

LAW 555

LABOUR

CARPENTER/GRAY

Table of Contents

HISTORY OF LABOUR RELATIONS	5
DETERMINATION OF WHETHER OR NOT YOU CAN UNIONIZE.....	7
-Montreal Locomotive:	7
Canadian Broadcasting Corporation	8
Cowichan Home Support	9
Dunmore	9
CERTIFICATION	10
Insurance Corp. of BC v. CUPE	11
Metroland Printing	12
XL Foods	13
XL Foods	14
Sie Mac (??)	14
Extra Foods	14
Rimouski	15
National Trust	15
Michelin Tire	15
PROTECTING THE RIGHT TO ORGANIZE.....	15
Lakeside Feeders.....	16
Duchesneau	17
Canadian Corps of Commissionaires.....	17
Cal Coop [sp?]	17
Lakeside Feeders 41	17
Westinghouse	18
Kennedy Lodge.....	18
STATUTORY FREEZE	18
CIBC	18
Simpson's.....	18
OPSE.....	19
National Labor Relations Board	19
EMPLOYER FREE SPEECH	19
Walmart.....	19
Westfair.....	20
REMEDIES OF UNFAIR LABOUR PRACTICES.....	20
Westinghouse	20
Westfair Foods	21
Tandy Electronics [“RadioShack”].....	21
Royal Oak Mines	21
National Bank	21
Loeb Highland	22
Baron Metal	22
K-mart	22
UNA	23
PROFESSIONAL RESPONSIBILITY	23
CONSTITUTIONAL LAW	23
ATU v. Greyhound	24

WORKPLACE ACCESS FOR ORGANIZING.....	24
Midwest Pipeline Contractors.....	24
Michelin Tires.....	25
DE-CERTIFICATION [AKA: “revocation of bargaining rights” and AKA: rescission].....	25
SUCCESSORSHIP.....	26
Foothills [Weyerhaeuser case].....	26
Metropolitan Parking.....	27
Finning.....	27
Finning [reconsideration].....	28
Danfield.....	28
Tri Muni.....	28
COMMON EMPLOYER.....	29
Pioneer Trust [Sask.].....	29
WW Lester 1978.....	30
White Spot Ltd.....	30
White Spot [appeal].....	30
FINNING [notes pertaining to this case end at the next dividing line just before Carewest].....	31
Empire Iron Works.....	31
Etobicoke.....	31
MacCosham Cartage Co.....	31
Finning (reconsideration).....	34
AUPE v. Carewest.....	34
DUTY TO BARGAIN IN GOOD FAITH.....	34
DeVilbiss.....	38
Graphic Arts.....	38
Noranda.....	38
RadioShack.....	38
Royal Oak.....	39
Buhler Versatile.....	39
Westinghouse.....	40
Husky Oil.....	40
Famous Players.....	40
Royal Oak.....	40
Famous Players.....	41
First Collective Agreement.....	41
STRIKES AND LOCKOUTS [general].....	44
Alberta Reference.....	46
PIPS.....	46
Delisle.....	46
Dunmore.....	47
Graham Cable.....	47
Western Archrib.....	48
Royal Oak [Pat Nugent].....	49
Berry v. Pulley.....	50
Regulation of Striking and Picketing.....	50
Pepsi.....	52
Telus.....	52
LRB Regulatory Powers.....	53
CLRA and PCL Industrial Construction [Agrios decision].....	55
Retail Wholesale Canada.....	55

Lakeside [Rollins].....	56
St. Anne.....	56
AUPE v. Alberta (Provincial Health Authority).....	56
Followka v. Royal Oak.....	57
Berry v. Pully.....	57
Parry Sound.....	58
Parry Sound [dissent by Major].....	58
McLeod v. Egan.....	58
Weber.....	59
Regina Police.....	60
McGavin's Toastmaster.....	60
Allen v. Alberta.....	60
DUTY OF FAIR REPRESENTATION.....	60
Rayonier Canada.....	61
K.H.....	61
Russellsteel.....	62
Metropolitan Police.....	62
Toronto Printing.....	63
Port Arthur Shipping.....	63
William Scott.....	63
Cartier.....	64

-there are 4 legal regimes for the regulation of work in Canada

- I. Common Law
- II. Collective Bargaining
- III. Statutory Regulation
- IV. International Treaties

I. Common Law [IE: Employment Law]

- most of the economy is here [~60% of the workforce]
- including management and other sectors that are not allowed to unionize
- based on contract law, and premised on the equality b/w employers and employees in terms of the bargaining relationship [courts are beginning to recognize the reality though]

II. Collective bargaining [IE: unionized workers]

- comprises the remaining ~30.8% of the workforce
- based on contract law, but with a collective twist
- recognizes the inequality in the bargaining relationship, hence the banding together of employees into a union
- heavily regulated by statutes [e.g.: Labour Relations Code, Canada Labour Code, Public Service Employees Act, Colleges Act, Universities Act, etc.]

III. Statutory Regulation

- mostly statutes re minimum standards in labour
- *e.g.: *Employment Standards Act, Workers Compensation Act, Occupational Health and Safety Act, pay equity laws, etc.*

IV. International Treaties

-NAFTA + Int'l Labour Organization + UN Resolutions

HISTORY OF LABOUR RELATIONS

-in the Middle Ages there was a universal obligation to work

*enforced by law

*e.g.: *Statute of Artificers*

-everyone had his/her place [every servant had a master]

*servants had obligations to work → fealty [retained in today's labour law in some respects]

*the master had paternalistic duties as well

-note: there are fewer rights in the workplace than there are in society at large

*hold over of fealty obligations from the Middle Ages

-some crafts banded together and formed guilds

*some call these the beginning of the union movement, while others refer to them more as employers associations

*such movements were often reactions to shifts in power that came about as a result of labour shortages [e.g.: during the Bubonic plague]

-1800s: idea of the freeing of the individual and the right to contract freely

*however: under Canadian master-servant law unionization was illegal

*also: it remained an offense to disobey a master's orders or to refuse to work

*these rules were actually part of the Criminal Code

-generally: trade unionism follows cycles [increased memberships during good economic times and decreases during recessions]

-after the prohibition on worker organization was lifted in Canada, there were a large number of "recognition strikes"

*note: recognition strikes are very inefficient because the bargaining unit strikes to gain recognition and then as soon as they are recognized they may strike again to get certain working conditions

*eventually this was rectified by way of "conciliation" [a strategy devised by William Lyon Mackenzie King] → IE: the right to strike would be recognized only after certain steps were taken

-WWI: soldiers were overseas and there was a high demand for workers domestically

*people began making demands for better wages and working conditions

-moreover, when people came back from the war they were not afraid to ask for better conditions [their resolve was strengthened]

*also, this was the time of some of the great Bolshevik revolutions

*there were also several large general strikes at this time [e.g.: the Winnipeg General Strike, which was ultimately brutally repressed by the government; the RCMP was called in, people were jailed, deported, etc]

*the aftermath of the Winnipeg General Strike led to a more conservative period re unionization that lasted into the 1920s and 1930s

-1935: as part of New Deal policies, FDR adopts *Wagner Act* in the USA

*major attempt to recognize the RIGHT of workers to unionize with respect by the government for this, so long as they follow the rules [IE: the proper steps for certification]

*NB: later, the US would implement more regressive labour legislation [more hoops for a union to go through prior to strike, limitation on what could be bargained for, requirement of a mandatory vote in order to achieve certification]

-it took Canada quite some time to catch up to the US

*IE: it took us longer to recognize the right to organize

- *eventually PC 1003 [Privy Council] was passed → importation of Wagner-like provisions as part of a provision used under the *War Measures Act*
- *entailed the right to organize, the duty to bargain and the introduction of a tribunal to administer this
 - as this was passed under the *War Measures Act*, it was eventually repealed and replaced with appropriate legislation provincially
- in AB, there is the requirement for a mandatory vote to achieve certification
 - *introduced only in the 1980s
 - *makes for an automatic electioneering campaign in which the employer can participate to a degree [free speech rights for the employer—see further in CAN]
- some claim that collective bargaining results in distributive justice [IE: a fairer, more equitable distribution of income]
 - rebuttal: if one were to really want to make a difference for a lot of workers, it would be best to change labour statutes, because most workers in Canada aren't even unionized!
- Beatty: the results of collective bargaining are intimately tied to someone's place in the market economy
 - *e.g.: someone with few skills in an industry with a lot of labour to draw on may not get a lot from collective bargaining
 - *e.g.: it is hard to organize part-time employees
 - *e.g.: it is hard to organize a group of employees in a sector that is largely non-unionized
 - the gains of the high income workers often come at the expense of lower income workers
 - collective bargaining laws deny access to many who are vulnerable [e.g.: agricultural workers]
 - if unionization is justified on the basis of distributive justice, then shouldn't everyone get to unionize?
 - *again, the most vulnerable are left out
 - moreover: self-fulfillment [of the type that Weiler refers to below] is limited by majority rule
- Weiler: collective bargaining results in increased productivity and does not distort wages artificially
 - *there is more stability in a unionized workplace [less turnover]
 - argues that more people will remain at unionized jobs because there are mechanisms in place to deal with problems, there will be rewards for seniority, etc.
 - unionization results in greater distributive justice through wage standardization
 - *unionization in one segment of a particular sector may result in wage increases across the board since there is often competition for the same pool of labour
 - also: unionization has a civilizing impact on work life and the workers' environment
 - *reduction of arbitrary treatment, etc.
 - *enhanced citizenship through self-governance
 - *access to procedural justice w/o needing a lawyer [use grievance/arbitration system]
- Panich & Schwartz
 - referring to collective bargaining as “free” overlooks structural inequalities b/w employer and employees
 - *e.g.: at the Brooks plant, many of the employees lacked much education or English
 - moreover, a reference to “free” collective bargaining overlooks the coercive role of the state
 - *AB is especially bad for this [e.g.: passing of ad hoc legislation to get people to go back to work from an illegal strike]
- Saskatchewan was more progressive in their labour legislation

- *did not limit the right to strike
- *the system in AB and elsewhere in Canada does not allow striking during the term of the collective agreement

-Labour Relations Boards [3 people]

- *must avoid conflicts of interests
- *empr and union member, and chair [who is the leader]
- *can use informal procedures in AB [e.g.: push the parties toward settlement]
- *powers set out in the Code s. 12
- *the Code has a privative clause [quite a bit of deference, but people may apply for judicial review under s. 19(2)]
- *hearsay allowed [however: if things end up in court, the rules of evidence will apply]

DETERMINATION OF WHETHER OR NOT YOU CAN UNIONIZE

1.) Are you an employee?

- note: at some points, an employer will want its workers classified as employees and at other points it will not
- *e.g.: when facing an organizing drive, the employer will want to load up the bargaining unit with as many employer-sympathetic employees as possible, as these people will vote against having a union
- *however: once a union is certified an employer would rather have people classified as non-employees

-a definition of “employee” is set out in s. 1(1) of the Code

- one who does work and receives wages
- *complications for volunteers, those receiving honorariums

-independent contractors are NOT employees

- *will not be covered by a certification of employees

-Montreal Locomotive:

development of a 4-fold test to assess if someone is an employee or an independent contractor

- i. Who has control? [this will not always be determinative]
- ii. Who has ownership of tools?
- iii. Is there a chance of profit?
- iv. Is there a risk of loss?

-note: employment contracts designed to avoid application of the code will have workers paid in ways other than on an hourly basis

- *generally, if a worker is paid hourly, he/she is an employee
- *vs. piecework, where there is more of a chance of profit [however: note that with piecework there is no risk of loss even though there is chance of profit]

-if a person is not an independent contractor, he/she may be a dependent contractor

- *sometimes employers will go out of their way to structure a relationship like this to avoid the employment label
- *there is dependence here [hence the term] → purchase tools from employer, use employer’s equipment, have defined routes/sets of customers, etc.
- *despite dependence there is still a risk of loss [because the person often has to purchase wares from the employer]

*e.g.: McGavin's Bread

-some jurisdictions have responded to this problem by introducing dependent contractor legislation [treat them as though they were employees]

*we do not have such legislation in AB

-Labour legislation operates under the recognition that the employer and worker's interests are different

-that is why the owner/employer cannot be part of a union [difference in interests]

*nor can people in managerial capacities nor those working with confidential materials be involved in the union

-workers demands could change if they had some of the information that the employer has access to

-despite what someone might be referred to as in the workplace, he/she will not necessarily have that same classification for the purposes of labour law

-expansion of the Montreal Locomotives test [text, page 218]

- i. Use of or right to use substitutes
- ii. Tool ownership
- iii. Evidence of entrepreneurial activity
- iv. Selling of one's services
- v. Economic mobility or independence
- vi. Variation in fees charged for services rendered
- vii. Carrying on of an independent business rather than work on behalf of employer
- viii. Degree of specialization, skill, expertise or creativity involved
- ix. Control of the manner and means of performing the work
- x. Contract amount, terms and manner of payment
- xi. Rendering of services in a manner similar to employees

←this list is policy driven→ recall: the purpose of the statute is good labour relations, and often this should push toward inclusion in the union [IE: classification as an employee]

-managers ARE employees of the employer in technical terms but are excluded from being members of the bargaining unit [statutory exclusion of management]

-managers are **NOT** allowed in the union, as it wouldn't make much sense to have the person doing the firing and the person who got fired in the same union [conflicts of interests, etc.] → ability to hire and fire is likely determinative of management status, as is the ability to discipline and involvement in collective bargaining on the employer's behalf

-management staff can't be counted toward the numbers the union needs to get a vote [this may be problematic]

-even if a manager really wants a union and for good reasons, if he/she participates in the organization in any way this is a problem [because theoretically his/her interests are supposed to be divergent]

Canadian Broadcasting Corporation

-set out the test to determine if the management exclusion should apply or not

- (a) Power to effectively and regularly make decisions [not recommendations] in the workplace
- (b) Decisions are typically those of the management cycle [e.g.: hiring and firing]
- (c) Extent of authority in financial matters

←this is a question of fact [not law] and all the factors need to be assessed holistically to see how they relate to the organizational configuration

Cowichan Home Support

-another test to assess if someone falls within management's ranks

(a) ability to discipline and discharge

(b) labour relations input

(c) hiring, promotion, and demotion

-assess these in light of the size of the workplace and other such contingencies

-if an individual simply directs the workforce, but has no authority to hire/fire or discipline, then that person will likely not be a "manager" [despite that his nametag says "Deli Manager", etc.]

*if an individual COULD exercise such powers but simply doesn't, the Labour Board will likely classify him/her as a manager

-if an individual has the power to make "effective recommendations" then he/she may be classified as a manager [if his/her recommendations are de facto orders]

-employers will want to have as many managers as possible, to have a large presence that is outside of the bargaining unit [they don't want a large, strong bargaining unit, but the union does as this will make a strike more effective]

*plus, such people can be paid salary [work more, paid less]

*again: when the union is trying to get in initially, the employer will want these same individuals [assuming they are loyal to the employer] to be classified as employees so they can vote against the union

-the OTHER big exclusion from the union: those with access to confidential information

-for this exclusion to apply, the information has to be valuable in terms of labour relations [e.g.: not just health records, etc.]

-employers may attempt to make as many employees as possible ineligible for the union by exposing them to what it would call confidential information

-there are express exclusions from unionization for professionals and domestics, plus agricultural workers

Dunmore

-re the agricultural worker exclusion from unionization

*the Charter contains the right to freedom of association, and Ontario agricultural workers claimed that this was breached when the Ontario government expressly excluded them from unionization

-**PSAC**: a fairly regressive decision in which the SCC stated that the entire labour relations scheme is not necessarily protected by the Charter right to freedom of association

-a more moderate approach was taken here in Dunmore → they say if there is a labour relations structure in place, and one group is expressly excluded, this is a breach of the right to associate

*moreover: this limitation is not reasonable under s. 1

-note: ag. workers in AB are still excluded and there has been no challenge to this

*there was not as much of a demand for unionization here and the logistics may also be more difficult

- note: slaughterhouses are NOT subject to the agricultural exception
- what is another way that an employer can avoid “hassles” under the Code?
 - attempt to be classified as a “Labour Broker” rather than an employer

- NOTE: bargaining may be easier for craft unions because they have more skills [big bargaining chip]
 - *now we refer to craft unions as “trade unions” [e.g.: those covering plumbers, welders, etc.]
 - *concentrated in the construction and oil industries
-

CERTIFICATION

- certification → “getting the ticket”
 - getting the declaration from the labour board that you are the exclusive bargaining agent [note: in Europe there may be as many unions in a plant as there are employees...they don’t ascribe to exclusivity]
 - *employees no longer bargain for themselves as they would have at common law
 - certification will only be given if the Board finds that the bargaining unit that has been applied for is appropriate
 - *the board may alter or amend the description of the unit applied for [if the altered unit is substantially similar to the one applied for] → IE: can include or exclude employees as it finds necessary
 - *see Code s. 35
 - if the proposed bargaining unit is really from left field the application may be denied altogether

-the elements of certification:

- prove you’re a union
- show 40% support
- avoid time bar
- appropriate bargaining unit

-the board wants a bargaining unit that is actually strong enough to bargain [recall the purpose of Labour legislation...plus the Board doesn’t want to have to re-hear matters because the union initially applied for is inadequate in some way]

- *the employer wants no bargaining unit at all
- *the union doesn’t really care about bargaining unit strength, they just want to get certified and then they can deal with the strength of the unit after

-different types of bargaining units:

A. Trades/Craft Unit

- the bargaining unit is determined by the work that is performed
- e.g.: nurses, teachers, construction workers

B. Plant Unit

- broken down into office and production [warehouse, maintenance, etc.]

C. All employee units

- typical in government [e.g.: AUPE]

D. Multi-site Units

-e.g.: all employees in ATCO warehouses in Edmonton AND Calgary

E. Multiple Employer Unit

-2 [somehow related] employers get one certificate
-this is very rare

F. Statutory Bargaining Unit

-standardized by law, not board policy

-factors the board will assess in bargaining unit determination

- A. Community of Interest [common skills, working conditions, work, goals, geographical location, etc.]
-some groups simply lack a community of interest to be in a bargaining unit together [this is why units at hospitals are fragmented → janitors, nurses, etc.]
-this factor favours a smaller bargaining unit
-may lead to extreme fragmentation [e.g.: at the university: profs, janitors, clerical, etc.]
-note: the split b/w blue and white collar workers has been detrimental for the largely female clerical workers who have dealt separately and secured few gains
- B. Bargaining History
- C. Nature of the Employer's Organization
-e.g.: do you have employees who are at one location 2 days a week and another for the remainder [2 sites with a lot of intermingling]
- D. Viable Bargaining Structure [keep the intentions of the Code in mind]
-avoid conflicts of interests in the formation of a bargaining unit
- E. Avoidance of Fragmentation
-generally the board is hesitant to fragment the workplace
*ergo: where possible they prefer an ALL EMPLOYEE bargaining unit
-the board's hesitance to fragment the workplace may make unionization harder because it is more difficult to organize a large and varied group

Insurance Corp. of BC v. CUPE

the preferred bargaining unit is a broad one comprising all of the employees of a single employer

*this is administratively efficient

*does not impede lateral mobility of employees

*promotes industrial peace and stability by making strikes/lockouts less likely than if there are several separate sets of negotiations

-however: that being said, big units are harder to organize

*also: big units may not be refined enough to address labour market issues at the local level [e.g.: postal workers in rural areas may get huge wages increases because negotiations are based on the higher cost of living in the cities]

-the employer wants a big bargaining unit, hoping that it can pack in people to vote "no"

*the union will be somewhat more selective in choosing people for the bargaining unit, because they really only want people who will say “yes”

F. Agreement of the Parties

-**NOTE:** labour boards are set up to encourage collective bargaining and to maintain good labour relations

*this will also be kept in mind vis-à-vis bargaining unit selection

Metroland Printing

-part-time and temporary employees may cause problems in bargaining unit formation

-casual/temporary employees may have a downward pressure on wages/benefits, because they don't have as much of an interest in the position as fulltime employees

-use of **Hospital for Sick Children** test here:

A. is there a sufficient community of interest?

B. would the bargaining unit create serious labour relations problems for the employer?

-the board had significant experience in placing disparate groups of employees in one bargaining unit with little apparent negative effect on labour relations

*therefore community of interest will not necessarily be determinative

-also, employees may have a community of interest simply by working for the same employer

-the board basically will only find a bargaining unit inappropriate if such a unit would prevent certification

-“tag-end positions” = those that are left out of the bargaining unit

-descriptions in bargaining units should make reference to the actual occupations concerned, NOT titles [IE: functional role, not professional title]

-“sector-based certification”: division of certifications into “sectors” [various portions of the construction industry defined by the type of construction activity performed]

-the BIG GOAL in labour legislation: harmonious labour relations

*part of this is the preference for non-fragmentation [if an employer has to deal with several unions instead of just one, this does not make for smooth labour relations]

-to become certified, a union must win a representation vote [Bulletin # 14]

*supervised by someone from the Board

*typically held at the workplace

-those present can vote

*absent people may vote if they are shown to have a continuing interest in the job

*if on casual illness leave, you likely CAN vote, if on Long Term Disability, probably NOT

-30 day rule [an employee can vote if he/she was at work 30 days before or after the vote]

*does not apply to casual employees [they must be there on the day of the vote]

*see Bulletin 14

-post-vote hearings may be held

*determine if people are actually employees, whether or not a vote was conducted properly, etc.

-a quorum is not needed for the vote

-in Canada, a quick vote is done to avoid an extended period in which employers can influence employees

*however: a “card-based system” as used in Saskatchewan is even more effective in this respect because the vote is avoided altogether [much less opportunity for the employer to influence]

XL Foods

-union attempted to certify

*however: there was an employee association already in place

-NB: an employee association cannot be so influenced by the employer that it cannot fulfill its role as representative of the employees

-the employee association here was found to have violated s. 151 of the Code [re restrictions on what an association can do in its organizing, which prohibits organization during work time, coercion, threats, etc.]

-what does an organization need to apply for certification in AB?

-40% of the bargaining unit supporting it

*e.g.: 40% of “all employees, except for security guards, office staff, etc.”

-must be a trade union

-see Code, s. 33

-to obtain the 40% to get through to a certification vote, the union may provide signed union cards

*or they may provide proof of ongoing membership in good standing

*or by way of a petition [petitions are dicey in that they don't afford confidentiality re membership, unless a separate petition is given to each employee]

-an advantage with petitions is that there is no associated fee, whereas there is a minimum fee of \$2 to join a union

-if signed cards are provided as proof of the 40%, the union must ensure that these were not signed more than 90 days previous

*therefore, the union will be pressured to do things quickly

-the reason for this time limit is that the Board wants to avoid an overly long and disruptive organizing campaign

*however: in practical terms this may make things difficult for the union if the unit is particularly hard to organize due to part-time and casual employees, etc.

-s. 37: when a union forms, it must file all necessary documents and then wait for 60 days to apply for certification

-a union cannot apply for certification when there is a strike going on [IE: no raid during a strike]

-raid = one union moving in for certification in the open period of another union

-when can one union RAID another union?

a. When there is no union, a union can apply for certification at any time

b. When there is a union, but no CBA 10 months from the date of certification

-after 10 months, may sign petitions to “un-join” the union [revocation] if no CBA has been reached

-note: if judicial review is applied for re certification, the 10 month period does not start running until the final disposition of that application before the courts

*so if the 2nd union complains about the certification of the 1st union and matters go to JR, the 2nd has to wait until the JR is done and then an additional 10 months

*the theory is that in the time that an application is before the courts for JR there will be no serious bargaining

c. CBA signed and lasting 2 years or less in duration

-the 2nd union can move in 2 months prior to the end of the CBA

*so at this time, the employees may vote to revoke the original union and certify a new one

d. CBA signed and lasting more than 2 years

-the 2nd union can raid in the 11th/12th month of the 2nd year, on the anniversary of this date, and then also 2 months from the end of the agreement

-s. 57: if a certification application is unsuccessful, the union must wait 90 days following the refusal [or withdrawal]

XL Foods

-union applied for certification but did not have the 40%

*application dismissed due to insufficient support

*the union then tried to get more cards signed to reach that level and withdrew their original application and filed for a new one

-the board consented for this and let them proceed w/o the 90 day wait

*they found that things were slowed down already by a great deal of confusion in the workplace

*so long as undue disruption is avoided then everything is OK

-in most cases, if a union wants the 90 day period waived, they will have to show good reason for this

*plus the board will assess: i. what the effect will be on the workplace

ii. if this is an inappropriate raid

iii. is this a first time application

iv. what was the reason for dismissal/withdrawal of the 1st application

-recall: in Saskatchewan things are way easier for the union

*they simply need to establish 50% and they are certified

*not a 2 step process like in AB

-CLC = Canadian Labour Congress

*a “central house” for labour, with most major unions belonging

Sie Mac (??)

-to be a bargaining agent for the employees, an association must be recognized by the employees and there must be a system in place to recognize employee support

-there was no employee consent/support of the association here [which, incidentally, was an association that was voluntarily accepted by the employer]

*the association coerced employees into signing cards [breach of s. 151]

-the Board found that this association couldn't adequately bargain on behalf of the employees

Extra Foods

[see case handout]

-the “key” is the person who organizes the union drive at the workplace

-here, the key was an assistant manager

*this was his title, but look more at his actual function at the store

-bargaining units can ONLY include employees...no managers!

*here, he did not exercise enough managerial authority to be excluded from the bargaining unit

-banking certification

- example in which a small union began organizing banks on a branch by branch basis
 - *this was found to be an unorthodox strategy but it was allowed because it was basically the only perceived option for organization at that time
- they got 22 certifications but were unable to get CBAs because these units in each particular branch did not have the bargaining power against the bank
- ultimately the branch units were de-certified

Rimouski

- banks are now allowed to organize on a branch by branch basis, but after organization is completed, more than one bank's employees bargain together
- this is called "cluster organizing"
- this gives the union more strength in a given geographical area

National Trust

majority support needs to be shown at EACH branch in such cluster arrangements

Michelin Tire

- Michelin had 2 plants with inter-related work [A and B]
- workers were calling for certification of a union at A
 - *empr complained b/c the work that B did depended on A [IE: it was saying that you could not have a unit only covering one of the 2...either both or none]
- the Board said that such economic interdependence is simply a fact of life and cannot be used to impede union certification
- Michelin went around the Board and got the government to amend the Trade Union Act
 - *Act changed so that multi-site bargaining units are required when emprs ask for them
 - *this removes board discretion on the matter and puts the choice to the empr
- note: Michelin likely had ulterior motives in that they knew the workers would not be able to certify both plants

-certification is just one of the 2 ways that a union can be recognized: the other is VOLUNTARY RECOGNITION

*this is difficult

- a way of proving employee recognition of a voluntarily accepted association is the ratification of the collective agreement
- most employers will NOT voluntarily recognize unions

PROTECTING THE RIGHT TO ORGANIZE

- protection of the right to organize is more of an issue in jurisdictions w/o card-based systems
 - *more of a campaign-style certification [not quite as bad as the US though, where they don't even have a "quick vote" provision]
- if the empr does something suspicious, the union will file an unfair labour practice application
- there are 2 broad types of clauses under the unfair labour practice provisions

I. No Discrimination [s. 149]

- the empr will not refuse to hire, will not fire, etc. simply b/c the empee is a member of a trade union, a trade union applicant, etc.
- e.g.: the empr. cannot fire the key simply because he/she is the key [typically they won't say they're firing him/her b/c he/she is the key, but they'll cite some trivial reason, so as to try to avoid s. 149]
 - *firing of the key has a chilling effect on the campaign, and this chill may even extend into the collective bargaining period [making employees generally skeptical about what the union can do, and how much power they have vis-à-vis the employer]
 - note that the firing of a key may also have a solidifying effect for the workers if/when that fired employee returns in triumph [a "Norma Rae" moment]
- AB's "no discrimination" provision is odd in that it DOESN'T contain a reverse onus clause [the onus does not shift onto the empr]
 - *union provides evidence and then the empr responds
 - *if the union provides enough evidence then the onus shifts to the empr [if the empr says nothing at that point then there is an inference against them]
 - *this is odd because the empr is really the only one with knowledge of its own subjectivity
- the empr's motive [anti-union animus] must be established here
 - *on a balance of probabilities [by the union in AB]
- note: as union counsel it is smart to attempt to establish anti-union animus regardless of whether you are trying to establish discrimination OR interference [but it is only NEEDED for discrimination]

II. No Interference [s. 148]

- there shall be no interference by the empr with union activities/organizing
 - *esp. interference with an empee's right to be involved in a trade union
- the empr's motive [anti-union animus] need not be established here
- this is tied in with s. 21 [the right to be involved in a union]

Lakeside Feeders

[see handout]

- Stevens was called before a Discipline Review Committee at the Brooks plant
 - *the empr wanted to dismiss her b/c it caught wind of the fact that she was involved in union organization at the plant
- when called before the DRC, Stevens asked to be accompanied by a union rep
 - *management responded that since there was no CBA, she could not have a rep [note that the plant was certified though]
- the Board: if an empr fires an empee and its decision is motivated in any part by anti-union animus, it doesn't matter if there was other cause for termination
 - *anti-union animus only has to be one factor leading to termination
- to establish an anti-union animus, use the De Vilbiss test:
 - i. Is there a pattern of anti-union activity by the empr?
 - ii. What is the extent of the empr's knowledge re organization?
 - iii. What was the manner of the empee's discharge?
 - iv. Witness credibility?
- here: the empr was aware of organization, and the manner of discharge was suspicious b/c 2 other empees making similar mistakes [but not involved in the union] were NOT discharged
- moreover: by refusing to allow Stevens to have a union rep present at the meeting, this was found to be an interference with her union rights [s. 148 breach]

- use of the Naback [sp?] test to assess the refusal of a union rep [in trying to determine whether or not this was interference]
 - this is a balancing test...the empr must have compelling and justifiable business reasons to keep the union rep out
- the empr would argue here that since there is no CBA and no grievance procedure, there is no point to have a union rep
 - *IE: they would argue that the common law would govern things
- the board responded that even though there is no CBA in place yet, a union rep's presence may still be relevant and required
- EVEN W/O A CBA THERE IS STILL THE RIGHT TO UNION REPRESENTATION
 - generally, a union rep should accompany an employee into meetings re discipline [as here] and workplace accommodations
 - s. 21: there is a statutory right to participate in the lawful activities of a union

Duchesneau

- again, if anti-union animus played any part in discharge, that is an unfair labour practice [even if the anti-union animus is just a "proximate cause"]
 - *even if the other reasons for dismissal were grounds for discharge
- here: D did engage in misconduct and the empr claims that that is why he was fired
 - *however: the empr knew about the misconduct for quite some time, and only fired him after catching wind of his union activities
 - *the empr also had a rather bad attitude toward certification

Canadian Corps of Commissionaires

- an employee should be informed in advance as to the purpose of a meeting
 - *if an employee doesn't know what a meeting is about and makes a request only once the meeting is in progress this request may be granted
 - *if the employer doesn't inform the employee in a timely manner, then refusal of a union rep is a code breach [interference]

Cal Coop [sp?]

- even if a CBA doesn't provide for a union steward, if someone wants union representation at a meeting, they should get it
 - *note: Lakeside Feeders [above] is different in that there was no CBA in place

Lakeside Feeders 41

- the Board muddled discrimination and interference
 - *they analyzed this as an interference case, whereas it probably should have been analyzed as a discrimination case [as Stevens was dealt with in a discriminatory fashion on account of her union participation]
- they said that anti-union animus on the employer's part didn't need to be established
 - *therefore this case is basically authority for the statement that establishing discrimination [under s. 149] does NOT require anti-union animus [though this doesn't seem right]
- moreover: it was found that there was no business justification for the policy whereby union meetings had to be held in an isolated trailer ¾ of a mile away from the plant on the worksite

-there has been a lot of debate among various Labour Boards re the issue of empr's economic decisions and whether or not they constitute interference

*the following 2 cases are polar opposites

Westinghouse

-empr closed unionized manufacturing operation and opened new plants in other locations where there was no trade union presence

-this was found to be an unfair labour practice [interference]

-it is true that it was cheaper for the empr to operate in this manner and the empr tried to frame their decision as an economic one, rather than an anti-union one

*the Board disagreed

Kennedy Lodge

-empr. laid off unionized janitors and contracted out this work

-again, it claimed that it did this for economic reasons, not for anti-union purposes

-the board found that this was NOT interference

*it is not unusual to contract out certain parts of an operation in an allowable fashion

STATUTORY FREEZE

-see s. 147: when a union applies for certification, no employer affected by the application can alter rates of pay, terms/conditions of employment, nor employee rights from the period STARTING at the date of application and ENDING at the date of refusal of the application or 30 days after certification

*an additional 30 days freeze is in place following the certification date

-if notice to bargain is given during this 30 day period, then the freeze is extended by 60 more days

-this freeze does NOT apply to normal practice [e.g.: if a raise was given once a year every year, that can still happen]

-the employer's intent is irrelevant if they make any changes during the freeze

-purpose of the freeze: keeping conditions stable

*avoid disruption [in the form of major changes] during the certification process

*allow people to know just what they are bargaining for [by instituting the freeze you avoid having a "moving target" in terms of working conditions, etc. when it comes to bargaining]

CIBC

the pre-certification freeze period will not preclude regularly scheduled wage increases

*the empr must operate as though it is business as usual

Simpson's

-the empr began contracting out some of its work during a freeze period

*something is typically NOT "business as usual" when it is occurring for the first time

-the "reasonable expectation" test was developed here

*asks what a reasonable employee would think that his entitlements/rights are in the situation

-here: Simpson's was in bad economic shape so the layoffs were said to be OK

*when finances are tight and there is no work, a reasonable empee would expect a layoff

-HOWEVER: an empee would NOT expect this work to be contracted out to someone else

- there are some drawbacks to the reasonable expectation test
- *see text

OPSE

- the purpose of the statutory freeze is to have a starting point for bargaining [avoid a “moving target”]
- reasonable expectation test said not to be ideal
- freeze provisions should be read in light of the purpose of the freeze
 - *the motivation: bolster collective bargaining
 - *therefore: they are tougher about the freeze here than they were in Simpson’s [where it could often be argued that an employee’s reasonable expectation left him in a pretty bad place in terms of his entitlements, which has a generally bad impact on collective bargaining and is contrary to the intentions of the freeze and the statute overall]

National Labor Relations Board

- the freeze is needed to avoid the situation in which the empr fools empes by giving them entitlements when the union is trying to get certified
- *the “fist in the velvet glove” analogy
-

EMPLOYER FREE SPEECH

- an employer will not be in breach of s. 148 [interference] just for: allowing employees to confer during union hours, permitting the union on the premises, and things of this nature
- s. 148(2)(c): the employer can express its views, so long as it does not use coercion, intimidation, threats, promises or undue influence
 - *this demonstrates that the employer’s privilege of free speech is not absolute
 - *there must be a balancing b/w the speech and the goals of the code
 - *ask if the speech is conveying information to the employees that is necessary [information that will help them make a more informed judgment]
- an employer and employee are not on a level playing field, and this must be taken into account in terms of how seriously an employee will take statements made by the employer
 - *an employee may feel compelled to give more weight to the employer’s speech

Walmart

- management caught wind of possible unionization
 - *they brought in extra managers, who would rather aggressively question employees
- note: Walmart has a very solid union avoidance strategy
- management was very open to answering questions
 - *however: they refused to answer the question re whether or not the store would close if it was unionized
 - *this silence had big implications → unfair labour practice
- also: at morning meeting, an anti-union employee made a speech that made the union seem rather horrible
 - *the employer did not distance itself from these comments
 - *moreover: the other side was not given a chance to say it’s part [in part for practical reasons, but they should have been accommodated somehow]

Westfair

- the empr had some literature posted at the workplace that alluded to the risks associated with a strike in a misleading way
 - *they did not mention any of the protections that workers had and overstated the risks
 - this offended the Labour Code [unfair labour practice]
-

REMEDIES OF UNFAIR LABOUR PRACTICES

- note: some remedies for unfair labour practices may come too late
 - *IE: the empr may have permanently scared employees away from the union
- s. 12 sets out important Board powers
- 12(e): the Board can make or issue any interim orders, decisions, directives or declarations it considers necessary pending the final determination of a matter before it
 - interim orders may be necessary to put a stop to particular empr conduct that is interfering with employee rights
 - *e.g.: in XL Foods the Board made an order that the union could hold meetings, that there be union postings in the plant, etc.
- 12(f): the Board can make or issue any orders, decisions, notices, directives, declarations or certificates it considers necessary
 - the court will typically give a Board a lot of leeway in terms of the orders it is allowed to make
- the board has a quasi-criminal remedy at its disposal as well
 - *the AG can bring a case against the party found to be in violation of the Code
 - *set out in Division 25 of the Code [penalties outlined re prohibited lockouts, strikes, etc.]
- fines can be levied against persons acting in contravention of the Act
- Labour Boards can award damages, costs, etc. [not just “Mickey Mouse” remedies]

Westinghouse

- following a finding of contravention of the code by the empr, the Board ordered that
 - Empees should be able to use their seniority to claim jobs with similar conditions at the new plant, or maintain their same jobs at the old plant
 - Pay to be red circled
 - Empr to provide union with a list of names of employees at new locations
 - Reimbursement for relocation, etc. for those employees moving to new locations
 - Union access to bulletin boards at workplace to post notices, etc.
 - Employees to meet union reps during work hours up to 3 times
 - Union to be reimbursed for costs in organizing
- the court pointed out that the standard of review on such orders is PU
- rule re an order:
 - must not be patently unreasonable
 - must be within the scope and intent of the Act
 - must NOT be punitive [only compensatory]
 - IE: no damages
 - therefore, the union must be careful to frame the orders it is seeking as compensatory, not as punishments to the empr

-the award here was found to be compensatory [the empees lost their union and this needed to be rectified]

Westfair Foods

-in initially hiring empees, the empr screened so as to ensure that they only got those who would not be pro-union

-when the union tried to organize the workplace there was very little support [which is relatively rare, as most people would hop at the chance to get a ~20% increase in wages]

-an unfair labour practice claim was filed re these hiring practices [there has not been a decision yet]

-this is a very difficult situation to rectify [the Board cannot insist that the empr fire the entire workforce and rehire a new one]

*so the union just asked for the Board's assistance in organizing [e.g.: to give them the right to meet with empees in the coffee room, empr funding for organization, etc.]

*note: an empr response to this might be that such a remedy would be discriminatory to other unions

Tandy Electronics ["RadioShack"]

-managers told to get rid of the union

*spies infiltrated union

*2 employees fired for union activities

-as a remedy, the Board ordered compensation to the union and bargaining unit members

*on review, the court found that this was a punitive remedy and that basically an award of damages against the empr

-again: award must not be punitive + flow from the scope/intent/provisions of the act

-an award should not be struck down for being novel

Royal Oak Mines

-union took a case of bad faith bargaining to the Board

-the Board basically ruled that an entire CBA should be imposed

*this was novel [but that isn't a bar, as set out in Tandy]

-the empr tried to argue that the board didn't have this power, but on review the court disagreed

*standard of review = PU [look at provisions of the code, board's expertise, privative clause, etc.] and this order was not PU

-the SCC [Cory J.] set out a test to assess whether or not a remedial order will be found to be PU

I. Was the order punitive?

II. Was the order an infringement of the Charter?

III. Was the order not rationally connected to the breach?

IV. Was the order contradictory re the objects and purposes of the Code?

National Bank

-for its indiscretions, the offending bank was ordered by the Board to set up a trust fund to promote unionization AND was to write a letter stating that they had breached the Code

-this set of remedies was struck down

*it was found to be punitive [the union was preserved when the empees were moved from one branch to another (successorship order), so the trust fund was found to be punitive in that it went above and beyond what was needed]

*it was found to breach the Charter [violation of freedom of expression by forcing the empr to say something]

*note: it IS OK to force an empr to post certain things on its bulletin boards, or to distribute a notice from the Board, but not to force it to write something like in this case

-apply the test from Royal Oak → failure on I, II

*moreover: the relationship b/w the act alleged and the remedies was not rational [failure on III]

Loeb Highland

-empee allegedly fired for participation in union organization

*he was reinstated pursuant to an interim order by the Board, pending their ultimate decision

*note: if this relief were not allowed and the empee has to wait until the Board's final decision, this may be a big knock to the cause [chilling effect, plus also the loss of that particular worker in organizing]

*NB: Ontario Labour Boards no longer have the power to make such interim orders

-Ontario Labour Boards used to be able to make the order for AUTOMATIC CERTIFICATION

*was done in the Walmart case

*this remedy was used in cases in which the union could not have possibly have had a fair chance to certify

-the Board would apply a test to determine if certification would actually reflect the wishes of the employees

-such a remedy would only be ordered if the Board was satisfied that no other remedy was sufficient [IE: another vote wouldn't reflect the true wishes of the employees]

*moreover, there obviously needs to be adequate support for the union as a collective bargaining agent

-this is all basically a moot point now though [doesn't exist in AB anymore either]

Baron Metal

-a criminal gang was used by the empr to intimidate workers from voting for the union

*unfair labour practice application was brought and the Board ordered the following remedies:

-union allowed to meet with empr anytime anyone was disciplined or discharged

*empees had to attend monthly union meetings

*union allowed reps in the workplace

*union allowed to distribute leaflets in the workplace prior to the vote

*empr had to compensate for organization

*damages for intimidation and loss of opportunity to bargain [this seems to go beyond compensation...check]

K-mart

-empr used a security firm to infiltrate workforce and boost its numbers

*a tie vote resulted

*they also lied to the Board about their practices later

-K-mart was prosecuted criminally for the offense of conspiring to effect an unlawful purpose [commission of unfair labour practices]

*a fine was imposed initially at \$25 000, but was increased to \$100 000 on appeal

-BUILD UP PRINCIPLE: the state of the bargaining unit should be reflective of what is typical so that certification is accurate

-IE: if you know that the small number of workers at a particular time will increase to a larger number, wait until then to certify

-both the union and empr may rely on this principle

*empr tells union to wait until there are more empees

*union tells empr to wait until there are more empees [in the event that the empr has brought in a “friendly association” like CLAC and is trying to certify]

→ CLAC is a “friendly association” because they don’t believe in strikes and tend to believe more in “cooperation”...take what the employer gives you, that’s the CLAC way!

UNA

-re the older versions of what are currently ss. 12(2)(f) and 17

-12(2)(f): The Board may make any orders, decisions, notices, directives, declarations or certificates it considers necessary

*this is to be read BROADLY!

-17: remedies that can be ordered by the Board

*also to be read broadly

-the Board can prohibit threatened activity which has not yet occurred

-the Board can order the union to rectify its breaches

-Gwen argues: given the broad reading of s. 12(2)(f) there may be a possibility that automatic certification would be allowed in AB

*John argues: it would be difficult to establish this, given the fact that the Board’s ability to do this was expressly removed [this speaks to intent of the legislators]

PROFESSIONAL RESPONSIBILITY

-basically, tell your client what is illegal and what is legal

*inform them of the consequences of planned actions

*don’t tell them to break the law

-there is a big difference b/w advising a client to break the law and advising them of what may happen if they take certain steps

CONSTITUTIONAL LAW

-generally the provinces have power over labour law due to their power over property and civil rights in the province

*note: things are backwards in the US in this respect

-however: the feds have power in the case of EMERGENCIES, and in the following areas:

*banking

*shipping

*nuclear material

*aeronautics

ATU v. Greyhound

-re transportation

*if a successor company is provincial [in that its transport operations occur within the province], then it is to abide by provincial labour law, regardless of the fact that the previous company was federally regulated

WORKPLACE ACCESS FOR ORGANIZING

Midwest Pipeline Contractors

-union organizers visited the empr camp for organizing purposes, but to do so had to cross 3rd party property [the camp was very remote]

-another issue in a case such as this is that meeting the empees in person was basically the only feasible way since they were in a camp and could not be easily contacted by phone, fax, e-mail, etc.

-note: there was an unfair labour practice in the threats the empr made to the organizers vis-à-vis empees who decided to join the union

-AB Boards do NOT have the power to issue anticipatory access orders

*in AB you actually have to access first, and then can ask for a remedy]

-re access the NB question is: does the access restriction interfere with the representation of empees by a trade union, under s. 146(1)(a) of the code

-policy was key in this decision

*is it empr property or 3rd party property?

*is it empees who are organizing or a 3rd party?

-empr argued that property right should override here, and that there is nothing in that statute that expressly overrides property rights

-Board: the purpose of the act is to encourage harmonious relations b/w emprs and empees via collective bargaining

*collective bargaining cannot become a reality if empees are not exposed to info in the debate re the pros/cons of unions generally or a particular union

-empees have rights → these are only meaningfully exercised when the empees are informed of them → union reps are a common vehicle for purveying the info

*especially in a membership card system [where face time is NB]

-it is also NB to assess whether access is desired during working or non-working time

*generally, no access during working time [see e-mail] balancing is done for this though

*working time does not include paid coffee breaks and lunches

-Carswell v. Harrison: when you have 2 rights and one is absolute [while the other is qualified], the absolute right will trump [unless the qualified right says something specific]

*this is basis for the principle that property rights should win out

-Babcock v. Wilcox: rights granted by the same authority must be accommodated with as little destruction as is possible → balancing → no absolute right to access + no absolute denial

-Dome Petro: it is more difficult to give union organizers access to a 3rd party's property than to the empr's property [it can still be given though!]

*also: Adams Mines: onus is heavier for non-empee during work time [vs. empees organizing on break]

-Cadillac Fairview: re union organizer access to a 3rd party mall [recall the particular facts about how the only good place for them to set up was on mall property, and that the mall had a no solicitation policy]

-the union claimed breach of s. 146(1)(a) [interference] by the mall owner [CF]

-Board: use balancing approach

*consider other means of access

-here: for the rights to be meaningful access was necessary

-end result in Midwest: enjoyment of property won out

*if the legislator saw access as necessary, it should be in the code

*use other means that aren't trespassing [balance]

*they didn't use the more rational approach as was used in Cadillac Fairview

*Midwest did NOT recognize absolutism in property rights

Michelin Tires

-this is the counterpoint to Cadillac Fairview [although Midwest may also be used as a counterpoint to an extent]

-Michelin moved into NS only after the legislature passed a statute that would basically allow it to remain non-union

-the Board here found that the union need not have access during non-working hours

*importance of the distinction b/w employees and the union

*higher standard for "strangers" [empees already have the right to be there, strangers do not]

-the Board also said [somewhat out of line with the above] that just because there is no express statutory access provision, this is not enough to deny access [esp. if there has been interference]

*an access order can be given as a remedy for unfair labour practices [but no anticipatory access orders can be given, in most jurisdictions]

*you need to have asked and have been refused to get an access order [IE: try first]

-utilize other means of access that would NOT constitute trespassing

-re access during work time: it is generally permitted during paid breaks or lunches.

-Where the issue is interference arising from refusal to grant access where organizing could not otherwise take place, the Board will not [generally], permit access to disrupt work times [does not apply if there has been serious unfair conduct by the employer]

-The Board may be tempted to go further and order meetings even if they must occur during work hours.

This was done by consent order in the Lakeside certification drive in 1999.

DE-CERTIFICATION [AKA: "revocation of bargaining rights" and AKA: rescission]

-the signing of petition evidence to indicate that the empees no longer want a union

-s. 52: a de-cert application cannot be brought during a strike w/o the consent of the labour board [otherwise this would be an interference with collective bargaining]

-s. 52(2): if a union doesn't have a CBA and wants to abandon its bargaining rights, it can apply for de-cert

-s. 52(3): empees can apply for de-cert at the following times:

- (a) 10 months after certification [if no CBA]
- (b) 10 months after disposition of a JR application on certification
- (c) when there is a CBA of 2 years or less, in the open period of the 2 months preceding the end of the term
- (d) when there is a CBA of more than 2 years, in the last 2 months of the 2nd year, on that anniversary in subsequent years and in the final 2 months of the term

-as the labour lawyer handling this issue, find out: if there is a CBA, the date of the certification order/JR disposition, etc.

SUCCESSORSHIP

-applications for successorship often accompany those for common employer declarations
 -purpose of successorship → protecting a union that has already been certified [and the CBA if there is one in place]

- *under normal corporate law, the contract that the union and empr have negotiated would NOT transfer since the new empr is a new legal entity
- *therefore simple reorganization of a corp. would be far too easy of a way to screw empees
- *the Code rectifies this to a degree

-these provisions are established to protect established bargaining rights

-the code gets around problems of privity

- *new empr bound by previous contracts, even though they're a separate legal entity

-successorship is governed by s. 46(1)

- 2 part test: I. Transfer/sale/lease of **part** of a business or undertaking
 → note: there is no defn of “part” or “business” in the code

II. Passing of control, supervision, or management

-if both of these are satisfied, then:

- *any proceedings against the empr proceed
- *certified trade unions remain certified
- *CBAs stay in effect

-transfer of just assets will not be enough to find successorship

- *hence the phrase “transfer of a functioning economic vehicle”

*if the transfer of assets transfers the capacity to do business, then this may be a transfer of the business/part of the business

-s. 46(2): board powers re successorship

- *make inquiries, determine what is binding, choose between multiple CBAs
- *if there is a transfer to a non-union empr a vote may be ordered

-NB: remedial powers for a finding of successorship are **BROADER THAN** the remedial powers for a finding of common employer

-successorship applies to union reorganization as well

-nothing in the legislation prohibits an empr from reorganizing, but the statute is concerned with setting out appropriate empr protections when this does occur

Foothills [Weyerhaeuser case]

-the board will give a full and liberal interpretation to the conduct of emprs

- goal of preserving the established relationships
 - *the provisions have a skew in favour of protecting, rather than emphasizing technicalities [as emphasizing technicalities would allow emprs to get rid of the union by simply engaging in a simple corporate re-organization]
- the board here set out a defn of business → business = a combination of physical assets and human initiative
 - OR
 - a dynamic activity, a going concern or a functioning economic vehicle
- very broad defns of business here
 - *makes it hard for an empr to get around a transfer being called a successorship, BUT also makes it hard for the union to predict what will happen
 - *the decisions in this realm are often result-oriented
- the transfer of work alone will be insufficient
 - *look also to continuity of operations
 - *what must be transferred is a portion of the business that is coherent and severable
 - *facts must be assessed on a case-by-case basis
- there is a checklist that is set out [don't remember these for the exam, but just get a sense of them]:
 - *transfer of fixed assets
 - *transfer of work
 - *goodwill
 - *logo/trademark
 - *customer lists
 - *accounts receivable
 - *agreement not to compete
- absence or presence of any one indicia will not be determinative
- here: following transfer, new empr. kept same old building
 - *had some of the old management come in
- successorship was established here
 - *IE: the board found that an entirely new business was NOT established
 - *what was determinative here was the transfer of the timber license [because without this there is effectively no business] → purchase of the capacity to carry on business + other factors → successorship

Metropolitan Parking

- sending on just the work may not be a successorship but sub-contracting
- sometimes sub-contracting can amount to a successorship
- this case set out the analysis re outsourcing vs. transfer of a business
- was it an arm's length transaction or not?
 - *presence of pre-existing relationship b/w transferor/ee may suggest an artificial transaction designed to avoid bargaining obligations
- was it a business reorganization that does not alter the essential attributes of the empr-empree relationships and ergo should NOT disturb the CB?

Finning

- a union was certified for a bargaining unit covering all of the workers of Finning Int'l in the province
- Finning decided to divest itself of its engine rebuilding division [CRC division]

- *the buyer/new empr moved into a plant that was paid for almost entirely by Finning [Finning also had a role in designing the new plant]
- *the new empr then took the CRC work from Finning [it constituted 90% of their work]
- none of the empees transferred [they were all laid off]
 - *v. few management people were transferred [or they made it look that way at least]
 - these are not good facts to find a successorship
- ultimately, the board found that very little transferred except maybe customer lists
- HOWEVER → NB: this was not an arm's length transaction
 - *Finning was a partner in the joint venture and held the majority of the equity in the factory
 - *IE: Finning was doing business with itself...it only makes sense that successorship be found as this is not a new entity doing business!!
 - Finning owned the company now "running things" through a subsidiary
- Finning argued that all they were doing here was outsourcing/sub-contracting [see Metropolitan, below]
 - *if this is the case, there is little the union can actually do
 - *why is this NOT outsourcing? → the target had nothing to begin with [that's like saying "I'm going to outsource to Jim" and then giving Jim all the equipment he needs, the work, etc.]
- Vice Chair Wallace relied on Metro → a non-arm's length transaction will be scrutinized more
 - *there was a pre-existing nexus b/w the 2 parties here
 - *it is much more difficult to sustain the contention that one has not acquired a predecessor's business but merely founded a new, independent but similar business serving the same market
 - the regular assessment of various factors [like the checklist used above] will not be as relevant here, given that we know this was a non-arm's length transaction
 - *here: the checklist would have screwed the empees, b/c all that was really transferred was some work, a small number of empees [whose skill could be obtained elsewhere], trivial equipment, limited know-how, etc.
 - not enough transferred to constitute transfer part of a dynamic economic vehicle
- however: capital may also be an asset to support a finding of successorship
 - *here: \$87 million!!!
 - *if it is clear that the target is unable to fulfill the transferor's requirements with his existing organization and received capital, then this does NOT look like a simple contracting out of work

Finning [reconsideration]

- Chair Asbell found the infusion of capital to be irrelevant
 - *note: there were some political shady goings on here
- the board here also found that it was Finning Canada that gave the "new empr" the money, not Finning Int'l [even though it should be clear that these reorganizations shouldn't really matter]
 - *note: successorship is supposed to allow the Board to lift the corporate veil anyway!
- the case is now before the CA

Danfield

just because something is called "outsourcing", that does NOT make it so

Tri Muni

- the town of Spruce Grove operated a municipal swimming pool

- *it was closed and merged with 2 other area pools for a new centre that was not unionized
- Spruce Grove was a major investor in the new pool [similarity to Finning in this regard]
 - *IE: transferor/ee were not arm's length parties
- no successorship found here
 - *it was found that not enough was transferred
 - *the new centre was a multi-use facility [not just a pool]
 - *transfer of capital was not necessarily from the old pool [came from Spruce Grove's general coffers]
- this case may be a template to avoid successorship

-successorship is ***automatic*** when it is found

*IE: the board just confirms that it has happened, and all employee entitlements are said to have continued all along [even during the time when it was in dispute whether or not there was successorship]

-IE: then a union should conduct itself from jump as though there has been successorship

*e.g.: file grievances as though there is a CBA in place, even if dealing with the allegedly "new" empr

COMMON EMPLOYER

-AKA "related employer" AKA "spin-offs"

-see. s. 47

-3 elements that need to be proved to establish that there is a common empr:

1. common control/direction
2. more than one empr./corp. etc.
3. associated or related business or activities

→ IN ADDITION: is there a labour relations purpose for the board to find that the case to be a common employer situation?

-what is the point of a common empr provision?

-arose re issues in the construction industry

*to operate w/o unions, emprs would establish spin-off corps.

*PCL was particularly bad for this [they almost have a new corp. for every job that they do]

-what is the difference b/w a "common employer" finding and a "successorship" finding?

-as stated above, successorship is automatic

*also: the collective agreement automatically follows at the time of transfer

-Vs...

-with common employer provisions, the collective agreement does NOT automatically carry over

*also: the collective agreement only takes effect from the time the board makes its decision

*ergo: in the time b/w the transfer and disposition of the board, there is somewhat of a no-man's land

Pioneer Trust [Sask.]

-union wanted to certify and found that two corps. were basically running the empr

*these 2 corps. were related and owned by a 3rd corp.

-it doesn't matter what legal structures are...the board will determine who actually runs the show

*all 3 corps. were named as the empr.

-NB: this concept is used not only in labour law, but in common law as well [re regular employment, e.g.: Downtown Eatery case, judgment enforced against all the corps. as a common empr.]

WW Lester 1978

- spin off situation, but the 2 emprs were run separately and one was not depleting the work of the other
 - *ownership was the same
- the Newfoundland board used successorship provisions [they didn't have related empr. provisions at the time]
 - *common ownership + common key people + same work = 2nd empr is a successor
- the SCC overturned that decision → successorship provisions could not be applied because the first corp. did not DISPOSE of anything
 - *this would normally be a related empr case, but NFL didn't have the provisions
- SCC: common empr provisions cannot be used by labour boards to allow unions to expand CB rights beyond what is reasonable [IE: to prevent contracting out]
 - *this is difficult as it may be hard to tell when you have a situation of contracting out, or when you have related emprs

- s. 47(2): this section is relevant for cases in which an empr is found to have restructured for the purpose of avoiding the union
 - *recall: Finning admitted to restructuring in order to avoid the union

White Spot Ltd.

- Gilley and White Spot were 2 entirely different corps. but Gilley was a white spot franchisee [not owner]
 - *Gilley used White Spot name, menu, prices, tc.

- assess using s. 47:
 1. Common control/direction? → yes
 - White Spot was basically in charge, aside from day-to-day stuff
 2. More than one corp.? → yes
 - Gilley and White Spot = 2
 3. Associated or related business? → yes
 - functional inter-dependency

- also, labour relations purpose for the board to find common employer?
 - yes → in the rest of BC, WS had a number of certifications, but only one CBA
 - *the board wanted to retain this, so that the empees at this location would have all the rest of that power behind them [as opposed to just being alone against G/WS]

White Spot [appeal]

- determining common control and direction [factors set out in Walters Lithograph]

- i) common ownership?
- ii) financial control?
- iii) what are the contractual relations?
- iv) who controls labour relations?
- v) common management?
- vi) **inter-dependence of operation? (NB)**

-even if you have more than one owner, and more than one controlling hand, if they work in an inter-related/dependent fashion, then this will likely lead to a common employer classification

vii) what is the representation to the public?

- factors i-vii are not all required, just some
- NB: actual legal control and ownership is not necessary
- NB: there need not be a SINGLE GUIDING FORCE running things
- here: White spot had substantial control
 - *there was a strong functional interdependence through the franchise agreement
 - *it was represented as one business to the public
- this case was very progressive

FINNING [notes pertaining to this case end at the next dividing line just before Carewest]

-successorship and common empr provisions may overlap [e.g.: when there is a transfer of elements of a business to a related corporation]

Empire Iron Works

- the purpose of related empr provisions is to prevent the subverting of establishing relationships by corporate reshuffling when the idea is to get rid of the union
 - *see Finning I, page 41, paragraph 90
- the Empire statement may not be entirely correct, since s. 47(1) does NOT require an anti-union animus [just establish the 3 factors and board gives a labour relations purpose]

Etobicoke

[in Finning at paragraph 93]:

- better statement of the purpose of the common empr provisions →
 - a. they protect against the artificial erosion of bargaining rights of the union
 - b. they create or preserve working bargaining structures [as in White Spot]
 - c. ensure direct dealing b/w the bargaining agent and the entity with the real economic power over empees

MacCosham Cartage Co

- set out the elements for a common empr application:
 - (a) application made by union or empr
 - (b) associated or related activities or businesses/undertakings
 - (c) common control or direction of the businesses/undertakings
 - (d) more than one corp./business

-Finning, page 43, paragraph 95

*empr admitted to anti-union purpose

-since the empr admitted that they restructured to avoid collective bargaining with the union, as long as the other requirements of s. 47(1) are met [which they were] then pursuant to s. 47(2) the Board has no choice but to issue a common employer declaration

-assessment of related activities/business

*same work [same market, same procedures, dealing with similar customers]

-empr argued here that the companies were not involved in the same business since one did rebuilding and the other did sales/servicing

-the board said you had to look at things more broadly

*at a general level, the two companies are in the same business [servicing of heavy equipment]

- they serve the same market
- they utilize the same equipment
- they utilize similar empee skills
- they draw on the same labour pool

-the board looked for signs of common ownership and vertical integration

-there was functional integration of Finning and OEM [they basically operated as one business]

* “Though OEM will perform an aspect of Caterpillar service work that Finning will no longer do, it remains the fact that OEM’s operations will and must be closely integrated with those of Finning”

- Finning branches are the contact point for end users
- ongoing contract b/w Finning and OEM re inventory levels
- cooperation in warranty administration

-Finning argued that many of these things would be common in ANY outsourcing agreement

*even if that is the case, that doesn’t make them irrelevant here for the assessment of a potential common empr. situation

-“Overall, the activities are sufficiently similar, and sufficiently closely integrated”

-see paragraph 101

*factors from **Empire Iron Works** to assess if there is common control or direction

*in the context of the entire business relationship, assess if there is:

- a. common/related ownership
- b. financial relationships giving rise to a claim of influence or control
- c. managerial control [including the presence of a single guiding force]
- d. degree of integration of the businesses
- e. functional dependence

←look to the totality of the above, presence/absence of any one indicia will not be determinative

-paragraph 102: factors from **Walters Lithographic** were considered in determining common control and direction

*none of these factors are determinative

- i. common ownership or financial control
- ii. common management
- iii. interrelationship of operations
- iv. representation to public
- v. centralized control of labour relations

-see paragraph 103

*another test of common control and direction relevant in cases of subcontracting is the “core activities” test from **Kennedy Lodge**:

→ “it is one thing to contract out the performance of peripheral activities over which fundamental control can be easily relinquished [e.g.: rust-proofing where the selling of cars is the main activity]...It is much more difficult to relinquish fundamental control over the core activities of a business.”

-IE: if the empr claims to be sub-contracting out, but it could easily re-take control, then that may be evidence pointing toward a common empr. situation

*then, a Board should carefully scrutinize the degree of ongoing control when it comes across a claim of subcontracting

-“A common situation, especially in the construction industry, is for the principals of a certified employer to incorporate a new company through which the principals carry on a similar business to that of the certified corporation”

-“Less common is the situation where the certified employer starts a new business activity or divests itself of an existing business activity through a contractual relationship with another entity, but the terms of the contract are such that the certified employer still exercises pervasive control over the business activity.”

-“Yet another variation is where the employer acquires an existing business and uses its control of the acquired business to have the acquired business carry on some of the business activities that the certified employer previously performed”

-you need not have common control AND direction

*just one or the other

-common control = higher level strategic control [business planning, operational decisions, long-term plans, financing, etc.]

-direction = day-to-day management

-either way, this direction or control need not be ACTUAL, but can be POTENTIAL/THEORETICAL [IE: they *could* come in and order this but normally don't]

-the joint venture agreement gave Finning higher level strategic control

*they likely could have exercised day-to-day control as well

*however: remember that only one of these is necessary

-application of Walter Lithographic test for common empr

*there was no common control over HR [bad for common empr finding]

*they were not represented to the public as being one business [bad]

*significant degree of inter-relatedness in operations [good for finding a common empr]

→ OEM got all work and parts through Finning

*common ownership and financial control of OEM by Finning [good]

-why was this not a normal situation of sub-contracting?

→ in large part because of the joint venture agreement between them [the very notion of a joint venture suggests a measure of common control or direction of an enterprise]

*joint venture agreement here = Finning had blocking vote on OEM board + OEM could not engage in business outside the joint venture + Finning bears liabilities + OEM management to make reports to Finning

-why was this not sub-contracting?

→ there was a joint venture agreement

→ OEM could not engage in significant outside work

→ Finning had a great deal of control

→ Finning bears all original liabilities

-there WAS COMMON CONTROL AND DIRECTION

*the labour relations purpose required under s. 47(1) was NOT necessary here, because the empr's admitted anti-union goal triggers s. 47(2)

Finning (reconsideration)

-Asbell basically took the Walter's Lithograph test and reduced it to one factor → is there control of day-to-day activities?

-recall: this "one guiding hand" requirement was rejected in White Spot

-here, Asbell: common ownership does NOT equate to common control

*this much is fair...think about it, a corp. can have several different, completely unrelated divisions

*however: Asbell may have gone too far by basically conflating tests for common ownership and common control and then stating that common ownership is totally irrelevant

-as it stands in AB, it is basically useless to apply for a related empr order

*you need to show that one empr. controls the day-to-day work

*this is just impractical

*construction companies take advantage of this

AUPE v. Carewest

-Calgary Health Region is the provider of many different medical service

-CHR wholly owns Carewest [which provides long-term care]

-AUPE was trying to get an order that CHR and Carewest are related emprs

-test for associated/related activities: is there a connection b/w the work done b/w the 2 entities [type of work, target market, corporate expertise, capital assets, labour force, etc.]

-the board found that CHR and Carewest were NOT involved in the same work or enterprise

*THEREFORE: they were not engaged in associated activities

*there is some connection in that they both provide health services, but it is to different sectors of the healthcare system

-as Asbell said: common ownership does not equate to common control or direction

*they didn't take this as far as Asbell though [he said it was irrelevant]

-corporate relation but unrelated activities → not enough for common empr declaration

*note: if the approach was used, as Wallace did above in Finning, they would be found to be related, but a more narrow approach was used

-Carewest operates independently of CHR

*they both have separate operational policies/procedures

*own HR departments

*separate management

*strategic planning carried out by Carewest on its own [IE: the big decisions AND the day-to-day stuff was taken care of by Carewest → no common empr]

DUTY TO BARGAIN IN GOOD FAITH

-collective bargaining vs. "regular" bargaining

*regular bargaining is totally voluntary [vs. CB: most emprs don't want to]

*with regular bargaining you can choose your partner [vs. CB: empr is stuck with the group that has been certified as the exclusive bargaining agent]

*with regular bargaining you can just walk away if there's something you don't like

*economic warfare is not a part of normal bargaining

-there are two components to the duty to bargain

- i) duty to bargain in good faith
- ii) duty to make every reasonable effort to reach a CA

-s. 59 is the “heart” of the code

*59(1): sets that the “certified bargaining agent” [typically a union] can serve notice on the empr, or the empr can serve notice on the union to begin collective bargaining

-s. 59(2): parties must give notice [to commence collective bargaining] in writing not less than 60 days and not more than 120 days before the expiry of the CA

*the parties may agree to a longer period prior to the expiry of the CA in which notice can be served

-when an allegation is made that an empr is not bargaining in good faith, one of the first things that is checked is whether or not notice has been served on the empr

*discussions outside of the service of notice need not be conducted in good faith

-there are different rules for voluntary recognition

*s. 43(1)

-same timelines as above BUT they may also be subject to a 6 month notice [prior to the termination of the CA] from the empr that it is terminating the voluntary recognition and therefore refusing to bargain collectively

*gives the empr an opportunity to get out of its decision to voluntarily recognize

-the government wants the parties to come to a CA w/o a strike

*the sooner they do this, the better

*however: they also don't want an excessive amount of disruption [this disruption comes along with the bargaining process]

-s. 61: this sets out what must be in the notice

*name and address of the person/persons resident in AB who are authorized to bargain collectively, conclude a CA, and sign a CA

*there must be at least one rep from the trade union local

*there is a residency requirement here so that the negotiators have some connection with the jurisdiction [you can have other people not from AB on the bargaining committee though]

→ paternalistic way to make sure there is a local connection

-s. 61(6): state if the authority of the group bargaining is subject to ratification

-s. 61(7): even if there is authority for ratification, changes cannot take place without informing the other party in writing

-s. 60: sets out the actual DUTY TO BARGAIN

-s. 60(1): not more than 30 days after notice is served, the parties must

(a) meet and commence, or cause authorized representatives to meet and commence, to bargain collectively in good faith, and

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

-the timeline can be changed with agreement of both parties [IE: need not happen with 30 days of notice]

- the good faith component CANNOT be waived
- s. 60(2): bargaining proposals must be exchanged within 15 days of meeting, or longer if agreed to by the parties
 - *proposal exchange is very important [and in a 1st CB situation, these may basically set out the whole agreement]
- notice to bargain also implements a freeze on working terms
 - *recall: first, a freeze occurs when there is an application for certification, and then one again once certification has been given [see s. 147, for freezes in first collective bargaining situation]
- the freeze in AB in a first CB situation is not terribly long
 - *used to be longer
- s. 147(3): freeze provisions when there is already a CB in place
 - *when notice to bargain is given, there is a freeze until the new collective agreement, strike or lockout [AB]
 - *in some other provinces the freeze is no longer on in the period when the parties CAN strike or lockout [whereas in AB it is over when they do]
- ergo: in AB, when emprs are legally able to lockout, they may do so just in order to lift the freeze
 - *then they can change the conditions and stop the lockout
 - *this may be very problematic for the union, because they can only strike if they have all their ducks in order [also: it may be hard to get the empees to go out on strike once they have gone back into work post-lockout]
- if a union is already in a CA and they don't give notice to bargain, this may lead to their automatic removal
- in AB a strike can only carry on for two years max
- duty to bargain in good faith
 - subjectively assessed [we don't know exactly how they determine this]
- duty to make every reasonable effort to come to a CA
 - objectively assessed
 - content of the proposals can be compared to industry standards
- the government generally does not want to determine what is in a CA
 - *let "free bargaining" do what it is supposed to do [free CB is the underpinning of the Act]
 - *there must be mutuality
- exceptions: I. standard provisions in labour codes
 - e.g.: union security provisions, such as exclusive bargaining status for a certified union, right to belong to a union, and right of the union to collect dues from members]
 - in AB the minimum is a voluntary dues check-off provision [if the emee tells the empr to deduct union dues, the empr must do this]
 - *this doesn't seem to be of much significance, but without such provisions, there is actually a good chance that emprs would not deduct
 - unions would like to push for compulsory membership for all workers and compulsory dues check-off, but this is a long ways away

II. every CA must have a grievance procedure

-a grievance procedure is the reason that workers cannot strike during the term of a collective agreement

*there is a statutory grievance procedure, but one can also be bargained for

-“Rand Formula”: everyone who is a member of the union must pay dues, but not everyone must be a member of the union

*everyone involved must pay dues, and there cannot be any free-riders

*the DUTY TO BARGAIN is meant to encourage emprs and unions to come to their own terms about what will be in a CA, w/o resorting to economic warfare

-duty to bargain in good faith requires: rationality + good faith + effort

-there is a state interest in encouraging stable bargaining and avoiding economic warfare

*no strike or lockout is entirely “private”, because they will all have some degree of effect on the public at large

*sometimes it is direct [school strike, or a strike with a lot of violence, such as the Giant Mine Strike, which saw 9 killed] other times it is via a ripple effect [casino strike affects casino revenues, etc.]

-What would “ideal” bargaining be?

*one party sets out wide parameters for change

*other side responds by tabling its proposals

*the issues are narrowed

*culmination in compromise and a CA

-What is the purpose of collective bargaining/the duty to bargain?

-avoidance of “recognition strikes” [if there were no duty to bargain, the union may get certified and then face an empr who refuses to bargain with them]

*that would make recognition empty

-rectifies imbalance in power

-recognition of the union as the exclusive bargaining agent

-obtain a better understanding of the other side

-allows empees to set appropriate labour standards

*without this, they would be unable to do this, due to the power imbalance b/w empees and emprs

*therefore, unionization + the duty to bargain = something that helps empees avoid arbitrary treatment/bad conditions

-note: this is all based in idea of power imbalance in an individual empee contract, and these notions are generally correct, but not so much in AB currently, given our hot job market.

However, generally:

*workers may be unable to resist arbitrary/unequal treatment

*may have to live on a very low wage

*may be essentially stuck in their jobs

-duty to bargain

→ empr must treat the union as an equal partner

→ empr must recognize that the certified union is the exclusive bargaining agent

→ fostering of a **rational process of persuasion in bargaining**

*exchange of facts

- *use of reason
- *ideally, a certain degree of responsiveness to government concern/public opinion/moral judgment by both sides
- *each side will get a better understanding of the state of the industry and of the other side's wants and needs

-“minimalist approach to collective bargaining by the state”: the state only escorts the parties to the door and what happens inside meetings has nothing to do with them

DeVilbiss

- freedom to join a union is purposeless if the empr can enter negotiations with no intention of entering into a CA
 - *hence the duty to meet and make every reasonable effort to come to an agreement
 - *this should lead to a better understanding and help avoid strikes/lockouts
 - *fostering of rational, informed discussion
- *also reinforces the empr's duty to recognize the union as the exclusive bargaining agent
- modern society generally accepts trade unions and their legitimate role
 - *this may be too broad a generalization, esp. in a place like AB, during globalization, etc.
- economic sanctions will not be confined to the parties

Graphic Arts

- union and empr actually came to an agreement in collective bargaining
 - *the union then brought forth a grievance re some dismissed empees
 - *this angered the empr and they reneged on what they had agreed
- bargaining in bad faith = conduct undermining the decision making capability of the other side
- you must provide the other side with enough information to make a rational decision
- also, the parameters of the dispute must be set up early
 - *if you hold some of your proposal back, this may be bad faith bargaining
 - *parties CAN agree to withhold some proposals until later
 - *side note: in AB, either side may go to the board and demand that the opposite side put forth a full proposal

Noranda

- there was a dispute re benefits in bargaining and the empr would not disclose costs of benefits
- bargaining info cannot be withheld without good reason
- full and informed discussion is better than ignorance and deception
- a clearly illegal term cannot be included in bargaining
 - *however: in AB, an illegal term can be proposed, but cannot be used to push negotiations to impasse

RadioShack

- the board had to step in here because the conduct of the empr was so egregious
- RadioShack tabled a number of improper proposals in bargaining
- the board ordered a “change in personalities” [IE: change in the people at the bargaining table]
- empr wanted to just give the union the statutory minimum security provision [voluntary dues check off in this case]
 - *this is problematic in cases in which you have an anti-union empr [as here] because that will let the empr know who supports the union [they then may discriminate]

*at any rate: the court said here that bargaining the minimum is not illegal [makes intuitive sense, but not practical sense given the situation]

-however: it is very rare that the empr has any business making propositions re union due check-off → if it can be shown that the empr does not have any business purpose in negotiating re something and they do, this may be deemed to be “surface bargaining”

*surface bargaining = bargaining to avoid a CA

*it is not one of their concerns, so if they are trying to regulate it in some way, this may be an indication of ulterior motives

*the empr argued that it was there business to regulate this here since the union didn't have much support, so it would not have been rational to impose a rand formula

-the board stated that any absence of support could be due in part to the empr's unfair practices

-an empr may be able to bargain things like this so long as they are squeaky clean

*here, RadioShack was far from squeaky clean → inference of surface bargaining

*even if the empr WAS squeaky clean, if it looks like a proposal has ulterior motives, this may be deemed surface bargaining [use “smell test”]

-note: empr-union conflicts are often worst in the first round of collective bargaining

*the empr is still not hip to the idea of a union

-the AB board is not very receptive to the applicability of national union agreements

Royal Oak

-the subjective standard re the duty to bargain is unclear

*this is re the duty to bargain in good faith

-the objective standard re the duty to bargain is more clear

*this is re the making of a reasonable effort to bargain

-some proposals may be so egregious that no union could possibly accept them

-test proposals vis-à-vis industry standards

*this was the first case that set out such an objective analysis

-also: refusal to include certain standard terms [e.g.: requirement of just cause for dismissal, pension negotiation, grievance arbitration clause]

Buhler Versatile

-empr: this is my 1st offer and it only gets worse from here

*bad faith bargaining

-obligations inherent in the duty to bargain in good faith

*recognition of the union as the bargaining agent

*meet

*bargain with the intent of concluding, revising or renewing a CA

*make every reasonable effort to enter into a CA

*engage in full, rational, informed discussion about the issues

→ there was no rational discussion here as the empr would not here the union's side at all

*provide relevant information to the other side

*avoid surface bargaining

→ it looks as though the empr here was just surface bargaining

*avoid deception

-these rules are set up so that the 2 sides “play nice” and the board doesn’t need to intervene

Westinghouse

-the rule here: if the empr is only THINKING about closing it’s plant/selling/etc. it does NOT need to inform the union in CB unless the union ASKS

*if, however, the empr has already come to a definite decision, then they must tell the union [the union need not ask]

-there is no duty to bargain DURING the CA [only when determining the CA]

-therefore: the empr has an incentive to not come to a definitive conclusion until after the CA has been settled [that way they can keep their mouths shut about closure during the entire bargaining period and close as soon as it is concluded]

-moreover: if a decision re plant closure is made after the CA has been decided, empees cannot strike b/c this is during the term of the CA

Husky Oil

similar fact situation to the above except in this case the empr waited until after the CA was agreed to to make change to benefits

*they can do this because it is typical in the petro-chemical industry to often leave provisions re benefits outside the CA

Famous Players

-the empr locked out the empees

-the board ordered an extraordinary remedy → suspension of the lockout

*this was necessary to meaningful CB to occur

-where the lockout is part of an overall strategy of bad faith bargaining, compliance with the procedural requirements of s. 72 does not make the lockout immune from a remedial order

-the empees were returned to work at previous CA non-wage terms, and at wage terms as had been proposed by the union in the most recent bargaining

-there are different models of bargaining in different industries

*different requirements in different jurisdictions

-s. 17: broad remedial power of the Board

-if an empr engages in surface bargaining → board may require empr to table new proposals, remove illegal proposals, etc.

-if an empr fails to make a reasonable effort to bargain → board may set meeting times, impose an obligation to table an offer within a certain time frame, etc.

-if the empr conducts itself in a manner away from the table that amounts to bad faith bargaining [e.g.: telling the workers about proposals prior to the union] → board may grant the union special meetings with emprs, etc.

-in the US, the parties may only take some bargaining issues to impasse

*that is NOT the case in Canada

Royal Oak

-remedial orders of the board will be assessed on a PU standard

-a remedial order will be PU if it:

- i. is punitive
- ii. infringes the Charter
- iii. does not have a rational connection b/w breach and consequences
- iv. contradicts the objects and purposes of the code

-recall: the board “imposed” some of the terms on the empr here

*the agreement with recent proposals by empr was imposed, but w/o a provision they were illegally going to take to impasse [not allowing strikers to come back to work, and not even allowing these workers to go before an arbitrator], plus an obligation to negotiate with the union on certain unresolved issues, with that dispute going to arbitration if not resolved in a certain amount of time]

*empr said that was overstepping bounds of free collective bargaining

-there was a rational connection b/w breach and remedy here

*basically, the board just put the parties back into the position that they would have been in but for the empr’s holding to its illegitimate term re striking workers returning

-NB: free collective bargaining is NB, but the duty to bargain in good faith will come out on top

*free collective bargaining, then, may be brushed to the side for the purposes of a remedy for bad faith bargaining

-the board here was said by the court to be at the end of their remedial rope [so they were OK, but could go no further than this]

Famous Players

-pre-Royal Oak [so not as progressive of a stance re remedies]

-empr breached duty go bargain in good faith

*the board here found that the empr’s proposed wage rollback lacked justification and amounted to surface bargaining

*also: the empr did disclose an adequate amount of information

*also: bait and switch tactic

-moreover: the bargaining conduct constituted interference and intimidation [separate from the bargaining altogether]

-recall: the lockout was also said to be part of bad faith bargaining

*so it was suspended for 90 days [see previous summary]

*on reconsideration: the board said that the workers could not be put back to work under terms of the previous CA, since the union’s most recent proposal accepted a drop in wages

-the board’s order was ultimately overturned [but would likely be upheld today, due to the ruling in Royal Oak]

-the new method of collective bargaining

-finding more in common...make a bigger pie, etc.

*it works better in some scenarios than in others

*it is controversial

*unfortunately: ultimately there is only so much “pie” to split up

First Collective Agreement

-note: if a union is negotiating the first collective agreement and they are looking to the board for help re empr bad faith bargaining, they are already in trouble

lockout includes (i) closing of workplace by empr (ii) susp of work by empr
(iii) refusal by empr to continue to employ empees

for the purpose of compelling empees [or to aid another empr in compelling its empees] to accept terms or conditions of employment

→ this [like the strike defn] is broad so that it takes into account all the creative lockouts

- strikes and lockouts co-evolved to more creative forms, so the statutory defn had to keep pace
 - *e.g.: the 24 hour lockout [the union says that the subjective intention of compelling workers to accept terms of employment is missing in this]
 - *it may be problematic when an empr's action is classified as a lockout when it really just wants to end the collective agreement

-recall: the union may run into a problem if an empr has a 24 hour lockout and at the end of it the union is not in a position to strike

*the empees may have to return to work then w/o a CA

-s. 64: informal mediation

*either party may request that the negotiations be assisted by a mediator [only after notice of collective bargaining has been served]

*this is rarely used

*mediators do not really have much persuasive power over the parties [their decisions are NOT binding]

-s. 65 (a): either of the parties may request a mediator, OR

* (b): the Minister may require the Director to appoint a mediator

* (4) the mediator is to encourage a settlement

* (5)(a): only has 14 days to do this, or (b) the parties can agree to a longer period

* (6)(a): mediator may recommend terms for settlement and give time periods for this

-in AB mediators typically don't even make recommendations

*the reason for this is that mediation here is a private enterprise and by taking a position adverse to one of the parties they are disgruntling their client base

-s. 65(7): cooling off period of 14 days from

(a) the time when the mediator says he's not making a recommendation

(b) the date fixed for acceptance or rejection of recommendations

(c) if a vote is requested [see s. 66], the date on which the parties are notified of the results of the vote

-s. 66(1): the parties may accept the mediator's recommendations, and they will become the CA terms [give notice of this]

* (2): or they can refuse it [give notice of this]

* (3): if one party accepts the recommendations and the mediator, it can request the board to conduct a vote on the acceptance/refusal of the recommendations

-this vote can be used by the empr to gauge where empees are at [how much they can be pushed, etc.]

-this vote may be slowed down if the union claims not to understand the proposals

-nothing is binding if only one party accepts and there is no vote

-s. 69(1): after proposals have been exchanged, the parties may apply to the board to conduct a vote by the other party as to its proposals

*(2): the board conducts this vote [only if it figures that this could possibly form a CA if accepted...IE: there must be complete proposals]

*(3): you can only apply for this once [regardless of whether or not that app is successful]

-this is a “draconian” measure in that it allows the empr to circumvent the union and go right to the empees [as though the union is in the way of settlement of the dispute]

-s. 70: conduct of the vote [this applies to either votes on mediator recommendations or the other party’s proposal]

*(1)(a): if the vote is for empees, all empees in the bargaining unit must vote

*they are looking for a majority of those who vote

*(1)(c): the employer is polled [ask a person high up]

*the vote is conducted by the board [they run things, count votes, etc.]

*the determination of this vote WILL be binding on the parties

*(4): weighted vote system used for employer’s organization if that’s what their ratification procedure was

STRIKES AND LOCKOUTS [general]

-strikes can obviously be very time-sensitive [e.g.: teachers don’t want to strike in the summer, a postal strike near Christmas will cause trouble, etc.]

*the parties take these timing issues into concern

-s. 71: no employees/bargaining agent/person acting on their behalf shall strike, cause a strike, or threaten to strike or cause a strike unless the strike is permitted by the Act [mirrored in 72 for lockouts]

-when IS a strike allowed?

-note: before s. 73 is even relevant, notice must have been served that collective bargaining is going to take place

-s. 73: empee/bargaining agent/person acting on their behalf may strike or cause a strike if

(a) no CA is in force, other than as a result of s. 130 [re bridging of CAs]

→ IE: the bridged CA doesn’t count here

(b) a strike vote was held

i. that remains current

ii. for which the results have been filed with the board

iii. that resulted in a majority in favour of a strike

(c) strike notice is given

(d) the strike starts where and when the notice said it would [or if the notice was amended, where the amended notice said it would], **AND**

(e) in a case where a disputes inquiry board is established before the commencement of the strike, the time limits referred to in s. 105(3) have expired [IE: 10 days after the Minister serves a copy of the DIB’s report on the parties, or 72 hours after they conduct a vote under s. 107]

-the D.I.B. is government interference that delays the commencement of a strike, or once the strike has commenced

-s. 75: application to the board to supervise strike/lockout vote

*(1): either party may apply to the Board to supervise a strike/lockout vote

*(2): no collective agreement can be in place [except subject to s. 130]

*(3): the strike/lockout vote will only be supervised after a mediator has been appointed under s. 65 and the cooling off period has expired

*-application for the board to supervise the vote can be made prior to the end of the cooling off period
-if a union wants to be in a position to strike right when the cooling period is done, they should apply for the board to supervise the vote 7 days into the cooling off period [it takes 7 days for everything to go through]*

-the ballot for the strike vote must contain certain key elements

-s. 76(5)(a)(i): empees affected by the strike are those who were in the bargaining unit 60 days before the most recent strike vote

-s. 77: expiry of vote and right to strike or lock out

**(1): if there is no strike/lockout 120 days after the vote, the strike/lockout is void [new vote needed]*

**(2): no strike or lockout after 2 years following the end of the cooling-off period [“drop dead date”]*

**(3): if (2) prohibits, the dispute is said to no longer exist*

-the parties are no longer said to be bargaining

-the legislature is basically just making sure people still really want a strike with these timeliness provisions

-after 2 years, there is no CA [but the certification is still in place]

-while a strike is going on, replacement workers cannot vote for de-cert, but once the strike is over replacement workers CAN vote for de-cert

*-s. 78: at least **72 hours** notice of strike/lockout must be given to the other side*

**re DATE, TIME, INITIAL LOCATION WHERE THE STRIKE WILL COMMENCE*

**same notice given also to the mediator*

**same notice provisions for lockout*

-s. 79: strike or lockout notice can be amended, but that means an additional 72 hour period must be given

-s. 90(1): at the end of a strike [which happens because of a settlement, termination of the bargaining agent’s bargaining rights or the end of the 2 year period]: the employees can be reinstated

**preference of this empee over scabs hired*

**request must be made in writing*

-see Division 17 re the DIB

-s. 105

-s. 130: bridging of a collective agreement

**when notice to commence collective bargaining has been served under this Act, a CA that applies to the parties at the time of service of the notice is deemed to continue to apply to the parties, notwithstanding any termination date in the agreement, until*

(a) a new CA is concluded]

(b) the right of the bargaining agent to represent the empees is terminated

(c) a strike or lockout commences

-s. 90: a strike or lockout can only last 2 years

-note: lockout provisions mirror those for strikes

-pre-WWII: strikes widely used as a weapon by workers even though they were illegal

*basically they could get away with it and use strikes for various things [recognition, minor grievances, termination...]

*strikes during the terms of CAs

-post-WWII: certain steps had to be completed pre-strike

*time limitations put into place

*no striking during terms of the CA

*some groups prohibited from striking altogether [e.g.: police, firemen, government employees...such groups go to compulsory arbitration]

→ this can be said to be problematic to free collective bargaining because it restores power imbalance in favour of the empr

Alberta Reference

-rule: s. 2(d) of the Charter does NOT include right to **bargain collectively** and **strike** for union

*these rights were said to not be fundamental rights or freedoms

-the court emphasized that the Charter was about individual rights

→ “People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess”

→ freedom to associate for the purpose of activities which are legal when performed alone

-restrictions on strikes were said not to interfere with the associational character of trade unions

-they also point to how making a right to strike would make for more court involvement in labour relations [which is not good, because they don't know as much]

-the union here argued that the Charter's guarantee of freedom of association must mean that prohibition of striking is a violation of those constitutional rights

-another issue re dissent: what about Canada's int'l obligations entailing a recognition of the right to strike?

*int'l law not binding, but should be persuasive [e.g.: Int'l Covenant on Civil and Political Rights, ILO Conventions]

*some of the things we are signatory guarantee CB

*implicit in free CB is the right to strike

*IE: it IS an essential activity

PIPS

-SCC once again emphasized that freedom of association does not protect the right to bargain collectively

*here the empr/government was said to be under no constitutional obligation to bargain collectively or provide any statutory scheme for collective bargaining by recognition or certification

Delisle

the above principles were affirmed again [IE: no right to CB]

Dunmore

-here the SCC moved slowly toward the idea that freedom of association may protect some aspects of empee organizing activity which is inherently collective [granted not all activities of CB should be protected]

*also: this case affirmed the broader reading of freedom of association vis-à-vis int'l obligations, as was previously set out in Dickson's dissent in the Alberta Reference

-note: unions find it problematic that government empees do not have the right of which union to join [it is already set...e.g.: AUPE]

*plus: gov't empees cannot strike in AB

-strangely, in the *Colleges and Universities Act*, not only is the union assigned, but the working terms are pre-established

-depending on the circumstances emprs/the union will take a different stance as to whether or not something is a strike

*if within the right time period, and satisfying the necessary pre-requisites, the union will typically want the action to be classified as a strike, because then empees cannot legitimately be punished for their involvement in it

*if outside of the appropriate time period and without the necessary pre-requisites, the empr will want action classified as a strike [because then it is illegal action]

Graham Cable

-here for the union to engage in a traditional/complete strike would not really have been that effective [the empr could easily have got replacement workers]

*they took a different approach, then, which entailed slow-downs in some areas, speed-ups in others, diversion of calls to management, provision of services to clients for free, no OT...

-the empr drafted an agreement which included a promise not to engage in such action

*to work, the empees would have to sign this agreement

→ that is an unfair labour practice, because it constitutes the imposition of discipline for participation in a lawful strike [s. 149(a)(vii)]

-the empr's conduct here basically amounted to a lockout

*this would be legit if they had gone through the steps, but they hadn't

*the empr is not helpless...it just needs to take the necessary steps so it can lock out

-“work to rule” can constitute a strike in AB if the action is concerted and it is intended to pressure the other side to accept bargaining terms

-“Hot Cargo” provisions → not accepting orders/goods from other parties that are on strike

*this may constitute a strike, so long as the action is concerted and there is a subjective element to aid to other empees to compel empr to accept terms or conditions of employment

-in AB: even if the union and empr have a provision whereby the workers will not have to cross picket lines of other units, all this really does is protect them from discipline if they don't cross the line

*the action is basically still illegal

-despite the fact that the subjective element seems to be missing, in AB job action for political reasons typically HAS been said to constitute a strike

*this is odd, as there is no intent for the action to compel the empr to accept terms, nor to compel another empr to accept terms

-prior to lockout or strike, a party must

- *issue notice to bargain
- *bargain in good faith through a course of mediation
- *assuming mediation fails, wait the 14 day “cooling off” period
- *take strike vote/lockout poll
- *give strike/lockout notice [date/time/initial location]

-once strike/lockout is underway, applications for cert/de-cert cannot be made w/o board consent

Western Archrib

- this case set out the principle that there need not even be a work stoppage for a lockout
- the offering of altered terms and conditions of employment may in itself constitute a lockout [with the subjective element, which is a desire to compel the union to accept it's the empr's terms]
 - note: such action by the empr is problematic because it kind of avoids the CB relationship
- unfortunately, the lockout here was re arbitration
 - *basically, the empr said it would not go to arbitration anymore because it is too expensive
 - *technically, this is not illegal, because the statute calls for some dispute resolution procedure, but it need not necessarily be arbitration

-a lockout ends a CA

- *emprs can offer employment on altered terms and conditions
 - the only obligation is that they bargain in good faith [even during the lockout]

-the board can actually waive the 7 day notice necessary for the empr to have a lockout

- *it takes longer generally for a union to get into a position to strike

-when the empr begins to make the moves to lockout, a union should prepare itself to strike

-there will be both federal and provincial regulation of strikes in every province [depending on the industry, etc.]

-in AB, regulation of strikes is mostly done by the Labour Board

- *the courts are also involved for enforcement/contempt issues
- *if you are dealing with a federally regulated issue, you go right to the QB

-in other provinces, labour board have no role at all in strikes/picketing

- *that may be problematic...because the labour boards have [in theory] the experts

-generally, in a strike, a board will start off being relatively loose on the rules, but will tighten them up as time goes on

-when your client goes on strike, it is necessary to establish a contact in the police service/RCMP

- *you want them to be sensible and they may be [e.g.: Brooks]
- *maybe also a liaison with the fire department

-also: instruct client [and have them pass these instructions onto their members] re “picketing protocol”

*try to keep everyone in line during the strike, as this maintains legitimacy and also keeps relations with police better

-during a strike/lockout, an empr will be very concerned with security

-Division 14: Regulation of Strikes, Lockouts and Picketing

- s. 84: sets out what can be done
 - *(3): the matters the board will consider when making a determination/order re a strike or lockout [prevent violence, escalation, etc.]
 - *(4): general prohibition on picketing [aside from where it is allowed, as set out here]
- s. 85: refusal to work
 - *(a): if covered by a CA you can't refuse to work alongside scabs
 - *(b): unless the empees you are supporting are involved in a lawful strike/lockout, you cannot refuse to ship/receive goods from the empr of those empees
- s. 86: Board powers over unlawful strikes, etc.
 - *the board can make declarations and directions to act/refrain from certain action
 - *mirrored in s. 87 for lockouts
- s. 88(1): directives from the board are binding on empr/union [the directive has to be served to the appropriate party]
 - *(2): the directive may be filed with the court, and then it becomes an enforceable judgment or order of the court [the court-filed directive also has to be served on the relevant party]
- a party may go back to the court to get a modified order if the one they are relying on is not working well
- the union does NOT need to instruct their counsel to accept service of directives
 - *in such a case, then, the directive will need to be served on high-ranking officers of the union
 - *this may lead to situations such as that of the Union president being run off the road and seriously injured in Brooks
- once documents have been served, an application may be made to the court for enforcement
- for disobeying a court order, a party may be held in contempt of court
 - *there is a strictness to the procedure for this though, since the liberty of the party may be at stake [jail time!]
 - *the alleged wrongdoer is allowed to bring forth evidence, etc. [like a trial]
- police have discretion re orders to enforce [although they do take direction from the court...but not the Labour Board]
- process in AB: board makes directive → directive is served → directive violated by one party → other party goes to the board and asks that the directive be filed in court → becomes a court order → court order is breached → contempt of court
- if a strike is settled, all outstanding actions are removed
- see text [8:311] for material re illegal conduct during picketing
 - *may come up later in CAN

Royal Oak [Pat Nugent]

- the union at the mine was a small local
 - *it came to an impasse with the empr and there was a lockout
 - *replacement workers used

- a worker set up a bomb in a mine shaft
 - *it killed 9 workers [some replacement workers and some who had crossed the picket line]
 - *their families claimed WCB compensation
 - *the WCB then sued several parties [the security company, the guy who did it, the RCMP, the union executive...]
- they sued the CAW
 - *the CAW did send financial support and an advisor, but it certainly didn't appear to be in control of things there
 - *moreover: the guy they sent was very adverse to unnecessary conflict
 - *the CAW also sent letters referencing the incident to several parties in order to encourage anti-scab legislation [but it could not be said that they created the incident for that purpose]
- there was no direct support of any of these theories
- the TJ basically accepted all these theories
 - *basically found that the CAW has allowed [if not caused] the guy to plant the bomb
 - *it was odd, b/c the TJ basically held a 3rd party responsible for the intentional tortious conduct of the murderer
- this ruling was also strange in that a national union was held responsible for the involvement of one of its locals
 - *even though they are 2 different entities
 - *the locals have a lot of autonomy as well
- also: the CAW was found vicariously liable for the murderer
 - *plus some of the other parties' liability was put on the CAW
- this has been appealed [there are issues of remoteness... locals being separate entities, etc.]
- some boards will only certify the local union, others only the national [when there is a choice]
 - *this will depend largely on the union's constitution
 - *above: the statutorily certified group was the local [so holding the national liable seems wrong]
- the court here basically ignored the constitutional documents of the union
 - *this is unheard of [courts are not so loose with the rules in corporate law, and it must be recognized that unions require similar treatment in several respects]

Berry v. Pulley

- technically, unions are unincorporated associations
 - *as such they would have no status at common law
- this case got over the fiction that a union is just a collection of contracts
 - recognition of UNIONS AS LEGAL ENTITIES
- this can be justified since unions satisfy many of the indicia of personhood/status
 - *right to bargain, own property, etc.

Regulation of Striking and Picketing

- jurisdictional issues
 - if the empr is provincial → regulate picketing and strikes through LRB
 - if the empr is federal → regulate picketing and strikes through the QB

- *the federal labour code does not regulate picketing
- *note: if matters are not dealt with in provincial labour codes, they will be handled in the courts [dealt with in labour code → dealt with by labour board]
- if there is regulation/enforcement → jurisdiction will be combined
- *e.g.: contempt of court provisions re breaching a court order

-criminal matters vis-à-vis strikes are dealt with by the courts

- to get an injunction, the empr/union must have a civil claim in contract or tort
 - *often these claims are not proceeded with once the objection is obtained
 - to get an injunction, the requesting party must file evidence [not hearsay]
 - the claim will often be re illegal action vis-à-vis the CA
 - *e.g.: an illegal strike
 - *e.g.: breach of a statute with a no strike clause

- to establish that picketing is illegal, show a tort or a breach of contract
 - nominate torts → straightforward matters such as assault, battery, defamation, nuisance
 - economic torts → more creativity by the courts at common law here
 - *conspiracy to injure by lawful means [must be committed by 2 or more people]
 - *conspiracy to injure by unlawful means
 - *e.g.: an illegal strike against an empr
 - *directly inducing breach of contract
 - *direct interference with contractual relations falling short of a breach of contract
 - *intimidation [intent to injure economically]
 - *intentional injury by economic means

- note: the defn of “unlawful” for the economic torts is rather broad [breach of a law, tort, sometimes even breach of contract]
 - *e.g.: a breach of the no-strike provision in the labour code will be treated as unlawful for the purposes of granting an injunction
 - *this is odd in that generally a statutory breach cannot give rise to a claim in court [labour is different in this context]

- this rare approach to the meaning of “unlawful” was set out in *Gagnon*
- *also in *Winnipeg Builders*: there the court said that breach of a contract was “unlawful”
 - *an injunction was granted for this

- NB: unionized workers CAN be sent back to work by the court by way of injunction
 - *this cannot occur under the common law
 - *generally under common law, the remedy would just be damages for breach of contract if an emee refused to return to work

- labour boards can do 2 things mainly re strikes/picketing
 - I. declare the strike illegal
 - this may go to civil court where an order may be filed requiring employees to return to work
 - II. declare that picketing is unlawful
 - remedy: no picketing or picketing restrictions [re where, when, why and how...check on this later]

- secondary picketing = picketing at any location other than the primary empr [e.g.: at corporate HQ]
 - *this is where the empr will most often allege economic torts against the union

Pepsi

- THIS CASE ESTABLISHED THE LEGALITY OF **SECONDARY PICKETING** IN THE CASE OF A LEGAL STRIKE!
- adoption of the “wrongful action” model by the courts
 - *secondary picketing per se is lawful
- 2nd model [rejected]: secondary picketing can ONLY take place at a location that is aligned with the interests of the empr
- a 3rd model [rejected]: secondary picketing is illegal per se

- under the “wrongful action” model
 - *ONLY the HOW of picketing will be regulated
 - *the when/where/why will NOT be regulated

 - the HOW will be regulated in that picketers cannot engage in wrongful action
 - *e.g.: torts
 - *e.g.: crimes

- the right to picket is affirmed by s. 2(b) of the Charter
 - *picketing is expressive activity

 - union speech may be very powerful [e.g.: one picket getting a whole plant not to work] but it should not be subject to any special rules
 - *corporations are very powerful, but their speech rights are not curtailed at all [as per **Irwin Toy**]

- so when courts do regulate picketing, they are looking only at the wrongful conduct
 - *e.g.: don’t tell them not to picket, tell them not to trespass

Telus

- the process that needs to be fulfilled to get an injunction
 - *as in **RJR MacDonald**
 - *requirement for
 - A. serious question to be tried
 - B. irreparable harm
 - C. balance of convenience test

- note: in labour, the vast majority of statements of claim do not go to trial
 - *they are used only as a vehicle to get an injunction
- in this case, the union was picketing in front of peoples’ homes [management and some empees]
 - *this was basically necessary since the particular people being targeted could do much of their work from home

- note: picketing in a residential area here better have a damn good purpose for the union, because it is horrible PR
- it was said here that residential picketing could occur [contrary to ruling in BC Telus case]

- *they distinguished their facts from others where residential picketing was disallowed, because in those other cases the picketing also involved threats, etc.
 - *IE: it did not have to be enjoined
 - IE: application of Pepsi
 - *allow the picketing and just regulate the “how” [re wrongful action]
 - the empr may have big problems in attempting to regulate residential picketing
 - *torts will be against the home owners/people in the neighbourhood, not against the empr
 - potential unlawful elements of such residential picketing in this case [none of which were established for Telus, although the homeowners may have had a cause of action]:
 - *breach of privacy [PIPA]
 - *watching and besetting [CC offense]
 - *threats/intimidation
 - *interference with economic relations
 - *procuring breach of contract
 - at any rate, an order was made restricting the picketing
 - *the court said that if the homeowners had brought the same claims that the empr did, there would have been restrictions
 - *this was an odd approach, but the union did not appeal because their secondary picketing was still allowed, albeit in a modified form
-

LRB Regulatory Powers

Board powers over unlawful strikes, etc.

86 Where the Board is satisfied that

- (a) a trade union called or authorized or threatened to call or authorize an unlawful strike,
 - (b) an officer, official or agent of a trade union counselled, procured, supported or encouraged an unlawful strike or threatened an unlawful strike,
 - (c) employees engaged in or threatened to engage in an unlawful strike,
 - (d) any person has done or is threatening to do an act and the person knows or ought to know that, as a probable and reasonable consequence of that act, another person or persons will engage in an unlawful strike, or
 - (e) a trade union, employee or other person has contravened section 84 or 85,
- the Board may, in addition to and without restricting any other powers under this Act, so declare and may direct what action, if any, a person, employee, employer, employers’ organization or trade union and its officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or threat of an unlawful strike or the contravention of section 84 or 85.

Board powers over unlawful lockout, etc.

87 Where the Board is satisfied that

- (a) an employer or employers’ organization called or authorized or threatened to call or authorize an unlawful lockout, or
 - (b) an officer, official or agent of an employer or employers’ organization counselled, procured, supported or encouraged an unlawful lockout or threatened an unlawful lockout,
- the Board may, in addition to and without restricting any other powers under this Act, so declare and may direct what action, if any, a person, employee, employer, employers’ organization or trade union and its officers, officials or agents shall do or refrain from doing with respect to the unlawful lockout or threat of an unlawful lockout.

Effect of directive

88(1) A directive or interim directive to cease a strike or lockout that is not permitted under this Act, or any directive or interim directive under section 86 or 87, is binding on the employer, employers' organization, employee, trade union or other person to whom it is directed with respect to the strike or lockout referred to in the directive or interim directive and any future strike or lockout that occurs for the same or substantially the same reason.

(2) Notwithstanding section 18(6), the Board may file a copy of a directive or interim directive referred to in subsection (1) with the Court and, on filing, the directive is enforceable as a judgment or order of the Court.

(3) Service of a directive or interim directive under section 86 or 87 in accordance with this Act or any rules or directives of the Board, in addition to being service of the directive or interim directive, is deemed to be service of the judgment or order of the Court under subsection (2) of this section when that directive or interim directive is filed with the Court.

-s. 86: sets out the directives the board may make in the event of an unlawful strike

*s. 87: mirror provisions for lockouts

-s. 88: sets out the effects of such directives

- i. a directive is made by the labour board and served on the union
- ii. if the union doesn't comply, the empr can apply to have the board file the directive in court
- iii. the board may decide whether or not this is appropriate
- iv. if the board does file its directive with the court, it becomes a court order
- v. this court order will then be served on the union in accordance with the rules of court [recall rule from Brooks]
→ this is unique in that there is an order without all the other trappings of a judicial action
- vi. if the union doesn't comply with the directive/court order, an originating notice can be brought to court to have them held in contempt
- vii. the union will have the chance to bring forth reasonable/lawful excuse
- viii. the contempt may be classified as civil [less serious and subject just to a fine] or criminal [more serious, and subject to jail time]...criminal if conduct is continuing

-police

-they do NOT enforce directives of the board

-they DO enforce court orders [but there is some discretion in their enforcement]

*if a party is violating a court order, typically the police will remove the party and have them attend in court, plus not return to the picket site [or jail if they do go back]

-note: generally, in dealing with such matters, the board will have more flexibility given their understanding of labour law

*The courts? Not so much.

-Constitutional Issue

-if the province creates an LRB and allows it to handle torts and criminal law issues, it is basically creating a s. 96 court

-for this reason, the province needs to be very careful how they frame things in legislation

*e.g.: if the province were to state "any civil matter arising out of a labour dispute will be dealt with by the LRB", this would be a breach of s. 96

CLRA and PCL Industrial Construction [Agrios decision]

- re constitutional issues
- it was said here that the board could regulate lawful picketing
 - *however: they could NOT regulate unlawful picketing
- in the case of unlawful picketing, they can prohibit it, but not regulate it
 - *this is indeed a little wacky
- moreover: it was stated that the board actually **MUST** do something when there is illegal picketing
 - *once they determine that there is unlawful conduct, they must do something
- the board here found that there was wrongful action in the secondary picketing
 - *they found that it was tortious [the picketers in this case had induced a breach of contract]
 - *the picketing was disallowed

Jurisdiction of court

91 No court shall grant any injunction or other process that has the effect of restraining a strike or lockout or restraining or limiting picketing in respect of a labour dispute to which this Act applies unless

- (a) there is a reasonable likelihood of danger to persons or property, or
- (b) resort to the Board is impractical in the circumstances, in which case the court may issue an order, which shall remain effective until the time that the Board is able to determine the matter.

Injunctions

92(1) Notwithstanding anything in this Act, the *Judicature Act* or any other Act, when there is a strike or lockout, no injunction before trial shall be granted *ex parte* to

- (a) a party to the dispute, or
- (b) any other person or party,

to restrain a party to the strike or lockout from doing any act in connection with the strike or lockout.

(2) Every affidavit intended to be used in support of an application for an interim injunction to restrain a person from doing any act in connection with a strike or lockout shall be confined to those facts that the deponent is able of the deponent's own knowledge to prove, and a copy of every such affidavit shall be served with the notice of motion.

(3) If members of a trade union are the defendants or intended defendants, the notice of motion may be served on an officer of the trade union or a member of it who is engaged in the activity proposed to be restrained or another person engaged in that activity.

(4) The notice of motion shall be served in sufficient time before the time fixed for the hearing, not being less than 4 hours in any event, to enable the person to attend at the hearing of the motion.

Retail Wholesale Canada

- s. 84 of the AB code still outlines that secondary picketing is against code
 - *however: this must be read in light of the Charter s. 2(b) finding in Pepsi [found that restrictions on secondary picketing were overbroad 2(b) limitations]
- so that section is still on the books, but it is unconstitutional
 - note: the LRB CAN consider constitutional issues
- despite the ruling in Pepsi, some broad restrictions on picketing will still pass constitutional muster
 - *e.g.: restrictions preventing harm to 3rd parties
- Pepsi has not answered all questions re secondary picketing
- it is not clear how much harm a 3rd party will be expected to suffer due to picketing
- Pepsi left the door open for legislatures to statutorily restrict secondary picketing

- *so long as any measures imposed by the legislature are constitutionally sensitive
- *however: that is a pretty high burden to meet [again, they may be able to regulate the how, but not really the where, when, why]

Lakeside [Rollins]

- use of s. 91 of the Code by the courts
 - *when resort to the board is impractical, the court may issue an order
- this was allowed
- secondary picketing has a “signaling effect”
 - *IE: one group of unionized workers sends a message to another and the latter stops work
 - *e.g.: UNA setting up a picket in front of Labatt
 - *depends on union solidarity
- the labour code cannot be contracted out of

St. Anne

- union engaged in an unlawful strike
 - *in response, the empr goes to court for an injunction [based on breach of contract for the unlawful strike]
- it is MANDATORY that a CA set out a method for resolving disputes
 - *it need not necessarily be arbitration, but it must be something
- main point: in this case the dispute settlement mechanism was binding arbitration, so the empr could not take matters to the courts like they did
 - *the empr cannot sue in such a case
- side note: that being said, either party can still go the court to get an injunction for an illegal strike/lockout
 - *courts retain their “inherent” jurisdiction to issue injunctive relief
 - *the injunction may be necessary so that things can go through arbitration w/o too much damage for one of the parties
 - *note: RJR factors also need to be satisfied to obtain an injunction

-board remedies for an unlawful strikes/lockouts

- i. s. 114: suspension of dues provision [under division 19]
 - the empr will no longer have to deduct union dues and fees
 - ditto for illegal lock out
- ii. s. 116: cabinet can direct the board to remove the certification for a union engaging in an illegal strike
 - or, for an illegal lockout, an empr’s organization [not common outside of the realm of healthcare] may no longer be able to represent the emprs

AUPE v. Alberta (Provincial Health Authority)

- the union challenged the board’s ability to use the remedy under s. 114 re dues deduction
- freedom of association as set out in the Charter is not a tremendous help to unions
 - *it basically just prevents the gov’t from interfering with rights...and dues check off is a right that is only established in the Labour Code and nowhere else

- also: it is not as though an order under s. 114 prohibits dues check off, it just makes a big pain in the ass, because the union has to collect money itself and people actually have to give it up [as opposed to never really having it in hand in the first place]
 - the challenge of s. 114 was unsuccessful
 - see Dunmore [page 11 in AUPE] re freedom of association
 - *there, the court established that in order for a freedom of association claim to succeed,
 - i. the claim must be grounded in a fundamental freedom
 - ii. the claim must be supported by an evidentiary foundation
 - iii. the state must be truly accountable for the inability to exercise the freedom
-

Fallowka v. Royal Oak

- re the legal capacity of unions to sue/be sued
- unions = unincorporated associations [typically, although some unions are incorporated as non-profit organizations]
- to sue an unincorporated association such as a union, you need to use a representative action
 - *name some of the members of the UA as defendants

-note: the right of unions to sue and be sued is often set out in statute now

Berry v. Pully

- unions are legal entities
 - *IE: they can sue and be sued [like an individual or a corporation]
- this is provided for in the Canada Labour Code
- this case should clarify it, but union status may still be questionable in Ontario re their ability to sue and be sued
- this is the case with CALPA and the AC pilots [check on this?]
- SCC: the theory of contractual relations as a network between union members needed to be thrown out [no need for the legal fiction of a web of contracts anymore]
 - *rather: each member has a contract with the union
- an individual union member cannot be sued for breach of contract
 - *if you are harmed by something the union did, sue the union... **not** the individual!!
 - *you can sue individual union members in tort for things they have done though
- “Relationship in nature of contract between member and union itself as legal entity is such that in action brought for breach of union constitution, liability of union is limited to assets of union and cannot extend to its members personally”
- “On grounds of both law and policy, no contract exists as between individual union members based on terms of union constitution -- Given that union itself can be held liable in breach of contract, no need exists to maintain "complex of contracts" model”

-no discipline can be engaged by the empr on empees solely for participating in a lawful strike
 *however: empees CAN be disciplined for particular unsavory conduct on the picket line, and they would be disciplined if/when they return to work [the motivation in imposing the discipline, however, cannot be just the strike participation]

-an empr may agree as part of a “back to work protocol” that any disciplinary action will be waived

-there are provisions in the code that prohibit a union from prepaying for certain benefits pre-strike in order to allow the empees to effectively strike longer

-see s. 90

*gives priority to union workers over replacement workers in the post-strike period

Parry Sound

-CA here that set out that probationary employees could be fired at the discretion of management and that they could not grieve this

*broad management rights provision

-the employee here was probationary

*she went on maternity leave and when she returned the employer fired her

-in this particular case, her situation related to provisions in both the Employment Standards Code and the Human Rights Code [re gender discrimination]

-the issue: could the arbitrator take hold of this grievance?

*there was nothing in the CA that said she had any rights as a probationary employee

-NB: the broad management rights provision CANNOT be read as overriding statutory standards applying to all employees

*the management rights provision must be read in light of other applicable law

-the grievor here had 3 different modes of recourse

- i. CBA grievance
- ii. employment standards claim
- iii. human rights claim

-note: she did not have any substantive rights in the CBA

*can the ESC/HRC statutes be imported by the arbitrator and enforced as a substantive right?

→ YES [note: this is different than McLeod below in that here a positive right was being imported, whereas in McLeod they just needed to assess whether or not employees could be made to work more than 48 hours/week]

-it must be read into the management rights clause that they can only discharge for lawful reasons

*even re probationary employees

*management cannot use their broad rights to do something unlawful

Parry Sound [dissent by Major]

-making arbitrators incorporate other statutes like this may put too much pressure on them

-look only within the 4 corners of the agreement

-attempted to distinguish McLeod v. Egan

-thought that the other mechanisms could do their own part as well [e.g.: the HR Commission, etc.]

McLeod v. Egan

-this was looked to for guidance in Parry Sound

-here: employment law stating people cannot be required to work more than 48 hours/week

*however: there was a broad management rights clause in the CA

*employee refused to work more than 48 hours/week and was disciplined

-decision: statutory minimums MUST be read into the CA

*the CA cannot go below this “floor”

-note: when an arbitrator has to interpret a law other than the Labour Code, the standard of review will be correctness

Weber

- is a labour board a “court of competent jurisdiction” as per s. 24(1) of the Charter?
 - *IE: can Charter claims properly be brought before them and can they order Charter remedies?
 - here, the empee had s. 7 and 8 Charter claims against his empr
 - *his empr was the gov’t...hence the Charter issue

 - the arbitrator DID have jurisdiction here because the Charter-breach was employment-related
 - *moreover: the statute or CA [maybe both] give the arbitrator the power to grant remedies
 - *jurisdiction over subject matter + power over remedies = court of competent jurisdiction under Charter s. 24

 - note: if, for e.g., all the arbitrator was able to do remedy-wise was state that a breach had occurred, this would be insufficient remedial power vis-à-vis s. 24

 - arbitrators are useful fact finders
 - *at any rate, if they screw up, their decisions can be JR’d
-

-as alluded to in Parry Sound, in several issues, there may be the possibility to recourse via multiple forums

- i. civil courts
- ii. arbitrator through CA
- iii. human rights tribunal
- iv. WCB
- v. forum via employment standards act [ESA]
- vi. forum via occupational health and safety act [OHS]
- vii. forum via PIPA
- viii. forum via professional bodies

-there are 3 models re jurisdiction when more than one forum is available

- I. Overlapping
- II. Concurrent
- III. Exclusive

-Arbitrator [via CA] vs. Civil Court

-when the matter is something arising directly or inferentially from the CA, the arbitrator will have exclusive jurisdiction

-e.g.: Weber

*look to the essential nature of the empr’s action

*in that case, the action extended from work...therefore, the arbitrator should have exclusive jurisdiction

*action was related to a provision in the CA

-IE: as long as you can relate action to a CA provision somehow, the arbitrator will have jurisdiction over the matter [assuming arbitration is the chosen dispute resolution mechanism]

-statutory ouster

-Arbitrator [via CA] vs. HR Commission [or similar such statutory commissions]

-jurisdiction will be concurrent here

-practically, the arbitrator will probably get to it first

- *then, the HRC can decide whatever is left over after the arbitrator is done with it
- *if the arbitrator has decided on some aspects, then the HRC cannot decide on those matters as well because of res judicata/issue estoppel

Regina Police

- there is a CA here for the police here
- however: the police were also subject to the Police Commission Act
 - *this set out that all police disciplinary and other such matters would go through the police commission
- the grievor here wanted to pursue his grievance to an arbitrator
- SCC: the essential nature of the dispute here was a disciplinary matter
 - *ergo: it should be dealt with by the Police Commission [not through an arbitrator via the CA]
 - *the Police Commission had exclusive jurisdiction due to the Police Commission Act
- the most important thing in cases where multiple forums are available: determine the legislative intent...and run with it!!
- arbitration is pricey
 - *however: due to their duty of DFR, the union may be obligated to bring forward cases
 - *plus, now because of the ruling in Parry Sound, there may be more kinds of cases that the union must bring forward [e.g.: Human Rights, Employment Standards, etc.]

McGavin's Toastmaster

- the CA REPLACES the individual employment contract
- here: the empr tried to say that empees were not entitled to severance because they had repudiated their contracts with the empr by going on illegal strike
 - *that is not how things work...repudiation is a common law contractual principle and only something that can be pursued in a regular contract situation, not a CB situation as here
- the empr has the right to discipline for the illegal strike, but cannot refuse to pay severance like they did
- the one exception as for when the CA does not replace the individual contract is in the pre-employment context [this falls outside the McGavin ruling]

Allen v. Alberta

- union made some agreements w/ empr outside of the CA
 - *this basically put empees in a position in which they had no severance rights and could not grieve issues
- the empees later tried to sue the empr to get severance
- this dispute sprang out of CA provisions re severance, so the matter had to be dealt with by arbitration
 - *at any rate, the claim was not brought in a timely manner

DUTY OF FAIR REPRESENTATION

- unions must represent members in good faith

Steel

- US case with racist policies by the union that discriminated against black non-members
- USSC: if a union is granted an exclusive statutory right to represent empees exclusively, they must do so

- *fairly
- *impartially, and
- *in good faith

-there has been much debate in Canada as to the issue of whether or not the DFR applies to collective bargaining in addition to the duty it definitely owes in the grievance and arbitration process

- *there is not an express statutory duty for the union to bargain in good faith, but there may be a duty at common law

-in Canada, the importance of the majority in unions is emphasized, as per Cox → the union alone determines if grievances proceed

- *note: this is still subject to the DFR though!

*scrutiny of the union's decision will be more heavy as more serious issues are involved [e.g.: if there is termination, a board will look quite closely at the decision of a union not to proceed with a grievance]

*vs. the view of Summers → the individual should get to decide whether or not a grievance proceeds, not a union

*vs. Weiler [moderate position] → the union should control the gate, EXCEPT in the event that the grievance pertains to critical job interests

Rayonier Canada

-the lead case re a union's DFR

-DFR =

- *the union must not act in bad faith [personal hostility, political revenge, or dishonesty]
- *no discrimination [race nor sex]
- *no personal favouritism
- *no arbitrary decisions that disregard the interests of an empee

-it will be fairly easy to establish that a union has acted in a discriminatory fashion

*ditto for bad faith

*it is difficult, however, to establish that a union has acted arbitrarily

K.H.

-KH was an empee with a mental disability

-the union did what it was obligated to at the minimal level, but they did not go above and beyond that

*K.H. was obviously ill

*the union had a duty to accommodate him...they had to take extra steps to ensure that his grievance was dealt with adequately

-this was an importation of HR law re discriminatory treatment

*the treatment was discriminatory according to the HR statute because they failed to accommodate

-labour relations statutes always have a provision that requires a CA to have some sort of dispute resolution mechanism

*the purpose of this is to prevent strikes in the duration of the CA

*in most cases, this is arbitration

*however: in AB they don't specify that arbitration has to be used

-an odd quirk is that it seems as though in AB for the empr to simply deal with the dispute as it wishes is a dispute resolution mechanism

Russellsteel

- re contracting out
- Chair Arthurs here: there is a residual right for management to do what they please
 - *unless something is expressly prohibited in the CA, management can do it
 - a union has to expressly bargain and restrict management's rights...if they don't, the residual rights apply
- the union actually had a clause in the CA here that appeared [on a common sense reading] to preclude contracting out
 - *it basically stated that those who were not in the bargaining unit could not do bargaining unit work
- however: Arthurs used some sleight of hand
 - *he pointed to arbitrations re contracting out
 - *the majority allowed it
 - *he said, therefore, that the parties must have been aware of this when they bargained for their agreement, so if the union really wanted to preclude contracting out, there would have been an express provision for this
- he referred to the above clause as being only a "working foreman" clause
 - *for it to have any more effect than this, the terms would have had to be expressly in the CA

-note: from Russellsteel onward, union side labour lawyers had to advise unions that if they wanted to preclude contracting out, this would have to be in the CA in express terms, with no room for interpretation [because according to the decision above, as soon as there is room for interpretation, that is when management's residual rights factor in]

- Justice Laskin proposed a theory opposite to that set out in Russellsteel
 - CB is a completely new regime that fills in gaps that there were at common law
 - *IE: once you have a CA, there is nothing else left...so don't talk about residual rights!
 - *apply the CA even to matters that are not expressly mentioned in the CA
 - *this makes much more sense than simply throwing the empr this bone [why should management get a freebie?]
 - CB is about equal partnership b/w labour and capital
 - *recall: there are public aspects to this, as society overall benefits from good labour relations [interest in orderly production]

Metropolitan Police

- empr did not assign employees overtime based on what it claimed was an "attitude problem"
- there was no provision in the CA re the determination of OT
 - *if the rationale from Russellsteel were applied here, it would be said that if the union really wanted a provision governing this, they would have bargained for it, and it would be in the CA in express terms
- the arbitrator here was more sensible than Arthurs
 - *he implied into the CA an obligation for the empr to act reasonably
 - *the refusal to assign OT due to an irrelevant consideration as there was here is not reasonable
- Ont. CA: reversed the arbitrator's decision

- *they said that the CA is a total document, so we should NOT imply an obligation for the empr to act reasonably, not discriminate, etc. [IE: if it were really NB it would be in there]
- IE: unless there are provisions in the CA expressly governing this, an empr has the right to make arbitrary decisions, discriminate, etc. [subject to laws on such matters]

Toronto Printing

- there was to be a reclassification by the empr of empees into permanent status
 - *there were no provisions in the CA that delineated how this reclassification should take place
 - *the empr assigned jr. empees to perm. status before senior empees
 - here: the arbitrators looked at the document as a whole
 - *they stayed within the 4 corners
 - *they saw the importance of seniority elsewhere in the CA
 - the arbitrator pointed to the large number of arbitrations that affirmed the importance of seniority
 - *said that the parties must have been aware of this in negotiation
 - *flipside of what was argued in Russellsteel
 - this basically overrules the Ont. CA in Metro
 - *this happens
 - *although there is not strict stare decisis for arbitrations, arbitrators are still caught by the law... but where there are goofy decisions, they will strain to make decisions that make sense
- Division 22 in the Labour Code sets out requirements [s. 135] and model clauses for a CA
- *s. 135: there must be a dispute resolution mechanism
 - *model clauses: if a CA does not contain a dispute resolution mechanism, the code can impose arbitration
 - *as part of this, under s. 136(j), the arbitrator may replace discipline imposed with what he/she thinks to be appropriate
- arbitrators either get their jurisdiction from the Code, or from the CA, possibly from both
- *typically they get it from the CA [IE: the parties choose arbitration for dispute settlement]
- most CAs will have provisions re dispute resolution
- *also: most CAs will have provisions requiring just cause for termination

Port Arthur Shipping

- the arbitrator found that the empr had cause for discipline in a particular incident
 - *however: they substitute termination for a lesser penalty, as they thought the dismissal to be too extreme
 - *the arbitrator did not have this remedial authority expressly, but it was said to be implied
- SCC: the arbitrator CANNOT substitute a lesser penalty!
 - *as soon as the arbitrator finds cause for discipline, they have to defer to the empr in terms of the way they decided to deal with it

William Scott

- arbitrators have FULL remedial authority
 - *overrules PAS
- an arbitrator can look at discipline imposed and use its remedial authority to change that discipline
 - *the arbitrator should ask itself 3 questions

- I. Has the empee given just and reasonable cause for some form of discipline from the empr?
- II. Was the empr's decision to dismiss excessive in all the circumstances?
→ the arbitrator can look beyond the conduct to other matters such as clean disciplinary record, etc.
- III. If yes to (II), what alternative measure could be substituted that is just and equitable?
→ if there is something that can be done to restore the employment relationship, the arbitrator should do that

-this case basically imposes the obligation of using progressive discipline on the empr

*AKA: "corrective discipline"

*there are a number of steps that typically will have to be taken prior to termination

Cartier

-the arbitrator found that there was just cause for termination

*this is a half-assed approach to the strategy set out in *William Scott*

*here: the arbitrator combined steps I and II

-Cartier was an alcoholic empee who had several troubles in the workplace

-the arbitrator said that there was cause for termination

*however: after the termination, Cartier went into rehab and cleaned up [he basically annulled the just cause for his termination after the fact]

-however: the SCC said that the arbitrator could not look to such evidence that came about AFTER the termination

-this decision basically has the effect of Port Arthur Shipping [IE: the arbitrator cannot use remedial powers to reconsider the discipline imposed and substitute other discipline if necessary]

-in the post-*Cartier* labour law landscape, in the case of an alcoholic employee, if an arbitrator wanted to substitute some lesser penalty for dismissal, he/she would have to establish that the after-the-fact evidence is relevant to the circumstances at the time of discipline

-so, in the above case, it would have to be established that the after-the-fact rehab was relevant to the termination

-therefore, you should advise clients not to hide their alcoholism [ergo: if they are being fired, they are being fired not for all their other BS, but for being an alcoholic, and the post-termination evidence of rehab WILL be relevant to the circumstances [IE: alcoholism] at the time of termination