Foundations of Canadian Labour Relations

With a British Columbia Focus

Brian Fixter

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Acknowledgments

With Gratitude and Respect

The author respectfully acknowledges that he researched and wrote this textbook on the traditional and unceded territories of the Tsleil-Waututh Nation and Squamish Nation.

Tsleil-Waututh Nation
PEOPLE OF THE INLET

Səl̓ílwətaɬ

Sḵwx̱wú7mesh Úxwumixw
Squamish Nation 1923 – 2023

The history and communities of the Nations is deeply rich and diverse and deserves further exploration. To view more information about the Nations, please visit the following links:

https://twnation.ca/

https://www.musqueam.bc.ca/

https://www.squamish.net/

Personal Acknowledgements

I am nothing without the love and strength of my family. Thank you both for lighting up my entire life.

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This AI acknowledgement is provided to ensure full transparency about the tools used in the writing process while also confirming that the primary researcher, drafter, and editor was the author.

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Canadian Labour History

Learning Outcomes:

1. Explain the social, economic, and political conditions that led to key labour movements in Canadian history.
2. Describe the causes, key events, and outcomes of some of the major moments in Canadian labour relations including, the 1872 Toronto Typographical Union strike, the 1919 Winnipeg General Strike, and the 1945 Ford-Windsor strike.
3. Reflect on the long-term effects of these historical labour movements on Canadian society including, their contributions to social justice, equality, and the development of labour law.
4. Discuss the 1935 Wagner Act in the United States and 1944 PC 1003 order-in-council in establishing a framework for collective bargaining.
5. Analyze major Charter of Rights and Freedoms cases related to labour rights, focusing on how these decisions have affected the rights of workers and unions in Canada.

Introduction

So much of our modern understanding of Canadian labour relations relies on a deep understanding of its historical evolution. That history is one of struggle and social evolution, a contest of rights between employees, employers, and governments. It is within this context, this clash of policies and politics, that Canadian labour relations was formed. While many readers may wonder about diving too deep into history, the key movements in Canadian labour relations are utterly fascinating and give us real answers as to why do we have a statutory holiday of Labour Day? How did we get a (mostly) 8-hour workday? These and many other answers will be canvassed in this chapter.

To begin our academic journey, we will look back at the evolution of labour relations in Canada, from its earliest beginnings to the modern era. We will examine key events, legislative developments, and pivotal moments that have shaped the landscape of worker-employer relations in the country. What will find is that the rights and conditions of workers have been forged through collective action, legal battles, and societal shifts, ultimately leading to the complex system of labour relations we see in Canada today.

Pre-1800s: Early Labour Movement

In the pre-1800s era, in what would become Canada, the concept of organized labour as we know it today did not exist. Instead, there was a work structure where employees had no ability to band together, few individual freedoms, and were expected to work with little means to redress issues.

Despite the restrictions in what is now Canada, during the late 18th century, Britain's Industrial Revolution was setting the stage for significant changes in labour relations. The emphasis on factory-led production, meant that worker organization was more accessible and which resulted in a slight push to develop early trade unions.

Ultimately though, to lay the foundation for collective organization, workers in the British North America had to contend with a "work relationship" that was almost entirely prefaced on a skewed power imbalance. Pretty much all the power to determine the existence and modification of the workplace relationship was held in favour of employers - that legal relationship was based on indentured master-servant law.

Master and Servants laws were common in Britain and through time, made their way to what is now Canada. Master and Servants laws imposed a duty owed by an apprentice to their master and ensured that servants could not simply abandon their jobs. The usual course was that the servant was contractual bound to the work for the duration of the obligations and, in exchange, often the master provided living quarters and meals.

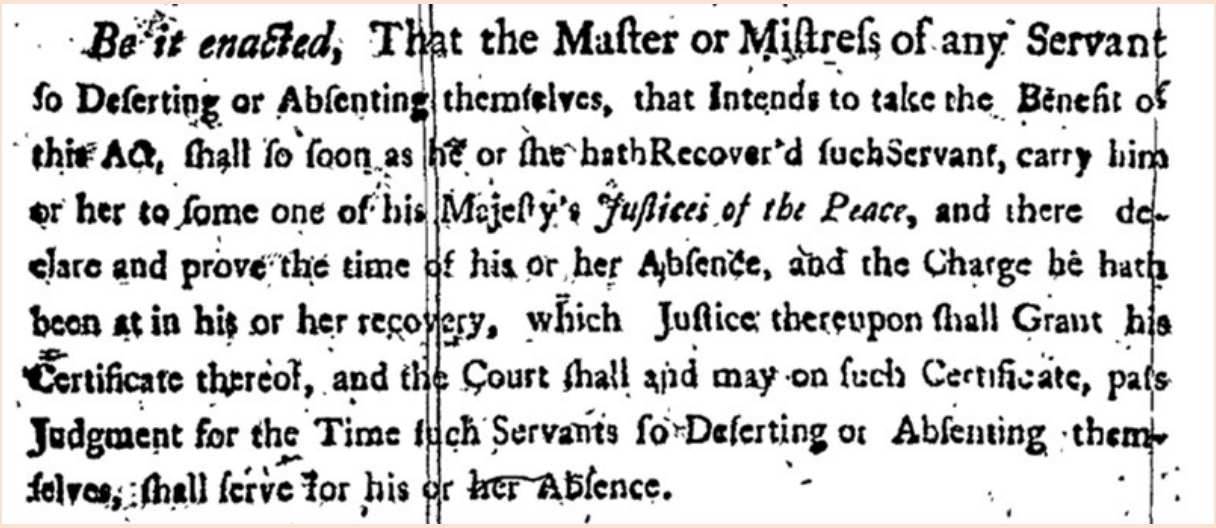
The master and servant style-relationship also came with a number of insidious features. Firstly, the servant could be strictly monitored by the master and has their personal freedom heavily

restricted. Additionally, the servant was unable to abandon their obligations – as such, they could be stuck in their obligations even if they wish to leave or were subject to mistreatment. Lastly, violations by the servant were subject not to regular civil consequences but rather criminal ones. Accordingly, the master had the ability to seek prosecution of the servant and request that they be fined or imprisoned.

Master and Servants legislation was not just an artifact of Britian – colonies in Canada, most notably Nova Scotia, also had laws expressing master and servant principles.

Nova Scotia *Master and Servants Acts* of 1765

In 1765 Nova Scotia passed the Master and Servants Acts which stated, among other things, the following:



Be it enacted, That the Maſter or Miſtreſs of any Servant ſo Deſerting or Abſenting themſelves, that Intends to take the Benefit of this Act, ſhall ſo ſoon as he or ſhe hath Recover'd ſuch Servant, carry him or her to ſome one of his Majeſty's *Juſtices of the Peace*, and there declare and prove the time of his or her Abſence, and the Charge he hath been at in his or her recovery, which Juſtice thereupon ſhall Grant his Certificate thereof, and the Court ſhall and may on ſuch Certificate, paſs Judgment for the Time ſuch Servants ſo Deſerting or Abſenting themſelves, ſhall ſerve for his or her Abſence.

Transcription:

> Be it enacted, that the master or mistress of any servant so deserting or absenting themselves, that intends to take the benefit of this act, shall so soon as he or she hath recover'd such servant, carry him or her to some one of his Majesty's justices of the peace, and there declare and prove the time of his or her absence, and the charge he hath been at in his or her recovery, which justice thereupon shall grant his certificate thereof, and the court shall and may on such certificate, pass judgment for the time such servants so deserting or absenting themselves, shall serve for his or her absence.

While the structure of master-servant regulation continued into the late 1700s, another

development in the slow march for worker rights was the actions of workers for the North-West Fur Trading Company.

The North-West Fur Trading Company was established in 1779 in Montreal and quickly emerged as one of the principal trading companies in the British controlled regions of what is now Canada. In 1794, at Grand Portage, located on the northwest shore of Lake Superior (in present-day Minnesota, but part of British North America at the time), a group of voyageurs engaged in what could be considered as the first "strike" action in Canada.

The voyageurs, who were primarily French-Canadian, Métis, and Indigenous workers, were essential to the fur trade as they transported furs across in birchbark canoes. Their work was physically demanding and dangerous involving long hours of paddling and portaging heavy loads. In the spring of 1794, a group of these voyageurs, facing particularly harsh working conditions and low wages, refused to paddle the canoes unless their wages were increased. The voyageurs' refusal to work effectively brought the company's operations to a standstill and, after some negotiation, the company agreed to increase the wages.

The action of the voyageurs was not a strike in the modern sense because formal unions and collective bargaining did not yet exist however, it was a significant moment in that workers withheld their labour to draw concessions from the employer. Ultimately, the refusal by the voyageurs was a harbinger to the organized Canadian labour movement that would emerge in the following century.

While we could leave the voyageurs as a successful example of collective action, there was, of course, a philosophical and legislative response to those types of action. Notably in 1799, back in England, the Combination Act of 1799 was passed. The Combination Act prohibited workers from combining to demand better working conditions or higher wages – this effectively outlawed trade unions. While this act did not directly apply to the British North American colonies, its presence certainly influenced colonial attitudes and the idea that collective action should not be encouraged.

Early 1800s: The Dawn of Industrialization

Slowly, moving into the 1800s, workers began to test the limits of anti-collective action. What occurred was the development of small craft unions which consisted of groups of individuals which practiced a certain trade. A good example of these collective crafts were carpenters who became inspired by a labour push in Europe and began to meet. Halifax, Nova Scotia became a hub for these craft discussions which often took place in secret to avoid employer retaliation.

As crafts caught on, they became the entry point for official labour recognition in Canada. The first recorded craft union in Canada was established in 1812 in Halifax, Nova Scotia. The union was formed by printers and was known as the Halifax Typographical Society. The idea was that the craft union would best positioned to protect the interests of skilled printers and uphold printing standards.

Following the establishment of the Halifax Typographical Society in 1812 other crafts soon followed; stonemasons, carpenters, tailors, and shoemakers all saw fit to join collectively. Despite this progress, all the crafts still operated in a legal environment that was hostile to worker organizations –the Combination Acts were still in effect – and there was still disdain against worker collective action. That said, the craft unions persisted and set the table for a broader worker movement.

1812-1872: Yellow Dog Contracts and Labour Suppression

In the period from 1812 to 1872, there was substantial tension between workers' attempts to organize and employers' efforts to suppress that push. One of the key forms of suppression was the utilization of "yellow dog" contracts which was an exported concept from the United States.

Yellow dog contracts were agreements that workers were forced to sign as a condition of employment where the worker promised to not join a labour union. In effect, to secure a position, the worker actually had to sign a contract which prohibited them from joining a union.

Yellow Dog Contracts

The following is an example of a yellow dog contract:

> I am employed by and work for the H. C. & C. Co. with the express understanding that I am not a member of the U. M. W. A. and will not become so while an employee of the H. Co.; that the H. Co. is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time I am employed by the H. Co. I want to become connected with the U. M. W. A. or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company, I will not make any efforts amongst its employees to bring about the unionizing of that mine against the company's wish. I have read the above or heard the same read.

The yellow dog contracts allowed employers to prevent unionization and maintain *de facto* control over their workforce.

1872 - The Toronto Typographical Union

The year 1872 marked a significant turning point for Canadian labour. What started as a collective desire for better working conditions soon sparked one of the most seismic protests in Canadian labour history.

In the early 1870s, a movement started called “The Nine-Hour Movement”. Workers, exhausted by the typical 12-hour workday spread across 6 days-a-week demanded shorter working days without a reduction in pay. The Nine-Hour Movement began in Hamilton, Ontario, starting in early 1872, but quickly spread to other industrial centres across the country including, Toronto, Ontario.

As part of the movement, workers formed Nine-Hour Leagues as an advocacy organ; they also held rallies, signed petitions, and in some cases, engaged in strikes to pressure employers and the government to accept their reduced workload demands. Politicians and employers became concerned as they viewed it as a threat to economic stability and social order.

On March 25, 1872, the Nine-Hour Movement reached its apex in Toronto. 100 members of the Toronto Typographical Union, representing printers who worked at a newspaper called *The Globe*, went on strike demanding a 58-hour work week (equivalent to 9-hour days and a half-day on Saturday) without a reduction in pay. At the time, the employees were typically working 10 hours a day, six days a week. The strike quickly gained wide-spread public support in Toronto.

The employer, led by George Brown, was quick to act. The strike's leaders including, 24 printers, were arrested and charged with criminal conspiracy. This action was based on the Combination Acts which still made it illegal for workers to collectively negotiate for better wages or conditions. The arrests sparked public outrage and, on April 15, 1872, a crowd of about 10,000 people protested and gathered at Queen's Park to show support for the imprisoned union leaders.

Photo reproduced from the Canadian Encyclopedia. Access link:
https://www.thecanadianencyclopedia.ca/en/article/toronto-feature-printers-strike

Sir John A. Macdonald, Canada's first Prime Minister. Recognizing the political importance of the labour vote (and seeking a tactical advantage against his political opponents), Macdonald introduced the Trade Union Act of 1872.

No. 50 VOL. V

The Canada Gazette.

PUBLISHED BY AUTHORITY.

OTTAWA, SATURDAY, JUNE 15, 1872.

An Act respecting Trade Unions.

Managers of the Ministers' Widows and Orphans Fund of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland.

An Act to incorporate the Canada and Newfoundland Sealing and Fishing Company.

CHAMBER OF THE SENATE.

Ottawa, Friday, 14th June, 1870.

Library and Archives Canada

The Trade Union Act decriminalized unions and, for the first time in Canadian history, made it legal for workers to organize and bargain collectively. More specifically, the provisions of the Act formally recognized unions as an agent for workers and permitted collective union activities including, the strikes. While the Trade Union Act did not immediately solve all labour issues, it was a monumental step.

One other byproduct of the Toronto Typographical Union was that politicians decided the protest, and the fight for labour recognition, should be honoured. The first major Labour Day parade in Canada was held in Toronto on April 15, 1872. However, on July 23, 1894, the government of Prime Minister John Thompson passed a law making Labour Day a national holiday – this then became a national statutory holiday celebrated on the first Monday of each September.

1919 - The Winnipeg General Strike

Much like the Toronto Typographical strike in Ontario, Winnipeg, Manitoba has also experienced its share of pivotal labour events. None of these are more important than that of the Winnipeg General Strike of 1919. The strike was a massive work stoppage involving approximately 30,000 workers and effectively paralyzed the city for six weeks.

The lead up to the Winnipeg general strike involved a constellation of factors. Notably, coming out of World War I in 1918, Canadian military personnel returned back home to Canada and discovered a rough economic landscape with high unemployment rates and inflation. Indeed, many veterans faced challenges in reclaiming their old pre-war occupations which led to heightened social tensions. This unease set the table for the impending labour action.

During the spring of 1919, negotiations broke down between management and labour in the Winnipeg building and metal trades. Following a lack of bargaining progress, the Winnipeg Trades and Labour Council called for a general strike. On May 15, 1919, virtually the entire working population of Winnipeg walked off the job and the city ground to a halt.

We Pay Cash for Victory Bonds

The Morning Bulletin

FINANCIAL AGENTS — Stocks and Bonds, Fire Insurance, Etc. — Real Estate and Farm Lands — The Alberta Trusts Co.

VOL. X, No. 22 — TWELVE PAGES — EDMONTON, ALBERTA, MONDAY, MAY 26, 1919 — CITY EDITION — PRICE FIVE CENTS

GENERAL STRIKE IN CITY AT 11 A.M. TODAY

Labor Unions Vote Three to One for Walk Out--Definite Order of Strike to Develop

At eleven o'clock this morning, unless news has been received before that time that the Winnipeg strike is settled, or from some accredited source that it is about to be settled, business in Edmonton will be tied up by a walkout of members of local trade unions in sympathetic support of the Winnipeg strike.

This decision was arrived at as the result of the strike vote taken among the local unions during the week-end, and which was counted on Sunday afternoon. According to figures handed out by the propaganda committee subsequently appointed, the vote in favor of a strike was 34 unions for and 4 against, with some others yet to send in their votes. Some 49 unions were supposed to record their vote. Although not given out officially, it is understood that the individual voting was about 1670 in favor of a strike to 500 against.

The Edmonton strike will automatically cease with the conclusion of hostilities in Winnipeg. Workers have been warned not to pay any attention to news of the cessation that might be given out by the newspapers, but to wait until direct word is given out by the central strike committee, or through the government at Ottawa.

The Trades and Labor hall in the Purvis block on 101st street was a beehive on Sunday afternoon. The results of the strike vote taken by the local unions was supposed to be handed in for counting between the hours of 3 and 5 p.m., and during that time the hall was thronged with labor men, all anxious to know how the vote had gone.

Business Done Secretly

The votes were received by a special committee consisting of J. J. McCormick, assistant secretary of the Trades and Labor Council, J. Findley, representing the machinists, and Carl Berg, of the

RIGORS OF 'PEG STRIKE RULES ARE LESSENED

Free Press Now Issuing Daily Paper Under Very Great Difficulties

NEWS BY WIRELESS

No Mail Received and No Soldiers' Pay Forthcoming—Utilities Work

Copies of the Winnipeg Free Press morning and evening editions dated Thursday May 22nd reached Edmonton on Saturday, brought by travel from Winnipeg. They contain the latest authentic news of the strike situation up to the hour of writing. There was also received by the same hand a copy of the Winnipeg citizen of Wednesday, May 21st, and copies of the Western Labor News of May 20th and 22nd. The latest Vancouver Province received carries despatches of the 22nd.

Printers Not On Strike

The Free Press evening edition is of eight pages and the morning edition of only two. The Free Press explains that the printers did not strike, but the pressmen and stereotypers did, although all three had unexpired

BOLSHEVIK IN TIGHT CORNER AFTER REVERSES

Paris Peace Conference Circles Take Interest in Russian Situation

NO ARMISTICE—KOLCHAK

Lenine and Trotsky Facing Most Critical Period in Bolshevik Regime

Paris, May 25.—Interest in the Russian problem which the council of four is considering at every session is intensified by the despatches from Finland, announcing that explosions and fires have occurred in Petrograd. This is interpreted as meaning that the Bolshevikis' are destroying their superfluous ammunition supplies preparatory to retreating southward.

Helingsfors despatches declare that the Bolshevik demand for an armistice from Admiral Kolchak, has been refused. This coupled with the reports of anti-Bolshevik advance upon Petrograd from the north and west as well as Kolchak's successes along the trans-Siberian, and General Denikine's advances from the Don district toward the Volga, is regarded in conference circles as proof that the Bolshevik ministers, Lenine and Trotsky are facing the worst crisis the Bolshevik government has encountered.

Fleeing to Russia

Omsk, (Saturday)—Reports to the general staff of the Siberian army indicate disintegration of the morale of the Bolsheviki, mobolized working men and peasants are deserting at the first opportunity, and even the Bolshevik commissaries are reported to be disheartened, many of them declaring openly that they are ready to flee from Russia. Siberian newspapers print resolutions adopted at recent meetings of peasants in the district of Samara. Peasants decided to expell all those with Bolshevik sympathies, to organize special peasant detachments to fight the Bolshevik and to arm all men between 18 and 50 for this purpose.

PREMIER BACK

Missing Airmen Safe

Petrograd Is Closely Invested By Success Of The Esthonians

LONDON, May 24.—(Bulletin)—Great fires and loud explosions have occurred in and around Petrograd, according to reports forwarded by the Daily Mail correspondent at Helsingfors under date of Thursday. It is believed the Bolsheviki, pressed by the Esthonian advance, are destroying the munitions in Petrograd. Machine gun firing also has been heard in Petrograd, and it is reported that the population has risen against the Bolsheviki.

LONDON, May 24.—Polish troops have captured the important town of Lutsk, Involhynia, northeast of Lemberg, from the Ukrainians, according to a Central News dispatch from Berlin. The Poles also took 2,000 prisoners and a large number of guns.

Austrian Treaty Almost Ready For Submission To Delegates; German Counter Draft Complete

CALGARY TO STRIKE

CALGARY, May 25.—A general strike has been called in Calgary to take effect at 11 o'clock tomorrow morning. Practically all unions affiliated with the Trades Council will be affected, the vote being four to one in favor. Essential activities, such as police and fire protection, delivery of milk, bread and other necessities will be carried on. Hotel and restaurant employees have also been requested to stay

Reported That Counter Proposals Will Demand German Administration for Rhineland — Also Claim Right to Keep Border Coal Districts

PARIS, May 25.—The council of four has completed the Austrian treaty with the exception of financial clauses and the southern boundary on which some details remain to be straightened out.

Chinese and Japanese delegates were before the council yesterday afternoon in connection with the Russian question which continues to occupy much of the council's attention owing to the proposal to recognize Admiral Kolchak, anti-Bolshevik leader in Russia.

COPENHAGEN, May 25.—Accord-

Hawker and Grieve Have Been Found

Daring Aviators Given up for Dead After Failure to Arrive from the Trans-Atlantic Attempt Picked up by Danish Steamer—Sopwith Plane Is Lost

LONDON, May 25.—(Bulletin) — Harry G. Hawker and Lieut. Commander McKenzie Grieve, the two airmen who started last Sunday in an attempt to fly across the Atlantic from St. Johns, Nfld., have been picked up at sea and landed in Scotland. Both men were in perfect health.

It is officially announced by the Admiralty that the aviators were picked up in latitude 50.20 and longitude 29.30, having alighted close to the little Danish steamer Mary, owing to a stoppage of circulation in the water pipes between the radiator and the water pump. The

By mid-June 1919, the strike had been ongoing for over a month, and emotions were high between strikers, government officials, and the "Citizens' Committee of 1000," a group of Winnipeg's business and political elites opposed to the strike. Eventually, on June 21, 1919, the tensions would reach a boil and culminate in a tragedy known as “Bloody Saturday”.

On the morning of June 21, 1919, a group of pro-strike war veterans organized a silent parade to protest the arrest of strike leaders, and a city ban on public gatherings. Thousands of strikers and sympathizers gathered at Victoria Park, intending to march peacefully through the downtown area. As the parade proceeded, it encountered a contingent of Royal North-West Mounted Police (“RNWMP”) and special constables near the intersection of Main Street and Portage Avenue. The special constables, many of whom were war veterans opposed to the strike, had been hastily recruited and armed by the city to maintain order.

As the protest and response escalated, a streetcar, operated by strikebreakers, attempted to pass through the crowd. Strikers surrounded the streetcar, rocking it and smashing its windows. This action heightened the already tense atmosphere and prompted authorities to take decisive action. In response, the Mayor of Winnipeg, Charles Gray, ordered the crowd to disperse. When the protesters did not immediately comply, the RNWMP, led by Colonel Cortlandt Starnes, charged into the crowd

on horseback. The mounted officers, wielding clubs, dispersed the gathering with considerable force.

As the RNWMP charged, some of the special constables opened fire on the crowd. It remains disputed whether this was a planned action or a spontaneous response to the chaos. Regardless, the use of firearms escalated the violence dramatically. The charge resulted in numerous injuries and two fatalities, Mike Sokolowski and Steve Szczerbanowicz. Dozens more were injured including, both strikers and bystanders caught in the melee.

In the days that followed Bloody Saturday, strike leaders were arrested, and many workers, fearing further violence or legal repercussions, began to return to work. On June 25, in the face of that increased government pressure, strike leaders called off the strike.

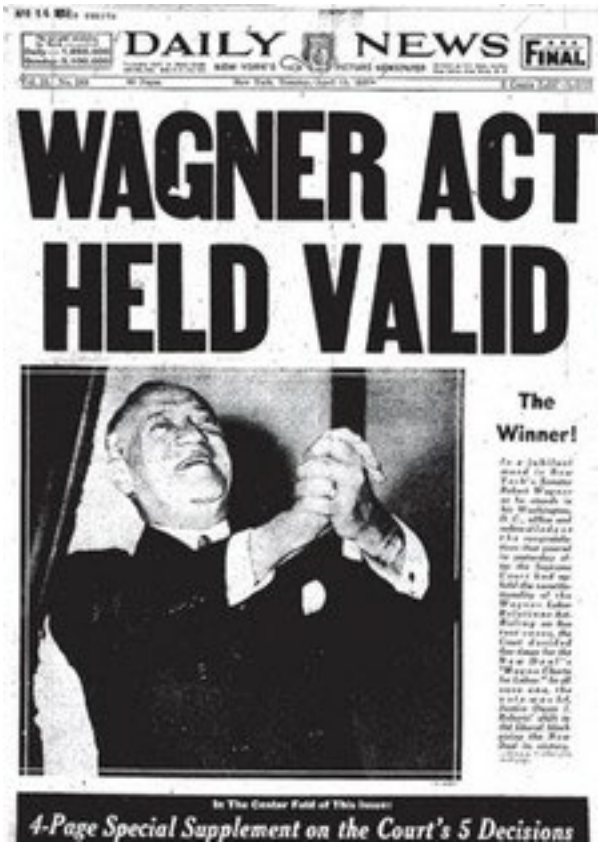
Despite the strike's collapse, it clearly highlighted the angst of workers in the storm of economic uncertainty. It also became evident to governments, who worried similar strikes could pop up across other cities, that a staunch worker movement had formed.

1935 - The *Wagner Act* in the United States

In both Canada and the United States, the seminal moment in the establishment of modern labour relations was the passage of the *Wagner Act* in the United States. In fact, the *Wagner Act* was so profound that we refer to the American and Canadian labour regimes as the "Wagner Model" of labour relations.

The roots of the Wagner Model can be traced back to the *National Industrial Recovery Act* ("NIRA") of 1933, which was part of President Franklin D. Roosevelt's New Deal. Section 7(a) of the NIRA granted workers the right to organize and bargain collectively through representatives of their own choosing. However, the NIRA was short-lived as it was declared unconstitutional by the United States Supreme Court in 1935.

In response to the NIRA's demise, Senator Wagner introduced the *National Labour Relations Act* ("NLRA"), also known as the *Wagner Act* that was signed into law by President Roosevelt on July 5, 1935. The Act guaranteed workers the right to form unions, engage in collective bargaining, and participate in strikes and other forms of concerted activity for mutual aid and protection.


DAILY NEWS FINAL

WAGNER ACT HELD VALID

The Winner!

4-Page Special Supplement on the Court's 5 Decisions

The *Wagner Act* also codified the creation of the National Labour Relations Board (NLRB), an independent federal agency tasked with enforcing labour law in relation to collective bargaining and unfair labour practices. The NLRB was given the power to investigate and remedy unfair labour practices, as well as to conduct representation elections to determine whether workers wanted union representation.

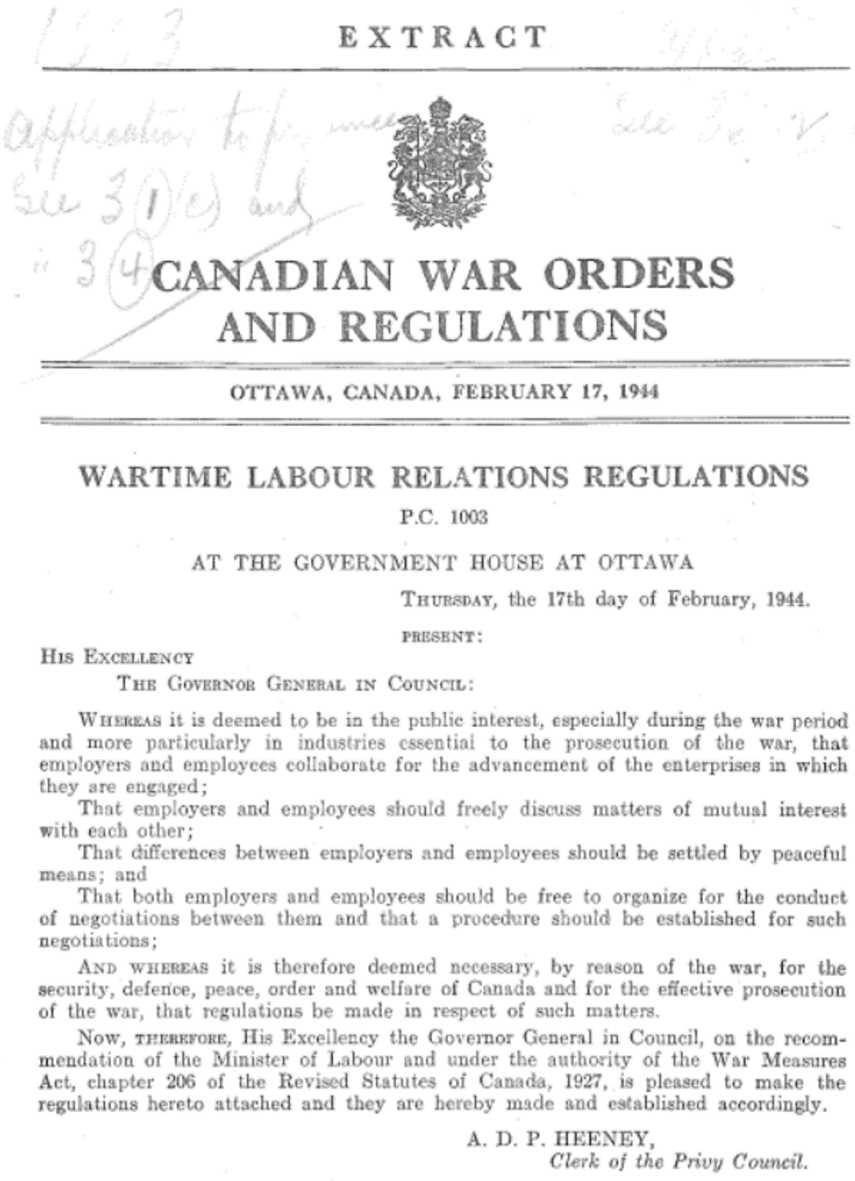
The *Wagner Act* faced significant opposition from the business community and was legally challenged in the courts. However, in 1937, the Supreme Court upheld its constitutionality in the case of *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)*, finally marking the culmination of Roosevelt's and labour march towards a definitive labour regime.

Ultimately, the enforcement of the *Wagner Act* was a watershed moment. By providing legal protections for workers to organize and negotiate, the statute helped balance power between employers and employees, leading to improved working conditions, better wages, and increased job security for millions of American workers.

1944 – Privy Council Order 1003

The mechanism for bringing the Wagner Model to Canada was through a regulation known as PC 1003, also known as the Wartime Labour Relations Regulations. PC 1003 was a regulation enacted by the Canadian government on February 17, 1944, near the tail-end of World War II and it would have seismic impacts on the state Canadian labour.

The order drew significant inspiration from the Wagner Act of 1935 in the United States, adapting many of its principles to the Canadian context. At its core, PC 1003 established the legal framework for union recognition and collective bargaining in Canada. It guaranteed workers the right to join labour unions and engage in collective negotiations with their employers, a radical departure from previous labour practices. The legislation also prohibited unfair labour practices by employers, such as discriminating against workers for union activities or refusing to bargain in good faith with certified unions.



EXTRACT

CANADIAN WAR ORDERS AND REGULATIONS

OTTAWA, CANADA, FEBRUARY 17, 1944

WARTIME LABOUR RELATIONS REGULATIONS

P.C. 1003

AT THE GOVERNMENT HOUSE AT OTTAWA

THURSDAY, the 17th day of February, 1944.

PRESENT:

HIS EXCELLENCY
THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS it is deemed to be in the public interest, especially during the war period and more particularly in industries essential to the prosecution of the war, that employers and employees collaborate for the advancement of the enterprises in which they are engaged;

That employers and employees should freely discuss matters of mutual interest with each other;

That differences between employers and employees should be settled by peaceful means; and

That both employers and employees should be free to organize for the conduct of negotiations between them and that a procedure should be established for such negotiations;

AND WHEREAS it is therefore deemed necessary, by reason of the war, for the security, defence, peace, order and welfare of Canada and for the effective prosecution of the war, that regulations be made in respect of such matters.

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour and under the authority of the War Measures Act, chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make the regulations hereto attached and they are hereby made and established accordingly.

A. D. P. HEENEY,
Clerk of the Privy Council.

One of the most significant aspects of PC 1003 was its establishment of a formal process for union certification. Under this system, if a majority of workers in a bargaining unit voted to be represented by a union, the employer was legally obligated to recognize that union and engage in collective bargaining. This provision effectively institutionalized the role of unions in Canadian workplaces and provided a democratic mechanism for workers to choose their representatives.

To administer this new labour relations system, PC 1003 created the Wartime Labour Relations Board. This body was tasked with overseeing union certification processes, adjudicating unfair labour practice complaints, and generally enforcing the provisions of the order. The board's establishment marked the beginning of specialized labour relations tribunals in Canada, a model that would persist long after the war's end.

Initially, the scope of PC 1003 was limited to industries deemed essential to the war effort and those under federal jurisdiction. However, its influence quickly spread as provinces adopted similar legislation, effectively extending its principles across the country. This expansion of

coverage played a crucial role in the rapid growth of union membership and collective bargaining coverage in Canada during the postwar years.

The order also introduced a structured framework for dispute resolution in labour relations. It mandated conciliation procedures before a legal strike or lockout could occur, a feature that remains a hallmark of Canadian labour law today. While recognizing the right to strike, PC 1003 placed certain restrictions on this right during the period of the order, reflecting the delicate balance between workers' rights and wartime necessities.

After the war, the principles enshrined in PC 1003 were transitioned into permanent peacetime legislation. At the federal level, this took the form of the Industrial Relations and Disputes Investigation Act of 1948, while provinces enacted their own versions. These laws solidified the collective bargaining framework established by PC 1003 and continued to govern labour relations in Canada for decades to come.

Despite its transformative impact, PC 1003 was not without its critics and limitations. Some argued that its initial scope was too narrow, leaving many workers outside its protections. Others pointed to potential weaknesses in its enforcement mechanisms. Nevertheless, its fundamental principles – the right to unionize, collective bargaining, and protection against unfair labour practices – have remained cornerstones of modern Canadian labour relations.

1945 – Ford Windsor Strike

The 1945 Windsor Strike, also known as the "Ford Strike", helped shaped not only the town of Windsor, Ontario but also Canadian-wide labour law. At its core, the Ford Strike was a strike which paralyzed Ford Motor Company of Canada's production of cars in Windsor from September 12 to December 19, 1945. The 99-day strike was highly contentious, and which would culminate in a crucial arbitration decision.

The roots of the strike can be traced back to PC 1003. As the war ended, workers sought to solidify their collective gains and improve their working conditions. Specifically, in Windsor, Ontario, the United Auto Workers (UAW) Local 200, representing Ford workers, demanded union recognition, a union shop (mandatory union membership for all workers), dues check-off (automatic deduction of union dues from paychecks), and improved wages and working conditions. Ford management, however, was resistant to these demands, setting the stage for a confrontation.

When negotiations broke down, approximately 11,000 Ford workers walked off the job on September 12, 1945. The strike quickly escalated beyond a typical labour dispute. In a show of solidarity, workers from other Windsor factories joined the Ford strikers, swelling the number of strikers to around 25,000. This mass action effectively shut down the city of Windsor.

One of the most dramatic moments of the strike occurred on November 5, 1945, when strikers blockaded the Ford plant with a "bumper-to-bumper" barricade of vehicles. This action, involving some 2,000 vehicles, prevented any attempts by the company to resume production and became an iconic image of worker resistance. The blockade lasted for days and garnered national attention, putting pressure on both the company and the government to resolve the dispute.

City of Toronto Archives, Fonds 1266, f1266_it99991

The strike's impact extended far beyond Windsor. It sparked a wave of sympathy strikes across Ontario and other parts of Canada, with workers in various industries downing tools in support of the Ford strikers. The provincial and federal governments were caught in a delicate position. While PC 1003 had established a framework for labour relations, the Ford strike tested its limits. Ontario Premier George Drew initially took a hard line, threatening to use force to break the

blockade. However, federal Labour Minister Humphrey Mitchell intervened, appointing Supreme Court Justice Ivan Rand as an arbitrator to resolve the dispute.

Justice Rand's arbitration resulted in what became known as the “Rand Formula”, a landmark in Canadian labour relations. The formula was a compromise that addressed the key issues of the strike. While it did not grant the union shop demanded by the UAW, it established the principle of union security through a compulsory check-off of union dues for all workers in the bargaining unit, regardless of their union membership status. This "compromise of 1946" became a model for labour settlements across Canada.

The Rand Formula had several significant implications. It provided financial security for unions, ensuring a stable source of funding through dues collection. At the same time, it obligated unions to maintain responsible leadership and avoid illegal strikes. The resolution of the Ford strike on December 19, 1945, clearly helped labour in Windsor however, the Rand Decision had lasting implications on the enhancement of Canadian unionization.

Key Take-aways from the Rand Decisions

1. All employees in a bargaining unit, whether union members or not, must pay union dues.
2. The union gains financial security without requiring mandatory membership (avoiding a full "closed shop").
3. In exchange for financial security, unions must take responsibility for their actions including, unauthorized work stoppages.
4. Workers retain the right to choose whether to join the union, balancing individual freedom with collective responsibility.

1982 – Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms, enacted in 1982 as part of the Constitution Act, had a profound impact on labour relations in Canada. This constitutional document enshrined certain fundamental rights and freedoms including, those relevant to workers and unions, and provided a new legal framework through which labour issues could be addressed. The Charter's influence on labour relations has been significant, evolving through a series of landmark court decisions that have shaped the interpretation and application of these rights in the workplace context.

Section 2 of the Charter, which guarantees fundamental freedoms, has been particularly relevant to labour relations. It protects freedom of association and has been interpreted to include certain labour rights. Additionally, Section 15, the guarantee of equality rights, has implications for workplace discrimination issues. The advent of the Charter meant that labour laws and practices could now be challenged on constitutional grounds, leading to a series of important court cases that have redefined the landscape of Canadian labour relations.

The impact of the Charter on labour relations has not been straightforward or immediate. Rather, it has unfolded through a series of court decisions, often referred to as "trilogies," that have progressively interpreted and reinterpreted the scope of Charter protections in the labour context. These decisions have grappled with complex questions about the extent to which the Charter protects collective bargaining rights, the right to strike, and other aspects of labour relations.

The *First Labour Trilogy* included the following seminal cases:

1. ***Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313**

   The Alberta government had passed legislation prohibiting strikes and imposing compulsory arbitration for public sector employees. The question was whether this legislation violated the freedom of association guaranteed in Section 2(d) of the Charter. The Supreme Court ruled that the freedom of association in the Charter did not protect the right to strike or to collectively bargain. The majority held that while the Charter protected the right to form and join associations, it did not protect the activities of those associations including, collective bargaining and striking. This decision set a restrictive precedent for interpreting labour rights under the Charter.

2. ***Public Service Alliance of Canada v. Canada*, [1987] 1 SCR 424**

   Federal legislation prohibited strikes by federal public service employees and imposed a compensation plan that limited wage increases. The union challenged this as a violation of freedom of association. Consistent with the *Alberta Reference*, the Court held that the legislation prohibiting strikes in the federal public service did not violate the Charter. The Court reaffirmed that the right to strike was not a fundamental freedom protected by Section 2(d) of the Charter.

3. ***Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 SCR 460**

   Saskatchewan had enacted legislation that prohibited strikes and lockouts during the term of a collective agreement and mandated binding arbitration for disputes. The union challenged this as infringing on freedom of association. The Court reaffirmed that the right to strike was not protected by the freedom of association under the Charter. It held that the Saskatchewan legislation was constitutional, further solidifying the position that collective bargaining and striking were not Charter-protected activities.

Next up was the *Second Labour Trilogy* which included the following:

1. ***Dunmore v. Ontario (Attorney General)*, 2001 SCC 94**

   Ontario's Labour Relations Act excluded agricultural workers from its protections, effectively denying them the right to unionize. The workers argued this violated their freedom of association. The Court ruled that the Charter may sometimes impose positive obligations on governments to extend protective legislation to vulnerable groups. It found that the total exclusion of agricultural workers from the labour relations regime substantially interfered with their freedom to organize, and that the government had an obligation to provide some statutory protection for their associational activities.

2. ***Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27**

   British Columbia had passed legislation that invalidated important provisions of collective agreements for health care workers and restrained future collective bargaining. The unions challenged this as a violation of freedom of association. In a landmark decision, the Court overturned its previous position from the 1987 trilogy, ruling that collective bargaining is protected by the freedom of association in the Charter. The Court held that the BC legislation substantially interfered with collective bargaining and was unconstitutional, marking a significant shift in Charter interpretation regarding labour rights.

3. ***Ontario v. Fraser (Attorney General)*, 2011 SCC 20**

   Ontario enacted the Agricultural Employees Protection Act in response to Dunmore, providing agricultural workers with some protections but not the full right to collective bargaining. The unions argued this was insufficient to meet Charter requirements. The Court clarified that while the Charter protects collective bargaining, it does not mandate a particular model of labour relations or specific bargaining method. It found that the Act was constitutional as it provided a process for agricultural workers to make representations to their employers that was sufficient to meet the requirements of freedom of association.

And lastly, the *Third Labour Trilogy* included the following seminal cases:

1. ***Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1**

   The RCMP was excluded from the public service labour relations regime and instead had a non-unionized labour relations program. RCMP members challenged this as a violation of their freedom of association. The Court ruled that the Charter protects the right of workers to choose their collective bargaining representatives independently of management. It found that the imposed RCMP labour relations system violated freedom of association by denying members the right to choose their own representatives.

2. ***Meredith v. Canada (Attorney General)*, 2015 SCC 2**

   The federal government had unilaterally rolled back previously negotiated wage increases for RCMP officers as part of the Expenditure Restraint Act during the 2008 financial crisis. RCMP members challenged this as violating their freedom of association. The Court held that while unilateral government rollbacks of previously negotiated wages violated freedom of association, the violation was justified under Section 1 of the Charter in this case due to the 2008 financial crisis. This decision emphasized that Charter rights can be limited if the government can justify the limitation.

3. ***Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4**

   Saskatchewan had passed legislation that limited which public sector workers could be deemed "essential" and therefore prohibited from striking. The unions challenged this as infringing on the right to strike. In another landmark ruling, the Court recognized that the right to strike is protected by the Charter's guarantee of freedom of association, overturning its position from the 1987 trilogy. The Court found that Saskatchewan's essential services legislation violated the Charter by excessively restricting the right to strike without adequate safeguards.

The trilogies demonstrate the evolution of the Supreme Court's interpretation of Charter rights as it relates to labour. What is clear is that the court moved from a restrictive approach in 1987 to a more expansive protection of collective bargaining rights and the right to strike by 2015. Despite this shift, debates continue over the extent of Charter protections for labour rights.

Chapter 1 - Review Questions

1. What legal framework governed employment relationships in pre-1800s British North America?

2. What was significant about the voyageurs' refusal to paddle canoes in 1794?

3. What was the main purpose of yellow dog contracts used in the 1800s?

4. What was the impact of the 1872 Toronto Typographical Union strike?

5. What was the “Rand Formula” established in response to the 1945 Ford Windsor strike?

6. Which 1944 regulation introduced formal union certification and unfair labour practice protections in Canada?

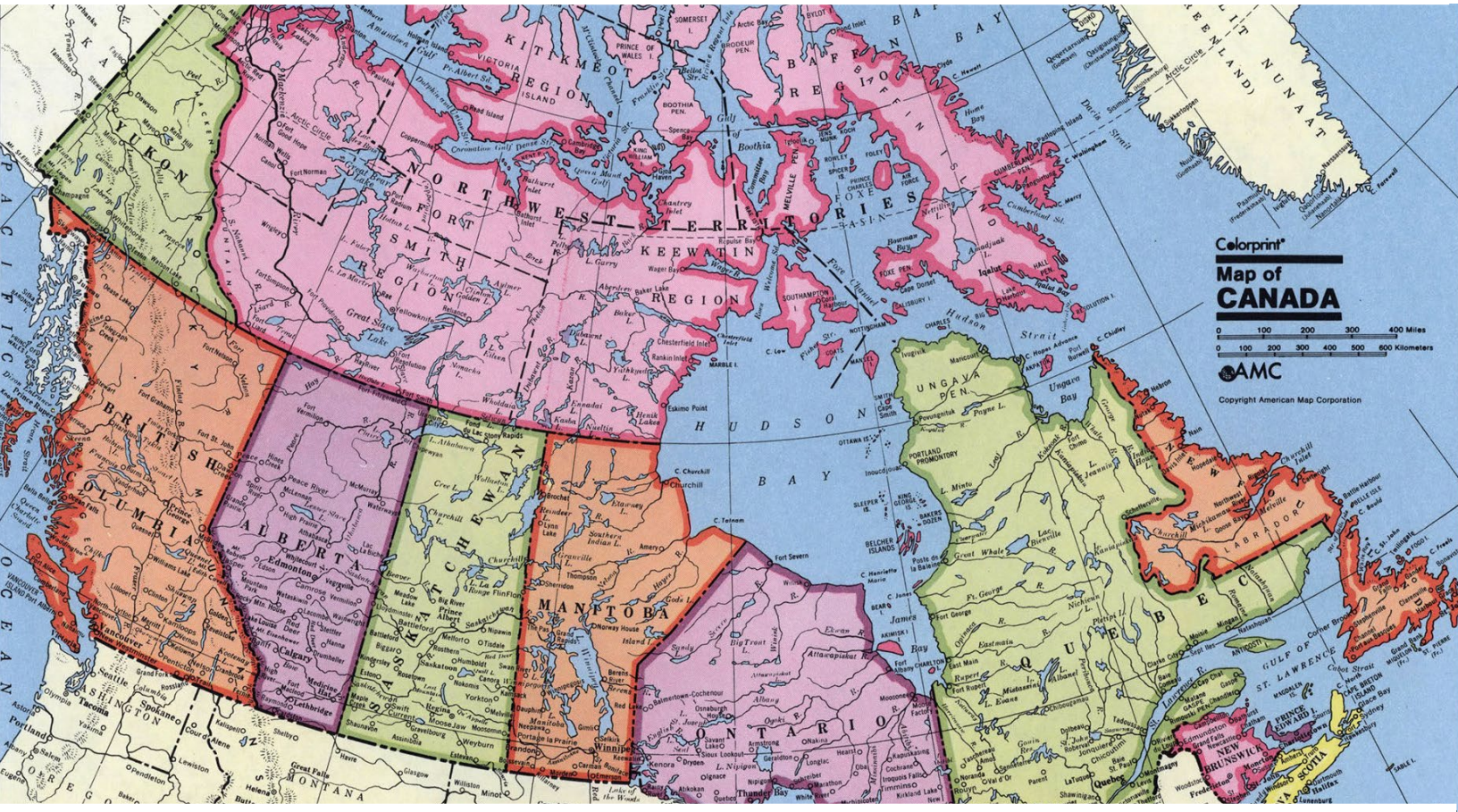
7. What landmark U.S. legislation inspired Canada's post-war labour framework?

8. What was the major outcome of the 1919 Winnipeg General Strike?

9. How did the Supreme Court of Canada’s view of the Charter’s protection for labour rights evolve between 1987 and 2015?

10. Which Supreme Court case in 2015 recognized the constitutional right to strike under the Charter?

Chapter 2:
Current Legal Landscape of Labour Relations



Learning Outcomes:

1. Explain the social, economic, and political conditions that led to key labour movements in Canadian history.
2. Describe the causes, key events, and outcomes of some of the major moments in Canadian labour relations including, the 1872 Toronto Typographical Union strike, the 1919 Winnipeg General Strike, and the 1945 Ford-Windsor strike.
3. Reflect on the long-term effects of these historical labour movements on Canadian society including their contributions to social justice, equality, and the development of labour law.
4. Discuss the 1935 Wagner Act in the United States and 1944 PC 1003 order-in-council in establishing a framework for collective bargaining.
5. Analyze major Charter of Rights and Freedoms cases related to labour rights, focusing on how these decisions have affected the rights of workers and unions in Canada.

As was seen in the previous chapter, the landscape of labour relations in Canada has evolved significantly over the past century, shaped by legislative changes, court decisions, and shifting societal issues. This chapter aims to provide a comprehensive overview of the current legal environment governing Canadian labour relations with a particular focus on British Columbia. We will explore key aspects of the modern system including, union density, constitutional regulation, the role of labour relations boards, types of unions, organizational structures, and the scope of unionization under current legislation.

Current Union Density

Union density which refers to the percentage of workers who are union members, is a key indicator of the strength and influence of the labour movement. In Canada, union density has remained relatively stable in recent years, albeit with some fluctuations. As of 2023, approximately 30% of Canadian workers are unionized, though this figure varies by sector and region.

Union status	Union coverage rate (by a collective agreement)[3]				
Sex	Both sexes				
Age group	15 years and over				
Geography[4]	2019	2020	2021	2022	2023
Canada (map)	29.8	31.0	30.7	30.3	30.4

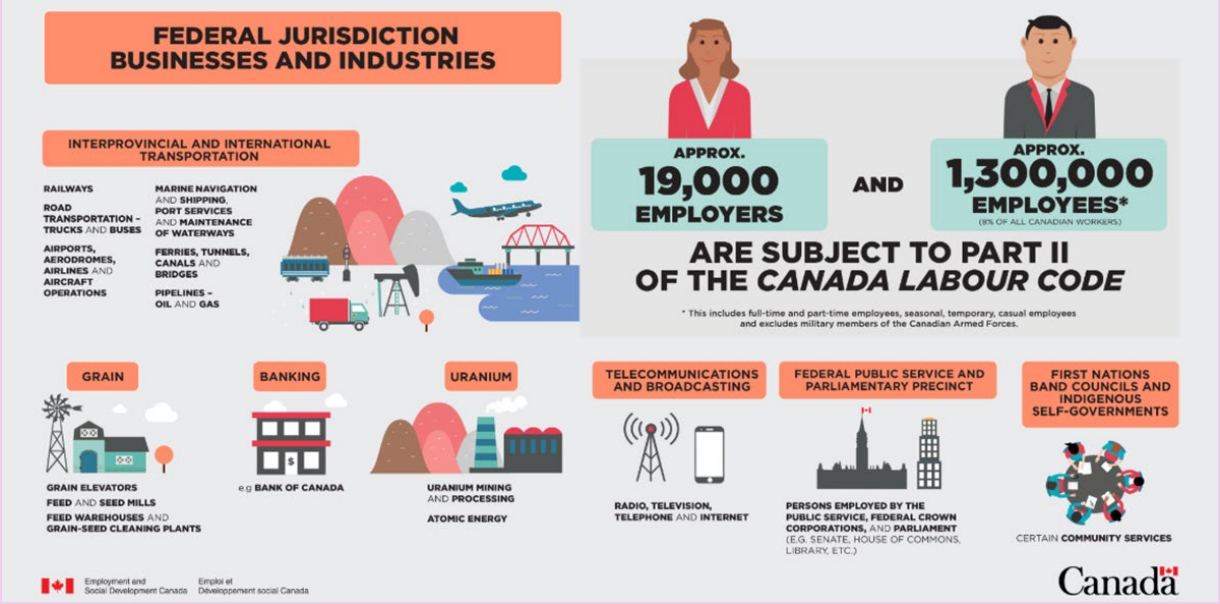
In British Columbia, union density tends to be slightly higher than the national average, hovering around 31-32%. The public sector in BC has a significantly higher unionization rate (around 75-80%) compared to the private sector (about 15-16%).

Constitutional Regulation of Labour Relations

The regulation of labour relations in Canada is primarily a provincial responsibility as established by the *Constitution Act*, 1867. Section 92(13) of the Act assigns property and civil rights to provincial jurisdiction which has been interpreted to include labour relations. However, the federal government retains jurisdiction over labour relations in certain industries that are considered to be of national importance or that operate across provincial boundaries, such as banking, telecommunications, and interprovincial transportation.

Infographic on Federally-Regulated Industries

The following information graphic was created by *Employment and Social Development Canada.* It highlights some of the major industries that are subject to Federal jurisdiction.



*Infographic retrieved from: https://www.canada.ca/en/employment-social-development/corporate/reports/labour-transition-binders/minister-labour-2021/health-safety-infographic.html

This division of powers has led to a complex system where most workers fall under provincial labour laws, while a minority (approximately 6-10%) are governed by the federal *Canada Labour Code* (R.S.C., 1985, c. L-2). The primary agency responsible for administering and enforcing the Canada Labour Code is the Canada Industrial Relations Board (CIRB). The CIRB is an independent, quasi-judicial tribunal that has a wide range of responsibilities including, certifying unions as bargaining agents, determining appropriate bargaining units, and adjudicating unfair labour practice complaints. The CIRB also has the authority to interpret and apply the provisions of the Code, making binding decisions on matters falling within its jurisdiction.

Relatedly, each Canadian province has its own primary statute governing labour relations, particularly the unionization process, collective bargaining, and dispute resolution in the private sector. While many of these laws share common features, such as protections for union organizing and procedures for certification and decertification, each province structures its labour relations regime slightly differently.

The following table identifies the name of the key labour relations statute in each province, along with the year of its most recent major consolidation or enactment:

Province	Labour Relations Statute	Year of Major Consolidation or Enactment
British Columbia	*Labour Relations Code*, RSBC 1996, c. 244	1996 (with amendments in 2022)
Alberta	*Labour Relations Code*, RSA 2000, c. L-1	2000 (updated regularly; key 2022 changes)
Saskatchewan	*Saskatchewan Employment Act*, SS 2013, c. S-15.1	2013 (consolidated previous labour statutes)
Manitoba	*Labour Relations Act*, CCSM c. L10	1987 (ongoing amendments)
Ontario	*Labour Relations Act, 1995*, SO 1995, c. 1, Sched. A	1995 (major 1995 reform, amended often)
Quebec	*Labour Code / Code du travail*, CQLR c. C-27	1964 (statute still in force; revised codification in 1996)
New Brunswick	*Industrial Relations Act*, RSNB 1973, c. I-4	1973 (regularly updated)
Nova Scotia	*Trade Union Act*, RSNS 1989, c. 475	1989 (revised statute; original law earlier)
Prince Edward Island	*Labour Act*, RSPEI 1988, c. L-1	1996 (revision of 1988 statute)
Newfoundland and Labrador	*Labour Relations Act*, RSNL 1990, c. L-1	1990 (consolidated version still in force)
Yukon	*Labour Standards Act*, RSY 2002, c. 72	2002 (revision of earlier acts; in force)
Northwest Territories	*Employment Standards Act*, SNWT 2007, c. 13	2007 (replaced the Labour Standards Act)
Nunavut	*Labour Standards Act*, RSNWT (Nu) 1988, c. L-1	1999 (mirrored NWT legislation upon creation)

Note: The year listed refers to the most recent statutory consolidation or major enactment of the law, not necessarily the original date of passage. Labour legislation is regularly amended and, while it is accurate at the time of writing, it may have changed since.

BC's Labour Regulation

As with most areas of law, there is both an enabling statute with codifies the law as well as a venue where that law is enforced. For labour law in BC, we refer to the *Labour Relations Code* and the Labour Relations Board as described in full below.

As we move forward with the text, it's important to highlight a few acronyms that will be used throughout:

Key Acronyms in Textbook	
Labour Relations Code, [RSBC 1996] CHAPTER 244 (the "Code").	**The "Code"**
BC Labour Relations Board	**The "Board" or "BCLRB"**

The BC *Labour Relations Code*

In British Columbia, the primary legislation governing labour relations is the *Labour Relations Code,* [RSBC 1996] CHAPTER 244.

LABOUR RELATIONS CODE

[RSBC 1996] CHAPTER 244

Enacted in 1973 and subject to numerous amendments since then, the Code sets out the framework for collective bargaining, union certification, and dispute resolution in the province's private sector and parts of its public sector. Its key objectives, are outlined in Section 2 which include:

1. encouraging the practice and procedure of collective bargaining;
2. promoting conditions favourable to the orderly, constructive, and expeditious settlement of disputes;
3. minimizing the effects of labour disputes on persons who are not involved in those disputes;
4. ensuring that the public interest is protected during labour disputes; and
5. encouraging cooperative participation between employers and trade unions in resolving workplace issues.

One of the major elements of the Code is the creation of obligations during the collective bargaining process. It mandates good faith bargaining between unions and employers, requiring both parties to make genuine efforts to reach a collective agreement. The Code outlines the procedures for initiating bargaining, conducting negotiations, and resolving impasses. It also provides mechanisms for dealing with unfair labour practices, ensuring that neither employers nor unions engage in activities that undermine the bargaining process or infringe upon workers' rights.

Dispute resolution is another critical aspect of the Code. It provides a framework for resolving conflicts between employers and unions including provisions for mediation and arbitration. The Code regulates the right to strike and lock out, setting out the conditions under which these actions can legally occur. It also includes provisions for essential services, ensuring that vital public services are maintained during labour disputes.

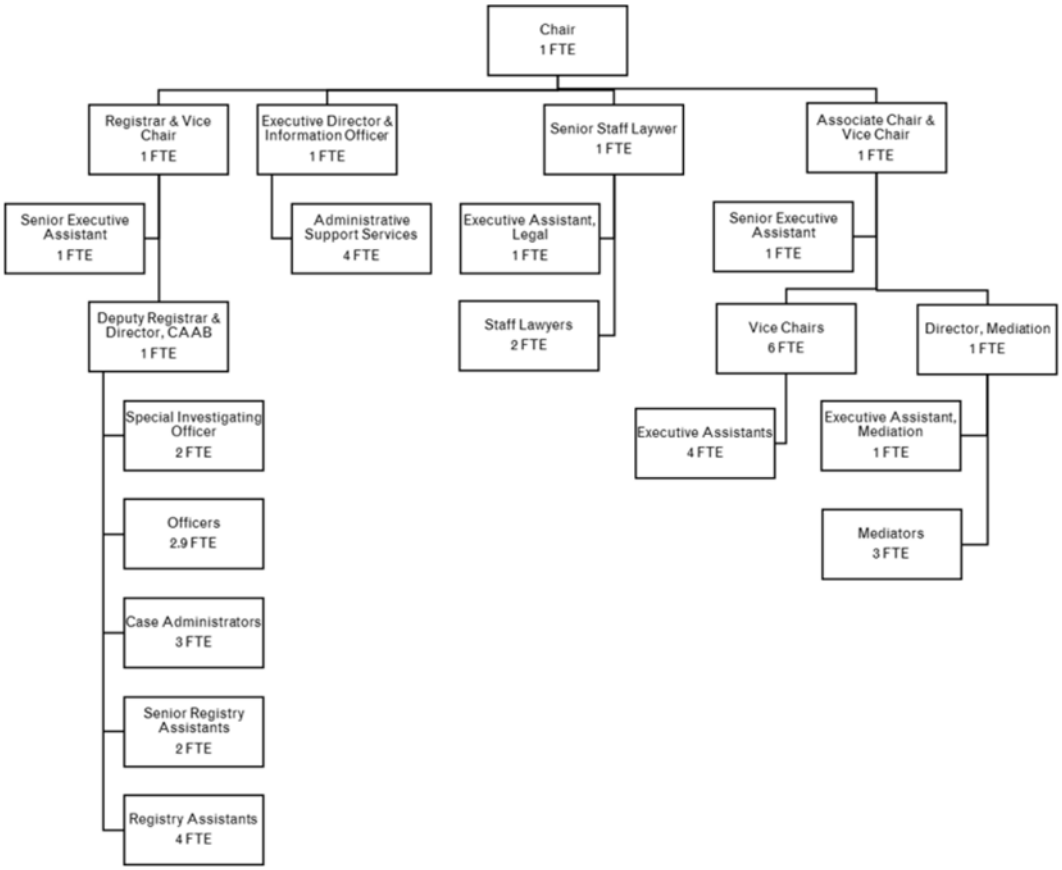
The BC Labour Relations Board

To interpret and enforce labour regulations, the Code establishes the Labour Relations Board of British Columbia, an independent, quasi-judicial tribunal located at 1066 West Hastings St. in Vancouver, BC:

The Board has broad powers to hear and decide on various labour-related issues such as certification applications, unfair labour practice complaints, and disputes over the interpretation and application of collective agreements. Its decisions are binding and can significantly impact labour relations practices across the province. Much of the discussion in this textbook will relate back to Board determinations and its interpretation of the Code.

Structure of the Board

The Board has produced an excellent organizational chart which explains the structure and staffing of the Board:



British Columbia Labour Relations Board. Annual Report 2024. p. 12.
https://www.lrb.bc.ca/media/23441/download?inline

At the top of the structure is the Board Chair who holds ultimate responsibility for administration and decision-making oversight. Below the Chair are three major leadership positions: the Registrar & Vice Chair, the Executive Director & Information Officer, and the Associate Chair & Vice Chair.

The Registrar & Vice Chair oversees the case intake and registry functions. The Deputy Registrar leads a team comprising Special Investigating Officers, Officers, Case Administrators, and both Senior Registry Assistants and Registry Assistants. This branch is primarily concerned with the procedural and administrative processing of applications, investigations into unfair labour practices, and other registry services vital to the Board functioning.

The Executive Director & Information Officer handles internal operations and public communications.

The legal arm of the Board is managed by the Senior Staff Lawyer who oversees legal services. This legal team conducts legal research, drafts decisions, and advises on complex legal matters related to the Code.

Lastly, on the adjudicative side, the Associate Chair & Vice Chair oversees a substantial team of Vice Chairs who serve as the primary adjudicators in matters such as unfair labour practices, applications for certification, and interpretation of collective agreements. Many of the decisions we refer to in the textbook had been determined by Vice Chairs.

Hierarchy of Labour Organizations

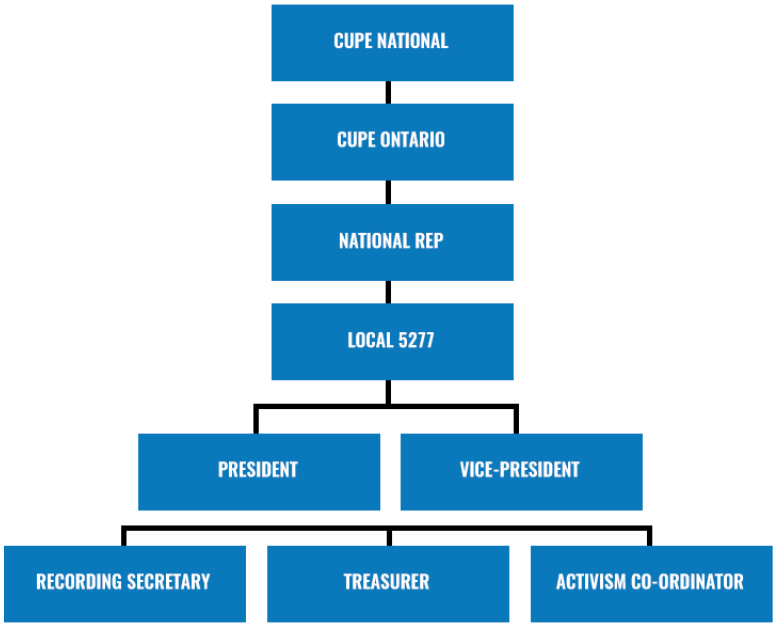
While much of this text will focus on BC, the Canadian labour movement is structured in a hierarchical manner, with various levels of organization. At the top of this hierarchy is the Canadian Labour Congress ("CLC"), the largest national federation of unions in Canada. The CLC represents millions of workers across the country and plays a key role in coordinating the efforts of its affiliated unions, advocating for labour rights at the national level, and influencing public policy.

Below the CLC are national unions that represent workers across the country in specific industries or sectors. These unions have their own leadership, policies, and resources, and they often affiliate with the CLC to benefit from its broader support and advocacy.

Local unions operate at the workplace or community level, representing the immediate interests of their members and handling day-to-day labour relations issues. Within local unions, stewards are elected or appointed to represent members in interactions with management, ensuring that the collective agreement is upheld and addressing grievances as they arise. You will also see the role of the local president and officers who manage the administration of the local itself.

At the base of the hierarchy are the union members, whose participation and support are essential to the functioning of the labour movement. Members have the right to vote on union matters, elect their representatives, and participate in the collective bargaining process.

While each Canadian union will have a slightly different flowchart, below is an example of a CUPE union structure from Ontario:



CUPE Local 5277. "Who We Are". https://cupe5277.ca/about/

The CUPE organizational chart outlines the structure of CUPE Local 5277 starting with CUPE National at the top, followed by CUPE Ontario, a National Representative, and then the local itself. Below the local, leadership roles include a President and Vice-President, with further subdivision into positions such as Recording Secretary, Treasurer, and Activism Co-ordinator.

Types of Unions

A "union" is perhaps too broad a term. The reason for that is that there are a variety of different types of union structures, each suited to particular industries or work arrangements.

Worksite unions, also known as industrial unions, organize all workers at a particular workplace, regardless of their specific job functions. This type of union is common in industries such as manufacturing, where all employees at a plant might belong to the same union. Craft unions, on the other hand, represent workers who share a particular skill or trade, such as electricians or carpenters. These unions often have a long history and play a significant role in regulating the standards of their respective trades. Sectoral bargaining is a more recent development and involves unions representing workers across an entire industry or sector, rather than at individual worksites. This approach is particularly prevalent in public sector industries, such as healthcare and education, where unions negotiate agreements that apply to all workers in the sector, rather than on a workplace-by-workplace basis.

Who Can Unionize Under the Code

Not everyone is entitled to unionized. In fact, there are marked boundaries on who may be permitted to unionize under the various labour legislation.

In BC, the Code defines who can be part of a bargaining unit and, therefore, who can unionize. Generally, the section 1(1) definition of "employee" under the Code results in most employees have the right to join a union and engage in collective bargaining.

> **"employee"** means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,
>
> (a) performs the functions of a manager or superintendent, or
>
> (b) is employed in a confidential capacity in matters relating to labour relations or personnel;

The definition of an "employee" begins that they are "a person employed by an employer." While scarce on details, the definition essentially re-enforces the basic employer-employee relationship as the foundation for coverage under the Code. Interestingly, the definition also captures "dependent contractors" which are slightly different than employees and yet still permitted rights under the Code; dependents contractors will be discussed shortly below.

The definition of employee speaks to two key exclusions. The first exclusion pertains to individuals who, in the board's opinion, "perform the functions of a manager or superintendent." This exclusion is based on the principle that those with significant managerial responsibilities should not be part of the same bargaining unit as the employees they supervise, due to potential conflicts of interest. The use of the phrase "in the board's opinion" gives the Labour Relations Board discretion in determining who falls into this category, allowing for case-by-case assessments based on the actual functions performed rather than just job titles.

The second exclusion relates to persons employed "in a confidential capacity in matters relating to labour relations or personnel." This exclusion is designed to protect the employer's interests in sensitive labour relations and personnel matters. It ensures that individuals privy to confidential information in these areas are not placed in a position of conflict due to union membership. Again, the Board's discretion is emphasized, allowing for nuanced decisions based on the specific circumstances of each case.

It's important to note that the definition uses the phrase "does not include" for these exclusions, indicating that they are mandatory if the conditions are met. This means that even if an individual otherwise meets the criteria of an "employee," they must be excluded if they fall into one of these categories.

The structure of this definition reflects the complex balancing act inherent in labour relations law. It seeks to provide broad protection for workers while recognizing the legitimate needs of employers to maintain managerial prerogatives and confidentiality in certain areas. The inclusion of dependent contractors demonstrates an awareness of evolving work arrangements, while the

exclusions for managers and those in confidential capacities reflect traditional labour relations principles.

In practice, this definition requires careful interpretation and application. The Labour Relations Board plays a crucial role in determining how these categories apply in specific cases, often dealing with grey areas where the distinction between included and excluded workers is not immediately clear. The Board's decisions in these matters shape the understanding of these categories and provide guidance for future cases.

Understanding this definition is essential for both employers and workers in British Columbia, as it fundamentally determines who has access to the rights and protections provided by the Code including, the right to join unions and engage in collective bargaining. As work arrangements continue to evolve, particularly with the rise of the gig economy and new forms of flexible work, the interpretation and application of this definition will likely remain a dynamic and important area of labour law in the province.

Independent Contractors

Firstly, independent contractors are explicitly excluded from the definition of "employee" under section 1 of the Code. An Independent contractor is a worker who is not as closely connected to the employer's business as is an employee. As the Code is designed to protect and regulate the rights of employees, not those who are genuinely self-employed or operating their own businesses, independent contractors have been specifically denied coverage.

The exclusion of true independent contractors from the Code's coverage has significant implications. Independent contractors are not entitled to form or join unions under the Code, cannot engage in collective bargaining, and do not have access to the dispute resolution mechanisms provided by the Code. They are essentially considered to be operating their own businesses and are expected to negotiate their terms of service directly with their clients or contracting entities.

For example, if we conclude that certain gig workers like Uber drivers are independent contractors and not employees, there are substantial restrictions in their rights. Unionization would be barred and many legislative protections like the *Employment Standards Act* would not be applicable.

A critical question then emerges: how do you we know if a worker is an employee or an independent contractor? This question is routinely addressed by Canadian courts and tribunal but, somewhat surprisingly, has even been considered in 1947 by the Judicial Committee of the Privy Council ("JCPC").

Foundational Law - *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 DLR 161

Montreal v. Montreal Locomotive Works Ltd. et al., [1947] 1 DLR 161 was a decision from the Judicial Committee of the Privy Council in 1946 – this served as the court of last resort before the Supreme Court of Canada was established.

Montreal Locomotive Works Ltd. was established in 1939 in response to the pressing need for war materials. The Canadian government, recognizing the urgency of wartime production, entered into an agreement with the company. Under the arrangement, the government provided the land, buildings, and equipment necessary for the manufacture of essential war supplies, particularly locomotives and tanks. The company, while privately incorporated, operated under significant governmental oversight.

The crux of the dispute emerged when the City of Montreal sought to impose municipal taxes on the company's operations. Montreal Locomotive Works contested this, arguing that its employees were effectively servants of the Crown and, therefore, the company should be exempt from municipal taxation. This claim was based on the extensive control the government exercised over the company's operations such as the power to appoint key personnel and direct production priorities. The fundamental issue for the courts was whether the workers at employees of a private company subject to normal taxation, or were they de facto government employees, rendering the company's operations exempt from municipal taxes?

As the case made its way through the legal system, it became clear that resolving this dispute required a nuanced examination of what constitutes an employment relationship. The JCPC, in addressing this issue, would go on to articulate what became known as the "fourfold test" for distinguishing between employees and independent contractors.

Lord Wright, delivering the judgment, emphasized that determining employment status requires considering the total relationship between the parties. While control was acknowledged as a significant factor, the JCPC established a more comprehensive approach. This test considers four key factors:

1. control,
2. ownership of tools,
3. chance of profit, and
4. risk of loss.

The JCPC stressed that the relative weight of these factors may vary depending on the specific circumstances of each case.

In applying this test to Montreal Locomotive Works, the JCPC concluded that despite the significant control exercised by the government, other factors – such as the company's incorporation and its ability to make profits – indicated an independent contractor relationship rather than one of Crown servants.

Consequently, the employees were not deemed servants of the Crown, and the company was not exempt from municipal taxation.

While *Montreal Locomotive Works* laid the foundation of the classification test, the Board has had the opportunity to weigh in as well. Typically, in disputes of classification, the Board considers various elements of the working relationship including:

1. The level of control the employer has over the worker's activities;
2. Whether the worker provides their own equipment;
3. Whether the worker hires their own helpers;
4. The degree of financial risk taken by the worker;
5. The degree of responsibility for investment and management held by the worker;
6. The worker's opportunity for profit and the performance of their tasks.

As in *Montreal Locomotive Works*, no single factor is determinative; instead, the Board looks at the totality of the relationship to make its determination.

Dependent Contractors

While independent contractors are excluded from the Code, "dependent contractors" are not.

Dependent contractors are workers who cannot be considered employees but who are economically dependent on a single client company. As such, their status requires 'a certain minimum economic dependency that may be demonstrated by complete or near-complete exclusivity.

The inclusion of dependent contractors within the Code's definition of "employee" serves as an important safeguard against potential misclassification. This inclusion recognizes that some workers, while nominally independent, may be so economically dependent on a single entity that they are functionally equivalent to employees. By including these workers under the Code's protections, the legislation aims to prevent employers from using contractor classifications to avoid their obligations under labour regulations.

The essence of a dependent contractor classification is that the worker is economically dependent on the business. To determine whether the financial dependency is sufficient enough, the Board typically looks the duration or permanency of the relationship, the degree of

closeness and reliance of the worker on the business, and degree exclusivity.

Foundational Law - *West Fraser Mills Ltd v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-425*, 2012 CanLII 20347

The 2012 West Fraser Mills Ltd. case involved log haulers working for West Fraser Mills in Williams Lake, BC. The United Steelworkers union sought to certify a bargaining unit of "dependent contractors employed as log haulers", while West Fraser argued these workers were independent contractors.

The Board had to determine whether the log haulers met the definition of "dependent contractors" under the BC Labour Relations Code. In effect, the Board was trying to determine where the contractors were in a position of economic dependence and under an obligation to perform duties more closely resembling an employee than an independent contractor. Vice-Chair Ken Saunders explained that approach:

> A determination of dependent contractor status is based on a comparative evaluation of the whole of the relationship. In the present case, the log haulers must be placed on a continuum. At one end lies the 'independent contractor'. At the opposite end is the 'employee'. A dependent contractor lies between those ends of the continuum. (*West Fraser* at para. 11)

The Board examined various factors to assess the log haulers' status such as their integration into West Fraser's operations, economic dependence, control over their work, and opportunity for profit or loss. While the log haulers had some characteristics of independent businesses, such as owning their own trucks, the Board ultimately found them to be dependent contractors.

> The evidence shows that West Fraser is the log haulers' primary source of work. The log haulers earn a substantial percentage of their income from West Fraser. This is an important consideration. It points to the conclusion that the log haulers are in a position of economic dependence on West Fraser, more closely resembling the relationship of an employee than an independent contractor. (*West Fraser*, at para. 92)
>
> ...
>
> I am satisfied on the whole of the evidence that the log haulers are attached to West Fraser's business as a continuing part of it. The log haulers work under terms where they are generally expected to be available to work. The parties' past conduct and the

> terms governing the hauling list show a stable ongoing relationship between the log haulers and West Fraser. (*West Fraser*, at para. 97)

Despite finding the log haulers to be dependent contractors, the Board denied the union's application for a stand-alone bargaining unit. Instead, it determined that the log haulers should be varied into the existing bargaining unit of sawmill employees at West Fraser's Williams Lake sawmill.

Performs Management Functions

Section 1(1) of the Code excludes from the definition of "employee" any person who performs management functions or is employed in a confidential capacity in matters relating to labour relations. Effectively, management is not an employee nor are they permitted to unionize.

One might wonder why management is excluded from the Code. There are two primary policy considerations underlying the exclusion of management from collective bargaining.

Firstly, the managerial exclusion helps preserve the integrity of collective bargaining. Collective bargaining is inherently an adversarial process between parties with opposing interests. To maintain an arm's length relationship between trade unions and employers, it's necessary to exclude certain individuals who are too closely aligned with management interests.

Secondly, it helps avoids conflicts of interest. Management employees are expected to maintain undivided loyalty to the employer. Participation in a union could potentially create conflicts of interest or divided loyalties for these individuals.

Foundational Quote

"The broad purpose of the managerial exclusion is, as we have stated, to ensure the undivided loyalty of the managers to the enterprise. This is consistent with the arm's length model of collective bargaining that safeguards the adversarial relationship (in both labour and management's interest) and is consistent with the underlying purpose of the statute."

Cowichan Home Support Society (Re),
BCLRB Decision No. B28/97 at para. 104

In essence, the exclusion is rooted in the fundamental principle that individuals with managerial responsibilities should not be part of the same bargaining unit as the employees they supervise, due to potential conflicts of interest and the need to maintain the integrity of the employer's management structure.

As we've seen with previous worker classifications (independent or dependent contractor), The determination of whether an individual qualifies as a manager for the purposes of exclusion from the Code is not always straightforward. Job titles alone are not determinative, and the Board looks at the actual functions performed by the individual in question. The Board typically considered the following criteria to assess managerial status:

1. Authority to hire, fire, and discipline. Managers typically have the power to make or effectively recommend decisions regarding the employment status of other employees
2. Independent decision-making. Managers are expected to exercise independent judgment in their role, making decisions that significantly impact the organization or its employees.
3. Policy-making role. Individuals involved in developing and implementing company policies may be considered managers.
4. Supervisory responsibilities. While not all supervisors are necessarily managers, those with substantial supervisory duties may fall under the managerial exclusion.
5. Labour relations involvement. Participation in labour relations matters, such as grievance handling or collective bargaining, can be indicative of managerial status.
6. Budgetary control. Authority over financial matters including, budget preparation and control, is often associated with managerial roles.
7. Scheduling and assignment of work. The ability to determine work schedules and assign tasks to other employees can be a factor in determining managerial status.

It's no surprise that modern workplaces can have positions that straddle the line between management roles or duties. This has led to numerous cases before the Board where the managerial status of certain positions is contested including, the Cowichan Home Support decision below.

Foundational Law - *Cowichan Home Support Society (Re)*, BCLRB Decision No. B28/97

The Cowichan Home Support Society case arose from three separate applications concerning the status of supervisors and the appropriateness of supervisory bargaining units. Cowichan Home Support Society employed approximately 100 full and part-time home support workers, with the United Food and Commercial Workers International Union, Local 1518 (UFCW) seeking certification for a bargaining unit of four supervisory employees. The employer opposed this application, arguing that these supervisors should be excluded as managers or, alternatively, that a separate supervisory unit was not appropriate.

The Board had to address two key questions: first, what criteria should be used to determine whether an individual is a manager and thus excluded from the definition of "employee" under the Code; and second, under what circumstances is it appropriate to create separate bargaining units for supervisors?

In its analysis, the Board streamlined the criteria for determining managerial status, narrowing it down to three main factors: discipline and discharge, labour relations input, and hiring, promotion, and demotion. The Board emphasized that the first two criteria are the most important stating:

> We therefore affirm the Board's approach in VGH that discipline and discharge, together with labour relations input, are the two most significant factors in determining managerial status -- and thus exclusion from the Code definition of 'employee'. (paragraph 101)

The decision also addressed the issue of potential conflict of interest which is central to the concept of managerial exclusion: The Board stated:

> Underlying these factors is the rationale for exclusion -- conflict of interest. As was originally stated in Burnaby and affirmed in VGH, the conflict of interest that is at the heart of the collective bargaining scheme is 'a potential conflict of interest'. No actual conflict need be shown. (paragraph 115).

Importantly, the Board clarified that this potential conflict of interest cannot be resolved simply by placing supervisors in a separate bargaining unit.:

> A supervisor who is simply placed in a separate bargaining unit does not resolve the issue of conflict of interest for the employer. That is because the potential conflict of interest which is of concern to the employer in regard to the issue of managerial exclusion, is not the one which is internal to the bargaining unit (which will be dealt with under appropriateness); but rather, is directed at maintaining an arm's length relationship between supervisors and any unionized bargaining unit. (paragraph 117)

Further, the Board noted that the size and structure of the employer may be relevant:

> ... the size of the employer may be significant. A smaller employer, for instance, especially in the private sector, may have few employees and little managerial staff. In such a situation a true manager may in fact be performing many 'bargaining unit duties'; yet placement of such a person in the unit would be counter to the policies articulated above regarding exclusions.

The Board ultimately concluded that the supervisors in question were managers and therefore excluded from the definition of "employee" under the Labour Relations Code. This decision overturned the original panel's finding. The Board noted in paragraph 136 that:

> the supervisors were directly involved in all discipline, including discharge. They are involved solely at the first levels of the grievance procedure and are also part of the decision-making at the end of the disciplinary process -- that includes the Executive Director, HEABC and the supervisors. Indeed, one of the supervisors in the proposed unit relieves the Executive Director … [Accordingly,] these individuals are managers under Section 1 and are therefore excluded from the definition of employee under the Code.
>
> The Board's decision emphasized that the actual authority and functions performed by these individuals, rather than their job titles or the existence of a separate bargaining unit, were the determining factors in their exclusion as managers.

Employed in a Confidential Capacity

Section 1(1) of the Code also excludes those who "is employed in a confidential capacity in matters relating to labour relations or personnel". As such, the BC Labour Relations Code, employees who work in a confidential capacity in matters relating to labour relations are typically excluded from bargaining units.

This exclusion applies to individuals who, as part of their regular duties, have access to confidential information that could impact the employer's position in collective bargaining or other labour relations matters. The rationale behind this exclusion is to prevent potential conflicts of interest and ensure that the employer can maintain the confidentiality of its labour relations strategies and decisions.

To qualify for the confidential capacity exclusion, an employee must have regular access to confidential labour relations information as a core part of their job duties. This may include employees who prepare confidential reports, correspondence, or other documents related to collective bargaining, grievances, or other labour relations issues. It may also encompass those who regularly attend meetings where sensitive labour relations matters are discussed or who are privy to the employer's strategic planning in this area.

Foundational Quote

"Those captured by the confidential personnel exclusion are persons whose work requires them to be regularly and substantially involved in confidential personnel matters. They are entrusted with confidential information about employees and must act on it discreetly. They will be responsible for making judgments about the information, as opposed to merely recording it or processing it in a routine way."

Gateway Casinos & Entertainment Inc.,
BCLRB No. B81/2010 (Leave for Reconsideration of B210/2009) at para. 60

Not all employees who handle confidential information are automatically excluded under this provision. The exclusion specifically pertains to confidentiality in labour relations matters. For example, an employee who has access to confidential financial information but is not involved in labour relations would not typically be excluded on this basis alone.

The Board has established criteria for determining whether an employee serves in a confidential capacity. These criteria include the nature and extent of the employee's access to confidential labour relations information, the frequency of such access, and whether the access is an integral part of the employee's regular duties. The Board also considers whether the employee's role requires them to exercise independent judgment in handling this information.

Employers seeking to exclude employees based on confidential capacity must provide evidence to support their claim. This often involves demonstrating that the employee's duties regularly involve handling confidential labour relations information and that their inclusion in the bargaining unit could compromise the employer's ability to effectively manage its labour relations. The onus is on the employer to prove that the exclusion is necessary and justified.

It's worth noting that the confidential capacity exclusion is not absolute and can be challenged by unions or individual employees. The Board has the authority to review and make determinations on disputed exclusions, balancing the employer's need for confidentiality in labour relations matters with employees' rights to union representation and collective bargaining. One such determination was the Gateway Casinos & Entertainment Inc. decision which is noted below:

Foundational Law - *Gateway Casinos & Entertainment Inc.*, BCLRB No. B81/2010 (Leave for Reconsideration of B210/2009)

The 2010 Gateway Casinos & Entertainment Inc. case arose from a certification application by the Canadian Office and Professional Employees Union, Local 378 (the Union) to represent a unit of surveillance operators at Gateway's Penticton casino location. Gateway opposed the application, arguing that the surveillance operators should be excluded from the definition of "employee" under Section 1 of the Code because they are employed in a confidential capacity in matters relating to personnel.

An original panel decision had granted the Union's application for certification. The Board granted leave for reconsideration and ultimately set aside the Original Decision, remitting the matter to a new panel for fresh consideration.

In its analysis of the confidential personnel exclusion, the Board noted in paragraph 60:

> "Those captured by the confidential personnel exclusion are persons whose work requires them to be regularly and substantially involved in confidential personnel matters. They are entrusted with confidential information about employees and must act on it discreetly. They will be responsible for making judgments about the information, as opposed to merely recording it or processing it in a routine way."

In its application, a key aspect of the Board's analysis was the distinction between the duties of surveillance operators and those of security guards. The Board noted that in previous casino industry decisions, it had seen a material distinction between these roles. This distinction was important because the Board has a long-standing policy that security guards are employees within the meaning of the Code. The Board stated in paragraph 78:

> "In our view, the decision as to whether the surveillance operators are employees within the meaning of the Code or are excluded under the confidential personnel exclusion turns on a careful consideration of their duties in the context of the casino industry."
>
> ...
>
> "[A] key determination is likely to be whether the judgement exercised by the surveillance operators in the course of performing their principal duties is of such a nature as to align their interests with management."

The Board emphasized that this determination would require evidence about the actual nature of the surveillance operators' duties, as well as how these duties compare to those of

others in the casino, such as surveillance supervisors, casino security guards, and dealer supervisors.

Ultimately, the Board decided that the Original Decision should be set aside and the matter remitted to a new panel for fresh consideration because it was satisfied that "a proper determination of the status of the surveillance operators under the Code cannot be made without having evidence of this nature provided."

Religious Exemptions to Unionizing

Section 17 of the Code provides for religious exemptions to union membership.

Religious objections

17 (1) If the board is satisfied that an employee, because of the employee's religious conviction or belief

(a) objects to joining trade unions generally, or

(b) objects to the paying of dues or other assessments to trade unions generally

the board may order that the provisions of a collective agreement of the type referred to in section 15 do not apply to the employee and that the employee is not required to join a trade union, to be or continue to be a member of a trade union, or to pay any dues, fees or assessments to the trade union, if amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) that may be designated by the board.

(2) Despite any other provision of this Code, a person exempted under subsection (1) is not entitled to participate in a vote conducted by a trade union or in a vote held for the purposes of this Code.

This provision allows individuals who have a genuine religious objection to joining or financially supporting a union to be exempted from doing so. This provision aims to balance the right to freedom of religion with the principles of collective bargaining and the concept of union security (the ability for the union to fund itself which will be discussed later on).

Foundational Quote

"The onus is on the applicant employee to satisfy the Board that the basis for their objection to joining trade unions and paying union dues is religious belief..."

Robert Alan Bogunovic, BCLRB No. B131/2018
(Leave for Reconsideration of BCLRB No. B92/2018) at para. 9

The key elements of this exemption are:

1. The employee must have a sincere religious objection to joining or supporting a trade union.

2. The objection must be based on the tenets of a religious denomination of which the employee is a member.
3. The employee must apply to the Board for the exemption.
4. If granted, the employee must pay an amount equal to union dues to a registered charity mutually agreed upon by the employee and the union.

The Board has interpreted this section narrowly, requiring clear evidence of a genuine religious belief that conflicts with union membership or support. Ultimately, if an exemption is granted, the individual must instead contribute an equivalent amount to a charitable organization approved by the Board.

As with many issues, determinations are circumstance specific and each will be considered on its own merits.

Foundational Law - *Robert Alan Bogunovic,* BCLRB No. B131/2018 (Leave for Reconsideration of BCLRB No. B92/2018)

Bogunovic involved an application by Robert Alan Bogunovic, a teacher who had been a union member since 1998. In 2016/2017**,** Bogunovic had objected to specific sexual orientation and gender identity curriculum required by the school. He engaged in email exchanges with the Union about the that curriculum and came to believe that trade unions were "a major part of the grand Marxist agenda" and that "Marxist ideologies are diametrically opposed to [his] religious beliefs." Ultimately, he sought an exemption to the union membership under section 17 of the Code.

The Board noted that the Section 17 exemption is available to relatively few bargaining unit members because union representation under the Code is founded on the majoritarian principle…

> "[t]his means that where a majority of employees in a bargaining unit vote to be represented by a union, the union is certified to represent 'all employees even if a minority is opposed to being represented by the union'" at para. 11.

Of course, there will be employees who do not wish to be represented by their union or any union. However, individual exemption from union membership and dues payment is not available in such circumstances. It is only available where the Board is satisfied a religious exemption is warranted under Section 17 of the Code.

According to the Board,

> "To be granted an exemption from required union membership and dues paying under Section 17, an applicant's objection must be to trade unions generally, and the Board must be satisfied the objection is predominantly based on religious beliefs (as distinct from other sincerely held personal beliefs)." (para 19).
>
> ...
>
> "Where an applicant seeks a religious exemption after having been a union member or paid union dues for some time, the Board is unlikely to be satisfied that an exemption from union membership and/or dues is warranted. An exemption is not granted merely because an applicant who has religious beliefs seeks one." (para. 22).

The Board also held that it is not sufficient to object to union membership on a basis which is predominantly political, social, ethical, moral, and/or philosophical – even if there is a slight connection to religious beliefs.

> "While it will not necessarily doom an application if reference is made to non-religious objections to trade union membership, the Board must be satisfied the predominant basis for objection is a deeply-held religious conviction regarding membership in trade unions generally." (para. 25)

On the facts, the Board found that the applicant's objections to union membership were primarily based on political and ideological grounds, rather than religious beliefs. The Board noted that Bogunovic had been a union member for approximately two decades before seeking exemption, and his application came after a dispute with the union over its policies on sexual orientation and gender identity issues.

Summary

The Code defines who is eligible to unionize and who is excluded from the collective bargaining process. Most employees in British Columbia have the right to join a union and participate in collective bargaining. However, the Code specifically excludes certain groups from unionization.

Independent contractors, who are considered to be self-employed and not employees, are not eligible to join a union under the Code. Similarly, managers and those acting in a confidential capacity with respect to labour relations or personnel matters are excluded from unionization, as their roles could create a conflict of interest in the collective bargaining process. The exclusion of these groups is intended to maintain the integrity of the labour relations process and ensure that those who participate in collective bargaining do so without conflicting interests. While possible, workers can seek a religious exemption from unionization however, there is a high bar to proving its requirements to the Board.

Chapter 2 - Review Questions

1. What is union density and how does it differ between regions in Canada?

2. How is constitutional authority over labour relations divided between federal and provincial governments in Canada?

3. What is the role and structure of the British Columbia Labour Relations Board?

4. How is the Canadian labour movement organized?

5. According to the BC Labour Relations Code who is allowed to unionize and who is excluded?

6. What distinguishes independent contractors from employees under the Code and why are independent contractors excluded from unionization?

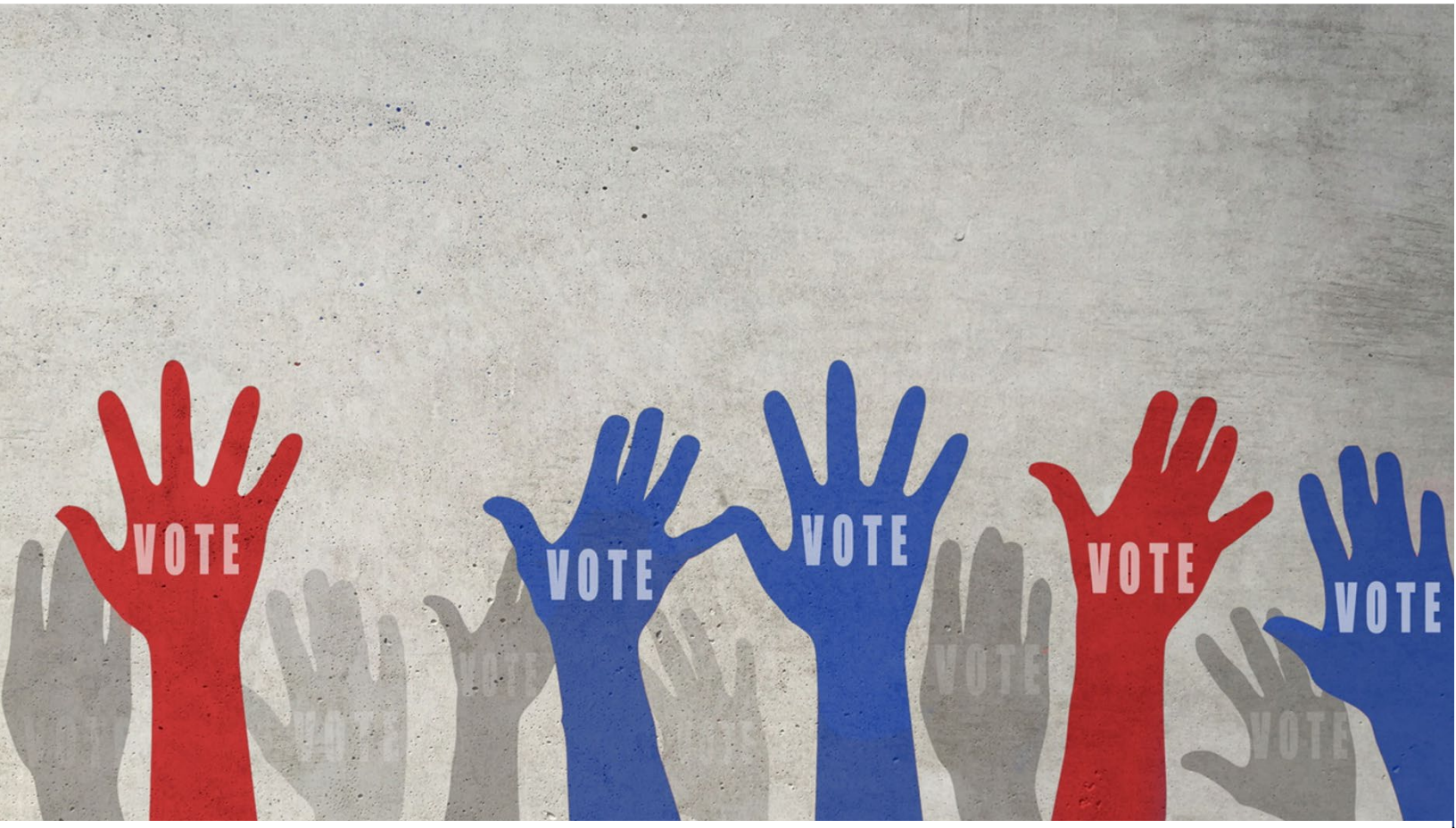
7. Who qualifies as a dependent contractor and how does that status get evaluated?

8. What criteria does the Board use to determine whether a worker performs "management functions" and is thus excluded from unionization?

9. What is meant by "confidential capacity" under the Labour Relations Code and why are such employees excluded from union membership?

10. What are the requirements for obtaining a religious exemption from union membership in BC? How did the *Bogunovic* case clarify this process?

Chapter 3:
Organization Drive and Certification



Learning Outcomes:

1. Explain the processes of voluntary recognition and application for certification under the Code.
2. Analyze union organizing strategies and legal restrictions on organizing activities in BC workplaces.
3. Canvass the thresholds necessary for obtaining certification under the Code.
4. Evaluate the criteria and procedures for representation votes and determining appropriate bargaining units.
5. Identify and explain unfair labour practices during the organizing and certification process as defined by BC labour law.

Introduction

To this point we've been able to canvass the historical and modern foundations of unions in British Columbia. What we have not yet done is discuss how we get unionized workplaces. How does a union form? What are the requirements? How are the principles of exclusivity and majoritarianism put into practice by the Code?

This chapter explores the key aspects of organizing drives and certification under the Code, focusing on the procedures, legal requirements, and protections in place to ensure fair and equitable outcomes for workers and employers. Understanding this building blocks of union formation is essential for anyone involved in labour relations, as it effectively establishes the formal relationship between a union and an employer.

Acquisition of Bargaining Rights

The acquisition of bargaining rights is the process by which a union becomes the legally recognized representative of a group of workers for the purpose of collective bargaining. This is obviously a critical moment because once the union is legally validated then it becomes the bargaining agent for all of the covered employees.

Unions in British Columbia can acquire bargaining rights through two primary methods: certification and voluntary recognition. Each of these methods can establish the union's legal authority to represent a group of employees in negotiations with their employer. As will be discussed there are different reasons for why a voluntary recognition or certification path would be used and also different trade-offs in forming a union that way.

Voluntary recognition

In a situation of voluntary recognition, a union and an employer mutually agree that the union will act as the exclusive bargaining agent for a group of employees. This agreement is typically formalized through the negotiation of a separate agreement called a voluntary recognition agreement. In effect, the union and employer simply agree that a particular union represents a particular group of employees – this greatly speeds up the process of union formation and also is seen as a cooperative approach to labour relations.

Voluntary recognition is particularly common in industries characterized by short-term projects, such as construction or film production. For example, a film production company might voluntarily recognize a union like IATSE (International Alliance of Theatrical Stage Employees) to represent crew members for the duration of a specific film project. That said, voluntary recognition can occur in any industry regardless of the work duration.

The Board does not traditionally oversee the decision to voluntarily recognize a particular union – it is left to the parties to make that choice. However, parties must still file a copy of the voluntary recognition agreement with the Board within 30 days of signing. Additionally,

voluntary recognition does not eliminate the possibility of another union challenging the recognition or employees petitioning for a decertification (to be discussed in later chapters).

Application for Certification

Certification is the more formalized path, governed by the Labour Relations Code of British Columbia. Through this process, a union applies to the Labour Relations Board to be granted the exclusive right to represent a specific unit of employees. The term "certification" refers both to the Board's order that establishes the bargaining relationship and to the official document recording this order. For instance, if the United Food and Commercial Workers (UFCW) seeks to represent employees at a local grocery chain, they would apply to the Board for certification. If successful, the UFCW would become the certified bargaining agent for those workers.

The application process involves demonstrating that the union has the support of a significant portion of the employees in the proposed bargaining unit. This general process is identified in section 18 of the Code:

Acquisition of bargaining rights

18 (1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit.

If the union can show that it has signed membership cards from enough employees in the bargaining unit then it can file an application with the Board and potentially, be certified.

The following image shows the number of certification applications received by the Board from the year 2000 through 2024. In recent years, there's has been an uptick in certification activity above the average. In 2024, there were a total of 264 applications for certification.

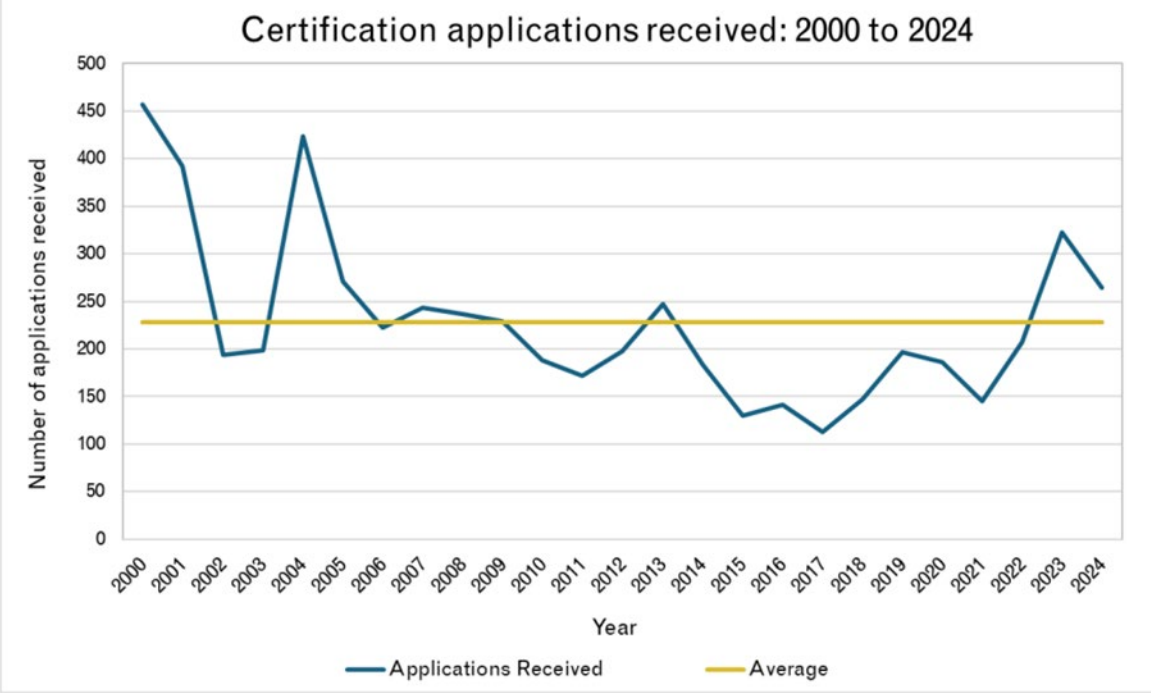


Figure 5: Certification applications received 1999-2024

British Columbia Labour Relations Board. Annual Report 2024. p. 24.
https://www.lrb.bc.ca/media/23441/download?inline

The remaining portions of this chapter will squarely deal with the requirements for obtaining certification.

Thresholds for Applications for Certification

One of the crucial determinants for a successful certification is whether the union has demonstrated the appropriate threshold of support by the employees. Assuming the union has the requisite support, it has a very good chance of being certified.

While it sounds simple in theory, there are actually cascading threshold levels which have implications on the certification process. The threshold options are effectively whether the union can show single-step certification (otherwise known as card-check) or if it needs a representation vote to obtain certification.

Single-Step Certification (Card-Check)

In 2022, British Columbia enacted significant changes to its labour laws introducing, a streamlined union certification process. These changes resulted in the addition of a single-step certification process, also known as card-check certification. This process is stated in section 23 of the Code:

23 If the board is satisfied that

(a) on the date the board receives an application for certification under this Part at least 55% of the employees in the unit are members in good standing of the trade union, and

(b) the unit is appropriate for collective bargaining,

the board must certify the trade union as the bargaining agent for the employees in the unit.

Under a single-step system, if a union can show that it has the support of over 55% of the employees in the proposed bargaining unit, the Board will grant certification without the need for a membership vote. If the union demonstrates support lower than 55% of the employees in the proposed bargaining unit, then single-step will fail however the Board can order a membership vote if the support is between 45%-55% (see the discussion below).

The goal of single-step is to expedite the union process by speeding up the certification process when there is clear, strong support for unionization. It also has the benefit of reducing the potential for employer interference during the organizing campaign - employers do not get the chance to conduct anti-union campaigns which could result in intimidation or coercion of workers by the employer. Another benefit is that card-check systems typically result in higher rates of successful union certification; the argument here is that more successful campaigns are reflecting workers' true desires for representation.

Not all of the arguments are in favour of a card-check regime - there are some opponents as well. One of the main criticisms is that workers might feel pressured to sign a union membership card due to peer pressure or union organizer tactics, rather than making a free choice. Organizing drives achieving less than 55% would have s secret vote and that's where you are more likely to get the true feelings of each individual workers – in a public and visible card signing campaign, workers might feel coerced. Employers also argue that the expedited process doesn't allow them sufficient time to present their perspective to employees before a union is certified. And lastly, some critics argue that card-check gives unions an unfair advantage in the certification process, it seems too easy to obtain a 55% threshold.

Example – Single-Step Certification

To illustrate how the single-step certification process works, consider the following example involving a company called Innovate Inc.:

> Innovate is a software development company in Vancouver with 200 employees, becomes the target of an organizing campaign by the British Columbia Tech Workers Union (BCTWU). Over several weeks, union organizers connect with employees, explaining the benefits of unionization and addressing concerns. They collect signed membership cards, with each card signifying an employee's desire to join the union and have BCTWU represent them in collective bargaining. After the campaign, BCTWU counts 120 signed cards, representing 60% of the workforce. They file an application for certification with the Board, submitting the signed cards as evidence of employee support. The Board reviews the application, verifies the authenticity of the membership cards, and confirms that 60% of the proposed bargaining unit has signed cards, exceeding the 55% threshold for single-step certification. The Board then notifies Innovate Inc. of the certification application. Under the single-step process, the employer does not have an opportunity to campaign against unionization or request a vote. Based on the strong showing of support, the Board grants certification to BCTWU without ordering a representation vote. As a result, BCTWU becomes the exclusive bargaining agent for all 200 employees in the bargaining unit at Innovate Inc., and the union and employer must now begin the process of negotiating their first collective agreement.

The example demonstrates how the single-step certification process can expedite union recognition when there is strong initial support, potentially reducing the period during which employers might attempt to influence the outcome.

Representation Vote

Turning back to the Innovate Inc. example above, what would have happened if BCTWU only collected between 90-110 signed cards (45-55% of employees)? While there would no single-step certification however, provided there was that 45-55% threshold support, the certification could take place following a representation vote. The representation vote process is canvassed in section 24 of the Code:

Representation vote ordered by board

24 (0.1) For the purpose of determining whether the employees in an appropriate bargaining unit wish to have a particular trade union represent them as their bargaining agent, the board may order that a representation vote be taken, in accordance with the regulations, among the employees in the unit.

(1) If the board receives an application for certification under this Part and the board is satisfied that on the date the board receives the application at least 45% but less than 55% of the employees in the unit are members in good standing of the trade union, the board must order that a representation vote be taken among the employees in that unit.

(2) A representation vote under subsection (1) must be conducted within 5 business days from the date the board receives the application for certification or, if the vote is to be conducted by mail, within a longer period the board orders.

(2.1) A representation vote may be conducted by mail only if

(a) the trade union and the employer agree, or

(b) the board is satisfied exceptional circumstances exist requiring the vote to be conducted by mail.

(2.2) An order under subsection (2) for a longer period in which the representation vote is to be conducted by mail must provide for the vote to be conducted as expeditiously as possible in the circumstances.

(3) The board may direct that another representation vote be conducted if less than 55% of the employees in the unit cast ballots.

Accordingly, if the union has the support of between 45% and 55% of the employees, the Board will order a membership vote to determine whether the majority of employees wish to be represented by the union. Importantly, when a representation vote is conducted, the outcome is determined by a simple majority of those who *cast ballots*, rather than a majority of all employees in the unit.

The vote is typically conducted by secret ballot, and certification will be granted if a majority (50%+1) of those who vote support the union. Therefore, the decision to unionize is prefaced on democratic principles and reflects the wishes of the employees in the bargaining unit.

This vote must be conducted within 5 business days of receiving the application, unless it's to be conducted by mail, in which case a longer period may be ordered. A mail-in option is rare and only available if both the trade union and the employer agree, or if the Board determines that exceptional circumstances require it. In cases where a mail-in vote is ordered, the Board must ensure the vote is conducted as expeditiously as possible given the circumstances.

To ensure that the outcome truly represents the will of the employees, the Board has the authority to order another representation vote if less than 55% of the employees in the unit cast ballots in the initial vote. This provision helps to address situations where low voter turnout

might otherwise lead to a result that doesn't accurately reflect the wishes of the majority of employees.

Outcome of representation vote

25 (1) When a representation vote is taken, a majority must be determined as the majority of the employees in the unit who cast ballots.

(2) If after a representation vote is taken, the board is satisfied that

(a) the majority of votes favour representation by the trade union, and

(b) the unit is appropriate for collective bargaining,

the board must certify the trade union as the bargaining agent for the unit.

(3) If after a representation vote is taken, the board is

(a) satisfied that the majority of votes are not in favour of the trade union representing the unit as its bargaining agent, or

(b) not satisfied that the unit is appropriate for collective bargaining,

the trade union may not be certified as bargaining agent for the unit.

Based on section 25 of the Code, the Board has the authority to certify a union as the bargaining agent if two conditions are met: first, the majority of votes favour union representation, and second, the Board is satisfied that the proposed bargaining unit is appropriate for collective bargaining.

Conversely, if either condition is not met - that is, if the majority of votes do not favour the union or if the Board determines the unit is not appropriate for collective bargaining - the union cannot be certified as the bargaining agent for that unit. The goal here is for certification to reflect both the will of the employees but, also account for practical considerations for effective collective bargaining.

The Code also provides for a unique process where a union can request a representation vote before the Board's final determination of the appropriate bargaining unit. In such cases, if the Board finds that at least 45% of the employees in the proposed unit are union members in good standing, it may order a vote among a group of employees it deems eligible. The purpose is to allow for a more expedited voting process in certain circumstances.

To protect the integrity of this pre-determination vote, the Board may also order the ballot box sealed until all parties have had the opportunity to present evidence and make submissions regarding the appropriate bargaining unit. Once the Board determines the appropriate unit, if the 45% membership threshold is still met, the results of this early vote carry the same weight as a standard representation vote.

Example – Representation Vote Certification

To illustrate how the representation vote certification, consider a different scenario for Innovate Inc. and the BCTWU:

> The BCTWU has been organizing a union drive at Innovate Inc. and has collected signed union cards from 100 employees, representing exactly 50% of the workforce. Given that the union support falls between 45% and 55%, the Board orders a representation vote. The Board schedules the vote to take place 4 business days after receiving the application, well within the 5-day requirement.
> The vote is conducted by secret ballot at the Innovate Inc. office. Out of the 200 eligible employees, 180 cast their votes. The results are as follows:
>
> - 95 votes in favour of union representation
> - 85 votes against union representation
>
> In this case, the majority of those who voted (95 out of 180, or about 52.8%) supported union representation. Even though this represents less than 50% of all employees at Innovate Inc. (95 out of 200, or 47.5%), the Board would certify the BCTWU as the bargaining agent for the employees at Innovate Inc. This is because the outcome is determined by the majority of those who actually cast ballots, not the total number of eligible voters.
>
> The turnout for this vote was 90% (180 out of 200 employees) which is above the 55% threshold. Had the turnout been lower - say, only 100 employees voted - the Board might have considered ordering a second vote to ensure the outcome truly represented the will of the employees.

As you can well imagine, the Board stays busy with the various applications for both single-step and representation vote. The following table provides a detailed breakdown of how certification applications were resolved by the Board in the years 2023 and 2024.

Table 5: Certification Applications resolved by disposition				
			Year	
			2023	2024
Granted	Single-Step Certification	Without objection	152	112
		After objection resolved	27	30
	After representation vote	Without objection	10	19
		After objection resolved	5	8
		TOTAL GRANTED:	**194**	**169**
Dismissed		Lack of threshold	4	3
		After objection resolved	11	4
		After representation vote	4	6
		TOTAL DISMISSED:	**19**	**13**
		TOTAL RESOLVED:	**213**	**182**
		Unresolved at the end of the year	39	30

British Columbia Labour Relations Board. Annual Report 2024. p. 26.
https://www.lrb.bc.ca/media/23441/download?inline

What you can see is that the vast majority of certifications were granted. 194 certifications were granted in 2023, and 169 were granted in 2024. The number of dismissed applications was relatively low with 19 dismissals in 2023 and 13 in 2024.

The Organizing Drive

We now know that to obtain unionization, certain thresholds need to be met. To obtain and prove that support, an organizing drive is the campaign undertaken by a proposed union to secure the signed membership cards needed by the Board.

During the organizing drive, union representatives, often known as organizers, engage with employees to educate them about the benefits of unionization, address their concerns, and encourage them to join the union. Organizing drives can be challenging and are often met with resistance from employers, who may prefer to maintain a non-unionized workforce. The success of an organizing drive depends on the union's ability to effectively communicate its message, mobilize workers, and navigate the legal restrictions that govern the process.

In some cases, an organizing drive may involve “salting”. Union salting is a tactic used by unions during an organizing drive where union members or supporters seek employment with a targeted employer with the intention of organizing the workforce from within. These individuals,

known as "salts," work alongside other employees, building relationships and advocating for unionization. Salting can be an effective way to gain access to a workplace and increase the chances of a successful organizing drive. "Salts" may also count as members of the bargaining unit when determining the percentage of support that the union has among the employees.

Signing of Membership Cards

A union proves its support by submitting signed membership cards. When an employee signs a membership card, they are indicating their desire to be represented by the union for collective bargaining purposes and therefor, signed cards are the critical evidence in an application for certification.

The Code requires that the cards be signed voluntarily and without coercion, and they must be valid at the time of the application for certification. Unions typically collect membership cards during the organizing drive, often meeting with employees individually or in small groups to explain the benefits of unionization and address any concerns they may have.

Foundational Quote

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

Re W.G. Enterprises Ltd. (Willy's Wholesale and Distribution of Foods), BCLRB No. B308/96 at paragraph 42

According to section 3 of the Labour Relations Regulation, there are a few specific criteria for union membership cards.

Criteria for membership

3 For the purpose of establishing membership in good standing in a trade union where that trade union is making an application for certification, the following minimum criteria apply:

(a) a membership card must be signed and dated at the time of signature;

(b) a membership card signed on or after January 18, 1993 must contain the following statement:

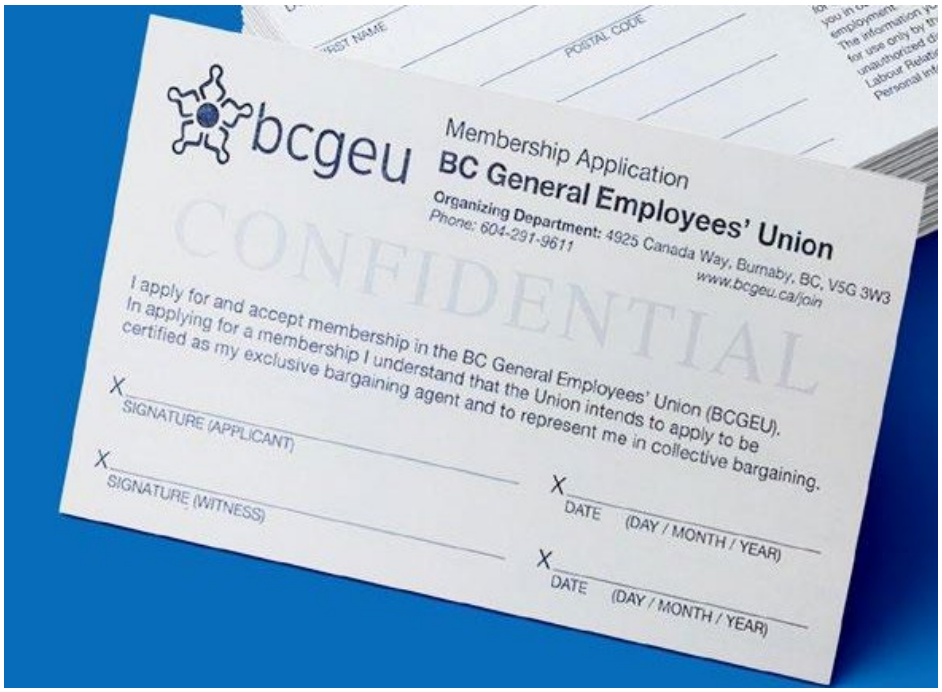
In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining. ;

(c) within 6 months of the application for certification,

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

(ii) active membership must have been maintained by dues payments.

Accordingly, under section 3 a membership card must be signed and dated at the time of signature. For cards signed on or after January 18, 1993, they must include a clear statement indicating the member's understanding that the union intends to apply for certification as their exclusive bargaining agent and to represent them in collective bargaining. Additionally, the membership must be current, with the card either signed or active membership maintained through dues payments within six months of the certification application.



The Board has the authority to reject and exclude certain cards from the official membership support count based on several key factors. Firstly, membership cards may be rejected if they fail to meet the criteria set out in section 3 (see the above discussion). The Board also excludes cards obtained through coercion or intimidation. Cards signed under false pretenses or due to misrepresentations about the implications of union membership are similarly disqualified. Lastly, any cards obtained through fraudulent or illegal organizing tactics are automatically invalidated.

Additionally, if an employee revokes their membership card after initially signing it, that card will not be counted in the certification application. Accordingly, section 4 of the Code provides a mechanism for employees to revoke their union membership.

Revocation of membership cards

4 A membership card may be revoked by delivering a written statement signed by the member to the trade union and the Labour Relations Board on or before the date of application for certification.

Revocation can be done by delivering a written statement, signed by the member, to both the trade union and the Board. Importantly, this revocation must be submitted on or before the date of the application for certification; that means employees have the opportunity to reconsider their union membership up until the formal certification process begins.

Application to the BC Labour Relations Board

Once a union has collected the required number of signed membership cards, it can apply to the BC Labour Relations Board for certification. The application must include evidence of the union's support, such as the signed membership cards, and a description of the proposed bargaining unit. The Board will review the application to ensure that it meets the legal requirements, and that the proposed bargaining unit is appropriate. The Board may also investigate to verify the authenticity of the membership cards and the level of employee support.

Hearing at the BCLRB

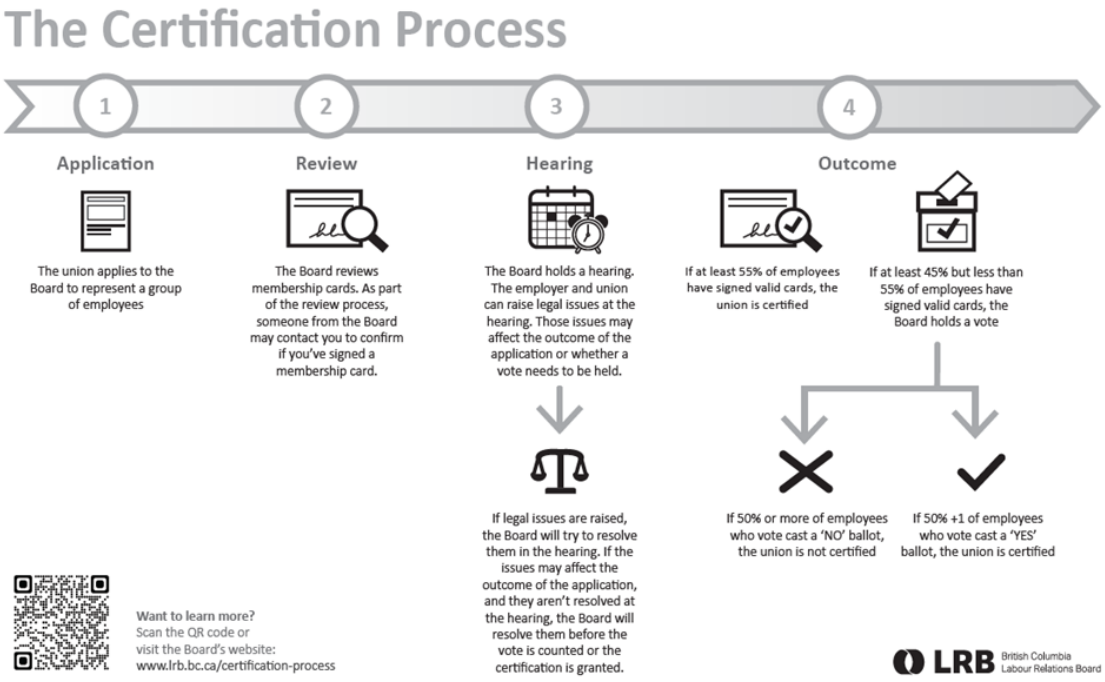
In some cases, the Board may hold a hearing to determine whether the union should be certified. A hearing is typically convened if there is a dispute over the appropriateness of the proposed bargaining unit (to be discussed below), if there are allegations of unfair labour practices, or if the employer or another union challenges the application. During the hearing, both the union and the employer can present evidence and arguments to support their positions. The Board will consider all relevant factors such as the structure of the workplace, the community of interest among employees, and any potential impact on labour relations.

BCLRB Determination and Certification

After reviewing the evidence and hearing arguments from both sides, the BC Labour Relations Board will issue a decision on the application for certification. If the Board is satisfied that the union has met the requirements, it will grant certification, recognizing the union as the exclusive bargaining agent for the employees in the bargaining unit. Certification gives the union the legal authority to negotiate a collective agreement with the employer on behalf of the employees. If the Board finds that the union has not met the requirements, it may deny the application, and the union may have to start the organizing process again.

Summary

The certification process is summed up nicely by the following illustrated chart produced by the Board:



As we learned, certification begins with the application stage, where a union submits its request to represent workers. The second stage involves a review by the Board, during which membership cards are examined and verified. The Board may contact individuals to confirm their signed membership cards. The third stage is a hearing, where both the employer and union can raise legal issues that may impact the certification outcome or necessitate a vote. If legal issues arise, the Board attempts to resolve them during the hearing or prior to vote counting or certification.

The final outcome stage is pivotal and can result in three scenarios: If at least 55% of employees have signed valid cards, the union is automatically certified without a vote. However, if between 45% and 55% of employees have signed valid cards, the Board conducts a representation vote.

The union achieves certification if a simple majority (50% + 1) of voting employees support it. Conversely, if 50% or more of voting employees oppose unionization, the application is dismissed.

Restrictions on Organizing

One of the delicate balancing acts in the Code is whether, and to what degree, there should be limits on union organizing? How much can a union seeking to unionize workplace be permitted access or resources to achieve that goal? What is fair to the employer? What enhances the democratic values for choosing a union? To maintain this balance, the Code has several key provisions that regulate activities during organizing campaigns.

Limits on Where and When Organizing Occurs

Section 7 the Code places significant restrictions on union organizing activities at the employer's place of business during working hours.

Limitation on activities of trade unions

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

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

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

Specifically, unions or their representatives are prohibited from attempting to persuade employees to join or not join a union at the workplace during work time, unless they have obtained the employer's consent. The goal here is to minimize disruption to business operations while still allowing for organizing activities outside of work hours or off company premises.

However, the Code recognizes that there are circumstances where strict adherence to this rule could effectively prevent unions from reaching certain workers. In cases where employees reside on their employer's property or on property where access is controlled by the employer or another entity, the Board has the authority to direct that union representatives be granted access. As such, workers in remote locations, company towns, or similar situations are not isolated from union organizing efforts. When such access is granted, the authorized union representative must be permitted to enter the property to attempt to persuade employees to join the union. If the union successfully acquires bargaining rights, this right of access extends to conducting union business.

Furthermore, in situations where union representatives are granted access to employer-controlled residential property, the Code goes a step further in facilitating organizing activities. Upon direction from the Board and at the request of the union representative, the employer is required to provide food and lodging to the representative. Importantly, this must be offered at the current price and be of similar quality to that provided to employees.

Foundational Law - *RMH Teleservices v. BCGEU*, 2003 BCSC 278

RMH Teleservices employed approximately 1,200 workers at its facility that included office space and employee parking lots on three sides of the building. As part of their organizing campaign, BCGEU representatives entered the employee parking lots to distribute leaflets to workers arriving for and departing from their shifts. Despite repeated requests from RMH to leave the property, the union representatives continued their activities, stating that a judge should decide their right to be there.

The central legal issue in this case was the interpretation of Section 66 of the Code which provides certain protections for union organizing activities. Specifically, the court had to determine whether RMH's employee parking lots constituted "land to which a member of the public ordinarily has access" under Section 66(a) of the Code.

Justice Hood look at the competing interests of property rights and union organizing rights. He considered previous cases including, the landmark Supreme Court of Canada decision in *Harrison v. Carswell* which upheld the primacy of private property rights in similar circumstances. The judge also addressed more recent cases that emphasized the importance of freedom of expression in labour relations contexts.

In his analysis, Justice Hood emphasized the limited scope of Section 66:

> The section itself is somewhat brief and relatively clear. The words used determine its scope, and it is quite narrow. No action or proceeding may be brought for any of the stated results of the specified union activities, including attempts to persuade employees to join a trade union made at or near, but outside entrances and exits to an employer's work place. (para. 57)

Ultimately, Justice Hood ruled in favour of RMH Teleservices. He found that the employee parking lots did not qualify as "land to which a member of the public ordinarily has access" under Section 66. The judge determined that occasional, unauthorized use of the parking lot by members of the public did not transform it into a space where the public ordinarily had access. He stated:

> The evidence on which the Defendant relies goes no further than members of the public, who themselves are trespassers, have used the parking lot casually and

> infrequently. I do not see how the acts of such trespassers could be interpreted as giving rise to any right in others to use the parking lot. (para. 61)
>
> Justice Hood concluded that while Section 66 of the Labour Relations Code does provide some limited exceptions to property rights for union organizing activities, it does not grant a general right for unions to conduct their activities on private property. He emphasized that it is the role of the legislature, not the courts, to balance the competing rights of property owners and unions.
> The court granted the injunction sought by RMH, prohibiting the union from entering the company's property without consent.

The Right to Communicate

Section 8 of the Code protects the right to communicate, ensuring that the limitations on union activities do not infringe on the freedom of expression.

Right to communicate

8 Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

The right to communicate, as outlined in Section 8 of the Code, allows employers to communicate certain information to their employees, but it also sets important limitations to prevent unfair labour practices. While employers have a general right to express their views, these communications must be either factual statements or reasonably held opinions specifically related to the employer's business.

The term "business" in this context is broadly interpreted to include various aspects of managing the enterprise including, matters related to collective bargaining. However, it does not extend to general comments about unions or union membership. The Board also applies stricter scrutiny to employer communications during the initial stages of collective bargaining compared to situations where collective bargaining rights are more established. This approach reflects the vulnerability of nascent union organizing efforts to employer influence.

The Board also takes a particularly cautious approach to "captive audience" meetings, where employees are required to attend and listen to employer communications about union-related matters. In such contexts, statements that might otherwise be permissible could be deemed impermissible due to the inherently coercive nature of the setting. Further, employers are explicitly prohibited from engaging in anti-union political-style campaigns aimed at preventing union certification.

Ultimately, employers must exercise caution in their communications, particularly when discussing the potential impact of unionization on their business. Any such statements must be

grounded in a reasonable belief and supported by objective evidence. Unfounded claims or exaggerations about the negative consequences of unionization could be viewed as violations of Section 8.

The stakes for employers in adhering to these communication guidelines are high. Under the amended Code, the Board has the discretion to award remedial certification to a union that loses a certification vote if the employer is found to have violated Section 8. This potential remedy exists even without the union needing to prove that the employer's illegal comments directly caused the union to lose the vote.

Foundational Law - *Cardinal Transportation B.C. Inc.,* BCLRB No. B344/96

The 1996 Cardinal decision involved two separate applications for reconsideration at the Board that were consolidated due to their shared legal questions.

The first application concerned Cardinal Transportation, a bus company operating in several locations around Vancouver. The Canadian Union of Public Employees (CUPE) had attempted to organize drivers at Cardinal's North Vancouver depot. During the organizing drive, a supervisor named Vicki Enders made several anti-union comments to employees such as that unionization could lead to job losses. Cardinal also distributed a bulletin to employees discussing unions. The original Labour Relations Board panel found that Cardinal had committed unfair labour practices through Enders' actions and its bulletin and granted CUPE remedial certification. Cardinal sought reconsideration of this decision.

The second application involved Klassen Pontiac, a car dealership that had faced an organizing drive by the Teamsters union. Klassen held meetings with employees where management discussed unionization. The original panel found some unfair labour practices but concluded that most of Klassen's statements were protected by Section 8 of the Code. The panel denied the Teamsters' request for remedial certification. The Teamsters sought reconsideration of this decision.

Both cases raised significant questions about the interpretation of Section 8 of the Code and the extent to which employers can liberally speak about unions and their potential impact on a workplace. The key legal issues for the Board were:

1. What are the parameters of employer speech protected by Section 8?
2. What is the appropriate approach to remedial certification under Section 14(4)(f)?

The Board rejected arguments that Section 8 provided "statutory immunity" for any employer statements about its business, even if they were coercive. It also rejected a return to a policy of strict employer neutrality during organizing campaigns. Instead, the Board established a new policy framework for interpreting Section 8:

1. Employers have a general right to express views, but to fall within Section 8, communications must be statements of fact or opinions reasonably held regarding the business.
2. Coercion is defined as any effort by an employer to use force, threats, undue pressure, or compulsion to influence an employee's freedom of association.
3. The definition of "business" in Section 8 includes statements about managing the business and collective bargaining matters but not statements about union membership or negative comments about unions in general.
4. Captive audience meetings will be subject to strict scrutiny.
5. Employers are not entitled to engage in anti-union political-style campaigns.

Despite establishing these new policies, the Board did not apply them retroactively to the cases at hand. Instead, it dismissed both reconsideration applications and upheld the original panel's findings.

Coercion or Intimidation

While Section 8 protects certain employer communications, it does not permit coercion that the Board defines as any attempt by an employer to use force, threats, undue pressure, or compulsion to influence an employee's freedom of association. This prohibition is fundamental to maintaining the integrity of the unionization process and protecting workers' rights.

Section 9 also addresses the critical issue of coercion and intimidation in union activities.

Coercion and intimidation prohibited

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

It prohibits any person from using coercion or intimidation that could reasonably compel or induce someone to become, refrain from becoming, continue to be, or cease to be a union member. This provision applies to both pro-union and anti-union activities, protecting workers' right to make free choices about union membership without undue pressure from any party.

Example – Intimidation or Coercion

Continuing our Innovate Inc. example, imagine that Innovate's President, Monty Ito, called a mandatory all-staff meeting to address the ongoing unionization efforts.

During the meeting Ito expressed a number of statements about the union campaign which could be seen as intimidating or coercive:

- "I've heard about the union drive, and I'm deeply worried. Innovate has always been like a family, and we don't need outsiders coming between us." This statement, while seemingly innocuous, could be seen as an attempt to create an us-versus-them mentality, implicitly discouraging union support.

- "If a union comes in, we'll have to start from scratch in negotiations. You could end up with less than you have now." This suggestion of potential loss of benefits could be interpreted as a veiled threat, potentially influencing employees' decision-making process regarding unionization.

- "Our investors are already nervous about this union talk. If we get unionized, they might pull their funding, and we'd have to consider relocating to a more business-friendly state." This statement implies a threat of job loss as a consequence of unionization which could be seen as a clear form of intimidation.

- "I've heard which employees are pushing for this union. I want you to know that we're watching this situation closely, and we have a long memory when it comes to loyalty." This comment could be interpreted as a threat of future retaliation against union supporters which is illegal under labour law.

These statements, made in the context of a mandatory meeting (often referred to as a "captive audience" scenario), go beyond sharing factual information or opinions reasonably held about Innovate Inc.'s specific business operations. Instead, they contain implied threats, suggestions of retaliation, and broad anti-union sentiments that could be interpreted as attempts to coerce or intimidate employees in their choice about unionization.

While we mentioned the prospect of remedial certification as a remedy in the Cardinal decision, it relatively rare.

The following table summarizes the number of remedial certification requests made to the Board. These are situations in which the Board has authority to grant union certification without a vote when an employer has committed unfair labour practices that undermine employee choice. Over the ten-year period, a total of 118 remedial certification requests were submitted, but only 13 were granted. So, the threshold for this remedy is very high.

Table 7: Requests and dispositions:
Remedial certification pursuant to Section 14(4.1) of the Code
(Previously s. 14(4)(f) and s. 8(4)(e) of the *Labour Relations Code* and the *Industrial Relations Act)*

Year	Requested	Granted
2015	5	1
2016	5	0
2017	3	0
2018	6	0
2019	14	2
2020	10	1
2021	9	0
2022	10	5
2023	19	1
2024	19	2
TOTAL	**118**	**13**

British Columbia Labour Relations Board. Annual Report 2024. p. 62.
https://www.lrb.bc.ca/media/23441/download?inline

Determination of the Appropriate Bargaining Unit

As part of the application for certification, the Board will also have to determine whether the proposed union is an "appropriate bargaining unit". The bargaining unit is the group of employees that the union seeks to represent, and it must be defined in a way where it makes sense that the unit would be appropriate when thinking about the collective bargaining process. Ultimately, the Board's decision on whether a unit will appropriate for collective bargaining involves balancing two fundamental principles: the employees' right to access collective bargaining and the maintenance of industrial stability.

When considering an application for certification, the Board's approach varies depending on whether the employer already has unionized employees. If the application represents the first attempt at unionization within the company, the Board's primary focus is on facilitating access to collective bargaining. However, if other employees are already unionized, the Board places greater emphasis on preserving industrial stability, as multiple bargaining units can potentially lead to increased labour relations complexity and instability.

In determining whether a proposed bargaining unit is appropriate, the Board generally looks for a group of employees (including dependent contractors) around which a rational and defensible boundary can be drawn and who share a community of interest.

As to the rational and defensible boundary, a unit encompassing all of an employer's employees is typically considered appropriate however, the Board will also evaluate circumstances where a unit comprising less than the entire workforce.

As to the community of interest component, the Board assesses four key factors: similarity in skills, interests, duties, and working conditions; the physical and administrative structure of the employer; functional integration; and geography.

In cases where the employer already has unionized employees and there is a subsequent application, the Board also takes into account the practice and history of the current collective bargaining relationship, as well as the collective bargaining practices within the relevant industry or sector.

The Community of Interest Factors

The following represents the factors used to determine a community of interest for initial certification applications:

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

In addition to those factors, the Board also consider the following when there is a subsequent certification application:

5. the practice and history of the current collective bargaining relationship, and
6. the practice and history of collective bargaining in the industry or sector.

One of the key Board decisions concerning the factors for determining an appropriate bargaining unit is *Island Medical Laboratories Ltd. and Dueck Chevrolet Oldsmobile Cadillac Limited,* BCLRB No. B308/93 below:

Foundational Law - *Island Medical Laboratories Ltd. and Dueck Chevrolet Oldsmobile Cadillac Limited (BCLRB No. B308/93*

The *Island Medical* decision consolidated two separate applications for reconsideration, both challenging previous Board rulings on the appropriateness of proposed bargaining units: an issue with Island Medical Laboratories Ltd. and Dueck Chevrolet Oldsmobile Cadillac Limited

In the Island Medical Laboratories (IML) case, the Health Sciences Association (HSA) applied for certification of a bargaining unit consisting of medical laboratory technologists employed at IML's Lower Vancouver Island sites. IML objected, arguing that the proposed unit was inappropriate as it excluded other technical and support staff who performed similar work.

In Dueck Chevrolet, there was an application by the Teamsters union to represent a unit of mechanics and mechanics' helpers at a car dealership. Dueck objected to the certification, contending that the proposed unit inappropriately excluded other employees in the service area, such as those in the body shop and parts department.

In its analysis, the LRB reaffirmed that "community of interest" is the primary test for determining an appropriate bargaining unit. It further elaborated on the four key factors to be considered in assessing community of interest: similarity in skills, interests, duties, and working conditions; the physical and administrative structure of the employer; functional integration; and geography.

The Board emphasized that on initial applications for certification, access to collective bargaining should be the paramount consideration however, in cases where collective bargaining relationships already exist, industrial stability becomes increasingly important.

For IML, the Board found that while the registered technologists shared a distinct community of interest based on their professional status, the degree of functional integration with other staff (particularly departmental assistants) was significant enough to warrant their inclusion in the same bargaining unit. However, recognising the potential application of the Woodward Stores doctrine for traditionally difficult-to-organise sectors, the Board remitted the matter back to the original panel to determine if IML fell into this category.

For the Dueck Chevrolet case, the Board overturned the original decision, finding that certifying a unit of only mechanics and mechanics' helpers would inappropriately create a craft-based unit within an industrial setting. The Board reaffirmed its policy against such units, citing potential industrial instability.

This decision is significant in its comprehensive review and clarification of the principles governing bargaining unit determinations in British Columbia. It provides a framework that balances the sometimes competing objectives of facilitating collective bargaining access and maintaining industrial stability, while offering guidance on the application of the community of interest test in various contexts.

Example – Determination of an Appropriate Bargaining Unit

To illustrate how these principles are applied in practice, consider the following hypothetical scenario:

Greenleaf Technologies, a company specializing in sustainable energy solutions, has 200 employees across three departments: Research and Development (R&D), Manufacturing, and Sales and Marketing. The company operates from two locations: a main facility housing R&D and Manufacturing, and a separate office for Sales and Marketing. The United Eco-Workers Union applies for certification to represent only the 80 employees in the Manufacturing department.

As to a rational and defensible boundary, the Manufacturing department represents a clear organizational unit within the company.

On the community of interest, the Board would consider the following factors:

1. Skills, interests, duties, and working conditions. Manufacturing employees likely share similar skills and working conditions, distinct from R&D or Sales staff.
2. Physical and administrative structure. While Manufacturing shares a location with R&D, it may have its own supervisory structure and operational procedures.
3. Functional integration. There may be some integration between Manufacturing and R&D, but potentially less with Sales and Marketing.
4. Geography. Manufacturing is co-located with R&D but separate from Sales and Marketing.

Given these factors, the Board might conclude that the proposed Manufacturing unit constitutes an appropriate bargaining unit. However, the Board would also consider the potential impact on future organizing efforts and industrial stability. It might encourage a broader unit including R&D employees due to their close proximity and potential functional integration or even suggest a company-wide unit to prevent fragmentation of the workforce.

This example demonstrates the complex balancing act the Board must perform when determining appropriate bargaining units, weighing the specific circumstances of each case against broader labour relations principles and objectives.

Chapter 3 - Review Questions

1. What are the two main methods through which a union can acquire bargaining rights in British Columbia, and how do they differ?

2. How does single-step (card-check) certification work under British Columbia's Labour Relations Code? What are its pros and cons?

3. What happens when a union gathers between 45% and 55% employee support? Can certification still occur?

4. What is the role of signed membership cards in the union certification process? What makes a card valid or invalid?

5. What restrictions exist on union organizing activities in the workplace under the Labour Relations Code?

6. How does the Labour Relations Code regulate employer communications during a union drive?

7. What is considered coercion or intimidation under Section 9?

8. What is an "appropriate bargaining unit" and how does the Board determine its boundaries?

9. What is "union salting"?

10. What is the general process followed by the Board once a certification application is filed?

Chapter 4:
Collective Bargaining

Learning Outcomes:

1. Describe the structure and purpose of collective bargaining including, who has the legal authority to negotiate and the steps that initiate the bargaining process.
2. Explain the process of developing and exchanging bargaining proposals.
3. Identify and explain the legal obligations of both unions and employers during the bargaining period under the Code.
4. Outline the processes for reaching settlement, union ratification, and the use of last offer votes.
5. Differentiate between procedural and substantive aspects of the duty to bargain in good faith including, requirements to meet, exchange information honestly, and make reasonable efforts to reach agreement.
6. Assess the distinction between *hard bargaining* and *surface bargaining* and analyze conduct that may constitute a breach of good faith bargaining obligations.

Introduction

Collective bargaining is the legally-regulated process by which a union (on behalf of the employees in the bargaining unit) and an employer negotiate a binding collective agreement. The collective agreement stands as the employees' terms and conditions of work and its negotiations is integral to the workplace.

This chapter provides an overview of collective bargaining in BC walking through the current legal framework. We examine the stages of bargaining including the notice to bargain, negotiations, ratification, as well as some of the key obligations under the Code like the duty to bargain in good faith and associated "statutory freeze" periods. By the end, students should have a sense of how complex labour negotiations can be and also how the Code tries to ensure that bargaining is fair.

Legal Backdrop to Collective Bargaining

Generally, collective bargaining regulations are housed in the Code; however, there are also constitutional underpinnings. As mentioned previously in Chapter 3, in the 2007 landmark *Health Services* case, the Supreme Court of Canada recognized that freedom of association under 2(d) of the Charter of Rights and Freedoms protects a right to a meaningful process of collective bargaining.

More specifically, in *Health Services,* the SCC affirmed that the ability of workers to join together and negotiate workplace terms "was fundamental to freedom of association" and that governments must not substantially interfere with this process.

Foundational Quote

"The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society.

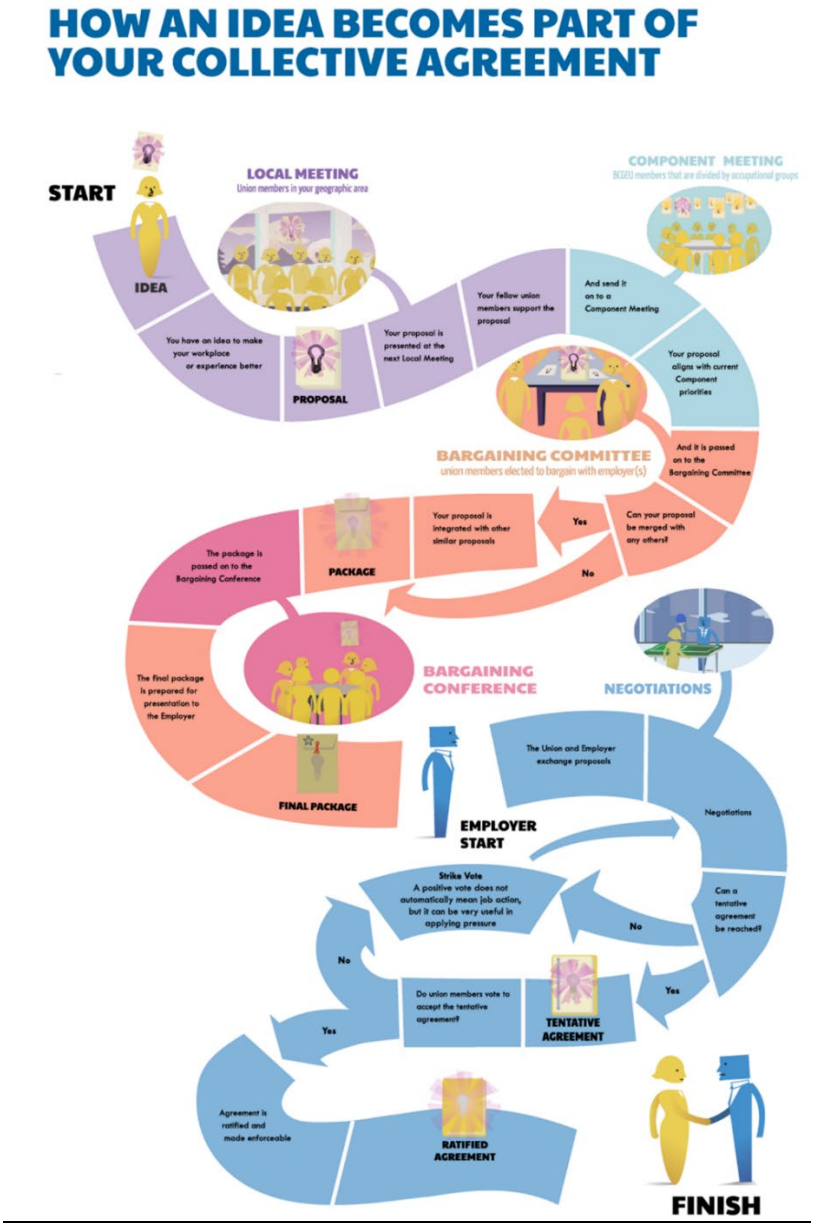
Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 at para. 41

The later Supreme Court decisions of *Ontario (AG) v. Fraser* in 2011 and *Saskatchewan Federation of Labour v. Saskatchewan* in 2015 further enforced that the Charter guarantees "meaningful participation in the pursuit of collective workplace goals" encompassing a right to collective bargaining. Taken together, the SCC has been clear that collective bargaining is not a mere statutory right but rather, a constitutional one.

Additionally, given that the various provincial statutory regimes also impose rights and obligations through bargaining, it's necessary to examine the Code (or other provincial statutes as the case may be). There are several key provisions of the Code which influence the collective bargaining process and which will be discussed in greater detail as we move through the bargaining stages.

The Collective Bargaining Process

Collective bargaining usually unfolds in a series of stages. It starts with the initial notice to bargain through to the conclusion of negotiations or, if negotiations stall, it hits an impasse and may result in industrial action. The image below provides a flowchart produced by the BCGEU showing the key stages in BC collective bargaining:



While not all of these BCGEU steps will be applicable in other bargaining contexts, the flowchart does a good job of highlighting the major elements arising during bargaining of a new collective agreement. The following discussion will expand on the common steps in bargaining.

Step 1 - The Notice to Bargain

The bargaining process begins with a notice to bargain which is required by different sections of the Code depending on if the negotiation is of a first collective agreement or the renewal of an existing collective agreement.

If it's a first contract after a union certification, either party can trigger bargaining by serving notice under Section 45:

Notice to bargain collectively

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

(a) the trade union may by written notice require the employer to commence collective bargaining, or the employer may by written notice require the trade union to commence collective bargaining, and

(b) subject to subsection (1.1), the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until

(i) 12 months after the board certifies the trade union as bargaining agent for the unit, or

(ii) a collective agreement is executed,

whichever occurs first.

According to section 45, either the union or the employer may initiate collective bargaining by delivering written notice to the other. This setup allows either party to trigger negotiations rather than relying on consensus to start which might be challenging to obtain. The actual delivery of written notice by one party is sufficient to oblige the other to come to the bargaining table.

Foundational Quote

"...The intent of Section 45 is to maintain the status quo shortly after certification by prohibiting an employer from unilaterally implementing changes to the terms and conditions of employment which would have a "chilling effect" on collective bargaining..."

Sears Canada Inc. BCLRB No. B533/98 at paragraph 42

For a renewal of an existing agreement between a union and employer, notice is typically given in the last four months of the contract term under Section 46:

Notice before expiry of agreement

46 (1) Either party to a collective agreement, whether entered into before or after the coming into force of this Code, may at any time within 4 months immediately preceding the expiry of the agreement, by written notice require the other party to commence collective bargaining.

(2) A copy of the notice given under section 45 and the notice with the endorsement referred to in this section must be sent by registered mail to the associate chair of the Mediation Division within 3 days after notice is given under subsection (1) of this section.

(3) The endorsement must state where, when and to whom the original notice was given.

(4) If a notice is not given under subsection (1) by either party 90 days or more before the expiry of the agreement, both parties are deemed to have given notice under this section 90 days before the expiry.

The immediate effect of the service of the notice to bargain is that the parties must then meet.

According to section 47 of the Code both the employer and union must meet on set a timeline to begin bargaining:

Collective bargaining

47 If notice to commence collective bargaining has been given

(a) under section 45, the trade union and the employer, or

(b) under section 46, the parties to the collective agreement

must, within 10 days after the date of the notice, commence to bargain collectively in good faith, and make every reasonable effort to conclude a collective agreement or a renewal or revision of it.

More specifically, if notice is issued after certification when no agreement is in place (Section 45) or for the renewal of an existing agreement (section 46), both parties must begin to bargain collectively in good faith within 10 days. They must make every reasonable effort to conclude a collective agreement or renew their existing one.

Example – Notice to Bargaining

The following is a notice to bargain under section 46 of the Code:

UNITED STEELWORKERS, LOCAL 1-1937
Affiliated with AFL-CIO-CLC
SERVING MEMBERS THROUGHOUT COASTAL BRITISH COLUMBIA

May 9, 2019

VIA EMAIL: [redacted]
Original to Follow by Mail

FOREST INDUSTRIAL RELATIONS (F.I.R.)
P.O. Box 1065 Station Main
1029 Ridgeway Ave.
Coquitlam, BC V3J 6Z4

Attention: Tom Getzie

Dear Sir:

RE: CONSTRUCTION COLLECTIVE AGREEMENT

Further, pursuant to **Section 46** of the Labour Relations Code, we hereby require you to commence collective bargaining in accordance with the said code.

USW Local 1-1937 and USW Local 2009 are prepared to meet with your Company within ten (10) days of receipt of this notification or at such time as may be agreeable to both Parties.

Regards,

Rick Nelson

Rick Nelson, 1st Vice-President
United Steelworkers, Local 1-1937
#301-8988 Fraserton Court, Burnaby, BC V5J 5H8
[redacted]

A question that could arise is what if a union or employer simply refuse to meet as required? The answer is effectively that the non-bargaining party may be in violation of the requirement to bargain in good faith (to be discussed later in this chapter). One other issue related to the notice to bargain is the impact of the "statutory freeze" where the parties are prohibited from making changes to the terms of work – these freezes will also be discussed later in the chapter.

Step 2 - The Bargaining Teams

Each side to the bargaining will assemble its bargaining team. The employer is usually represented by its managers and/or human resources/labour relations professionals while the

union's negotiating team is typically elected by the membership. Depending on the size of the workplace, it's also possible that labour lawyers may be appointed to lead the negotiation for the employer.

As with all bargaining, it requires substantial preparation to be successful. Both parties will spend time gathering information about the current state of the business or industry like the economic conditions, competitive landscape, and wages and benefits in similar workplaces. The union and employer will also review the existing collective agreement for clauses to change and identify any problem areas that could have led to previous grievances.

Unions also commonly survey their membership for bargaining their input. A bargaining survey or questionnaire allows union members to contribute to the discussion of what should be pushed for in the new agreement. After analyzing the survey results union leaders can breakdown the issues down into potential strike issues (the essential demands) versus non-critical issues for membership. Once the results are in, the union can assume it has a bargaining mandate that reflects what most of their members want.

The first bargaining often is a work-out of the ground rules. The union and employer should agree on procedural matters to help ensure that the negotiations run smoothly. For example, they might decide on a number of logistical issues such as:

- where bargaining sessions will be held - neutral territory like a hotel or conference area is common;
- the frequency and duration of meetings;
- how caucus breaks (private breaks for each team) can be requested; and
- whether phones or recording is permitted.
- If there are any protocols or restrictions on media communication

One of the most important elements is whether the parties will "sign off" on agreed items as they go, i.e. formally record tentative agreement on specific clauses during bargaining. The

alternative would be a situation where the parties just informally agree that the issue has been successfully bargained. The key here is that if the parties physically sign off on the negotiated language then it becoming binding whereas the informal agreement has no legal effect and the issue could be re-opened again by the party.

Step 3 - Exchange of Proposals

Once the grounds rules are set, the bargaining truly begins. The parties will each exchange their bargaining proposals to the other side. These bargaining proposals are a package of proposed changes to the collective agreement at the outset. The union's proposals will state all the improvements or protections it is seeking for workers and the employer's proposals will state what it wants for operational improvements.

Proposals can be presented in various formats. A common method is for each side to table a written list or booklet of their desired changes, sometimes organized by article or topic. Another method is to exchange a marked-up version of the current collective agreement showing additions and deletions (e.g. bold text for proposed new language and strike-through for language the party wants removed). Some bargaining teams even use colour-coding to track the status of proposals (for instance, proposals tentatively agreed might be highlighted in green). There is no strict rule on format as long as both parties understand what is being proposed.

In the initial proposals, parties often "anchor" the negotiation with positions that leave room to move. It is not unusual for both union and employer to include some ambitious demands, as well as some secondary items that they might be willing to trade off or drop later. Bargainers sometimes label these throw-away or "shopping list" items because they are things that are not core priorities and could be traded off to achieve more important goals. For example, a union might ask for an extra holiday knowing it can live without it or an employer might propose a small rollback in a yearly bonus expecting to withdraw that demand as a concession. The whole idea is flexibility as the throw-aways provide bargaining chips to exchange.

Both sides also cost their proposals especially the economic ones because the full economic impact needs to be understood. If a union asks for a 5% wage increase, it will calculate what that costs the employer. Likewise, the employer will quantify the savings of any concession it is seeking.

Unlike some jurisdictions (i.e. the United States), the Code does not rigidly classify subjects for bargaining except that anything illegal or specifically off-limits by legislation cannot be included (see "substantive duties" later regarding illegal terms). Generally, wages, hours, and other terms and conditions of employment are all fair game for negotiation. It's up to the parties to decide what issues will get bargained and when.

Step 4 - Negotiations

At this point, the bargaining proposals have been exchanged. There is now likely to be a back-and-forth process of discussion, explanation, persuasion, and compromise. Each side wants to gain ground towards their target positions and there is some strategy involved to achieve that goal.

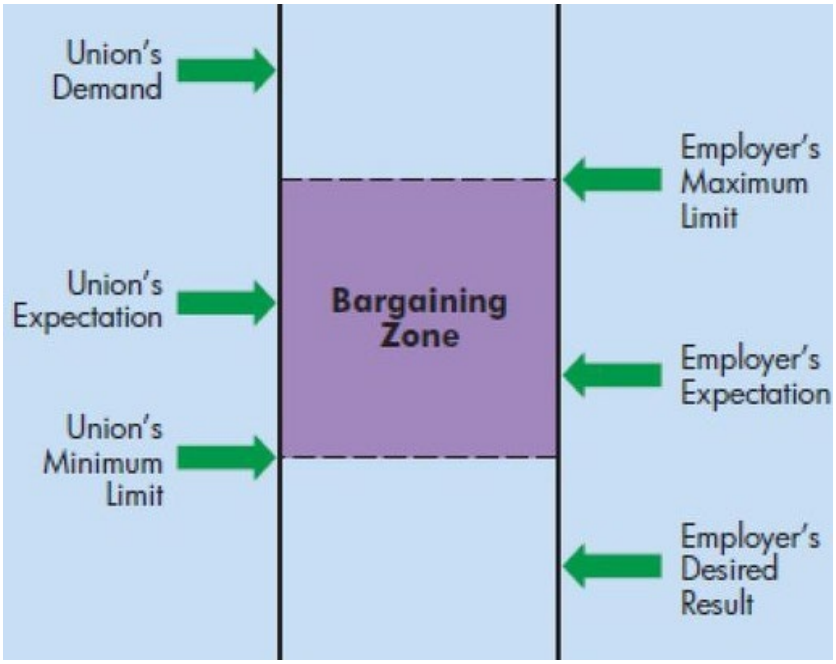
Negotiations typically involve both competitive and cooperative dynamics. Some issues are inherently distributive as one side's gain is the other's cost (for example, wage increases or benefits largely cost the employer while benefiting employees). Other issues can be integrative, meaning creative solutions might satisfy both parties (for example, scheduling changes that improve work-life balance *and* productivity). Skilled negotiators will try to "separate the people from the problem", maintaining a respectful relationship even while arguing positions. Those negotiators try to focus on underlying interests and understanding *why* the union demands something or *why* the employer resists. The hope is obviously that there are options for mutual gain and objective criteria to evaluate proposals. For instance, if there is a proposal to tie a wage offer to the inflation rate, this can be an objective conversation about the financial impact and then discussion on potential options.

The substance of negotiations can cover a wide range of employment terms. Typically, the negotiations are umped into economic issues (those with financial costs) and non-economic issues. Many negotiators believe that starting with the non-economic issues is the wiser path as it can lead to some "easy" negotiated wins while leaving much of the money still available to be negotiated across other items.

Economic Items	Non-Economic Items
Wages	Work hours and scheduling terms
Overtime rates, shift premiums, bonuses, etc.	Health and safety provisions
Benefits (health insurance, extended health/dental plans, pensions or RRSP contributions)	Job posting and promotion procedures
Vacation	Union security
Leaves	Layoff and recall procedures
Severance pay	Performance management
Cost-of-living adjustment (COLA)	Grievance and arbitration procedure

In addition to the more substantive, economic/non-economic, it's likely that both sides might also have some proposed "housekeeping" changes. These would be minor issues such as clarifying ambiguous language or removing out-dated language. For example, the parties might propose introducing gender-neutral language into the collective agreement.

Negotiators are always mindful of the "bargaining zone" which is considered the range in which a deal is possible:



If the union's minimum acceptable outcome and the employer's maximum offer overlap, there is a zone of possible agreement. If they do not overlap, no amount of negotiation will reach a voluntary deal and only pressure or third-party intervention will bridge the gap. Part of the art of bargaining is gradually discovering where that zone lies without conceding too much too quickly.

As mentioned previously, it's usually best to tackle some easier issues first to build momentum. This creates a shorter list of open items and can build goodwill. It's common that the parties will reach an understanding on most terms except the hardest (like wage increases) and then do a "big swap" or final compromise on those at the end.

Step 5 - Impasse and Dispute Resolution Options

Negotiations sometimes stall or reach an impasse on one or more issues. An impasse means the parties believe they cannot progress further toward a deal at that time. Even if both parties are bargaining in good faith, reaching an impasse can be a legitimate outcome. If an impasse happens, several things could happen next:

i. Mediation

The parties could seek assistance from a neutral third party to help mediate the dispute.

The mediator has no authority to impose a settlement (except in the special first-contract scenario under Section 55), but their involvement often helps parties move off rigid positions. A

skilled mediator can carry messages, re-frame issues, and propose creative solutions to break deadlocks.

The Code does encourage using mediation; for example, Section 74 allows appointment of a mediation officer at any time if it might help conclude an agreement.

Mediation officer and services

74 (1) The associate chair of the Mediation Division may appoint a mediation officer if

(a) notice has been given to commence collective bargaining between a trade union and an employer,

(b) either party makes a written request to the associate chair to appoint a mediation officer to confer with the parties to assist them to conclude a collective agreement or a renewal or revision of it, and

(c) the request is accompanied by a statement of the matters the parties have or have not agreed on in the course of collective bargaining.

According to section 74, either party (or both jointly) can request the help of a mediator from the BC Mediation Division and, in fact, many mediators are staff of from the Board or appointed by the Board's Associate Chair.

ii. Industrial Action

If negotiation breaks down and mediation fails to break the deadlock, the union may initiate a strike or the employer may declare a lockout. Both actions are forms of lawful industrial pressure intended to force movement at the bargaining table. The full details of these actions are considered in the next chapters.

iii. Government Mandates

In rare cases, where disputes remain unresolved and have significant public impact such as in essential services or public infrastructure, the government may intervene by appointing a special officer, ordering binding arbitration, or even legislating a return to work. The appointment of a special officer under Section 76 of the Code provides investigative and advisory powers that can sometimes lead to a settlement. Meanwhile, compulsory arbitration is generally reserved for situations where strikes or lockouts would cause serious harm to public health or safety, such as in health care or transit sectors.

Step 6 - Tentative Agreement and Ratification

If negotiations, with or without a mediator, are successful, the union and employer bargaining committees will reach a tentative agreement. This means the teams concur on all the terms of a new collective agreement. Usually, the terms are recorded either in a memorandum of settlement or by initialling all the revised articles of the old agreement. Signing off by the negotiators signifies that *they* agree to recommend the deal:

TENTATIVE AGREEMENT
between

VANCOUVER ISLAND UNIVERSITY
(Employer)
and

BC GOVERNMENT & SERVICE EMPLOYEES UNION
(Union)

Re: Terms of Tentative Agreement

The bargaining committees agree to recommend the terms of the tentative agreement as attached to their respective principals for ratification.

All proposals which are not addressed in this tentative agreement are to be considered withdrawn on a without prejudice basis. The terms of settlement are as follows:

1. All items agreed to form part of this agreement.

2. All changes to the collective agreement are effective from the date of ratification unless otherwise specified.

Signed in Nanaimo, B.C. this 18th day of March 2011.

For Vancouver Island University

Preben Skovgaard - VIU
Manager, Human Resources &
Labour Relations

Lynn Meyers – VIU
Human Resources Advisor

For BCGEU

Darlene Thorburn
BCGEU Staff Representative

Stu Seifert – VIU Local 702
Bargaining Unit Chairperson

However, as in most provinces, the union's negotiators cannot bind the employees to the new contract until it is *ratified* by the membership. A ratification vote is typically required by the

union's constitution or bylaws to ensure that membership has had a chance to weigh in on the agreement. This dynamic sometimes means that even after negotiators agree in principle, the union must "sell" the deal to their membership.

The union will arrange a meeting where the tentative agreement is presented to the members of the bargaining unit and a secret-ballot vote is held to accept or reject it. A majority vote in favour is needed to ratify (in some unions their constitution might require e.g. 50%+1; some unions set higher internal thresholds, but 50%+1 is common). If the ratification vote passes, the collective agreement is formally concluded and it is then signed by both union and employer representatives and becomes legally binding for its term.

If the union's members vote "no" on the tentative agreement, it is not adopted, and bargaining must resume or, if a strike had been started, then the strike continues. A rejection often sends the message that members felt the deal was insufficient and the union may go back to the employer for further improvements. That said, rejection is not very common if the union leadership endorses the deal, but it does happen, especially if there is a gap between the bargaining committee's view and the rank-and-file's expectations. In some cases, multiple ratification votes may occur before an agreement is finally accepted. Employers do not hold ratification votes in the same way because management's approval is simply if management approves the terms.

Once ratified by the union membership and agreed to by the management principles, the new collective agreement is signed and implemented. It will typically have a defined term (i.e. 1, 2 or 3 years) and, during the term, both parties must then abide by it. The collective bargaining cycle effectively pauses until the agreement nears expiry, at which point, notice to bargain for renewal will be served and the process begins again.

Duty to Bargain in Good Faith

How do we ensure that parties take their bargaining seriously or do not try to use unfair tactics during the process. The answer is that, for both the union and employer, there is a *duty to bargain in good faith*.

The duty to bargain in good faith is an overarching legal obligation that applies throughout the collective bargaining process. In BC, this duty is codified in Section 11(1) of the Code which prohibits either the union or the employer from refusing to bargain in good faith or from failing to make every reasonable effort to conclude a collective agreement:

Requirement to bargain in good faith

11 (1) A trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.

Section 11(1) requires the parties to bargain in good faith but not reach an agreement. While they are *not* compelled to actually agree on any specific term or to make concessions they

fundamentally oppose, they must still participate in the process in an honest, constructive manner. While section 11(1) reads in a straightforward manner, the duty of good faith (or breaches of it) can be complex and are typically, fact-specific.

Broadly speaking, the duty to bargain in good faith has both subjective and objective elements.

- The subjective aspect refers to the intent or mindset of the parties. Each side must genuinely intend to settle a collective agreement (i.e. be motivated by a desire to reach a deal, not to sabotage or avoid an agreement).
- The objective aspect refers to the conduct and concrete efforts made. The parties' bargaining behavior is measured against a standard of reasonableness and industry norms. As the Supreme Court of Canada explained in *Royal Oak Mines*, even if a party insists it wants an agreement, it can still breach the duty if its actual proposals and actions are so unreasonable by industry standards that they indicate a failure to make a sincere effort.

Foundational Law - *Royal Oak Mines Inc. v. Canada (Labour Relations Board), [1996] 1 S.C.R. 369*

In *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, the Supreme Court of Canada addressed the issue of whether Royal Oak Mines Inc. had violated its duty to bargain in good faith during negotiations with the union representing its employees.

The underlying dispute involved the union, the Canadian Association of Smelter and Allied Workers, Local No. 4, in negotiation with the employer, Royal Oaks. During collective bargaining, Royal Oak Mines refused to engage with the union for contract negotiations. The company presented proposals that were deliberately one-sided and regressive, excluding provisions that had been standard in both its own previous agreements and in the industry. Royal Oak also refused to compromise or seriously consider any of the union's proposals and ultimately, walked away from negotiations. The union alleged that the employer violated the duty to bargain in good faith and the Canada Labour Relations Board agreed. The CLRB's finding of the breach to bargain in good faith was upheld by the Federal Court of Appeal which was then appealed to the Supreme Court of Canada.

The SCC affirmed the decisions of the lower courts. The court first highlighted the importance of the duty stating:

> "In the context of the duty to bargain in good faith, a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions." (para. 41)

Accordingly, parties are not obligated to reach an agreement but, they must engage in sincere and constructive negotiations. Employers cannot merely go through the motions of bargaining to fulfill legal requirements. They must participate with a genuine intent to reach a mutually acceptable agreement.

In assessing Royal Oak's actions, the SCC stated:

> "The duty to bargain in good faith was breached in three ways. First, the appellant refused to bargain with the respondent union, the exclusive bargaining agent for the employees. Second, the appellant refused to include in its proposals terms which had been widely accepted in other agreements throughout the industry. Third, the appellant refused to include in its proposals terms which had been included in its own previous agreements."

All told, Royal Oak failed to demonstrate any sincere attempt at reaching a bargained agreement and was in violation of the duty to bargain in good faith.

The duty to bargain in good faith can be broken down into procedural duties (how the parties must conduct themselves while bargaining) and substantive duties (limits on the content or objectives of bargaining).

1. Procedural Duties

Procedural duties are the "how" of bargaining. Procedural duties emphasize that bargaining must be a genuine dialogue and not simply going through the motions or a sham. Generally, the key procedural aspects include the following:

Meet and Engage in Discussions

Each party must meet at reasonable times and intervals and devote the necessary time to negotiations. Simply delaying endlessly or refusing to schedule meetings is a classic sign of bad faith.

Parties should come to the table prepared. For example, parties should appropriate representatives readily available and have a bargaining proposal to present. More specifically, parties should avoid tactics such as canceling meetings without good reason or sending negotiators who lack authority to actually make decisions. If one side is just consistently unavailable or only going through the motions of bargaining, the Board can find a breach of Section 11.

i. Exchange and Explain Positions

For effective bargaining, there must be communication. Each side should present their proposals and also listen to and consider the other side's proposals. Even refusing to discuss an issue at all

could potentially be bad faith; an exception would be if the issue is clearly illegal or outside the scope of bargaining.

The Board expects parties to explain the reasoning behind their positions, at least in general terms. This doesn't mean revealing an entire strategy or bottom line, but if, say, the employer cannot entertain a particular demand, it should provide a rationale (like "funds are limited due to X"), rather than just saying "Because we said so." A willingness to exchange information and rationales is part of the cooperative spirit of good faith. In contrast, flat silence or a sharp refusal to respond to proposals could be evidence of bad faith.

ii. Avoid Unnecessary or Undue Delays

Assuming there was a deliberate dragging out of the talks for no legitimate reason, this would also violate good faith. The duty isn't violated by normal negotiating tactics like pausing to caucus or taking time to cost proposals, but stalling tactics will attract Board remedial action. For example, if an employer only agrees to meet once every three months without any justification or persistently cancels meetings right when they are about to begin, the Board may find that there is a lack of sincere effort to reach a deal.

iii. Be Honest and Disclose

Especially on the employer's side, there is a duty to furnish information that the union needs to bargain intelligently as the employees' representative. For example, the union might typically request an updated list of bargaining unit employees, their job classifications, wage rates, seniority, etc. which they need to cost proposals and understand the coverage of the collective agreement. The Board (and other Canadian labour boards/tribunals) has long held that failing to supply such basic information is bad faith.

Foundational Quote

"It is patently silly to have a trade union 'in the dark' with respect to the fairness of the employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit."

Graphic Arts International Union v. Graphic Centre (Ontario), [1976] OLRB Rep 221 at 231."

The union too may be asked for relevant information if, say, it proposes a new benefit plan then it should also share details to allow costing. However, the primary burden is on employers because they control information about the business.

An employer doesn't have to volunteer every detail of its operations, but it must answer honestly when asked direct questions on matters that relate to bargaining. A failure to disclose critical information or worse, providing false information, is a serious breach of the duty. For

example, if an employer is asked whether it plans to relocate or shut a facility in the near future, and such plans are indeed being actively developed, the employer must not lie or deceptively withhold that fact. This was, in fact, the main issue of the *Consolidated Bathurst* decision canvassed below. Good faith demands that the employer disclose the impending closure once it was sufficiently concrete, so that severance or other effects could be negotiated during bargaining.

Foundational Law - *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. September 1411

During collective bargaining between Consolidated Bathurst and the I.W.A. Local 2-69 representing workers at the company's Hamilton plant, the union raised concerns about potential plant closure and proposed a clause for severance pay and advance notice. While this clause was eventually withdrawn during bargaining, the employer did not indicate at any point that a plant closure was being considered. A collective agreement was reached and signed on January 13.

Only six weeks later, on March 1, the employer announced that the Hamilton plant would close permanently as of April 26. The union alleged that the employer had made the decision to close during bargaining, but had deliberately withheld that information, denying the union a chance to negotiate closure terms. The company claimed it did not decide to close until February 25, well after bargaining had concluded.

The Ontario Labour Relations Board (OLRB) found that Consolidated Bathurst violated the duty to bargain in good faith by failing to disclose information that was highly relevant and concrete at the time of negotiations. While there is no general obligation of full disclosure in bargaining, the Board emphasized that collective bargaining is not a game of "caveat emptor" (buyer beware), but a process grounded in good faith and mutual economic relationship.

The Board held that the timing of the closure announcement, so soon after the collective agreement was signed, gave rise to a rebuttable presumption that the employer had either:

- intentionally delayed the closure announcement until bargaining was completed; or
- failed to disclose a de facto decision that had effectively already been made.

The company provided no compelling evidence to rebut that presumption.

> "At the very least, the evidence before us raises a rebuttable presumption which went unrebutted that the company either manipulated the timing of its decision to avoid bargaining on the matter or withheld from the union a de facto decision…" (para. 51)

The OLRB concluded that the matter of the plant's closure was already "so concrete and highly probable" during bargaining that the employer had an obligation to inform the union of the situation, even if a final decision had not yet been formally made:

> "In any event, we find that the matter of the impending closing was so concrete and highly probable in early January … the company had a minimum obligation to say that unless a certain percentage of the new business was retained … a recommendation to close would be made." (para. 53)

The OLRB held that ordering a reopening of the plant was impractical since the equipment had been removed and the site dismantled. Instead, the matter was scheduled for further hearing to determine monetary losses suffered by the union and employees.

2. Substantive Duties

Substantive duties are the "what" of bargaining. The law does not require either side to actually concede on any issue or accept a proposal it disagrees with however, there are some boundaries on what goals or tactics are permissible. Substantive bad faith usually involves *what* a party is pursuing or refusing, rather than just *how* they conduct talks. The following are some of the more Important elements to the substantive duty.

i. No Insistence on Illegal Terms

Neither party can insist on a proposal that is unlawful. Insisting on an illegal clause is bad faith because the duty to bargain is predicated on reaching a *lawful* agreement. For example, an employer cannot demand a term that violates the Human Rights Code (such as a mandatory retirement age clause) or a term that undercuts the *Employment Standards Act* minimums. A union likewise could not lawfully insist on a term that would require the employer to do something illegal like violating safety regulations or discriminating in hiring. Usually, what happens when one side points out a proposal is illegal, the other will simply withdraw it however, if it was pressed forward, there could be an accusation of bad faith.

ii. Cannot Seek an Impasse on Mandatory Issues

While a party can have firm positions, it should not approach bargaining with a fixed intention *not* to budge at all on any issue. Such an uncompromising nature effectively makes impasse inevitable. Essentially the problem is when a party is "bargaining to impasse" on every issue or on a crucial issue without any flexibility.

Foundational Quote

"In some circumstances, even though a party is participating in the bargaining, that party's proposals and positions may be inflexible and intransigent to the point of endangering the very existence of collective bargaining."

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 at para. 104

For instance, if a union said, "we will strike rather than take any wage increase less than 100%" and absolutely refused to explore any other option, this rigidity could be seen as not making a reasonable effort. Alternatively, if an employer said "we will never agree to *any* form of grievance arbitration" that could be bad faith because grievance arbitration is actually required in the unionized context (this was similar to the *Royal Oak Mines* case discussion above, where refusal of a fair grievance process for disciplined strikers was deemed a violation).

The expectation is that parties enter negotiations with an open mind and at least some willingness to adjust their positions to seek a resolution. Adopting an extreme "take-it-or-leave-it" stance from the outset on all issues is not over bad bargaining its potentially, inconsistent with the duty.

iii. Surface vs. hard bargaining

It is very clear, that bargaining between the parties is always going to be tough. Both parties have it in their interests to attempt to extract concessions from each other and therefore, battles are expected. Within the context of the Code there is a recognition of this reality but, also a commitment that there has to be a limited where bargaining tactics can lead to breaches of good faith.

Foundational Quote

"It would be inconsistent with a fundamental policy of the Code - the fostering of free collective bargaining - for the Board to evaluate the substantive positions of each party, to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction … The theory of the Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength to strike to force the other side to make the concessions."

Noranda Metal Industries Limited, BCLRB No. 151/74 at pg. 159

Ultimately, *hard bargaining* is permissible while *surface bargaining* would violate the duty.

Hard bargaining means being tough but sincere bargaining. A party can take strong positions on the issues and perhaps gives very little but, does so with the genuine intention of reaching an agreement. Hard bargaining is not unlawful and not a violation of the substantive duty to bargain in good faith.

Surface bargaining means a party is only going through the motions with no real intent to reach an agreement. Surface bargaining often results from a pattern of inflexibility so extreme that it appears calculated to avoid agreement. For example, if an employer comes to the table with a long list of wild concessions and simply refuses to meaningfully consider any of the union's proposals, the argument is that they're not interested in an agreement. Another clue is if a party moves the goalposts by continually raises new demands whenever agreement seems near. Unions, too, can surface-bargain. For example, if a union simply refuses to consider any productivity improvements or keeps introducing non-starter proposals to drag negotiations out.

What is clear from the distinction is that each party must have a genuine willingness to find a compromise. Taking a firm line is allowed but, there must still be intent to eventually *get to a* "yes".

Foundational Quote

"Hard bargaining is taking an uncompromising position while genuinely seeking an agreement. In contrast, surface bargaining is when a party simply goes through the motions of bargaining without a genuine intent to reach agreement."

Cowichan Home Support Society (Re),
BCLRB Decision No. B28/97 at para. 104

The Board will examine the totality of conduct to decide if a party crossed into surface bargaining territory. As noted in *Royal Oak Mines*, the Board can consider if a party's substantive positions are extreme outliers compared to other players in the industry. If an employer is in an industry where almost every contract has a health benefit plan adamantly refuses to offer *any* health benefits, that could be viewed as failing to make a reasonable effort. The *objective* aspect doesn't require a party to match the best terms in the industry, but if their stance is far outside the norm without explanation, it might indicate an absence of good faith.

That said, generally, the Board does not like to second-guess the content of bargaining. This because the purpose of bargaining is to like the parties decide the terms as they will be the one in the long-standing relationship. However, in egregious cases like the *Radio Shack* case below, the labour boards/courts have intervened to say the duty of good faith was violated.

Foundational Law - *United Steelworkers of America v. Radio Shack,* [1979] OLRB Rep. Dec. 817

In *United Steelworkers of America v. Radio Shack*, [1979] OLRB Rep. Dec. 817, the OLRB considered whether the employer, Radio Shack, had violated its duty to bargain in good faith by engaging in surface bargaining following union certification at its Barrie distribution centre.

The union was certified in January 1977 and bargaining began shortly afterward. However, throughout the negotiations, Radio Shack maintained rigid positions on key issues, made minimal concessions, and failed to provide meaningful counterproposals. Radio Shack also refused to seriously consider any form of union security clause (a way for the union to fund itself) claiming that union support was fading among employees. At the same time, Radio Shack undertook a campaign to undermine the union by issuing anti-union communications to employees. Additionally, management closely monitored union activity and union supporters faced intimidation and, in some cases, termination.

Eventually, the union filed a complaint alleging that the employer was not bargaining in good faith but, rather was engaging in surface bargaining by not having a genuine intention to reach an agreement.

The OLRB agreed with the union. It found that the employer had clearly acted in ways that undermined the bargaining process. In its decision the OLRB provide a summary of surface bargaining:

> "Surface bargaining… describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union" (para. 89).

According to the OLRB, Radio Shack's refusal to consider proposals about union security was based on a desire to avoid concluding an agreement. The OLRB further emphasized that the employer could not rely on diminished employee support for the union when "it created the very conditions upon which it now relies" (para. 89).

Ultimately, the OLRB held that Radio Shack had breached its statutory duty to bargain in good faith. As the remedy, it issued a cease-and-desist order, directed that notices be posted in the workplace affirming the employer's duty to bargain properly, granted union access to the workplace, and ordered compensation to the union and certain employees.

3. Board Remedies for Breaches

If the Board finds that a party breached the duty to bargain in good faith, it can issue various remedial orders. Common remedies include:

- issuing a declaration that a party has violated the duty to bargain in good faith;
- cease-and-desist orders ordering the party to stop the bad-faith conduct and bargain properly;
- requiring the posting of notices in the workplace affirming the duty to bargain in good faith; or
- order the appointment of a mediator or special officer to assist bargaining.

The Board can also take extraordinary steps in severe cases. For example, in some cases of employer bad faith, boards have ordered the employer to compensate the union for bargaining expenses wasted due to the bad faith. In *Royal Oak Mines* case, the SCC upheld a remedy from the Canada Labour Relations Board which required the employer to re-table an earlier offer and put it to a vote of employees; this effectively forced the employer into a collective agreement on terms it had previously proposed.

In BC, the Board also has the power under Section 55 to intervene and actually impose a *first* collective agreement if bad faith prevents one from being reached:

First collective agreement

55 (1) If a trade union certified as bargaining agent and an employer have bargained collectively to conclude their first collective agreement and have failed to do so, either party may apply to the associate chair of the Mediation Division for the appointment of a mediator to assist the parties in negotiating a first collective agreement.

(2) If an application is made under subsection (1) an employee must not strike or continue to strike, and the employer must not lock out or continue to lock out, unless a strike or lockout is subsequently authorized under subsection (6) (b) (iii).

(3) The associate chair must appoint a mediator within 5 days of receiving an application under subsection (1).

(4) An application under subsection (1) must include a list of the disputed issues and the position of the party making the application on those issues.

(5) Within 5 days of receiving the information referred to in subsection (4), the other party must give to the party making the application and to the associate chair a list of the disputed issues and the position of that party on those issues.

(6) If the first collective agreement is not concluded within 20 days of the appointment of the mediator, the mediator must report to the associate chair and recommend either or both of the following:

(a) the terms of the first collective agreement for consideration by the parties;

(b) a process for concluding the first collective agreement including one or more of the following:

(i) further mediation by a person empowered to arbitrate any issues not resolved by agreement and to conclude the terms of the first collective agreement;

(ii) arbitration by a single arbitrator or by the board, to conclude the terms of the first collective agreement;

(iii) allowing the parties to exercise their rights under this Code to strike or lock out.

According to section 55, either the employer or the union to apply to the associate chair of the Mediation Division for the appointment of a mediator once bargaining for a first agreement has reached an impasse. Once an application is filed under Section 55(1), the associate chair must appoint a mediator within five days. During this period, the employer is prohibited from locking out employees and employees are prohibited from striking.

If a first agreement is still not reached within 20 days after the mediator's appointment, the mediator must submit a report to the associate chair. At that point, the mediator may recommend one or both of two courses of action. First, the mediator may propose specific terms of a first agreement for the parties to consider. Second, the mediator may recommend a process to conclude the agreement that could include further mediation or binding arbitration.

Again, as mentioned, the Board is not a fan of intervening and imposing terms on the parties. However, the section 55 context is such that the employer may be avoiding the union's bargaining authority. There has to be a way to avoid infinite impasse and section 55 is a mechanism that force a first collective agreement on the parties.

Last Offer Votes

Section 78 of the Code creates a unique mechanism known as a "last offer vote" where either party can bypass the bargaining committee and put their final offer directly to the union membership or the employer:

Last offer votes

78 (1) Before the commencement of a strike or lockout, the employer of the employees in the affected bargaining unit may request that a vote of those employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, and if the employer requests that a vote be taken, the associate chair must direct that a vote of those employees to accept or reject the offer be held in a manner the associate chair directs.

(2) Before the commencement of a strike or lockout, the trade union that is certified as the bargaining agent of the employees in the affected bargaining unit may, if more than one employer is represented in the dispute by an employers' organization, request that a vote of those employers be taken as to the acceptance or rejection of the offer of the trade union last received by the employers' organization in respect of all matters remaining in dispute between the parties, and if the trade union requests that a vote be taken, the associate chair must direct that a vote of those employers to accept or reject the offer be held in a manner the associate chair directs.

(3) If a vote under this section favours the acceptance of a final offer, an agreement is thereby constituted between the parties.

(4) The holding of a vote or a request for the taking of a vote under subsection (1) or (2) does not extend any time limits or periods referred to in section 60 or 61.

(5) Only one vote in respect of the same dispute may be held under subsection (1) and only one vote in respect of the same dispute may be held under subsection (2).

(6) If, during a strike or lockout, the minister considers that it is in the public interest that the employees in the affected bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of the employees in the bargaining unit to accept or reject the offer be held forthwith in a manner the minister directs.

(7) If, during a strike or lockout, more than one employer is represented in the dispute by an employers' organization and the minister considers that it is in the public interest that the employers comprising the employers' organization be given the opportunity to accept or reject the offer of the bargaining agent for the employees last received by the employers' organization in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of those employers to accept or reject the offer be held forthwith in a manner the minister directs.

Last offer votes effectively give the broader membership of the bargaining unit or employer group a direct voice in determining whether to accept a proposed settlement. Assuming the conditions are met, a last offer vote allows a party to appeal directly to the other side and hope that it is accepted.

Before a strike or lockout begins, an employer may request that the associate chair of the Mediation Division conduct a vote among the employees in the affected bargaining unit on whether to accept or reject the employer's last offer on all outstanding disputed matters. The associate chair would then direct that the vote be held. If a majority votes in favour of the final offer, it becomes binding and a collective agreement is thereby constituted under Section 78(3).

Each party is permitted only one such vote per dispute. The concern is that allowing more then one would result in repeatedly disrupted negotiations.

It's also possible that a party does not initiate a last offer vote but, in fact, the Minister of Labour could. If it's determined to be in the public interest, the Minister may direct that a vote be held among employees on the employer's final offer or among employers on the union's final offer. This is rare and likely would only be used for disputes with significant public implications.

Last offer votes are very tactical but, if they are successful, they can resolve deadlocks in the bargaining process. In practice, though, they are relatively rare and seldom successful unless the offer is clearly seen as fair.

Statutory Freeze Periods during Bargaining

It was mentioned earlier that the Code has certain "statutory freezes" which help to ensure bargaining is fair. In effect, during bargaining of the collective agreement, the Code implements a "freeze" on changes to the terms and conditions of employment. The hope here is that by implementing the freeze neither the union nor employer cannot undermine the negotiations by unilaterally making changes to the workplace.

The Code contains two main freeze provisions – freeze after certification and freeze after the notice to bargain.

According to section 45(1), once a union is certified as the bargaining agent for a group of employees, the employer is prohibited from certain actions:

Notice to bargain collectively

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

(a) the trade union may by written notice require the employer to commence collective bargaining, or the employer may by written notice require the trade union to commence collective bargaining, and

(b) subject to subsection (1.1), the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until

(i) 12 months after the board certifies the trade union as bargaining agent for the unit, or

(ii) a collective agreement is executed,

whichever occurs first.

Based on section 45(1), the employer is prohibited from changing the employees' wages or other conditions of employment for a period of 12 months or until a first collective agreement is concluded whichever comes first. This is often called the "certification freeze".

Ultimately, the employer must continue "business as usual" with no raises, no cuts, no new adverse policies on the working conditions unless it's part of normal operations or consented to by the union. The freeze kicks in once notice to bargain is given section 45(1.1) of the Code deems notice is given; this happens 90 days after certification.

The purpose of the certification freeze is to prevent an employer from retaliating or reacting to unionization by changing conditions before a contract is negotiated. For example, the employer cannot suddenly slash benefits or give questionable increases to non-union staff in the hopes of building a bias against the union. If a first agreement isn't reached in 12 months, the freeze continues until either a contract is reached or a strike/lockout is allowed.

Foundational Quote

"The intent of Section 45 is to maintain the status quo shortly after certification by prohibiting an employer from unilaterally implementing changes to the terms and conditions of employment which would have a 'chilling effect' on collective bargaining."

Re Sears Canada Inc., BCLRB No. B533/98, at para. 10

Section 45(2) deals with the renewal of an existing collective agreement and the freeze that applies after the notice to bargain has been given.

(2) If notice to commence collective bargaining has been given and the term of a collective agreement that was in force between the parties has expired, the employer or the trade union must not, except with the consent of the other, alter any term or condition of employment, until

(a) a strike or lockout has commenced,

(b) a new collective agreement has been negotiated, or

(c) the right of the trade union to represent the employees in the bargaining unit has been terminated,

whichever occurs first.

Section 45(2) states that after notice to bargain has been given and the contract has expired, neither party may unilaterally change wages or other terms of employment until certain events occur. In other words, even though the old collective agreement may have technically expired, its terms are carried forward.

This bridging of the old collective agreement continues until one of the following happens:

- the parties negotiate a new collective agreement;
- the union goes on strike or the employer locks out; or
- the union's bargaining rights are terminated through decertification or other cause.

If a strike or lockout commences, the freeze ends because the work stoppage is a game-changer; at that point, the employer can make some changes like using replacements or altering operations, within limits of labour law.

In practical terms, the renewal freeze under 45(2) means that after the collective agreement's expiry date, all provisions of the old agreement remain in effect. Employees continue working under the same wages, benefits, work rules, etc., as before. This prevents an employer from, say, locking out the union by changing conditions (like cutting wages 20%) to provoke a strike or force acceptance of its terms. It also protects employees from losing conditions while they wait for a new contract. Essentially, it maintains the balance – the union can't strike until legal

conditions are met, and the employer can't alter conditions until the bargaining process reaches an outcome.

There are two exceptions to the freeze period: business as usual and just cause.

i. Business as Usual

Section 45(3) allows an employer to apply to the Board for permission to make a change in terms or conditions during the freeze if the change is genuinely in the ordinary course of business:

> (3) Despite subsection (1), the board, after notice to the trade union, may
>
> (a) authorize an employer to increase or decrease the rate of pay of an employee in the unit, or alter a term or condition of employment, and
>
> (b) specify conditions to be observed by an employer so authorized.

From the Board's perspective, this exception makes sense because an employer should be able to maintain its usual business operations even if it results in some changes. Truly routine or foreseen changes can be allowed however, the Board would not sanction a change that is tainted by anti-union motives. For example, if an annual merit pay increase was routinely given every July pre-certification, the employer might seek permission to continue that practice rather than freeze employees' merit increases. Another example would be if a downturn required temporary layoffs that are consistent with how the company handled past slowdowns. The Board may allow such changes since they would have occurred regardless of collective bargaining.

If there is a dispute about whether something was truly "business as usual", the Board will examine the employer's past conduct. For example, if an employer announced large layoffs during a bargaining period claiming a business downturn, the union would question if that is consistent with past practice. The Board would likely require the employer to justify that these layoffs were economically necessary and not intended to retaliate or put pressure on the union.

ii. Discipline for Cause

Section 45(4) explicitly clarifies that nothing in the freeze provisions prevents an employer from disciplining or discharging employees for proper cause:

> (4) This section must not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for proper cause.

Again, this exception makes sense. Just because an employer has to maintain terms and conditions doesn't mean they have to accept explicit misconduct by an employee or poor performance. For example, if an employee engages in serious misconduct after certification, the employer can still impose discipline. The freeze is not a workplace freeze which immunizes employees from discipline even if it is a change to the workplace.

Despite these exceptions, the overarching rule is that unions and employers must tread very carefully in making any changes during bargaining. If a party believes the other side has breached the statutory freeze, it can file an unfair labour practice complaint with the Board. The Board can then order the party to reverse the changes.

Conclusion

Collective bargaining is not always straightforward. There is a web of hard rules in the Code but, also the stated goal of ensuring flexibility of the parties to reach their own agreement. Within this framework, there is a structured process from serving notice to bargain, through exchanging and refining proposals, and ultimately to either a tentative agreement or, if necessary, lawful job action.

The duty to bargain in good faith underpins every stage, requiring honesty, diligence, and a genuine attempt to find common ground. Failure to adhere to these duties can lead to legal sanctions and interventions (as in the *Royal Oak Mines* case where bad-faith tactics were remedied by the Board).

With the exception of some mandated provisions, every term in a collective agreement is a product of negotiation and compromise. When collective bargaining works, it results in a collective agreement ratified by the union and employer principals. This finally provides a contract that is acceptable to everyone and goes on to govern the employment conditions at the workplace.

Chapter 4 - Review Questions

1. What is the legal and constitutional foundation for collective bargaining in British Columbia?

2. How does the collective bargaining process begin?

3. What are the responsibilities of the bargaining teams and how do they prepare for negotiations?

4. How are proposals exchanged in collective bargaining? What is the strategic purpose of 'throwaway' demands?

5. How do economic and non-economic items differ?

6. What happens when bargaining reaches an impasse? What dispute resolution options are available under the Code?

7. What is the process of ratifying a tentative agreement and what happens if a ratification vote fails?

8. What does the duty to bargain in good faith entail under Section 11(1) of the Code?

9. What are statutory freeze provisions and how do they function during first contract and renewal negotiations?

10. What is a 'last offer vote' under Section 78 of the Code and when can it be used?

Chapter 5:
Industrial Action

Learning Outcomes:

1. Define and distinguish between legal strikes, lockouts, and picketing under the Code including, the statutory requirements for each.
2. Explain the legal preconditions for a lawful strike or lockout including, strike vote procedures, notice requirements, and the role of the BCLRB in verifying compliance.
3. Assess the restrictions on industrial action during the term of a collective agreement and explain the concept of the "statutory peace period."
4. Interpret the legal limitations on picketing such as the rules surrounding common site picketing, ally doctrine, and lawful consumer leafleting.
5. Analyze the prohibition on the use of replacement workers during a lawful strike or lockout including, the scope of Section 68.
6. Evaluate the legal process and public policy rationale behind the essential services designation under Section 72.

Introduction

For many, the most recognizable elements of labour relations are forms of industrial action. The visible nature of a picket line or locks on a warehouse door are stark indicators of a unionized environment.

Broadly, industrial action refers to the collective measures taken by either workers or employers to exert economic pressure during a labour dispute. In BC, the two primary forms of industrial action are strikes which are initiated by the union on behalf of employees and lockouts which initiated by the employer. These actions typically occur when negotiations for a new collective agreement reach an impasse and are intended to pressure the other side toward a resolution.

While strikes and lockouts can be disruptive, they are recognized as legitimate tools in the collective bargaining process but, are regulated by law to ensure they occur only under certain conditions and in an orderly manner. This chapter provides a comprehensive overview of the legal framework governing industrial action in BC under the Code including, the requirements for lawful strikes and lockouts, the various forms industrial action can take, picketing rights and limitations, the ban on replacement workers, and the special rules for essential services.

Strikes

Within the definitions section of the Code, a strike is defined broadly to include any concerted work stoppage or slowdown by employees that is intended to restrict the employer's operations.

> **"strike"** includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include
>
> (a) a cessation of work permitted under section 63 (3), or
>
> (b) a cessation, refusal, omission or act of an employee that occurs as a direct result of, and for no other reason than,
>
> (i) picketing permitted under this Code, or
>
> (ii) picketing conducted by employees in respect of whom collective bargaining is regulated by the laws of Canada or another province who are locked out or on strike,
>
> and **"to strike"** has a similar meaning;

Generally, the strike is a collective refusal to work or curtailing of work as a means of pressuring the employer during a labour dispute. The Code's definition of strike explicitly covers not only a full cessation of work but also partial measures (discussed below). The only exclusions in the Code notes are certain work stoppages that are during the term of the collective agreement or for reasons unrelated to collective bargaining. In short, any collective job action by employees aimed at pressuring the employer over terms of employment is likely considered a strike.

Forms of Strikes

Not every strike looks the same. Unions have a range of tactics and forms of pressure they can employ under the broad umbrella of strike. Some strikes involve a complete work stoppage, while others may be partial or strategic. All of the following tactics are considered forms of "strike" activity:

i. Full strike

A classic or full strike is when all or most bargaining unit members cease work entirely. In a full strike, workers set up picket lines and perform no duties until the dispute is resolved or the strike is called off. This is the most powerful tool because it completely shuts down the employer's operations.

During a lawful full strike, employees are not entitled to pay and the employer may attempt to continue business with management staff or other means (discussed below under replacement workers).

ii. Rotating strike

In a rotating strike, the union strategically alternates the work stoppage among different departments, locations, or groups of workers on a schedule. For example, the union might strike one work site or one group of employees for a day and then have them return to work while a different location or unit strikes the next day. This tactic spreads the disruption in a way that keeps the employer guessing and can prolong the employer's logistical difficulties while often allowing workers to still earn some wages intermittently. It also helps avoids some of the pain inflicted on the public from the loss of services from the strike.

Employers sometimes respond by imposing a lockout if they believe rotations are unpredictable or frustrating operations to the point where a full cessation of work is necessary.

iii. Work-to-rule

In a work-to-rule campaign, employees do not stop work entirely but instead specifically follow every work rule, policy, or procedure to the letter. Employees will also refuse any discretionary effort or extra work with the goal of reducing productivity. By declining any "above and beyond" tasks, workers significantly slow down operations while technically still working.

Work-to-rule is often used as a form of pressure when an outright strike is not yet undertaken. If done after a legal strike is called, the work-to-rule campaign can be a milder form of job action. For example, a union can issue a strike notice but initially implements a work-to-rule instead of a full walkout.

iv. Overtime ban

An overtime ban means union members refuse to work any overtime hours or refuse callouts beyond their normal shifts. By limiting work to the bare scheduled hours, the union can hurt an

employer that relies on overtime to meet demand. This type of situation is very common in hospitals and utility companies.

Like work-to-rule, an overtime ban legally counts as a strike action because it is a concerted refusal to continue normal work. While overtime may be "voluntary" in contract terms, an *en masse* refusal orchestrated by the union to pressure the employer is seen as part of collective action.

v. Slowdown

A slowdown is a more generalized description of any concerted reduction in work pace or productivity by employees. This could overlap with work-to-rule but, also includes deliberate inefficiencies like workers collectively agreeing to work at half-speed.

Slowdowns are typically either done during an open strike where it's clearly legal to do less work because the strike is in effect. In essence, a slowdown is legally permissible only as part of a sanctioned strike.

vi. Sick-outs

A "sick-out" or "blue flu" is a form of undeclared strike where employees call in sick en masse on the same day or over a short period in order to disrupt operations. The term "blue flu" is sometimes used when police officers or other public servants coordinate a sick-out.

Unions usually deny officially organizing sick-outs but, even an informal understanding among members can be found to violate the Code. For instance, if a union local's members all took sick leave on the day negotiations stalled, the employer could make a complaint that the action is unlawful.

vii. Summary

Despite their differences, all of these forms fall under the legal definition of "strike" in BC. They each act as concerted activities designed to restrict the employer's work. Unions will escalate their actions carefully by, for example, starting with an overtime ban or rotating strikes to increase pressure gradually and then moving to a full strike. All in, the form of strike can vary but, legally, they are treated as strike involving concerted withholding of work or productivity.

Lockouts

A lockout is the employer's counterpart to a strike. The Code defines lockout as an employer's closure of the workplace, suspension of work, or refusal to continue employing a group of employees in order to compel agreement to terms of employment:

> **"lockout"** includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of the employer's employees, done to compel the employees or to aid another employer in compelling that employer's employees to agree to conditions of employment;

Practically, a lockout means the employer shuts down all or part of its operations or bars employees from working. This locking out is not for business reasons like the lack of work but, rather to put economic pressure on the union and employees during the bargaining dispute.

A true lockout is intentional and strategic the employer withholds work and pay to try to force the union's hand in negotiations. The objective, like a strike, is to create enough pressure to encourage a settlement on the employer's terms. If an employer simply was closing temporarily for genuine business reasons that would *not* be deemed a lockout. For example, if you had a seasonal business like a ski hill that closed for the summer, even if the employer and union were still bargaining, the closure would not be considered a lockout provided it was done for genuine business purposes and it was a standard operational decision.

Legal Pre-Conditions for Strikes and Lockouts

While both strikes and lockouts are legitimate forms of job action used to resolve bargaining impasses not every strike or lockout is legal. Engaging in an illegal strike or lockout can have serious legal consequences and the Board has authority to declare the action unlawful, order a cease to the action, and grant other potential remedies. Given that there are tight regulation under which a strike or lockout may occur it's important to outline the legal framework and preconditions that must be satisfied in order for the strike or lockout is lawful.

The starting requirement for a lawful strike or lockout is section 57 of the Code:

Strikes and lockouts prohibited during term of collective agreement

57 (1) An employee bound by a collective agreement entered into before or after the coming into force of this Code must not strike during the term of the collective agreement, and a person must not declare or authorize a strike of those employees during that term.

(2) An employer bound by a collective agreement entered into before or after the coming into force of this Code must not during the term of the collective agreement lock out an employee bound by the collective agreement.

According to section 57, strike or lockouts are not permitted during the term of a collective agreement. So long as a binding collective agreement between the union and employer is in effect, the union cannot strike and the employer cannot lock out the employees covered by that agreement. This prohibition is a heavy restriction on industrial action however, it anchors one of the main goals of the modern Wagner model, that there should be labour stability. If unions or employers could engage in industrial action whenever they choose, even when covered by the collective agreement, it could lead to unnecessary stoppages of production.

Taken together, section 57 really creates a "labour peace" obligation. The collective agreement is essentially a contract in which the union promises not to strike and the employer promises not to lock out for the duration of the agreement. If either side were to take job action mid-contract, it would be an illegal strike or lockout.

Legal Framework for Strikes

The Code lays out several stringent preconditions must be met before a strike or lockout becomes legally permissible. Accordingly, a strike or lockout in BC will be lawful only if all of the following conditions have been satisfied.

i. Collective Agreement is Expired

As highlight above, the collective agreement covering the employees must have expired because a strike is permissible. It is illegal to strike or lockout while an agreement is still in force.

ii. Parties Must Have Attempted Collective Bargaining

The parties must have made a genuine attempt to negotiate a new collective agreement prior to the union striking. The union and employer are required to bargain in good faith (per section 11 of the Code) and typically will have gone through a period of negotiations after the previous agreement expires. Only if bargaining has reached an impasse can strike action be considered.

iii. Strike Vote Must Be Held

In order to strike, the union must seek authorization from its membership. The union must hold a secret-ballot vote and obtain majority support for the action. This requirement is codified in section 60 of the Code:

Pre-strike vote and notice

60 (1) A person must not declare or authorize a strike and an employee must not strike until a vote as to whether to strike has been taken in accordance with the regulations by the employees in the unit affected, and the majority of those employees who vote have voted for a strike.

(2) If on application by a person directly affected by a strike vote or an impending strike, or on its own behalf, the board is satisfied that a vote has not been held in accordance with subsection (1), the board may make an order declaring the vote of no force or effect and directing that if another vote is conducted, the vote must be taken on the terms the board considers necessary or advisable.

(3) Except as otherwise agreed in writing between the employer or employers' organization authorized by the employer and the trade union representing the unit affected, if the vote favours a strike,

(a) a person must not declare or authorize a strike, and an employee must not strike, except during the 3 months immediately following the date of the vote, and

(b) an employee must not strike unless

(i) the employer has been served with written notice by the trade union that the employees are going on strike,

(ii) written notice has been filed with the board,

(iii) 72 hours or a longer period directed under this section has elapsed from the time written notice was

(A) filed with the board, and

(B) served on the employer, and

This means a majority of the voting members in the bargaining unit must vote in favour of a strike mandate. The results of the strike vote must also be filed with the Board before any action is taken.

Importantly, a strike or lockout vote mandate is only valid for 3 months from the date the vote is taken. If the union or employer does not commence job action within 3 months of a successful vote, they must hold a new vote to refresh their mandate before proceeding.

iv. 72-Hour Notice

Section 60 also places further requirements in relation to the strike:

> (3) Except as otherwise agreed in writing between the employer or employers' organization authorized by the employer and the trade union representing the unit affected, if the vote favours a strike,
>
> (a) a person must not declare or authorize a strike, and an employee must not strike, except during the 3 months immediately following the date of the vote, and
>
> (b) an employee must not strike unless
>
> (i) the employer has been served with written notice by the trade union that the employees are going on strike,
>
> (ii) written notice has been filed with the board,
>
> (iii) 72 hours or a longer period directed under this section has elapsed from the time written notice was
>
> (A) filed with the board, and
>
> (B) served on the employer, and

Accordingly, even after securing a strike vote mandate, the union must give at least 72 hours' advance written notice of any strike to the employer *and* to the Board. This is required because we want to avoid sudden work stoppages; the 72-hour notice gives the employer and, just as important, the public, some warning that there is about to be a strike action.

The 72-hour period begins when notice is delivered and filed with the Board. There are a couple of narrow exceptions to the 72-hour rule. First, the Board may extend the notice period in disputes involving perishable goods; this is to allow perishable like food products to be secured. Second, if a government-appointed mediator is actively involved in the dispute, the parties cannot strike or lockout until 48 hours after the mediator has "reported out" (i.e. officially notifies that mediation has failed).

Outside of essential services (discussed further below), once the 72 hours have passed, the union is free to initiate a strike at any point thereafter within the valid 3-month mandate period.

v. No Contravention of Settlement Processes (Mediation/Boards)

In some cases, the Board or the Minister of Labour might have appointed a mediator or fact-finder (under Code section 74 or 65) to assist in bargaining. As noted, the mediator must have concluded their efforts by reporting out 48 hours before a lawful strike. Additionally, the Minister *in rare cases* can direct the Board to conduct a last offer vote (section 72 of the Code) or establish an industrial inquiry commission. If such either option is underway, the timing of the strike would be affected.

vi. Essential Services Compliance

Essential services are services designated as essential to preventing an immediate danger to the health, safety, or welfare of the public. If a strike would involve essential services then job action cannot proceed until an Essential Services Order is in place and complied with. This means that where essential services are at issue, the union and employer must have received either an agreement or a ruling from the Board on what minimum level of services will be maintained. Effectively, section 72 of the Code allows the Board to designate essential services a strike cannot lawfully begin until that's done.

Essential services are discussed in detail later in this chapter but, the key point here is that the normal right to strike is limited for workers who perform essential public services.

Legal Framework for Lockouts

Similar to the criteria for strikes, there's also a variety of restriction on lockouts in the Code. Interestingly, so many of the elements overlap with the strike restrictions however, as lockouts are moved by the employer, there are some differences as well.

The following are the legal requirements for a valid lockout under the Code.

i. Collective Agreement is Expired

A lockout cannot occur while a collective agreement is still in force. As mentioned, section 57 of the *Code* prohibits any form of strike but also, lockouts during the life of an agreement. Employers must wait until the agreement has expired before they can initiate a lawful lockout.

ii. Parties Must Have Attempted Collective Bargaining

Before initiating a lockout, the employer must have bargained in good faith with the union (as required under section 11 of the *Code*) and have reached a genuine impasse. Lockouts are meant to pressure the union to accept new contract terms, but there must still have been an attempt at meaningful negotiations. This ensures strikes/lockouts are a last resort, not a first response.

iii. Lockout Vote Must Be Held

It may seem odd that employer would hold a "vote" – they can make decisions as they wish and not consult with anyone. However, there are situations where there may be situation where an employer is part of employers' association and, if that's the case, then they would have to vote as a group on whether to lockout.

If a vote is required among the association then it would need majority support for the lockout just like a strike vote as stated in section 60 of the Code. The lockout vote is valid for three months, and if the employer does not act within that window, a new vote must be held.

iv. 72-Hour Notice

Assuming a lockout vote is held within the employers' association, the lockout can still not immediately proceed. The employer must provide at least 72 hours' written notice of the intended lockout to both the union and the Board. This notice period allows the union and employees to prepare for the interruption of work and mirrors the requirement imposed on unions in the case of strikes. Like strike notices, the 72-hour period begins when the last of the two notices to the union and the Board is received. Once the 72 hours have elapsed, the employer may proceed with the lockout at any time during the three-month validity of the mandate.

v. No Contravention of Settlement Processes (Mediation/Boards)

As with strikes, if a mediator has been appointed by the Board or Minister the employer must wait 48 hours after the mediator has formally "reported out" before initiating a lockout. The presence of active mediation or an industrial inquiry commission may temporarily suspend the ability to engage in job action.

vi. Essential Services Compliance

Continuing the strike similarities, a lockout cannot proceed until the Board has issued an Essential Services Order when essential services are engaged. If such an order has not been finalized, any attempt to lock out employees is unlawful.

Picketing

When a strike or lockout is in progress, a key aspect of industrial action is picketing. Picketing involves struck or locked out workers gathering at or near the employer's place of business to publicize the dispute and persuade others not to enter or do business with the employer.

Picket lines are the most identifiable symbol of a strike or lockout. The picket lines operate as a protest and as a way to press economic pressure. Picket lines can result in discouraging deliveries or customers to the struck employer. In BC, picketing activity is also regulated by the Code but, interestingly, are also shaped by court decisions.

Not all picketing is exactly the same. There are typically differences and important limitations imposed depending on where the picketing is taking place. The following outlines the various types of picketing which can be conducted by the union.

Primary Picketing

Primary picketing refers to picketing at the struck employer's premises where the dispute exists. It makes sense that, once a strike or lockout is legally underway, the union has the right to picket at the employer's place of business to further its cause.

However, the Code does impose some conditions on *where* and *how* even primary picketing can occur. Section 65(3) of the Code starts with a limit picketing to locations where the striking employees normally work and which are under the control of the struck employer.

> (3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

Generally, then, employees can only picket at the site of the lawful job action meaning the actual workplaces of the employer that are a significant part of its operations. This prevents, for example, a union from roaming around to picket other facilities not directly related to the bargaining unit's work. As long as picketers confine themselves to their employer's premises, this is primary picketing and is generally lawful.

Secondary Picketing

Secondary picketing means picketing someone other than the primary employer or at a location other than the struck workplace. This type of second-site picketing can include actions such as picketing at a retail store that sells the struck employer's products or at a supplier or related company's premises. You can imagine that the ability to picket at second sites is highly valuable to the union as it increases the pressure during job action – now a second site can be dragged into the union dispute.

Historically, secondary picketing was heavily restricted in Canada. Before 2002, many courts followed *Hersees of Woodstock Ltd. v. Goldstein*, [1963] 2 O.R. 81, a case from the Ontario Court of Appeal that ruled *all* secondary picketing was illegal as an unlawful interference with trade. This changed in 2002 with the landmark case of *RWDSU v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 ("*Pepsi-Cola*"), where the SCC ruled that secondary picketing is generally lawful provided it does not involve any unlawful acts. The SCC in *Pepsi-Cola* recognized picketing as a form of expression protected by the Charter of Rights and held that there is no general prohibition on picketing a secondary target unless the picketers engage in tortious or criminal conduct.

Foundational Law - RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8

The dispute in *Pepsi-Cola* arose from a labour dispute in Saskatchewan between Pepsi-Cola and members of the Retail, Wholesale and Department Store Union, Local 558. After a legal strike and lockout began at Pepsi's bottling plant, the union expanded its protest efforts. These included picketing at retail outlets selling Pepsi products, a hotel where replacement workers were staying, and the private homes of Pepsi's management.

Pepsi-Cola obtained an injunction from the Saskatchewan Court of Queen's Bench that restrained the union from picketing at any location other than Pepsi's business premises. The Saskatchewan Court of Appeal overturned that part of the injunction, holding that peaceful picketing at secondary locations was not unlawful *per se* unless accompanied by tortious or criminal conduct.

The SCC upheld the Court of Appeal's decision. In its decision, the SCC sought to clarify that secondary picketing is generally lawful under Canadian common law unless it involves independently wrongful acts like trespass, nuisance, intimidation, or defamation. The SCC rejected *Hersees of Woodstock Ltd. v. Goldstein* which held that secondary picketing was automatically unlawful, declaring that the *Hersees* approach was out of step with modern constitutional values.

The SCC held that picketing is a protected form of expression under the Charter of Rights and Freedoms and must not be unjustifiably restricted. The justices stated, "Both primary and secondary picketing engage freedom of expression, a value enshrined in s. 2(b) of the Charter." (para. 34).

Instead of an automatic ban on secondary picketing, the Court endorsed a "wrongful action model". Effectively this meant that picketing is only unlawful if it involves independently wrongful conduct. As the SCC put it "the wrongful action approach focuses on the character and effects of the activity as opposed to its location." (para. 33). This approach was seen to better balance the constitutional values of striking and third-party rights.

The SCC also affirmed that picketing outside private homes, particularly where it involved threats or intimidation, could still be banned. But peaceful picketing at locations like retail stores or hotels, even if unrelated to the immediate worksite, could not be broadly banned without infringing expression rights.

Accordingly, unions can extend their picketing to third parties as a means of putting pressure on the primary employer, as long as they remain peaceful and do not, for example, trespass on private property, blockade completely, or commit defamation, mischief, assault, etc. The general principle from *Pepsi-Cola* is that location alone is not determinative; it's the nature of the conduct that matters.

That said, British Columbia's law adds another layer via the Code. Section 65 of the Code places certain statutory limits on secondary picketing in labour disputes, primarily through the concepts of "ally" picketing and common-site picketing. Essentially, while *Pepsi-Cola* opened the door for secondary picketing under general law, the Code provides a framework to regulate it, aiming to protect third parties from harm arising from the job action.

i. Ally Picketing

Section 65 refers to speaks to when allies of the struck or locked out workplace can be picketed. Firstly, section 65(1) defines who is an ally:

> **Picketing**
>
> **65** (1) In this section:
>
> **"ally"** means a person who, in the board's opinion, in combination, in concert or in accordance with a common understanding with an employer assists the employer in a lockout or in resisting a lawful strike;

Accordingly, an "ally" is a person or company who assists the struck or locked out workplace. If a third-party business is actively helping the struck employer to bypass the strike or mitigate its effects that business can be declared an ally. An ally business might do some of the struck work or supply workers, facilities, or products to the struck workplace.

> (2) A person who, for the benefit of a struck employer, or for the benefit of an employer who has locked out, performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, must be presumed by the board to be the employer's ally unless the person proves the contrary.

In order to picket an ally, the union must apply to the Board. The Board then is the one who makes the determination on if a particular person/company is an ally. If the Board finds ally status, it may permit the union to picket at the ally's place of business as if it were a primary target.

As an example, suppose a struck employer shifts work to another factory or subcontractor to avoid the impact of the strike; the union could ask the Board to declare that second site an ally so that it can lawfully picket there and pressure the ally to stop undermining the strike. If the Board agrees, it will issue an order allowing ally picketing at that site. If the Board does not find the third party to be an ally, then union members picketing there would risk legal consequences.

Essentially, the ally determination attempts to strike a balance. The Board wants to protect neutral third parties who are not involved in the labour dispute, but it also wants to allow unions to reach those who coordinate to assist the struck worker.

ii. Common Site Picketing

Section 65 also speaks to what is called "common site picketing":

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

Common site picketing addresses the problem that can sometimes arise where the primary employer shares a work site with other unrelated businesses. For example, a mall or office building might multiple companies operating and then suddenly there is a labour dispute with one employer. Similarly, you might a construction site with multiple contractors and again, job action commences. Does the union of one employer get to disrupt operations for all the non-involved companies at the site?

The issue here is that picketing at a "common site" could unintentionally impact the neutral businesses since a picket line at a shared entrance might deter employees or customers of all businesses at that location.

To address this, section 65(6) and 65(7) of the Code empowers the Board to regulate common-site picketing:

> (6) The board may, on application or on its own motion, make an order defining the site or place at which picketing that is permitted by subsection (3), or that is permitted under subsection (4), may take place.
>
> (7) If the picketing referred to in subsection (6) is common site picketing, the board must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4), in which case the board may regulate the picketing as it considers appropriate.

The Board will typically issue a common site picketing order that limits where and how picketing can occur on a shared premises. The hope is that such an order will thread the needle - allow the union to effectively picket the primary employer at the site while minimizing disruption to the other tenants or businesses not involved in the dispute. For example, a common site order may require that picketing be confined to a particular gate or entrance that the primary employer's employees and suppliers use (sometimes known as a "reserved gate" system) leaving the other entrances free for neutrals. Or it may limit the number of pickets and specify that picketers must allow free passage to employees of other companies.

One might think that the SCC decision in *Pepsi- Cola* means that BC unions should just have the ultimate right to picket as long as its not wrongful. While *Pepsi-Cola* protected peaceful picketing, it didn't remove the Board's authority under the Code to regulate labour picketing. Again, section 65 constrains the secondary site picketing to those authorized as ally or common site. The Board could find that secondary picketing might still be in breach of the Code if it violated section 65.

In practice, BC unions typically seek a Board declaration for secondary sites. Failure to do so could result in the Board declaring the union's actions illegal under the Code even if they might be lawful under general common law.

Foundational Law - *Gateway Casinos & Entertainment Limited*, 2025 BCLRB 67

In Gateway Casinos & Entertainment Limited, 2025 BCLRB 67, the British Columbia Labour Relations Board addressed a significant constitutional challenge to the province's restrictions on secondary picketing under sections 65(3) and 65(8) of the *Labour Relations Code*. The case arose from a strike initiated by the BC General Employees' Union (BCGEU) at four Gateway-owned casinos in the Okanagan region. The union's key objective was to achieve wage parity with workers at Gateway's Lower Mainland locations. However, the BCGEU was legally prohibited from picketing at those other, non-struck sites because its members did not ordinarily work there. The union argued that these restrictions effectively neutered their ability to apply pressure during bargaining, as Gateway could continue operating and generating revenue at other locations unaffected by the strike.

The legal question was whether these Code provisions unjustifiably infringed the union's Charter-protected rights to freedom of expression (section 2(b)) and freedom of association (section 2(d)). It was undisputed by all parties that picketing is expressive activity and that the Code's limits did infringe section 2(b). The core issue was whether these limits also interfered with freedom of association and, if so, whether such infringement could be justified under section 1 of the *Charter*.

The Board made an important doctrinal move by recognizing picketing as falling under section 2(d) in addition to section 2(b), stating:

> "If the right to withdraw services in the form of a strike is a necessary component of meaningful collective bargaining… so must the right to picket." (para. 72)

Nonetheless, the Board concluded that the restriction did not amount to a substantial interference with meaningful collective bargaining under section 2(d). The Board found that although Gateway benefitted economically from non-struck sites, the union's legal right to picket does not automatically extend to locations where the union has no representational

rights or certification. Allowing picketing at such sites would violate the foundational structure of the Code that ties strike and picket rights to specific bargaining units.

In rejecting the union's claim that this amounted to a restriction on primary picketing, the Board emphasized the importance of respecting the scope of the union's certification:

> "The union has no relationship with the employees at the employer's other operations for the purpose of the labour dispute… while I appreciate the frustration… I find that it is insufficient to overcome the fact that the employees at those operations are strangers to the labour dispute." (para. 91)

Even assuming the restrictions substantially infringed the Charter, the Board found that the infringement could be justified under section 1. The Board accepted that the legislative purpose of these provisions — to protect neutral third parties and maintain a balanced, orderly labour relations framework — is both pressing and substantial. The limitations were found to be proportionate to that objective.

In conclusion, the Board upheld the constitutionality of BC's restrictions on secondary picketing, reinforcing the principle that lawful picketing must be grounded in the representational scope of the certified bargaining unit. While affirming the expressive and associative nature of picketing, the decision reflects a careful balancing of rights within a legislative scheme designed to manage the economic and social impacts of labour disputes.

Conduct during the Pickets

The conduct of picketing must always remain peaceful. Picketers can display signs, chant, and ask people not to enter but, they cannot use force, threats, or physically block people from crossing the line. Physical obstruction or violence on a picket line is not protected and can lead to court injunctions or criminal charges even if the strike itself is legal.

The Board has authority over the location and timing of picketing while the courts retain authority over misconduct on picket lines (for example, assault or nuisance). This means the Board can order picketers to move or limit their numbers/hours if they are in an improper location but, if there's harassment or blockades, the employer would likely go to BC Supreme Court for an injunction against that behaviour.

As mentioned previously, job action, including picketing, is limited to times when a lawful strike or lockout is in effect. It is not legal to picket an employer when you are not on strike/lockout and doing so would be considered illegal picketing and possibly an unlawful strike.

Respecting the Picket Lines

In any labour dispute involving picketing, a wide range of people may encounter a picket line — from the striking workers themselves to uninvolved members of the public. While picketing is protected as a form of expressive activity when it accompanies a lawful strike or lockout, the rights and obligations of those encountering a picket line vary considerably depending on their role and relationship to the dispute.

i. Striking Employees

Striking employees are the union members of the bargaining unit on strike and they are entitled to lawfully picket at locations permitted under the Code. During a legal strike, these employees are not considered to have abandoned their employment; rather, their employment is suspended during the job action.

Striking union members are generally expected to honour the picket line during a lawful strike, and failure to do so may carry consequences within the union itself. Most unions have internal rules and constitutions that govern member conduct during labour disputes including the obligation not to undermine collective strike action. If a striking member attempts to cross the picket line — for instance, by returning to work or performing struck duties — the union may view this as a breach of solidarity or a form of strikebreaking. In response, the union has the authority to initiate internal disciplinary proceedings. Penalties can range from formal reprimands to financial fines, and in more serious cases, a member may be expelled from the union entirely. Such disciplinary measures are intended to preserve collective strength and ensure the effectiveness of the strike. These consequences are enforceable under union governance processes and, depending on the circumstances, may also be supported by labour board rulings if challenged.

ii. Unionized Workers Not on Strike

Unionized workers who are not on strike include workers who are unionized under a different employer or union members from a different bargaining unit of the same employer. These individuals do not automatically have the right to refuse to cross another union's picket line. Despite that, many union members feel a strong solidarity and may be reluctant to cross a lawful picket line.

Some collective agreements contain a "picket line clause" that allows unionized employees to refuse to cross another legal picket line without disciplinary penalty. For example, a truck driver whose union contract says he can refuse to make deliveries to struck workplaces can turn away at a picket line. Absent such a clause, however, a unionized worker who is expected by their employer to cross a picket line (because their own employer isn't part of the dispute) could face a dilemma. If they honour the picket line and refuse to work, their employer may consider it misconduct (an illegal strike on their part). That said, if crossing the picket line raises legitimate safety concerns, any worker — unionized or not — may have the right to refuse unsafe work under occupational health and safety laws.

BC law does *not* generally protect workers for respecting another union's picket line – that would be seen as an unlawful secondary strike in most cases. Thus, other unionized workers must weigh the consequences. Some will choose to refuse and take the chance of discipline while relying on union solidarity to back them. Others will cross, perhaps under protest, to keep their own jobs secure. Ultimately, a moral stance of solidarity is not legally protected by default.

iii. Non-Union Workers

Non-unionized workers, such as contractors, delivery drivers, or employees of third-party firms, face even fewer legal protections if they decline to cross a picket line. These individuals typically have no legal right to refuse work due to a picket line. Without collective agreements to invoke, these individuals are typically required to perform their work assignments as usual.

For instance, if a delivery driver who is not in a union arrives at a struck facility, their employer can insist they complete the delivery. If the driver refuses purely out of sympathy, that could be grounds for discipline or dismissal by their employer.

Refusing to cross a picket line for moral or political reasons is not a protected right under the *Code* and may be treated by the employer as insubordination or abandonment of duties. This could actually result in the termination of the non-union worker's employment. However, as with all workers, non-union employees may lawfully refuse to cross if they reasonably believe their health or safety is at risk.

There is one exception which is that workers in BC (even non-union) cannot be required to perform the job of striking workers if it's not part of their own normal work. For example, if a company's unionized workers strike, the employer cannot compel a non-union subcontractor's employees to come in and do those exact jobs – that would run afoul of the replacement worker ban (discussed later) and potentially subject those workers to the picket line conflict. But for their own usual work, non-union workers are generally obligated to work despite someone else's picket line.

iv. Management

Management and supervisory personnel of the struck employer are generally expected to cross picket lines to maintain business operations. Because they are not part of the bargaining unit, they are permitted to perform struck work. Usually, picketers will let managers through after giving them an earful or a delay. Management does have the right to call police or seek court help if picketers are unlawfully blocking access.

Under BC law, management staff can perform the work of strikers (since they are not "replacement workers" in the sense of being new hires or contractors – they are existing employees of the employer).

The Code does *prohibit* employers from forcing someone who "ordinarily works at the struck location" to do struck work *without their consent* but – managers would usually be willing participants in keeping operations going. If a manager refuses (say, due to sympathy or fear of

crossing), that becomes an internal employment issue – theoretically they could be fired for insubordination, though in professional practice that is rare during a short labour dispute.

Overall, managers have an obligation to the employer to maintain operations and thus will almost always cross picket lines and potentially do bargaining unit work to whatever extent allowed.

v. Members of the Public

Members of the public, such as customers or clients of the struck business, are free to choose whether to cross a picket line. Picketing is as much about influencing public opinion as it is about workers, so unions try to convince customers not to patronize the struck employer during the dispute. For example, the union will urge shoppers not to shop at a store or ask trucks to turn away.

Legally, the public cannot be forced to honour a picket line. If the public member wishes to enter the business, they can. Pickets cannot threaten or assault them. If a picket line becomes coercive like physically blocking a customer's car or intimidating people, the employer can get an injunction.

Customers who do cross will usually have to pass through picketers but should otherwise not be impeded. In union-friendly communities, picket lines can significantly reduce customer traffic as many choose to stay away until the dispute is over.

Replacement Workers

One of the most emotional and controversial issues in Canadian labour relations is the use of replacement workers during a strike or lockout. Often referred to as "scabs" by unions and "temps" or "contingency workers" by employers, replacement workers represent a flashpoint where labour disputes job can escalate into personal, social, or even violent confrontation. This tension was tragically present the *Royal Oak Mines* strike at the Giant Mine in Yellowknife, Northwest Territories which was referred to earlier.

In 1992, during a bitter labour dispute between Royal Oak Mines and the Canadian Association of Smelter and Allied Workers (CASAW), the employer brought in replacement workers to keep operations running. Striking miners, already facing layoffs, lost wages, and highly combative labour relations, viewed the replacements as a betrayal. For some union members, the conflict grew hostile.

On September 18, 1992, a powerful underground bomb exploded in the mine, killing seven replacement workers and two union members who had crossed the picket lines to continue their work. A union member, Roger Warren, was eventually convicted of planting the bomb and although the union leadership was not found to be involved, the event was one of the worst instances of labour-related violence in Canadian history.

What's clear from the Giant Mine incident is that the use of replacement workers is not only a tactical question in collective bargaining; it's a deeply charged issue. From the union's perspective, allowing employers to bring in replacement workers undercuts the very purpose of a strike which is to withhold labour as a form of pressure. If an employer can operate business as usual during a strike, the union's leverage is essentially neutered. On the other hand, employers argue that being able to continue operations, especially in long strikes where permanent business loss is a risk, is necessary to protect the viability of the business and the jobs of those who do return to work. The question then becomes: how far can we go in protecting the right to strike while also preserving the employer's ability to function?

British Columbia, Quebec, and the Federal level of government are the only jurisdictions that have banned the use of replacement workers during a lawful strike or lockout. The remaining Provinces permit some form of replacement workers to be used by employers.

British Columbia Ban on Replacement Workers

Section 68(1) of the Code provides a comprehensive prohibition on the use of replacement workers during labour disputes:

Replacement workers

68 (1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,

(a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,

(b) who ordinarily works at another of the employer's places of operations,

(c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if the person was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, or

(d) who is employed, engaged or supplied to the employer by another person,

to perform

(e) the work of an employee in the bargaining unit that is on strike or locked out, or

(f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.

In essence, an employer in BC cannot staff its struck or locked-out operations with outside people to perform the work of the union members on strike. The Code specifies several categories of workers that the employer must not employ or contract for this purpose.

i. New hires after the notice to bargain

The employer cannot hire or engage any person after the start of the contract negotiations (i.e. after notice to commence collective bargaining has been given) and use them to do the work of the striking/locked-out employees. This prevents an employer from recruiting extra staff on the eve of a dispute in order to break a strike. If someone was hired specifically during bargaining to take over potential struck duties, they are treated as a replacement worker and barred from such duties if a strike occurs.

ii. Employees from another location of the employer

The employer cannot take an existing employee who ordinarily works at another of the employer's locations and bring them into the struck workplace to perform struck work. For example, if a company has a second plant or an office elsewhere not affected by the strike, it can't redeploy those employees into the striking plant to fill in. Those employees are considered "replacement workers" under the law if used in that way, even though they already work for the same employer (just at a different site).

iii. Transferred employees

Similarly, the employer cannot transfer an employee to the struck location after bargaining begins, if the purpose is to have them do the work of the strikers. This closes a potential loophole in that an employer might try to transfer, say, a manager or a worker from another branch into the bargaining unit's location during a dispute. Section 68 disallows any such transfers for strikebreaking purposes. If the transfer occurred *before* bargaining notice, it's valid, but any transfer after that date is suspect.

iv. Contracted workers from outside (including temps or other companies)

The employer cannot use a person who is "employed, engaged, or supplied to the employer by another person" to perform the work of the strikers. This covers contracting out and temp agencies. During a strike, the employer cannot bring in a contracting firm's workers or temp agency workers to do the jobs of the union members.

v. Tandem arrangements

The Code also prohibits doing indirectly what is forbidden directly. An employer cannot use any of the above types of individuals to do the work of someone else, who in turn is assigned to do the strikers' work. For example, the employer can't bring in a manager from another location to do *Manager A's* job, while assigning Manager A to perform the union work on the line – that maneuver would also breach section 68. Essentially, any personnel shuffle aimed at backfilling the duties of strikers is unlawful, if it involves outside hires, transferred staff, or employees from other sites doing the struck work.

Restriction on Performing "Struck Work"

Under section 68, replacement workers cannot perform "struck work" during a strike or lockout. The term "struck work" refers to any duties or tasks that would have been performed by

bargaining unit employees if not for the existence of a labour dispute. More specifically, section 68(1)(e) and (f) refer the work that cannot be performed as follows:

> (e) the work of an employee in the bargaining unit that is on strike or locked out, or
>
> (f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.

Accordingly, section 68 prohibits employers from using replacement workers to perform the work of striking or locked-out employees if that work is ordinarily done by a member of the bargaining unit or would have been done by the bargaining unit but for the strike/lockout.

The determination of what constitutes "struck work" hinges on the "but for" test. In essence, we ask would the work have been carried out by a member of the bargaining unit had the labour dispute not occurred. If the answer is yes, the performance of that work by another individual during the dispute is generally unlawful. While tricky and very context-specific, the Board would examine the nature of the duties, the structure of the workforce, and historical work assignments to determine if a bargaining unit member would normally do the work.

For example, imagine there is a legal strike by unionized "housekeeping" staff at a large downtown hotel. Management hires new temporary workers to clean guest rooms, change linens, and restock bathroom supplies. These tasks are ordinarily and exclusively performed by the bargaining unit housekeepers. The Board would find that the replacement workers are performing struck work because *but for* the labour dispute, unionized housekeepers would have done the work. The replacement workers are simply filling in for striking employees. Therefore, the work falls squarely within the definition of struck work under section 68.

On the flip side, imagine during the same strike at the hotel, the employer brings in an external contractor to install a new automated key card system and digital room locks. This installation was planned months in advance and no member of the bargaining unit has ever performed such technical installation or configuration work. Here, the work is not struck work because it does not meet the "but for" test. Even if the labour dispute had not occurred, members of the bargaining unit *would not* have carried out the specialized key card installation. So, bringing in contractors for this specific task would likely be permissible under section 68.

Ultimately, the but for requirement ensures that employers cannot circumvent the job action rights by redirecting the same work to other workers – whether they are contractors or non-union members.

Who Can Perform Struck Work in BC?

The only people the employer can use to perform the struck work are those who choose to cross the picket line or management/supervisory staff who were already working at that location prior to bargaining (since those are not new hires or transfers).

However, even if there are such workers, the employer cannot require someone who normally works at the struck location but is outside the bargaining unit to do struck work without their consent. This means, for example, if there are some non-union staff or managers at the site, the employer can ask but not force them to cover for strikers. In reality, most managers will consent or feel compelled by duty to help but, if a manager absolutely refuses to do the work of strikers, the Code gives them a right to refuse without punishment.

Violating the Replacement Worker Ban

Violating the replacement worker ban is taken seriously by the Board. Even a relatively minor infraction is deemed unlawful. For violations, the affected union can file a complaint with the Board which will investigate on a fast track.

Since the union often cannot easily observe what's happening inside the workplace, the Board requires the union to present as much evidence as it reasonably can. For example, reports of unfamiliar individuals entering the site or specific names/companies involved. The Board has powers to subpoena records or examine who is doing the work. If the Board finds a violation, it can order the employer to cease using the improper replacement workers immediately. It can also impose other remedies including, monetary penalties or declarations that could affect the bargaining leverage.

Foundational Law - North Shore Winter Club, BCLRB No. B114/2013

In 2013, the North Shore Winter Club in North Vancouver had locked out its unionized employees. The club, seeking to maintain its facilities, hired an outside contractor to perform groundskeeping (lawn mowing, etc.) and brought in a replacement worker to operate the Zamboni to due the ice resurfacing. The landscaping jobs and the ice re-surfacing were tasks normally done by the locked-out union employees. The union, CUPE, filed a complaint that these were illegal replacement workers.

Board Vice-Chair Mistry found that the club had violated section 68. The outside contractor for landscaping and the temporary Zamboni driver were both performing bargaining unit work during the lockout. The club tried to defend itself by arguing that it always used some contractors for lawn care and that the Zamboni driver had been hired before bargaining (implying it wasn't solely to undermine the lockout). However, the Board was not convinced and found that the use of the workers went against the spirit and letter of the replacement worker ban.

The Board issued a warning and ordered the club to stop using those workers immediately. Interestingly, the Board *did not* levy fines – instead finding the breach was not egregious enough for financial penalties. However, nonetheless the Winter Club was found to be in violation of section 68 and ordered to prevent further violations.

Summary

From a broader perspective, BC's ban on replacement workers is aimed at preserving a balance in bargaining power. The absence of replacement workers means an employer cannot readily operate at normal capacity during a strike which puts pressure on the employer to settle.

In labour disputes, unions closely monitor struck workplaces for any sign of outside workers being used. Employers, on advice of counsel, usually prepare contingency plans that rely on existing management staff or adjusting operations rather than bringing in new people.

The replacement worker ban does not mean an employer must shut down entirely. They can continue operating with those employees not in the bargaining unit or even ask bargaining unit members to return and cross picket lines though, it's rare and such individuals may face union discipline.

Essential Services

While the law acknowledges the right to strike or lockout as economic leverage, there is an important limitation when it comes to work that affects the broader public welfare. "Essential services" are those services whose interruption could endanger the health, safety, or welfare of the public. According to the Code there are valid restrictions on the right to strike or lockout when workers are considered essential. The goal with the restrictions is to strike a balance between allowing labour disputes to proceed while also protecting the public from serious harm from the loss of the struck services.

Section 72 of the Code addresses how strikes and lockouts are regulated in sectors that involve essential services:

Essential services

72 (1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,

(a) investigate whether or not the dispute poses a threat to the health, safety or welfare of the residents of British Columbia, and

(b) report the results of the investigation to the minister.

(2) If the minister

(a) after receiving a report of the chair respecting a dispute, or

(b) on the minister's own initiative

considers that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.

Under *section 72*, if a labour dispute "poses a threat to the health, safety or welfare of the residents of British Columbia", the Minister of Labour may direct the Board to designate essential services that must be maintained. The Board can then issue an Essential Services Order that requires a certain level of work to continue despite the strike or lockout.

Examples of sectors that commonly involve essential service designations include health care (hospitals, acute care, long-term care), emergency services (ambulance paramedics), electricity and natural gas utilities, and sometimes education depending on the context. Another example is snow removal or highway maintenance in winter where a strike could threaten public safety on roads.

The legal threshold for essential services is high. The Board typically applies the test of whether a withdrawal of services would cause "immediate and serious danger" to the health, safety, or welfare of the public. This includes risks such as threats to life, severe health impacts, or significant threats to public order. Inconvenience or economic disruption, assuming if it causes some financial pain, does not meet this standard.

For example, imagine a labour dispute involving hospital support staff, the Board may require that a core team of workers continue providing cleaning and sterilization services in emergency wards to prevent the spread of infections. Similarly, if ambulance dispatchers are involved in job action, an Essential Services Order could compel the continued operation of 911 emergency medical services to prevent lapses in life-saving care.

Conversely, in cases where services, while important, do not pose an *immediate* risk to health or safety, essential services may not be designated. For example, if unionized administrative staff at a provincial health authority go on strike, and their duties involve scheduling non-urgent appointments or maintaining records, these functions might not qualify as essential. The Board would assess whether the temporary suspension of these tasks actually risks public safety. If it doesn't then the work could lawfully be suspended during a strike.

Generally, both the employer and union have a sense that essential services might be in play prior to the launch of job action. In these types of situations, the Code encourages the parties to in advance to work out which jobs or tasks must continue during a strike. The Board strongly encourages parties to meet at least 3 months before the contract expiry to negotiate an essential services plan in the event that there a strike or lockout. To go back to our hospital example, the hospital and the nurses' union might agree on emergency room staffing will be maintained at a certain level even if there a strike. If the parties can agree on what is needed (how many staff, in which units, on what shifts), they can present that to the Board to be formalized in an order. The Board prefers this because really, it's the union and employer who know the workplace operations best. If they cannot agree on the levels, either party can apply to the Board for assistance. Usually, the Board will appoint a mediator to help determine essential service levels.

Foundational Law - *British Columbia Public School Employers' Association (BCPSEA) and the British Columbia Teachers' Federation (BCTF)*, 2011 BCLRB No. B214/2011

An essential services dispute during the 2011 round of bargaining between the employer, British Columbia Public School Employers' Association (BCPSEA), and the union, British Columbia Teachers' Federation (BCTF). At the heart of the dispute was whether the preparation and distribution of student report cards should be classified as an essential service during Phase 1 of BCTF's job action.

In July 2011, the Board issued an Essential Services Order following ministerial direction. The order, which was largely based on a mediated agreement between the parties, included a specific provision allowing BCTF members to withhold report cards during Phase 1 of job action. This provision had precedent - it had also been part of essential services orders in both 2001 and 2005.

BCPSEA later applied to the Board to vary the order arguing that the lack of report cards was jeopardizing students' education and welfare. They claimed the situation had evolved since the original order and that teachers were not providing sufficient feedback to parents about student progress. They also argued that report cards were essential for evaluating whether students should progress to the next grade. As part of their application, BCPSEA also sought a reimbursement mechanism proposing that BCTF reimburse school districts 15% of teachers' wages and benefits to reflect the value of work not performed.

The BCTF opposed the application. They stated the parties had already agreed that report cards were not essential there was no immediate or serious danger. Teachers were continuing to assess and communicate student progress such as through marks on assignments, tests, and individual feedback.

The Board dismissed BCPSEA's application finding that the absence of report cards, while heavily inconvenient, did not meet the threshold for an immediate threat or danger. Also of note was the fact that the parties had previously reached agreement on the issue:

> "The parties presumably turned their minds to that issue when the Order was being discussed and agreed that providing complete information through report cards, although no doubt helpful and even important, was not essential." (para. 50)

As a result, the Board concluded that there was no justification to alter the essential services designation and rejected both the request to require report cards and the proposed reimbursement scheme.

The Board's aim with essential services is to ensure that only the truly necessary services are kept running. These minimum levels should be enough to avoid immediate danger but, not so much that the strike's power is neutered. Once it's decided that essential services need to be maintained (either by agreement or Ministerial order), the Board will issue an Essential Services Order.

Once the order is in place, both the union and employer must adhere to it. For the union, this usually means not all members can strike as a certain number will be designated as "essential" and must continue working (or at least be available to work) even while the strike is on. Often the union will rotate which members cover essential shifts, so that the burden is shared and most members get to participate in the strike part of the time. For the employer, the order might require them to continue operating those essential functions (they cannot lock out those essential workers). It also means the employer can't demand more than the minimum; they can't schedule essential workers to do non-essential tasks.

Conclusion

In this chapter, we explored the concept of industrial action through the lens of strikes, lockouts, picketing, and replacement workers. It's clear that industrial action in BC is a tightly governed process. While we want parties to have economic levers to apply pressure during bargaining, there needs to be a balance with the public interest. The frameworks in the Code aim not to prevent strikes or lockouts outright, but to ensure that when they do occur, they unfold in a structured way that ultimately encourages the parties to return to the bargaining table and find a resolution.

As history and cases show, most labour disputes in BC, even contentious ones, eventually settle. While the periods of industrial action can be very visible and tense, their end result is always the hope of a collective agreement and labour peace until the parties are back at it again.

Chapter 5 – Review Questions

1. What are the two primary of industrial action forms used under BC law?

2. What are the different forms of strikes recognized under the Code and how do they function?

3. What is a lockout, and how does it differ from a business closure for operational reasons?

4. What are the legal preconditions for a lawful strike in British Columbia?

5. What are the legal preconditions for a lawful lockout under the Code?

6. What is picketing and how does the law distinguish between primary and secondary picketing?

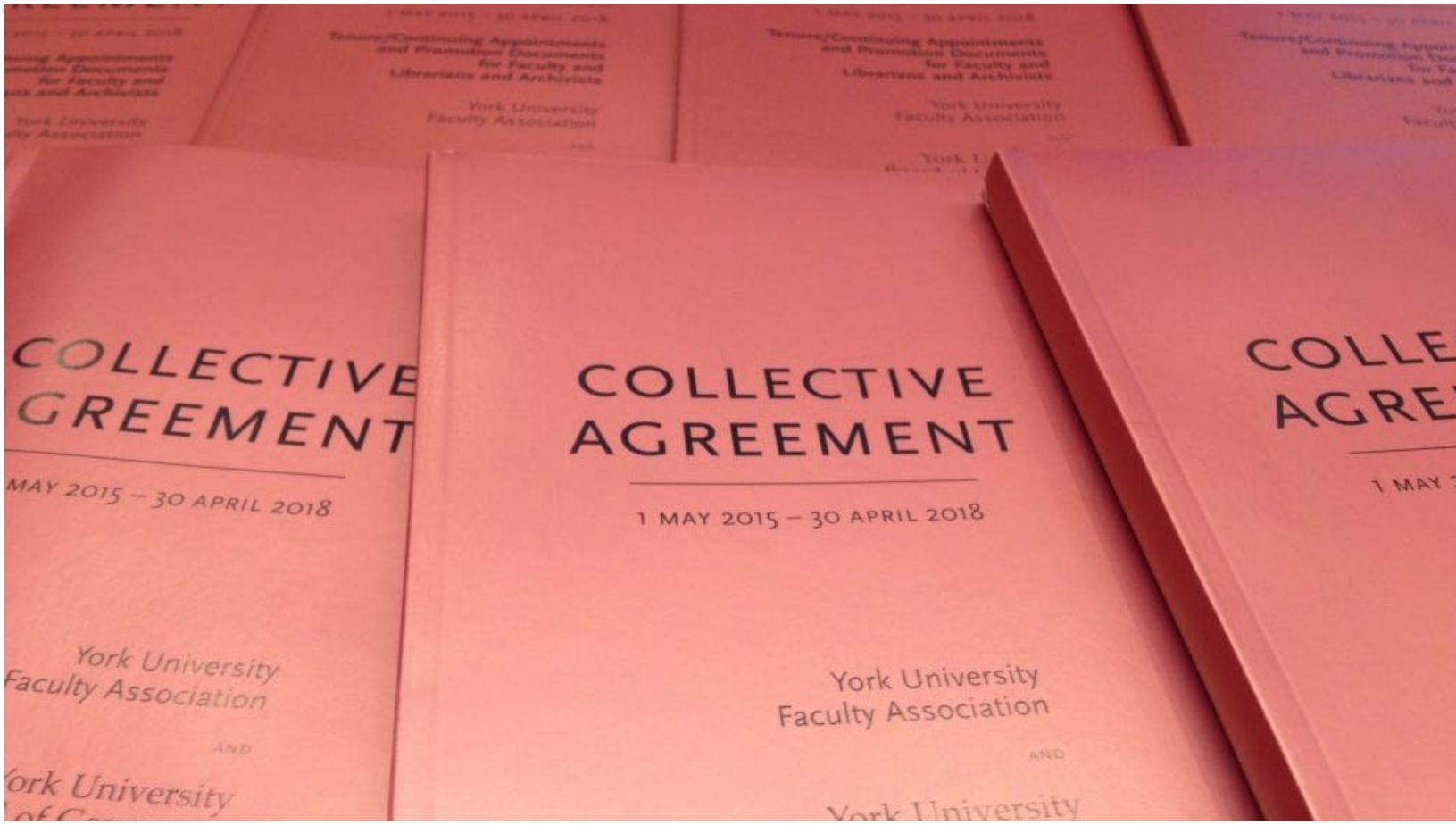
7. What is the 'ally doctrine' under section 65 of the Code? How does it affect secondary picketing?

8. What is BC's legal stance on replacement workers during a strike or lockout and what constitutes "struck work"?

9. How do essential services rules under the Code limit the right to strike or lockout?

10. What rights and risks do various groups face when encountering a picket line?

Chapter 6:
The Collective Agreement

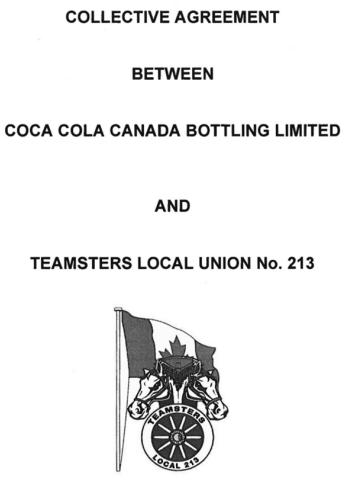


Learning Outcomes:

1. Describe the legal function and significance of collective agreements in unionized workplaces and explain how they govern the employment union/employer relationship.
2. Examine the various mandatory and common provisions that are in collective agreements.
3. Differentiate between forms of union security clauses.
4. Apply the KVP test to assess the enforceability of employer rules introduced without union agreement.
5. Analyze limits on management rights in unionized workplaces including, the requirement for employer actions to be consistent with the collective agreement.
6. Explain the doctrine of estoppel and its legal test.

Introduction

Much of what we have discussed so far in this textbook has been about the process for securing a collective agreement. But what is the collective agreement? This chapter helps settle that question by defining the collective and exploring the major elements of collective agreements in British Columbia. We'll also look at the legal framework for ensuring a valid collective agreement and look in detail at some of the most important terms which find their way into the agreements. At the end of the day, the collective agreement is the cornerstone document of the unionized workplace and so, it's vital to understand it.


COLLECTIVE AGREEMENT

BETWEEN

COCA COLA CANADA BOTTLING LIMITED

AND

TEAMSTERS LOCAL UNION No. 213

Throughout the chapter we'll be including specific examples of the various articles. The examples are all from a particular collective agreement negotiated between the Coca Cola Canada Bottling Limited and Teamsters Local Union No. 213. The agreement covers bargaining unit members conducting work for Coca Cola in and around the lower mainland area of British Columbia.

The full collective agreement can be found at the following link: https://www.bcbargaining.ca/content/4031/coca-cola-bottling-company_LM_Teamsters213%202029.pdf

What is a Collective Agreement?

A collective agreement is a written contract between an employer and a certified trade union that sets out the terms and conditions of employment for a group of employees in a bargaining unit. A collective agreement is not a typical commercial contract; it is a special type of employment contract with legal status defined by statute and shaped by decades of labour board and arbitration decisions.

The collective agreements serve multiple functions. Firstly, they provide predictability for both employers and employees by clearly setting out the terms of work. Secondly, they create a structured framework for resolving workplace dispute about those terms of work. Lastly, in the best collective agreements, they foster ongoing dialogue between management and labour and help collaboration between the otherwise adversarial parties.

Unlike an individual employment contract which is negotiated between a single employee and employer, a collective agreement is negotiated by the union on behalf of all employees in the bargaining unit. Once concluded, the collective agreement becomes binding on the union, the employer, and all employees in the bargaining unit. This means every employee covered by the agreement is governed by its terms and neither individual employees nor the employer can opt out of or contract around those terms during the life of the agreement. In effect, the collective agreement supplants individual employment contracts on all matters it covers.

Foundational Quote

"Certification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees. Because of its exclusive representation function, the presence of the union erects a screen between the employer and the employees. The employer loses the option of negotiating different conditions of employment with individual employees."

Noël v. Société d'énergie de la Baie James, 2001 SCC 39 at para. 42

For example, suppose a newly hired employee and an employer agree on a three-month probation period in an offer letter, but the collective agreement than negotiated by the union specifies a six-month probation. Upon hiring, the collective agreement will govern, the probation will be the six months as the individual deal is superseded by the collective terms.

The rationale is that the union-negotiated terms should apply uniformly to all employees in the unit, preventing employers from offering individual deals that could undermine collective standards or bypass the union. For example, if a collective agreement sets a wage scale or overtime rate, an individual employee cannot validly agree with the employer to work for less than the negotiated rate. Any such side arrangement would be void for conflict with the collective agreement or with employment standards lawopentextbc.ca. Likewise, the employer cannot selectively give individual employees terms better than the collective agreement as a means to reward or induce them, at least not without the union's consent – doing so could constitute an unfair labour practice (direct dealing) and would breach the collective agreement's integrity.

One trade-off to the overriding of the individual terms of employment is that individual employees generally cannot sue the employer in court for breach of the collective agreement. Instead, disputes must be resolved via the grievance/arbitration procedure provided in the agreement. As will be discussed in the next chapter, the Code reinforces this obligation by requiring every collective agreement to include a final and binding dispute resolution process for any differences arising under the agreement. That said, individual employees have little recourse other than through the union when they allege a breach of the collective agreement by the employer.

Foundational Quote

"The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law ... The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704 at pgs. 718-719

Valid Collective Agreements

As previously discussed, collective agreements are achieved through the process of collective bargaining between the certified union and the employer. During bargaining, the parties negotiate provisions on wages, hours, benefits, and other terms. Typically, any tentative agreement reached is subject to ratification by the union's members (an internal union requirement in most cases) before it becomes a binding collective agreement. Once ratified and signed by both the union and employer representatives, the collective agreement is in force for the agreed term.

The collective agreement must be in writing and signed by the authorized representatives of the union and employer. An oral collective agreement would not qualify or be enforceable. In practice, collective agreements are lengthy written documents often signed in multiple originals and so there's little concern about not meeting the writing components for the negotiated deal.

According to section 51 of the Code, once the collective agreement is signed, it must be filed with the Board within 30 days:

Copies of collective agreements to be filed

51 (1) Each of the parties to a collective agreement must, within 30 days after its execution, file a copy of it with the board.

(2) Subsection (1) applies in relation to any renewal or revision of a collective agreement and any ancillary agreement that comes within the meaning of collective agreement.

(3) If a collective agreement is not filed with the board in accordance with subsection (1), the board may decline to consider the collective agreement in any proceeding before the board.

The filing of the collective agreement is a statutory obligation and while failure to file doesn't void the agreement, it can lead to penalties including the Board declining to consider the collective agreement (although that's admittedly rare). The filing allows the Board to maintain a database of agreements and ensure compliance with mandatory terms.

Minimum Term Length

There is a minimum length for collective agreements in BC which is found in section 50(1) of the Code:

Agreement for less than one year

50 (1) Despite anything contained in it, a collective agreement, whether entered into before or after the coming into force of this Code, must, if for a term of less than one year, be deemed to be for a term of one year from the date it came or comes into operation, and must not, except with the minister's consent be terminated by the parties within a period of one year from that date.

Accordingly, collective agreements must have a duration of at least one year. Section 50(1) goes on to say that if parties make an agreement for less than one year, it will be deemed to have a minimum one-year term and cannot be terminated early.

This minimum one-year rule prevents extremely short agreements that would effectively wash away the labour stability in the workplace. Once a collective agreement is signed, the union cannot strike and the employer cannot lock out for that minimum one-year period.

Interestingly, under section 50(2), if an agreement's term is longer than one year, the Code allows either party, after at least 8 months, to apply for ministerial consent to terminate the agreement at the one-year mark:

(2) Subject to subsection (4), if a collective agreement is for a term of more than one year, either party may at any time after the agreement has been in operation for 8 months apply to the minister for leave to notify the other party that the agreement will be terminated on its next anniversary date.

While early ending is permitted by section 50(2), it's rarely invoked. In fact, most collective agreements in BC last between 1 and 3 years after which they are renegotiated.

Coca Cola/Teamsters Collective Agreement – Term of the Agreement

The length of the Coca Cola/Teamsters collective agreement is six years running from April 4th, 2023, until April 3rd, 2029.

Typically, you can find the duration of the collective agreement on the cover page of the collective agreement:

COCA COLA CANADA BOTTLING LIMITED

AND

TEAMSTERS LOCAL UNION No. 213

April 4th, 2023 – April 3rd, 2029

You can also find it in the clauses or articles of the collective agreement as well:

2. DURATION OF AGREEMENT

This Agreement shall be in full force and effect from and including April 4th, 2023, to and including April 3rd, 2029, and shall continue in full force and effect from year to year thereafter, subject to the right of either party to this Agreement within four (4) months immediately preceding the expiry date, or immediately preceding the anniversary date in any year thereafter, by written notice to the other party, require the other party to commence collective bargaining with a view to the conclusion of a renewal or revision of the collective agreement or a new collective agreement.

Mandatory Provisions in a Collective Agreement

As one would expect, if the collective agreement is going to supplant individual employment agreements, it has a lot to include. As such, there are several clauses that each collective agreement *must* contain – this is true whether the parties explicitly included them or not. These mandatory clauses are designed to protect fundamental employee rights but also, in some cases, protect the system of collective bargaining as well. The following represent the clauses or articles which must be present in BC collective agreements.

No-Strike/No-Lockout Clause

Every collective agreement must state that there will be no strikes or lockouts for the duration of the agreement. By law, strikes and lockouts are prohibited during the term of a collective agreement, since disputes are to be resolved by arbitration rather than work stoppages.

Sections 58 of the Code requires a clause in the agreement which prohibits strikes or lockouts:

Honouring of agreement

58 Every collective agreement must provide that there will be no strikes or lockouts so long as the agreement continues to operate and, if a collective agreement does not contain such a provision, it is deemed to contain the following provision:

There must be no strikes or lockouts so long as this agreement continues to operate.

According to section 58, even if an agreement lacked the language prohibiting strikes and lockouts during the collective agreement, such language is effectively read in anyway. This is often referred to as the "peace obligation" because compelling the application of the language ensures that there are no strikes and lockout while the collective agreement is active – the prohibition thus ensures labour peace.

Coca Cola/Teamsters Collective Agreement – Peace Obligation

The following language from the Coca Cola/Teamsters collective agreement reflects section 58 and the peace obligation:

(c) The Union, its agents and members hereby agree not to engage in any strike, work stoppage or other interference with the Company's operations, except as outlined in (a) above, and the Company and its agents hereby agree not to engage in any lockout during the term of this Agreement or any renewal thereof.

Discipline and Discharge for Just Cause

Each collective agreement must contain a provision governing the discipline or dismissal of employees; these clauses are generally understood as a "just cause" requirement. The Code effectively requires "just cause" protection for employees covered by the agreement through section 84(1):

Dismissal or arbitration provision

84 (1) Every collective agreement must contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision must require that the employer have a just and reasonable cause for dismissal or discipline of an employee, but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.

The effect of section 84(1) is that an employer cannot discipline or terminate an employee in the bargaining except for proper cause. This dramatically different from the non-union context where employees can be dismissed without cause (subject to the requirement to provide reasonable or contractual notice or pay-in-lieu of that notice).

Most agreements expressly include a just cause clause and which states that a grievance may be filed to challenge whether such cause existed. For example, a typical clause might read: "No employee who has passed probation shall be disciplined or discharged except for just and reasonable cause." However, even if a collective agreement did not explicitly say just cause is required, section 84(1) nevertheless implies such a term into the agreement.

Coca Cola/Teamsters Collective Agreement – Just Cause

While the Coca Cola/Teamster Collective Agreement does not have the exact style of just cause wording from section 84(1), it states the following:

> The Union acknowledges that it is the exclusive right of the Company to:
>
> (b) Hire, discharge, transfer, promote, demote or discipline employees, provided that a claim of discriminatory promotion or transfer, or a claim that an employee has been discharged or disciplined without just cause, may be the subject of a grievance and dealt with as herein provided.

Grievance and Arbitration Procedure

Every collective agreement must provide a final and binding dispute resolution process which, because of the unionized context, is typically a grievance procedure culminating in arbitration. Following the just cause requirement section 84(1), section 84(2) establishes that this dispute resolution process is mandatory in the collective agreement:

> (2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

In almost every case, the collective agreements set out a multi-step grievance process that the parties follow in the event of the dispute. This typically flows from an informal discussion with a supervisor, to written grievance, discussion among escalating employer representatives, and up to binding arbitration if unresolved. The goal of these cascading steps is to try to encourage an informal resolution of the dispute.

Coca Cola/Teamsters Collective Agreement – Grievance Steps

The following are the grievance steps from the Coca Cola/Teamster Collective Agreement:

GRIEVANCE PROCEDURE

(a) Any complaint, disagreement or difference of opinion between the Company, the Union or the employees covered by this contract, which concerns the interpretation or application of the terms and provisions of this contract, shall be considered a grievance.

Any employee, the Union or the Company may present a grievance. Any grievance which is not presented within thirty (30) calendar days following the event giving rise to such grievance shall be forfeited and waived by the aggrieved party. This provision shall not be used to deny any employee their rights under the Provincial Labour Statutes. Shop Stewards will be present whenever an employee receives a written reprimand, suspension or discharge. An employee shall have the right to have a Shop Steward present when they receive a verbal reprimand. The Company may also require the presence of a Steward for the verbal reprimand. The Company must inform the employee that they have the right to have a shop steward present for meetings surrounding driving infractions.

(b) The Steps of the Grievance Procedure shall be as follows:

An employee who has a grievance will ordinarily discuss the matter with their immediate supervisor and if the matter is not resolved in that discussion, they may refer the question to their Steward for consideration. However, should the nature of the grievance be such that the employee prefers to refer it to their Steward first, then they may do so.

Step 1:
If there is a potential violation of the Collective Agreement, the employee will raise the issue with the Shop Steward in their department. The Shop Steward will then raise the issue with the Supervisor of the Department. This step will be in a verbal manner and a discussion will take place to try to resolve the issue before it becomes a written grievance. Issues related to employee scheduling will be considered a priority. The Shop Steward shall first discuss the matter with the Supervisor of the Department giving rise to the grievance. If the matter remains unresolved, a written grievance may be filed and submitted to the Manager of the Department. The Manager will respond in writing to the grievor and the Shop Steward within two (2) working days as to resolution or denial of the grievance.

Step 2:
If the issue is not resolved at Step 1 as outlined above, then the employee and Shop Steward will file a written grievance in sufficient detail to define the issue on a form provided for by the Union to the Manager of the Department. Copies of the grievance will be given to the Manager, grievor and Shop Steward.

In accordance with the provisions in the Collective Agreement, the Manager will respond in writing to the grievor and the Shop Steward within seven (7) working days as to resolution or denial of the grievance.

Step 3:
If the grievance is not resolved at Step 2, the Shop Steward will forward a copy of the grievance to the Union Representative, and the Manager will forward a copy of the grievance to the Distribution Centre Manager or Plant Manager (whichever is applicable). The Distribution Centre Manager or Plant Manager, if applicable, the grievor and/or the Shop Steward (where possible) and any other management personnel that is required, will meet to resolve the matter. Failing settlement of the dispute at Step 3, the matter shall be taken to Arbitration as set out herein within seven (7) days of the last meeting.

A grievance that does not have the signature of the grievor and the Shop Steward on it will not be accepted by the Company.

The grievance response will be in writing and will include the details of the resolution to the grievance or the reasons why the grievance has been denied. Grievances that are not resolved at Step 2 and beyond of the Grievance process must be advanced by the grievor within seven (7) days of receipt of the position of the other party or the grievance will be deemed to be resolved and abandoned. In all cases, grievances must be resolved/withdrawn or be referred to the arbitration process within sixty (60) days of presentation in Step 2.

Assuming there is not a successful resolution of the grievance, arbitration would be the next step. Here an independent arbitrator (or arbitration board) hears evidence and issues a binding decision to resolve the dispute. If a collective agreement somehow lacked an arbitration clause, the Code provides one by default.

For example, imagine a union believes an employee was disciplined without just cause. It can then file a grievance which would set of the series of grievance steps in the collective agreement. If the grievance isn't settled internally, it proceeds to arbitration where the arbitrator will decide if the discipline was justified under the collective agreement's terms.

Coca Cola/Teamsters Collective Agreement – Arbitration Provisions

The following is the arbitration language from the Coca Cola/Teamster Collective Agreement:

(c) The Company and the Union will resolve a grievance with a single Arbitrator. The single arbitrator shall not have any jurisdiction or authority to alter or change any of the provisions of this Agreement, or to substitute any new provisions in this Agreement, or to give any decision inconsistent with the terms of this Agreement.

If the Arbitrator finds (or if at any earlier stage of the Grievance Procedure it is found) that an employee has been suspended or discharged without proper cause, or improperly laid off, that employee shall be reinstated by the Company without loss of pay and with all their rights, benefits and privileges which they would have enjoyed if the discharge or suspension had not taken place, or if the Arbitrator finds (or if at an earlier stage of the Grievance Procedure it is found) that an ex-employee should have been re-hired, that ex-employee shall be employed by the Company and paid all pay which they would have enjoyed if they had been hired at the proper time, provided that if it is shown to the Arbitrator that the employee has been in receipt of wages during the period between discharge or suspension and reinstatement or improper layoff or date of failure to re-hire and re-hiring, the amount so received shall be deducted from the wages payable by the Company pursuant to this clause, less any expenses which the employee has incurred in order to earn the wages so deducted, and PROVIDED THAT the Arbitrator, if circumstances are established before it, which in the opinion of the Arbitrator makes it just and equitable to do so, shall have the right to order the Company to pay less than the full amount of wages lost.

The Arbitrator shall have the power to determine whether a particular issue is arbitrable under this Agreement.

The Company and the Union shall each be responsible for one half (½) of the expenses of and fees payable to the arbitrator.

Joint Consultation Committee

Section 53(1) of the Code requires that every collective agreement establish what is called a "joint union-management consultation committee":

Joint consultation

53 (1) A collective agreement must contain a provision requiring a consultation committee to be established if a party makes a written request for one after the notice to commence collective bargaining is given or after the parties begin collective bargaining.

(2) The consultation committee provision must provide that the parties consult regularly during the term of the agreement about issues relating to the workplace that affect the parties or any employee bound by the agreement.

(3) If the collective agreement does not contain the provisions described in subsections (1) and (2), it is deemed to contain the following consultation committee provision:

On the request of either party, the parties must meet at least once every 2 months until this agreement is terminated, for the purpose of discussing issues relating to the workplace that affect the parties or any employee bound by this agreement.

(4) The purpose of the consultation committee is to promote the cooperative resolution of workplace issues, to respond and adapt to changes in the economy, to foster the development of work related skills and to promote workplace productivity.

(5) The associate chair of the Mediation Division must on the request of either party appoint a facilitator to assist in developing a more cooperative relationship between the parties.

As noted in 54(4), the purpose of this join consultation committee is to provide a forum in which representatives of management and the union meet regularly to discuss workplace issues, address concerns, and foster cooperation during the term of the agreement. This ensures that both the employer and union are in regular communication and hopefully, this help build good rapport for later bargaining.

Typically, the collective agreement will have a clause saying a committee of equal numbers of union and management representatives will meet to discuss matters relating to the workplace that are of mutual interest (excluding active grievances or collective bargaining issues). The joint consultation committee cannot override the collective agreement but, it can make non-binding suggestions and help resolve minor problems or misunderstandings before they escalate. For example, if employees are concerned about a scheduling issue or the employer plans to introduce new technology, the joint committee can be used to discuss those topics.

Coca Cola/Teamsters Collective Agreement – Committee Provisions

Within the Coca Cola/Teamsters collective agreement, the parties have agreed to create a Safety Committee to consider issues arising in the workplace:

(f) The Company agrees to establish a Joint Safety Committee composed of two (2) members from Management and two (2) members from the bargaining unit. The rules and regulations governing this Committee shall be in accordance with the Workers' Compensation Board requirements. The Joint Safety Committee shall meet a minimum of once per month. A list of Safety Committee members will be posted on the appropriate Notice Boards and be updated as the need arises.

Employment Standards Compliance

In BC, the *Employment Standards Act*, R.S.B.C. 1996, c. 113 sets out the minimum and maximums which must be complied. The statute provides a number of base protections to covered employees and ensures they are entitled to things like minimum wage and a maximum number of hours work. Interestingly, for quite a long range of times, collective agreements in BC did not specifically have to comply with the non-union employment standards legislation.

In practice, the idea that a collective agreement would actually give less than the minimums was somewhat rare. After all, unionized workers are often viewed as securing greater protections and benefits relative to non-union workers. However, it was still historically possible for the collective agreement to provide less than the ESA>

Section 3(2) of the *Employment Standards Act* (ESA) now provides that a collective agreement cannot waive or provide less than those minimums for certain protected rights:

Scope of this Act

3 (1) Subject to this section, this Act applies to all employees other than those excluded by regulation.

(2) If a collective agreement contains any provisions respecting a matter set out in column 1 of the following table, and the provisions, when considered together, meet or exceed the requirements, when considered together, of the Part or section of this Act specified opposite the matter in column 2 of the table, those provisions of the collective agreement replace the requirements of that Part or section of the Act in respect of employees covered by the collective agreement:

Column 1 Matter	Column 2 Part or Section
Special clothing	Section 25 (1) or (2)
Hours of work or overtime	Part 4
Statutory holidays	Part 5
Annual vacation or vacation pay	Part 7
Seniority retention, recall, termination of employment or layoff	Section 63

(2.1) Despite subsection (2), any provisions of a collective agreement respecting statutory holidays only replace the requirements of Part 5 of this Act as that Part applies to statutory holidays other than the National Day for Truth and Reconciliation.

(3) If a collective agreement contains no provisions respecting a matter set out in column 1 of the following table, or contains any provisions respecting a matter set out in column 1 that, when considered together, do not meet or exceed the requirements, when considered together, of the Part or section of this Act specified opposite the matter in column 2 of the table, that Part or section of the Act is deemed to be incorporated in the collective agreement as part of its terms:

If a collective agreement provision does fall below an ESA minimum, that provision is void to the extent of the deficiency and the ESA standard applies instead. For example, if the ESA minimum vacation is 3 weeks for an employee for over 5 years but, the collective agreement only gave 1 week then the employees would be legally entitled to the 3 weeks.

There is still some flexibility in unionized environments as some ESA provisions can be modified by agreement but, only within the limits the ESA allows. All critical minimums like minimum

wage, overtime rates, statutory holidays, etc. must be met or exceeded by the collective agreement.

Common Terms in Collective Agreements

We've seen the mandatory provisions that have to be in a collective agreement but, there are also a variety of common terms which are often reflected in the agreement. The following are terms that are not required but, nevertheless, are very often seen in collective agreements.

Recognition Clause

Nearly all agreements begin with a recognition clause in which the employer formally recognizes the union as the exclusive bargaining agent for those in the bargaining unit. The recognition clause solidifies the union's status as the exclusive bargaining representative and also outlines the parameters of the bargaining unit. For example, a recognition clause would say something to the effect: "The Employer recognizes the Union, Local 123, as the sole and exclusive collective bargaining agent for all employees in the bargaining unit described as except those excluded by the Labour Relations Code." Not only does this lay out the legitimacy of the union but it also helps to prevent the employer from negotiating with another group which purports to the exclusive agent for the bargaining unit members.

Coca Cola/Teamsters Collective Agreement – Recognition Clauses

The following is the recognition clause from the Coa Cola/Teamsters collective agreement:

1. BARGAINING AGENCY AND DEFINITION

(a) The Company recognizes the Union as the sole collective bargaining agency of all employees as set out in the Certificate of Bargaining Authority, and shall include temporary or so called casual employees in the unit, employed at 2471 Viking Way, Richmond, B.C., 7200 Nelson Road, Richmond, B.C., 44520 Yale Road, Sardis, B.C. and 2450 United Boulevard, Coquitlam, B.C.

Notwithstanding the above, all employees of the Company, employed in the capacity of "Account Managers" shall be excluded from the bargaining unit.

Wages

A critical compart of any collective agreement is going to be the wage schedule or wage grid. The agreement will set out wage rates for various classifications of employees within the bargaining unit. It's common to see multiple positions within a single bargaining unit and not every position will be paid the same amount. Additionally, the wage scales (usually in an

appendix to the collective agreement) very often show the wage increases over the term of the agreement and the effective date for those increases.

Coca Cola/Teamsters Collective Agreement – Wage Scales

The following is the recognition clause from the Coa Cola/Teamsters collective agreement:

APPENDIX "A"

WAGE SCHEDULES

CLASSIFICATIONS - SALES

SALES	EFFECTIVE Apr 4/23 4%	EFFECTIVE Apr 4/24 4%	EFFECTIVE Apr 4/25 4%	EFFECTIVE Apr 4/26 3%	EFFECTIVE Apr 4/27 3%	EFFECTIVE Apr 4/28 3%
Delivery Merchandiser	$37.53	$39.03	$40.60	$41.81	$43.07	$44.36
Full Service Vending	$37.20	$38.69	$40.24	$41.44	$42.69	$43.97
Utility Person	$35.03	$36.43	$37.89	$39.02	$40.19	$41.40
Merchandiser	$24.55	$25.54	$26.56	$27.35	$28.18	$29.02

CLASSIFICATIONS - SEASONAL AND TEMPORARY RATE

SEASONAL AND TEMPORARY	EFFECTIVE Apr 4/23 4%	EFFECTIVE Apr 4/24 4%	EFFECTIVE Apr 4/25 4%	EFFECTIVE Apr 4/26 3%	EFFECTIVE Apr 4/27 3%	EFFECTIVE Apr 4/28 3%
Temporary Delivery Merchandiser/Seasonal Delivery Merchandiser	$25.06	$26.07	$27.11	$27.92	$28.76	$29.62
Temporary Merchandiser	$23.39	$24.33	$25.30	$26.06	$26.84	$27.64
Seasonal Merchandiser	$19.04	$19.80	$20.60	$21.21	$21.85	$22.51

PROBATIONARY RATE

Hourly Paid - $1.50 per hour less than established rate for the job. Week following completion of probationary period (65 days worked) shall be at full rate.

The main benefit of the wage scales is the clarity of the wages and the precise dates for when they increase. It gives employees not only predictable for their wages but also transparency as to what other workers are earning. Beyond, the regular wage scales, it's also common that there are pay premiums for overtime rates and certain shift work or duties.

The collective agreement will set the normal workday and work week. For example, it could 7.5 hours per day, 37.5 hours per week, or define shift lengths. It might contain rules such as how overtime is assigned like whether it volunteer-based or based on seniority rotation. The rate of pay for overtime hours should be listed and, as stated earlier, that amount should at least meet the minimums in the ESA (time-and-a-half after 8 hours a day or 40 hours a week and double time for work beyond 12 hours in a day). There might be shift premiums such as extra pay for night shifts or weekends.

Coca Cola/Teamsters Collective Agreement – Wage Premiums

The following Coca Cola/Teamsters collective agreement clauses show the provisions for overtime and also, the premiums for certain shifts:

20. DAYS AND HOURS OF WORK AND OVERTIME

(a) Each employee shall work and be guaranteed eight (8) hours each day, provided that they commence work at the start of their shift, with a minimum of one-half (½) hour off for lunch which will be unpaid, unless the failure of the Company to supply work is beyond the Company's control. Employees who have completed their probationary period who are laid off shall receive twenty-four (24) hours' notice of layoff or eight (8) hours' pay in lieu thereof.

All premiums are to be paid at the rate stated throughout the collective agreement. When on overtime, if a premium is applicable, it will not be paid out at an overtime adjusted rate (ex., a $0.50/hr premium that is applicable during overtime will be paid out at $0.50/hr, it will not be paid out at overtime rates).

Work weeks may be arranged on a Monday to Friday, Tuesday to Saturday or Wednesday to Sunday basis, the latter for merchandising work only, and shall be selected by seniority. A merchandising only work week may be arranged on a Wednesday to Sunday basis and such work week shall include not more than five (5) employees.

Employees on a Tuesday to Saturday schedule will receive a premium of fifty cents (50¢) per hour for all hours worked during the week plus any other shift premium to which they are entitled. Employees on a Wednesday to Sunday schedule will receive a premium of one dollar ($1.00) per hour for all hours worked during the week plus any other premiums to which they are entitled. These premiums apply to overtime resulting in a continuation of shift, they do not apply to off-day overtime.

Other than ESA compliance, the union and employer are free to negotiate what works best for the workplace.

Benefits

Alongside wages, collective agreements typically include negotiated benefit plans such as health and dental insurance, pension or RRSP contributions, paid sick leave, and other wellness benefits.

A collective agreement might say the employer will pay 100% of premiums for a defined health insurance plan, provide a certain number of sick days per year, and contribute a percentage of salary to a pension plan. Vacation entitlements (often above the statutory minimum) and paid holidays are delineated.

The benefit language is usually detailed and, once again, it's left to the parties to negotiate what is appropriate as benefits for the bargaining unit.

Coca Cola/Teamsters Collective Agreement – Benefits

While the benefits section can be lengthy, the following are some of the introductory provisions of the benefits from the Coca Cola/Teamsters collective agreement:

30. WELFARE PLAN

(a) Full time employees in the bargaining unit are entitled (subject to eligibility requirements), to participate in the health and dental care benefits plan which must be provided by the Company for hourly employees (currently "Benefits Plus"). The terms and conditions of participation and benefits entitlements for full time employees shall be governed by the official text of the plan (as from time to time amended). For clarity, the Company's obligation in respect to such plans is limited to the payment of premiums only and the Company reserves its right to amend, modify or alter these plan(s) in the future at its discretion. The benefit plans are not incorporated into the collective agreement and will not be the subject matter of arbitration, except as set out in Letter of Understanding #23.

(b) The Company will pay the B.C. Medical Plan (Medical Services Plan) premium covering full time employees and their eligible dependents.

(c) Sick Pay Plan: The Company agrees to establish a Sick Pay Plan along the following lines: Full-time employees who have completed their probationary period shall, as of January 1st of each calendar year (beginning on January 1st, 2024), receive six (6) paid sick days. Full-time employees who complete their probationary period after January 1st of a given year will receive sick-time consistent with provincial employment standards legislation for that year, and if not used will not be paid out or carried forward into the following year. As of December 31st, for full-time employees only, any unused sick days over six (6) remaining will be paid out to the employee no later than the first pay period the following March 1st and the balance will continue to accumulate. If a full-time employee is terminated for any reason or resigns they shall receive all accrued sick pay to date of termination.

Temporary and Seasonal employees shall receive sick pay consistent with the provincial employment standards legislation.

Seniority

Seniority refers to an employee's length of service in the bargaining unit. Collective agreements often provide that decisions on certain matters will be made according to seniority, either alone or in combination with other factors like qualifications or ability. Common areas where seniority governs are with:

- layoffs and recalls where the last hired is the first laid off, and conversely, the last laid off is the first recalled when jobs reopen;
- promotions and job postings where many collective agreements require that when a job vacancy occurs, it is posted internally and the senior qualified applicant is awarded the job); and
- vacation scheduling where more senior employees typically get first preference for choosing vacation dates.

In principle, seniority clauses offer a way to manage workplace opportunities in a fair way without regard to personal favouritism. Making decisions on the back of seniority also encourages longer service and loyalty to the employer.

An example of a clause utilizing seniority would be something to the effect of: "In the event of a reduction in the workforce, layoffs shall be conducted in reverse order of seniority, provided the employees retained have the ability to perform the work. Recall from layoff shall be in order of seniority." You can see in that example that the seniority provision is still subject to the language of "ability to perform the work"; therefore, it's not as if a more senior employee could simply take a benefit solely on that seniority.

Coca Cola/Teamsters Collective Agreement – Union Security

The following is a provision from the Coca Cola/Teamsters collective agreement which integrates seniority as the basis to termination determinations:

(c) **Layoffs**

Seniority shall be applied with respect to layoff and recall to work in each of the above groups separately, provided the employee having the greater seniority has the ability to perform the work in a satisfactory manner. All temporary, probationary and seasonal employees will be laid off first before any regular employee is so affected.

If any employee is improperly laid off and a less senior employee is kept working during such layoff, the senior employee who was laid off shall be paid for the number of hours the less senior employee worked, at the senior employee's regular rate of pay or the job's classified rate of pay, and overtime if involved.

Union Security

Union security is also a form of common provision in the collective agreement though, it stands with such importance to the unionized workplace that it's receives specialized attention in this section.

Broadly speaking, union security refers to the contractual provisions that allow the union to collect dues and maintain their financial resources to advocate for the members in the bargaining unit. Strong union security clauses ensure that the union is financially secure and therefore, remains an effective voice for the workers. Historically, union security clauses were hold fought for by unions and one particular labour dispute, the Ford-Windsor strike played a pivotal role in the development of such clauses.

The Ford-Windsor Strike

Going back to 1945, Ford workers in Windsor had organized under Local 200 of the United Auto Workers (UAW), an affiliate of the Congress of Industrial Organizations (CIO). Although the union had gained widespread support among workers, Ford of Canada refused to grant official recognition or to implement means for the union to fund itself. The union was demanding not only recognition as the exclusive bargaining agent but also a contractual guarantee that all employees would contribute union dues as a condition of employment.

Negotiations broke down in September 1945. On September 12, nearly 11,000 workers walked off the job and began what would become a 99-day strike. The plant was shut down and a series of blockades were established to prevent the movement of vehicles or goods into or out of the facility. These included mass picketing and the strategic placement of disabled vehicles to block plant entrances. The blockades became a source of extreme tension particularly when the company attempted to remove new cars from the plant for shipment.

The strike attracted national attention and put considerable pressure on the provincial and federal governments. The Ontario government made limited efforts to mediate but, tensions remained high. At one point, the City of Windsor imposed emergency regulations in an attempt to maintain public order. The situation became so volatile that some feared it could escalate into a violent confrontation between labour and law enforcement.

Faced with a stalemate, the federal government intervened under the authority of the *Industrial Relations and Disputes Investigation Act*. Justice Ivan Rand of the Supreme Court of Canada was appointed as a one-person arbitration board to resolve the dispute. His appointment was generally accepted by both parties who had grown tired of the impasse.

In January 1946, Rand released his decision. On the union security front, he introduced what became known as the *Rand Formula*. Under the formula, all employees in the bargaining unit would be required to pay union dues, regardless of whether they chose to join the union. Rand justified this on the grounds that all employees benefit from the collective bargaining process and the administration of the collective agreement and it would be unjust to allow some to benefit without contributing. The decision was accepted by both the union and the employer and became a model for labour relations across Canada.

Following the decision, the Rand Formula became a standard provision in union contracts across Canada. It is one of those labour moments which had marked impact on modern labour relations. Once the Rand Formula was established it gave unions the ability to consistently and legitimately seek funding from their members. In BC, union security is negotiable, but in practice, unions nearly always secure at least a Rand formula dues clause.

Types of Union Security Arrangements

A union security clause requires employees to maintain union membership or at least pay union dues as a condition of employment. That said, the forms of union security can vary significantly. The following are the main forms of union security clauses:

i. Closed Shop

A closed shop is the most restrictive form of union security arrangement. In a closed shop, the employer agrees to hire only individuals who are already members of a designated union. Put simply, union membership is a precondition for both hiring and continued employment.

They are most often found in industries that operate under hiring hall systems, such as construction, maritime work, or certain skilled trades. In these sectors, employers often rely on union-run hiring halls to supply qualified workers. For example, in parts of the construction industry governed by multi-employer collective agreements, such as those negotiated by the British Columbia and Yukon Territory Building and Construction Trades Council, a contractor may only hire from the union's hiring hall. Electricians, pipefitters, and crane operators may all be dispatched through this system which operates on the assumption that all dispatched workers are union members in good standing.

ii. Union Shop

A union shop is a union security arrangement that requires employees to become members of the union within a specified period after being hired. Unlike a closed shop, a union shop allows employers to hire non-union workers but, mandates that these workers must join the union after a certain time period (typically within 30 to 90 days of employment). If an employee refuses to join the union within the required timeframe, they may be terminated under the terms of the collective agreement. By requiring all employees to become members, the union gains more dues and more financial stability.

Union shops are common across many unionized sectors in Canada. For example, many school districts in British Columbia operate under collective agreements where new teachers, educational assistants, or custodians are required to join the relevant union shortly after starting employment.

iii. Rand Formula

As mentioned in the discussion of the Ford-Windsor strike, under the Rand Formula, employees don't have to join the union but all employees must pay union dues. Each employee authorizes dues to be deducted automatically from their pay which are then remitted to the union. A typical BC collective agreement's union security article might state something to the effect of: "All employees within the bargaining unit shall, as a condition of continued employment, become and remain members in good standing of the Union. The Employer shall deduct from each employee's wages the regular union dues and remit them to the Union monthly."

The real critical benefit of the Rand Formula is that it prevents "free riders.". If we think of a unionized setting, all employees covered by a collective agreement receive the same negotiated wages, benefits, and protections; that could be true whether or not they are actually members of the union. Without the Rand Formula requirement, some employees could simply choose to avoid paying union dues while still enjoying all the advantages that come from union representation. In many Ontario public schools, for instance, all teachers are required to pay dues to the Ontario Secondary School Teachers' Federation (OSSTF) or the Elementary Teachers' Federation of Ontario (ETFO) depending on their position.

iv. Open Shop

An *open shop* is a type of workplace where employees are not required to join the union or pay union dues as a condition of employment, even if a union is present and has negotiated a collective agreement. Under an open shop model, union membership and dues payment are entirely voluntary. Employees may choose to join the union and contribute financially but, they cannot be compelled to do so.

This arrangement is the weakest of the options for the union. While the union is still legally recognized as a bargaining agent and must represent all employees in the bargaining unit equally, there is no compulsory dues

For example, suppose a group of airport ground crew workers are unionized under a collective agreement but they are in an open shop. An employee may decide not to join the union or pay dues but will still benefit from negotiated wage increases, paid leave, health benefits, and protection from arbitrary discipline. Open shops are generally not favoured because they lead to the "free rider" problem.

Coca Cola/Teamsters Collective Agreement – Union Security

The following is the union security language from the Coca Cola/Teamsters collective agreement. Based on the language requiring that all employees shall be required to be a member of the union, this appears to be a union shop:

(b) The Company agrees however, that when they do hire new employees they will have each new employee fill in the required membership cards supplied by the Union before commencing actual work, and shall remit such cards directly to the Union.

All employees shall be required to be a member of the Union as a condition of employment with the Company, excepting that employees who will be hired for less than ten working days shall not be required to join the Union, but shall be covered by the provisions of (d) herein.

Management Rights Clause

While many collective agreement clauses are clearly sought by the union, a management rights clause would be desired by the employer. Management rights clauses affirm that the employer retains all rights to manage and operate the business except as specifically limited by the collective agreement.

Management rights clauses often state that the employer has the right to direct the workforce, hire, classify, promote, demote, transfer, lay off, and discipline employees, and to manage and allocate resources, make workplace rules, etc., provided these actions are not inconsistent with the agreement. If the collective agreement is silent on an issue (i.e. the employer's right to introduce new technology or to restructure a department), typically the employer can proceed to do so, provided it doesn't violate any other provision.

Essentially anything not bargained away in the collective agreement remains the employer's prerogative. For example, we might see a management rights clause which states: "Except as expressly restricted by this Agreement, all management rights and prerogatives are retained by the Employer. The Union recognizes the right of the Employer to operate and manage its business including, but not limited to the right to hire, assign work, determine job content, establish policies, and discipline or discharge for just cause." While not ideal, unions accept management rights clauses to avoid needing to spell out every possible management function in the contract while relying on other clauses (like seniority or just cause) to constrain abuses of those rights.

Coca Cola/Teamsters Collective Agreement – Management Rights

The following language from the Coca Cola/Teamsters collective agreement affirms the residual rights of the employer to manage the workplace:

29. MANAGEMENT RIGHTS

The Union acknowledges that it is the exclusive right of the Company to:

(a) Maintain order, discipline and efficiency.

(b) Hire, discharge, transfer, promote, demote or discipline employees, provided that a claim of discriminatory promotion or transfer, or a claim that an employee has been discharged or disciplined without just cause, may be the subject of a grievance and dealt with as herein provided.

(c) Generally manage the industrial enterprise in which the Company is engaged, and without restricting the generality of the foregoing, determine the products to be manufactured, processed, packaged, shipped and distributed, the methods of manufacturing, processing, packaging, shipping and distribution, the sources, quantities and kind of ingredients, supplies and other material used in the manufacturing, processing and packaging of products, the schedules of manufacturing, processing, packaging, shipping and distribution, and the kinds and locations of machinery, equipment and tools used throughout the Company's operations.

The KVP Rule and its Limit on Management Rights

One major limitation on management's unilateral actions comes from the famous arbitration decision of *KVP Co. v. Lumber & Sawmill Worker's Union, Local 2537* (1965), 16 L.A.C. 73.

In KVP, there was a mechanic employed by KVP Co. Ltd. in Kapuskasing, Ontario named Raoul Veronneau. Veronneau could not read and relied on coworkers to inform him of workplace notices. The company had introduced a rule stating that any employee with more than one wage garnishment (a legal order requiring the employer to withhold a portion of an employee's earnings to pay a debt) could be subject to dismissal. This rule was not part of the collective agreement and was implemented without negotiation with the union. Veronneau had three garnishments filed against his wages over several months. After the third garnishment, the company terminated his employment based on the unilaterally imposed rule. The union grieved the dismissal, arguing that the rule was unreasonable and not part of the negotiated collective agreement.

Arbitrator William G. Robinson was appointed to determine whether the rule and Veronneau's dismissal based on it were fair. Arbitrator Robinson found in favour of the union/ Veronneau however, it was the basis for that conclusion which has now become a mainstay of restricting management right.

In the KVP decision, Arbitrator Robinson laid down a set of criteria to determine when an employer's rule or policy, introduced without the union's agreement, will be enforceable; this is now known as the "KVP test":

i. Consistency with the Collective Agreement

According to the KVP test, the rule brought in by the employer must not contradict or be inconsistent with the collective agreement. For example, if the agreement says overtime is voluntary, the employer cannot issue a policy mandating overtime as that would flatly contradict the contract. Any rule that conflicts with a negotiated term is invalid (the contract prevails).

ii. Reasonableness

Even if the employer is bringing in a rule which it wants, the rule must be reasonable in its scope and impact. The "reasonableness" of the rule generally means it should relate to legitimate business or safety objectives and not be arbitrary or capricious. A rule needs to make sense given the workplace circumstances. For instance, a rule requiring employees to wear hard hats in a construction zone is clearly reasonable for safety while a rule forbidding employees from talking to each other during work breaks might be deemed unreasonable.

iii. Clarity

The rule must be clear and unequivocal. Employees need to know what standard of conduct or performance is expected. If a rule is vague or ambiguous, it cannot be fairly enforced. For example, a policy stating "Employees must maintain a good attitude at work" is too vague, whereas a policy banning profanity towards customers is specific.

iv. Notice to Employees

The rule must be communicated to the employees before the employer attempts to enforce it especially if there the prospect it could be use for dismissal. Employees should be informed of the new or changed rule and ideally given the chance to ask questions or get trained if necessary. It's not acceptable for an employer to discipline someone for violating a rule the employee didn't know about. Thus, posting the policy or distributing it or even having employees sign an acknowledgment would satisfy this element.

v. Warning of Consequences

The employees must be notified that failure to comply with the rule could result in discipline including, possible discharge. In other words, it should be made explicit that the rule is a condition of employment and that breaching it is serious. Often policies state at the end that "Any violation of this policy may lead to disciplinary action up to and including termination of employment." This KVP criterion ensures no one can claim they didn't realize breaking the rule could get them fired.

vi. Consistent Enforcement

The rule must be consistently enforced by the employer. If the employer has a rule but turns a blind eye to violations by some employees or for a long time, it cannot suddenly use it to punish an employee. Consistency implies that once a rule is in place, the employer should apply it uniformly and regularly. If the employer failed to enforce the rule, arbitrators might find that the employer is estopped (prevented) from enforcing it strictly in a particular instance or that the inconsistent enforcement undermines the legitimacy of the rule. For example, if a company had a rule against personal cell phone use but managers routinely ignored employees using phones, it would be unreasonable to fire someone for using their phone. Management would have to re-affirm their consistent enforcement of the rule.

The KVP Test
1. Consistency with the Collective Agreement 2. Reasonableness 3. Clarity 4. Notice to Employees 5. Warning of Consequences 6. Consistent Enforcement

If all six conditions are met then a unilaterally imposed rule is likely to be upheld as valid and discipline for breaching it would be for "just cause". If one or more conditions are not met, an arbitrator may overturn or mitigate discipline. In the facts of KVP, Arbitrator Robinson found that the employer's rule was not enforceable because it was not reasonable. The rule effectively mandated automatic discharge of any employee upon a second wage garnishment. This penalty

was seen to be excessively severe especially considering that the garnishment situation had has no real relation to work production or day to day work of the employees.

Ultimately, if management issues a workplace rule, like a new policy on attendance or a vaccination policy and it's not something already covered by the collective agreement, the rule must the KVP test to be enforceable.

Foundational Law - *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34

Irving Pulp and Paper involved a dispute that arose at a kraft paper mill in Saint John, New Brunswick. The pulp and paper workplace had a variety of hazardous machinery, chemicals, and processes. In 2006, the employer, Irving, adopted a new "Policy on Alcohol and Other Drug Use" without consulting the union. Among other things, the policy required random breathalyzer testing of 10% of employees in "safety sensitive" positions each year. A blood alcohol content above 0.04% could lead to serious disciplinary consequences up to and including termination. Employees could also be fired for refusing a test.

The union grieved the random testing policy after an employee, who had not consumed alcohol in decades, was randomly selected and tested. Though the test was negative, the union challenged the very existence of random testing as unjustified and contrary to the terms of the collective agreement.

A labour arbitration board heard the grievance and applied the *KVP test* to determine whether the random breathalyser testing was reasonable. The Board confirmed that the rule would only be valid is it met the six KVP criteria including, that the rule was reasonable. The Board actually struck down the policy as unjustified. While it acknowledged that Irving's mill was a dangerous workplace and that breathalyzer testing was useful to avoid injury, they found no sufficient evidence of a workplace alcohol problem that would justify the heavy intrusion into employee privacy. The Board concluded:

> "The evidence is not to be dismissed, and I do not do so, but it cannot be said to be indicative of a significant problem with alcohol-related impaired performance at the plant".

In particular, the Board faulted the employer for failing to connect instances of alcohol consumption with actual safety incidents. What that meant was that the policy was unreasonable.

The Board rules was appealed and ultimately found its way to the Supreme Court of Canada which restored the initial decision of the Board. Justice Abella, writing for the majority, held

that the Board's decision was *reasonable* in finding that there was no balance between the Irving policy and employee privacy.

The SCC stated that random alcohol testing which involves a significant intrusion on employee bodily privacy cannot be justified in the absence of evidence showing a general or serious problem with alcohol consumption in the workplace. Irving had simply not demonstrated such a problem. Out of over eight years of operations, there were only three documented incidents involving alcohol none of which caused injury or showed evidence of impairment-related accidents. The majority held that this fell short of establishing the kind of risk that would justify random testing finding that "In the absence of evidence of enhanced safety risks, the intrusion on privacy associated with random testing is unjustified." (para. 46)

All told, the SCC restored the arbitration board's decision and struck down the random alcohol testing policy.

As an application example suppose an employer wants to introduce a new rule that all customer service staff must wear a uniform and maintain a certain dress and grooming standard. The collective agreement doesn't mention uniforms or dress code except maybe a clause that any uniform if required will be provided by the company. The employer issues a detailed dress code policy (no jeans, specific colour scheme, neat hair, etc.) and says starting next month, employees must comply or face discipline. How would the policy be considered under the KVP test:

- 1) Is it consistent with the CA? Yes, if nothing in the CA forbids it and if uniforms are allowed as long as employer pays.
- 2) Is it reasonable? Probably. As it's a customer-facing role an employer can reasonably set appearance standards.
- 3) Is it clear? The employer's written policy should clearly state what is and isn't acceptable attire/grooming.
- 4) Are employees informed? The employer circulates the new policy well ahead of enforcement date and holds a meeting to explain it then that satisfies notice.
- 5) Are employees warned of consequences? Yes, the policy states failure to adhere may lead to discipline.
- 6) Consistency? The employer must then enforce it fairly across the board and not ignore some people's violations.

If all criteria check out, an arbitrator will likely uphold the dress code policy as valid. If an employee then refuses to wear the uniform and is disciplined.

Estoppel as a Limit on Management Rights

If it applies, estoppel as a concept, prevents a party from suddenly enforcing strict legal rights when their prior conduct led the other party to believe those rights would not be enforced in that way. Estoppel in the collective agreement context often arises when there is a past practice

or representation that conflicts with the literal terms of the collective agreement. If one party, either the employer or the union, has consistently behaved in a way that suggests they won't enforce a particular contract term then estoppel may bar the first party from enforcing the term for a period of time.

In order for estoppel to apply the following elements must be met:

- 1) there must be an existing legal relationship between the parties;
- 2) one party must make an unequivocal representation (by words or conduct) that it will not enforce a strict right; and
- 3) the other party relies on that representation and suffer a detriments if the first party were allowed to later go back and enforce the right.

All these estoppel elements must be present and, if one or more are missing, then estoppel could not be asserted. In the labour context, the "legal relationship" is obviously there (employer-union under the collective agreement). The tougher questions are usually whether a truly clear representation was made and whether the other side actually relied to their detriment.

Foundational Quote

"[Estoppel] contributes to harmonious labour relations by preventing a party to a collective agreement from resiling from a representation… where the effect… would be to detrimentally affect the other party."

NCR Canada Ltd v International Brotherhood of Electrical Workers, Local 213, 2014 CanLII 48802 at para. 64

An "unequivocal representation" can be an explicit statement. For example, a manager telling the union "We won't invoke the layoff clause this year despite low orders, we'll keep everyone working," or the union telling the employer, "We won't enforce the double-time pay on Sunday for this special project."

The unequivocal representation could also be through consistent past practice. For example, say the employer for years freely gave extra sick days beyond what the contract said and the union therefore, didn't negotiate for a higher sick day entitlement in the next contract because they assumed the practice would continue. However, just because something was done a certain way for a long time doesn't automatically mean one side promised it would always be so. There must be some reason for the other party to reasonably believe that the strict terms of the contract would not be insisted upon. Often this comes down to whether the issue was discussed at bargaining or whether one party explicitly assured the other of something.

For example, consider a collective agreement article that says part-time employees are not entitled to benefits. But an employer, out of goodwill, had been giving part-timers some benefits for many years and the union became accustomed to it. At the next bargaining, the union doesn't push for a change to that clause because, in practice, part-timers are getting benefits. Now, mid-contract, the employer decides to enforce the strict language and cut off benefits for part-timers, pointing to the clause that says they're not entitled. An arbitrator could find an estoppel against the employer because:

- the employer, by its conduct, represented it would give benefits notwithstanding the clause;
- the union relied by not negotiating an amendment and the part-timers relied on receiving benefits; and
- taking away the benefits now is a detriment.

Thus, the employer might be estopped from denying benefits until the current agreement expires. However, if the employer can show it never intended it as a forever promise like repeatedly telling the union "This is an exception this year only", then no unequivocal representation exists.

Importantly, estoppel only suspends rights until the end of the current collective agreement. The idea is that when the parties renegotiate the next contract, they have an opportunity to address the issue and cannot assume that representations on past practice will continue unless they bargain it in. For example, in the scenario above, the arbitrator might say the employer must continue the benefits for part-timers for the remainder of the agreement because of estoppel but, when the contract is up for renewal, the employer can insist on the strict language going forward.

Foundational Law - *NCR Canada Ltd v. International Brotherhood of Electrical Workers, Local 213*, 2014 CanLII 48802 (BC LRB)

The employer, NCR, maintained a company-wide pension plan. Until 2001, the plan was a defined benefit ("DB") pension plan. In 2001, NCR introduced a defined contribution ("DC") plan and gave all employees a one-time irrevocable choice - switch to the new DC plan or remain in the existing DB plan for the duration of their employment. Nineteen unionized employees in the International Brotherhood of Electrical Workers, Local 213 ("IBEW") bargaining unit elected to stay in the DB plan.

Over a decade later, in 2012, NCR announced it would terminate the DB plan and move all remaining participants including, the 19 bargaining unit members to the DC plan as of January 1, 2013. The union filed a grievance, arguing that NCR was estopped from making this change because it had represented in 2001 that the employees' choice would be permanent.

Arbitrator Miller found that all three elements of estoppel were satisfied. On the unequivocal representation criteria, NCR's 2001 documents including, the "Transition Guide" and the "Enrollment Form" assured employees that their pension choice would remain in effect "as long as you are actively employed by NCR." While the Transition Guide included a general footnote reserving the right to amend the pension plan, the arbitrator concluded that this did not override the central, repeated message that the DB plan would continue for the duration of the employees' careers.

On reliance and detriment, evidence from bargaining unit members showed they had structured their retirement planning over 11 years based on the belief that their DB pension would remain in place. The arbitrator accepted this as clear reliance, and that moving to a DC plan late in their careers would undermine the predictability and stability that the employees had been promised.
"The result of the forced change in 2013 would be the loss of the stability and predictability which had been the cornerstone of their retirement planning for 11 years." (at pg. 34)

The employer argued that it had always retained the legal right to amend the plan and that any statement suggesting otherwise was subject to that limitation. However, the arbitrator held that a general legal reservation cannot override specific representations made to employees, especially where those representations formed the basis of critical long-term financial decisions.

While NCR sought to overturn the arbitration award at the Board the Board dismissed the application. The Board found that the arbitrator had properly understood and applied estoppel.

All in, estoppel is about fairness and avoiding surprise. It prevents a party from pulling the rug out from under the other by suddenly holding them to a contract clause that, through conduct, had been treated as waived. If parties do not want to be held to the estopped position then the expectation is to bargain the issue during the next rounds of bargaining.

Amending Collective Agreements

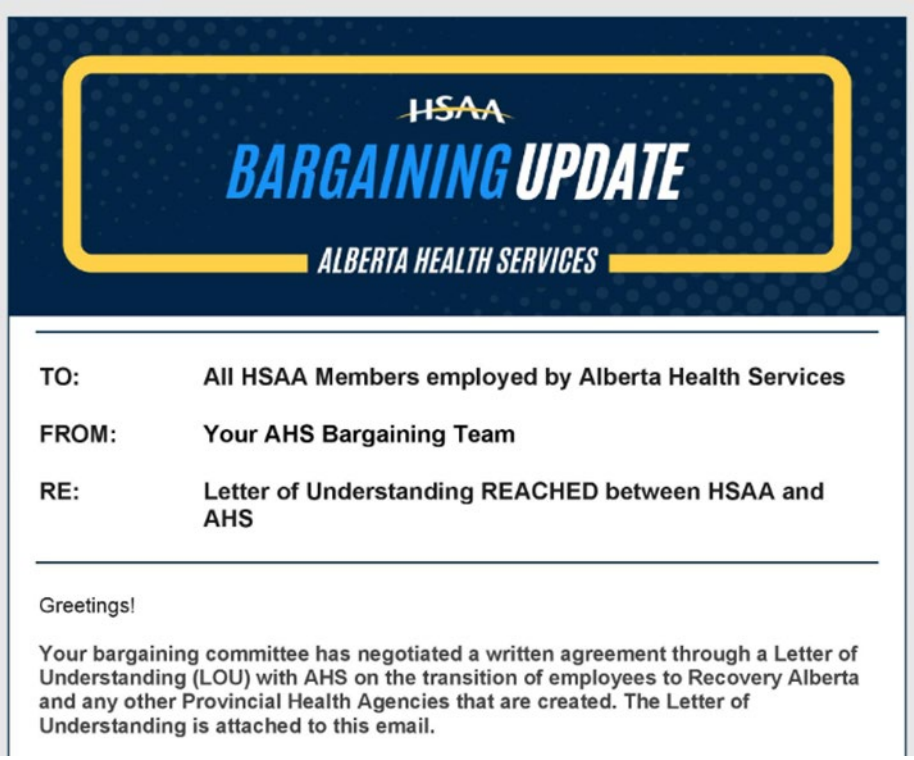
As we saw with estoppel, sometimes the parties wish to change their interpretation of the clear language of the collective agreement. However, if both the union and employer agree, they might actually look at amending or adding to the terms of the collective agreement.

Generally, once a collective agreement is signed and in force, circumstances may change or issues may arise that the agreement doesn't perfectly address. While, as a rule, neither party can unilaterally change the terms of a collective agreement during its term, the parties can mutually agree to amendments or clarifications. The main ways to do this are Letters of Understanding ("LOUs") or Memoranda of Agreement or Letters of Intent (LOI).

Letters of Understanding

A Letter of Understanding (sometimes called a Memorandum of Understanding or Memorandum of Agreement) is essentially a side agreement reached between the union and employer that supplements or amends the collective agreement. LOUs are binding agreements and have the same force as the collective agreement terms.

LOUs can be made during negotiations (often attached to the collective agreement at signing) or mid-term if both parties consent. They often deal with specific issues that don't fit neatly into the main body of the agreement or pilot projects with exceptions.



Example of an LOU negotiated between Alberta Health Services and the HSAA. Retrieved from: https://www.edmontonmetrolocal.ca/blog/letter-of-understanding-reached-between-hsaa-and-ahs

For example, an LOU might state "Notwithstanding Article 15 (Hours of Work), the parties agree to a trial 4-day compressed work week schedule in the IT Department for the duration of this agreement, subject to either party's right to cancel the trial with 30 days' notice." This LOU would allow a flexible schedule experiment without re-opening the entire collective agreement contract.

Many collective agreements explicitly state that attached LOUs are deemed part of the agreement. Even if not stated, arbitrators typically enforce LOUs as part of the agreement if they relate to its subject matter and were mutually agreed.

Coca Cola/Teamsters Collective Agreement – LOU

The following shows a letter of understanding dealing with work location preferences from the Coca Cola/Teamsters collective agreement:

LETTER OF UNDERSTANDING #2

BETWEEN: **COCA-COLA CANADA BOTTLING LIMITED**

AND: **TEAMSTERS LOCAL UNION No. 213**

Re: **WORK LOCATION PREFERENCE**

The Company within its operational requirements shall on an annual basis, enable full time employees to declare preferences of primary job location on a seniority basis.

Employees wishing to declare a different primary work location preference from their current location must do so in writing in January of each year. The Company will finalize in accordance with operational requirements and seniority provisions to institute the annual work location accommodations in February.

It is understood the junior employee in the classification shall be displaced in order to facilitate the movement between locations. If the junior person is a floater employee they will only be displaced if they are performing the majority of the work in the corresponding classification.

Employees who are already posted in a particular classification can post into an identical classification in a different work location to facilitate an early move to a different work location. However, the trial period shall not apply in this situation.

Job postings under Article 13 that are made after the initial start-up and staffing of the new distribution centre will indicate at which location it is anticipated that the majority of work will be performed for the vacancy.

The above applies to Mayfair, Chilliwack and Richmond locations.

DATED AT VANCOUVER, British Columbia, this day of 2023.

PARTY OF THE FIRST PART PARTY OF THE SECOND PART

LOUs are also useful for addressing unforeseen issues. Suppose new legislation affects the workplace like a new statutory holiday is created by government mid-contract. The parties might sign an LOU on how to implement that holiday rather than each side acting unilaterally. Or if the employer wants to introduce a new bonus program not contemplated in the contract, they might negotiate an LOU with the union setting it out.

Letter of Intent

Slightly different from LOUs, letters of intent often record one party's intent or future action rather than a concrete contractual obligation. For example, an LOI might say, "The Employer intends to implement a new payroll system by next year and will consult the Union regarding any impacts."

LOIs are usually not enforceable in the same way as LOUs, because they express intentions, not firm commitments. They are sometimes used to alleviate concerns without making a binding promise. However, if an LOI is specific enough and is part of the bargaining outcome, an arbitrator could potentially consider it when interpreting the agreement. Unions often prefer LOUs to LOIs because they are binding but, LOIs have their place when parties don't want to codify something just yet.

Conclusion

Collective agreements form the foundation of unionized employment in British Columbia and across Canada. They are far more than just pay and benefits schedules; they are comprehensive documents that establish the rules, rights, and procedures governing the workplace and the union-management relationship. For that reason, the collective agreement is often referred to as the "law of the workplace" for unionized settings. The document serves like a mini legal code tailored to a specific workplace or industry within the broader confines of labour law.

Chapter 6 – Review Questions

1. What is a collective agreement? How does it differ from an individual employment contract?

2. How is a collective agreement legally validated and made enforceable in BC?

3. What is the minimum term length for a collective agreement in BC and why does it matter?

4. What mandatory provisions must every collective agreement include under BC law?

5. How does the grievance and arbitration process function in a collective agreement?

6. What is the role of the joint union-management consultation committee?

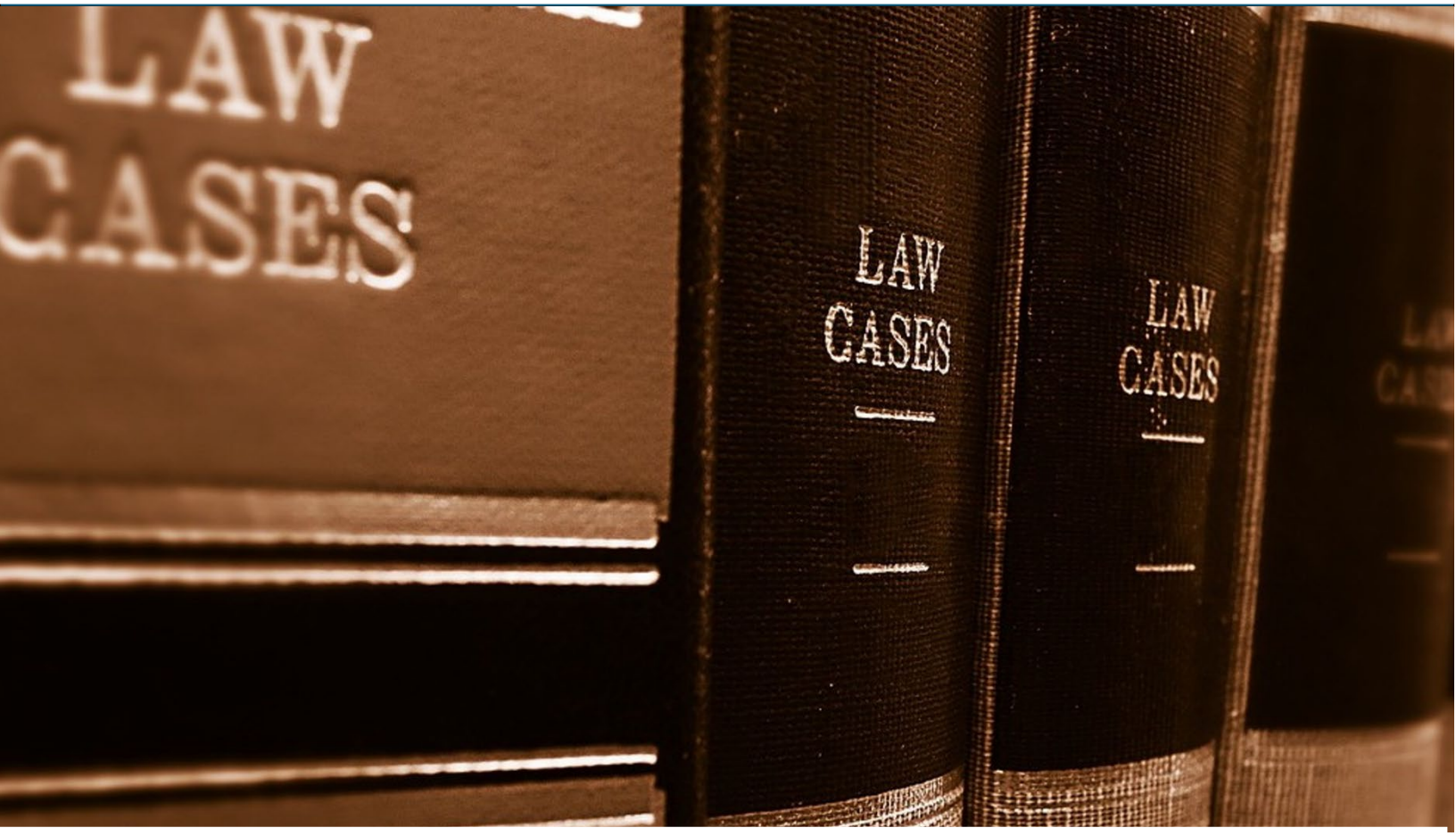
7. How do collective agreements interact with BC's Employment Standards Act (ESA)?

8. What are some common (but not required) clauses in collective agreements? What are their purposes?

9. What is union security? What are the main types of union security clauses?

10. What is the KVP test? How does it limit the employer's ability to impose workplace rules?

Chapter 7:
The Dispute Resolution Process



Learning Outcomes:

1. Explain the purpose and structure of the grievance process in unionized workplaces.
2. Identify and distinguish between the four main types of grievances: individual, group, policy, and union.
3. Describe the steps in the grievance procedure.
4. Interpret the "work now, grieve later" principle and recognize its legal exceptions.
5. Summarize the arbitration process including, the appointment of arbitrators, the structure of hearings, and the binding nature of arbitral decisions under the Code.
6. Apply the *Wm. Scott* test to assess just cause for discipline or discharge.

Introduction

Few components of the modern labour regime are as critical as the dispute resolution process. Having a structured and formal procedure for resolving disputes is the backbone of ensuring labour peace throughout the term of the agreement. It can also provide faster and more efficient decision-making when issues involve the day-and-day operations of the employer and need immediate results.

While we've mentioned terms like grievance steps and arbitration in previous chapters, this chapter will examine in-depth the various mechanisms and procedures used to resolve dispute in the unionized context.

Grievances in Unionized Environments

The grievance process is the central mechanism for resolving disputes that arise between unionized employees and employers under a collective agreement. Unlike civil litigation system which involves initiating a lawsuit in court, grievances are resolved through a private, specialized process agreed to by the union and the employer.

At its core, a grievance is a formal complaint brought by the union on behalf of an individual employee or a group of employees alleging that the employer has violated the terms of the collective agreement. The person or party who initiates a grievance is known as the grievor (often an individual employee or a group of employees but, the union can also be the grievor on behalf of members). The grievance process is typically outlined in the collective agreement itself including the various specific steps towards a resolution.

One of the fundamental reasons unionized employees pursue grievances instead of lawsuits is that the collective agreement ousts the jurisdiction of the courts over matters arising from its interpretation, application, or alleged violation.

Foundational Quote

"The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

St. Anne Nackawic Pulp & Paper v. CPU, 1986 CanLII 71 (SCC), [1986] 1 SCR 704 at para. 16

As a result, individual employees cannot bypass the union and sue their employer in court for matters covered by the agreement; instead, they must rely on the union to advance their claim through the grievance procedure. This exclusivity preserves industrial peace, maintains the integrity of the collective bargaining regime, and ensures disputes are resolved by experts who understand the specific workplace context.

The Code also codifies the mandatory nature of grievance. Section 84(2) states that "every collective agreement must contain a provision for final and conclusive settlement, without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes… respecting its interpretation, application, operation or alleged violation". Any disagreement about what the contract means or whether it has been breached must be resolved through the grievance/arbitration process rather than strikes or lockouts during the life of the agreement.

Types of Grievances

Grievances are not a singular concept. They can actually be categorized into several types depending on the scope of the grievances:

Individual Grievance

An individual grievance is brought forward by the union on behalf of a single employee who alleges that the employer has violated their specific rights under the collective agreement. This is the most common type of grievance and typically involves issues such as unfair or excessive discipline, denial of wages or benefits, failure to grant vacation entitlements, or improper job postings. For example, if a long-serving employee is suspended without pay for alleged insubordination and the union believes the employer failed to follow progressive discipline procedures required under the collective agreement, the union may file an individual grievance seeking to have the discipline removed and the lost wages reimbursed.

Group Grievance

A group grievance arises when several employees are affected by the same issue stemming from a common fact pattern or employer action. Although the grievance may still be filed by the union, it represents the interests of multiple individuals collectively. This type of grievance is appropriate when the employer has taken action that impacts a group of workers in the same way such as altering shift schedules without consulting the union, denying overtime pay to a department, or failing to provide mandated safety equipment. For example, if an employer implements a change to break times that reduces the number or duration of rest periods for all machine operators on a production line, the union may file a group grievance on behalf of the affected employees.

Policy Grievance

A policy grievance challenges the employer's broad practices or interpretations of the collective agreement. Policy grievances can apply even in the absence of a directly harmed employee. It is usually filed by the union when it believes the employer has adopted a policy or made a decision that sets a precedent or risks violating the agreement in an ongoing or systematic way.

For example, an employer unilaterally announces a new attendance management policy that includes automatic discipline for sick days taken without a doctor's note even though the collective agreement does not require such documentation. The union may file a policy grievance to contest the legality of the policy before it is enforced. The goal is to clarify or stop an employer practice that may be contrary to the collective agreement before it becomes entrenched.

Union Grievance

A union grievance is filed by the union to defend its own interests, rights, or status as the certified bargaining agent. These grievances do not necessarily involve harm to individual employees but are intended to protect the union's role in the workplace. This may include situations where the employer interferes with union organizing, fails to deduct union dues (in a union shop), refuses to recognize union stewards, or bypasses the union by dealing directly with employees on terms and conditions of employment. For example, if an employer fails or refuses to deduct and remit union dues as required by a union security clause in the collective agreement. This type of grievance doesn't focus on an individual member's rights but rather the union's legal and contractual right to maintain membership integrity and financial stability. The grievance would not be about any single employee's wages but about enforcing the union's right.

The Grievance Ladder

Typically, the first foundational step in an employee thinking about pursuing a grievance is fact collecting. It's essential that, for employee grievances, the union gathers all relevant information and evidence related to the alleged violation. The shop steward is traditionally the individual who assists in this process.

Shop stewards are the union representatives elected or appointed to represent the interests of union members at the workplace level. They often provide guidance to employees regarding their rights under the collective agreement and assist them in identifying and articulating grievances. They are also responsible for obtaining a detailed account of the violation from the employee, collecting relevant documents, interviewing individuals who have firsthand knowledge of the events in question, and assessing the strengths and weaknesses in the case. In general, the shop stewards are often the first point of contact for employees who believe their rights have been violated.

Assuming sufficient facts are known, the grievor is when be expected to follow the grievance steps outlined in the collective agreement. While each collective agreement will be different, most establish a similar multi-step process for resolving grievances, commonly referred to as the "grievance ladder." This process typically involves the following stages:

1. Informal discussion where the employee and their immediate supervisor attempt to resolve the issue informally.
2. First-level formal grievance where, if the issue remains unresolved, a written grievance is submitted to the employee's immediate supervisor or department head.
3. Second-level grievance where, if not resolved at the first level, the grievance is escalated to a higher level of management.
4. Final internal stage where the grievance is presented to senior management or a designated labour relations representative.
5. Arbitration where if the grievance remains unresolved after exhausting internal processes, it proceeds to arbitration.

Effectively, each step in the ladder offers an opportunity to settle disputes early with the hope of avoiding time and costs associated with arbitration. Most grievances are, in fact, resolved at earlier stages of the ladder though the cascading steps allow multiple opportunities to settle.

The "Work Now, Grieve Later" Rule

Let's start with a situation, a supervisor assigns an employee a duty that the employee believes is "not my job" under the collective agreement. What should the employee do? Should they perform the task even if they disagree? Can they simply refuse? The answer is almost always no, subject to limited exceptions, that the unionized worker should follow the instructions of their supervisor even if they disagree about its validity under the collective agreement.

Unionize workplaces follow the rule of "work now, grieve later" or sometimes also referred to as "obey now, grieve later" This means that employees are expected to comply with management's directions or policies at the time they are given, even if the employee (or union) believes those directions violate the collective agreement. The employee should perform the work or follow the order first and then challenge it through the grievance process afterwards. "Work-now, grieve later" allows the work to always continue even when there are hard disputes about whether or not the collective agreement is being violated. Individual employees cannot simply refuse to do work assigned or unilaterally determine which orders to follow. In our example then, the employee should still do the task when directed and then contact their steward and file a grievance if necessary.

That said, the "work now, grieve after" rule is not absolute. There are two well-recognized exceptions where an employee may refuse to comply immediately with an order and not be expected to wait for a grievance decision:

1. *Health and Safety Concerns*

If obeying the order would put the employee (or others) in imminent danger or violate workplace safety regulations, the employee is not required to follow the unsafe instruction. Section 3.12 of the BC *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 gives workers the right to refuse unsafe work.

Procedure for refusal

3.12 (1) A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.

(2) A worker who refuses to carry out a work process or operate a tool, appliance or equipment pursuant to subsection (1) must immediately report the circumstances of the unsafe condition to the worker's supervisor or employer.

(3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and

(a) ensure that any unsafe condition is remedied without delay, or

(b) if, in the supervisor's or employer's opinion, the report is not valid, must so inform the person who made the report.

Thus, an employee who genuinely believes that performing the ordered work would be dangerous to life or health can refuse on the spot while the matter is investigated. Going back to our example, imagine if the employee was a coffee shop barista who was instructed to drive a forklift offload some supplies from a truck. Being told to operate heavy equipment without having the needed training could justify refusal by the worker without complying with work-now, grieve later.

2. *Illegality*

If the order or directive is clearly illegal the employee is not required to comply. No one is expected to commit an illegal act even temporarily while waiting for a grievance to sort it out. In such cases, the worker can legitimately say "no" and later raise the issue through the union as needed.

For example, imagine that that supervisor instructs a unionized employee to falsify invoice records so that they can double-bill a client. This action would be unlawful and therefore, the employee could refuse without waiting for the grievance process to run its course.

Outside of these narrow exceptions, employees who refuse work or disobey orders, even if they believe they are right, risk being disciplined for insubordination. It's also entirely possible that refuses an instruction could later be found to be right. An arbitrator deciding the grievance might agree that the worker was correct about the contract interpretation however, the discipline could still apply if the worker had refused to do the work and not follow the grievance process.

Because of this dynamic, the burden is generally on the employee (or union) to demonstrate that an exception applied if they did *not* "work now and grieve later". In all other cases, the safe course is to obey and then file a grievance. This rule helps reinforce management's authority in the short term while still safeguarding the union's ability to challenge wrongful orders after the fact.

Grievance Arbitration

Arbitration is the last step of the dispute resolution process in unionized workplaces. In arbitration, a neutral third-party arbitrator (or panel of arbitrators) hears the union and employer's arguments about the grievance and issues a final, binding decision that resolves the dispute. Arbitration in this context is often called grievance arbitration or rights arbitration (to distinguish it from interest arbitration used in bargaining impasses).

While arbitration provisions will be each of the collective agreement, the reasons why are because of a section of the Code which was previously referred to, section 84. Section 84 demands that strikes and lockouts cannot occur over grievances during the term of a collective agreement by providing arbitration as the compulsory mechanism.

Dismissal or arbitration provision

84 (1) Every collective agreement must contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision must require that the employer have a just and reasonable cause for dismissal or discipline of an employee, but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.

(2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

(3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:

(a) the employer must not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;

(b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties must agree on a single arbitrator, the arbitrator must hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.

Specifically, section 84(2) mandates a clause for "final and conclusive" arbitration of all disputes arising from the agreement. Section 84(3)(b) provides a default arbitration procedure that is deemed included if the collective agreement is missing one which allows either party to refer the dispute to a single arbitrator after exhausting the grievance steps and the arbitrator's decision to be final and binding

Appointment of an Arbitrator

The process of selecting an arbitrator is usually outlined in the collective agreement. Many agreements contain a list of agreed to arbitrators. If the union and employer can agree on a specific arbitrator for the case then that person is simply appointed.

If the parties cannot agree on an arbitrator, either party can apply to the Collective Agreement Arbitration Bureau (CAAB), a branch of the Board, to appoint one. The CAAB director will then choose an arbitrator from a registry of qualified labour arbitrators. This CAAB appointment helps avoids situations where arbitration is stonewalled because a party refuses to select an arbitrator. In some instances, the collective agreement might call for a tripartite arbitration board (one nominee arbitrator from each party plus a neutral chair); however, single arbitrators are more common for efficiency.

Once appointed, the arbitrator contacts both parties to schedule dates for a hearing and to handle preliminary matters like defining the issues, arranging document exchange, etc. These

preliminary matters are also handled a case management conference which is mandatory under section 88.1 of the Code:

Case management conference

88.1 Within 30 days of the appointment of an arbitration board, the arbitration board must conduct a case management conference to

(a) schedule the exchange of information and documents,

(b) schedule hearing dates, and

(c) encourage settlement of the dispute.

According to section 88.1 we know that both the employer and union have to meet with the arbitrator within 30 days of the appointment.

Another question that arises is who pays for the arbitrator? Section 90(1) provides that, unless the collective agreement says otherwise, each party bears its own costs and they share the arbitrator's fees equally:

Fees and costs

90 (1) Unless the provision required under section 84 or 85 provides otherwise, each party to an arbitration under section 84, 85, 104 or 105 must bear

(a) its own fees, expenses and costs,

(b) the fees and expenses of a member of an arbitration board that is appointed by or on behalf of that party, and

(c) equally the fees and expenses of the chair of the arbitration board or a single arbitrator, unless the arbitration board allows another person to participate in the hearing in which case the arbitration board may direct that a portion of the fees and expenses of the chair be borne by that person.

This means the union pays half the arbitrator's cost and the employer pays the other half (plus their own lawyer or representative fees). That said, arbitration has costs to it and this is again an incentive for the parties to settle minor grievances earlier if possible.

Arbitration Hearing

An arbitration hearing is essentially a private judicial proceeding. It is quasi-judicial in nature, meaning it resembles a court trial but is somewhat less formal and usually conducted in a meeting room rather than a courtroom. Both the employer and union have the opportunity to present their case fully. A typical arbitration hearing in BC will proceed along the following steps:

i. Arbitrator's Introduction

The arbitrator will begin by introducing the case and perhaps dealing with any preliminary objections or jurisdictional matters.

ii. Opening Statements from the Parties

The union (grievor's side) as the initiating party often goes first, giving an opening statement that outlines the issue, the facts they will prove, and the remedy soughtfile-amgyuc3kmqsjx4b3axu9fy. Then the employer gives its opening, explaining its position and what it intends to show.

iii. Evidence Presentation

The union presents its evidence first (since it usually bears the burden of proving a contract violation, except in discipline cases where the employer often has the burden to prove just cause). The union may call witnesses – for example, the grievor, co-workers, experts, etc. – and present documents or other exhibits. Each witness can be examined and then cross-examined by the employer's representativefile-amgyuc3kmqsjx4b3axu9fy. The union will try to establish the facts that support the grievance (e.g., what happened and why it breaches the contract).

Once the union has presented its case, the employer then presents its evidence. The employer can call its own witnesses (e.g., supervisors, managers, other employees) and introduce documents to rebut the union's case or justify its actionsfile-amgyuc3kmqsjx4b3axu9fy. The union gets to cross-examine the employer's witnesses as well.

Throughout the hearing, rules of evidence are applied somewhat flexibly. Arbitrators are not strictly bound by courtroom evidence rules and may accept any evidence they deem relevant and reliable. However, principles of fairness and natural justice must be observed (each party must have a chance to respond to the other's evidence). A transcript is not usually taken unless one of the parties hires a court reporter, but the arbitrator will take detailed notes.

iv. Rebuttal Evidence

Sometimes, the union may offer rebuttal evidence if new facts emerged during the employer's presentation, though this is at the arbitrator's discretion and often limited.

v. Closing Arguments

After all evidence is in, each side has the opportunity to make closing arguments summarizing the evidence and making legal arguments. Typically, the union (initiating side) goes first, then the employer, and sometimes the union can reply briefly since it has the ultimate. These arguments may reference the collective agreement language, relevant statutes, and prior arbitration awards or court decisions that support their interpretation of the contract.

vi. Arbitrator's Deliberation

The arbitrator will then deliberate and issue an arbitration award. An arbitrator's first focus is to interpret and apply the collective agreement in a manner consistent with its purpose, the intent of the parties, and fairness in the employment context. They are also likely to draw on arbitral jurisprudence for guidance about what has happened in similar arbitration cases.

Once the arbitrator makes a decision, they will write an award that usually contains a summary of the evidence, the positions of the parties, analysis, and a final ruling on whether the grievance is allowed or dismissed (or allowed in part) and what remedy is ordered if any. Under section 96 of the Code, the arbitrator must file a copy of the award with the Director of the Collective Agreement Arbitration Bureau within 10 days.

Filing decision

96 An arbitration board must, within 10 days of issuing an award, file a copy of it with the director who must make the award available for public inspection.

Once the decision has been filed, the Director makes it available for public inspection. This is why many arbitration awards are published on databases like CanLII or in labour law reporters; they become part of the body of arbitral jurisprudence.

Powers of the Arbitrator

Arbitrators in British Columbia have broad authority to fashion appropriate remedies for violations of the collective agreement; this is thanks, in large part, to section 89 of the Code:

Authority of arbitration board

89 For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may

(a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value,

(b) order an employer to reinstate an employee dismissed in contravention of a collective agreement,

(c) order an employer or trade union to rescind and rectify a disciplinary action that was taken in respect of an employee and that was imposed in contravention of a collective agreement,

(d) determine that a dismissal or discipline is excessive in all circumstances of the case and substitute other measures that appear just and equitable,

(e) relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement,

(f) dismiss or reject an application or grievance or refuse to settle a difference, if in the arbitration board's opinion, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference,

(g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the collective agreement, and

(h) encourage settlement of the dispute and, with the agreement of the parties, the arbitration board may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Based on the reading of section 89, an arbitration board, which includes a single arbitrator, has all the necessary power to provide a "final and conclusive settlement" of a dispute under a collective agreement. Accordingly, arbitrators have an inherent ability to fashion remedies

appropriate to make the grievor "whole", meaning they are put in the position they would have been in had the collective agreement not been breached.

Section 89 goes on to identify a non-exhaustive list of specific powers that arbitrators can address a wide range of situations. The list is as varied as the disputes that arise and, as such, arbitrators can mould their decision in light of the specific circumstances of the case. Some of the key remedial powers under Section 89 include the following.

i. Monetary Compensation

The arbitrator can order payment of damages or compensation for any loss caused by a breach of the collective agreement. For example, if an employee was underpaid or unjustly denied wages or benefits, the arbitrator can calculate the monetary value of that loss and direct the employer to pay it. Likewise, if the employer suffered a loss due to union misconduct, an arbitrator could in theory award damages against the union or a person (though such cases are rare).

ii. Reinstatement of Employees

If an employee was dismissed in violation of the collective agreement, the arbitrator can order the employer to reinstate the employee to their job. This often comes with back pay for wages lost during the period of wrongful termination and restoration of any lost seniority or benefits. Reinstatement is an extremely powerful remedy that essentially undoes the firing; it is not typically available in the non-union context.

If the arbitrator feels there was misconduct by the employee but, it doesn't reach the severe threshold for dismissal, the arbitrator might direct reinstatement under a "last chance agreement". Last chance agreements are when the employee is brought back on very strict terms and, if the terms are not complied with, then it can lead to dismissal. These agreements will be discussed more below.

iii. Substitute a Lesser Penalty

Section 89(d) explicitly empowers the arbitrator to find that, while some discipline might be warranted, the penalty levied by the employer was excessive in all the circumstances. Following on that, the arbitrator can then substitute a different penalty viewed as more just and equitable. The idea is that arbitrators have the power to mitigate the punishment initially imposed by the employer.

This is substitution power is extremely important in practice. It means that even if an employer proves an employee committed misconduct, the arbitrator can reduce the consequences. For example, the arbitrator can change a firing to a suspension without pay or reinstate the employee under certain conditions if the termination was too severe given the particulars of the case.

iv. Procedural Time Limits

Arbitrators can relieve against breaches of time limits or other procedural requirements in the grievance process. If a grievance was filed late or a step timeline was missed, the arbitrator can overlook that delay and still hear the case provided the delay didn't prejudice the other side. For example, imagine the union filed one day late due to confusion caused by a long weekend and the employer wasn't harmed by the delay. One would imagine that the minor technicality should not necessarily defeat the grievance. Ultimately, arbitrators have the ability to still permit a grievance case to proceed if fairness dictates.

Conversely, if a party unreasonably delays pursuing a grievance to the point that it prejudices the other side, the arbitrator can actually dismiss the grievance. Section 89(f) allows an arbitrator to reject a grievance if the delay has caused serious detriment. This is rarely used but, nonetheless, the power to dismiss for want of prosecution remains a power of the arbitrator.

Lastly, if a party does not comply with an arbitration award, the other party can file the award in BC Supreme Court, and it will be enforced like a court judgment. Non-compliance is rare since it would undermine the integrity of the system and could lead to unfair labour practice complaints.

Binding and Final Nature of Arbitration Awards

An absolute critical understanding about arbitration is that an arbitration award is final and binding on the parties and the employees affected. Unlike a court judgment which might be appealed through several levels of courts, an arbitration award is intended to be the end of the line for the dispute, subject only to very limited review mechanisms. This approach is a direct result of the need for speedy and conclusive dispute resolution in the workplace.

Section 84(3)(b) of the Code itself states that the arbitrator's decision is final and binding.

> **84** (3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:
>
> (b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties must agree on a single arbitrator, the arbitrator must hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.

By and large, collective agreements will contain a provision compelling arbitration however, should that not be included, section 84(3)(b) deems that requirement into the agreement. All unionized employees in the bargaining unit can therefore, expect that there is a path to arbitration in the event of grievances.

Additionally, section 101 emphasizes that, except as provided in the Code's limited appeal/review sections, an arbitrator's award is final and conclusive:

Decision final

101 Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and proceedings by or before an arbitration board must not be restrained by injunction, prohibition or other process or proceeding in a court and are not removable by certiorari or otherwise into a court.

The effect of section 101 is that the arbitrator's must be abided by the employer and union. If the grievance is upheld, the employer is obligated to implement the ordered remedy. If the grievance is dismissed, the union and grievor must accept that outcome. There is no ordinary appeal on the merits.

Despite the finality of the decision, there is some very limited mechanisms for appeal to the court. The Code has a special "appeal jurisdiction" over arbitration awards, but it is tightly circumscribed. Under Section 99(1) of the Code, a party affected by an arbitrator's decision or award may apply to the Board to review it on one of only two grounds:

Appeal jurisdiction of Labour Relations Board

99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that

(a) a party to the arbitration has been or is likely to be denied a fair hearing, or

(b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

Based on section 99, the appeal grounds to the Board are effectively that (a) a party to the arbitration was denied a fair hearing, or (b) that the award is "inconsistent with the principles expressed or implied in [the Labour Relations Code] or another Act dealing with labour relations."

Ground (a) essentially covers procedural fairness. For example, if an arbitrator refused to allow a party to present crucial evidence or was biased or decided an issue beyond what was argued; those might be considered a denial of natural justice. Ground (b) is a bit more abstract and it is meant to capture situations where an arbitrator's decision contradicts fundamental labour relations principles or statutes. An example might be if an arbitrator interpreted the collective agreement in a way that permits something the Code clearly prohibits (like a clause that undermines employees' statutory rights).

If the Board grants an application under section 99, it can set aside the arbitration award, send the matter back for reconsideration, stay the arbitration proceedings, or substitute its own decision for that of the arbitrator. In practice, section 99 appeals are relatively rare and the Board is reluctant to interfere unless there is a clear breach of fairness or an untenable error of law/policy. Most arbitration awards stand without Board intervention.

The second limited ground of appeal is actually to the Court of Appeal under section 100 of the Code. Somewhat remarkably, section 100 allows a party to apply to the BC Court of Appeal to review an arbitrator's decision only if the basis of the decision is a matter or issue of the general law unrelated to the collective agreement, labour relations, or related factual determinations, and that is not a matter covered by the Board's section 99 jurisdiction.

Appeal jurisdiction of Court of Appeal

100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law

(a) unrelated to a collective agreement, labour relations or related determinations of fact, and

(b) not included in section 99 (1).

More simply, section 100 means that if an arbitrator's award turns on a pure question of law that is external to labour relations then a court might review it. For example, imagine an arbitrator errs in interpretation the application of a human rights provision or a Charter of Rights issue, then an appeal under section 100 could proceed. Ultimately, the threshold for appeal is high. The Court of Appeal's review is not an appeal in the ordinary sense but more akin to a specialized judicial review. If the Court of Appeal does take a review, it could potentially quash or modify an award.

Seniority and Bumping Rights in Layoffs

With the legal framework of arbitration covered, we now turn to some specific substantive issues that frequently arise in grievances, the first being issues of seniority.

Seniority is fundamental in unionized workplaces. As mentioned, it frequently/commonly appears as language in the actual collective agreement. Seniority typically refers to an employee's length of service in a bargaining unit or with the employer and it is used as a criterion for certain job outcomes like layoffs, recalls, promotions, scheduling, and vacations. Most seniority provisions which state that, in situations affecting job security or opportunities, the more senior employee should fare better (all else being equal like qualifications). The principle underlying that trade is that longer service represents a measure of an employee's investment in the workplace over time.

Seniority is defined as the length of continuous service with the employer (sometimes within the bargaining unit or classification) typically, calculated from the date of hire. Collective agreements usually require the employer to maintain a seniority list ranking all employees from most senior to most junior by date. This seniority list is updated as people join or leave.

Example – Seniority List

The following is a snapshot of the seniority list from CUPE Local 59 in Saskatoon. To maintain anonymity of the bargaining members, the names have been redacted. However, you can that the list shows the bargaining member names, job classification, department, hire date, and the seniority rank (here it's calculated based on hours):

Rar	Display Name	Job Classification	Department	Seniority Da	Hours
1	[redacted]	7872-Facilities Utilityperson 8	50000015-Facilities Management	1985-09-20	81,445.24
2		7341-Clerk 7	50000031-Corporate Revenue	1986-05-02	80,167.13
3		6606-Facility Operator	50000021-Recreation and Community Development	1988-01-28	76,529.00
4		7825-Resident Building Operator	50000015-Facilities Management	1988-09-27	75,145.16
5		6694-Meter Reader	50000031-Corporate Revenue	1988-12-26	74,635.13
6		6694-Meter Reader	50000031-Corporate Revenue	1989-07-11	73,508.57
7		6880-Senior Planner 21	50000017-Planning and Development	1989-07-24	73,434.63
8		7328-Clerk-Steno 6	50000027-Staff Development and Safety	1990-11-14	70,696.48
9		7341-Clerk 7	50000031-Corporate Revenue	1991-02-15	70,164.32
10		10148-Equipment Trainer	50000015-Facilities Management	1991-02-25	70,113.05
11		6507-Customer Service Representative	50000031-Corporate Revenue	1991-07-05	69,362.22
12		6821-Arborist	50000019-Parks	1991-09-24	68,904.53
13		6886-Recreation Site Administrator	50000021-Recreation and Community Development	1992-02-05	68,143.02
14		7803-Clerk 11	50000018-Building Standards	1992-02-19	68,059.80
15		6606-Facility Operator	50000021-Recreation and Community Development	1992-06-05	67,445.56
16		7220-Parks Technician 14	50000019-Parks	1992-09-03	66,932.75
17		6472-Clerk 10	50000094-Criminal Investigations	1992-10-09	66,722.63
18		7173-Security Systems Technician	50000028-Emergency Management	1992-10-14	66,699.08
19		1118-Land Development Coordinator	50000008-Construction and Design	1993-04-12	65,673.79
20		6360-Clerk-Steno 10	50000098-Operational Support	1993-06-10	65,329.79
21		7803-Clerk 11	50000099-Corporate Services	1993-06-29	65,226.99
22		6765-Plumber	50000015-Facilities Management	1993-07-29	65,050.71
23		6196-Building Custodian 3	50000015-Facilities Management	1993-08-30	64,877.50
24		6139-Labourer	50000021-Recreation and Community Development	1994-06-02	63,291.08
25		7311-Storekeeper 8	50000032-Supply Chain Management	1994-07-26	62,988.94
26		6417-Clerk-Steno 9	50000007-Transportation	1994-08-12	62,884.33

There are generally two types of seniority clauses regarding how seniority impacts decisions like promotion or layoff:

1. **Non-Competitive where Seniority Governs**

In some agreements, seniority is the decisive factor as long as the senior employee is basically qualified or competent to perform the job in question. For example, if two employees are vying for a promotion and both meet the minimum qualifications, the one with greater seniority gets the job. Or in layoffs, the person with the least seniority is the first to be laid off provided the more senior person can do the work of the junior (with perhaps minimal orientation). This approach puts heavy weight on seniority, reflecting the principle "first-in, last-out".

2. **Competitive Involving Relative Ability Plus Seniority**

Other agreements stipulate that decisions will be based on merit or ability but, if two employees are relatively equal in ability then seniority will be the tiebreaker. For example, in this model, the employer can choose the more qualified candidate for a promotion even if that person is junior, as long as there's a demonstrable difference in qualifications. Only when candidates are roughly equal does seniority tip the scale.

A typical layoff clause might read: "Layoffs shall be in reverse order of seniority, provided the employees retained have the skill, ability, and qualifications to perform the work available." This means the last person hired is the first laid off unless a senior person lacks the qualifications to do any of the jobs that remain. Disputes can arise over what "qualified" means or if there are exceptions. These disputes could become subject to the grievance process and ultimately, arbitration.

Bumping Rights

When layoffs occur, many collective agreements give laid-off employees a right to "bump" or displace other employees with less seniority in other positions as long as they are qualified to perform those jobs. Bumping is essentially a domino effect of seniority in layoffs. For example, if a senior employee's position is eliminated that person can bump a less senior employee in a different department or classification; in effect, the bumping employee takes over that job and forces the junior person out. That junior person, if they have any even more junior employees below them, might bump someone else, and so on. Eventually the least senior employees end up being the ones laid off. Bumping allows senior workers to remain employed by moving into roles occupied by those with less service.

However, bumping rights are usually subject to qualifications and reasonable ability. A senior employee cannot bump into a job if they truly cannot perform it or could not learn it in a short familiarization period. Employers are not required to retrain a bumping employee extensively. For example, a factory assembler might not be allowed to bump into an electrician's position without the necessary trade certification even if they have more seniority than the electrician. But that assembler might bump a junior assembler in another department or a general labourer position that requires less specialization assuming they can do that work.

Seniority and bumping clauses often generate grievances because the application can be contentious. Was the employee qualified for the bump? Did the employer correctly determine the order of layoff? Generally, though, seniority rights limit management rights by effectively constraining how managers can make decisions about the workforce. From the union perspective, seniority is a legitimate way to reward loyalty and protect workers from arbitrary treatment.

For example, imagine a company faces a downturn and needs to lay off 5 people. The company might start with the 5 most junior employees in the bargaining unit. Suppose one of those junior employees, however, holds a role that none of the more senior employees know how to do. The employer might try to skip that person and lay off someone slightly more senior who is easier to replace. If the union disagrees, a grievance will ensue to determine if the layoff violated seniority rights or if the collective agreement's qualification restriction justified it. The general rule "last in, first out" will be upheld unless the employer proves an exception applies.

The trade-off of bumping is that sometimes less experienced employees may be removed even if they are very capable. The employee who keeps their job is simply the one who is the longest-

serving. A union member does have to look to the specific language in the collective agreement to know how rigidly seniority must be applied.

Discipline

Grievances related to employee discipline and discharge are among the most sensitive and significant. The employer's ability to discipline or terminate employees is usually constrained by the collective agreement's just cause provision (discussed in the previous chapter as well). Moreover, there is also the restriction of progressive discipline which states that punishment for misconduct should typically escalate through a series of steps (from minor to severe).

Generally, an employee can likely expect that progressive discipline will involve the delivery of a few separate procedures including, the use of letters of expectation, formal disciplinary letters, and sunset clauses that limit how long past discipline can be held against an employee.

Letters of Expectation

A letter of expectation ("LOE") sometimes used by employers to address issues in an employee's performance or behaviour *without* it being formal discipline. An LOE is essentially a counseling or cautioning letter that sets out the expected standards of conduct or performance and advises the employee to improve.

What is fundamental is that an LOE is not considered disciplinary. Instead, it is more akin to coaching. Because it's not discipline, it typically is not placed in the employee's official personnel file or, if it is, it is marked as non-disciplinary. The LOE's purpose is to clearly lay out the employer's expectations in writing with the hope that the employee corrects the issue before formal discipline becomes necessary. A proper letter will outline what the employee needs to do going forward and offer guidance, training, or assistance as required.

Since LOEs are not disciplinary, they generally cannot be grieved or arbitrated by the union. Because the LOE is just a statement of expectations and there's no penalty, there's little to grieve in any event. However, unions keep an eye on them because if later the employee is disciplined, the employer might try to rely on the fact that expectations had been clearly set in the LOE. Arbitrators may scrutinize whether an LOE was truly non-disciplinary or if it was disguised discipline. As long as the LOE stays as a counseling memo, it's an exercise of management rights to manage the workforce.

Disciplinary Letters and Reprimands

When an employer formally disciplines an employee (short of suspension or discharge), it usually takes the form of a written reprimand or warning letter that goes into the employee's personnel file. This disciplinary *is* grievable because it is an official disciplinary action.

A disciplinary letter typically describes the misconduct or performance problem. The employer would include findings of any investigation and the employer's warning or expectations for the

future. The disciplinary letter puts the employee on notice that their behaviour was unacceptable and that further incidents may result in more severe discipline. Disciplinary letters often contain a clear statement like "further incidents may result in suspension or termination" to underline the stakes.

Such disciplinary letters are almost always a step in a progressive discipline system. For a first offense or a less serious infraction, the employer might issue a verbal warning; this should still be documented in the notes. Secondary, a written warning would be issued. If issues continue, a second warning or a suspension might follow, eventually culminating in dismissal if not corrected. Collective agreements sometimes outline the steps of progressive discipline or at least imply that discipline should be corrective rather than just punitive.

Disciplinary letters can be grieved and, as such, arbitrators can remove or modify them if they find no just cause. However, if the letter is justified, it typically stays on file subject only to any sunset clause that may also be in the collective agreement.

Sunset Provisions

Many collective agreements include sunset clauses, sometimes referred to as expungement clauses that limit how long a disciplinary record can be held against an employee. A typical sunset clause might state that if an employee has no further similar infractions for a period of time (usually 12-24 months), the prior warning or discipline will be deemed removed from their record and cannot be used in future discipline.

Coca Cola/Teamsters Collective Agreement – Sunset Provision

The following is the sunset provision contained in the Coca Cola/Teamster Collective Agreement:

(e) Records of discipline in an employee's personnel file shall be deleted after one (1) year from the date of occurrence.

The underlying rationale for sunset provisions is to allow employees a chance to start with a "clean slate" after demonstrating sustained improvement. If old mistakes are not being repeated why should the employee continue to be haunted by them indefinitely. For example, if an employee was disciplined for lateness and then has a perfect attendance record for the next 18 months (per the sunset clause), the previous warning might be expunged and not considered if the employee is late again in the far future. In effect, sunset provisions encourage rehabilitation and recognize that people can learn from mistakes.

In grievances, if an employer tries to rely on an old warning that should have "sunsetted," the union can object and an arbitrator would likely exclude that from consideration. Even without an explicit clause, arbitrators often give less weight to very old discipline if the employee's record has been clear for a long time.

Serious misconduct might avoid progressive discipline and skip straight to suspension or termination. But in general, arbitrators expect employers to use progressive discipline where appropriate and to clearly warn employees of consequences. As examined in the next section, grievances over discipline often succeed if the employer either lacked just cause entirely or if the penalty was disproportionate.

Just Cause for Discharge

As noted earlier, nearly all collective agreements include a provision that employees can only be disciplined or discharged (fired) for just and reasonable cause. Even if not explicitly stated, such clauses are implied by virtue of the Code.

"Just cause" essentially means the employer must have a valid, substantive reason for the discipline and that the level of discipline is appropriate in the circumstances. In unionized workplaces, employees effectively have job security unless the employer can prove just cause for discipline.

Because determining what constitutes just cause for termination can be complex, labour arbitration in BC and Canada uses a framework of analysis. The leading framework for determining just cause comes from a decision called *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98:

Foundational Law - *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98

Wm. Scott & Co. (Re), BCLRB No. 46/76 is a Board decision which involved the discharge of Margaret Martelli, a financial secretary with the Canadian Food and Allied Workers Union, Local P-162, who worked at Wm. Scott & Company's poultry-processing plant in Coquitlam.

During the employment, Martelli contacted a newspaper editor to dispute a published claim that the union was unwilling to work overtime to clear a poultry processing backlog. During the call, Martelli made several critical comments about the employer's operations that were later published including, her statement: "You wouldn't believe the inefficiencies at the plant." The employer viewed these remarks as damaging and malicious, particularly given public scrutiny of the industry at the time. Martelli was dismissed for making false and harmful public

statements and for allegedly interfering with operations and showing continued unwillingness to comply with management instructions.

The union grieved the dismissal as not being just cause. An arbitration board upheld the termination. The union then applied to the Board arguing that the arbitration award was inconsistent with principles expressed or implied in the Code and should be overturned.

In its ruling, the Board developed the now-foundational three-step analysis for just cause determinations, often referred to as the *Wm. Scott test*:

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

The Board's framework departed from rigid common law doctrines by requiring a contextual assessment of both the employee's conduct and their employment history. The Board criticized the arbitration panel for treating the dismissal as automatically justified upon finding misconduct and only considering mitigating factors at a secondary stage. As the Board explained:

> "The statutory responsibility of the arbitrator… is to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee… should actually lose his job for the offence in question." (para 14)
>
> …
>
> "Such features as the employee's motivation, attitude, and disciplinary record are directly relevant to the question of whether the employee was justly dismissed … They should not be relegated to a secondary level of inquiry…" (para 18)

Despite these concerns, the Board found that the arbitration panel, in substance, had engaged with the merits of the case and had not committed a reviewable error. The panel considered Martelli's recent return from a prior year-long suspension, her persistent confrontational stance, and her unwillingness to accept responsibility for her actions. Accordingly, the application to set aside the arbitration award was denied. Martelli was properly dismissed.

The WM Scott Test

7. Has the employee given just and reasonable cause for some form of discipline?
8. If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances?
    a. The seriousness of the offence.
    b. The degree of intention or provocation.
    c. The employee's service record.
    d. Previous corrective discipline.
    e. Consistency of the penalty.
9. If the discharge was excessive, what alternative measure should be substituted as just and equitable?

As seen in the case summary, the *Wm. Scott test* breaks the just cause assessment into three distinct questions that an arbitrator should ask in a discharge grievance:

1. **Has the employee given just and reasonable cause for some form of discipline by the employer?**

In other words, did the employee engage in misconduct that warrants any discipline? This is essentially establishing the guilt or wrongdoing. The employer bears the onus to prove, on the balance of probabilities, that the alleged misconduct occurred and that it is something blameworthy. If the answer to this first question is no and the employee did not do anything that justifies discipline, then the grievance will succeed and any discipline is overturned. If yes, then we proceed to question 2.

2. **If yes, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?**

Here the question is whether the penalty of termination too severe given the nature of the misconduct and the context? This is the proportionality analysis. Many arbitration awards hinge on this second part: an employer may have had cause to discipline but perhaps not cause to fire.

The arbitrator examines the mitigating and aggravating factors surrounding the incident and the employee's record to judge whether discharge was a just and equitable punishment or whether a lesser sanction was warranted. In *Wm. Scott*, there were five key factors identified (often cited in subsequent cases) that are particularly relevant in deciding if termination is an excessive penalty:

a. *The seriousness of the offence.* How grave was the misconduct? The more serious the misconduct, the more it justifies severe discipline like discharge. We would expect

serious misconduct to be actions like violence, substantial theft, serious insubordination, etc.

b. *The degree of intention or provocation*. Was the employee's act deliberate, premeditated, or repeated, or was it a momentary lapse or something provoked by others? A spur-of-the-moment or minorly provoked act may be viewed more leniently than a premediated wrongdoing).

c. *The employee's service record*. Is the grievor a long-term employee with a good record, or short-term with past disciplinary issues? Long, relatively discipline-free service is mitigating and weighs against firing.

d. *Previous corrective discipline*. Has the employer tried lesser discipline to correct the behaviour and were those efforts unsuccessful? If the employee has been warned or suspended before for similar conduct and didn't improve, termination is more justified. If no prior warning, firing might be premature.

e. *Consistency of the penalty*. How does this punishment compare to what others have received for similar offences in the past? Is the grievor being singled out? An arbitrator will consider whether the employer has applied rules evenly. If others weren't fired for similar acts, maybe this firing is excessive or discriminatory.

Other factors might also weigh in such as if the employee confessed or showed remorse, whether personal circumstances contributed to the wrongdoing, etc.

Essentially, the arbitrator puts themselves in the employer's shoes and asks, given all these circumstances, was it reasonably proportionate to terminate for cause? If the arbitrator finds the dismissal was disproportionate or excessive, then they move to question 3. If the arbitrator finds the dismissal was appropriate, then the grievance is dismissed and the termination stands.

3. **If the discharge was excessive, what alternative lesser penalty should be substituted as just and equitable?**

If the arbitrator concludes the firing was too harsh, question 3 is answered by deciding on a substitution. As noted previously, arbitrators have leeway under Code s.89(d) to impose a different penalty. They might reinstate the employee with no further penalty or reinstate with a suspension. They might impose conditions like mandatory retraining or treatment (for example, anger management counseling if the issue was a violent outburst. The arbitrator could also give a last chance stipulation or a demotion if appropriate. The substituted measure should be something the arbitrator finds just given all factors.

Example – Application of the WM Scott Test

To see the *Wm. Scott* test in practice, consider the following example involving a BC unionized Coca-Cola bottling plant.

The employee in question, Jordan, is a warehouse worker represented by the Teamsters, with five years of clean service. One afternoon, Jordan is observed on security footage slipping a six-pack of Coca-Cola into their personal bag at the end of their shift and leaving the premises without paying or notifying a supervisor.

The employer conducts an investigation, during which Jordan admits to taking the product but explains that it was a momentary lapse in judgment and they had planned to pay for it the next day but forgot. Coca-Cola has a clear policy prohibiting unauthorized removal of company property and similar incidents in the past have led to termination. Relying on this precedent, Coca Cola dismisses Jordan for cause. The union files a grievance, and the matter proceeds to arbitration.

The arbitrator applies the three-part *Wm. Scott test* for just cause:

1. Did the employee engage in misconduct warranting discipline?

   Yes. There is no dispute that Jordan took company property without authorization. The conduct amounts to theft.

2. Was dismissal excessive in all the circumstances?

   This is the heart of the inquiry. The arbitrator considers a range of mitigating and aggravating factors. On the one hand, the value of the stolen item was minimal (a six-pack of soda), Jordan had five years of unblemished service, immediately admitted to the conduct, and expressed remorse. On the other hand, theft is a serious violation and Coca-Cola had a documented practice of treating all theft seriously, even low-value items, to deter further incidents.

   The arbitrator would also consider whether Coca-Cola has applied its policy consistently. If other employees were terminated for similar infractions, that supports the employer's case. However, if lesser penalties were imposed in past comparable situations, that could weigh in Jordan's favour. Additionally, though, Jordan's actions appeared to be spontaneous rather than premeditated and there was no indication of deeper dishonesty or repeated behaviour.

3. If excessive, what alternative penalty is just and equitable?

   Concluding that dismissal was disproportionate, the arbitrator could substitute a suspension without pay or a last chance agreement.

Ultimately, what would happen here is left to the arbitrator but, it's likely that misconduct is worthy of discipline but not discharge. *Wm. Scott* is not black-and-white, it is nuanced. The arbitrator considers each case and make a determination of what is reasonable and just.

The bottom line is that "just cause" involves two components: 1) proving misconduct and 2) ensuring the punishment fits the crime and the person. The employer essentially has to clear both hurdles to uphold a dismissal on the basis of cause. The just cause standard provides substantial protection for unionized workers and it's why many discipline cases could end up in arbitration.

Foundational Law - *Direct General Partner Corp. v. Teamsters, Local 31 (Nguyen Grievance)*, [2020] C.L.A.D. No. 117

In *Direct General Partner Corp. v. Teamsters, Local 31*, the grievor, Mr. Henry Nguyen, worked at a Delta, B.C. warehouse operated by Canada Cartage Logistics and was dismissed after being caught attempting to remove a can of coconut cream from the warehouse without proper authorization.

Canada Cartage had a longstanding, albeit informal, practice allowing employees to take damaged goods only if the customer had released the goods and the employee had received explicit, signed permission from a manager. Although the Coconut Cream that Nguyen took had been released by the customer, he had no signed authorization from a manager. When questioned by the manager, Mr. Nguyen claimed that a co-worker had told him it was fine to take the item later in the day to avoid being seen, a story the co-worker and supervisor denied. The question was whether Mr. Nguyen's conduct constituted theft and dishonesty justifying discharge.

The arbitrator, Richard Coleman, applied the Wm. Scott framework:

1. Was there misconduct warranting discipline?

Yes. Arbitrator Coleman concluded that the grievor knowingly removed company property without authorization and in breach of a policy he had previously been warned about. Moreover, the evidence showed this was not an innocent misunderstanding. The arbitrator found that Mr. Nguyen had "concocted what I have found to be a false explanation" (para. 62) for taking the coconut cream and that was particularly damaging to the trust essential in an unsupervised warehouse setting.

2. Was discharge an excessive response in all the circumstances?

No. The arbitrator weighed mitigating factors such as the low value of the item and the fact that permission would likely have been granted had it been requested. However, he emphasized that the grievor's dishonesty, not just the act of taking the item, irreparably harmed the employment relationship. "The question is in each case whether the employment relationship can be restored" (para. 66) and, in this case, the grievor's actions of concealing

the item, misrepresenting the circumstances, and attempting to implicate colleagues destroyed the trust needed for continued employment.

3. Should a lesser penalty be substituted?

No. Unlike cases where the conduct was impulsive or arose from unclear rules, Mr. Nguyen had been warned in writing the year prior that any removal of customer goods without permission could lead to termination. The arbitrator concluded that the dishonesty and premeditation were inconsistent with any continued employment.

The grievance was dismissed and Mr. Nguyen's termination upheld.

Last Chance Agreements

We have mentioned last chance agreements previously but, it's important to clearly outline their role in regulating discharge in unionized workplaces. In situations where an employee's misconduct or performance issues are severe or repetitive, pushing the boundary where the employer is ready to terminate, the union and employer sometimes negotiate a Last Chance Agreement ("LCA") to give the employee one final opportunity to keep their job.

A last chance agreement is a written agreement among the employer, the union, and the employee that sets out very strict conditions for continued employment and typically states that any further breach will result in immediate termination with no recourse to grievance or very limited recourse. They are usually used as an alternative to outright termination. For example, an arbitrator or the parties might decide to reinstate an employee who was fired but, only if the employee agrees to behave perfectly going forward. It's essentially the "one more strike and you're out" deal.

The LCA will specify the expected conduct or steps the employee must follow to continue employment. This could be an absolute requirement not to violate any rules for a certain period, or specific requirements like attending rehabilitation, compliance with all company policies, no lateness, etc.

The LCA will absolutely make clear that any breach of the agreement during the specified period will result in termination and usually that the employee (and sometimes the union) agrees not to grieve that termination. In effect, the employee waives the right to challenge the discharge if they fail the last chance. This gives the employer confidence that if the employee doesn't reform, the employer can finally sever employment without another protracted arbitration.

Despite the severity of the LCA, they are tempered by the fact that they are often time-limited. For example, an LCA might be in effect for 1 or 2 years; if the employee maintains a clean record

throughout, the LCA expires and the employee is fully restored to normal status. If the employee slips up during that period, the last chance agreement kicks in and the termination may occur. Similar to sunset clauses, the LCA's time limitation prevents the employee from being under perpetual threat once they've demonstrated rehabilitation over a reasonable duration.

From the union's perspective, an LCA is risky for the employee because it removes the protective umbrella of the grievance process for any little mistake. Therefore, unions don't agree to them lightly. But it can be a lifeline for an employee who would otherwise be fired and requiring a grievance fight/arbitration. As noted, arbitrators sometimes impose last chance conditions as part of a reinstatement order.

Conclusion

Dispute resolution is a cornerstone of the collective bargaining relationship. When disagreements arise over the interpretation, application, or alleged breach of a collective agreement, parties are not left to fend for themselves. Instead, structured procedures such as grievances and arbitration provide a reliable and enforceable process for resolving those disputes without resorting to strikes, lockouts, or unilateral action.

The Code reinforces dispute resolution by mandating that collective agreements contain grievance procedures and by deeming an arbitration clause into every agreement. These compel workplace conflicts over workplace rights and obligations are addressed within a clear and binding framework.

Chapter 7 – Review Questions

1. What is the primary purpose of the grievance process in unionized workplaces? Why can't employees go directly to court with their disputes?

2. How do individual, group, policy, and union grievances differ from each other in purpose and scope?

3. What role do shop stewards play in the grievance process and what is meant by the "grievance ladder"?

4. What is the “work now, grieve later” rule, and what are its two main exceptions?

5. How does the arbitration process function as the final stage in grievance resolution? What role does the BC Labour Relations Code play in enforcing it?

6. What powers does an arbitrator have when resolving grievances and how can those powers influence the outcome?

7. What makes arbitration awards final and binding? Under what circumstances can they be appealed or reviewed?

8. How do seniority and bumping rights influence layoff decisions and what kinds of disputes can arise from them?

9. What is progressive discipline? How do letters of expectation, reprimands, and sunset clauses work?

10. What is the Wm. Scott test for determining just cause in discipline and discharge cases? How is it applied?

Chapter 8:
Duty of Fair Representation

Learning Outcomes:

1. Describe the purpose and legal basis of the duty of fair representation.
2. Discuss how the duty of fair representation balances union discretion with individual employee rights.
3. Outline section 12 of the Code which is the core section dealing with the duty of fair representation.
4. Identify what constitutes a breach of the duty including arbitrariness, bad faith, and discrimination.
5. Summarize key case law on the duty and focusing on the LRB's decision in *Judd (Re)*.
6. Explain the procedural rules for filing a duty of fair representation complaint and section 13 of the Code.

Introduction

In previous chapters, we've spent considerable time unpacking the legal and practical dimensions of the relationship between the employer and the union. We've looked at how rights and responsibilities are negotiated collectively, how disputes are resolved, and how the structure of labour relations emphasizes the collective voice over the individual one. But this raises an important question: what happens when an individual employee feels that their interests have been neglected, not by the employer, but by their *own union*? Are there any rights or claims that belong to the employee personally, outside of the union's control?

At first glance, the answer seems to be no. The foundation of labour law is built on the collective. Once a union is certified, it becomes the exclusive bargaining agent and employees typically cannot negotiate or grieve individually. However, the law does not leave employees entirely without recourse if their union fails to act fairly, in good faith, or without discrimination on their behalf.

This chapter explores the limited but critical area where individual rights re-emerge in the collective context. We will explore what happens when an employee brings a claim against their union for breaching its duty of fair representation. In doing so, we'll confront one of the core tensions in labour relations trying balance the power of the collective with the protection of the individual.

Overview of Duty of Fair Representation

A union certified as the exclusive bargaining agent for a group of employees must represent all employees in the bargaining unit fairly. This obligation is known as the duty of fair representation ("DFR"). It makes sense that if the union has exclusive authority to negotiate and administer the collective agreement on behalf of all workers and individual employees cannot bargain on their own, then the union has to act for them fairly.

Historically, this duty was recognized after instances of unions discriminating against certain members. For example, a 1944 U.S. Supreme Court case Steele v. Louisville & N.R. Co**.** held that a union representing railway workers could not exclude Black employees and must represent all members "without hostile discrimination, fairly, impartially, and in good faith".

Foundational Law - *Steele v. Louisville & N. R. Co., 323 U.S. 192*

Steele v. Louisville & Nashville Railroad Co. involved the Brotherhood of Locomotive Firemen and Enginemen (BLFE), a whites-only union that had been certified under the *Railway Labor Act* as the exclusive bargaining representative for all locomotive firemen employed by the Louisville & Nashville Railroad. The employees in the bargaining unit included both white and black employees. Despite this broad representation, the union negotiated a collective agreement that explicitly disadvantaged Black firemen limiting their job assignments and seniority rights without consulting them or allowing them to participate in union activities. Mr. Steele was a Black fireman affected by the agreement. He filed suit in federal court alleging that the union's actions were discriminatory and violated his rights under the *Railway Labor Act*. The lower federal courts initially dismissed his claim, ruling that no private right of action existed under the Act to challenge union conduct. Steele appealed and the case ultimately made its way to the U.S. Supreme Court.

In a groundbreaking decision, the Supreme Court reversed the lower courts. Writing for the majority, Chief Justice Stone held that unions certified as exclusive bargaining agents under the Railway Labor Act are not merely private organizations but, are legally bound to represent all members of the bargaining unit fairly. The Court stated that the union owed a duty to:

> "represent all members of the craft without hostile discrimination, fairly, impartially, and in good faith"

The Court held that because the union had been granted the authority to act as the exclusive bargaining agent, it also had a corresponding legal obligation to represent all employees in the bargaining unit without discrimination. This gave birth to the legal doctrine now known as the duty of fair representation. Accordingly, if individual workers are legally barred from bargaining for themselves, then the union that speaks for them must do so responsibly and without bias.

Although Steele was a U.S. decision, its influence certainly extended into Canadian labour law. Gradually Canadian jurisdictions also adopted statutory principles recognizing that unions, as exclusive agents, must act in good faith and avoid arbitrary or discriminatory conduct when handling grievances or making decisions that affect individual members.

Section 12 of the Code

Today, Section 12 of the Code codifies the DFR requirements in the province:

Duty of fair representation

12 (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith

(a) in representing any of the employees in an appropriate bargaining unit, or

(b) in the referral of persons to employment

whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

(2) It is not a violation of subsection (1) for a trade union to enter into an agreement under which

(a) an employer is permitted to hire by name certain trade union members,

(b) a hiring preference is provided to trade union members resident in a particular geographic area, or

(c) an employer is permitted to hire by name persons to be engaged to perform supervisory duties.

Much like *Steele*, section 12(1) of the Code sets out three grounds on which a union's representation may be challenged: arbitrary conduct, discriminatory conduct, and bad faith. These terms have been defined through arbitral jurisprudence law to establish fairly high thresholds for a violation. Indeed, the Board has long emphasized that section 12 provides a narrow right of protection and it is not meant to second-guess every union decision.

Foundational Quote

"Section 12 is not an avenue of "appeal" of the merits of union decisions. Rather it is designed to ensure the union exercises its judgment and acts based on proper considerations [that are not "arbitrary, discriminatory and bad faith"]."

Judd (Re), 2003 CanLII 62912 at para. 44

The Judd (Re) Decision

One of the leading decisions interpreting section 12 is *Judd (Re)*. In the case, the Board took great pains to stress the limited nature of complaints under section 12 as well as describe the grounds on which successful claims could be brought. The case is the remains the definitive discussion about section 12 DFR claims.

Foundational Law - *Judd (Re)*, 2003 CanLII 62912

Judd was an employee who had twice been dismissed by his employer and, on both occasions, sought the support of his union, Teamsters Local 213, to advance grievances on his behalf. In the first instance, the union initially declined to take the matter to arbitration but reversed its decision after Judd appealed through its internal process. The union ultimately did arbitrate that first dismissal and Judd was reinstated.

Following a second dismissal, the union reviewed the grievance, sought legal advice, and ultimately decided not to proceed to arbitration. Judd again appealed internally but this time the union upheld its original decision. Unsatisfied, he filed a complaint with the Board, alleging that the union had violated its duty of fair representation by failing to take his second dismissal to arbitration.

The Board used Judd's complaint to speak to larger structural issues with the DFR process and to highlight when it should be used. According to the Board, employees do not have a general right to override union judgment simply because they disagree and that the section 12 exists to protect against genuine abuse:

> "Section 12 is not a general appeal route for employees who disagree with their union's decisions. The Board has no jurisdiction to overturn a union's decision simply because an employee thinks it is wrong." (para. 49)

Judd had argued that his dismissal was unjust and that the union should have taken his case forward but, the Board concluded that there was no evidence of bad faith, discrimination, or arbitrariness in the union's process. The union had weighed the legal merits of the grievance and its impact on the broader membership. The Board further noted that the union's duty is not owed only to the individual but to the collective:

> "The Union is not the agent of the employee… the decision whether or not to proceed with a grievance belongs to the Union, not the employee." (para. 40)
>
> "The duty of fair representation is owed to all members of the bargaining unit. That means the union may sometimes decline to pursue individual grievances if it believes doing so would harm the collective interest or contradict the collective agreement." (para. 55)

Ultimately, section 12 provides employees with a "narrow right and protection" (para. 56) and is not a mechanism to compel arbitration or re-argue the union's internal assessments. Judd's section 12 complaint against the union was dismissed. The decision to not take Judd's grievance to arbitration, even if disappointing to Judd individually, was within the union's rights.

Judd gives us the framework for understanding section 12. Within that framework, it is clear that only when the union's conduct falls into arbitrary, discriminatory, or bad faith conduct will section 12 be invoked. Given how important the three categories are to the success of a DFR claim in BC, they are fully canvassed below.

Arbitrary Representation

"Arbitrary" conduct generally means actions that are careless, indifferent, or grossly negligent. Essentially, arbitrary conduct lacks a rational basis or proper consideration. A union can act arbitrarily when it blatantly disregards an employee's rights or fails to perform a minimal level of investigation or analysis before making a decision.

In practical terms, the Board expects that when a union is handling a member's issue or potential/actual grievance, the union should:

i. Investigate and inform itself

The union should know the relevant facts and the member's side of the story. This means taking reasonable steps to gather information such as reviewing documents, speaking with witnesses or the grievor, and checking the collective agreement provisions at issue. Simply ignoring a grievance or failing to even interview the parties involved would open the union act to an allegation of arbitrariness.

ii. Make a reasoned decision

The union should make a reasoned decision based on the facts and the merits of the case. The union's decision should have a logical explanation even if it's one the member disagrees with. The decision should not be random or based on whim. For example, if a union decides not to advance a grievance, it should be because it determined the grievance lacked sufficient merit, conflicted with the collective agreement, or would adversely affect the unit. The decision to not move forward cannot be simply because the union forgot a deadline or couldn't be bothered to properly examine the allegations.

iii. Avoid reckless disregard for the member's interests.

The union doesn't have to always agree with the member but, it must give the member's issue due consideration. Acting with complete indifference could be deemed to be blatant or reckless disregard for the individual's rights. For example, imagine that a union receives a union member's complaint and never responds to the member at all. This is recklessly disregarding the member's interests.

In short, arbitrariness is about the quality of the union's decision-making process. Negligence or error is not enough because it must be a serious and unjustified lack of care. A trivial mistake or a disagreement in strategy will not amount to arbitrariness if the union generally acted diligently. If a union official simply never bothers to file the grievance or ignores repeated requests until the time limit expires, that could be arbitrary.

Foundational Quote

"A gross error in processing a grievance may be regarded as serious negligence despite the absence of intent to harm. However, mere incompetence in processing the case will not breach the duty of representation … In assessing the union's conduct, regard must be had to the resources available, the experience and training of the union representatives, who are usually not lawyers, and the priorities connected with the functioning of the bargaining unit."

Noël v. Société d'énergie de la Baie James, 2001 SCC 39 at para. 51

Discriminatory Representation

Discriminatory conduct in the DFR context means the union treated an employee or group of employees differently from others for unjustifiable reasons. Unlike human rights law which focuses on protected characteristics like race or sex, the duty of fair representation takes a broader view: any unjust differential treatment by the union including, personal favouritism or bias, can be "discriminatory" under Section 12. There are two main facets of discriminatory representation:

i. Discrimination on a prohibited ground

If a union's decision is motivated by factors such as an employee's race, gender, religion, ethnic origin, etc., that is a clear violation of section 12. For example, if a union refused to pursue a grievance because the grievor belonged to a certain religion or ethnic group then that would be discriminatory. Unions must represent all members of the bargaining unit equally, regardless of personal characteristics. In fact, this was the whole premise of the American *Steele* case – that the union could not treat Black members different from white member.

ii. Personal favouritism or animosity

Even if no protected characteristic is involved, treating one member preferentially or prejudicially for personal reasons is a violation of section 12. The classic example is nepotism or cronyism. For example, imagine a union giving special treatment to the union president's friend

or relative at the expense of a more deserving member. Another example is if union officials actively favour one member's grievance over another's due to friendship or conversely, if they sabotage a particular member's case because of a personal grudge. Such conduct is outside any legitimate union purpose and therefore discriminatory under Section 12.

However, not every difference in treatment is unlawful discrimination. A union may treat cases differently for valid reasons such as the strength of the case or differences in circumstances. It is only when the union's reasons are illegitimate like personal bias that Section 12 is breached.

Bad Faith Representation

Bad faith is perhaps the strongest form of DFR violation and involves intentional misconduct by the union. Bad faith means the union's actions are driven by improper motives such as hostility, fraud, personal gain, or malice. If these improper motives exist and there's no honest effort to represent the member than it would violate section 12. The Board has identified two primary types of bad faith representation:

i. Representation with an improper purpose

An improper purpose refers to situations where union officials act out of ill will, revenge, or another motive unrelated to the merits of the matter. For example, imagine a union representative deliberately refuses to advance a valid grievance because the representative personally dislikes the grievor or because the grievor had been critical of the union. Any union decision motivated by malice or personal gain at the expense of a member would fall into this bad faith category. In short, the union must not sell out or sacrifice a member's rights for improper reasons.

ii. Representation with intent to deceive (dishonesty)

The deception or dishonesty category refers to lying or deliberately misleading the member in a way that undermines their rights. An example would be a union representative who misses a grievance filing deadline but then falsely tells the member the case was reviewed and found meritless. Looking at the misconduct, it's essentially covering up the union's own error. Another example would be if the union secretly agreed with the employer not to pursue certain grievances and hides this fact from affected employees. While general dishonesty is not the Board's concern, it becomes a DFR issue if the deceit affects the quality of the union's representation. In other words, if a lie by the union causes the member to lose rights or misleads them about their grievance, it may constitute bad faith.

Foundational Law - *Complainant v United Food and Commercial Workers Canada Union, Local No. 401,* 2021 CanLII 63313 (AB LRB)

Despite being a decision from Alberta, *Complainant v United Food and Commercial Workers Canada Union, Local No. 401* is a good example of how a union can actually violate the duty to represent a member fairly.

The complainant was a meat plant worker employed by JBS Food Canada ULC since 2004. He had been working modified duties since a 2012 workplace injury. In February 2016, the employer determined it could no longer accommodate him and arranged for vocational training via the Workers' Compensation Board ("WCB"). A termination meeting was held but, the complainant left with the impression that he was only being temporarily reassigned for training. The employer did not provide a formal notice of termination which contributed to this misunderstanding.

The complainant met with his union representative, Mr. Bennett, shortly thereafter. Although the complainant presented documents in March 2016 indicating he no longer had a job to return to, the union failed to file a grievance within the required 14-day window. Mr. Bennett maintained ongoing discussions with the employer and delayed filing a grievance in hopes of negotiating a return to work. When the grievance was finally filed in June 2016, it was dismissed as untimely at arbitration and again on review. The complainant then brought a DFR complaint to the Board.

The Board found that although there was no evidence of bad faith or discrimination, Mr. Bennett's actions constituted serious negligence. He failed to recognize the significance of the March 2016 documents confirming termination, did not promptly grieve the termination, and relied instead on informal discussions with the employer. The Board stated:

> "The Union's failure to preserve the ability to grieve the termination... falls below the standard of a reasonably cautious and competent union representative in this situation." (para. 33)
>
> "The failure to competently assess and consider whether something fundamental had changed once evidence of termination was presented... goes beyond mere negligence. It reflects a reckless approach to an important employee right..." (para. 37)

Ultimately, the Board found that this conduct breached the union's duty. However, the Board also found that a referral to arbitration five years after the events would unduly prejudice the employer, so the only remedy was a declaratory finding of breach.

While this decision is from Alberta, it is highly relevant in British Columbia the Board also recognizes serious or gross negligence as a basis for a DFR violation.

Summary

To violate the DFR, a union's conduct must fall into at least one of the three above categories. If a union handles a matter honestly, without discrimination, and with a minimally rational basis, the Board will *not* declare a DFR breach. This is true even if the member thinks the union's decision was wrong.

Additionally, section 12 is not a general quality control mechanism for union services. Complaints about a union representative being rude or slow, for instance, do not on their own establish a DFR violation. Those kinds of issues are better dealt with through the union's internal democracy by electing new leaders.

Section 13 of the Code

As we learned, when a union member (or any employee in the bargaining unit) believes their union breached the duty of fair representation, the issue is addressed by filing a **DFR complaint** under section 12. However, there is another DFR relevant section of the Code which is section 13.

Section 13 outlines a special procedure for handling DFR complaints. It's aimed at screening out unmeritorious cases early while allowing genuine breach allegations to go before the Board:

Procedure for fair representation complaint

13 (1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:

(a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;

(b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must

(i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and

(ii) dismiss the complaint or refer it to the board for a hearing.

(2) If the board is satisfied that the trade union, council of trade unions or employers' organization contravened section 12, the board may make an order or direction referred to in section 14 (4) (a), (b) or (d).

Under Section 13(1), a written complaint is filed with the Board alleging that a union contravened Section 12. The Board does not *automatically* hold a hearing for the DFR complaint. Instead, a preliminary panel of the Board will first review the complaint to see if it discloses an apparent case of a Section 12 violation.

In other words, the DFR complainant must, on the face of their application, allege facts which, if true, could constitute arbitrary, discriminatory, or bad faith conduct by the union. This is sometimes called a prima facie test. The focus is trying to determine if there is sufficient evidence of a breach on the face of the complaint? If the complaint is vague or clearly does not

involve any arbitrariness, discrimination, or bad faith, the Board can dismiss it at this threshold stage. If the complaint does appear to have merit, the matter can proceed to a hearing where evidence is taken and a decision made on whether the union breached its duty.

The screening mechanism created by section 13 extremely helpful to the Board because it helps manage the large volume of DFR filings that come through each year. As the Board said in Judd (Re) at para.25: "Every year the Board receives a far greater number of Section 12 complaints than are justified on the facts. This has resulted in excessive demands being placed on the resources of unions and the labour relations system as a whole, including the resources of the Board."

Before the Board will consider a DFR complaint, two procedural requirements must usually be met:

Exhaustion of internal union remedies

The complainant should first use any appeal or review procedures within the union to challenge the union's decision. Many unions have internal steps if a member is dissatisfied with the handling of their grievance; examples could be an appeal to the union's executive or membership. The Board expects members to utilize those avenues before coming to the Board.

If the member has not completed the internal channels, the Board may refuse to hear the complaint on the grounds that the union should be given a chance to fix its own mistakes internally. However, if internal appeals were attempted or unavailable, this requirement is considered met.

Timeliness

A DFR complaint must be filed promptly. While the Code does not set a specific limitation period in Section 13, if a member waits longer an unreasonable period of time for their complaint, it could be dismissed as not timely. Stale complaints make it difficult to investigate and remedy the situation. This time guideline encourages employees to pursue DFR issues while events are fresh.

Statistics on DFR Complaints

As has been highlighted, the likely of success with a DFR complaint is low. The following table shows the outcomes of applications filed under Section 12 between 2014 and 2024.

Table 11: Applications under Section 12 between 2014 and 2024 – Alleging arbitrary, discriminatory, or bad faith conduct by a trade union							
Year	Not proceeded with	Settled	Final decision rendered	Dismissed pursuant to Section 13	Dismissed pursuant to Section 12	Granted	Total applications disposed of
2014	25	1	41	21	19	1	67
2015	26	4	47	21	25	1	77
2016	32	6	39	16	23	0	77
2017	42	4	48	22	24	2	94
2018	32	6	41	24	15	2	79
2019	42	2	52	29	21	2	96
2020	19	5	29	21	8	0	53
2021	21	8	42	28	13	1	71
2022	12	1	37	30	6	1	51
2023	12	1	65	47	17	1	78
2024	9	8	51	36	12	3	68

British Columbia Labour Relations Board. Annual Report 2024. p. 37.
https://www.lrb.bc.ca/media/23441/download?inline

Over the 11-year period, the number of disposed applications per year ranged from a low of 51 in 2022 to a high of 96 in 2019. 17 cases were dismissed on Section 12 grounds in 2023 and 12 in 2024.

Notably, the number of granted Section 12 applications is consistently low, with only 13 successful cases over the 11-year period. Again, this highlights that being successful on a DFR is going to be extremely rare.

Conclusion

As a concept, DFRs attempt to square individual protection and collective power. As we've seen throughout this textbook, unions enjoy broad discretion in managing grievances, negotiating with employers, and making strategic decisions for the good of the whole. However, that discretion is not unlimited. Section 12 of the Code, like other similar provisions across Canada, ensure that employees have at least a narrow legal safeguard when their union fails to act in a way that is honest, fair, and impartial.

A DFR complaint is not a mechanism for second-guessing union judgment or simply appealing a decision the employee disagrees with. The standard is high and intentionally so. The law only intervenes when a union's conduct is arbitrary, discriminatory, or in bad faith. Th full breadth of when those categories are violated were extensively canvassed in the seminal case of *Judd (Re)*.

In short, a DFR complaint is one of the few places in labour law where the individual voice can still be heard however, there's a very high threshold for it to actually succeed.

Chapter 8 – Review Questions

1. What is the duty of fair representation (DFR) and why is it necessary in a unionized workplace?

2. How did the Steele v. Louisville & N.R. Co. case shape the development of the DFR doctrine?

3. What does Section 12 of the BC Labour Relations Code require from unions? How has it been interpreted by the Board?

4. What was the significance of the *Judd (Re)* case in defining the scope and limits of a DFR complaint in BC?

5. What constitutes "arbitrary" conduct by a union under the duty of fair representation?

6. How is "discriminatory" conduct defined in the DFR context? How does it differ from human rights discrimination?

7. What is "bad faith" representation?

8. How did the *Complainant v. UFCW Local 401* case illustrate a successful DFR violation?

9. What process does Section 13 of the Code establish for handling DFR complaints and what are the procedural requirements for a complaint to proceed?

10. Why are DFR complaints rarely successful and what broader principle does this reflect in labour relations?

Chapter 9: Decertification

Learning Outcomes:

1. Describe the legal framework and process of union decertification under Section 33 of the Code.
2. Analyze the impact of decertification on employment relationships including the termination of collective agreements and the legal freeze period before re-certification.
3. Explain the circumstances under which the LRB may cancel a union's certification without a vote.
4. Assess the legal safeguards against improper employer interference in decertification efforts including, how the LRB handles tainted campaigns.
5. Compare union raiding to decertification, explaining the timing rules, support requirements, and outcomes governed by Section 19 of the Code.

Introduction

While the duty of fair representation protects individual employees within a unionized workplace, there is a more drastic option available when dissatisfaction runs deeper. What happens if it's not just one employee who feels abandoned, but the broader workforce. That option is called decertification.

Decertification is the legal process through which employees can revoke their union's status as the exclusive bargaining agent. In effect, it removes the union's authority to represent the employees altogether. While rare and often contentious, decertification is one of those fundamental touchstones back to labour being a democratic process. Just as workers have the right to choose union representation, they also have the right to undo that choice if they no longer believe the union serves their collective interests.

This chapter introduces the legal framework for decertification, the practical and procedural steps involved, and the broader implications for both workers and employers when a union is removed from the equation.

Section 33 of the Code

In BC, the general right of decertification is set out in section 33 of the Code:

> **Revocation of bargaining rights**
>
> **33** (1) If at any time after a trade union has been certified for a unit the board is satisfied, after the investigation it considers necessary or advisable, that the trade union has ceased to be a trade union, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification.

While section 33(1) grants that decertification is possible, it does not describe the process. That coverage is saved for the later sections of section 33. Interestingly, in a lot of ways, decertification is essentially the mirror image of certification. Instead of employees voting a union in, they vote to kick the union out:

> (2) If a trade union is certified as the bargaining agent for a unit and not less than 45% of the employees in the unit sign an application for cancellation of the certification, the board must order that a representation vote be conducted within 5 business days of the date of the application or, if the vote is to be conducted by mail, within a longer period the board orders.

According to section 33(2), if at least 45% of the employees in the bargaining unit sign an application for decertification, the Board must conduct a secret ballot vote of the unit to determine employees' wishes. This 45% threshold is the same as the minimum needed for an initial certification application using a representation vote.

Signing of Form 33A

Each employee who supports the application must sign a declaration called a Form 33A indicating their desire to cancel the union's certification. The employee signatures must not be older than 6 months before the application for decertification is filed with the Board. It makes sense that we want the support for decertification to be reasonably recent.

Once a valid decertification application is filed with the requisite signatures, the Board will order a representation vote to be held within 5 business days. As with certification votes, the goal is to prevent a lengthy campaign period where there might be undue influence by either the employer or the union. The vote is conducted by secret ballot and all employees in the bargaining unit are eligible to vote whether or not they signed the petition.

According to section 33(4), the outcome of the vote determines the fate of the union's certification:

> (4) After a representation vote ordered under subsection (2) is held the board must,
>
> (a) if the majority of the votes included in the count are against having the trade union represent the unit as the bargaining agent, cancel the certification of the trade union as the bargaining agent for that unit, or
>
> (b) if the majority of votes included in the count favour having the trade union represent the unit as bargaining agent, refuse the application.

Under Section 33(4), if a majority of those who cast ballots vote "no" to the union (they are in favour of decertification), then the Board will cancel the union's certification. The union is then decertified and loses its bargaining rights.

If, on the other hand, a majority votes to keep the union, then the decertification application is dismissed and the union remains certified. Importantly, the Code specifies that it is the majority of votes counted; so, a simple 50%+1 of those voting decides the outcome of the decertification vote. Employees who abstain effectively let others decide.

The Code contains a safeguard for extremely low voter turnout in section 33(5):

> (5) The board may direct that another representation vote be taken if
>
> (a) a representation vote was taken under subsection (2), and
>
> (b) less than 55% of eligible employees cast ballots.

Accordingly, the Board may direct a new vote if less than 55% of eligible voters cast ballots in the first vote. This is to ensure the decertification results represent a clear choice of a reasonable proportion of the employees. In practice, most decertification votes have high turnout due to the importance of the issue to both union supporters and opponents.

Effect of Decertification

If decertification is successful, it means that the collective agreement would be terminated and it no longer applies to the employees. Instead, the employment relationship reverts to individual employment contracts governed by general law (employment standards and common law). The employer is no longer bound by the collective agreement terms.

Decertification also results in a waiting period before any new union can be certified to represent that unit. Under section 33(10), no other union may apply to represent the employees for 10 months following the decertification:

> (10) If the certification of a trade union as the bargaining agent for a unit is cancelled under any provision of this Code, no other trade union may apply for certification as bargaining agent for the employees within that unit until a period of 10 months or a shorter period specified by the board has elapsed.

The section is effectively a freeze period meant to prevent immediate "raiding" or a reflex to try to re-unionize the newly decertified workplace (sometimes called a "refractory period"). The freeze gives the employer and employees some time to adjust without a union and prevents a defeated union or a rival union from turning around and trying to get certified right away. The Board can shorten this 10-month ban at its discretion but, typically it stands.

Time Restrictions on Decertification Applications

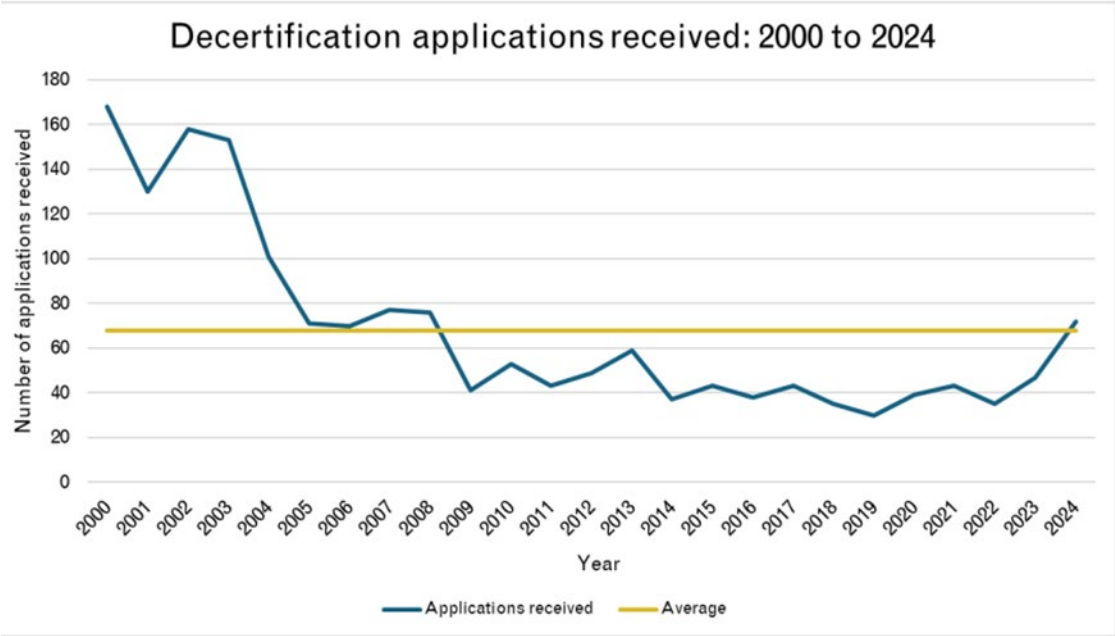
Much like there were timing restrictions for certification vote, there are timing restrictions on when a decertification application can be made. Section 33(3)(a) prohibits filing a decertification application during the first 12 months following a union's certification:

> (3) An application referred to in subsection (2) may not be made
>
> (a) during the 12 months immediately following the certification of the trade union as the bargaining agent for the unit,
>
> (b) during the 12 months immediately following a refusal under subsection (6) to cancel the certification of that trade union, or
>
> (c) during a period designated by the board under section 30 following a refusal under subsection (4) (b) of this section to cancel the certification of that trade union.

The time restrictions give a newly certified union a one-year "certification bar" to negotiate a first contract without threat of being voted out. Speaking generally, as long as it's beyond the first year and not within a barred period after a prior attempt, a decertification petition can be brought at almost any time including during the term of a collective agreement.

Statistics on Decertification

As with most aspects of the labour relations regime, the Board compiles statistics on decertification. The following table shows the number of decertification applications received by the Board from 2000 through 2024. The chart shows a clear downward trend over the 25-year period with a modest resurgence recently.



British Columbia Labour Relations Board. Annual Report 2024. p. 27.
https://www.lrb.bc.ca/media/23441/download?inline

Abandonment of the Union

In addition to employee-initiated decertifications, the Code recognizes a scenario where an employer can apply to have a union's certification cancelled. Under Section 33(1) and 33(11), if a union has effectively ceased to function as a union or "abandoned its bargaining rights," the Board may cancel the certification upon application. This is sometimes called an "abandonment application."

33 (1) If at any time after a trade union has been certified for a unit the board is satisfied, after the investigation it considers necessary or advisable, that the trade union has ceased to be a trade union, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification.

(11) On receipt of an application for cancellation of certification the board may cancel the certification of a bargaining agent for a bargaining unit if it is satisfied that the bargaining agent has abandoned its bargaining rights in respect of the employees in the bargaining unit.

Abandonment applications are used in situations where the union local has dissolved or no longer meets the definition of a trade union. It's possible that the union is no longer functional as it becomes employer-dominated, inactive, or failed to service the bargaining unit for a long period. For example, imagine if a union simply disappears from a workplace with no scheduled meetings, no contact, no bargaining when the contract expires and the employer has been allowed to make changes unilaterally. The union is effectively gone and the employer or employees might ask the Board to declare that the union's certification is cancelled due to abandonment.

The Board will consider factors like the length of the union's inactivity, whether it tried to negotiate or administer the collective agreement, and if the employer changed terms and conditions without the union's involvement. Essentially, if the union has effectively not been representing the members, the Board can decertify the union even without a vote; this is because the union gave is no longer a legitimate representative.

Abandonment is a relatively rare process and is not the typical "decertification vote" scenario, but it's an important part of Section 33.

Improper Interference in Decertification

Because decertification can benefit an employer who may prefer not to deal with a union, there is a risk that an employer might try to manipulate or pressure employees into decertifying. As it was with the certification process, employer interference in decertification is illegal.

Interference by with decertification violates the general unfair labour practice rules in Section 6 of the Code which forbids an employer from assisting in the formation or administration of a union or contributing support to it. These provisions include that an employer shouldn't be instigating a decertification drive against a union. To safeguard the employees' true free choice, Section 33(6) gives the Board special authority:

> (6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where
>
> (a) any employees in the unit are affected by an order under section 14, or
>
> (b) the board considers that by reason of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees.

Under Section 33(6), the Board may refuse to cancel a union's certification or refuse to proceed with a decertification vote if the Board believes that, because of improper interference by any person, a vote will likely not reflect the true wishes of employees. More simply, if an employer has tainted the decertification effort with coercion, intimidation, or undue influence, the Board

can throw out the results or halt the process thus, denying the decertification despite the apparent vote outcome. In *Helping Hands Agency Ltd. (Re),* the Board examined whether a decertification application could proceed in circumstances where the employer's conduct may have undermined employee independence:

Foundational Law - *Helping Hands Agency Ltd. (Re),* BCLRB Decision No. B401/2000

The case arose in 2021, after an employee at Helping Hands, a company providing home support services, submitted an application under Section 33 of the *Labour Relations Code* to decertify the United Food and Commercial Workers Union, Local 1518. Although the application appeared procedurally valid as it was supported by signatures from a majority of employees, the union objected arguing that the process was tainted by employer influence.

The Board conducted a detailed review of the surrounding circumstances and found that the employer, Helping Hands, had failed to maintain the required neutrality during the campaign. The Board highlighted several key examples of improper conduct that supported this conclusion. Most notably, supervisors were found to have directed employees with questions about the decertification process to the employee who was actively organizing the campaign. This suggested not just awareness of the campaign but, endorsement. Furthermore, supervisory staff made disparaging remarks about the union such as questioning what the union had accomplished or implying that employees might be better off without representation. These comments, though not direct instructions, contributed to a broader environment of anti-union sentiment.

Perhaps more importantly, the employer failed to take any steps to counteract this impression or reinforce its obligation to remain neutral. There was no communication issued to staff or supervisors reminding them of their legal duty to avoid involvement in union matters, nor were any corrective measures taken after management became aware of the petition. As a result, the Board found that employees were likely to have interpreted the employer's silence as support for decertification. As it explained:

> "The Employer did not take any meaningful steps to distance itself from the decertification campaign or to reinforce the importance of neutrality to its supervisors. Its silence, and the conduct of some of its supervisors, contributed to an atmosphere in which employees were emboldened to pursue decertification." (para. 39)
> ...
> "Even the appearance of employer involvement can be enough to invalidate a decertification application, particularly in workplaces where there is a power imbalance and employees may feel employer approval or disapproval matters." (para. 42)

Ultimately, the Board dismissed the application for decertification because of the employer's failure to maintain neutrality.

Union Raiding

There is another possibility for a union to vote out but, not exactly like decertification. Union raiding is the process by which one trade union attempts to displace another union as the certified bargaining agent for a group of employees. In practical terms, it means a rival union tries to take over representation of workers who are already unionized under a different union.

Raiding usually involves the rival union signing up members from the incumbent union's bargaining unit and then applying to the Board to be certified as the new bargaining agent. Under the Code, union raiding is legal but tightly regulated to balance employee choice. We want employees to have freedom to choose however, we cannot have a system of constant disruption of established collective bargaining relationships.

Section 19

Section 19 of the Code sets out when and how a raid can happen in BC including, the "open period" during which raiding applications are permitted:

Change in union representation

19. (1) If a collective agreement is in force, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months in each year of the collective agreement or any renewal or continuation of it.

(2) Despite subsection (1), an application for certification may not be made within 22 months of a previous application under that subsection if the previous application resulted in a decision by the board on the merits of the application.

(3) Unless the board consents, a trade union is not permitted to make an application under this section during a strike or lockout.

According to section 19 there are time-limited windows, open periods, in which a rival union may apply to be certified for an already unionized bargaining unit. Outside these windows, raiding is not allowed. The timing rules depend on the length of the collective agreement:

i. Collective Agreements Less than 3 Years

If the existing collective agreement has a term of three years or less, a raid application can only be made during the 7th and 8th months of the last year of the agreement. In other words, for a two- or three-year contract, the open period is the two-month window roughly in the middle of the final year of that contract (i.e. July and August). This is the only time a rival union can attempt to replace the incumbent union while the agreement is in force.

ii. Collective Agreements Greater than 3 Years

If the contract's term is longer than three years, Section 19 provides an initial open period in the third year. A raid may be launched in the 7th and 8th months of the third year of the agreement. If the collective agreement continues beyond three years, additional open periods occur

annually: specifically, in the 7th and 8th months of each subsequent year of the agreement until its expiry.

This means for a four or five year-agreement, there would be an open period in the third year, and again in the fourth year and fifth (if applicable), always in that two-month mid-year window. The inclusion of yearly windows after year 3 prevents unusually long agreements from locking employees into a representation indefinitely – they still get periodic chances to change unions.

Time Bar on Raids

Aside from defining open periods, Section 19 also imposes additional **timing limitations** to prevent excessive or disruptive raiding.

After a raiding attempt has been resolved, the Code prevents immediate back-to-back attempts. If a union raid application is decided on its merits by the Board (for example, the Board either certifies the new union or rejects the application after a hearing), then no further application to raid that bargaining unit can be made for 22 months following the initial application.

Again, this nearly two-year moratorium aims to give the workplace some stability after a raid, whether successful or not. It stops rival unions from continually pestering a group of employees with campaigns. Employees essentially must wait almost two years before another crack at switching unions if one raid has already been adjudicated.

Another restriction is that there should be no raiding early in a new certification. Although not explicitly a Section 19 rule, it's implied that a newly certified union cannot be raided immediately. Typically, once a union is certified and negotiates a first collective agreement, there is a period (usually the duration of that first contract) in which no raids can occur until the open period in the last year of that agreement. Additionally, the Code provides a one-year bar on decertification after certification which complements the bar on raids. That said, a union normally gets a chance to negotiate and administer a collective agreement for a while before facing any potential raid.

Requisite Employee Support for the Raid

A raiding union must meet the same basic support threshold as any certification applicant. Section 19 requires the raiding union to have as members in good standing a majority of the employees in the unit (at the time of application). This is the classic 50%+1 majority test for success.

In practice, the union must file membership evidence (signed union cards) with the Board. If the rival union cannot demonstrate sufficient support (at least 45% of employees to even file an application, and majority support to ultimately win), the application will fail. The Board will verify the membership evidence and may conduct a secret-ballot vote among employees or single-step if above 55% support.

After the Successful Raid

It's very likely that during the raid process, the incumbent union may file objections or arguments to block the raid. Common objections include that the application is untimely (outside the open period or within 22-month bar), the unit described is not appropriate, or allegations that the raiding union engaged in misconduct (misleading employees, improper promises, etc.) during the campaign.

However, assuming that none of these objections apply and the raid has the required employee support then it will be successful. After the successful raid, the newly certified union steps into the shoes of the former union. The existing collective agreement continues in force. The collective agreement is actually not voided by the change in union. However, all the rights and obligations of the "union" under that agreement such as the right to represent employees in grievances or to engage in collective bargaining for renewals are now transferred to the new union. The old union's certification is cancelled for that unit.

Foundational Law - *Interior Health Authority v British Columbia Nurses' Union,* 2012 CanLII 25262 (BC LRB)

In 2012, the Board was asked to rule on a high-profile series of raiding applications brought by the British Columbia Nurses' Union (BCNU). These applications sought to represent Licensed Practical Nurses (LPNs) who were, at the time, represented by three unions within the Health Services and Support – Facilities Subsector (the "Facilities Subsector"): the Hospital Employees' Union (HEU), the BC Government and Service Employees' Union (BCGEU), and the International Union of Operating Engineers, Local 882 (IUOE).

All employees in this Facilities Subsector including LPNs, were covered by a single collective agreement negotiated by the Facilities Bargaining Association (FBA), a consortium of unions including HEU, BCGEU, and IUOE. BCNU's applications aimed to carve out a new sub-unit within the FBA, where LPNs would be solely represented by BCNU

The incumbent unions raised several objections, notably arguing that allowing BCNU to represent only LPNs would improperly fragment bargaining units and contravene established Board policy discouraging proliferation of bargaining agents. HEU also alleged that BCNU had made misleading campaign statements such as suggesting that LPNs could later reverse their decision through a "referendum." While the Board agreed that BCNU's claims were somewhat inaccurate, it concluded that they did not rise to the level of material misrepresentation that would invalidate the membership evidence. The Board held that reasonable employees are expected to assess such campaign promises critically and that no fraud or coercion had occurred.

The Board dismissed the objections raised by the incumbent unions and ordered that representation votes be held among the affected LPNs. Following the votes, BCNU was certified as the new bargaining agent for those employees, replacing HEU, BCGEU, and IUOE in the relevant sub-units. While the Facilities Subsector Collective Agreement remained in force, BCNU assumed representation of the LPNs under its terms and joined the FBA as a member union for future negotiations. The raid was effective.

Unsuccessful Raids

Not all raids succeed. Many fail because they are procedurally deficient.

Raiding applications are most commonly rejected for timing violations. If a union files outside the open period, the application will be summarily dismissed as untimely often without even reaching a vote. For example, if a union attempted to apply in the ninth month of a one-year collective agreement, that would miss the 7th–8th month window. In one specific case, *Diversified Transportation Ltd. v. Teamsters Local Union no. 31, 2003*, CanLII 62841, Teamsters Local 31 filed a raid application in the ninth month of an agreement. The incumbent union, the Christian Labour Association of Canada, Local No. 66 ("CLAC"), immediately objected that the application amounted to an untimely raid because it fell outside the permitted open period. Normally, CLAC's position would be correct, and the Board would reject an off-window application outright. However, *Diversified*, the Board made an unusual exception because the employees in question had never had a chance to vote on CLAC in the first place by voluntary recognition. The Board allowed the Teamsters' raid despite the timing technicality. Generally, though, such exceptions are rare. The rule of thumb is that being even one day early or late outside the open period is fatal to a raiding application.

Another cause of failure is inadequate support. If the raiding union cannot show at least 45% membership support, the Board won't process the application. And if a vote is held but the raider fails to win a majority, the application is dismissed and the incumbent stays. A failed vote is treated as a decided application on the merits invoking the 22-month as well. Thus, a union that loses a raid vote cannot come back for a second try for nearly two years.

Conclusion

The decertification process under Section 33 is an embodiment of union democracy in action at the collective level. It allows the majority of employees to decide that they no longer want a particular union to represent them. This could be because they feel the union is not doing a good job by failing to address their concerns or maybe they just prefer a non-union environment). From a policy standpoint then, the law protects the *majority's* right to choose their representation: if the majority truly no longer want the union, they can remove it democratically.

Union raiding is the regulated opportunity for employees to change their bargaining agent, but it can only occur under the right conditions. Section 19 of the BC *Labour Relations Code* codifies those conditions, chiefly the open period timing tied to collective agreement duration and imposes safeguards like the 22-month ban on serial raids and a bar on raids during active labour disputes. The concept of the open period, the 7th and 8th month window, creates a periodic "election window" for union representation. Outside of that window, a certified union is secure from rival challenges, allowing it to focus on bargaining and administering the contract without fear of constant poaching.

Ultimately, just like how DFR complaints are a narrow individual right, decertification and raiding is a majority right with safeguards. A small group cannot remove their union unless they convince at least a near-majority to support a vote, and even then, over half must vote in favour of change. This ensures stability for those who still support the union and avoids frivolous or minority-driven attempts to displace the existing union.

Chapter 9 – Review Questions

1. What is decertification? How does it reflect democratic principles in labour relations?

2. What are the legal requirements for initiating a decertification application under Section 33 of the BC Labour Relations Code?

3. How is the outcome of a decertification vote determined? What are the consequences of a successful or failed vote?

4. What is the impact of decertification on employment contracts and union reapplication rights?

5. What timing restrictions exist for filing a decertification application? Why are they important?

6. How does the Board handle decertification in cases of union abandonment?

7. What constitutes improper employer interference in a decertification process and how does the Board respond?

8. What is union raiding and how does it differ from decertification?

9. What are the timing and support requirements for a successful raiding application under Section 19?

10. What were the legal and practical outcomes of the *Interior Health Authority v. BCNU* case regarding union raiding?

Appendix A:
Answers to the Chapter Review

The following appendix contains the answers to the individual review questions noted after each chapter.

Chapter 1 – Canadian Labour History

1. What legal framework governed employment relationships in pre-1800s British North America?

Employment relationships were governed by master-servant law, a legal framework imported from Britain. Under this system, workers, often referred to as servants or apprentices, were legally bound to their employers for a fixed term during which they had very few rights. Leaving employment early or disobeying instructions could result in criminal charges including, fines or imprisonment, giving employers near-total control over workers' lives and movement.

2. What was significant about the voyageurs' refusal to paddle canoes in 1794?

The 1794 work refusal by voyageurs employed by the North-West Company is considered one of the earliest forms of strike action in Canada. Although it occurred before the existence of formal unions, it demonstrated early collective resistance by workers in response to harsh conditions and low wages. Their action, which successfully led to increased pay, foreshadowed the modern union movement and showed that workers could influence employer decisions through solidarity.

3. What was the main purpose of yellow dog contracts used in the 1800s?

Yellow dog contracts were agreements that workers had to sign as a condition of employment. These agreements were pledges not to join or support a union. These contracts were a tool used by employers to undermine collective action and suppress union organizing efforts. They reflected the broader hostility of the legal and business environment toward worker organization during the 19th century and made it difficult for early unions to gain traction.

4. What was the impact of the 1872 Toronto Typographical Union strike?

The strike by the Toronto Typographical Union in 1872 was a watershed moment in Canadian labour history. Sparked by demands for a nine-hour workday, the strike led to the arrest of union leaders under laws prohibiting collective action. Public backlash prompted Prime Minister John A. Macdonald to pass the *Trade Union Act* which legalized union activity and collective bargaining in Canada. It was also the catalyst for Canada's first Labour Day parade and, eventually, the creation of the Labour Day statutory holiday.

5. What was the "Rand Formula" established in response to the 1945 Ford Windsor strike?

The Rand Formula, developed by Justice Ivan Rand following the 99-day Ford strike in Windsor, required all employees in a unionized workplace to pay union dues, regardless of union membership. This ensured unions had a stable financial base to represent all workers fairly while respecting individual choice about union membership. The formula became a cornerstone of Canadian labour law and helped stabilize union-employer relations nationwide.

6. Which 1944 regulation introduced formal union certification and unfair labour practice protections in Canada?

Privy Council Order 1003 (PC 1003), enacted during World War II, was the first Canadian regulation to formally recognize the rights of workers to join unions and engage in collective bargaining. It created a legal process for union certification and prohibited employer retaliation against union activity. PC 1003 also established the Wartime Labour Relations Board to enforce these rights and laid the groundwork for modern labour legislation in Canada.

7. What landmark U.S. legislation inspired Canada's post-war labour framework?

The *National Labour Relations Act* of 1935, commonly known as the *Wagner Act*, inspired Canada's transition to formalized labour relations. It enshrined American workers' rights to unionize, bargain collectively, and engage in strikes. Canada adapted many of its principles through PC 1003 in 1944, adopting what became known as the "Wagner Model" of labour relations that continues to influence Canadian labour law today.

8. What was the major outcome of the 1919 Winnipeg General Strike?

The Winnipeg General Strike involved over 30,000 workers and shut down the city for six weeks. Although the strike ended without meeting its demands and was violently suppressed during "Bloody Saturday," it drew national attention to workers' grievances including, wage stagnation and lack of bargaining rights. The event marked a turning point in Canadian labour consciousness and influenced the development of future labour protections and political labour movements.

9. How did the Supreme Court of Canada’s view of the Charter’s protection for labour rights evolve between 1987 and 2015?

Initially, in the 1987 "First Labour Trilogy," the Supreme Court held that the Charter’s freedom of association (s. 2(d)) did not protect collective bargaining or the right to strike. However, by 2015, through a series of decisions known as the Second and Third Labour Trilogies, the Court reversed its stance. It recognized both collective bargaining and the right to strike as fundamental constitutional rights. This shift expanded legal protections for workers and unions under the Charter of Rights and Freedoms.

10. Which Supreme Court case in 2015 recognized the constitutional right to strike under the Charter?

In *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4, the Supreme Court ruled that the right to strike is protected by the Charter's guarantee of freedom of association under section 2(d). The Court struck down provincial legislation that excessively limited public sector workers' ability to strike, affirming that striking is a critical part of meaningful collective bargaining in a free and democratic society.

Chapter 2 - Current Legal Landscape of Labour Relations

1. **What is union density and how does it differ between regions in Canada?**

Union density refers to the proportion of workers who are members of a union. In Canada, this has remained relatively stable, sitting around 30% nationally as of 2023. In British Columbia, union density is slightly higher at about 31–32%. There's a stark contrast between sectors: the public sector in BC has a very high unionization rate (around 75–80%), while the private sector has a much lower rate (about 15–16%). These differences highlight the varying degree of labour organization depending on the type of work and the policies surrounding those industries.

2. **How is constitutional authority over labour relations divided between federal and provincial governments in Canada?**

Labour relations in Canada are primarily governed by the provinces under Section 92(13) of the *Constitution Act*, 1867 which assigns authority over property and civil rights. However, the federal government regulates labour relations for certain industries of national concern such as banking, telecommunications, and interprovincial transportation through the *Canada Labour Code*. As a result, while most workers are subject to provincial legislation, about 6–10% of Canadian workers fall under federal jurisdiction. This division creates a complex system in which two parallel sets of laws and enforcement bodies operate.

3. **What is the role and structure of the British Columbia Labour Relations Board?**

The Board is an independent, quasi-judicial tribunal tasked with interpreting and enforcing the Code. It adjudicates issues such as union certification, unfair labour practices, and collective agreement disputes. The Board is chaired by the Board Chair and includes roles such as the Registrar & Vice Chair (handling intake and investigations), the Executive Director (overseeing operations), and Vice Chairs (who decide legal disputes). The legal team supports the Board's decisions with research and drafting. This structure allows the Board to handle a wide range of issues efficiently and with specialized expertise.

4. **How is the Canadian labour movement organized?**

The Canadian labour movement is structured hierarchically. At the top is the Canadian Labour Congress (CLC), a national federation that advocates for union rights and coordinates efforts across various sectors. Below that are national unions, representing specific industries like healthcare or construction. Local unions operate at the community or workplace level, handling day-to-day representation. There are also different types of unions: industrial or worksite unions (covering all workers at a site), craft unions (focused on specific trades like electricians), and sectoral bargaining unions (common in public sectors like education). Each type is suited to particular organizational needs and employment structures.

5. **According to the BC Labour Relations Code who is allowed to unionize and who is excluded?**

Under the BC Labour Relations Code, most employees have the right to unionize including "dependent contractors" who are economically tied to a single employer. However, exclusions apply to those who "perform management functions" or are employed "in a confidential capacity in matters relating to labour relations or personnel." These exclusions are based on the need to avoid conflicts of interest and protect the integrity of collective bargaining. The Labour Relations Board determines inclusion or exclusion based on actual job duties, not just job titles. Independent contractors are also excluded as they are considered self-employed.

6. **What distinguishes independent contractors from employees under the Code and why are independent contractors excluded from unionization?**

Independent contractors are individuals who operate their own businesses, assume financial risk, and maintain control over their work and tools. Because they are not in an employee-employer relationship, they are excluded from unionization under the BC *Labour Relations Code*. Their exclusion means they do not have access to collective bargaining or the dispute resolution mechanisms of the Code. The 1947 *Montreal Locomotive Works* case originally established the "fourfold test" (control, ownership of tools, chance of profit, risk of loss) to help differentiate independent contractors from employees.

7. **Who qualifies as a dependent contractor and how does that status get evaluated?**

Dependent contractors are workers who are not formal employees but are economically reliant on a single business, often working exclusively or nearly exclusively for them. They are included in the definition of "employee" under the BC *Labour Relations Code* and are therefore entitled to unionize. The Board looks at the whole relationship including factors like length of engagement, degree of economic dependency, and integration into the business. In *West Fraser Mills*, log haulers were classified as dependent contractors due to their stable, ongoing, and exclusive relationship with the company.

8. **What criteria does the Board use to determine whether a worker performs "management functions" and is thus excluded from unionization?**

The Board considers several key functions to determine if someone performs management duties: authority to hire, fire, and discipline; significant input into labour relations; ability to make policy; budgetary control; and independent decision-making. The *Cowichan Home Support* case clarified that the most important indicators are involvement in discipline/discharge and labour relations decisions. Supervisors may be excluded even in small workplaces if they perform these core functions. The goal is to prevent conflicts of interest and preserve a clear line between management and unionized employees.

9. What is meant by "confidential capacity" under the Labour Relations Code and why are such employees excluded from union membership?

An employee in a "confidential capacity" is someone who regularly accesses sensitive labour relations or personnel information, such as during collective bargaining or grievance processes. The exclusion is designed to protect the employer's strategic interests and avoid conflicts of interest. The Board requires that such confidentiality be a regular and central part of the employee's duties and not incidental or occasional. In *Gateway Casinos*, the Board emphasized that surveillance operators could only be excluded if their judgment and access aligned their interests too closely with management, showing how nuanced the application of this rule can be.

10. What are the requirements for obtaining a religious exemption from union membership in BC? How did the *Bogunovic* case clarify this process?

Under Section 17 of the BC Labour Relations Code, individuals may request exemption from union membership or dues if they can demonstrate a sincere religious objection rooted in the tenets of their faith. They must apply to the Labour Relations Board and, if granted, redirect union dues to a registered charity. The *Bogunovic* case reaffirmed that the objection must be religious in nature and not ideological, political, or moral. The Board will scrutinize whether the belief is long-standing and genuinely based in religion. Because the applicant in *Bogunovic* had been a union member for years and framed his objection in ideological terms, his exemption was denied.

Chapter 3 - Organization Drive and Certification

1. **What are the two main methods through which a union can acquire bargaining rights in British Columbia, and how do they differ?**

In British Columbia, unions can acquire bargaining rights through voluntary recognition or certification. Voluntary recognition occurs when an employer and union mutually agree to recognize the union as the exclusive bargaining agent for a group of employees typically, through a voluntary recognition agreement. This approach is quicker and more cooperative and is often used in industries like construction or film where projects are short-term. On the other hand, certification is a formal legal process governed by the BC *Labour Relations Code* where a union must apply to the Board and demonstrate employee support. Certification is more structured and involves statutory thresholds and possibly a vote. While voluntary recognition avoids Board oversight (except for filing), certification involves formal validation of union support and bargaining unit appropriateness.

2. **How does single-step (card-check) certification work under British Columbia's Labour Relations Code? What are its pros and cons?**

Single-step certification, re-introduced in BC in 2022, allows a union to be certified without a vote if it obtains signed membership cards from more than 55% of the employees in a proposed bargaining unit. This process, governed by section 23 of the Code, aims to expedite union certification and reduce opportunities for employer interference. Supporters argue that card-check better reflects workers' true desires and avoids anti-union pressure tactics during campaigns. However, critics claim that workers might sign cards due to peer pressure and that the process lacks transparency since there's no secret ballot. Employers also argue they are denied a fair opportunity to present their views before certification. Despite the debate, card-check has become a significant tool in union organizing in BC.

3. **What happens when a union gathers between 45% and 55% employee support? Can certification still occur?**

If a union secures between 45% and 55% support from employees in the proposed bargaining unit, the Board will order a representation vote as outlined in section 24 of the Code. This vote must typically occur within five business days and is conducted by secret ballot. Certification is granted if a simple majority (50% + 1) of those who vote support the union. Importantly, it is the majority of ballots cast, not total employees, that determines the result. If turnout is low (less than 55%), the Board may order a second vote to ensure the outcome reflects employee will. This dual-step process adds a democratic safeguard for marginal support cases.

4. **What is the role of signed membership cards in the union certification process? What makes a card valid or invalid?**

Signed membership cards are the primary evidence of employee support in a union's application for certification. To be valid, a card must be voluntarily signed and dated, and it must clearly state the worker's understanding that the union intends to apply for certification and act as the bargaining agent. Additionally, the membership must be current, meaning the card was signed or union dues paid within the six months before the application. The Board has the authority to reject cards obtained through coercion, misrepresentation, fraud, or other improper methods. Workers can also revoke their cards in writing before the application is filed. These rules help ensure the certification process reflects informed, voluntary worker choices.

5. **What restrictions exist on union organizing activities in the workplace under the Code?**

Section 7 of the Code restricts union organizing at the employer's place of business during working hours unless the employer consents. This protects business operations from disruption while preserving the right to organize outside work hours or off-premises. In special cases, such as remote worksites or company-owned housing, the Board may order that union representatives be given access to employees including, provisions for food and lodging at the standard employee rate. These exceptions ensure that location or employer control does not completely isolate workers from organizing efforts. However, as shown in *RMH Teleservices v. BCGEU*, access to private property is still limited by the courts and organizing must occur within clearly defined legal boundaries.

6. **How does the Labour Relations Code regulate employer communications during a union drive?**

Section 8 of the Code allows employers to communicate with employees but, only in ways that involve statements of fact or reasonably held opinions about the business. Employers are not allowed to make anti-union statements, engage in fearmongering, or hold coercive "captive audience" meetings. The Board closely scrutinizes employer speech during organizing efforts, especially where there's an imbalance of power. For example, the *Cardinal Transportation* case clarified that speech must relate to business matters and not general union opinions. If an employer crosses the line, the Board may grant remedial certification, meaning the union can be certified without a vote due to employer misconduct though this remedy is rare.

7. **What is considered coercion or intimidation under Section 9?**

Section 9 prohibits any form of coercion or intimidation intended to force or dissuade someone from joining or leaving a union. This includes threats, undue pressure, or retaliatory comments, whether by employers or union representatives. For example, if an employer threatens job loss or implies negative consequences for union support, it may be found to have violated the section 9. Similarly, unions must also avoid coercive tactics during organizing. These protections

ensure that the decision to support or oppose unionization remains a free and voluntary one for all employees. Violations can result in serious consequences such as overturned votes or certification without a vote.

8. What is an "appropriate bargaining unit," and how does the Board determine its boundaries?

An appropriate bargaining unit is a defined group of employees that a union seeks to represent for collective bargaining purposes. The Board assesses whether the unit has a rational and defensible boundary and whether the employees share a community of interest based on factors like similar duties, working conditions, functional integration, and geographic location. In initial applications, the Board prioritizes access to collective bargaining. In workplaces with existing union relationships, the Board emphasizes industrial stability to prevent fragmentation. As seen in the *Island Medical Laboratories* case, the Board balances these factors carefully and may expand or limit a proposed unit to ensure it supports effective labour relations.

9. What is "union salting"?

Union salting is a tactic where union supporters or members apply for and obtain employment at a non-unionized workplace with the intent of organizing from within. These individuals, known as "salts," work alongside other employees and promote unionization efforts internally. They can be counted as part of the bargaining unit when determining whether the union has met the support threshold for certification. Salting can be especially effective in reaching reluctant or hard-to-organize workers, but it may also raise concerns among employers about ulterior motives in hiring. Legally, salts have the same rights as other employees, and their presence does not invalidate the organizing process under the Labour Relations Code.

10. What is the general process followed by the Board once a certification application is filed?

Once a certification application is submitted, the Board follows a multi-stage process:

1. Review – The Board verifies signed cards and checks that all legal requirements are met.
2. Hearing (if needed) – A hearing may be held if there's a dispute over the bargaining unit, card validity, or alleged unfair practices.
3. Vote (if required) – If support is between 45%–55%, the Board will order a representation vote.
4. Decision – The Board certifies the union if the 55% card threshold is met or if the majority of voters support the union in a valid vote.

If the requirements are not met, the application is dismissed. This structured process ensures transparency, fairness, and that certification outcomes reflect both legal standards and the employees' collective will.

Chapter 4 - Collective Bargaining

1. **What is the legal and constitutional foundation for collective bargaining in British Columbia?**

Collective bargaining in BC is clearly governed by the Code but is also supported by constitutional protections under Section 2(d) of the Charter of Rights and Freedoms. The Supreme Court of Canada in *Health Services* (2007) affirmed that freedom of association protects a meaningful process of collective bargaining, making it a constitutional, not merely statutory, right. This was reinforced in *Fraser* (2011) and *Saskatchewan Federation of Labour* (2015), confirming that workers must be able to pursue workplace goals collectively without undue government interference. These constitutional principles inform how provincial laws like the Code are interpreted and applied. As such, both statutory and constitutional frameworks shape the rights and duties of parties during collective bargaining.

2. **How does the collective bargaining process begin?**

The process begins with a notice to bargain which can be served under Section 45 (for first agreements after certification) or Section 46 (for renewals). Either the union or the employer can initiate this notice, triggering a legal obligation for both parties to meet and bargain in good faith within 10 days. The notice also starts the timeline for the "statutory freeze" which prohibits unilateral changes to terms of employment. Refusal to meet or unreasonable delay can be seen as a breach of good faith bargaining. Thus, the notice is a critical formal step that shifts both parties into the regulated bargaining framework of the Code.

3. **What are the responsibilities of the bargaining teams and how do they prepare for negotiations?**

Each party assembles a bargaining team, usually consisting of management or HR professionals for the employer and elected representatives for the union. Preparation involves analyzing the current agreement, economic conditions, grievances, and industry comparators. Unions often survey their membership to identify priorities and determine a bargaining mandate. Teams also negotiate ground rules covering logistics like meeting locations, communication protocols, and whether to formally "sign off" on tentative agreements during bargaining. Proper preparation ensures the teams are aligned internally and positioned to negotiate strategically and legally.

4. **How are proposals exchanged in collective bargaining? What is the strategic purpose of 'throwaway' demands?**

Once ground rules are agreed, parties exchange initial proposals, often in written form or using a marked-up version of the collective agreement. These proposals outline desired changes (both economic and non-economic) and may include both core demands and less critical 'throwaway' items. Throwaways serve as bargaining chips that can be dropped later in exchange for more important concessions. This strategic anchoring allows for flexibility and makes movement

possible as negotiations proceed. Each side also usually costs its proposals, particularly economic ones, to evaluate feasibility and impact.

5. How do economic and non-economic items differ?

Economic items such as wages, benefits, and bonuses, have direct financial impacts, while non-economic items cover operational and procedural matters like scheduling, health and safety, and grievance procedures. Skilled negotiators try to identify distributive issues (zero-sum) and integrative issues (win-win), aiming to uncover mutual interests. Often, non-economic items are tackled first to build momentum, while economic items are saved for final trades. The goal is to explore the "bargaining zone" where both parties' acceptable outcomes overlap.

6. What happens when bargaining reaches an impasse? What dispute resolution options are available under the Code?

An impasse occurs when the parties believe no further progress is possible. At that point, they may seek mediation, where a neutral third party helps bridge the divide. Under Section 74, either party can request a mediator through the Board's Mediation Division. While the mediator cannot impose a settlement (except in certain first contract situations), they can reframe issues and promote compromise. For first agreements, Section 55 allows for more intervention including, potentially binding arbitration if the impasse persists. Mediation is a crucial tool to avoid strikes or lockouts while preserving bargaining autonomy.

7. What is the process of ratifying a tentative agreement and what happens if a ratification vote fails?

A tentative agreement is reached when bargaining teams agree on terms, but it only becomes binding after the union membership ratifies it by majority vote. This vote is typically held in a meeting where the agreement is presented and discussed. If ratified, the agreement is signed and becomes the governing employment contract. If rejected, bargaining resumes, and any ongoing strike may continue. Although union leadership usually recommends ratification, members can still vote it down, particularly if they believe the deal does not meet expectations. Repeated votes may occur in rare cases until a deal is accepted.

8. What does the duty to bargain in good faith entail under Section 11(1) of the Code?

Section 11(1) mandates that both parties must bargain in good faith and make every reasonable effort to reach a collective agreement. This includes both procedural duties (meeting, exchanging positions, honesty) and substantive duties (no insistence on illegal terms, no surface bargaining). In *Royal Oak Mines*, the Supreme Court found the employer had violated this duty by refusing to negotiate meaningfully, ignoring industry standards, and presenting regressive proposals. The case clarified that good faith requires sincere effort, not merely showing up. The Court upheld remedial measures, showing that failure to bargain seriously can attract legal consequences.

9. What are statutory freeze provisions and how do they function during first contract and renewal negotiations?

Statutory freeze provisions prevent unilateral changes to employment terms during bargaining. Under Section 45(1), after certification, employers cannot alter wages or conditions for 12 months or until a first agreement is reached. For renewals, Section 45(2) extends the old agreement's terms until a new deal is reached, a strike/lockout occurs, or bargaining rights are lost. These freezes prevent either side from pressuring the other by making disruptive changes. Exceptions exist for "business as usual" (Section 45(3)) and discipline for cause (Section 45(4)), but even those are narrowly interpreted to prevent abuse. Breaches can lead to Board complaints and remedies.

10. What is a 'last offer vote' under Section 78 of the Code and when can it be used?

A last offer vote allows one party to bypass negotiators and put a final settlement offer directly to the other party's membership. Under Section 78, either the employer or union can request a vote through the associate chair of the Mediation Division. This can only occur once per dispute. It must occur before a strike or lockout begins. If a majority votes in favour, the deal becomes binding. The vote is a tactical move, often used when one side believes the other's bargaining team does not reflect broader member sentiment. While potentially powerful, last offer votes are rare and often fail unless the offer is seen as fair and reasonable.

Chapter 5 - Industrial Action

1. **What are the two primary of industrial action forms used under BC law?**

Industrial action refers to collective measures taken by workers or employers to exert economic pressure during a labour dispute. The two primary forms under BC law are strikes, initiated by the union on behalf of employees, and lockouts, initiated by the employer. Both are intended to pressure the other party during bargaining impasses and are legitimate parts of the collective bargaining process. However, they are only lawful if undertaken in accordance with strict rules under the Code. These actions can be disruptive, so the law ensures they occur only under regulated and fair conditions.

2. **What are the different forms of strikes recognized under the Code and how do they function?**

The Code recognizes various forms of strikes beyond a full work stoppage. These include full strikes, rotating strikes, work-to-rule campaigns, overtime bans, slowdowns, and sick-outs. Each form represents a strategic way for workers to withhold labour or reduce productivity to pressure the employer. For instance, a rotating strike disrupts operations intermittently across departments, while a work-to-rule campaign reduces productivity by following every rule exactly. All of these are considered "strikes" under the law because they involve a concerted effort by employees to restrict or reduce work output. Even actions like refusing overtime can qualify as a strike if done collectively and for bargaining purposes.

3. **What is a lockout, and how does it differ from a business closure for operational reasons?**

A lockout is an employer's deliberate decision to shut down operations or bar employees from working in order to exert pressure during a labour dispute. Unlike a regular business closure done for economic or seasonal reasons, a lockout is strategic and aimed at compelling union agreement on bargaining terms. The Code defines a lockout as an action taken to influence terms of employment, not simply to reduce costs or adjust to slow business. For example, closing a ski resort during the summer is not a lockout, but closing it mid-season to pressure a union is. The intent and context are critical in determining whether an employer's actions constitute a lockout under the law.

4. **What are the legal preconditions for a lawful strike in British Columbia?**

Several strict preconditions must be met for a strike to be legal in BC. First, the existing collective agreement must have expired, since strikes during the term of an agreement are prohibited. Second, bargaining must have occurred in good faith and reached an impasse. Third, the union must hold a secret-ballot strike vote, gaining majority support and filing the results with the Board. Fourth, a 72-hour written notice must be given to the employer and the Board. Finally,

the union must not proceed with job action if mediation or essential services orders are still active. Failing to comply with any of these steps can render a strike illegal.

5. What are the legal preconditions for a lawful lockout under the Code?

Lockouts are subject to similar requirements as strikes. The employer must wait until the collective agreement has expired and must have engaged in good faith bargaining. If the employer is part of an employer association, a lockout vote must be held and pass by majority. A 72-hour written notice of the lockout must be provided to the union and the Board. Like strikes, lockouts cannot be initiated during ongoing mediation or before an Essential Services Order is in place if applicable. These safeguards are meant to ensure that lockouts are a last resort rather than a first reaction to stalled negotiations.

6. What is picketing and how does the law distinguish between primary and secondary picketing?

Picketing is when striking or locked-out workers demonstrate near the employer's business to publicize a dispute and discourage others from entering or doing business with the employer. Primary picketing occurs at the direct workplace of the employer involved in the dispute and is generally permitted under BC law. Secondary picketing occurs at other sites, such as retailers or suppliers, and is more restricted. While the Supreme Court of Canada's decision in *Pepsi-Cola* recognized peaceful secondary picketing as a form of protected expression, BC's Labour Relations Code imposes additional rules through section 65, particularly requiring Board authorization for secondary picketing or "ally" picketing. Location alone doesn't make picketing illegal, but wrongful conduct can.

7. What is the 'ally doctrine' under section 65 of the Code? How does it affect secondary picketing?

The ally doctrine allows unions to lawfully picket third parties who actively assist the primary employer in undermining a strike or lockout. According to section 65(1) of the Code, an "ally" is any person or business that performs work or supplies services that the striking workers normally perform. To picket an ally's premises, the union must apply to the Board and receive authorization. If granted, the third party is treated like the struck employer for picketing purposes. This doctrine balances protecting neutral parties while preventing employers from avoiding strike effects by shifting work to "friendly" third parties. Without a Board declaration, picketing at an ally site may be ruled unlawful.

8. What is BC's legal stance on replacement workers during a strike or lockout and what constitutes "struck work"?

BC has one of the strongest bans on replacement workers in Canada. Under section 68 of the Code, employers cannot use outside hires, transfers, contracted workers, or staff from other locations to perform the duties of striking or locked-out employees. The key test is whether the work would have been performed by a member of the bargaining unit "but for" the labour

dispute (this is known as "struck work"). Employers can only use existing management or bargaining unit members who cross the line voluntarily. Violations of this ban are taken seriously, and the Board can issue cease orders and impose penalties. The goal is to protect the union's economic leverage during job action.

9. How do essential services rules under the Code limit the right to strike or lockout?

The Code limits strikes and lockouts in sectors where a service disruption could pose immediate danger to public health, safety, or welfare. Under section 72, if such a threat exists, the Minister of Labour may direct the Board to issue an Essential Services Order. This order outlines which services must be maintained during job action and limits the scope of lawful strikes or lockouts. Both union and employer must comply with the order, and only minimum staffing levels necessary to prevent public harm are maintained. This ensures that vital public services like emergency care or utility operations continue even during labour disputes.

10. What rights and risks do various groups face when encountering a picket line?

The response to a picket line depends on the individual's role:

1. Striking union members are expected to honour the line and may face union discipline for crossing.
2. Unionized workers not on strike generally must cross unless protected by a "picket line clause" in their own contract.
3. Non-union workers have no legal right to refuse to cross a picket line and may be disciplined if they refuse work out of sympathy.
4. Management can and often must cross picket lines and may lawfully perform struck work.
5. Members of the public are free to cross picket lines but may be discouraged from doing so by picketers. Picket lines must remain peaceful and cannot obstruct or threaten those approaching.

Chapter 6 - The Collective Agreement

1. **What is a collective agreement? How does it differ from an individual employment contract?**

A collective agreement is a legally binding written contract between a certified union and an employer that governs the terms and conditions of employment for all employees in a defined bargaining unit. Unlike individual employment contracts, collective agreements override personal deals between employer and employee on all covered matters. This means that once a collective agreement is in place, neither the employer nor individual employees can deviate from its terms. For example, if an individual is offered a shorter probation period than what's in the agreement, the collective agreement prevails. The uniformity ensures fairness and consistency and helps prevent employers from undermining union standards.

2. **How is a collective agreement legally validated and made enforceable in BC?**

A valid collective agreement in British Columbia must be in writing and signed by authorized representatives of both the union and the employer. Oral agreements are not legally enforceable under the Code. Once ratified, the agreement must also be filed with the Board within 30 days under section 51. While failure to file it doesn't void the agreement, it could limit its legal enforceability and may prompt Board sanctions. These formal steps ensure that both parties are bound by a common legal document and facilitate future dispute resolution.

3. **What is the minimum term length for a collective agreement in BC and why does it matter?**

Section 50(1) of the Code sets the minimum term of a collective agreement at one year. If parties try to agree on a shorter term, it will automatically be deemed to last at least one year. This provision ensures labour stability by preventing rapid contract turnover, and it prohibits strikes or lockouts during this protected period. After eight months, either party may apply to terminate the agreement early, but this rarely happens. In practice, most agreements last between one and three years and longer agreements like the six-year Coca-Cola/Teamsters deal are not uncommon.

4. **What mandatory provisions must every collective agreement include under BC law?**

The Code requires several mandatory clauses to be included in all collective agreements. These include a no-strike/no-lockout clause (section 58), a just cause requirement for discipline or dismissal (section 84(1)), and a final and binding grievance/arbitration process (section 84(2)). Additionally, section 53 requires a joint consultation committee to promote union-management dialogue during the life of the agreement. Even if these terms are not explicitly written in, the law implies them into the agreement. These provisions are essential for preserving workplace stability, protecting employees from arbitrary discipline, and offering fair dispute resolution.

5. How does the grievance and arbitration process function in a collective agreement?

Grievance and arbitration procedures provide a step-by-step mechanism for resolving disputes under a collective agreement. Typically, the process begins informally with a supervisor then escalates through written grievances and higher management discussions. If unresolved, the matter proceeds to binding arbitration where a neutral arbitrator issues a final decision. This process is mandatory under section 84(2) of the Code and replaces the courts for resolving contract disputes. For example, if an employee is dismissed, the union can file a grievance alleging no just cause and push the case to arbitration. This ensures fairness while minimizing work stoppages.

6. What is the role of the joint union-management consultation committee?

Under section 53(1) of the Code, every collective agreement must establish a joint consultation committee made up of union and employer representatives. The purpose of the committee is to regularly meet and discuss workplace issues that are not active grievances or bargaining matters. This forum promotes collaboration, resolves minor disputes before they escalate and helps build trust between parties. While the committee has no power to change the collective agreement, it can make non-binding suggestions and address emerging workplace issues, such as scheduling concerns or new technologies.

7. How do collective agreements interact with BC's Employment Standards Act (ESA)?

Section 3(2) of the *Employment Standards Act* requires that certain minimum standards (like minimum wage, overtime, and vacation entitlements) must be met or exceeded in collective agreements. If a provision in a collective agreement falls below the ESA minimum that provision is void to the extent of the conflict. However, the ESA does allow some flexibility for unionized workplaces to negotiate alternate arrangements in limited areas. Historically, collective agreements were sometimes exempt from ESA compliance, but the current legal framework ensures that unionized workers still receive baseline protections.

8. What are some common (but not required) clauses in collective agreements? What are their purposes?

Common clauses include the recognition clause (affirming the union's role), wage scales (specifying pay rates and increases), overtime and shift premiums, benefits, seniority provisions, and management rights. These terms tailor the agreement to the specific needs of the workplace. For example, wage scales provide predictability and transparency while seniority rules govern layoffs, promotions, and vacation preference. The management rights clause reserves employer authority over operations unless specifically limited. Together, these clauses form a detailed employment framework beyond legal minimums.

9. What is union security? What are the main types of union security clauses?

Union security refers to contract provisions that allow the union to collect dues and maintain representation. The four main types are:

1. Closed shop (hire only union members),
2. Union shop (join the union after hire),
3. Rand formula (dues required but membership optional),
4. Open shop (membership and dues are voluntary).

The Rand Formula is the most common in Canada and ensures all employees contribute financially since they all benefit from union representation. It solves the "free rider" problem and helps stabilize union funding. In BC, union security is negotiable, but most agreements mandate at least a Rand-style dues deduction.

10. What is the KVP test? How does it limit the employer's ability to impose workplace rules?

The KVP test is a six-part legal standard used by arbitrators to determine whether an employer's unilaterally imposed rule is enforceable under a collective agreement. The rule must be:

1. consistent with the agreement,
2. reasonable,
3. clear,
4. communicated to employees,
5. include warnings of consequences, and
6. enforced consistently.

If any element is missing, the rule may be invalid. For example, in *Irving Pulp & Paper*, the Supreme Court of Canada upheld the arbitrator's decision striking down a random alcohol testing policy for failing the "reasonableness" element. The KVP test is crucial for protecting employee rights from overreach by management.

Chapter 7 - The Dispute Resolution Process

1. **What is the primary purpose of the grievance process in unionized workplaces? Why can't employees go directly to court with their disputes?**

The grievance process exists as the central mechanism for resolving workplace disputes in unionized environments. It provides a structured, internal method to address violations or misinterpretations of the collective agreement. Because the collective agreement typically ousts the court's jurisdiction over such matters, employees cannot bypass the union and sue the employer in court for contract breaches. Instead, disputes must be addressed through the grievance procedure which is negotiated by the union and employer. This system ensures consistency, preserves industrial peace, and relies on decision-makers familiar with the specific workplace context.

2. **How do individual, group, policy, and union grievances differ from each other in purpose and scope?**

Individual grievances are filed on behalf of a single employee alleging a violation of their rights under the agreement. Group grievances involve multiple employees affected by the same issue, such as a department-wide scheduling change. Policy grievances challenge the employer's broad interpretations or practices under the collective agreement, even without specific harm to an employee. Union grievances are filed by the union itself to protect its role or rights as a certified bargaining agent such as when the employer bypasses union processes or fails to remit dues. Each grievance type addresses a different dimension of the employment relationship but all rely on the collective agreement as their foundation.

3. **What role do shop stewards play in the grievance process and what is meant by the "grievance ladder"?**

Shop stewards are union representatives at the workplace who guide employees through the grievance process. They help collect facts, interview witnesses, assess the validity of a grievance, and act as liaisons between employees and union officials. The grievance ladder refers to the typical multi-step process outlined in collective agreements to resolve grievances. It starts with informal discussions, then moves to formal written grievances at escalating management levels, and ultimately, arbitration if earlier steps don't yield resolution. This structured progression offers multiple opportunities to settle disputes before incurring the cost and formality of arbitration.

4. **What is the "work now, grieve later" rule, and what are its two main exceptions?**

The "work now, grieve later" rule requires employees in unionized workplaces to obey a supervisor's instructions even if they believe the order violates the collective agreement. They must follow the directive and file a grievance afterward if they wish to challenge it. This rule ensures continued productivity and managerial authority while preserving employees' rights.

However, there are two key exceptions: (1) if the order poses an imminent threat to health and safety, the employee may refuse under occupational safety regulations; and (2) if the order is clearly illegal, the employee is not obligated to comply. In both cases, immediate refusal is justified due to the potential harm or unlawful consequences of the directive.

5. **How does the arbitration process function as the final stage in grievance resolution? What role does the BC Labour Relations Code play in enforcing it?**

Arbitration is the final step of the grievance process where a neutral arbitrator hears both sides and issues a binding decision. It functions like a private court and is mandated by Section 84(2) of the Code which requires every collective agreement to include a mechanism for final settlement of disputes without work stoppages. If the agreement lacks a procedure, Section 84(3)(b) deems one into existence including the right for either party to appoint a single arbitrator. Arbitration ensures that disputes are resolved based on the collective agreement, workplace context, and legal standards, and prevents strikes or lockouts during the agreement's term. The arbitrator's decision is final and binding, reinforcing stable labour relations.

6. **What powers does an arbitrator have when resolving grievances and how can those powers influence the outcome?**

Arbitrators in BC have wide-ranging powers under Section 89 of the Code to craft fair and just remedies. They can award monetary compensation, order reinstatement of employees, substitute lesser penalties, or waive procedural time limit violations if they haven't caused prejudice. This flexibility allows arbitrators to tailor outcomes to the specific circumstances of each case. For example, they can reduce a termination to a suspension if they find the employer's penalty was excessive. These powers help maintain balance between managerial authority and worker protection, reinforcing the principle that discipline must be both warranted and proportionate.

7. **What makes arbitration awards final and binding? Under what circumstances can they be appealed or reviewed?**

Arbitration awards are final and binding by operation of both the collective agreement and statutory provisions like Section 101 of the Code. This finality is essential to achieving timely, conclusive dispute resolution in unionized workplaces. However, very limited appeal mechanisms exist. Under Section 99, a party can apply to the Board for review if they were denied a fair hearing or if the award is inconsistent with the Code's principles. Under Section 100, appeals can go to the Court of Appeal only if the issue involves a question of general law unrelated to labour relations. These narrow grounds ensure that arbitration remains the primary and definitive method of resolving grievances.

8. **How do seniority and bumping rights influence layoff decisions and what kinds of disputes can arise from them?**

Seniority determines the order of layoffs and recalls in many unionized workplaces. In "non-competitive" clauses, the most senior qualified employee keeps their job, while in "competitive" clauses, ability may come first and seniority breaks ties. Bumping rights allow laid-off employees to displace less senior employees in other positions they are qualified to perform. Disputes can arise over whether the bumped employee was properly identified, whether the senior employee was qualified, or if the employer's layoff decisions violated the collective agreement. These clauses protect long-serving employees but also limit managerial flexibility during workforce reductions.

9. **What is progressive discipline? How do letters of expectation, reprimands, and sunset clauses work?**

Progressive discipline involves escalating levels of corrective action, starting with less severe steps like verbal warnings and moving toward suspension or termination if misconduct continues. A letter of expectation is a non-disciplinary tool that outlines behavioural expectations, while a reprimand is a formal disciplinary measure placed on an employee's file. Sunset clauses limit how long past discipline can be held against an employee, typically 12–24 months, encouraging improvement and giving employees a clean slate. This system ensures discipline is corrective rather than punitive, giving employees the chance to reform before facing severe consequences. Unions often monitor this process closely to ensure fairness and consistency.

10. **What is the Wm. Scott test for determining just cause in discipline and discharge cases? How is it applied?**

The Wm. Scott test is a three-part framework used by arbitrators to assess whether just cause exists for discharge. First, it asks if the employee engaged in misconduct warranting discipline. Second, it evaluates whether the dismissal was excessive in light of mitigating or aggravating factors such as the seriousness of the offence, intent, prior record, and consistency. Third, if the termination was excessive, the arbitrator determines what alternative penalty is fair. This test ensures that discipline is both warranted and proportionate. It provides a contextual and balanced approach that protects employees from arbitrary dismissal while upholding employer authority in appropriate circumstances.

Chapter 8 - Duty of Fair Representation

1. **What is the duty of fair representation (DFR) and why is it necessary in a unionized workplace?**

The duty of fair representation (DFR) is a legal obligation imposed on unions that requires them to represent all members of the bargaining unit fairly, impartially, and in good faith. This duty exists because, in unionized workplaces, individual employees cannot pursue grievances or negotiate directly with the employer; only the union can do so as the exclusive bargaining agent. Given this exclusivity, the law imposes a responsibility on the union to protect all employees' interests equally. The DFR ensures that no employee is neglected or mistreated in grievance handling or negotiations simply due to personal bias, indifference, or discrimination. Without the DFR, unions could wield unchecked power over members who have no alternative voice in labour disputes.

2. **How did the Steele v. Louisville & N.R. Co. case shape the development of the DFR doctrine?**

The *Steele* case, decided by the U.S. Supreme Court in 1944, was the foundational case in recognizing that unions acting as exclusive bargaining agents owe a legal duty to represent all workers fairly. In this case, a white-only union negotiated a collective agreement that disadvantaged Black employees without their participation. The Court ruled that since the union had been granted exclusive bargaining power, it also bore a legal obligation to act without discrimination and in good faith toward all employees in the bargaining unit. The Court's language, emphasizing fairness, impartiality, and good faith, has since been adopted in Canadian jurisprudence and legislation including British Columbia's Section 12 of the Labour Relations Code. The *Steele* case established that exclusive representation brings with it a duty of accountability and fairness to all.

3. **What does Section 12 of the BC Labour Relations Code require from unions? How has it been interpreted by the Board?**

Section 12 of the Code mandates that a union must not act in a manner that is arbitrary, discriminatory, or in bad faith when representing employees. The Board has interpreted this section as setting a high threshold for violations, emphasizing that it is not a mechanism for reviewing every poor or unpopular union decision. The Board clarified in *Judd (Re)* that section 12 is designed to protect against serious misconduct, not to allow employees to override union judgment. In essence, unions are allowed to make difficult or strategic decisions so long as they act honestly, with care, and without improper motive. The law only intervenes when the union's conduct is so flawed that it fundamentally violates fairness and trust.

4. **What was the significance of the *Judd (Re)* case in defining the scope and limits of a DFR complaint in BC?**

The *Judd* case is a cornerstone decision in BC labour law for clarifying how Section 12 should be applied. The Board used it to emphasize that Section 12 is a "narrow right," meant to catch only union conduct that is arbitrary, discriminatory, or in bad faith. The case illustrated that unions have broad discretion to decide whether to proceed with grievances, particularly if the case lacks merit or pursuing it could harm the broader membership. In *Judd*, even though the employee was unhappy with the union's refusal to take his grievance to arbitration, the Board found no misconduct because the union's decision was informed, reasoned, and aligned with its duties to all members. This case set a strong precedent for deference to union decision-making unless one of the three defined violations is clearly shown.

5. **What constitutes "arbitrary" conduct by a union under the duty of fair representation?**

Arbitrary conduct occurs when a union makes decisions without any reasonable investigation, rationale, or regard for an employee's rights. This can include ignoring a grievance altogether, failing to gather basic facts, or missing critical deadlines through indifference. The standard is not simple negligence or disagreement; instead, it must rise to a level of serious carelessness or irrational behavior. For instance, if a union never speaks to the grievor or fails to review relevant documents before deciding not to proceed, that could be deemed arbitrary. The Board expects unions to conduct minimal due diligence, assess cases logically, and communicate clearly—even if the outcome is not what the employee hoped for.

6. **How is "discriminatory" conduct defined in the DFR context? How does it differ from human rights discrimination?**

In the DFR context, "discriminatory" conduct means treating a member unfairly based on irrelevant or unjustifiable factors. This includes, but is not limited to, discrimination based on protected characteristics like race, gender, or religion. It also encompasses personal favouritism, cronyism, or animosity. For example, if a union only advances grievances for close friends of union leadership while ignoring others with equally valid claims, that would be discriminatory. Unlike formal human rights claims, DFR discrimination includes any unfair differential treatment without legitimate union purpose. The Board looks at whether the union had a valid reason for treating cases differently and intervenes only when unjust bias is evident.

7. **What is "bad faith" representation?**

Bad faith involves intentional misconduct by the union such as actions driven by hostility, revenge, fraud, or deceit. A union acts in bad faith if its decisions are motivated by malice or if it actively misleads the employee. An example would be a union rep refusing to pursue a grievance solely because the employee criticized union leadership, or a rep lying about filing a grievance to cover their own inaction. The Board takes bad faith allegations seriously, but they

must be supported by clear evidence of improper motives or dishonest behavior. Honest mistakes or even poor judgment typically do not meet the standard for bad faith unless they involve deliberate wrongdoing.

8. **How did the *Complainant v. UFCW Local 401* case illustrate a successful DFR violation?**

In *Complainant v. UFCW Local 401*, the union representative failed to file a grievance in time after a member's termination, despite being presented with clear evidence that the termination had occurred. The union rep instead relied on informal talks with the employer and ignored key documentation, leading to the grievance being dismissed as untimely. The Alberta Labour Relations Board found that this amounted to serious negligence so severe that it crossed into arbitrary conduct under the DFR standard. While the Board did not find bad faith or discrimination, the failure to act competently and preserve the member's rights breached the union's legal duty. The case underscores that while unions are given discretion, they must still act with a reasonable level of care and diligence.

9. **What process does Section 13 of the Code establish for handling DFR complaints and what are the procedural requirements for a complaint to proceed?**

Section 13 sets out a two-step process for DFR complaints. First, the Board reviews the written complaint to determine if it discloses a *prima facie* case meaning, does it allege facts that, if true, could show arbitrary, discriminatory, or bad faith conduct. If not, the complaint is dismissed at the preliminary stage. If it passes, the case can proceed to a hearing. Before filing, the complainant must also usually exhaust the union's internal appeals process and must file the complaint in a timely manner. These procedural safeguards help filter out weak or frivolous claims while preserving access to justice for those with genuine grievances.

10. **Why are DFR complaints rarely successful and what broader principle does this reflect in labour relations?**

DFR complaints are rarely successful because the legal threshold to prove a violation is intentionally high. Most union decisions, even ones that employees strongly disagree with, fall within the union's broad discretion as a collective representative. The law is designed to protect the union's ability to prioritize the group interest, manage limited resources, and make strategic choices, even at the expense of individual preferences. Successful complaints must show serious misconduct, not just errors in judgment or unpopular decisions. This reflects a broader labour relations principle: the balance between collective solidarity and individual protection should not allow individual interests to undermine the union's role as a representative of the whole.

Chapter 9 – Decertification

1. **What is decertification, and how does it reflect democratic principles in labour relations?**

Decertification is the legal process through which employees can revoke a union's certification as their exclusive bargaining agent. It effectively removes the union's authority to represent employees in collective bargaining. This process reflects democratic principles because just as employees can choose to unionize, they also have the right to reverse that decision if the majority believes the union no longer serves their interests. Decertification ensures that union representation remains accountable to the workforce and that employees retain ultimate control over their workplace representation. It provides a majority-driven way to exit union representation that helps preserve the legitimacy of union influence in the workplace.

2. **What are the legal requirements for initiating a decertification application under Section 33 of the BC Labour Relations Code?**

To initiate a decertification application under Section 33(2), at least 45% of employees in the bargaining unit must sign a petition supporting decertification. Each employee must sign a declaration called Form 33A, and the signatures must be no older than six months from the filing date. Once the application is filed with sufficient support, the Board is required to conduct a secret ballot vote within five business days to ensure neutrality and minimize campaign influence. This process mirrors the rules for initial certification applications and ensures the vote reflects the recent, collective will of employees.

3. **How is the outcome of a decertification vote determined? What are the consequences of a successful or failed vote?**

Under Section 33(4), the outcome is based on a simple majority of votes cast. If a majority of voting employees choose to decertify, the Board will cancel the union's certification. This leads to the termination of the collective agreement, and the employment relationship reverts to individual contracts governed by general labour law. If the majority votes to retain the union, the application is dismissed, and the union remains certified. Employees who do not vote are effectively allowing others to decide the outcome. If voter turnout is below 55%, Section 33(5) allows the Board to order a new vote to ensure a representative decision.

4. **What is the impact of decertification on employment contracts and union reapplication rights?**

Following successful decertification, the collective agreement no longer applies, and employees are governed by individual employment contracts under employment standards and common law. Employers are no longer bound by union-negotiated terms. Additionally, Section 33(10) imposes a 10-month waiting period before any new union can apply to represent the same unit. This freeze, also called a "refractory period," is designed to prevent immediate re-unionization

efforts and allows both employees and employers time to adapt to the post-union environment. The Board may shorten this period, but typically it is enforced in full.

5. **What timing restrictions exist for filing a decertification application? Why are they important?**

Section 33(3)(a) of the Code prohibits decertification applications within the first 12 months following a union's certification. This one-year certification bar allows the new union an opportunity to negotiate a first collective agreement without the threat of being removed. Outside of this initial bar, decertification applications can generally be made at any time including, during an active collective agreement. These timing rules are essential to balance stability and democratic choice, ensuring unions have a fair opportunity to function while allowing employees to reconsider their representation after a reasonable period.

6. **How does the Board handle decertification in cases of union abandonment?**

If a union has ceased to function or abandoned its bargaining rights, the employer or employees may file an abandonment application under Section 33(1) and 33(11). The Board can decertify the union without a vote if evidence shows the union has not performed its duties, such as negotiating, communicating with members, or servicing the collective agreement. Factors include length of inactivity, failure to bargain, and whether the employer made unilateral changes without union objection. This rare but important provision addresses situations where a union is no longer a legitimate or active representative, and a vote would be unnecessary or impossible.

7. **What constitutes improper employer interference in a decertification process and how does the Board respond?**

Improper interference includes any coercion, pressure, or support by the employer that could influence the employees' decision to decertify. This violates Section 6 and is further addressed in Section 33(6) which allows the Board to halt the decertification process or refuse to cancel certification if the process has been tainted. In *Helping Hands Agency Ltd. (Re)*, the Board found the employer failed to maintain neutrality during a decertification drive, allowing supervisors to make anti-union remarks and failing to distance management from the campaign. Because of this, the Board invalidated the vote, showing that even the appearance of employer involvement can undermine employee free choice.

8. **What is union raiding and how does it differ from decertification?**

Union raiding occurs when a rival union seeks to replace an existing certified union as the bargaining agent for employees. Unlike decertification, which removes union representation entirely, raiding replaces one union with another. The process is governed by Section 19 which sets strict timing rules known as "open periods" based on the duration of the collective agreement. Raiding reflects employee choice within a unionized environment, whereas

decertification ends union representation altogether. Both processes are democratic, but raiding retains the union structure, just under different leadership.

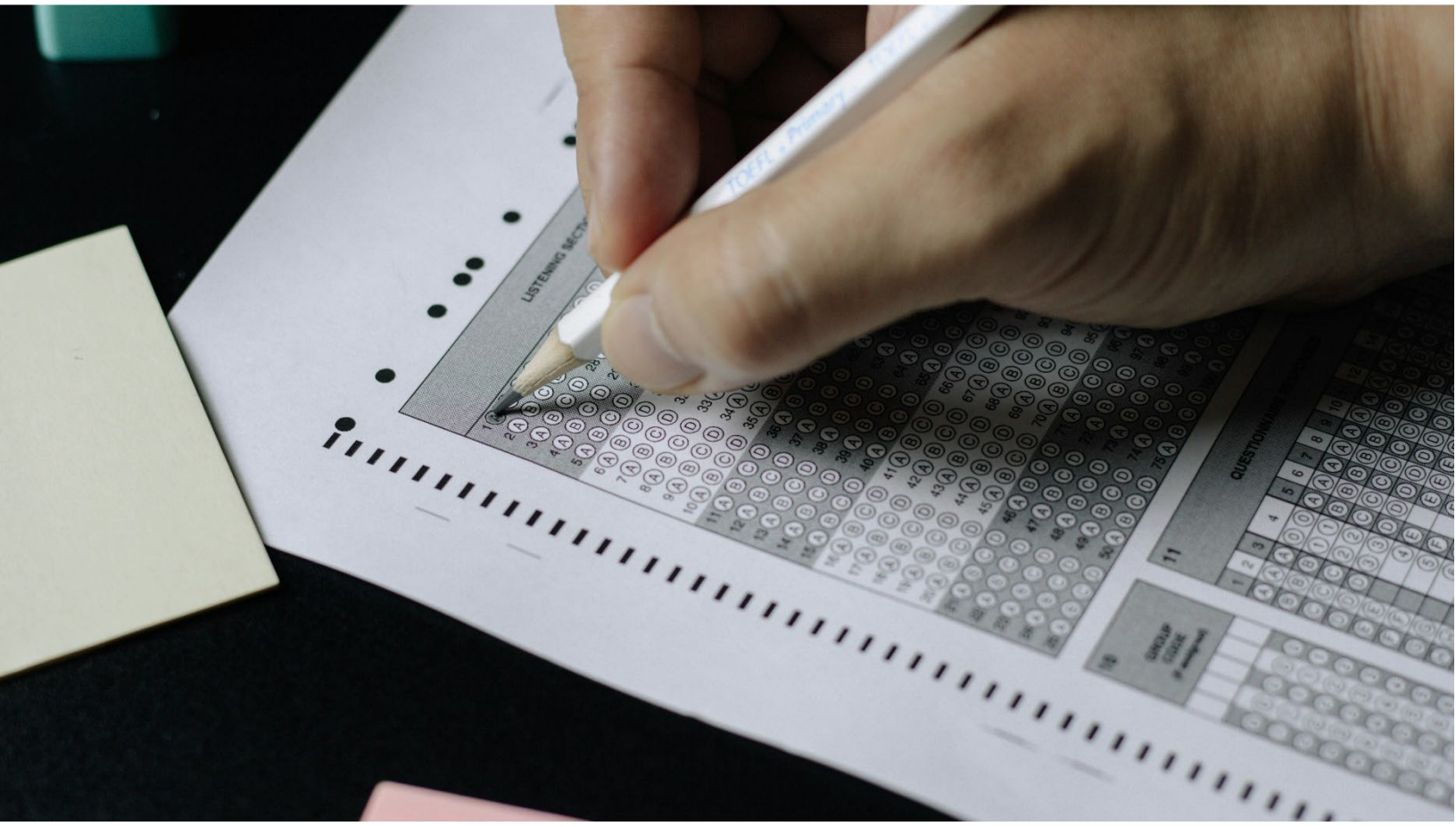
9. What are the timing and support requirements for a successful raiding application under Section 19?

Raiding is permitted only during specific "open periods," which are based on the collective agreement's length. For agreements under three years, the window is during the 7th and 8th months of the final year. For longer agreements, the first open period is in the third year and recurs annually thereafter. A raiding union must have membership cards from at least 45% of employees to file an application, and a majority (50%+1) to succeed. If the application fails on timing or support, it triggers a 22-month ban on further raiding attempts to prevent repeated disruption in the workplace.

10. What were the legal and practical outcomes of the *Interior Health Authority v. BCNU* case regarding union raiding?

In *Interior Health Authority v. BCNU*, the Board ruled on BCNU's attempt to raid and represent Licensed Practical Nurses (LPNs) previously covered by multiple unions through a common collective agreement. Although the incumbent unions raised concerns about improper fragmentation and misleading campaign tactics, the Board found that the BCNU's conduct did not rise to the level of misrepresentation or coercion. The Board upheld the employees' right to choose their representation and ordered representation votes. Ultimately, BCNU was certified for the sub-units, and the existing collective agreement remained in force.

Appendix B:
Sample Multiple Choice Quizzes



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Appendix C: Index

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