an HEU member called an IWA organizer “a scab”, advised employees at Burnaby Hospital not to talk to him, and not to attend an IWA meeting scheduled at the hospital.99 The Board dismissed the section 9 complaint:

6...as the IWA has not established that Switzer acting on behalf of the HEU used actual or implied threats or was a person who exercises “employer-like” influence, I find no basis to conclude that the HEU intimidated or coerced employees...100

Organizing at the Employer’s Place of Business During Working Hours

Section 7(1) of the Code prohibits a union from engaging in organizing activity at the workplace during work hours. However, the ban against organizing contained in section 7 is not absolute. For example, an on-duty employee may attempt to organize co-workers during lunch breaks or coffee breaks.101 The Board explained in Cominco Ltd.102:

Questions could arise concerning what constitutes “working hours”. We reject the notion, argued for by the company, that since its operations are continuous, all hours are working hours. The question must be answered by reference to the particular employee. If employees are away from their work stations, having a lunch break or coffee break, we do not consider that time to be during “working hours”, notwithstanding that other employees may still be working...

In Re Coast Mountain Buslink Co., the Board held that organizers could approach bus drivers on “schedule recovery time” who had gotten off the bus to attend to personal needs.103 Although schedule recovery time was not break time but rather time designed to make up for lost travel time during which drivers remained subject to the control of supervisors, the evidence was overwhelming that, “time permitting and absent any further direction from supervisors”, the consistent practice was for drivers to take a personal break after having completed their required duties.104 The safety concerns advanced by

99 Re Industrial Wood and Allied Workers of Canada (I.W.A. Canada), Local Union Number 1-3567, BCLRB No. B275/2004 at paragraph 4.  
100 Re Industrial Wood and Allied Workers of Canada (I.W.A. Canada), Local Union Number 1-3567, BCLRB No. B275/2004 at paragraph 6. 
101 Re Lansdowne Dodge City Ltd., BCLRB No. B165/97 at paragraph 57.  
102 No. 72/81 (Reconsideration of No. 59/81) at page 8 (QL).  
103 Re Coast Mountain Buslink Co., BCLRB No. B410/99 at paragraph 77.  
104 Ibid. at paragraph 76.
the employer ceased when the driver had completed his or her duties and left the bus to attend to personal needs.\textsuperscript{105}

It is important to emphasize that, to comply with section 7(1), both the employee doing the organizing and the employee being organized must be on their own time.\textsuperscript{106}

Nor is there an absolute right for inside organizers to organize during breaks. If the employer has compelling reasons for prohibiting such activity, it may be illegal. For example, if the employer can establish that the organizer was materially interfering with workplace safety, destroying company property, or creating a serious disturbance or obstruction, then the company may prevent such interference.\textsuperscript{107} In \textit{Re Coast Mountain Buslink Co.}, for instance, the Board prohibited organizing of drivers inside buses because of safety concerns, even if the drivers were on break.\textsuperscript{108}

Organizing activities include:

1. having conversations about unionization that go beyond merely stating that membership cards should be signed during non-working hours;\textsuperscript{109}

2. placing pro-union stickers or banners on employer property;\textsuperscript{110}

3. signing membership cards;\textsuperscript{111}

4. approaching co-workers and asking whether they had been given an opportunity to sign a membership card;\textsuperscript{112} and

5. disseminating pro-union material at the workplace.\textsuperscript{113}

\textsuperscript{105} \textit{Ibid.} at paragraph 78.

\textsuperscript{106} \textit{Re Sears Canada Inc. (Victoria)}, BCLRB No. B302/96 at paragraph 75; Leave for Reconsideration granted but not with respect to the finding of a section 7(1) violation: BCLRB No. B216/97.

\textsuperscript{107} \textit{Cominco Ltd.}, No. 72/81 (Reconsideration of No. 59/81) at page 6 (Q.L. version).

\textsuperscript{108} BCLRB No. B410/99 at paragraph 80.

\textsuperscript{109} \textit{Re EBN Grainco Inc.}, BCLRB No. B400/2000 at paragraph 18.

\textsuperscript{110} \textit{Re Coast Mountain Buslink Co.}, BCLRB No. B410/99 at paragraph 81.

\textsuperscript{111} \textit{Re Lansdowne Dodge City Ltd.}, BCLRB No. B165/97 at paragraph 70.

\textsuperscript{112} \textit{Re Sears Canada Inc. (Victoria)}, BCLRB No. B302/96 at paragraphs 12 and 75; Leave for Reconsideration granted but not with respect to the finding of a section 7(1) violation: BCLRB No. B216/97.

\textsuperscript{113} \textit{Re Wal-Mart Canada Inc.}, BCLRB No. B90/98 at paragraph 139; Leave for Reconsideration dismissed in BCLRB No. B176/98.
On the other hand, the Board has concluded that the following did not constitute organizing:

1. wearing a union pin;\textsuperscript{114} or

2. stating simply “I’m the union supporter you see about cards”.

The Board has observed that although stating “I’m the union supporter you see about cards” is not organizing as it does not involve an attempt at persuasion, there is a fine line between casual conversation and persuasion.\textsuperscript{115} The Board commented that had the organizer gone beyond merely identifying herself as the person to see about membership cards by, for example, arranging subsequent meetings to discuss the benefits of unionization, the conduct might have crossed the line.\textsuperscript{116}

A question may arise not only as to what constitutes “working hours” but what constitutes the “employer’s place of employment” under section 7(1). For example, in \textit{Re Coast Mountain Buslink Co.},\textsuperscript{117} the Board considered whether buses, bus loops or terminuses were employer property. Buses and bus loops were\textsuperscript{118} but that terminuses were not:

\begin{quote}
80 ...on-street terminuses do not constitute Employer property or places of work... Such a terminus is no more than a geographic point at which a bus route ends. They are mere notional points on the street, i.e. municipal property. Consequently, while the Employer in its letter of September 14, 1999 was acting within its full authority to preclude organizing on its property, it is powerless to preclude organizing at terminuses. ...
\end{quote}

\textbf{Duty of Fair Representation}

Section 12 of the Code imposes a duty of fair representation upon unions. By the words of that section, a union must not act in an arbitrary, discriminatory or bad faith fashion “in representing any of the employees in an appropriate bargaining unit”. The duty arises from the date of certification\textsuperscript{120} and continues for as long as certification is held.\textsuperscript{121} Thus,\textsuperscript{114} \textit{Ibid.} at paragraphs 139 to 141.

\textsuperscript{115} \textit{Re Wal-Mart Canada Inc.}, BCLRB No. B90/98 at paragraph 139; Leave for Reconsideration dismissed in BCLRB No. B176/98 at paragraphs 138 and 141.

\textsuperscript{116} \textit{Ibid.} at paragraph 141.

\textsuperscript{117} BCLRB No. B410/99.

\textsuperscript{118} \textit{Ibid.} at paragraphs 2(9) and 70.

\textsuperscript{119} \textit{Re Coast Mountain Buslink Co.}, BCLRB No. B410/99 at paragraph 80.

\textsuperscript{120} \textit{Re Capostinsky}, BCLRB No. B340/97 at paragraph 56.
the section 12 duty applies to the union’s negotiations leading up to a collective agreement.\textsuperscript{122}

Acting arbitrarily means acting randomly or without any course of reason.\textsuperscript{123} It encompasses three elements. A union will not be acting arbitrarily if it:

1. ensures it is aware of the relevant information;
2. makes a reasoned decision; and
3. does not carry out representation of the member with blatant or reckless disregard.\textsuperscript{124}

Ensuring that it is aware of relevant information is self-explanatory. With respect to grievances, it generally means that the union must conduct an adequate investigation. This may involve consideration of the sequence of the event, learning the member’s point of view, and speaking to potential witnesses.\textsuperscript{125}

A reasoned decision “is demonstrated by a reasonable and rational connection between relevant considerations and the decision made”.\textsuperscript{126} The threshold appears to be quite low: “Typically where a union gives reasons for its decision it will not be arbitrary.”\textsuperscript{127}

Discriminatory representation means drawing a distinction on the basis of a prohibited ground as set out in the \textit{Human Rights Code}. It also covers “personal favouritism”.\textsuperscript{128}

Finally, there are two categories of bad faith representation. The first is representation tainted by an improper purpose. An example would be if the union’s decision with respect to a particular employee was rooted in personal hostility or political revenge.\textsuperscript{129}


\textsuperscript{122} \textit{Ibid.} at paragraph 38.

\textsuperscript{123} \textit{Re Judd}, BCLRB No. B63/2003 at paragraph 58.

\textsuperscript{124} \textit{Re Judd}, BCLRB No. B63/2003 at paragraph 61.

\textsuperscript{125} \textit{Ibid.} at paragraph 63.

\textsuperscript{126} \textit{Ibid.} at paragraph 65.

\textsuperscript{127} \textit{Ibid.} at paragraph 66.

\textsuperscript{128} \textit{Ibid.} at paragraph 56.

\textsuperscript{129} \textit{Ibid.} at paragraph 50 and \textit{Rayonier Canada (B.C.) Ltd.}, BCLRB No. 40/75 at page 5 (QL).
The second is representation tainted by dishonesty. The Board writes about this second category of bad faith representation:

53 ...[I]t is important to emphasize that what is prohibited by Section 12 is bad faith representation. Section 12 does not give the Board any general authority to intervene when someone lied to someone else. However, if a union's dishonesty directly affects the quality of the union's representation of an employee's interests, that could be representation in bad faith.\textsuperscript{130}

This being said, the protection in section 12 is narrow.\textsuperscript{131} First, section 12 applies only to matters that fall within the union’s exclusive bargaining agency. It does not apply to matters outside the union’s exclusive bargaining agency even where the union has voluntarily involved itself in such matters.\textsuperscript{132} Second, the union conduct at issue must be arbitrary, discriminatory or in bad faith.

In the seminal decision of \textit{Mervin Klaudt}, the Board observes that unions have traditionally been given “...a wide latitude with respect to the manner in which negotiations are conducted and with respect to the provisions that may or may not be included in collective agreements. ...”\textsuperscript{133} Inevitably, there will be competing interests at play. The Board comments:

\textit{The Board recognizes that in an effort to obtain the maximum benefits for its membership, a trade union may be forced to make critical choices and trade-offs that may affect its membership unequally and that a trade union may be required to go so far as to abandon in some respects the interests of certain individual members. Trade-offs between trade unions and employers form the essence of collective bargaining. Trade unions are frequently required to balance the interests of various groups within the bargaining unit and this is particularly the case with unions with broad-based bargaining units. For these reasons, the Board allows trade unions a wide latitude respecting its conduct during collective bargaining. The Board will only intervene when the trade union’s conduct is blatantly arbitrary or discriminatory or when it can be concluded that the employees affected have not been treated in good faith.}\textsuperscript{134}

Another important point to remember when considering the duty of fair representation is that while there is no limitation period set out in the \textit{Code} for the filing of section 12 complaints, employees cannot sit on their rights indefinitely. As explained in \textit{Re Judd},

\textsuperscript{130} \textit{Re Judd}, BCLRB No. B63/2003 at paragraph 53.


\textsuperscript{133} \textit{Mervin Klaudt}, BCLRB No. B85/93 at page 2 (QL).

\textsuperscript{134} \textit{Mervin Klaudt}, BCLRB No. B85/93 at page 3 (QL).
while a complainant is expected to complete any internal appeal process before filing a section 12 complaint, acceptable delay is measured in “months not years”. A complaint filed within two months is generally acceptable; however, one filed after 12 months will generally be dismissed unless there is a compelling explanation for the delay.

Remedies

As a general rule, the Board exercises its remedial powers in a compensatory rather than punitive fashion:

84 Generally, a remedy should be compensatory and not punitive in nature. As far as possible, it should place the injured party in the position it would have been in had the breach not occurred. There should be a clear connection between the remedy ordered, the violation of the Code and its consequences... In addition, the remedy should promote the duties under the Code which include [those described in section 2]...

Section 14 governs the Board's power to order an appropriate remedy for unfair labour practices. It includes the power to grant cease and desist orders (section 14(4)(a)) as well as orders re-instating an employee in his or her position or to membership in the union (sections 14(4)(c) and (d)). Under subsection 14(4)(f), it is also open to the Board to order certification if it is of the view that but for the unfair labour practice, “the union would likely have obtained the requisite support”.

The Board also enjoys general remedial authority under section 133 of the Code. Its discretionary remedial authority in section 133 includes the power “to rectify a contravention of this Code” (section 133(1)(b)), “to refuse to make an order, despite a contravention” (section 133(1)(c)), and to set the “monetary value of an injury or loss suffered” (section 133(1)(d)).

Remedial certification applications, the Board comments in Re Viva Pharmaceuticals Inc., “are not uncommon, but have been granted relatively rarely”. In 1997, three such applications were granted out of 52. In 1998 and 1999, none were granted out of 50 and 51 applications respectively. More recently, in 2013, none were granted out of 11


136 Ibid.

137 Re CJS Victoria Inc. (CopperJohns), BCLRB No. B46/2004 at paragraph 84.


139 Ibid.

140 Ibid.
applications, and in 2014 and 2015, one application was granted out of 18 and 5 applications respectively.\textsuperscript{141} The Board’s reluctance to use this remedy is explained:

108 The fundamental policy underlying remedial certification has remained constant: namely, the desire to ensure employees free choice in deciding whether or by whom they wish to be represented. The desire to protect that freedom against improper action by the employer is tempered by recognition that too ready a use of remedial certification may have the effect of visiting the sins of the employer upon the very people the legislation is intended to protect by denying them a voice in the process. The task of the Board involves a balancing of these competing values. The cases reflect the desire, on the one hand, to provide a meaningful remedy where the more traditional cease and desist order would not do so and to provide a real disincentive by depriving the offender of the fruits of its unlawful conduct. The desire, on the other hand, to ensure that wherever possible collective bargaining should be based on the wishes of the majority of employees in the bargaining unit (\textit{Cardinal}, supra, para. 328) and not foisted upon employees who do not want it, is reflected (a) in a reluctance to impose certification where the Board is not satisfied that the Union's campaign has sufficient momentum to lead to a majority of support, (b) findings that some other remedy short of certification will be sufficient effectively to address the employer's misconduct (see \textit{Cardinal}, supra, para. 328); (c) where certification is granted, the imposition of conditions relating to the composition of the bargaining committee or requiring that any settlement be subject to a ratification vote; as well as (d) reminders that certification is not necessarily for ever, and that if the employees are dissatisfied they can apply for decertification in due course.\textsuperscript{142}

The six factors the Board will consider in deciding whether to order remedial certification are set out in \textit{Re Cardinal Transportation B.C. Inc.}:

317 In deciding whether a union would likely have obtained the requisite majority support, we will consider the following factors:

(1) the level of membership support prior to and subsequent to the employer's unfair labour practice;

(2) the seriousness of the employer interference and the reasonable effect (assessed objectively) of that interference on employees;

(3) the point or stage in the organizational drive of the employer's interference;

\textsuperscript{141} BC Labour Relations Board, Annual Report (2015), available online at: \url{http://www.lrb.bc.ca/reports/}.

\textsuperscript{142} \textit{Re Viva Pharmaceuticals Inc.}, BCLRB No. B9/2002 at paragraph 108.
(4) if less than a majority of employees are members of the trade union, whether there is adequate or sufficient support to conduct collective bargaining, (i.e. negotiation, representation, etc.);

(5) the "totality of the conduct" of the employer; and

(6) the specific nature of the employer and the employees.\(^{143}\)

On the other end of the spectrum, where a union has engaged in serious misconduct during organizing, such as relying on forged membership cards, it may see its certification cancelled as a remedy.\(^{144}\)

A costs order is a possible, although exceptional, remedy.\(^{145}\) Under section 133(1), the Board may order costs.\(^{146}\) However, “[a]s a general rule, and unlike the courts, the Board does not award legal costs to successful litigants.”\(^{147}\) Costs have been awarded in the face of repeated failure to comply with previous Board orders\(^{148}\) and where there have been “exceptional and compelling circumstances.”\(^{149}\)

Other useful remedies that the union may wish to seek include orders that the employer provide it with employee contact information, allow meetings with union representatives on company time, and post the Board’s determination on the unfair at the workplace. For example, in *Re Taseko Mining Ltd.*, to remedy the employer’s improper interference with the employees’ selection of their bargaining agent and its coercive and intimidating actions, the Board ordered that the employer:

1. cease and desist its unfair labour practices;

2. allow the union access to the employee parking lot for a period of time;

\(^{143}\) BCLRB Decision No. B344/96 at paragraph 317. See also *Re Peter Ross 2008 Ltd.*, BCLRB No. B104/2012.


\(^{145}\) *Re Wal-Mart Canada Inc. (Kamloops Store No. 3040)*, BCLRB No. B454/98 at paragraph 24.

\(^{146}\) *Ibid.*


\(^{148}\) *Re Kaspar (c.o.b. Kaycee Enterprises)*, BCLRB No. B228/96 at paragraph 67.

\(^{149}\) *Re Northern Health Authority (Prince Rupert Regional Hospital)*, BCLRB No. B9/2014 at paragraph 27.
3. schedule one-hour paid meetings, without managers, for employees to meet with a union representative at the workplace;

4. post one unaltered copy of this decision on the employee bulletin board;

5. provide the Board with three sets of employees’ names and addresses on adhesive labels (If the union provided mail-out materials in pre-stuffed, pre-paid envelopes, the Board would post the materials to workers.); and

6. permit workers to carry printed material on the mine site and receive printed material on the mine site during break times.\(^\text{150}\)

If the unfair labour practice occurs on the eve of a representation vote, the union should request that the tainted vote not be counted and a new vote ordered. This was the remedy in *Re British Columbia Lottery Corp.*\(^\text{151}\)

Another important aspect of the Board’s remedial authority is set out in section 135 of the Code. This provision allows a Board order to be filed in British Columbia Supreme Court. If a Board order is filed in this way, it is treated as though it is a court order. In the event of non-compliance, the panoply of enforcement mechanisms available to court orders becomes available with respect to the filed Board order.

A case in which the Board made such an order is *Re Medarb Services Ltd.*\(^\text{152}\). In *Medarb*, the employer had not paid its half of arbitration costs, so the ADR provider sought and obtained an order from the Board that the Employer pay its share of the invoice and that the Board’s order be filed in Supreme Court.\(^\text{153}\) If the Employer continued to refuse to pay, it would be open to the arbitration company to register the filed order against the Employer’s property or begin contempt proceedings in court.

**B) Freeze Periods**

The Code contains a number of freeze provisions that cover different windows of time during the life cycle of the collective bargaining relationship. With respect to the establishment of a new bargaining relationship, their purpose is “…to provide a period of calm during which changes cannot be made which might be construed by the employees as penalizing them for electing to engage in collective bargaining.”\(^\text{154}\) The Board has recognized that the period of time in which employees move from individual employment

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\(^\text{150}\) *Re Taseko Mining Ltd.*, BCLRB No. B335/2004 at paragraphs 21 to 28.


\(^\text{153}\) Ibid. at paragraphs 7 and 8.

\(^\text{154}\) *Re KFCC/Pepsico Holdings Ltd.*, BCLRB No. B342/97 at paragraph 61.
governed by the common law to a collective bargaining regime is “particularly sensitive”\textsuperscript{155}

Organizing

During an organizing campaign, the operational freeze provision is set out in section 6(3). As discussed above in the section on employer unfair labour practices, subsections (a) and (b) deal with discharge, suspension, transfer, lay off and discipline. Subsection (d) contains the basket freeze provision:

\textit{(3) An employer or a person acting on behalf of an employer must not}  

\begin{center}
\textit{(d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union,}
\end{center}

Examples of alterations to terms and conditions during an organizing campaign which run afoul of section 6(3)(d) include:

- reducing employees’ hours; and\textsuperscript{156}

- taking away a paid day off during the Easter long weekend when there had been a long-standing practice of providing two paid days to employees.\textsuperscript{157}

It should be noted that the freeze in section 6(3)(d) is not absolute. An employer still has the right to discharge, suspend, transfer, lay off or discipline workers for proper cause (section 6(4)(a)). Further, employer may make changes “reasonably necessary for the proper conduct of [its] business” (section 6(4)(b)).

Once the Union Has Applied for Certification

After the union has filed its application for certification with the Board, the freeze in section 32(1) comes into play. Section 32 provides:

32. No change during certification – (1) If an application for certification is pending, a trade union or person affected by the application must not declare or

\begin{flushright}
\textsuperscript{155} \textit{Re Viva Pharmaceutical Inc.}, BCLRB No. B167/2002 at paragraph 40.


\textsuperscript{157} \textit{Re Societe de les Enfants Michif}, BCLRB No. B290/2002 at paragraph 31.
\end{flushright}
engage in a strike, an employer must not declare a lockout, and an employer must not increase or decrease rates of pay or alter a term or condition of employment of the employees affected by the application, without the board’s written permission.

(2) This section must not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for proper cause.

The freeze in section 32(1) covers the period from when the certification application is filed until the point when the Board releases its decision on that application.¹⁵⁸

Like the section 6(3) freeze, the pending-certification freeze in section 32(1) is not absolute. The proper cause provision is available to employers in section 32(2). Further, as the Board explains in Re Viva Pharmaceutical Inc.,¹⁵⁹ section 32(1) is:

42 ...not intended to paralyze the employer’s ability to manage its business. [It] would not prevent the employer, for example, from proceeding to implement customary or seasonal adjustments in the workforce, annual salary reviews or similar matters that arise routinely; or giving effect to firm decisions that are crystallized before certification but are not implemented until afterwards…¹⁶⁰

The Board’s Information Bulletin on Unfair Labour Practices puts the point this way:

...An employer must continue ordinary business practices. Wage increases previously scheduled for a specific date must be implemented; however, there can be no unscheduled changes in rates of pay or other terms and conditions of employment without written permission from the Board. …¹⁶¹

Section 32(1) differs from the protection offered workers in section 6(3) in that the prohibitions set out in section 6(3) are directed solely at employers and their agents while section 32(1) covers both employer and union conduct. Another important difference is that a section 32(1) complaint does not turn on proof of anti-union animus.¹⁶² The Board explains in Re KFCC/Pepsico Holdings Ltd.¹⁶³:


¹⁵⁹ Ibid.

¹⁶⁰ Ibid. at paragraph 42.


¹⁶³ BCLRB No. B342/97 at paragraph 61.
The freeze provisions [sections 32 and 45] thus serve a complimentary function to the unfair labour practice provisions [including section 6(3)]...The unfair labour practice provisions of the Code are concerned with employer motivation. Generally speaking, if anti-union animus forms any part an employer's decision making process, the Board will nullify the employer's actions. On the other hand, the freeze provisions key on employee perception irrespective of employer motivation.

Examples of section 32(1) violations include:

- taking away a paid day off;\(^{164}\)
- converting layoffs into dismissals without cause;\(^{165}\)
- terminating employees without proper cause;\(^{166}\)
- failing to call in an employee to work;\(^{167}\)
- reducing employees’ hours of work and/or shifts;\(^{168}\)
- contracting out part of the work (leading to a reduction in hours of work);\(^{169}\)
- reducing lunch breaks from one hour to one half hour without proper cause,\(^{170}\)
  and
- eliminating smoke breaks entirely without proper cause.\(^{171}\)

One interesting issue that arose in *Re Chesire Homes Society*,\(^{172}\) was the employer’s mistaken belief that if disciplinary action had commenced prior to the filing of the certification application, the freeze in section 32(1) did not apply. The Board wrote:

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166 *Re Securiguard Services Ltd.*, BCLRB No. B36/2001 at paragraph 69.
168 *Re South Surrey Hotel Ltd. (Best Western Pacific Inn)*, IRC No. C123/92 at page 1 (QL).
The actual provisions of Section 32 are not so permissive. Any alteration of terms and conditions while the application is pending requires permission of the Board unless excluded by Subsection 2, which preserves the right to discipline for proper cause. That section clearly applies to any disciplinary action taken during the period in question, even if it is only one step in a sequence that started before the application was made. ... \[173\]

The Board found in Re Cheshire Homes Society that the employer had not acted with proper cause in dismissing the worker in question. \[174\] It substituted a suspension in place of dismissal. \[175\]

Post Certification

Once the Board has certified the union, then the statutory freeze in section 45 of the Code applies:

45. Notice to bargain collectively – (1) When the board certifies a trade union as the bargaining agent for employees in a unit and a collective agreement is not in force,

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(b) the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until

(i) 4 months after the board certifies the trade union as bargaining agent for the unit, or

(ii) a collective agreement is executed

whichever occurs first.

The triggering event with respect to the section 45 freeze is the date of certification and not the date a notice to bargain is provided. \[176\] Thus, the protection offered to employees by sections 32 and 45 is seamless.


\[175\] Ibid. at paragraph 356.

As with the other statutory freeze provisions, section 45 is not an absolute freeze. Employers may act with “proper cause” under section 45(4). Further, the “business as usual” rule applies.\textsuperscript{177} Thus,

\begin{center}
34 Where a fluctuation in scheduled hours is an employer's normal response to business exigencies before certification, an employer is free to continue that fluctuation in response to its business requirements after certification. That is business as usual...\textsuperscript{178}
\end{center}

Like the freeze provision set out in section 32(1), a violation of section 45(1) does not turn on evidence of anti-union animus.\textsuperscript{179} The focus of the section 45(1) post-certification freeze is not on the employer’s motivation for the change.\textsuperscript{180}

An example of an alteration of terms and conditions of employment contrary to section 45(1) is the decision of an employer to lay off an employee without proper cause within two weeks of the Board certifying the union.\textsuperscript{181}

\textbf{Timeliness}

The Board has stressed the importance of filing applications regarding the statutory freeze provisions in a timely manner in its jurisprudence. For example, in \textit{Re Pride Beverages Ltd.},\textsuperscript{182} while the Board acknowledged that there is no statutory time limit for filing a section 32 application, nevertheless such an application must be filed in an expeditious manner in order to fulfill the purpose of the section – that is, “to prevent an employer from unilaterally implementing changes which will have a chilling effect on a union’s ability to achieve certification and conclude a collective agreement”\textsuperscript{183}

\textsuperscript{177} \textit{Re Ventur Steel (1990) Ltd.}, BCLRB No. B310/96 at paragraph 57.

\textsuperscript{178} \textit{Re Coquitlam Inn and Convention Centre Ltd.}, BCLRB No. B274/2001 at paragraph 34.

\textsuperscript{179} \textit{Re Viva Pharmaceutical Inc.}, BCLRB No. B167/2002 at paragraph 44.

\textsuperscript{180} \textit{Re KFCC/Pepsico Holdings Ltd.}, BCLRB No. B342/97 at paragraph 61.

\textsuperscript{181} \textit{Re Ventur Steel (1990) Ltd.}, BCLRB No. B310/96 at paragraphs 103 and 104.

\textsuperscript{182} BCLRB B193/99.

\textsuperscript{183} \textit{Ibid.} at paragraph 17.
Chapter 11

Signing Up Members

(Labour Relations Regulation, Sections 3, 3.1, and 4;
Labour Relations Code, Sections 9, 10, and 18)

A) Introduction

The actual sign-up process is very simple. There is no "official" form issued by the Labour Relations Board. Organizers often devise their own or adapt one that has been successfully used before by another union. The basic purpose of the form is to demonstrate that the employee signing the form has voluntarily committed him or herself to the union. In order to establish that purpose, the Board has developed a number of rules.

Before reviewing these rules, it should be noted that people often read reported cases of union applications being dismissed for what appear to be minor technical errors, and wonder how such simple requirements can be missed by individuals responsible for the sign-up. It is often a very simple matter to enter the wrong date, or leave a date out completely, when one is involved in a large sign-up campaign, or where the card is completed in a hurry, or under similar stressful conditions. It must be remembered that as simple as the requirements are, the cards are scrutinized very carefully by an Industrial Relations Officer. Some cards may be rejected entirely for one flaw or another. If enough are rejected, the application for certification itself may be rejected for failure to obtain valid sign-up cards for at least 45% of the employees.

B) Membership Evidence

General

Section 3 of the Labour Relations Regulation\(^1\) requires:

1. The membership card be signed and dated at the time of signature.

2. A card signed on or after January 18, 1993, contain the following statement:

   In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.

3. Within 90 days of the application for certification,

   (i) the membership card must have been signed, or

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\(^1\) BC Reg. 7/93, as am. BC Reg. 59/93; 154/99.
(ii) active membership must have been maintained by due payments.

**Construction Industry**

If the membership drive is taking place in the construction industry, then the union must also attach a signed expression of support from its active members, in addition to the requirements in section 3, in the following form:

\[
I \text{ support the application by } \underline{\text{Name of trade union}} \text{ for the certification applied for.}
\]

\[
\underline{\text{Name of employee}} \quad \underline{\text{Date}}
\]

The Board’s Information Bulletin on certification states that this additional form:

...must be signed and dated by the employee within six (6) months of the application for certification, and will apply to an application for certification for the employer whom the employee is working for on the date the form is signed.

**PRACTICAL TIPS**

1. Keep the membership form as simple as possible. The more information to be filled in, the more opportunity for error, and membership evidence is reviewed very strictly.

2. Ensure the membership card identifies the local number of the applicant union, if there is one. For an example of problems that arise from failure to adhere to this requirement see *Britco Structures Ltd.* In that case the Carpenters' union applied for certification on behalf of four locals, but submitted membership evidence relating only to one of the locals. The Board dismissed the application.

3. Ensure the way the applicant union is identified on the membership card corresponds with how it is described in the certification application.

4. Ensure the employee applying for membership signs the card personally. It cannot be done by proxy.

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2 *Labour Relations Regulation*, BC Reg. 7/93, as am. B.C. Reg. 59/93; 154/99, section 3.1.

3 BC Labour Relations Board, Information Bulletin No. 1 - “The Trade Union Certification Process” at page 3, available online at: [http://www.lrb.bc.ca/bulletins/certification.htm](http://www.lrb.bc.ca/bulletins/certification.htm)

4 *Britco Structures Ltd.*, BCLRB Nos. 295/83 and 332/83; Leave for Reconsideration dismissed at BCLRB No. 62/84.

5 BC Labour Relations Board, Information Bulletin No. 1 – “The Trade Union Certification Process” at page 2, available online at: [http://www.lrb.bc.ca/bulletins/certification.htm](http://www.lrb.bc.ca/bulletins/certification.htm)
5. The date should be written out in full to avoid confusion – e.g. December 2, 2004.7

6. Follow the process for signing up new members as described in the union’s constitution or by-laws. The Code used to contain a provision that stated: “In deciding whether a person is a member in good standing of a trade union, the board may decide the question without regard to the constitution and bylaws of the trade union.” However, that section was repealed in 2001.8

C) Coercion or Intimidation

General

The union should take care that statements it makes to employees during an organizing drive do not intimidate or coerce. Evidence of coercion or intimidation of employees by the trade union is an extremely serious matter which the Board can remedy in various ways:

29  …[T]he Board has a broad range of remedial responses to cases in which intimidation and coercion on the part of organizers or fellow employees has been alleged depending upon the circumstances. If...the effect is inconsequential in the sense that only a few employees were so approached and none were intimidated, the Board may issue a declaration but nonetheless grant certification. If a very limited number of employees were approached some of whom signed membership cards, the Board may discount the cards: Shaftesbury, supra; Brick and Brew Holdings Ltd., BCLRB 346/83, (1984) 4 CLRBR (NS) 129, at p. 134. If the evidence establishes that many employees were approached in a manner that would objectively cause reasonable employees to feel intimidated or coerced such that there is a cloud hanging over the organizational campaign, whether or not it is established that employees did in fact feel so intimidated or coerced, the Board may hold a vote. Where the manner of approach was so serious or egregious as to have the potential of bringing the Board's certification process into disrepute or where a vote is simply an inadequate remedy in the circumstances, the Board may deny the application for certification outright. …9

Differential Fees

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6 Ibid.

7 BC Labour Relations Board, Information Bulletin No. 1 – “The Trade Union Certification Process” at page 2, available online at: http://www.lrb.bc.ca/bulletins/certification.htm

8 See Re Campbell River Fibre Ltd., BCLRB No. B356/2001 at paragraphs 1 and 11.

Section 10(3) of the **Code** prohibits unions from charging different initiation fees depending on whether the member joins before or after an application for certification. Such two-tiered fees may also run afoul of section 9, which prohibits coercion and intimidation “that could reasonably have the effect of compelling or inducing a person to become…or to continue…to be a member of a trade union.” However, the union is not prevented from charging different initiation fees depending on whether the employee joins before or after the signing of the first collective agreement, provided that the differential fee does not stem from a discriminatory practice contrary to section 10. The Board summarizes the issue neatly in **Gray Beverage Inc.**:

...[I]n order to run afoul of Section 10 so as to constitute coercion under Section 9, the evidence must establish that a union induced employees to sign cards prior to the application for certification (i.e., during the organizing campaign). Finally, a new union will not violate these sections where its policy is to later charge full initiation fees to new hires after a collective agreement has been obtained.

**D) Revocation**

Employees occasionally change their minds, and decide they do not wish to be members of the union after they have signed up. Section 4 of the **Labour Relations Regulation** states that: “A membership card may be revoked by delivering a written statement signed by the member to the trade union and the Labour Relations Board on or before the date of application for certification.” Thus, if the revocation is filled on or before the union’s certification application, then the revocation will be effective and will reduce the total number of employees signed up by the union. If it is not, then it will not be considered by the Board when calculating whether the union has the requisite 45% support under section 18.

**E) Rejection of Cards**

The union’s membership evidence must comply strictly with the requirements described in sections 3 and 3.1 of the **Labour Relations Regulation**. The high standard “helps maintain the integrity of the certification process and ensures the Board will not normally inquire into confidential membership issues.”

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12 BC Reg. 7/93, as am. B.C. Reg. 59/93; 154/99.

In addition:

…the Board may dismiss cards and/or the certification application where the cards do not express the true wishes of the employees concerned. The employees’ true wishes may not be disclosed where the Board has concluded that there have been fraudulent organizing tactics, the signature(s) were obtained by coercion or intimidation, or misrepresentations were made which render the membership card(s) conditional or equivocal.14

The Board presumes that signed and dated membership cards that meet the requirements of Regulation 3 are bona fide evidence of membership support.15 However, that presumption is rebuttable in certain circumstances. The validity of membership evidence may be challenged and membership cards rejected in the following four circumstances:

- 1. failure to strictly adhere to the minimum technical requirements set out in Regulation 3;
- 2. fraudulent or illegal organizational tactics;
- 3. coercion/intimidation by way of threats or inducements;
- 4. misrepresentations during the course of the organizing which render a signed membership card conditional or equivocal.16

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15 Lonsdale Hotels Inc., BCLRB B130/95 (Leave for Reconsideration of BCLRB No. B459/94) at paragraph 21.

16 Ibid. at paragraph 22.
Chapter 12

Access to Employer’s Property

(Labour Relations Code, Sections 7 & 66)

A) The Labour Relations Code and Civil and Criminal Trespass

The Labour Relations Code deals with only some of the problems arising out of organizers' access to employer's property. Other problems are addressed by the Criminal Code and by the general law of trespass.

Employee Organizers vs. Non-Employee Organizers

The first point that must be emphasized is that the right of access for organizing purposes depends on whether the organizer is an employee or not. If the organizer is an employee, he or she will have access to the employer’s property during working hours. It is implicit that employees have the consent of the employer to be on the employer’s property during working hours. Although section 7(1) of the Code prohibits an employee-organizer from organizing during working hours, it is open for him or her to engage in organizing during non-working hours such as on coffee or lunch breaks or before and after shift. There may be special circumstances justifying an employer from prohibiting organizing on these times, but these circumstances are rare.

The rest of the comments in this section are addressed to the situation where the union organizer is not an employee. As a general rule, non-employees have no right to enter the employer’s property for the purposes of organizing. The employer may resort to the law of trespass to deal with outside organizers. In such cases, there is a tension between workers’ rights to freedom of expression, association, and access to collective bargaining and owners’ and occupiers’ private property rights, including the right to exclude people from their property.

A good illustration of the problem is Regina v. Layton where Jack Layton was issued a ticket for trespass during an organizing campaign of retail workers at Eaton’s store, the flagship store in Toronto’s Eaton’s Centre. Mr. Layton was leafleting five to six feet outside the entrance to Eaton’s. When he refused to leave after being asked to do so by the manager of the shopping centre, Mr. Layton received a ticket for trespass under Ontario’s Trespass to Property Act. He successfully appealed his conviction. Scott Prov. Ct. J. accepted the Charter arguments advanced on his behalf, writing:

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1 Re Coast Mountain Buslink Co., BCLRB No. B410/99 at paragraph 62.
2 Teleflex Canada Inc. (Re), BCLRB No. B272/2007 at paragraph 43.
3 (1986), 38 CCC (3d) 550 (Ont. Prov. Ct.).
In the present case the occupier has invited the general public to enter upon the "common area" of the mall for one overriding purpose, and probably for the sole purpose, of giving them access to the tenants in order that business may be carried on for the mutual benefit of the public and the tenants, which in turn results in commercial benefit to the mall owners. In my view, the occupier cannot set a condition on its invitation whereby the invitees enter the mall with money in hand but must leave their Charter rights and freedoms outside the mall property. These invitees are different persons from those pre-Charter persons who appear in R. v. Peters and in Harrison v. Carswell, supra. If the occupier wishes to create and maintain private property having an essential public character as part of a commercial venture, it cannot in my view escape the responsibility or the expense of preserving at least a bare minimum of its invitees' freedom of expression guaranteed by the Charter. Anything less would not, in my view, be regarded as reasonable by fair-minded people in our democratic society.  

The judge reached a similar conclusion with respect to the freedom of association claim:

... the occupier has allowed the Eaton employees to traverse one of the "common areas" of the mall to facilitate their entry into the premises of their employer, one of the mall tenants. This serves the commercial interest of the occupier to at least the same extent as does his invitation to the general public to enter upon this common area. The Eaton employees are invited into the common area as employees and cannot, in my view, be required by the occupier to leave their freedom of association behind on the subway. Their being denied the opportunity to receive literature from the appellant, on the particular facts of this case, did in my view constitute an infringement (indeed, a denial) of their freedom of association guaranteed by the Charter. ...  

British Columbia amended its Trespass Act in 2004. The amendment provided in section 4 that an occupier or an authorized person may direct persons to leave the premises or to “stop engaging in an activity on or in the premises”. A person receiving such a direction who refuses to leave or stop the activity “as soon as practicable after receiving the direction” or who “re-enters the premises or resumes the activity on or in the premises” commits an offence. In addition, section 8 permits an occupier or an authorized person with reasonable grounds to believe a person is trespassing to demand that person’s correct name and address. Section 10 allows a peace officer to arrest without warrant “any person found on in premises if the peace officer believes on

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5 Ibid. at page 17 (QL version).

6 See the Trespass Amendment Act, 2004, SBC 2004, c 73.

7 Trespass Act, RSBC 1996, c 462, section 4.

8 Ibid.
reasonable and probable grounds that the person is committing an offence under section 4 in relation to the premises”.

There are three defences in the Act described in section 4.1:

4.1 A person may not be convicted of an offence under section 4 in relation to premises if the person’s action or inaction, as applicable to the offence, was with

(a) the consent of an occupier of the premises or an authorized person,

(b) other lawful authority, or

(c) colour of right.

On the other hand, section 66 of the Labour Relations Code attempts to protect workers’ rights to organize. It provides in part:

66. Actions – No action or proceeding may be brought for

(a) petty trespass to land to which a member of the public ordinarily has access,

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arising out of strikes, lockouts or picketing permitted under this Code or attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer’s workplace.

The inter-relationship between section 66 of the Code and the Trespass Act has not yet been tested in the courts. There have been some limited Charter challenges on offences themselves outside of the labour setting. In a series of decisions, R. v. Breeden,9 offences under the Trespass Act were challenged for violating section 2(b) of the Charter – the freedom of expression. The accused, Jack Breeden, was charged with a series of offences for displaying signs and failing to leave premises or cease activities after notice to do so at various government premises – a courthouse, fire station, and municipal hall. He displayed signs expressing his criticisms of and frustrations with the activities of various levels of government, corporations, and public institutions following his loss of employment. The trial judge held, which was later affirmed by the appeal courts, that although the locations involved government buildings where public functions were being performed, they were not “public” in the nature to allow indiscriminate use of the premises for free expression of political or personal views.10 However, the trial judge

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10 2007 BCPC 79 at paragraph 60.
noted, which was later affirmed by the appeal courts, that he was open to display his signs and to express himself outside the premises.\textsuperscript{11}

Trespass is also covered by the \textit{Criminal Code}. Prior to 2012 amendments of the \textit{Criminal Code}, section 41(1) contemplated the use of force in the expulsion of a trespasser from “real property”. Any active act of resistance by the trespasser in such circumstances constituted assault.\textsuperscript{12} However, section 41 was repealed in 2012 and replaced with the current section 35.\textsuperscript{13} Section 35(1) now contemplates the use of force in the prevention or expulsion of a trespasser from property.\textsuperscript{14}

\textbf{The Protection Offered Organizers by Section 66 of the Labour Relations Code}

Organizers have had mixed success regarding the protections offered by section 66 of the \textit{Code}. In \textit{RMH Teleservices International Inc. v. British Columbia Government and Service Employees’ Union},\textsuperscript{15} the employer applied successfully to the British Columbia Supreme Court for an injunction restraining the union from entering on its land or premises. The organizers had been leafleting in the employee parking lot. Hood J. agreed with the Employer that a narrow interpretation of section 66 was necessary to ensure that private property rights were not encroached upon beyond the clear legislative intent.\textsuperscript{16} Hood J. rejected the union’s freedom of expression argument, summarized in the judgment: “…because the rights of freedom of expression are so important, s. 66(a) cannot be interpreted in a manner which would restrict or abrogate those rights.”\textsuperscript{17} Hood J. concluded that acceding to this submission “would result in a convoluted interpretation of the section”.\textsuperscript{18} Rather, he found that the employee parking lot was not “land to which a member of the public ordinarily has access” and therefore did not fall within the scope of section 66.\textsuperscript{19}


\textsuperscript{12} \textit{Criminal Code}, RSC 1985, c C-46, s 41(2).

\textsuperscript{13} \textit{Citizen’s Arrest and Self-defence Act}, SC 2012, c 9, s 2

\textsuperscript{14} \textit{Criminal Code}, RSC 1985, c C-46, s 35(1)(b).

\textsuperscript{15} 2003 BCSC 278.

\textsuperscript{16} \textit{Ibid.} at paragraph 55.

\textsuperscript{17} \textit{RMH Teleservices International Inc. v. British Columbia Government and Service Employees’ Union}, 2003 BCSC 278 at paragraph 34.

\textsuperscript{18} \textit{Ibid.}

\textsuperscript{19} \textit{Ibid.} at paragraphs 59 & 60.
The evidence on which the Defendant relies goes no further than members of the public, who themselves are trespassers, have used the parking lot casually and infrequently. …

In his view:

…the legislature has dealt with the competing interests of the parties in s. 66 to a limited extent. And in my opinion the law remains the same in any other circumstances. In this regard, in my opinion, the views and opinions expressed by Dickson J. in Harrison [v. Carswell (1975), 62 D.L.R. (3d) 68 (S.C.C.)] are as valid and compelling today as they were in 1975. To the extent that union activities have been permitted on private property, that right has been granted by statute. And s. 66 is an example where the owners’ property rights have been infringed in circumstances where the property has been open to the public and is treated as if it were public property. It is for the legislature to resolve the conflict between these fundamental competing rights if it chooses to do so. It is not for the Court to do by judicial legislation, that is by a strained interpretation of the statute.

In a decision more favourable to organizers, Re N.W. Art in Motion, the Board distinguished RMH. In Re N.W. Art in Motion, the organizers were leafleting primarily at the side of the driveway at the main entrance to the plant. Part of the driveway was on public property, part on the employer’s property. At times, the president of the company stood at the gate watching the leafleting. At other times, security guards monitored it. When the managers were present, the union’s leaflet acceptance rate plunged.

The Board found that the monitoring by the employer at the gate constituted an unfair labour practice. Surveillance of the union organizers during leafleting would lead “…a reasonable employee not to take a leaflet for fear the employer would interpret this as an

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21 Ibid. at paragraph 56.


23 Ibid. at paragraphs 6 & 7.

24 Ibid. at paragraph 2.

25 Re N.W. Art in Motion, B203/2003 at paragraphs 7 & 10.

26 Ibid. at paragraph 12.

27 Ibid. at paragraphs 11, 14 & 15.

28 Ibid. at paragraph 65.
The Board roundly rejected the trespass argument raised by the employer and distinguished the *RMH* decision. The Board found it significant that the employer did not object to the organizers’ presence immediately and that it, unlike the employer in *RMH*, had made only one request that the union organizer leave.\(^{31}\) It was fortified in this conclusion by the knowledge that there was a strip of property at the main gate that was public land:

> *...had the Employer actually taken any steps to enforce its property rights, the Union leafleters would have been able to continue leafleting at the Main Gate by merely standing a little closer to Hartley Avenue.*\(^{32}\)

### B) Employees Living on the Employer’s Property

Where employees live on the employer's property, section 7(2) of the *Code* allows the Board to grant union organizers who are authorized in writing by their unions access to the employer's property. The underlying principle is “equal access”: employees living on the employer’s property should have the same access to information from union organizers as do employees not living on the employer's property.\(^{33}\)

Section 7(2) has been used in the agricultural sector to facilitate access to organizing information of farm workers living in cabins on the employer’s farm,\(^{34}\) construction workers at construction camp sites,\(^{35}\) and ski resort employees living at employer-owned apartment buildings at the base of the resort.\(^{36}\) The key is equal access to employees regardless of place of employment.

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29 *Re N.W. Art in Motion*, B203/2003 at paragraph 45.


32 *Ibid.* at paragraph 60.

33 *H.S. Rai Farms Ltd.*, BCLRB No. 11/82 at page 6 (Q.L. version) and *Re Sidhu & Sons Nursery Ltd.*, BCLRB No. B154/2010 paragraphs 18 to 19.


35 *Ledcore Construction Limited*, BCLRB No. 208/85, Reconsideration dismissed in No. 233/85

36 *Blackcomb Skiing Enterprises Ltd.*, BCLRB No. B83/95 (Leave for Reconsideration of BCLRB No. B72/95) at paragraph 26. The order in *Blackcomb* permitted authorized union organizers to have unsupervised and unrestricted access to the apartment intercom systems and to the doors and apartments of employees who invited the union representatives into their apartments.
It should be noted that organizational picketing is illegal. Under some circumstances, the distribution of leaflets, and similar conduct, may constitute picketing; under other circumstances it may not constitute picketing.

Sections 65(3) and 67 of the Code set out when it’s permissible and impermissible to picket. Section 1 contained a definition of “picketing” which has been ruled as unconstitutional by the Supreme Court of Canada in United Food and Commercial Workers, Local 1518 (UFCW) v. Kmart Canada Ltd. (“KMart”). At issue in that case was the distribution of leaflets by the union to consumers during a labour dispute with two Kmart stores. The leaflets informing consumers of unfair labour practices and urging them to shop elsewhere were distributed at other Kmart locations, thereby constituting secondary picketing. “Picketing” was defined very broadly under section 1 of the Code as “attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to…” enter the premises, deal in or handle the products of the person, or not to do business with the person. The Code further provides that picketing can only be lawfully conducted when union members are lawfully on strike or locked out, and can only take place at the primary site of the labour dispute.

The Court held that the definition of picketing in the Code was overly broad and violated the freedom of expression under the Charter. It defined picketing in such a broad way in that it would capture leafletting by unions. In coming to its conclusion that the definition of picketing violated the freedom of expression, the Court drew a distinction between consumer leafleting and conventional picketing. It held:

43 Consumer leafleting is very different from a picket line. It seeks to persuade members of the public to take a certain course of action. It does so through informed and rational discourse which is the very essence of freedom of expression. Leafleting does not trigger the "signal" effect inherent in picket lines and it certainly does not have the same coercive component. It does not in any significant manner impede access to or egress from premises. Although the enterprise which is the subject of the leaflet may experience some loss of revenue, that may very well result from the public being informed and persuaded by the leaflets not to support the enterprise. Consequently, the leafletting activity if properly conducted is not illegal at common law. In the absence of independently tortious activity, protection from economic harm resulting from peaceful persuasion, urging a lawful course of action, has not been accepted at common law as a protected legal right. See J. G. Fleming, The Law of Torts (9th ed. 1998), at pp. 765-77. Significantly, the harmful effects that flow from leafleting do not differ from those which would result from a consumer boycott campaign conducted by permissible means. In fact it is well nigh impossible to distinguish between the situation whereby consumers are informed and persuaded not to buy through leafleting at the place of purchase, and the situation whereby the same

consumers are informed and persuaded not to buy through leaflets delivered to the mailbox, newspaper advertising, internet mailing or billboards and posters.

At paragraphs 57 and 58, the Court provided the following description of the distinction:

I agree that in certain circumstances some forms of leafleting could be considered to be picketing or the equivalent of picketing. For example, if those distributing the leaflets carried placards, or if they were so numerous that they impeded access to and egress from the targeted premises, or if the leaflets were directed towards the workers in those premises rather than customers, then those types of leafleting could constitute or be the equivalent of picketing. However, the leafleting at issue in this case had none of these features.

In this case, the leafleting conformed with the following conditions:

- (i) the message conveyed by the leaflet was accurate, not defamatory or otherwise unlawful and did not entice people to commit unlawful or tortious acts;
- (ii) although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only;
- (iii) the manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful or tortious;
- (iv) the activity did not involve a large number of people so as to create an atmosphere of intimidation;
- (v) the activity did not unduly impede access to or egress from the leafleted premises;
- (vi) the activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to the neutral sites.

Following the Court’s decision in K-Mart, the Board instituted its policy distinguishing consumer leafleting from conventional picketing at secondary sites and set a “bright line” test. It held in Re Overwaitea Food Group 39:

41 The "bright line" distinction is an objective one. Even if a union or individual does not intend a consumer leafleting campaign to cross the line into picketing, the Board will enjoin the additional activity as conventional picketing if the conduct goes beyond the handing out of leaflets.

42 On the basis of the above analysis, we can summarize what will be the Board's approach to picketing applications:

1. First, the alleged picketing must be in respect to a labour dispute or matter over which the Board has jurisdiction: Section 67. "Dispute" is defined in Section 1 of the Code. If there is no "dispute", the impugned activity does not fall under the picketing provisions of the Code: Re Daishowa Inc. and Friends of the Lubicon et al. (1998), 158 D.L.R. (4th) 699 (Ont. Gen. Div.);

2. In order to be constitutionally protected consumer leafleting, the conduct must conform with the conditions set out in KMart for permissible leafleting, para. 58;

3. If the impugned conduct does not constitute constitutionally protected leafleting, it can be regulated under the Code. In determining whether "conventional" picketing is present, the Board will consider factors such as the number of individuals participating, their location (i.e., proximity to entrances of the business), the nature of their activities (i.e., walking back and forth), the presence or absence of placards, or sign boards. This is a non-exhaustive list of attributes which characterize "conventional" or "traditional" picketing and, if present, will be regulated under Part 5 of the Code. Leafleting is excluded from this regulation of conventional picketing.
Chapter 13

Voluntary Recognition vs. Certification

(Labour Relations Code, Sections 18, 33, and 34)

A) Introduction

There are two ways a union may achieve collective bargaining rights. The first is to sign up sufficient employees and apply for certification under section 18(1) of the Code, or in the case of a craft union, under section 21(1). The second is voluntary recognition.

As the Board explains in Chapter 1 of its Code Guide:\(^1\)

> Even where a union has not sought certification under the Code, an employer may agree to acknowledge the union as bargaining agent for the employees and to conclude a collective agreement with the union. This is called voluntary recognition. In such cases the union will normally have the same rights and be subject to the same obligations under the Code as a certified union. The Board, however, must be satisfied that the voluntary recognition has been approved by the employees affected.

The two routes to bargaining agency are different. In Delta Hospital,\(^2\) the Board wrote:

> Where a trade-union chooses the certification route to an exclusive bargaining agency it applies to the Board and submits proof of employee support in the form of signed membership cards. The Board investigates this membership evidence and if it finds that the requisite employee support exists, issues a certificate of bargaining authority (assuming, as well, that the unit is appropriate). Thus, under that route the wishes of the employees are a governing factor and that fact is independently verified. On the other hand, where a trade-union elects not to follow the certification process and instead seeks and secures voluntary recognition, there is no such independent check of employee support. Undoubtedly, it is too strong to characterize the formal certification process as the preferred route for a trade-union to obtain recognition. But where the parties to a voluntary recognition agreement hold up their contract as a bar to the employees’ use of the Code to secure representation by another trade-union, this Board must scrutinize that document closely. The purpose of that examination is to make a serious judgment about whether the document satisfies the notion of a collective agreement within the larger framework and principles of the Code. In our view, as we suggested earlier, the Code contemplates that an agreement between an employer and an uncertified trade-union will enjoy the legal status of a "collective agreement", and will thus be binding on the

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\(^1\) Available online at [http://www.lrb.bc.ca/codeguide/chapter1.htm](http://www.lrb.bc.ca/codeguide/chapter1.htm).

\(^2\) BCLRB No. 76/77 at page 17 (QL).
employees, only if one may reasonably judge that the trade-union is in some way actually representative of the group of employees affected....

It cautioned:

...there is a danger that a "sweetheart" deal may be struck, one which favours the trade-union and management but which is to the distinct disadvantage of the employees. ...Alternatively, an employer may, for no readily apparent reason invite a trade-union to enter into a collective agreement, but later examination reveals that the employer's objective was to influence his employees against another trade-union which had been experiencing some organizational success. ...

B) Where They Traditionally Arise

Voluntary recognition agreements are often found in the construction industry.³ As the Board observed in Delta Hospital:

...this alternative route to a bargaining agency is generally (although not exclusively) used in industries employing skilled craftsmen or tradesmen where placement on the job is through a hiring hall. Frequently, the voluntary arrangement is entered into even before employees are required. As and when they are required a request is made to the hiring hall, employees are dispatched and these, of course, are members of the trade-union. ...⁴

C) The Board’s Analysis

In Re University of Victoria,⁵ the Board’s starting point was that the party asserting a voluntary recognition agreement bore the onus to prove its existence. Evidence could either be explicit (e.g. a signed letter of agreement) or implicit (e.g. the conduct of the parties).

When assessing the parties’ conduct, the test is: “does the objective conduct of the parties demonstrate that they mutually intended to establish a relationship which would be governed by the Labour Relations Code?”⁶

The Board in Re University of Victoria considered:


⁴ Delta Hospital, BCLRB No. 76/77 at page 17 (QL).

⁵ BCLRB No. B190/99 at paragraph 81.

⁶ Ibid. at paragraph 83.
1. whether the parties had negotiated binding agreements or arbitrated salary levels;

2. what the parties stated or asserted in public as to the nature of their bargaining relationship; and

3. the positions taken by the parties in correspondence with the Board.\(^7\)

The Board’s other major concern is that employees purportedly covered by the voluntary recognition agreement not have a bargaining agent foisted on them that “they have never wanted and still do not want”.\(^8\) As a result, when a voluntary recognition agreement is objected to or held up as a bar to a certification application by another union, the Board may require that the party relying on the voluntary recognition agreement demonstrate that the voluntarily recognized union is actually representative of the affected employees.\(^9\)

This latter issue has arisen in the health care sector. For example, the employer service provider in \textit{Re Aramark Canada Facility Services Ltd.},\(^10\) entered into a collective agreement with the IWA more than a month before any employees were hired. Subsequently, it held job fairs. Applicants who successfully made it through the pre-screening stage were directed to an orientation session with the IWA where they were asked to sign an IWA membership form. At the end of the orientation session, the applicants were asked to sign a second form indicating that their terms and conditions of employment would be governed by the collective agreement between the IWA and Aramark. If the applicant signed both forms, the IWA representative would sign a confirmation slip that the applicant had attended an orientation session. Only those applicants with signed confirmation of attendance from the IWA would be considered by Aramark at the second and final interview stage.

The Board held at paragraph 44: “We do not find that employees involved in the job fairs were able to express their true wishes about the ratification of the voluntary recognition agreement when rejection of the agreement meant they would not be hired.” It continued in paragraph 55: “…there is no evidence the employees freely chose to be bound by the collective agreement and represented by the IWA.” As a result, it found that the voluntary recognition agreement could not be held up as a bar to the Hospital Employees’ Union’s application for certification, writing: “We find that there is no collective agreement in force between the IWA and Aramark.\(^11\)

\(^7\) \textit{Re University of Victoria}, BCLRB No. B190/99 at paragraphs 84, 85, and 92.

\(^8\) \textit{Delta Hospital}, BCLRB No. 76/77 at page 13 (QL).


\(^11\) \textit{Ibid.} at paragraphs 52 and 54.
Similarly, the Board rejected a voluntary recognition agreement between the IWA and Sodexho MS Canada Ltd., which, too, was signed before any employees were hired. “Bald assertions,” it wrote, “are not sufficient… Without sufficient details, I am unable to conclude that…a reasonable ratification procedure took place or that a majority of employees freely chose the IWA as their exclusive bargaining agent.”

More recently, the Board in Compass Group Canada Ltd. (c.o.b. Crothall Services Canada) considered whether a voluntary recognition agreement between the USW and Compass Group Canada Ltd. was a bar to HEU’s application for certification. The USW held a certification; however, the collective agreement contained a recognition clause covering a broader group of employees. There were two potential outcomes to the issue if the collective agreement was a bar to the HEU application: 1) if the answer was yes, then HEU’s application would be dismissed as an untimely raid; or 2) if the answer was no, then the Board would have to determine the membership evidence of the USW in support of its application to vary its certification.

Relying extensively on Diversified Transportation and the principle that trade unions be the freely chosen representatives of employees, the Board attempted to strike a balance between private recognition of bargaining units and the wishes of the employees. It held that the balance tipped in “favour of recognizing the interests of employees…”Given the large number of employees – approximately 500 – the Board held that the consideration of their wishes outweighed private recognition of units. Therefore, the collective agreement did not bar the HEU application.

D) Termination of a Voluntary Recognition Agreement

Section 33 governs the revocation of bargaining rights. It allows the Board to cancel a union’s certification under certain circumstances. By virtue of section 34 of the Code, this procedure also applies to voluntarily recognized bargaining rights.

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13 *Re Compass Group Canada Ltd. (c.o.b. Crothall Services Canada)*, BCLRB No. B241/2015.

Chapter 14

Timing of Certification Applications

(Labour Relations Code, Sections 18, 19, 30, 33(10))

A) Introduction

Generally, the time at which an application for certification may be made depends on whether:

1. a trade union is already certified for the same employees;

2. a collective agreement is in effect.

The time for organizing is least restrictive where neither a trade union nor a collective agreement is in place, and is most restrictive where both are present. The provisions on this branch of the law of organizing are summarized in the chart below.

<table>
<thead>
<tr>
<th>Union?</th>
<th>Collective Agreement?</th>
<th>Certification applications permitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>No</td>
<td>any time: s. 18(1).*</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>six months after the date of certification, if there is no strike or lockout: s. 18(2)(a) and (3), or with the Board’s consent if the six months have not yet expired: s. 18(2)(b).</td>
</tr>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>in the 7th and 8th month of each year of the collective agreement or any renewal or continuation of it: s. 19(1).*</td>
</tr>
</tbody>
</table>

B) New Enterprises and the Build-Up Principle*

General

If the employer in question is just starting up its business and has yet to hire its full complement of employees, or if there is an expectation of an increase in the workforce,
union organizers should consider the timing of their certification application in light of the build-up principle. The Board writes that the build-up principle “refers to an imminent increase in the permanent workforce of an employer to the extent that it affects the appropriateness of a proposed bargaining unit.” The principle “is grounded in the concern for the potential interest of future employees have to a say in the choice and exercise of representational rights.”

Generally speaking, the Board will not entertain a certification application until 50% of the total number of anticipated employees has been hired and all or most of the classifications contemplated are represented. However, the principle is flexible. Where the expected increase will not be permanent, the build-up principle may not apply with the same force, even where the employee complement is somewhat less than one half of the total anticipated workforce.

**Seasonal Employees**

The build-up principle will rarely be applied where the work force is low due to the normal, for example, seasonal, fluctuation of that work force.

**Construction Industry**

In addition, the Board will not apply the build-up principle in the construction industry “because of the rapidly changing composition of the work force”. The only exception is where the certification application sought is an all-employee (rather than a traditional craft) bargaining unit.

**Board’s Analysis**

The factors the Board will consider in applying the build-up principles are:

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1 BC Labour Relations Board, Information Bulletin “Trade Union Certification Process”, available online at: [http://www.lrb.bc.ca/bulletins/certification.htm](http://www.lrb.bc.ca/bulletins/certification.htm).


3 *Re Sears Canada Inc.*, BCLRB No. B500/98 at paragraph 34.


5 *Weyerhaeuser Canada Ltd. (Secondary Fiber Division)*, BCIRC No. C150/89 (Reconsideration of C112/89) at page 3 and *Daesung Canada Inc.*, BCIRC No. C3/91 at page 3.

6 *Weyerhaeuser Canada Ltd. (Secondary Fiber Division)*, BCIRC No. C150/89 at p. 3.

7 *Cicuto & Sons Contractors Ltd.*, BCIRC No. C271/88 (Reconsideration of BCLRB No. 52/87) at page 24.
1. the nature of the employer’s operations;
2. the imminence and certainty of the build-up;
3. the nature and the degree of the build-up; and
4. the representative character of the existing employees.  

The Board has cautioned that these factors are guidelines and should not be too strictly followed; rather, decisions must be made on a case-by-case basis.

The first factor considers the type of industry in which the certification application arises. For example, as mentioned earlier, the Board will consider applications for craft units in the construction industry differently than other applications.

Under the second, the Board:

looks to see if the plans for the work force expansion are firm, rather than speculative. The Board does not always accept at face value the staffing estimates provided; it examines the projections for their consistency with the probabilities surrounding existing conditions to see if the estimates are accurate or inflated…

The third deals with whether the expansion to the workforce is permanent or merely due to seasonal fluctuations inherent to the industry. The Board will also consider whether the future increase in workforce will be “overwhelming” or “significant”.

The final factor requires the Board “…to look at the composition of the work force in terms of the numbers and classifications to determine if the employee complement on the date of application represents a substantial segment of the work force to be employed in the near future.” Here, the Board considers the 50% rule.

C) Timing of Certification Applications in the Context of Raids**

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10 Sears Canada, BCLRB No. B500/98 8 at paragraph 29.

11 Ibid. at paragraph 31.


13 Sears Canada, BCLRB No. B500/98 at paragraph 32.
A raid is where one union attempts to persuade members of an incumbent union to defect and join its ranks. The Board has established the following principles for the timing of raid applications:

1. Time runs from the commencement date of the collective agreement.\textsuperscript{14}

2. The 'year of a collective agreement' in section 19(1) may be a period of less than twelve consecutive months, except where section 50(1) is applicable. For example, if a collective agreement is for an 18-month term, the last eight months is the second “year” of the agreement.\textsuperscript{15}

3. A continuation of the terms of a collective agreement is a prolongation of the term of that agreement and is not counted as a complete separate time span.\textsuperscript{16}

4. A raid application made in a continuation period (the period of time between the expiration of the old collective agreement and the new one in situations where the parties have included a continuation clause in their old agreement) is calculated from the commencement date of the old collective agreement even if a new agreement is negotiated with a retroactive commencement date.\textsuperscript{17}

5. A raid application brought after a prior raid under section 19(1) will not be timely if it is “made within 22 months of a previous application…if the previous application resulted in a decision by the board on the merits of the application”: section 19(2).

6. Unless the Board consents, a raid is not permitted during a strike or lockout: section 19(3).

**D) Certification Applications after Decertification**

If the union’s certification has been cancelled, for instance, in the case of a successful decertification campaign, then another certification application may not be brought within 10 months or within a shorter period specified by the Board: section 33(10).

\textsuperscript{14} Innova Envelope, Division of Barbecon Inc. – and- Canadian Paperworkers’ Union, Local No. 433 and Pulp, Paper and Woodworkers of Canada, Local 5, IRC No. C40/88 at p. 3; and Re Timothy Edward Bradley (Hope Traffic Control), BCLRB No. B434/2000 at paragraph 24.

\textsuperscript{15} Cara Operations Ltd. and Sinke Enterprises, c.o.b. Swiss Chalet Restaurant – and – Hotel, Restaurant and Culinary Employees’ & Bartenders’ Union, Local 40, and Canadian Union of Restaurant and Related Employees, Local Union No. 6 IRC, No. C222/92 at page 6; leave for reconsideration dismissed in BCLRB No. B44/93.

\textsuperscript{16} Timothy Edward Bradley, BCLRB No. B434/2000, citing with approval Westmin Resources Ltd. IRC No. 69/88 at paragraph 22.

\textsuperscript{17} Cara Operations, IRC, No. C222/92 at page 7.
E) Discretionary Time Bar - Repeated Certification Applications

In some circumstances, the Board will impose a time limit on re-applications for certification under section 30. If a trade union applies for and fails to achieve certification, and there are sound reasons to delay a further application, the Board may designate a period of not less than 90 days during which a new application by the same union may be made.

The Board’s power under section 30 is discretionary and is designed to protect against “substantial and excessive workplace disruptions caused by repeated organizing campaigns”. There are two kinds of disruption the Board may consider: first, disruption within the workforce as a result of repetitive organizing campaigns and second, disruption to the employer in the administration of its business. This must go beyond the normal activities associated with an organizing drive. In sum, there is a very high standard to be met before the Board will exercise its discretion to order a time bar under section 30.

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20 Ibid. at paragraph 16.

# Chapter 15

## Mechanics of Applying For Certification

### A) Basic Outline of the Process

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Obtain valid membership cards of at least 45% of EEs in proposed unit.*</td>
</tr>
<tr>
<td>2</td>
<td>Complete Certification Application. **</td>
</tr>
<tr>
<td>3</td>
<td>Deliver application to LRB &amp; to nearest Employment Standards Office.***</td>
</tr>
<tr>
<td>4</td>
<td>LRB sends Notice of Certification Application to ER to post for 5 consecutive working days.</td>
</tr>
<tr>
<td>5</td>
<td>IRO investigates and issues report. The part of the report in which the union’s membership evidence is compared against payroll information is kept confidential. The Board will provide the union with the employee list only if the union has met the 45% threshold. If it appears the union has 45% support, the IRO will tentatively schedule a vote.</td>
</tr>
<tr>
<td>6</td>
<td>Certification Hearing</td>
</tr>
</tbody>
</table>

*It may be helpful to begin by asking – what would be the best time for the union to have a certification hearing or vote? – bearing in mind that cards have to have been signed within 90 days of filing the application (s. 3, BC Reg. 7/93) and the vote must be held within 10 days of the filing, provided the union’s membership evidence satisfies the Board (s. 24(2)).

**Form 18 asks applicants to take a set of photocopies (1 card/sheet) and the original cards to the Industrial Relations Officer. Signed cards will be accepted if they are submitted before midnight on the day the application is filed.

***The Union should consider notifying the Employer in writing at the outset of its organizing drive. This might serve to freeze working conditions under s. 32 and establish Employer knowledge in the event of an unfair labour practice complaint.


The Board usually schedules the hearing within a week of the date the union files the certification application: BC Labour Relations Board, “Information Bulletin No. 1” at page 9.
B) Applications by More Than One Union

Two or more unions may apply jointly to certify an appropriate bargaining unit under section 20. This kind of application is also referred to as a poly-party application. The joint applicant unions are treated as one for the purposes of the Code. In Re KGK Construction Ltd., the Board discussed the relationship between sections 18 and 20 of the Code:

13 The Board's jurisprudence, as accurately reflected in the original decision, has treated Sections 18 and 20 as alternative paths in making an application for certification. As a result, poly-party applicants have brought their applications under Section 20. However, we do not view Section 20 as an alternative path. Rather, we find that provision is better understood as an enabling provision that empowers qualified poly-party applicants to apply under Section 18, as if they were a single trade union...

The use of section 20 does not change the trade union status of the individual unions who join together. 2

Note that a joint application must include a constitution, approved by the Board, governing the structure and relationship of the applicant unions. 3 However, as with section 20, the constitution does not change the fact that it is the individual unions who are certified. 4

1 BCLRB No. 241/97 (Reconsideration of B18/96) at paragraph 13.


Chapter 16

Withdrawal of Certification Applications

A) General

Since section 126 permits the Board to determine its own practice and procedure, it has the discretion to permit a union to withdraw an application for certification. A union may seek to withdraw if it discovers that the size and nature of the employer's operation is different than originally understood, thus making the proposed bargaining unit inappropriate.

In *Re Pacific Forest Products Ltd.*,
1 the Board set out its policy regarding withdrawal:

1. A withdrawal continues to require a written application.

2. Consistent with Section 2(1)(d) [now 2(e)], there is a policy in favour of granting withdrawal applications.

3. “Labour relations reasons” are not required to make out an application to withdraw. A bare request to withdraw is sufficient. However, an applicant seeking a withdrawal may want to augment its application by including supporting facts and argument which support the application to withdraw, particularly when it suspects the application may be opposed.

4. Where an application to withdraw is unopposed, the Board will normally exercise its discretion by granting the application. However, the Board may also exercise its discretion by refusing the request for withdrawal.

5. A respondent wishing to oppose a withdrawal application may do so by demonstrating prejudice if the withdrawal were granted, or by showing a valid purpose for adjudicating the application.

6. Where a party objecting to an application to withdraw cannot show real prejudice the Board will, as a general rule, grant the withdrawal. Where real prejudice can be shown by the respondent, the applicant will be given the opportunity to reply to the matters raised in the respondent’s submission. The application to withdraw will then be considered in light of Section 2 and by weighing the potential prejudice to the respondent against the case put forward by the applicant.

B) Raids

Where the certification application to be withdrawn arises in the context of a raid, the Board will still apply the *Re Pacific Forest Products* analysis; however, the issue of prejudice is different:

1 BCLRB No. B327/97 at paragraph 11.
...in initial certification applications, the Board typically takes a liberal approach where the trade union has incorrectly estimated the number of employees in the bargaining unit, or has discovered another deficiency in its application: Insurance Corporation of British Columbia, BCLRB No. B306/97. By contrast, in raid applications, the Board has not granted withdrawals where the objective may be to avoid imposition of the statutory time bar to future applications.²

In raid applications, as opposed to initial certification applications, an application for withdrawal brings with it concerns over the loss of the time bar for subsequent applications. The Board has been reluctant to allow withdrawals in such cases.³

The Board summarized:

...in the context of a raid application, a request to withdraw will not be granted unless the reasons advanced by the applicant outweigh the prejudice caused by the loss of the time bar in Section 19(2) of the Code. A raiding union must act with due diligence and take all reasonably available steps to determine the scope of the bargaining unit. Further, while the purpose of the time bar is to avoid disruption in the workplace, the incumbent union will suffer prejudice even in the absence of disruption because it will lose the statutory protection from a subsequent raid.⁴

² Re Dufferin Care Centre, BCLRB No. 398/2002 at paragraph 10.

³ See for example Coquitlam Ridge Construction Ltd. (Re), BCLRB Decision No. B103/2007.

Chapter 17

The Certification Hearing

Once an application for certification is made, the Board will require notice of the application to be posted at the work place for five consecutive working days.¹

An Industrial Relations Officer will review the union’s application and membership evidence and will issue a report. If the Board is satisfied that the union has the requisite 45% support, it “must order that a representation vote be taken among the employees in that unit”: section 24(1). The vote must be conducted within 10 days from the date the Board receives the certification application, unless the vote is to be conducted by mail, in which case a longer timeframe may be ordered: section 24(2).

The Board will also schedule a certification hearing, typically within a week of receipt of the certification application. If the vote precedes the hearing, the ballot box will be sealed pending the outcome of the hearing.

At the hearing, the Board must be satisfied of three things²:

1. Is the applicant a trade union?
2. Is the unit appropriate for collective bargaining?
3. Does the union have the requisite support?

As well, unfair labour practice allegations may be consolidated with the certification hearing.³ Challenges over the voter list or any ballots may also be heard at the certification hearing.

The hearing can be over in a matter of minutes if the employer does not have any objections. In fact, the employer may not even attend. However, the union should anticipate the employer’s presence and always be prepared to respond to any possible objections the employer might have, even if the employer has indicated it will not raise any.

The first question regarding the status of the applicant as a trade union is usually only an issue when the applicant is a new union or a new local of a union. The issue of appropriateness could arise, for example, if the union is not applying for an all-employee


unit. The union should be ready to justify the unit for which it has applied. With respect to the final question, the union should also ensure that the membership cards and supporting evidence are in good order. See Chapter 11: Signing Up Members for a more detailed discussion about card criteria. As well, if the union has signed up supervisors or managers, it should review the law on managerial exclusions since the question of requisite support is often linked to the issue of who should be excluded from the proposed bargaining unit.

According to the Board’s Information Bulletin No. 1 regarding the certification process, the four most common questions with respect to inclusions and exclusions are:4

1. whether a person is an “employee” as defined in section 1(1) of the Code bearing in mind that managers and those employed “in a confidential capacity in matters relating to labour relations or personnel” are not covered by the definition;

2. whether a person is an “employee” but should be excluded because he or she does not have a community of interest with the other employees in the unit (e.g. an employee who will be leaving the employer shortly5);

3. whether a person who was not at work on the date of the certification application nevertheless has a sufficient and continuing interest in the workplace to be included (e.g. a person with a recall right6); and

4. whether a person was employed on the date of the certification application.

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Chapters 18

The Certification Vote

(*Labour Relations Code, Sections 18, 19, 24, 25 & 39 and Labour Relations Regulation, Sections 9 to 11*)

**General**

Once the Board has determined that the applicant is a trade union, that the unit is appropriate for collective bargaining, and that at least 45 percent of the employees in the unit have joined the union, a certification or representation vote will be held. Section 24(2) of the *Code* requires the vote to be held within 10 days from the date the Board receives the union’s certification application unless the vote is to be conducted by mail, in which case the Board may order a longer time period. The ten day vote rule applies to applications for new certifications under section 18(1) as well as to raids under section 19.

**Eligibility to Vote**

If the Industrial Relations Officer (IRO) reviewing the certification application concludes that the applicant union appears to have the requisite membership support, he or she will draw up a Tentative Voter List as part of his or her report. However, the specific date to determine eligibility to vote is the actual date of the representation vote.1

Generally speaking, employees in the proposed bargaining unit who are working at the date the union files the certification application and who are still working at the time of the representation vote are eligible to vote.2 The Board also has discretion to allow employees hired between the time of the application for certification and the vote to participate, pursuant to section 39(4)(a).

**Scrutineers**

Typically, an IRO conducts the vote at the work place. The employer is entitled to have one scrutineer at the ballot box, as is the union. One of the statutory duties of the scrutineers is to “contest the right of a person to vote if there is valid reason for doing so”.3 When a scrutineer challenges a ballot, it will be double-sealed until the Board determines its validity.4 If the challenged ballot was determinative of whether or not the

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1 *Re Naya Inc.* BCLRB No. B294/98 at paragraph 63.


3 Section 9(a) of the *Labour Relations Regulation*, BC Reg 7/93, as am. BC Reg 59/93; 154/99.

union obtains certification, the Board might hold a hearing with respect to the employee status of the individual at a later date.

**The Test the Board Applies Where Eligibility Challenged**

When a ballot is challenged, the Board will ask itself whether the employee has a “sufficient continuing interest” in the bargaining unit. It must examine all of the relevant facts and circumstances in making its determination. Challenges may arise in relation to employees who are off on long-term disability leave or other leaves or those who work on a temporary or casual basis.

With respect to employees who are absent due to disability, the question the Board most frequently asks in its assessment of the sufficient continuing interest test is “…whether, at the date of application, the individual had a reasonable likelihood of returning to active employment in the foreseeable future.” The Board pays particular attention to the period of time they have been absent from the workplace measured from the date of the certification application and the objective medical evidence that was available at the time.

With respect to challenges leveled at employees with less than permanent full-time status, such as students, the Board will consider “…the permanence of the individual’s employment; the proportion of casual or temporary employees in the total work force; the nature and organization of the employer’s business; and each disputed individual’s particular employment circumstances…” The individual’s work history is a relevant factor in the determination of status. Collective agreements terms that touch on the issue will also be relevant, although not necessarily determinative.

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10 *4020 Investments Ltd. (Dufferin Care Centre)*, BCLRB No. B430/2003 at paragraph 91.


Construction Industry

A different test applies for employees in the construction industry. The rule set out in *B.A.T. Construction Ltd.*[^15] is:

... a person will meet the definition of employee if they are working in the bargaining unit on the date of application for certification; second, should a person not be at work on the date of the application for certification but have worked at any time during the thirty days preceding the application, and further, have a reasonable expectation of being re-employed during the thirty days following the date of the application, they will qualify as an employee. Both of these conditions must be met if an individual is not working on the date of the application for certification.

As the Board explains in *Re McAsphalt Western Ltd.*,[^16] a different test is appropriate in the construction industry because of its unique nature:

18 The two-part B.A.T. rule takes into account the unique circumstances of the construction industry. If employees are at work on the day of the certification application, it is not necessary to look beyond this fact. There are good labour relations reasons for this rule. Construction work is by its very nature, temporary. The duration of the work varies. Jobs are often measured in days or weeks, not months or years. In adopting the B.A.T. rule, the Board noted that it was balancing access to collective bargaining with the rights of individual employees to participate in the decision as to whether they wish trade union representation. This balance recognizes that the whole scheme of the Code is based on the fundamental proposition in Section 4(1) that "every employee is free to be a member of a trade union and to participate in its lawful activities." The opportunity for construction employees to exercise this right could be severely curtailed if they had to be at work on the day of the certification application and meet the "sufficient continuing interest" test if they were not present on the day of the representation vote.

Sealing Ballots

The Board will routinely seal ballots in a representation vote until the parties have had an opportunity to be heard on a disputed issue, which may affect the ballots. For example, the ballots may be sealed pending the outcome of an unfair labour practice complaint.[^17]


However, the Board will rarely seal the ballots in a representation vote or stay the counting of the votes pending determination of an application for reconsideration. This is because an application for leave to apply for reconsideration does not operate as a stay of an earlier decision. A party must apply for a stay and show that its application for reconsideration will be irremediably prejudiced if the stay is not granted.\textsuperscript{18}

\textit{Second Vote}

Under section 24(3), the Board may direct a second vote if less than 55\% of the employees in the proposed bargaining units vote.

\textit{The Results}

Under section 25(2), if the union wins the vote by obtaining a majority of the votes cast in its favour and the proposed bargaining unit is appropriate, the Board must certify it. If the union loses the vote, of course, the Board may not certify it: section 25(3).

The Board must make available to both the applicant union and the employer the results of the vote, including the number of ballots cast and the number of votes for, against or spoiled.\textsuperscript{19} In small bargaining units, the voting results may enable the employer to determine the choice made by specific employees. As well, in the past, it has been seen that a close vote may offer encouragement to the company to pressure employees to organize a decertification application.


\textsuperscript{19} Section 11(1) of the \textit{Labour Relations Regulation}, BC Reg 7/93, as am. BC Reg 59/93; 154/99.
Chapter 19

Reconsideration

*(Labour Relations Code, Section 141; Labour Relations Board Rule 29)*

A) Introduction

After the Board issues a decision or order, any party to it may apply for leave to have it reconsidered. Essentially, reconsideration is considered a limited form of appeal.

B) Discretionary Decision

It is important to note that there is no automatic right to reconsideration. Granting leave is a discretionary decision of the Board.¹

The Board cautions in its Information Bulletin No. 21 that:

> Leave will rarely be granted where a party seeks to reconsider a procedural, evidentiary or other “interlocutory” determination by an original panel.²

C) Burden on Applicant

The Applicant must convince the Board to grant leave by showing that it has “a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration”.³ It must raise “a serious question as to the correctness of the original decision.”⁴

The three established grounds for reconsideration are:

(a) Evidence not available at the time of the original decision has become available.⁵

(b) The decision of the board is inconsistent with the principles expressed or implied in this *Code* or in any other *Act* dealing with labour relations.⁶

¹ *Labour Relations Code*, RSBC 1996, c 244, sections 141(1) and (2).

² BC Labour Relations Board, Information Bulletin No. 21 “Reconsideration of Board Decisions” page 2; available online at: [http://www.lrb.bc.ca/bulletins/reconsideration.htm](http://www.lrb.bc.ca/bulletins/reconsideration.htm).

³ *Brinco Coal Mining Corporation*, BCLRB No. B74/93 at paragraph 2.

⁴ *Ibid*.

⁵ *Labour Relations Code*, RSBC 1996, c 244, section 141(2)(a).

(c) The original panel acted contrary to the principles of procedural fairness and natural justice.⁷

D) The Mechanics

The key procedural points to remember when applying for leave for reconsideration are:

- The application must be filed within 15 days of the publication of the Reasons for the decision or order at issue.⁸
- The application must be in writing.⁹
- It must set out argument regarding:
  a) the “good arguable case” or “serious question” test to show that the Board ought to grant leave;¹⁰ and
  b) the specifics of the alleged error by the original panel.¹¹
- Where an application is founded on material facts which are not evident on the face of the Board’s original decision or order, a statement of those facts verified by statutory declaration must accompany the application.¹²
- The format of the leave application must conform to the requirements described in Rule 2(2), which is available online at: http://www.lrb.bc.ca/rules/rules1.htm#2.
- It must be served on the respondent and any other person who will be affected by the application.¹³
- It must be accompanied by the appropriate filing fee. Currently, the cost for filing an application for leave for reconsideration is $200. Filing a Reply costs $100.¹⁴

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⁷ Brinco Coal Mining, BCLRB No. B74/93 at paragraph 2.
⁸ Labour Relations Code, RSBC 1996, c 244, section 141(5) and Rule 29(1)(a).
⁹ Rule 29(1)(a).
¹⁰ Brinco Coal Mining Corporation, BCLRB No. B74/93 at paragraph 2; Rule 29(1)(c).
¹² Rule 29(2).
¹³ Rule 2(3).
¹⁴ Labour Relations Board Fee Regulation, BC Reg 395/2003, section 2.
E) Possible Outcomes on Reconsideration

After granting leave, a reconsideration panel may:

a) dismiss the reconsideration application;\(^{15}\)

b) vary or cancel the decision that is the subject or reconsideration;\(^ {16}\) or

c) remit the matter to the original panel.\(^ {17}\)

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\(^{15}\) This happened in *Re Kootenay Lake Regional Hospital*, BCLR No. B14/2004 at paragraph 20 (Leave for Reconsideration of BCLR No. B161/2003): “…while leave for reconsideration is granted, the application for reconsideration is dismissed.” In such situations, the Board may find that after granting leave for reconsideration, on the merits of the decision, there were no grounds for reconsideration.

\(^{16}\) *Labour Relations Code*, RSBC 1996, c 244, section 141(7).

\(^{17}\) *Ibid.*
Chapter 20
Raids and Other Changes of Unions

(Labour Relations Code, Sections 18(2), 18(3), 19, 21(2) & 142)

A) Introduction

There are a number of ways in which one union can take over from another. This chapter will discuss four: raids, partial raids, expanded unit applications, and consolidations.

B) Raids and Partial Raids

Raids

A raid is a hostile attempt by one union to displace another as the bargaining agent for a group of employees.\(^1\) Where one trade union already has collective bargaining rights, a raiding union may apply to certify and replace the incumbent union under section 19(1). Any application, however, must comply with the time limits set out in that section: see Chapter 14 for further details. Raids are generally recognized as being inherently disruptive in the workplace to employers, unions and employees. Therefore, the Code limits the time and manner they occur.\(^2\)

The Board will not allow these time limits to be circumvented. Certification applications that fall outside the time limits will be dismissed as untimely. For example, in *Re Timothy Edward Bradley (Hope Traffic Control)*,\(^3\) the Board dismissed the raiding union’s application for certification because it was not filed within the seventh and eighth months in a year of a continued collective agreement under section 19(1).

Partial Raids

A partial raid is a hostile attempt by one union to take over as bargaining agent for a subset of an already certified bargaining unit.

On a partial raid application, the applicant union must make out a prima facie case that changed circumstances justify an alteration to the bargaining structure.\(^4\) Put another way,

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the question is whether there is a greater potential for industrial stability within the larger unit than there would be if a fragmentation of that unit were permitted. This policy is often described as requiring “compelling circumstances” or “compelling reasons” to justify fragmenting the bargaining unit.

Once that threshold question is met, the raiding union still has to satisfy the Board that the unit it has applied for is appropriate in light of the community-of-interest factors set out in *Island Medical Laboratories Ltd.*\(^7\) In *Re British Columbia Ferry Corp.*,\(^8\) the Board confirmed that “the principles in *IML* are always relevant to questions of bargaining unit appropriateness, irrespective of the nature of the application”.

**No Employer Favouritism or Assistance**

During a raid situation, an employer may not assist one union over another. For example, in *Harbour Electric Ltd.*,\(^9\) the employer’s involvement in the raid was problematic. The Board found that the initiation of the raiding union’s organizing campaign had been orchestrated with the assistance of the employer, and that there had been communications between that union and the employer before that event to ensure that was accomplished.

In addition, the employer may not negotiate provisions of a collective agreement with the incumbent union which will unduly influence the employees’ choice with regard to union membership. Nor may it negotiate provisions which indicate favoritism for either the incumbent or the raiding union.\(^10\) As the Board observed in *Afton Mines Ltd.*\(^11\):

> ...Given that raiding applications for certification may be made in the seventh and eighth months of every year of a collective agreement, it is not surprising that reopener negotiations and a raid occasionally coincide.

> When this happens, almost anything the employer does may be seen as an attempt to influence the outcome of the raid. If the employer takes the position that bargaining should be postponed until the organizing campaign is completed, the

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\(^8\) BCLRB No. B257/97 at paragraph 16.

\(^9\) BCLRB No. B96/99 at paragraph 122; Leave for Reconsideration dismissed in B360/99.


incumbent may interpret this as a withdrawal of recognition of it as a bargaining agent, an act which might be seen by employees as favouring the raiding union. On the other hand, if bargaining continues while the campaign is in progress, there can be little doubt that the raid will play a perhaps unspoken part in the negotiations. Where bargaining is hard and agreement is not forthcoming, the incumbent may feel the employer's bargaining stance is designed more to strengthen the hand of the raiding union than to obtain a favourable deal. If agreement is reached, the raiding union may believe that the employer has rushed into or sweetened the deal in order to increase the incumbent's prestige. Indeed, where an employer has actually acted in any of these ways so as to unfairly contribute support to one union, it will have committed an unfair labour practice.

**Effect of Voluntary Recognition Agreements**

Where a voluntary recognition agreement is held up as bar to a certification application on the basis that the application is a raid, the Board will look for evidence that the employees covered by the voluntary recognition agreement have approved it. The Board will seek membership evidence that shows a reasonable ratification procedure was followed or that other adequate means were employed.\(^{12}\) The ratification must be clear\(^ {13}\) and allow employees to express their true wishes.\(^ {14}\) In addition, the ratification process must pre-date the certification application at issue to be effective.\(^ {15}\)

**Special Cases – Health Sector & Construction**

The Board’s approach to partial raids - that they will not be permitted absent very compelling reasons for fragmenting an existing bargaining unit has been applied by the Board in the heavily legislated health care sector, though in a unique manner.

The unique bargaining structure mandated by the *Health Authorities Act*\(^ {16}\) (the “Act”) contemplates that more than one union may act as the bargaining agent within each of five appropriate bargaining units established by the Act.\(^ {17}\) The health sector is divided into these five statutorily mandated bargaining units, each with its own bargaining

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\(^{15}\) *Ibid.* at paragraph 47.

\(^{16}\) RSBC 1996, c 180.

\(^{17}\) *Re 4020 Investments Ltd. (Dufferin Care Centre)*, BCLRB No. B303/2003 at paragraph 37.
association consisting of member unions. As a result of this structure, the representation of employees in the health sector falls under two tiers. The first tier concerns collective bargaining in which the unions cannot bargain individually with the health employers, but bargain together as an association. The second tier concerns the day-to-day administration of the collective agreement, which each union administers in its representation of its members. Given this unique bargaining structure, the Board has held that in the context of partial raids in the health sector, the second tier unit is the relevant unit of concern in determining whether there would be industrial instability or if there is a compelling reason to fragment the unit.\(^{18}\)

Previously, the Board held that given this statutory scheme, where an applicant union applies to represent all employees of a single employer:

\[\text{The normal concerns for industrial stability do not arise. There will not be an increase in the number of bargaining agents conducting negotiations and there is no potential for an additional labour dispute. The newly-added union will become a member of the applicable association that will, in turn, negotiate with HEABC on behalf of all its member unions for a single collective agreement covering the entire bargaining unit.}\(^{19}\)

However, in recent decisions from the past several years of raids in the health sector, the Board has modified its approach, finding that industrial stability concerns do arise in the health sector when there is an increase in bargaining agents at a single location in a health authority.\(^{20}\) It now considers its policy concerns regarding fragmentation of bargaining units, the proliferation of bargaining units and the industrial instability at the second tier level of labour relations.\(^{21}\)

The role of craft unions in the construction industry potentially brings different considerations to bear with respect to raids conducted in that sector. It is a Board principle that craft unions cannot “raid back” on an all-employee unit.\(^{22}\) Thus, if an all-employee unit is already certified, a craft union cannot apply to represent just the members of its craft.


\(^{19}\) \textit{Re 4020 Investments Ltd. (Dufferin Care Centre)}, BCLRB No. B303/2003 at paragraph 39.


If the situation is reversed – a craft unit is already certified and a non-craft union wishes to apply to certify all of the employees at the workplace – the non-craft union would need to satisfy the Board that:

1. it had as members in good standing not less than 45 percent of the employees in the proposed unit, who were not members of the existing craft unit: (section 18(1));

2. it had a majority of the already certified craft unit as members: (section 21(2)); and

3. assuming the craft union had a collective agreement in place and that it had been certified more than six months before, the all-employee certification application was made during the seventh and eighth months during a year the collective agreement was in place: (sections 21(2) and 19(1)).

Even if all three criteria were met, there would be a presumption against the non-craft union being certified where a craft unit is already in place due to the Board’s concern over the potential for industrial instability.

C) Expanded Unit Applications

Where a second union applies for a bargaining unit which is larger than and overlaps a smaller certified unit, the Board does not treat the application as a raid. In White Spot Limited, the Board explained:

"where the proposed unit is either larger than and inclusive of the existing unit, or merely overlaps with the existing unit, it would not be correct to say that a collective agreement binding on the existing unit was in force for the proposed unit. ...[O]nly a part of the group of employees in the intended unit would be covered by the collective agreement, and Section 39(2)(b) [now section 18(2)] would not apply. The application for the larger or overlapping unit could be made at any time under Section 39(1) [now section 18(1)]…"

However, a raiding union cannot finesse the time bar provisions. If the unit applied for is substantially the same as that already certified, then the time bar in section 19(2) applies.

23 Cicuto & Sons Contractors Ltd., IRC No. C271/88 (Reconsideration of BCLRB No. 52/87) at page 15.


26 BCLRB No. 84/75 at page 9 (QL).

D) Section 142 Consolidations

A final way in which there may be a switch in union representation is if the Board exercises its discretion to issue a consolidation order under section 142 of the Code. Such an application may arise if the employer closes part of its operation; if an employer is replaced by a successor; or following a common employer declaration.

Generally speaking, the Board will determine a consolidation application on the basis of the principles set out in Island Medical Laboratories. Please see Chapter 9 for more detail.


30 *Burritt Bros. Floor Coverings Ltd. (Re)*, BCLRB No. B120/2012.

Chapter 21

Varying a Certificate
(Labour Relations Code, Section 142)

A) Introduction

Section 142 allows parties to apply to vary or to cancel the certification of a trade union or the accreditation of an employers’ organization. It also permits the Board to do this on its own motion.

B) Variance

Reasons Why Unions Make Variance Applications

A union might apply under section 142 to vary its certification to expand the bargaining unit. For example, in Re British Columbia (Workers’ Compensation Board), the Compensation Employees’ Union applied to vary its certification to include employees in the internal audit department. The Board ordered the section 142 vote be counted. In Re Central Vancouver Island Health Region, the Health Sciences Association of British Columbia successfully applied to vary its application to include paramedical employees at the Nanaimo and Parksville mental health offices.

It is important to note that when a union is applying to vary its certification to include more employees, it must demonstrate that it has majority support in the new group of employees. The Board described the Olivetti principle as follows:

…the Board will not allow a union which has established itself in one location, or among one group of employees, to use that foothold as a base for sweeping other employees into the unit through an application for variance without proof of support in the group of employees to be added. ...

Where two or more unions are certified to a bargaining unit, they might use section 142 to split their certification. For example, in Re Northern Steel Ltd., the British Columbia

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2 Ibid. at paragraph 62.


5 Re Mainstream Assn. for Proactive Community Living, BCLRB No. B343/98 at paragraph 23; Leave for Reconsideration dismissed at BCLRB No. B527/98.
Provincial Council of Carpenters and Local 2736 of the Millwrights, Machine Erectors and Maintenance Union applied to split the existing certification into two: one certification to be held by the Council for carpenters, joiners and lathers and the other to be held by Local 2736 for millwrights.  

The Board granted this variance application.  

**The Test**

The test governing the appropriateness of a variance is set out in *Island Medical Laboratories*.  

**Negotiated Variances**

It should also be kept in mind that the parties may negotiate a broader certification after the initial certification is granted. Such a proposal could be a matter for negotiation when bargaining the union recognition provision of the collective agreement.

**C) Cancellation**

The Board may cancel a certification if:

1. the certified trade union has ceased to be a trade union; or
2. the employer has ceased to be the employer of the employees in the bargaining unit; or
3. upon receipt of an application for cancellation of the certification, if it is satisfied that the bargaining agent has abandoned its bargaining rights in respect of the employees in the bargaining unit.

**D) Decertification**

The Code permits termination of the relationship between the employer, the union, and the employees. When employees seek to end the relationship, they apply to decertify. A successful decertification application under section 33(2) will result in cancellation of the

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10 *Labour Relations Code*, RSBC 1996, c 244, section 33(1).
union’s certification. A successful partial decertification application under section 142 will result in a variance of the union’s certification to reflect its diminished role.

The topic of decertification and partial decertification is addressed in further detail in Chapter 22.
Chapter 22
Cancelling a Certificate
(Labour Relations Code, Sections 33 and 142)

A) Introduction

Organizing a union does not end with certification. Maintenance of the economic and political health of the union requires that organization be an ongoing process. Beyond those concerns, newly certified unions as well as those that have been certified for a longer period of time must be aware of the possibility of decertification.

B) Full Decertification

Subject to certain time bars, a trade union may be decertified if not less than 45 percent of the employees in the unit sign an application for cancellation of the certificate under section 33(2), and subsequently, a majority of employees vote in favour of decertification under section 33(4). A trade union could also be decertified for abandonment of its bargaining rights with respect to the bargaining unit.

Abandonment

Employers may apply for decertification under section 33(11) on the basis that union has “abandoned its bargaining rights in respect of the employees in the bargaining unit.”¹ They may also raise this argument in a collateral way on a section 139 application to determine whether a collective agreement exists.²

In determining whether a union has abandoned its bargaining rights, the Board will consider the following:

(i) length of the union’s inactivity;³

(ii) whether the union has made attempts to negotiate or renew a collective agreement;

(iii) whether the union has sought to administer the collective agreement through the grievance and arbitration provisions of a collective agreement;

¹ Pacific Produce, IRC No. C187/92.


³ Ibid.: “A period of one and a half years of inactivity has been described in some cases as marginal, and in other cases considered as a minimum: Quadra, supra; and Pacific Produce, A Division of Albert Fisher Canada Limited, IRC No. C187/92. In other cases, delays of 14 months have not been found to establish abandonment when coupled with other circumstances: Kitimat Builders Supplies Limited, BCLRB No. B100/97.”
(iv) whether the terms and conditions of employment have been changed by the
employer without objection by the union; and

(v) whether there are extenuating circumstances to explain an apparent failure to
assert bargaining rights.4

Time Bars

The time bars to an application for decertification are found in section 33(3) of the Code.
An application for decertification may not be made during the ten months immediately
following certification; during the ten months immediately following a refusal to cancel a
certification under section 33(6); or during a period designated by the Board pursuant to
section 30 following a representation vote in which the majority of voters vote against
decertification under section 33(4)(b).

The policy rationale behind the time bar in section 33(3)(a) is to allow the newly certified
union “a period within which to consolidate its support among the bargaining unit
employees and seek to obtain a first collective agreement…”5 The purpose of the time
bar in section 33(3)(b) is “to provide the Union an opportunity to restore its relationship
with the bargaining unit after either unfair labour practices (Section 33(6)(a)) or improper
interference (Section 33(6)(b)).”6

C) Partial Decertification

Sometimes a partial decertification will be effected by employees applying to vary a
certificate to exclude certain employees. This is an application pursuant to section 142.

The decision to grant partial decertification is a discretionary exercise of the Board. The
Board “recognizes that a partial decertification is a limited rather than a routine solution
to problems in the bargaining unit.”7

The Board’s approach to partial decertification is set out in the leading decision from
2001, White Spot.8 When considering an application for partial decertification, the
Board asks as a threshold question whether the applicants have established that the
remaining unit be appropriate for bargaining in accordance with the Island Medical
Laboratories factors. (See Chapter 9 on Appropriate Bargaining Units.)

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4 Quadra Control & Weigh Systems Ltd., IRC No. C196/89. See also Re Vicwest Steel Ltd., BCLRB

5 Richmond Cabs Ltd. and Coral Cabs Ltd., BCLRB No. B264/95 at paragraph 35.

6 Re Mahara Electric Ltd., BCLRB No. B47/97 (Reconsideration of BCLRB B349/96) at paragraph 10.

7 Re Minolta Business Equipment (Canada) Ltd., BCLRB B116/2003 at paragraph 47.

Once that threshold issue has been met, the Board weighs the wishes of the employees wanting to leave against the impact of granting the application on (1) the employees remaining in the bargaining unit and (2) the collective bargaining relationship as a whole.

The Board’s focus is on real, as opposed to hypothetical adverse impact. For example, in relation to the impact on employees remaining in the bargaining unit, the Board’s concern is on the loss or diminution of rights and opportunities the employees actually exercise or can be expected to exercise in the future.9 Thus, where employees regularly transferred into, out of and between various locations of the employer and where layoff, recall and bumping rights were bargaining unit-wide, the Board concluded that the proposed partial decertification would have a real adverse effect on the remaining employees.10

Where relevant, the Board will also consider whether:

- the timing or context of the application make it inappropriate;
- the application is tainted by improper interference by the employer or another entity;
- the application is a disguised raid; or
- there is a realistic possibility of decertifying the unit as a whole.

With respect to timing issues, applications for partial decertification will rarely be granted if made during strikes, lockouts or collective bargaining. In addition, such applications are likely to be dismissed where a union’s certification is new or only just expanded to include the applicant employees.11

The Board considers collective bargaining to be underway upon giving notice to bargain.12 Deemed notice to bargain is also sufficient to trigger the Board’s timeliness concern.13 Despite the Board’s general rule of not permitting partial decertifications during collective bargaining, the Board has left the door open to hearing partial decertification applications in some exceptional circumstances.14 For example, in one case where bargaining concluded, a tentative agreement was been reached pending ratification, with the ratification vote delayed because of a policy grievance that was not being actively pursued, the Board proceeded with the partial decertification application.15

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10 Re Vancouver City Savings Credit Union, BCLRB No. B19/2004 at paragraph 19.


15 Ibid. at paragraph 10.
D) Decertification, Unfair Labour Practices & Improper Interference

Under section 33(6) of the Code, the Board may refuse to cancel a union’s certification in the event of an unfair labour practice or improper inference where the interference is such that a representative vote is unlikely to disclose the true wishes of the employees. Note that where a union alleges a section 6(3)(a) or (b) unfair labour practice, the reverse onus provisions of section 14(7) applies to place the burden of proof upon the employer.

Legal Fees and Improper Interference

In the Starbucks decision, the Board ordered Blake, Cassells & Graydon LLP to produce particulars of any payment or consideration for legal services rendered to a group of employees seeking to decertify the Cambie Street Starbucks by the employer or by a related company. The Board had earlier ruled that the union’s allegation that the employer had a policy to cover all legal fees for employees seeking to decertify, if proven, could be found to constitute improper employer interference.

Other Examples of Improper Interference or Unfair Labour Practices

In Helping Hands Agency Ltd., the Board found the employer committed a number of unfair labour practices during a decertification campaign, including:

- improperly displacing a union representative with a less-senior employee for the purposes of assigning work;
- calling an employee and suggesting that the employee file grievances against the union – the employer suggested the employee might not get paid otherwise;
- frustrating the exercise of seniority rights;
- frustrating employee access to the grievance procedure; and
- failing to make obligatory dues deductions.

The Board dismissed the decertification application under section 33(6)(a) without counting the ballots cast in the representation vote.

Furthermore, in B.F. Roofing Ltd., the Board held that the employer committed an unfair labour practice by failing to remit dues on behalf of two employees, one of whom was disenfranchised and was not included on the voters list as a result of that failure.

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In *Checkmate Cabs Ltd.*,²¹ the Board found that the employer’s refusal to implement the collective agreement for almost the entirety of its term constituted an unfair labour practice contrary to section 6(3)(d) of the *Code*. In addition, the employer had committed a second unfair labour practice by refusing to collect and remit union dues. The Board refused to cancel the union’s certification and ordered the ballots cast on the decertification issue not to be counted.

A bonus system which made non-unionized employees at other locations eligible to receive higher bonuses than the unionized employees at another location sparked a decertification campaign in *Re Thompson Interior Savings Credit Union*.²² The Board concluded that the employee leading the decertification campaign had the tacit approval of management because he was permitted to campaign openly at work. That, in combination, with various emails, letters, and meetings led the Board to conclude that the events fell “within the wider scope of improper interference under Section 33(6)(b)” rather than constituting an unfair labour practice under sections 6 or 9 of the *Code*.²³ Instead of refusing to cancel the union’s certification, which would have triggered the 10 month time bar, the Board ordered a second representation vote be conducted.²⁴ The Board also ordered that the employer provide a copy of its decision to the employees and also to allow the union to conduct a one-hour meeting with the bargaining unit employees prior to the vote.²⁵

**E) Decertification and the Construction Industry**

The 30/30 rule which the Board applies to determine who is an employee and therefore eligible to vote in a representation vote in the construction industry applies to both certification and decertification.²⁶

The rule states that a person is an employee if they are working in the bargaining unit at the date of the application. Should the person not be working at that date, he or she will nevertheless be considered an employee if he or she worked at any time during the thirty

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²⁶ *Re Directional Mining & Drilling Ltd.*, BCLRB No. 178/2004 at paragraph 11.
days preceding the application, and further, have a reasonable expectation of being re-employed during the thirty days following the date of the application.\footnote{B.A.T. Construction Ltd., BCLRB No. B444/94 (Leave for Reconsideration of BCLRB Nos. B102/93 & B178/93).}
Chapter 23
Duty to Bargain in Good Faith

(Labour Relations Code, Sections 1, 11, 27, 45 & 47)

A) Introduction

After certification, pre-existing employment contracts, oral or written, will remain in effect until amended or displaced by the collective agreement.\(^1\) After certification, either the union or the employer may initiate collective bargaining by giving the other side a written notice under section 45 of the Code.

The provision of written notice to start bargaining triggers various other obligations in the Code. First, under section 47, good faith bargaining must start “within 10 days after the date of the notice”. That same section also requires the parties “to make every reasonable effort to conclude a collective agreement or a renewal or revision of it”.

In addition, the notice to bargain can only be given after certification. Certification, in turn, triggers the freeze on terms and conditions of employment as set out in section 45(1)(b) of the Code. In a nutshell, in a new bargaining relationship, the freeze—unless the employer has previously sought leave of the Board pursuant to subsection (3)—lasts until the earlier of (i) four months after certification or (ii) a collective agreement is executed (section 45(1)(b)).

It should be noted that, despite the freeze, the employer maintains the right to suspend, transfer, lay off, discharge or discipline an employee for proper cause (section 45(4)). The employer may also make changes so long as these constitute “business as usual”\(^2\) or if it has the Board’s approval (section 45(3)).

The purpose of the post-certification freeze, that may overlap with collective bargaining, is to ensure “business as usual”. As the Board explains in Re Sears Canada Inc.\(^3\):

10 …The intent of Section 45 is to maintain the status quo shortly after certification by prohibiting an employer from unilaterally implementing changes to the terms and conditions of employment which would have a "chilling effect" on collective bargaining. ...

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1 Vancouver Professional Soccer Ltd., BCLRB No L51/79.

2 Re Coquitlam Inn and Convention Centre Ltd., BCLRB No. B274/2001 at paragraph 33. See also Re Osprey Care Penticton Inc., BCLRB No. B52/2015 at paragraphs 27 and 31.

3 BCLRB No. B533/98.
The post-certification freeze has also been described as ensuring a period of calm during which a “level playing field” is maintained between the parties when starting to collectively bargain.\(^4\) It also serves to prevent any changes that might be construed as penalizing employees for certification.\(^5\)

If a wage increase was planned before notice to bargain is given, then the “business as usual” approach may apply to require the employer to implement the increase.\(^6\)

**B) What is the Duty to Bargain in Good Faith?**

In its *Employers’ Guide to the Union Certification Process*, the Board offers the following guidance as to the meaning of the duty to bargain in good faith:

**Q. What is bargaining in good faith?**

**A.** Bargaining in good faith means meeting with the other side, exchanging proposals for the contents of collective agreement in making a sincere attempt to reach an agreement. Failure to agree with the other side's proposals does not, in itself, constitute bad faith. However, a deliberate strategy by either side to prevent reaching an agreement is bad faith bargaining and contrary to the *Labour Relations Code*.\(^7\)

“Collective bargaining” is defined in section 1 of the *Code* as follows:

> “**collective bargaining**” means negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision, or to the regulation of relations between an employer and employees;

**C) Evolution of the Board’s Approach**

The Board’s approach to complaints of bad faith bargaining has expanded over time. The Board summarized the evolution of its jurisprudence in this area in *Re Kelowna Daily Courier*\(^8\).

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\(^5\) Ibid.

\(^6\) *Re Rogers Cablesystems Ltd.*, BCLRB No. B283/97 at paragraph 20 and 25a, Leave for Reconsideration dismissed in BCLRB B116/98.

\(^7\) BC Labour Relations Board, *Employers’ Guide to the Union Certification Process*, available online at: [http://www.lrb.bc.ca/guidelines/ercertguide.htm](http://www.lrb.bc.ca/guidelines/ercertguide.htm).

\(^8\) BCLRB No. B363/2000 at paragraphs 195 to 197.
195 The initial approach of the Board under the Code was non-interventionist. It would intervene if a party was simply going through the motions without any bona fide intention of reaching a collective agreement. However, it would not oversee the substantive discussions of the parties at the bargaining table. As the Board stated in Noranda Metal Industries Limited, BCLRB No. 151/74, [1975] 1 CLRBR 145:

A failure to reach a collective agreement because of a determination not to make the concessions necessary to secure the consent of the other side is not, in and of itself, an unfair labour practice. It would be inconsistent with a fundamental policy of the Code - the fostering of free collective bargaining - for the Board to evaluate the substantive positions of each party, to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction. That interpretation of Section 6 [now Section 11] would amount to compulsory arbitration in disguise, and without the restrictions carefully placed around Section 70 [now Section 55]. The theory of the Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength to strike to force the other side to make the concessions. (p. 159...)

196 As the Board when on to state, "collective bargaining is not a process carried out in accordance with the Marquess of Queensbury Rules: ibid at p. 160. Thus while it interpreted the duty as requiring adherence to certain principles of reasonable bargaining procedure, it exercised considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.

197 Since then, the duty to bargain in good faith has undergone a process of refinement and expansion. The evolution of the incipient duty of disclosure that was recognized in Noranda Metal Industries Ltd., supra, was recognized in cases such as Marian Regional High School Education Committee, IRC Decision No. C213/88 at pp. 31 - 32. In other cases it has been recognized that demands that are illegal because they are expressly prohibited by the Code or some other statute such as the Human Rights Code, would be unenforceable even if expressly incorporated into the collective agreement. Likewise, proposals that, while not perhaps per se illegal, are inconsistent with the scheme of the Code, cannot be pressed to impasse. Thus in Northwood Pulp and Timber Limited, BCLRB No. B271/94, (1994) 23 CLRBR (2d) 298, the Board held while it is open to the parties to agree to change the format of collective bargaining between them, a union cannot strike and employers cannot lockout to compel a change. To do so is contrary to the statutory scheme. ...
Subsequent to the *Kelowna Daily Courier* decision, the Legislature added a duties provision in section 2 of the *Code*. Any remedy for breach of the duty to bargain in good faith must be fashioned consistently with the duties set out in section 2.⁹

**D) Hard Bargaining Versus Surface Bargaining**

The duty to bargain in good faith does not preclude hard bargaining only surface bargaining. Hard bargaining is “taking an uncompromising position…while genuinely seeking an agreement”.¹⁰ In contrast, surface bargaining is when a party simply goes through the motions of bargaining without a genuine intent to reach agreement.

An example of surface bargaining comes in *Re Salvation Army in Canada (Sunset Lodge)*,¹¹ where the employer “within 24 hours moved the goal posts yet another $100,000 more or less without reasonable explanation”.¹² The Board concluded that “Sunset Lodge did engage in surface bargaining by tabling demands that resulted in an ever-receding horizon.”¹³

Another example of surface bargaining is tabling a proposal knowing full well that the other side could never agree to it. For instance, the Canada Board wrote of the employer’s proposal in *Royal Oak Mines Inc.* that employees who had gone out on strike be subject to a “probation clause” upon their return to the mine:

> As well, [the probation clause] was a proposal which the company must have known the union – any union – could not accept, and it thus ran afoul of the principle expressed by the Board in *Brewster Transport Company Limited* (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB No. 574), and with which we agree.¹⁴

In *Brewster*, the employer tabled proposals “designed to ensure refusal by the union” such as a proposal that the union would file no grievances for 60 days after ratification of the proposed deal.¹⁵ The Board stated:

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¹⁴ *Royal Oak Mines Inc.*, CLRB Decision No. 1037 (November 11, 1993) at page 5 (QL); petition for judicial review dismissed at [1994] FCJ No. 416 (CA) (QL); appeal to the Supreme Court of Canada dismissed at (1996) 133 DLR (4th) 129 (SCC).

¹⁵ *Brewster Transport Company Limited*, CLRB Decision No. 574 at page 39 (QL); Reconsideration application dismissed in CLRB Decision No. 580 (June 6, 1986).
...The June 27 offer was a callous and systematic attempt to undermine the role of the bargaining agent and collective bargaining. The combination of the new proposals, the preconditions and the short time limit in which to respond was designed to ensure non-acceptance. It could have no effect other than to frustrate the union and, at this pivotal time in negotiations, lower the morale of the striking employees.16

E) Examples of Bad Faith Bargaining

The duty to bargain in good faith rests on the requirements that the employer recognize the union's exclusive bargaining agency and that both parties engage in rational, informed discussion. Within that general framework the following practices have been held to be bad faith bargaining.

Bargaining with Employees Rather Than the Union

While the employer is not barred from communicating with its employees during collective bargaining, there can be no direct negotiation with individual employees. To do so will violate sections 11 and 27 of the Code by undermining the union’s exclusive bargaining authority.17 For example, in Re British Columbia Automobile Assn.,18 the employer violated the duty to bargain in good faith when it told employees in a bargaining update document that it had accepted the mediator’s “recommendations” prior to informing the union.19 Furthermore, even when the mediator clarified that his “Potential Framework for Settlement” were not recommendations, the employer did not correct the information contained in its previous update.20 Similarly, in Re CIS Victoria Inc. (CopperJohns)21, the Board found the employer to be in violation of sections 11 and 27 when the employer’s representative rejected a tentative agreement on one bargaining issue at a staff meeting without first communicating this to the union.22

In one of the series of decisions concerning a lockout at an IKEA store location, the employer’s offer of terms and conditions of employment to employees who had crossed

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16 Brewster Transport Company Limited, CLRB Decision No. 574 (CLRB No. 574) at page 40 (QL); Reconsideration application dismissed in CLRB Decision No. 580 (June 6, 1986).

17 Re British Columbia Automobile Assn., BCLR No. B498/99 at paragraph 121.


19 Ibid. at paragraphs 133 and 153.

20 Ibid.


22 Ibid. at paragraph 52.
the picket line, which were not offered to the union, was a violation of sections 11, 47, and 6(3)(d) of the Code.23

Illegal or Improper Proposals

In Royal Oak Mines Inc.,24 the union successfully argued that the employer mine had violated the good faith duty. One violation of the duty was the company’s refusal to negotiate any provision in the new collective agreement to deal with the 45 employees who had been terminated for their picket line activities during the bitter 18 month long strike. Another was the mine’s insistence that returning strikers be subject to a probationary clause.25

On the first issue, the Board observed that where employees had been disciplined or discharged for behaviour on the picket line, it was typical once the strike was over to include a procedure in the new collective agreement to deal with claims arising from the imposition of that discipline or discharge.26 By refusing to allow the 45 dismissed strikers from returning to work under any circumstances, the company had created an improper precondition to bargaining.27 The Board wrote:

...The fallacy in this argument, in the present context, is that it assumes the guilt of the persons concerned or, perhaps more precisely, it asserts the jurisdiction of the company to be both accuser and judge. An employer may indeed have that jurisdiction in a non-collective bargaining situation, but this is not such a situation. Questions of identification and of course of evaluation of acts committed and the circumstances in which they were committed are best determined by an objective third party, and this is particularly so the more emotional the circumstances.28

On the issue of the “probationary clause”, the Board concluded that the differentiation between those who had worked at the mine during the strike and those who went out on


24 CLRB Decision No. 1037 (November 11, 1993); petition for judicial review dismissed at [1994] FCJ No. 416 (CA) (QL); appeal to the Supreme Court of Canada dismissed at (1996) 133 DLR (4th) 129 (SCC).

25 Ibid. (CLRB Decision) at pages 4 and 5 (QL).

26 Ibid. at page 4 (QL).

27 Ibid. at page 4 (QL).

28 Ibid. at page 5 (QL).
strike and would be returning to the workplace was improper.29 The probationary clause, the Board held, was “contrary to public policy as expressed in section 57 of the Code”.30

**Duty to Disclose Information**

Collective bargaining only works effectively where the parties are able to engage in rational, informed discussion. The Board summarized in **Hey-Way’-Noqu’ Healing Circle for Addictions Society.**31

107 The duty to bargain in good faith includes an obligation to disclose information which is necessary to "foster rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict: **DeVilbiss (Canada) Ltd.,** [1976] OLRB Rep. Mar. 49 (para. 15). As noted by the Board in **Noranda Metal Industries Limited,** BCLRB No. 151/74, [1975] 1 Can LRBR 145:

> Negotiation nourished by full and informal discussion stands a better chance of bringing forth the fruit of collective bargaining agreement than negotiation based on ignorance and deception. (p. 162)

108 The duty to disclose has two aspects. The first is the obligation to make unsolicited disclosure. In certain circumstances the Board may impose a positive duty to reveal information such as decisions to relocate, contract out, or engage in major lay-offs: **Workers’ Compensation Board,** BCLRB No. 310/84; and **White Spot Limited,** IRC No. C7/89 (upheld in IRC No. C57/89). ...

109 The other branch concerns requests for information. The Board addressed this aspect of the duty in **Noranda Metal Industries Limited,** supra, and held:

> It is a long-established principle of American labour law that a party commits an unfair labour practice if it withholds information relevant to collective bargaining without reasonable grounds...That principle does fit comfortably within the language of s. 6 (now Section 11). One would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making "every reasonable effort to conclude a collective agreement." (p. 162)

It can be a violation of the duty to bargain in good faith if the employer fails to provide unsolicited disclosure of information that affects "a large number of employees", or when

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29 **Royal Oak Mines Inc.,** CLRB Decision No. 1037 (November 11, 1993) at page 5 (QL); petition for judicial review dismissed at [1994] FCJ No. 416 (CA) (QL); appeal to the Supreme Court of Canada dismissed at (1996) 133 DLR (4th) 129 (SCC).

30 Ibid.

31 BCLRB No. B414/95.
the matter is "of such significant importance" or of "a major impact" to the bargaining unit. In addition, where an employer makes its ability to pay an issue in collective bargaining, the Board has held that “information necessary to foster the informed and rational discussion of issues” could include financial information.

The Board has found a violation of the good faith duty when the employer refused to respond to the union’s request for the current wage rates of employees in the bargaining unit in the absence of written consent from each employee. The Board stated:

10  The Union is certified as the exclusive bargaining agent for the employees in the bargaining unit. In order to exercise its statutory rights and responsibilities, it requires wage and classification information. The Union's request is reasonable in that the requested information is necessary to enable rational and informed collective bargaining to take place. The request is consistent with Sections 2(a) and (d) of the Code [to encourage collective bargaining and to promote settlement of disputes between employers and trade unions]...

The Board also pointed out in that decision, Re Insurance Council of British Columbia, that the public sector employer was subject to the Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165. While the Board did not explicitly refer to the possibility of a FOI request, it cited section 22(4)(e) of the privacy legislation which states that a disclosure of personal information is not unreasonable if “the information is about the third party’s position, functions or remuneration as an officer, employee or member of a public body…”.

In Re Hudson’s Bay, the employer raised the private sector privacy legislation, the Personal Information and Privacy Act, SBC 2003, c 63 (“PIPA”) as a bar to the union’s request for a list of employees’ names, wage rates, and benefits. The Board rejected the employer’s privacy argument. It began its analysis by observing that section 18 of PIPA allowed disclosure of personal information if “the disclosure is required or authorized by law”. It then went on to conclude that the employer had an obligation under the Code to provide the requested information. The Board wrote:


35 Ibid. at paragraph 11.

36 Ibid.


38 Ibid. at paragraph 21.
In this case, the Union's right is with respect to information it needs for collective bargaining. It submits that there is an obligation to disclose information to "foster rational, informed discussion" as part of the duty to bargain in good faith. See Insurance Council of British Columbia, BCLR No. B138/99 and Hey-Way'-Noqu' Healing Circle for Addictions Society, BCLR No. B414/95. We agree that contact and salary information of bargaining unit members must be disclosed as part of that duty.

It ordered the employer produce the requested information after observing:

The Employer relies on its internal policy, claiming that it is an undertaking to employees that information will not be "provided to any person or organization unless properly identified as an agent of the Federal or Provincial government." Given the duty of fair representation that the Union is subject to and the duty to bargain in good faith that both parties are required to fulfill, we find that the Employer's unilateral policy cannot override statutory requirements.

One final observation on the duty to bargain in good faith and union requests for information, the timing of a union’s application to the Board is significant. For example, in Re Modern Auto Plating Ltd., the Board granted a declaration that the employer had violated the good faith duty under section 11 of the Code by refusing to provide financial records as to its revenues and production costs. The employer had sought wage concessions on the basis that it had lost a million dollars. In spite of the section 11 violation, however, the Board refused to order the records produced. By the time the union filed its complaint, the employer had withdrawn its proposals for wage and benefit concessions, which had sparked the request for financial information from the union. In fact, the union did not lodge its complaint until “almost six months after the strike began and almost one year after the Employer refused to provide the information it sought”. The Board held that while the employer had violated section 11, its refusal to provide the requested information “had no practical impact on the Union’s ability to assess the Employer’s proposals after October 10, 2001.”


41 Ibid. at paragraph 29.

42 Ibid.

43 Ibid. at paragraph 34.

44 Ibid. at paragraph 32.

45 Ibid.

46 Ibid.
Other Examples of Bargaining in Bad Faith

Further situations in which the Board has found a violation of the duty to bargain in good faith include:

- where the employer has provided inaccurate financial information to justify its position; and

- where the union forwarded its bargaining proposals in advance of a meeting on the basis that the employer “had no proposals of its own” and the employer then fashioned proposals in light of the union’s material. Being able to review one side’s proposals in advance “creates an unfair collective bargaining advantage”, the Board wrote.

The duty to bargain in good faith also applies to unions. Thus, unions may find themselves subject to allegations that they have breached the duty. In Re Health Employers’ Assn. of British Columbia, the employer launched such a complaint under sections 11 and 47. The Board did not evaluate the section 11 complaint but concluded that the Nurses’ Bargaining Association’s refusal to begin bargaining until it received certain information from HEABC (the number of nurses who had retired, the number of full-time, part-time and casual nurses, overtime hours, the number of WCB and LTD claims, etc.) violated section 47 of the Code:

23 Nonetheless, Section 47 of the Code is "explicit and mandatory": B.C. Rail Ltd., BCLRB No. B350/97 (para. 29). Once the HEABC served notice under Section 46 to "commence to bargaining collectively in good fai th", the NBA was required to meet within 10 days. The NBA has not met this requirement and cannot set pre-conditions for doing so: Wheaton Construction Ltd., IRC No. C194/89; BC Rail Ltd., BCLRB No. B157/93.

24 The proper context for the NBA to raise and discuss the issues and information it seeks is at collective bargaining not as a pre-condition to bargaining. ...

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49 Ibid. at paragraph 11.


51 Ibid. at paragraphs 23 and 24.
Chapter 24
Organizing and the Charter of Rights and Freedoms

(Labour Relations Code, Sections 2 and 15)

A) The Administrative Tribunals Act

In 2004, the Legislative Assembly passed the Administrative Tribunals Act. Sections 44 and 45 of the Act deal with statutory tribunals’ constitutional jurisdiction, including jurisdiction over Charter issues. The heading above section 44 reads: “Tribunal without jurisdiction over constitutional questions”. The heading above section 45 reads: “Tribunal without jurisdiction over Canadian Charter of Rights and Freedoms issues”.

The Act is made applicable to statutory tribunals by way of consequential amendments to the tribunals’ enabling statutes. In the case of the Labour Relations Code, section 115.1 lists which provisions of the Administrative Tribunals Act apply to the Board. Sections 44 and 45 are not listed. As a result, unlike other administrative tribunals, the Board may still adjudicate Charter and other constitutional questions.

B) Organizing and the Charter

The provisions of the Charter relevant to organizing are as follows:

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

   (a) freedom of conscience and religion;

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

   (c) freedom of peaceful assembly; and

   (d) freedom of association.

1 SBC 2004, c 45.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

C) Section 2(d) – Freedom of Association

Early Section 2(d) Decisions

Over the past several years, the Supreme Court of Canada has issued several decisions that have gradually expanded the scope of section 2(d), with a recent one being the decision, Saskatchewan Federation of Labour v. Saskatchewan\(^3\), which constitutionalized the right to strike.

In Alberta Reference (Reference re Public Service Employee Relations Act (Alta.))\(^4\), the Supreme Court of Canada held that the freedom of association guaranteed under s. 2(d) of the Charter did not protect the right to collective bargaining or to strike.

The Supreme Court of Canada’s decision in Dunmore v. Ontario (Attorney General)\(^5\) first expanded the scope of section 2(d) of the Charter. Bastarache J. writing for the majority of the Court began his analysis by reviewing the four principles of the freedom of association as set out in previous decisions of the Court, citing Sopinka J. in Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 SCR 367:

> Upon considering the various judgments in the Alberta Reference, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second,

\(^3\) 2015 SCC 4.

\(^4\) [1987] 1 SCR 313.

\(^5\) 2001 SCC 94.
that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.6

The majority reasons in Dunmore continue in paragraph 16:

…the purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in PIPSC, supra, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the Alberta Reference, supra, such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(d) (at p. 367):

There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. . . . The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

[Original emphasis.]

Bastarache J. concluded that certain union activities, such as making collective representations to an employer, adopting a majority political platform, and federating with other unions “may be central to freedom of association even though they are inconceivable on the individual level”.7 While not all union activities or all associations fall within the protective ambit of section 2(d), Bastarache J. wrote that the law must


7 Dunmore v. Ontario (Attorney General), 2001 SCC 94 at paragraph 17.
recognize “certain collective activities...if the freedom to form and maintain an association is to have any meaning”.

Thus, Dunmore cracked the door open for expanding the scope of the right of freedom of association to cover certain collective activities that have no individual analogue.

In addition, the majority in Dunmore concluded, in some circumstances, that section 2(d) freedom may impose positive obligations on government, for example, to extend protective legislation to unprotected groups of employees. At issue in Dunmore was the exclusion of agricultural workers from Ontario’s labour relations statute. Noting the "profound connection between legislative protection and the freedom to organize", the majority concludes that without the benefits of protective legislation such as the Labour Relations Act, 1995, exercising the right of association in Ontario’s agricultural sector was “all but impossible”. The exclusion of agricultural workers from the Labour Relations Act, 1995 “substantially interferes with their fundamental freedom to organize” and, thus, breached section 2(d). After concluding that the breach was not justified under section 1 of the Charter, Bastarache J. found that what was required of the State was:

...at a minimum a regime that provides agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations. The record shows that the ability to establish, join and maintain an agricultural employee association is substantially impeded in the absence of such statutory protection and that this impediment is substantially attributable to the exclusion itself, rather than to private action exclusively. Moreover, the freedom to establish, join and maintain an agricultural employee association lies at the core of s. 2(d)... I conclude that at minimum the statutory freedom to organize in s. 5 of the [Labour Relations Act, 1995] ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.

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8 Ibid. at paragraph 17.


10 Ibid. at paragraph 35.

11 Ibid. at paragraph 48. See also paragraphs 45 & 67.

12 Ibid. at paragraph 48.

13 Ibid. at paragraph 65.

14 Ibid. at paragraph 67.
Dunmore’s advance in section 2(d) jurisprudence proved to be a modest one. Twenty years after the Alberta Reference decision, the Supreme Court of Canada further, but gradually, expanded section 2(d) in Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia (“Health Services”). It held that s. 2(d) protects the right of employees to engage in a “meaningful process” of collective bargaining. Dunmore was raised by the plaintiffs in this case. Directly at issue was Bill 29 that was passed by the BC government as the Health and Social Services Delivery Improvement Act. It passed the legislation without consultation with the affected unions, such as the Hospital Employees Union, whose thousands of members were affected by the legislation. Bill 29 sought to reorganize the health care sector in the province. It gave health care employers more flexibility to unilaterally organize their relations with employees and in ways that would not have been allowed under collective agreements. It introduced changes to the ability of the health employers to contract out work, undid important provisions of the collective agreements, and restricted the ability to collectively bargain on certain issues.

The plaintiff unions and individual members argued, in part, that the legislation violated the right to freedom of association in several key ways. They argued that the statute emphasized “that a union’s ability to engage in a free collective bargaining process can be removed by the stroke of a government pen”. The Supreme Court of Canada held that the freedom of association guaranteed by s.2(d) of the Charter includes a procedural right to collective bargaining and ruled that the provisions in Bill 29 which substantially interfered with that right constituted a Charter violation. It ruled that the right to collective bargaining was a procedural right in that s. 2(d) does not guarantee particular objectives sought through collective and associational activities; rather, it entails a right to process to seek those objectives. It held:

*It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.*

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16 SBC 2002, c 2.

17 Ibid. (BCSC) at paragraph 3.

18 [2007] 2 SCR 391 at paragraph 89.

19 Ibid.
This right to process includes the duty to bargain in good faith. For there to be a violation of the right to collectively bargain, the state’s interference with the general process must be substantial.\(^{20}\) The Court further held:

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\text{Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2 (d) of the Charter. It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.}^{21}\]

In \textit{Ontario (Attorney General) v. Fraser} (“\textit{Fraser}\textsuperscript{22}”) the Court interpreted its \textit{Health Services} decision with respect to its expansion of the constitutional right to collective bargaining. If the door to a constitutionally recognized right to collective bargaining, which was opened by \textit{Dunmore}, was widened by \textit{Health Services}, then the \textit{Fraser} decision served to restrict it by basing its decision on a limited interpretation of \textit{Health Services}. Following \textit{Health Services}, the thought had been that the Court constitutionalized a process for collective bargaining. However, the Court in \textit{Fraser} appeared to backpedal from that position.

After the \textit{Dunmore} decision, the Ontario government enacted the \textit{Agricultural Employee Protection Act} (AEPA) which granted agricultural workers rights to make collective representations to their employers, but did not provide for collective bargaining and other rights granted to workers in other sectors. The UFCW challenged the constitutionality of the legislation stating that it violated sections 2(d) and 15 of the \textit{Charter}. The majority of the Supreme Court of Canada affirmed the principles in \textit{Health Services}, but held that the AEPA did not violate section 2(d) as the freedom does not guarantee access to any particular model or process of labour relations or a particular result. The majority of the Court interpreted \textit{Health Services} as not necessarily constitutionalizing a right to a specific collective bargaining process, but merely elaborating on \textit{Dunmore} about what is a meaningful procedure for the purposes of s. 2(d). In addition, whereas \textit{Health Services} required “substantial interference” by state law or action in the activity of collective bargaining for there to be a violation of s. 2(d), the Court in \textit{Fraser} appeared to require a much stricter test: “[i]n every case, the question is whether the impugned law or state

\(^{20}\textit{Ibid.} \text{ at paragraph 90.}\)

\(^{21}\textit{Health Services}, [2007] 2 \text{SCR} 391 \text{ at paragraph 90.}\)

\(^{22}\text{[2011] 2 SCR 3.}\)
action has the effect of making it impossible to act collectively to achieve workplace goals.”

D) 2015 Trilogy

In 2015, the Supreme Court of Canada issued a trilogy of decisions interpreting and further expanding section 2(d).

The first decision, Mounted Police Association of Ontario v Canada (Attorney General) (“Mounted Police”), the majority of the Court made a significant move with respect to the scope of section 2(d). It moved back to its previous interpretation that “substantial interference” is required for there to an infringement of the freedom of association, rather than the stricter requirement of “impossibility” that was proposed in Fraser.

The RCMP had been excluded from unionization and collective bargaining rights afforded to other public service employees under the Public Service Labour Relations Act (“PSLRA”). Instead, they were subjected to a non-unionized scheme in which RCMP members were represented by the Staff Relations Representative Program (SSRP). The SSRP was the primary way in which they could express their workplace concerns, with the exception of wages. Furthermore, it was the only form of employee representation recognized by management. In 2006, two private associations of RCMP members challenged the constitutionality of their exclusion from the PSLRA.

In finding that section 2(d) was infringed by their exclusion from the labour relations scheme, the majority of the Court held that the freedom of association “protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests.” It concluded that “[t]he current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management’s influence.” The basis of the majority of the Court’s decision is its characterization of the progression of the right of freedom of association from a “restrictive approach” to the current “generous and purposive approach”.

Mounted Police was heard with the companion case, Meredith v. Canada (Attorney General) (“Meredith”), which dealt with similar issues regarding labour relations.

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23 Ontario (Attorney General) v. Fraser, [2011] 2 SCR 3 at paragraph 46.
25 SC 2003, c 22.
26 [2015] 1 SCR 3 at paragraph 5.
27 Ibid.
28 Ibid. at paragraph 30.
29 [2015] 1 SCR 125.
matters with the RCMP. In *Meredith*, the issue pertained specifically to the constitutionality of the federal wage restrictions imposed on the RCMP. In contrast to the significant movement made in *Mounted Police*, the majority of the Court in *Meredith* upheld the wage restrictions. It based its decision on the pronouncement made in its previous decisions that although s. 2(d) of the *Charter* guarantees a right to a meaningful labour relations process, it does not guarantee a particular result.

The last of the 2015 trilogy cases is a historic one in light of its significance. With a 5-2 majority of the Supreme Court of Canada, *Saskatchewan Federation of Labour v. Saskatchewan*,30 in effect, gave “constitutional benediction” to the right to strike.31 It held that it was an “indispensable component” of the right to meaningful collective bargaining that is protected under section 2(d) of the *Charter*.32 The case dealt with two pieces of legislation: the *Public Service Essential Services Act* (“ESA”) and the *Trade Union Amendment Act* (“TUA Act”). The *ESA* removed the right of public sector employees to participate in work stoppages and established an essential services designation process that was in favour of the employers. It contemplated the unilateral designation of essential services by employers with the inability of unions to challenge those designations. The TUA Act amended the results regarding certification, decertification and employer communications, which in effect made it difficult for unions to organize and certify.

With respect to the ESA, the majority of the Court held that the legislation substantially interfered with section 2(d). It states:

>...Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d). As the trial judge observed, without the right to strike, “a constitutionalized right to bargain collectively is meaningless”.

Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the *Charter*. In my view, the failure of any such mechanism in the *PSESA* is what ultimately renders its limitations constitutionally impermissible.33

30 [2015] 1 SCR 245.
The majority of the Court further explained the right to strike as follows, relying on its earlier decisions:

In Health Services, this Court recognized that the Charter values of “[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy” supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2 (d) (para. 81). And, most recently, drawing on these same values, in Mounted Police it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2 (d) aims to protect the individual from “state-enforced isolation in the pursuit of his or her ends” . . . . The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.34

The majority of the Court also recognized that the right to strike also promotes equality in the bargaining process.35

The downside to this case is the finding that the TUA Act did not violate section 2(d) of the Charter with limited discussion. The majority of the Court held:

But I agree with the trial judge, whose conclusion was upheld by the Court of Appeal, that in introducing amendments to the process by which unions may obtain (or lose) the status of a bargaining representative, The Trade Union Amendment Act, 2008 does not substantially interfere with the freedom to freely create or join associations. This conclusion is reinforced by the trial judge’s findings that when compared to other Canadian labour relations statutory schemes, these requirements are not an excessively difficult threshold such that the workers’ right to associate is substantially interfered with.

35 Ibid. at paragraph 55.
I also agree with the trial judge that permitting an employer to communicate “facts and its opinions to its employees” does not strike an unacceptable balance so long as the communication is done in a way that does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.36

E) Post 2015 Trilogy Decisions

There have been mixed developments from the lower courts regarding the freedom of association in the labour context.

In Canadian Union of Postal Workers v. Canada,37 an Ontario Superior Court judge held that back-to-work legislation passed by the Conservative government in 2011 which prohibited strikes and unilaterally imposed wage increases was a violation of the freedom of association and expression. The back-to-work legislation was passed in response to a labour dispute between the CUPW and Canada Post. CUPW members instituted job action in the nature of rotating strikes; subsequently, Canada Post locked them out. In addition to ordering the return to work and among other requirements, the legislation unilaterally imposed wage increases that were below what Canada Post had already offered in negotiations.

Referencing Saskatchewan Federation of Labour v. Saskatchewan and Mounted Police, Justice Firestone ruled that the legislation violated sections 2(d) and (b) of the Charter. With respect to section 2(d), he held:

Based on the evidentiary record, there can be no question that, on the facts of this case, the Restoring Mail Delivery for Canadians Act abrogated the right to strike of CUPW members. The Crown argues, however, that the right to strike has not been abrogated. It contrasts the situation in this case, where the Union engaged in rotating strikes and had the potential to strike for the 100-plus days of bargaining that preceded the work stoppages, with the facts of SFL, where the relevant legislation removed any possibility of strike action ab initio.

With respect, this is a false distinction. The right to strike is protected insofar as it contributes to a meaningful process of collective bargaining. So long as it makes that contribution, it is deserving of constitutional protection. There is no support for a temporal limit on the right to strike in the jurisprudence of the Supreme Court of Canada. Nor is there any support for the proposition that the right to strike, once engaged (as long as it is contributing to a meaningful process of collective bargaining), can then be taken away without a s. 2(d) violation

36 Ibid. at paragraphs 100-101.

37 2016 ONSC 418.
(subject, of course, to justification under s. 1). Quite the opposite. The facts of this case reveal that the right to strike was actively contributing to a meaningful process of collective bargaining at the very moment of its abrogation by the Act.\textsuperscript{38}

As for the freedom of expression under section 2(b), Justice Firestone found that the legislation did limit freedom of expression by prohibiting strike.\textsuperscript{39}

\textit{Ontario Public Service Employees Union v. Ontario (Minister of Education)}\textsuperscript{40} is another recent decision by the Ontario Superior Court that found that the Ontario government’s legislation – \textit{Putting Students First Act}, violated section 2(d). The applicant unions represented education workers whose collective agreements were due to expire. The Ontario government approached negotiations with the intention of implementing cost-saving measures. The Ontario government then passed Bill 115 – the \textit{Putting Students First Act} – which required parties to reach a Memorandum of Understanding that was substantially similar to an agreement with the Ontario English Catholic Teachers’ Association. If no agreement was reached, Bill 115 imposed a contract. The Act was repealed and the agreements that were imposed through Bill 115 remained in place.

Five unions, which represented teachers, other professionals and support staff, brought a \textit{Charter} challenge that the Ontario government’s conduct breached second 2(d). In finding that there was an infringement of the freedom of association, the Ontario Superior Court judge cited \textit{Mounted Police} and held:

\begin{quotation}
133 The issue at hand is whether the actions of Ontario substantially interfered with "a meaningful process of collective bargaining". What is required for appropriate collective bargaining "... varies with the industry, culture and workplace in question..." What is required is a fact-based inquiry into "... whether the process of voluntary, good faith collective bargaining between employees and the employer has been...significantly and adversely impacted."

... 

135 When reviewed in the context of the Charter and the rights it provides, it becomes apparent that the process engaged in was fundamentally flawed. It could not, by its design, provide meaningful collective bargaining. Ontario, on its own, devised a process. It set the parameters which would allow it to meet fiscal restraints it determined and then set a program which limited the ability of the others parties to take part in a meaningful way.
\end{quotation}

\textsuperscript{38} \textit{Canadian Union of Postal Workers v. Canada}, 2016 ONSC 418 at paragraphs 184-185.

\textsuperscript{39} \textit{Ibid.} at paragraph 219.

\textsuperscript{40} 2016 ONSC 2197.
The **Putting Students First Act** was part of a process that interfered with collective bargaining:

... When the central negotiations, as set up by Ontario, did not succeed, they were set aside and replaced by one agreement entered into by one bargaining agent. That bargaining agent had responsibility for the concerns of only its members but became, by arbitrary decision of Ontario, the after-the-fact representative of all members of all bargaining agents in the education sector; a group whose concerns and priorities would have differed, one from the others. When the Putting Students First Act is understood in the context of the process as a whole, it becomes apparent that it did nothing other than sustain and confirm the interference with collective bargaining. By requiring that agreements entered into before August 31, 2012 be "substantially similar" and that those made after that date be "substantively identical" to the OECTA agreement, Ontario made it clear that there would be no bargaining that diverted in any meaningful way from the terms of the OECTA deal.\(^{41}\)

The Ontario Superior Court judge found that infringement of section 2(d) could not be justified under section 1 of the **Charter**, because the means of achieving Ontario’s goals of fiscal restraint were arbitrary – the means adopted were not rationally connected to that objection. \(^{42}\) In coming to this conclusion, the judge relied upon the principles in **Meredith** that:

- The fact that there are fiscal concerns does not give the government an unrestricted license on how it deals with the economic interests of its employees.

and

- While wage rollbacks are technically seen to be rationally connected to fiscal stability and responsibility, the refusal to engage in any meaningful form of consultation is not.\(^{43}\)

In contrast, in **British Columbia Teachers' Federation v. British Columbia**,\(^{44}\) the B.C. Court of Appeal allowed the Province’s appeal of a trial court decision by Justice Griffin,

\(^{41}\) *Ontario Public Service Employees Union v. Ontario (Minister of Education)*, 2016 ONSC 2197 at paragraph 171.

\(^{42}\) Ibid. at paragraph 256.

\(^{43}\) Ibid.

\(^{44}\) 2015 BCCA 184; leave to appeal to SCC granted in [2015] S.C.C.A. No. 266.
which declared certain sections of the *Education Improvement Act*\(^{45}\) as unconstitutional for infringing the teachers’ freedom of association under s. 2(d). The Act deleted collective agreement terms and prohibited collective bargaining on certain issues related to class size, class composition, and supports for special needs students. Justice Griffin’s decision\(^{46}\) followed the Court's declaration in 2011 that prior legislation interfering with teachers' collective bargaining rights was unconstitutional for breaching section 2(d). Despite this declaration, the government then enacted virtually identical legislation.

Justice Griffin found that the duplicate legislation substantially interfered with the teachers’ s. 2(d) *Charter* right which protects their freedom to associate to make representations to their employer and to have the employer consider them in good faith. The Court of Appeal, in reversing her decision, held that the decision failed to give effect to the consultations that occurred prior to the passing of the legislation in determining whether it infringed on section 2(d). The Court of Appeal considered that *Health Services* placed emphasis on the presence of consultations between the parties in determining whether there has been an infringement.\(^{47}\) It held that its interpretation of *Health Services* regarding pre-legislative consultations was not inconsistent with recent Supreme Court of Canada cases such as *Saskatchewan Federation of Labour v. Saskatchewan* and *Mounted Police*, since pre-legislative consultations were not a factor in those decisions.\(^{48}\) It concluded:

> Between the consultations and the collective bargaining leading up to the legislation, teachers were afforded a meaningful process through which to advance their collective aspirations regarding their working conditions, the topics affected by the legislation, and the relevant policy considerations. Their freedom of association was respected.\(^{49}\)

It further held:

> ...the judge should not have assessed the substantive merit or objective reasonableness of the parties' negotiating positions. Courts are poorly equipped to make such assessments. What matters in this case is the quality of the consultation process itself and whether it gave teachers a meaningful opportunity to make collective representations (through the BCTF) about their shared workplace goals.\(^{50}\)

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\(^{45}\) SBC 2012, c 3.

\(^{46}\) 2014 BCSC 121.

\(^{47}\) 2015 BCCA 184 at paragraphs 57-60.

\(^{48}\) *Ibid.* at paragraph 63.


\(^{50}\) *Ibid.* at paragraph 7.
In 2015, the Supreme Court of Canada granted leave to hear the appeal of this decision.\(^{51}\) Given its recent pronouncements expanding section 2(d), it will be curious to see how the Court approaches the BC Court of Appeal’s interpretation of \textit{Health Services} and whether it will decide to expand section 2(d) even further or will use this case as an opportunity to clarify and backpedal from its earlier decisions and restrict the current interpretation of the freedom of association.

Most recently in \textit{Professional Institute of the Public Service of Canada v. Canada (Attorney General)}\(^{52}\), the Ontario Court of Appeal issued an unsettling decision regarding the freedom of association and meaningful collective bargaining in the context of economic austerity, discussing the “consequences” of the Supreme Court of Canada’s 2015 trilogy decisions.

In response to the economic crisis of 2008, the Federal Government passed the \textit{Expenditure Restraint Act}\(^{53}\) ("ERA"), which set wage increase limits for public servants such that it had the effect of rolling back already negotiated or awarded wage limits and to prelude future wage increases and awards. Two unions, the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada, who represent approximately 885 of unionized employees in the federal public service and a total of 62 bargaining units, challenged the constitutionality of the \textit{ERA} and government conduct leading up to and after the \textit{ERA}. They argued that provisions of the \textit{ERA} and the government’s conduct in collective bargaining substantially interfered with their right to a meaningful collective bargaining process by interfering with bargaining on wages. Many of the bargaining units reached collective agreements prior to the enactment of the \textit{ERA}.

The application judge dismissed the challenge, finding that section 2(d) was not infringed by the \textit{ERA} or government conduct.\(^{54}\) Justice Lederer found that the \textit{ERA} did not just apply to unionized workplaces, distinguishing it from \textit{Health Services} of which he explained that the legislation at issue was directly solely at unionized health sector employees and their collective agreements.\(^{55}\) He found that in this case, the limits on wages applied to a broad spectrum of employees. He then made a distinction between the right to collective bargaining and the right to associational activity. He held:

\begin{quote}
117 The error in the submissions of the union is that they conflate the right to collectively bargain into the freedom of association. They mistake the former as included in the latter. This is the same analysis made by the Court of Appeal in
\end{quote}

\(^{51}\) [2015] SCCA No. 266

\(^{52}\) 2016 ONCA 625.

\(^{53}\) S.C. 2009, c. 2.

\(^{54}\) 2014 ONSC 965.

\(^{55}\) \textit{Ibid.} at paragraph 116.
Fraser. It was rejected by the Supreme Court of Canada. The submission ignores the injunction that the right to collectively bargain is a derivative right. It only arises, as a right, if the freedom of association would otherwise be impinged on.\textsuperscript{56}

He found that it was sufficient to dismiss the challenge on the basis that the government action was not directed at the association, but at all employees such that “there was no impact on the association that can be distinguished from the effect the legislation has had on others.”\textsuperscript{57} The application judge also concluded that the government action did not substantially interfere with the freedom of association as the unions were provided with a meaningful process of collective bargaining, although the results of that process were unsatisfactory.\textsuperscript{58}

Justice Lederer’s decision was issued before the Supreme Court of Canada’s 2015 trilogy of cases. Nevertheless, with the benefit of the 2015 trilogy, the Ontario Court of Appeal upheld the decision.\textsuperscript{59} It agreed with Justice Lederer in that the government’s approach in collective bargaining was “hard bargaining” which is permitted in its duty of good faith bargaining.\textsuperscript{60} Furthermore, there wasn’t a significant power imbalance between the government and the unions before the ERA.\textsuperscript{61} Both sides were aware of the economic crisis and had tools available to them in order to address their demands.\textsuperscript{62} It held in paragraph 101:

101 In short, the bargaining record, as carefully and extensively laid out by the application judge, shows sophisticated and experienced bargaining parties making the best of a bad situation and coming to reasonable settlements in the pre-ERA period. The bargaining units freely negotiated with eyes wide open to the global economic crisis and to their right of access to all the available options in collective bargaining. The fact that most bargaining units settled, but some did not, and that some pursued bad faith bargaining claims, while others did not, speaks to the independence of the bargaining units within the unions. They were free to, and did, come to their own risk assessments, carve their own paths and choose their own most advantageous strategies.

\textsuperscript{56} Professional Institute of the Public Service of Canada v. Canada (Attorney General), 2014 ONSC 965 at paragraph 117.

\textsuperscript{57} Ibid. at paragraph 120.

\textsuperscript{58} Professional Institute of the Public Service of Canada v. Canada (Attorney General), 2014 ONSC 965 at paragraph 158.

\textsuperscript{59} 2016 ONCA 625.

\textsuperscript{60} Ibid. at paragraph 96.

\textsuperscript{61} Ibid. at paragraph 98.

\textsuperscript{62} Ibid. at paragraph 99.
As for the ERA, the Court concluded that the Charter does not require consultation with the affected parties before legislating – there was no additional duty on the government to consult with the unions about the legislation.63

Emphasising that the 2015 trilogy affirms that the freedom of association does not guarantee unions a particular outcome or result, the Court held that not all legislative interference will be found to infringe section 2(d). In this case, the Court found that the ERA did not infringe on the freedom of association. First, the ERA’s wage increase caps were consistent with what the parties would have achieved in bargaining.64 Second, the Court relied on the Meredith decision, finding that the wage rollbacks did not infringe section 2(d) as the unions were able to reopen negotiations for other benefits and since the level of capped wage increases imposed by the ERA reflected the results of collective bargaining.65

The Court further accepted the application judge’s decision about whether there were “pressing” and “substantial” objectives in implementing the ERA in the context of the global economic crisis and the need to set an example of fiscal restraint, such that if there was a violation of section 2(d), it would be justifiable under section 1 of the Charter.66

F) Section 15 – Equality Rights

The exclusion of agricultural workers from Ontario’s labour relations regime in Dunmore was also challenged on the basis of Charter equality rights in section 15(1). The majority reasons do not address the equality argument, concluding this unnecessary as they had already found a Charter violation of the right to freedom of association.67

At paragraphs 165 to 170 of her concurring judgment in Dunmore, L’Heureux-Dubé J. finds, in obiter, that the occupational status of agricultural workers constitutes an analogous ground for the purposes of section 15, elaborating her analysis of this point from her concurring judgment in Delisle v. Canada (Deputy Attorney General).68

In reaching this conclusion, L’Heureux-Dubé J. notes the Supreme Court’s earlier jurisprudence that “employment is a fundamental aspect of an individual’s life and an essential component of identity, personal dignity, self-worth and emotional well-being”.69

63 Professional Institute of the Public Service of Canada v. Canada (Attorney General), 2016 ONCA 625 at paragraph 111.
64 Ibid. paragraphs 128-129.
65 Professional Institute of the Public Service of Canada v. Canada (Attorney General), 2016 ONCA 625 at paragraph 161 and 163.
66 Ibid. at paragraphs 222 and 313.
67 Dunmore v. Ontario (Attorney General), 2001 SCC 94 at paragraph 70.
L’Heureux-Dubé J.’s analysis continues with the finding that agricultural workers are generally disadvantaged.\textsuperscript{70} The critical question was whether the state had a “legitimate interest in expecting agricultural workers to change their employment status to receive equal treatment under the law”.\textsuperscript{71} L’Heureux-Dubé J. concludes that it did not.\textsuperscript{72} Given “their relative status, low levels of skill and education, and limited employment mobility”, such workers could “change their occupational status ‘only at great cost, if at all’ (Corbiere, supra at para. 14 [[1999] 2 SCR 203])”.\textsuperscript{73}

A Charter challenge on the basis of section 15 was also brought in Fraser with respect to the exclusion of agricultural workers from a collective bargaining scheme available to other workers.\textsuperscript{74} However, similar to Dunmore, the majority reasons do not address the equality in much, if any, detail. The majority of the court held that a “formal legislative distinction does not establish discrimination.”\textsuperscript{75} It held:

\begin{quote}
What s. 15 contemplates is substantive discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17. The AEPA provides a special labour regime for agricultural workers. However, on the record before us, it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the AEPA is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature.\textsuperscript{76}
\end{quote}

G) Parliamentary Privilege and Charter Rights

In Re British Columbia (Legislative Assembly),\textsuperscript{77} the BCGEU applied to certify certain employees at Hansard Services. In response to the Legislative Assembly’s and the Province’s submissions that parliamentary privilege would bar the BCGEU’s application, Certain Employees raised their rights under section 2(d) of the Charter.\textsuperscript{78}

The Board rejected the employees’ Charter argument. First, the Board concludes the Charter could not override parliamentary privilege based on New Brunswick

\begin{footnotes}
\footnoteref{70} Ibid. at paragraph 168.
\footnoteref{71} Ibid.
\footnoteref{72} Ibid. at paragraph 169.
\footnoteref{73} Ibid.
\footnoteref{74} [2011] 2 SCR 3.
\footnoteref{75} Ibid. at paragraph 116.
\footnoteref{76} Ibid. at paragraph 116.
\footnoteref{78} Ibid. at paragraphs 3 and 49.
\end{footnotes}
Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319.\textsuperscript{79} Also fatal to the \textit{Charter} argument was the Board’s finding that:

...employees in the proposed bargaining unit already engage in association and participate in certain collective activities. Nor has the Legislative Assembly attempted to prevent the employees from joining the BCGEU and engaging in collective activity in the context of the BCGEU short of certification. That is all the \textit{Charter} protects.\textsuperscript{80}

\textsuperscript{79} \textit{Re British Columbia (Legislative Assembly)}, BCLR No. B202/2003 at paragraph 167.

\textsuperscript{80} \textit{Ibid.} at paragraph 170.