1. *Development of labour relations law*

a. *Overview* - at common law, every individual employer negotiates an individual contract with the employer. The nature of this relationship, financial dependency, are what eventually gave rise to collective bargaining and statutory intervention.

b. *Jurisdiction in federal system*

i. *PG jurisdiction* - collective bargaining is primarily under PG jurisdiction subject to a narrowly construed Fed jurisdiction. Where the Fed reigns, this is an exclusive jurisdiction (IJI - even where the Fed is silent on an issue, the PG is restricted from legislating). This exclusivity is what causes the narrow limitations of Fed jurisdiction.

ii. *Fed jurisdiction* - Under s. 91, Fed has jurisdiction over all Federal enterprises and undertakings (works); of course, this includes labour relations within those works; Federal public servants; First Nations (lands, rights, or FN persons generally). Also controlled via POGG and constitutional amendment as well. For instance, there is no Fed worker's compensation, so Fed employees are covered by PG worker's compensation via constitutional amendment.

c. *Applicability of labour relations codes*

i. *Federal labour relations code* - covers both unionized and non-unionized employees.

ii. *PG labour relations codes* - cover only unionized employees.

iii. *Territorial labour relations codes* - cover only unionized employees.

d. *Rationale for government involvement in labour relations*

i. *Floor rights* - ensures provision of basic rights to workers; if rights fall below the floor, then they are being exploited.

ii. *Marketplace efficiency* - through legislation, government has the ability to insert terms into contracts by law; as a result, these terms do not need to be won through bargaining. Focuses the bargaining process, and provides a basis for negotiation.

iii. *Safety* - desirable that workplaces are safe, advantageous to employee and to employer. Provided through Occupational Health and Safety Act, worker's compensation, etc. Allows transfer of responsibility for caring for injured employees from state to employer.

iv. *Dignity* - recognition that there ought to be a certain level of dignity in the employer-employee and employee-employee relations; leads to human rights, pay equity, parental leave legislation, as well as recognition that sexual harassment is a workplace issue.

v. *Social welfare objectives* - through employment insurance legislation, workers who lose their jobs are not burdens on the welfare system, thus again preventing a burden on the state; requires employers and employees to cover own risks arising from labour market.

e. *Employment standards legislation*

i. *Overview* - not to be confused with labour relations codes, ESA applies to both collectivized and non-

collectivized employees, takes on importance for vulnerable workers - youth, the disabled, non-unionized, or non-English speaking workers, those who would be unable to negotiate decent terms of employment for themselves.

ii. *Nature* - quasi-collective agreement which is negotiated by the state on behalf of all workers; adjusts every employment contract by inserting floor rights designed to prevent exploitation.

iii. *Variances* - under **Part 9**, director may grant employers variances from certain obligation under the *Act* so long as a majority of employees consent to the variation.

iv. *Complaints* - employees must first complete self-help kit and present a copy to employer before complaint will be accepted by the Employment standards tribunal; retain the discretion to refuse to investigate a complaint for lack of reasons, lack of applicability, the complainant has not taken the requisite steps to facilitate resolution, etc.

1. *Appeals* - may appeal decision of investigator not to investigate to Tribunal, but grounds restricted to errors in law, principles of natural justice, or fresh evidence applications.

v. *Definition of employee* - stands in stark contrast to *Labour Relations Code* definition. Employee includes (a) a person, including a deceased person, receiving or entitled to wages for work performed for another, (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, (c) a person being trained by an employer for the employer's business, (d) a person on leave from an employer, and (e) a person who has a right of recall.

1. For instance, much broader than the definition of employee included in the Labour Relations Code (eg. deceased persons). This means that the precise determination lies with the common law, and as a result, many workers are denied entitlement under the statute.

2. For instance, under **s. 31** of the *Employment Standards Regulation*, certain industries/professions excluded, including doctors, lawyers, etc. Under **s. 34(1),** farmers excluded from having to comply with provisions relating to work hours, overtime, stat holidays.

vi. *Interplay with Labour Relations Code,* ***ESA s. 3(2) -*** if a collective agreement contains any provision respecting a matter such as hours of work, overtime, stat holidays, vacation, seniority, termination, recall, that the Part or provision of this Act relating to that provision does not apply in respect of employees covered by the collective agreement (see s. 3(1), s. 3(2)).

1. For instance, severance means different things under ESA (lieu of notice) and CBA (loss of seniority). Therefore, provisions in the CBA which touch on severance (regardless of whether that is the same type of severance in the ESA) operate to exclude operation of ESA provisions. {Woodworks}

2. For instance, collective agreements must have arbitration clauses in the agreement, or else a minimal arbitration clause will be statutorily inserted - see **s. 85**. {Woodworks}

3. For instance, previously, the standard was "meet or exceed" - eg. CBA could not provide for t&c which were lesser than those provided to all employers under *ESA*. Now, any CBA involvement "occupies the field."

2. <u>*Human Rights Code*</u>

a. *Overview* - while at common law, employers could discriminate at will, this is now outlawed through applicability of human rights statutes; *cannot discriminate at any time during relationship*. Applicable to individual

and collectivized employees alike - cannot contract out of HRC. {SELI}

b. *Exceptions* - may discriminate based on (1) age if a *bona fide* seniority scheme, (2) on marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, or (3) any grounds if related to a *bona fide occupational requirement.*

c. *Enforcement* - only enforceable through procedures within the *Code*, civil actions are not available. Following changes in 2002, the Human Rights Commission was eliminated, and therefore enforcement of the Code became a private matter between parties at the Human Rights Tribunal. Human Rights officers no longer investigate/mediate etc., meaning that parties must prepare and present own case.

i. *Remedies* - may issue a declaratory order that conduct constitutes discrimination, order that a party take steps to ameliorate the discrimination, award compensation for lost wages and injury to dignity.

ii. *Costs* - previously only awarded present improper conduct, now allowable against any party per the discretion of the Tribunal.

iii. *Conventional approach to enforcement*

1. *Overview* - requires the tribunal to decide at the outset into which of two categories the case falls: (1) *"direct discrimination"*, where the standard is discriminatory on its face, or (2) *"adverse effect discrimination"*, where the facially neutral standard discriminates in effect. {Meiorin}

2. *Direct discrimination* - once the complainant has shown *prima facie* discrimination, owner may establish that the discrimination is a *bona fide occupational requirement* through establishing: {Meiorin}

a. *Honest, good faith* - that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); {Meiorin}

i. For instance, the standard must not be a colourable attempt to justify otherwise unlawful discrimination. {Meiorin}

b. *Reasonably necessary* - that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element).

i. For instance, the standard must be rationally connected to the performance of the job, and must not be unduly burdensome. An aerobic performance standard is not reasonably necessary to firefighting where failure to meet it does not pose a serious safety risk. {Meiorin}

ii. For instance, the imposition of a broad standard may be difficult to justify in general where individual testing of the capabilities of employees is available as an alternative. {Meiorin}

3. *Adverse effect discrimination* - cannot be justified through a *bona fide occupational requirement*. Once complainant has shown *prima facie* discrimination, employer may defend itself; even where it fails to do so, the standard remains in place for persons other than complainant: {Meiorin}

a. *Rational connection* - showing that there is a rational connection between the job and the particular standard; {Meiorin}

b. *Undue hardship* - showing that the complainant cannot be accommodated without incurring un-

due hardship. {Meiorin}

iv. *Modern approach to enforcement*

1. *Overview* - complexity and unnecessary artificiality of aspects of the conventional analysis attest to the desirability of now simplifying the guidelines that structure the interpretation of human rights legislation in Canada. {Meiorin}

2. *Alterations* - unified approach that (1) avoids the distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate. {Meiorin}

3. *Process* - employer (or union, per Renaud/SELI) may justify the impugned standard by establishing on the balance of probabilities: {Meiorin}

   a. *Prima facie discrimination* - complainant must show that the operation of the standard adversely affected that individual based on a ground prohibited under **s. 13(1)** of the HRC. Focus at this stage is on the *effects* of the discrimination, not the reason it was engaged. {SELI}

      i. For instance, made out when term of employment results in a serious interference with a substantial parental or other family duty or obligation. {Health Sciences}

      ii. For instance, where Latin American employees are paid less than Europeans doing the same work, are housed in worse conditions, and have less advantageous meal allotments, discrimination is made out. {SELI}

      iii. *Process*

         1. *Identification of grounds* - with reference to prohibited grounds in s. 13(1), including race, nation of origin, language, religion, sexual preference, marital status, et al. {SELI}

         2. *Adverse treatment* - must determine whether members of the complainant group were treated less beneficially. {SELI}

         3. *Treatment discriminatory* - must determine whether the discriminatory grounds identified were factors in the adverse treatment. {SELI}

            a. For instance, while paying differential amounts to workers based on skills, duties, and experience is not discriminatory, difference based on minimum wage in home country is discriminatory. {SELI}

   b. *Rational connection* - that the employer adopted the standard for a purpose rationally connected to the performance of the job; objective. {Meiorin}

      i. For instance, the ability to work safely and efficiently is related to performance of the job, but to justify, the standard must promote safety/efficiency. {Meiorin}

      ii. For instance, the reduction of business costs, including the reduction of labour costs; however, a rational connection may yet be discriminatory. {SELI}

   c. *Good faith belief* - employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; subjective. {Meior-

in}

i. For instance, there must have been no intention of discriminating against the claimant in the development of the standard. {Meiorin}

d. *Reasonably necessary* - impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. {Meiorin} Considerations include cost of accommodation, interchangeability of workforce, interference with rights of others. Focuses on individual characteristics of employee, not those ascribed to group. {Meiorin}

i. *Considerations*

1. *Alternative approaches and investigation* - has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard? {Meiorin}

a. For instance, rather than merely denying visually impaired persons driver's licences, could not testing procedures be developed to determine individual capacity? {Grismer}

b. For instance, did the employer investigate the severity/impact/duration of an employee's disability before deciding to terminate that employee? {Rogers}

c. For instance, where an employer did not conduct investigation into nature of disability, but undue hardship would have been impossible, damages yet awarded for failure to investigate. {Rozon}

2. *Justification for non-implementation* - if alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented? {Meiorin}

a. For instance, beyond individual testing rather than blanket standard, must also consider whether there are less discriminatory ways of determining whether employee is capable of performing work safely/efficiently. {Meiorin}

3. *Blanket standard necessary* - is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established? {Meiorin}

a. For instance, rather than merely denying visually impaired persons driver's licences, could not testing procedures be developed to determine individual capacity? {Grismer}

4. *Necessity of approach* - is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose? {Meiorin}

a. For instance, some hardship is acceptable in accommodation; only hardship which is severe and undue will establish a BFOR defence. {Meiorin}

b. For instance, failing to accommodate employee's hours of work so that she could take care of son with psychiatric disorder runs afoul of this requirement. {Health Sciences}

5. *Undue burden on applicants* - is the standard properly designed to ensure that the desired

qualification is met without placing an undue burden on those to whom the standard applies? {Meiorin}

a. For instance, a procedure which merely describes current aerobic capacity of employees to establish minimum standard is not designed to place minimal burden, particularly where female and male candidates not distinguished - average aerobic performance is irrelevant, therefore not reasonable nor necessary. {Meiorin}

6. *Search for accommodation* - have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? {Meiorin}

a. For instance, some hardship is acceptable in accommodation; only hardship which is severe and undue will establish a BFOR defence. {Meiorin}

b. For instance, complainant has a duty to assist with designing appropriate accommodation, and to accept that accommodation where satisfactory. {Renaud}

7. *Undue hardship*

a. For instance, some hardship is acceptable in accommodation; only hardship which is severe and undue will establish a BFOR defence. {Meiorin}

b. For instance, a *de miminus* approach to determining the cost of accommodation would remove any duty to accommodate; only *undue* hardship which precludes accommodation. {Renaud}

c. *Considerations*

i. *General* - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. {Renaud}

- For instance, reaction of employees/morale taken with caution, as reactions based on concerns incompatible with human rights should not be protected in decisions concerning discrimination. {Renaud}

- For instance, there was no cost, scheduling implication, or other issue in allowing a machinist to work only jobs which would not affect injury. {Tarxien}

- For instance, the Newfoundland govn't was justified in delaying pay equity legislation for health care workers during a financial crisis; while this was discriminatory, s. 1 allows for delay due to the severity of the crisis and the high cost of the equity agreement. Delayed, not cancelled. {Newfoundland}

ii. *Size* - the size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. {Renaud}

iii. *Safety* - where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations. {Renaud}

v. *Harassment*

1. *Overview* - may arise on any **s. 13(1)** ground; generally sexual in nature, which involves (1)unwel-

come conduct of a (2) sexual nature that (3) detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. {Mahmoodi}

a. *Unwelcome* - test for determining whether conduct is unwelcome is an objective one: taking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant? Both overt and implicit cues are sufficient. {Mahmoodi}

b. *Applies to all grounds, all harassment* - harassment of any person because of that person's personal characteristics that are associated with a prohibited ground of discrimination is a violation of human rights legislation, even in those statutes where it is not declared to be so in express terms.

2. *Rationale re: sexual harassment*

a. *American definition* - American courts divide into "quid pro quo" versus "hostile work environment" however, dichotomy not helpful. Main point is that the conduct is sexual and unwelcome. Denial of concrete rewards / other analyses not necessary, though may aggravate. {Janzen}

b. *Canadian approach* - broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. {Janzen}

i. For instance, that not all female employees at the restaurant were subject to sexual harassment is not a defence; crucial fact is that it was only female employees who ran the risk of sexual harassment. Male employee would be safe in knowledge that they would not be subject. {Janzen}

3. *Employer liability*

a. *Overview* - employers are obligated to ensure that their workplaces are harassment-free. This obligation includes both taking steps to prevent harassment from occurring and responding appropriately to incidents of harassment. {Robichaud}

b. *Rationale* - to give effect to equal opportunity to live life, earn a living, etc. as per *HRC* **s. 2.** must not only be discriminators who are subject to the laws; the HRC is not punitive to those who discriminate, but rather meant to ward off discrimination altogether. {Robichaud}

i. For instance, liability applicable to criminal or quasi-criminal proceedings therefore not applicable, as these are stringent based on punitive nature. {Robichaud}

ii. For instance, only employers could take measures prescribed in HRC, such as following up, creating special plans/programs, implying that employer involvement required in legislation. {Robichaud}

iii. For instance, much of the conduct of the employer will go to remediation, not liability (eg. the ability to avoid future incidents); liability will stand regardless. {Robichaud}

d. *Remedies*

i. *Cease and refrain,* ***s. 37(2)(a) -*** where a complaint is found to be justified, the Tribunal must make an order that the respondent cease and refrain from committing the same or a similar contravention. {SELI}

ii. *Declaration,* ***s. 37(2)(b) -*** where a complaint is found to be justified, the Tribunal may make a declaration that the conduct is discriminatory. {SELI}

iii. *Compensation,* **s. 37(2)(d) -** where a complaint is found to be justified, the Tribunal may order access to the right that was denied, as well as any compensation for lost wages/dignity. {SELI}

1. For instance, may arise where the discrimination signals to the complainant group that they are less worthy of benefits/privileges/rights than others. {SELI}

3. <u>*Participants in collective bargaining*</u>

a. *Overview* - generally, all *employees* are entitled to participate in collective bargaining with their *employers* through *trade unions.*

b. *Is the worker in question an employee?* - **s. 1(1)**

i. *Overview* - vague in legislation, therefore definition heavily dependent on the common law. Categorical employee exclusions (domestic, agriculture, etc.) were abandoned in BC in 1975; retained in some provinces, but likely vulnerable to s. 2(d) of the *Charter.*

ii. *Public sector employees* - relations between PG and its employees modified by *Public Service Labour Relations Act* (general) and *School Act* (applicable to teachers/school boards). Modifications concern bargaining units, unfair labour practices, and *employee status*. However, *Labour Relations Code* applies where specialized codes are silent.

iii. *Statutory purpose test*

1. *Meaningful benefit* - whether workers in question will be able to meaningfully benefit from access to collective bargaining; or, put another way, whether the workers are subject to the evils that the statute was designed to eradicate. {Cranbrook Hospital}

a. For instance, student nurses not hired by the hospital, not disciplined by the hospital, not scheduled by the hospital, did not receive wages or benefits from the hospital; therefore, not employees of the hospital. {Cranbrook Hospital}

2. *Sufficient integration* - whether the workers in question are sufficiently integrated into the undertaking that they are properly considered employees of that undertaking, despite status within organization. {Kelowna Museum}

a. For instance, inmates who work in a slaughterhouse as part of their rehabilitation may be considered employees. {Guelph Beef Centre}

b. For instance, persons working at a museum under a temporary, publicly subsidized project were performing task which was beneficial to museum; not there as students, volunteers, or contractors; under detailed control and supervision, and on that basis, considered employees. {Kelowna Museum}

iv. *Dependent contractor test* - **s. 1(1)**

1. *Code definition* - person who performs work for another person under terms which put the former into a position of obligation and economic dependence on the latter, therefore more closely resembling an employee than a dependent contractor. Ownership of tools or presence of contract is not dispositive.
   a. For instance, freelance newspaper reviewers earn money by using labour to produce a product - rather than as a return on capital investment, entrepreneurism, or a staff organization of their own.

Further, develop continuing relationships with newspapers which come to account for majority of earnings. Therefore, dependent. {Pacific Press}

2. *Rationale* - those who are substantially similar to employees should receive the same rights as employees, and further, inclusion discourages employers from seeking out contractor relationships in order to avoid application of the code.

3. *Differentiation from independent contractors* - workers who, due to capital investment, entrepreneurial talents, their own staff organization, and/or their special professional skills, function on a detached and independent basis. {Pacific Press} ICs considered opposite of employees, while DCs fall between. {Semiahmoo} Considerations, identified in *West Fraser Mills,* include:

    a. *Guiding factor* - type and extent of control and direction exercised by the employer with respect to such matters as hiring, firing, discipline, work assignment, hours of work, and so forth;

        i. For instance, employer determined where papers were to be delivered, hours of delivery, standards of performance, and unilaterally imposed additional flyer delivery - implies dependent, not independent. {Semiahmoo}

    b. *The way the industry operates*, type of work involved and its source, contractual arrangements between the parties and others;

    c. *Nature of the applicant's operations;*

        i. For instance, if applicant does not drive a truck, but rather rents trucks/drivers to others, then this is selling the labour of others as a profit, and will generally militate towards independency. {West Fraser Mills]

    d. *Organization of the employer's operations* and the degree to which the contractors are a continuing part of it (does the employer generally expect the contractors to work on a daily basis and are the contractors generally available for work during working hours; is a long term, stable relationship between the parties evident?);

        i. For instance, significant attachment found where newspaper requires carriers to give notice if wishing to cease delivery. {Semiahmoo}

    e. *Nature and manner of compensation* and how it is determined;

        i. For instance, where there is no negotiation over compensation, this implies a relationship of economic dependence. {Semiahmoo}

    f. *Percentage of income* which the contractor derives from the employer (generally, the lion's share of the contractor's income must derive from the relationship with the employer);

        i. For instance, freelance writers in *Pacific Press* derived 75% of their income from continuing relationships with single employer. {Pacific Press}

    g. *Opportunity for the contractor to make a profit* through the exercise of independent entrepreneurial judgment;

        i. For instance, if the contractor is selling the labours of others at a profit, as opposed to selling their own labour. {West Fraser Mills}

ii. For instance, where the hours of work and realities of a newspaper delivery route preclude the making of a profit. {Semiahmoo}

h. *Contractor's opportunity for economic mobility* and whether the contractor advertises or solicits customers elsewhere.

i. However, the the necessity of finding alternate employment does not detract from dependent contractor status. {Semiahmoo}

c. *Is the employee in question excluded from collective bargaining?* - ***s. 1(1), s. 29***

i. *Overview* - all Canadian labour statutes exclude certain employees from the bargaining unit on the basis that to do otherwise would be to give rise to a *conflict of interest*. Each of the categories of exclusion operates with conflict avoidance as central goal. As such, management must arrange its affairs so as to avoid such conflicts, where possible. {District Burnaby}

ii. *Management status exclusion*

1. *Overview* - management refers to persons who are dependent on the enterprise for livelihood, but also wield substantial power over employees; legislature has decided that these persons must be assigned to the employer's side. {District Burnaby}

2. *Categories of management* - break down into those who manage the overall undertaking (senior executives) and those who manage operations (managers/supervisors). Latter are usually where conflict arises concerning the scope of the exclusion. {District Burnaby}

3. *Rationale for exclusion*

a. *Efficiency* - effective bargaining is dependent on an arms length relationship between sides, each organized in order to best represent its own interests. {District Burnaby}

b. *Employer interests* - employer must have undivided loyalty of senior people in order to ensure that business interests are not diluted by union interests. {District Burnaby}

c. *Employee interests* - employers may sponsor weak and dependent unions in order to dominate them; management are uniquely well positioned to pursue this regrettable purpose, which must therefore be avoided. {District Burnaby}

4. *BC Ferry test*

a. *Responsibilities associated with management* - discipline and discharge and input into labour relations are the critical factors, because these are the factors which relate to the conflict of interest position from which exclusion arises. {VGH}

b. *De facto, not de jure powers* - the determination of whether an employee should be excluded as "management" is dependent not on what powers they have "on paper" but rather powers which are exercised in practice. Different from conflict of interest test, which involves only potential conflict. {District Burnaby}

i. For instance, an employee may be management, even where hiring and firing authority is only recommendatory on paper, where recommendations amount to effective determinations. {District Burnaby}

ii. For instance, employee may not be management where given explicit hiring and firing authority on paper, but this is never exercised or is not exercisable in practice. {District Burnaby}

c. *Factors* - question is whether the responsibilities bely a real conflict of interest in the actual exercise of authority. {VGH}

i. *Discipline and discharge* - critical factor. Given same weight in all settings, whether industrial or professional, although must be investigated more subtly in professional settings, where exercise of discipline is rarer. Otherwise, would require greater discipline than necessary to be exercised for managers to be excluded, not in the interests of any of the parties. {VGH}

1. *Professional workplaces* - involve highly skilled work force, more independence and cooperation: discipline and discharge is rare. Subtle judgment required to determine *actual* exercise of authority: subtle judgment, requiring no minimum content - thereby different than industrial settings. {VGH}

a. For instance, in a hospital, there does not have to bee significant discipline exercised to find that authority to discipline exists. {VGH}

b. For instance, professionals may be subject to discipline from colleges, thus reducing importance of discipline exercised in workplace. {VGH}

ii. *Labour relations input* - critical factor. Based on four considerations:

1. *Input into collective bargaining*

a. For instance, head nurses have input into employer's proposals for bargaining, but no evidence that this had any effect. {VGH}

2. *Involvement in grievance procedures* - the authority to represent the employer in a grievance procedure, to settle a grievance or to sent it to arbitration; clearly puts management in a conflict of interest.

a. For instance, head nurses handle grievances, but there were only few of these and none had gone to arbitration. {VGH}

3. *Access to personnel files*

a. For instance, head nurses able to access and contribute to personnel files, including employee evaluations (also relevant to D&D). {VGH}

4. *Involvement in essential service delegations* - important, because this affects the ability of the union to execute a strike; if essential services are set high, then the effectiveness of the strike is attenuated, for instance.

a. For instance, head nurses had input into essential services, but these were determined without their direct input. {VGH}

iii. *Hiring and firing* - critical factor, itself able to be dispositive as with D&D and H&F. {Cowichan Home Support

iv. *Supervisory work (especially of subordinate supervisors)* - not dispositive, but may tip the balance in either direction where D&D, H&F, and LRI are not determinative. {VGH}

1. *Supervision alone not sufficient to warrant exclusion* - mere supervision of employees does not bring the management exclusion into effect. Rather, there must be something more. Modern management structures are complex, and the *Code* must be flexible to accommodate this. Otherwise, many persons will be excluded from any form of collective bargaining. {District Burnaby}

v. *Other factors* - hiring, promotion, performance evaluation, overtime and leave approval, policy setting; fit into the above processes to some degree. {VGH}

1. For instance, where D&D, H&F, and LRI absent, it would not be fitting to exclude head nurses from bargaining based solely on policy setting. {VGH}

iii. *Management team exclusion*

1. *Overview* - narrow ground which is separate and distinct from managerial *status*. Only applies to parties also meeting the definition for employees. Rare ground. {District of Burnaby}

2. *Rationale for exclusion* - as with management status, concern is conflict of interest. However, rather than an interest which arises out of D&D/H&F/LRI, this is a concern which arises out of special characteristics of the person (rather than nature of their position) which gives rise to a *community of interest* with employer. {Highland Valley}

3. *Highland Valley test*

a. *Factors* - include ownership stake in the business, providing confidential advice to management, or a personal relationship to management. {Highland Valley}

b. *Applicability* - does not apply to first-level supervisors who perform administrative or supervisory duties. {VGH}

c. *Alternatives* - could the employer have otherwise organized its affairs so as to prevent exposure to the conflict of interest? Related to the volume of work, though this is not determinative. Where the employee cannot be shielded, community of interest may lie with employer. {District of Burnaby}

i. For instance, where the amount or type of work which could raise a potential conflict could be easily assigned to non-union workers, this militates towards inclusion in the CBU. {District of Burnaby}

ii. For instance, mere fact that secretaries had been shielded from confidential information since joining the union is not dispositive, as employer had to use a law firm instead: extraordinary circumstance, particularly as capacity for this work was available in existing workforce. {District of Burnaby}

iv. *Confidential exclusion*

1. *Overview* - certain non-managerial employees will be exposed to confidential information related to labour relations as part of their jobs. These persons may be excluded from the bargaining unit in order to avoid a conflict of interest. {District of Burnaby}

2. *District of Burnaby test, confidential employment re: labour relations*

a. *Employed* - individual must be meet the definition of employee;

b. *Substantial and regular portion* - the nature of employment must be such that the portions concerning a conflict of interest must constitute a *substantial and regular* part of a person's job - not merely occasional or accidental. {District of Burnaby}

   i. For instance, a secretary that has prepared only a few letters relating to labour relations matters is not "regularly" involved in such matters. {District of Burnaby}

   ii. For instance, 20% insufficient in *Vancouver Island Regional Library*, 25% insufficient in *Fort St John General Hospital.*

c. *Confidential capacity* - judgment of the seriousness of the need for secrecy of the information that the employee is privy to. {District of Burnaby}

   i. For instance, a "draft" of a letter is confidential, because it is not yet in a form deemed fit for public consumption, even if in its final form it would be expected to be released publicly. {District of Burnaby}

   ii. For instance, salaries, benefits, etc. are not confidential because this information would be in any case accessible to the Union. {Central Park}

d. *Labour relations* - the matters which need to be kept confidential must be related to labour relations. {District of Burnaby}

e. *Alternatives* - could the employer have otherwise organized its affairs so as to prevent exposure to the conflict of interest? Related to the volume of work, though this is not determinative. {District of Burnaby}

   i. For instance, where the amount or type of work which could raise a potential conflict could be easily assigned to non-union workers, this militates towards inclusion in the CBU. {District of Burnaby}

   ii. For instance, mere fact that secretaries had been shielded from confidential information since joining the union is not dispositive, as employer had to use a law firm instead: extraordinary circumstance, particularly as capacity for this work was available in existing workforce. {District of Burnaby}

3. *Burnaby General Hospital test, confidential employment re: personnel*

a. *Involvement* - regular and material involvement in personnel matters; {BGH}

   i. For instance, a secretary that has prepared only a few letters relating to personnel matters is not "regularly" involved in such matters. {District of Burnaby}

   ii. For instance, 20% insufficient in *Vancouver Island Regional Library*, 25% insufficient in *Fort St John General Hospital.*

b. *Confidential personnel information* - entrusted with confidential information about employees; {BGH}

   i. For instance, a "draft" of a letter is confidential, because it is not yet in a form deemed fit for public consumption, even if in its final form it would be expected to be released publicly.

{District of Burnaby}

ii. For instance, salaries, benefits, etc. are not confidential because this information would be in any case accessible to the Union. {Central Park}

c. *Discreetness* - expected to act discreetly upon such information; {BGH}

d. *Threat of divulgence* - divulgence of such information would threaten relationship between employee and employer, or between employees; {BGH}

e. *More than mere recording* - person receiving information must be responsible for making judgments rather than merely recording or processing it. {BGH}

f. *Alternatives* - could the employer have otherwise organized its affairs so as to prevent exposure to the conflict of interest? Related to the volume of work, though this is not determinative. {District of Burnaby}

i. For instance, where the amount or type of work which could raise a potential conflict could be easily assigned to non-union workers, this militates towards inclusion in the CBU. {District of Burnaby}

ii. For instance, mere fact that secretaries had been shielded from confidential information since joining the union is not dispositive, as employer had to use a law firm instead: extraordinary circumstance, particularly as capacity for this work was available in existing workforce. {District of Burnaby}

d. *Is the organization in question the employer?*

i. *Overview* - generally not in issue, although may be raised where persons are employed through a third party, such as an employment agency. Main question is determining which party exercises fundamental control of the employment relationship. {Kelowna Cabs} (see also: picketing - id'ing employer)

ii. *Kelowna Cabs test*

1. *Direction and control* - party exercising direction and control over the employees performing the work. {Kelowna Cabs}

2. *Compensation and benefits* - party bearing the burden of remuneration. {Kelowna Cabs}

3. *Discipline* - party imposing discipline. {Kelowna Cabs}

4. *Hiring* - party hiring the employees. {Kelowna Cabs}

5. *Dismissal* - party with the authority to dismiss the employees. {Kelowna Cabs}

6. *Perception* - party which is perceived to be the employer by the employees. {Kelowna Cabs}

7. *Intention* - intention to create the relationship of employer and employees. {Kelowna Cabs}

iii. *Successorship, **s. 35***

1. *Overview* - under **s. 35**, where a business is sold, leased, or transferred, the successor is bound by the proceedings under the *Code* and any collective agreement in place.

2. *Rationale* - without successorship, collective bargaining rights would disappear without awareness or participation of employees; therefore, necessary to give meaning to collective bargaining. Further, best interests of the union would not be represented in negotiations for sale of business. {Kelly Douglas}

    a. For instance, buyer of business is involved in negotiations, therefore, makes sense to put emphasis on that party to investigate CBA, and ensure that it is reflected in price of business sale. {Kelly Douglas}

3. *Approach*

    a. *Full and liberal interpretation* - to ensure that employers are not able to elude their CBA obligations through transfer/sale, must give successorship a full and liberal interpretation. {Kelly Douglas}

    b. *Relationship focused* - factor to be determined is the relationship between the successor, the employees, and the undertaking; therefore, any means of taking over enterprise is accounted for. {Kelly Douglas}

    c. *Discernible continuity* - the general requirement is that there be a "discernible continuity in the business" between the predecessor and successor employers. {Cariboo Trail}

        i. *Considerations*

            1. *Key person* - while generally transfer of business involves assets, may also be an important person, particularly in the construction industry; implied by *direct contact* through successor and predecessor. {CCAG}

                a. For instance, construction companies require little tangible assets, operate mostly on skills, expertise, reputation of principal of company. Where skills, reputation, and expertise have passed to successor, then continuity is found. {CCAG}

            2. *Transfer of assets* - must be a transfer of the essential elements of the business as a *going concern*. Also includes accounts receivable, existing contracts, inventory, logos, trademarks, and goodwill. {Cariboo Trail}

                a. For instance, where a resort hotel sold, along with liquor licence, to new owner, building demolished, rebuilt executive chain hotel, assets not transferred as going concern. {Cariboo Trail}

            3. *Expansion or new business* - where the new owner already has existing business operations, must ask whether the new acquisition is a standalone continuation of a going concern, or rather than an expansion of the new owner's existing business. {Cariboo Trail}

                a. For instance, where chain hotel acquires resort hotel, demolishes it and then builds new structure in keeping with chain, constitutes expansion. {Cariboo Trail}

            4. *Customers* - has there been a transfer of customer lists? Are customers of the predecessor now serviced by the successor? {Cariboo Trail}

            5. *Non-compete* - has the successor covenanted to maintain a good name, or has the predecessor covenanted not to compete? {Cariboo Trail}

6. *Employees* - are the same employees performing the same work? {Cariboo Trail}

7. *Hiatus* - has there been a hiatus in the business between the two companies? {Cariboo Trail}

iv. *Common employer and doublebreasting,* ***s. 38***

1. *Overview* - occurs where employer sets up second corporation, and then transfers work to that corporation so that it can avoid CBA. **s. 38** allows for these businesses to be treated as a single employer for the purposes of collective bargaining. {Intermountain}

2. *Retroactivity* - *c*ommon employer declaration has retroactive effect back to the time that the non- union entity was established; thus, may be liable for CBA breaches while using non-union entity. {Lorne}

3. *Process*

a. *More than one entity carrying on business* - all of the entities must be going concerns, must be carrying on business or reasonably likely to resume doing so in the future. {Mackie}

i. For instance, where a business had lain dormant for five years and was only still extant due to pending lawsuit, not going concern, no likelihood of resumption in future. {Lisogar}

b. *Common control or direction* - established through common ownership, contractual provisions establishing control of one entity by another, or through spousal or familial relationships. {Mackie}

c. *Associated activities* - activities will often be identical, but where otherwise, there must be functional integration between the entities. {Mackie}

i. *Complementary activities* - sometimes referred to as "horizontally" or "vertically" integrated operations.

1. For instance, the construction of logging roads is functionally integrated with a logging operation; {Mackie}

ii. *Operational overlap* - operating from the same location or using the same assets, particularly where this involves capacity for employee exchange. {Mackie}

d. *Labour relations justification* - there must be a practical labour relations purpose to be served. {Mackie}

i. For instance, enforcement of a CBA which would otherwise not be honoured by employer.

e. *Is the organization of employees a trade union?* ***- s. 1(1)***

i. *Overview* - defined under s. 1(1) of the *Code*, which sets out the various requirements for an organization to be eligible for certification.

ii. *Institutional requirements*

1. *Viability* - there must be a viable organization capable of assuming the obligations of collective bargaining; {Jensen}

a. For instance, must be capable of carrying out its stated purposes; for this, it needs members, monetary contributions by those members, etc. {Jensen}

2. *Presence* - the organization must have a presence within the relevant province to ensure that there is an entity against which board orders can be enforced; {Jensen}

   a. For instance, a national union must establish a provincial component in order to meet this requirement. National/international unions have no standing in collective bargaining in BC absent this requirement. {Jensen}

3. *Constitution* - organization must have a properly drafted constitution which has been ratified by its members. {Jensen}

   a. For instance, if a constitution drafted but never submitted for consideration, debate, and approval, then union is disqualified. {Rempel Bros.}

4. *Purpose* - regulation of relationships between employers and employees must be one of the purposes of the organization, generally through express constitutional decree. {Jensen}

iii. *Disqualification*

1. *Human rights violation* - ***s. 31(b)*** - organizations which discriminate against persons in a manner contrary to the *Human Rights Codes* are disqualified from trade union status. Stems from *Wagner Act*, responding to exclusion of groups in U.S. unions.

2. *Employer dominance* - ***s. 31(a)*** - organizations which are dominated or influenced by an employer are disqualified from trade union status; employers may occasionally attempt to promote organization of a "tame" union in order to forestall organizing drives by independent unions. (see unfair labour practices - **s. 6(1)**).

   a. For instance, Teamsters challenged and had disqualified a "homemade" union which it alleged had formed with employer's blessing to stymie the former's attempts at certification. {Rempel Bros.}

      i. Employer did not object to posting a petition concerning the homemade union on its bulletin board. {Rempel Bros.}

      ii. Employer was willing to do a "dues check off" (eg. deduction of dues) before certification/CBA, almost unheard of. {Rempel Bros.}

iv.*Recognition*

1. *Certification*

   a. *Overview* - status which endows the union with exclusive right to bargain on behalf of the bargaining unit, bringing with it certain protections (statutory freezes, good faith bargaining duty of employer) and obligations (fair representation).

   b. *Rationale* - introduces stability into the organization process - no longer to workers need to strike in order to gain recognition from employers, etc.

   c. *Security of tenure* - protected against changes in t&c of employment (see ULP - changes to t&c),

against raids upon signing of a CBA under **s. 18(2)**, and subject to strict requirements for revocation of bargaining rights set out in **s. 33** (see revocation, below).

d. *Certification process*

i. *Determination of appropriate bargaining unit*

1. *Overview* - generally, a matter for adjudication, and the first substantive issue to be considered during the certification process.

2. *Public sector employees* - ***Public Service Labour Relations Act*** holds that the apt bargaining unit for PG civil servants is one unit of all such employees, and ***Public Education Labour Relations Act*** holds that province-wide unit apt for *cost item*s, while school board unit apt for *local matters*.

3. *Community of interest (historical approach)*

a. *Overview* - general test for appropriateness of bargaining unit, question is whether the members of the unit share a "community of interest" such that the union would be able to sufficiently represent all interests present in the bargaining unit. This test preferred larger number of smaller, specialized units.

b. *Considerations*

i. *Skills;*

ii. *Duties;*

iii. *Working conditions;*

iv. *Geographic proximity;*

v. *Historical representation.*

4. *One big unit (approach until 1993),* ***s. 42***

a. *Overview* - offers administrative efficiency, convenience in bargaining, and industrial stability. Presumptive position under **s. 42** of the *Code*, but subject to considerations set out in *Island Medical Labs*.

b. *Considerations*

i. *Employer management structure* - highly centralized, or more widely dispersed? With increased management centralization, dealing with a single unit increasingly beneficial. {ICBC}

ii. *Nature of industry* - is the continuing operation of the employer's business important to the well-being of the province - thus, stability critical? {BC Ferry}

- For instance, a near-monopoly on vehicular traffic to VI is important to BC economic well being, stability important, implies OBU better. {BC Ferry}

- For instance, while the banking industry is central to the fabric of Canadian

society, strike at a single branch is unlikely to imperil this. {CIBC}

iii. *Distinctness secondary* - only a minimal concern for minority employee rights, assuaged through imposing requirements on the union and employer to provide a modicum of distinct representation. {BC Ferry}

- For instance, to ensure that unique needs of licenced officers not lost in BC Ferry OBU, created new executive, business agent, Bargaining Committee positions for these officers. {BC Ferry}

- For instance, "distinct" members could choose to remain unrepresented, OBU, or seek a joint certification or council of unions under **s. 20** or **s. 41** - like an OBU. {MacMillan}

iv. *Functional integration* - extent to which the duties of one group are aligned with the duties of other groups within the unit. Where a strike by one group could disrupt the work of large amount of others, preference for OBU.

- For instance, a strike by technical staff at a pulp and paper operation could disrupt thousands of other workers. Therefore, OBU. {MacMillan}

v. *Foothold principle* - certain industries traditionally difficult to organize, therefore in such industries, OBU relaxed where there is an identified unit with a reasonably coherent an defensible boundary - generally in retail or service, for instance. Applies where the Board's records, industry insiders, or experts reveal low-union density or systemic difficulties in organizing this sector. {Island Medical}

- For instance, unions perceived organization of banks impossible unless on branch basis - otherwise, resources needed to sustain nationwide campaign too great, esp. due to employee turnover. {CIBC}

- For instance, single branch of bank sufficient bargaining unit in retail banking industry as a result; however, 2/3 of such certifications failed, often due to bank ULPs. {CIBC}

c. *Advantages of OBU*

i. *Convenience in bargaining* - far more administratively efficient and convenient to deal with one CBA at set intervals than in a continuous process of unrest. {CIBC}

ii. *Lateral mobility* - where there are multiple bargaining units, may be difficult for employees to move between units, due to seniority and benefit differences. {ICBC}

iii. *Common framework* - establishes a basic structure of conditions which serve as basis for collective bargaining. {ICBC}

iv. *Industrial stability* - reduces risk of "whipsawing" and "leapfrogging" where different unions strike sequentially against employer, and with only one contract, limits occurrences of striking. {ICBC}

d. *Disadvantages of OBU*

i. *Inhibition of organization* - scale necessary to fulfill OBU aptness poses a huge barrier to entry in new industries. (see foothold principle, above) {CIBC}

5. *Island Medical Labs approach (present approach)*

a. *Overview* - Board may certify *appropriate* unit, but this need not be the *most* appropriate unit; where there is a *community of interest* sufficient to establish an appropriate unit, a certification may be granted. {Island Medical}

b. *Balancing of principles* - board must balance access to collective bargaining against the need for industrial stability. Both goals are reflected by community of interest. {Island Medical}

i. *Initial certification* - on initial certification, design of bargaining unit is key goal in industrial stability; ensure viable bargaining unit. *Access to collective bargaining more important.* {Island Medical}

ii. *Subsequent certifications* - concerns relate to design, but also to proliferation of bargaining units and the relationships between those units; therefore, presumption against multiple units increases markedly with number of units. Therefore, more often will be added to existing units. *Industrial stability more important.* {Island Medical}

c. *Foothold principle* - applies within the context of the *Island Medical* test; requires application of the principles above in a more "relaxed" fashion. Applies where the Board's records, industry insiders, or experts reveal low-union density or systemic difficulties in organizing this sector. {Island Medical}

d. *Desires of employees or union* - the Board will not hold the desires of the union nor of the employees concerning representation as determinative. {Island Medical}

e. *Community of interest*

i. *Overview* - union must take employer as it finds it, knowing that the employer may not have organized business to reflect labour relations, and may implement such changes as it sees fit. {Island Medical}

ii. *Similarity in skills, interests, duties, and working conditions* - persons who perform similar work under similar t&c will have a community of interest; this is of only limited conceptual guidance. {Island Medical}

- For instance, despite that two Costco locations had slightly different product lines, skills, duties, t&c effectively the same. {Costco}

iii. *Physical and administrative structure of the employer* - physical layout, organizational chart, other factors relevant to establishing community of interest. As opposed to *operational structure,* considered under *functional integration.* {Island Medical}

- For instance, physically separate locations are less relevant where the employer has a centralized administrative structure. {Costco}

iv. *Functional integration* - relationship between departments is expected, does not preclude community of interest *within* single departments. However, integration *across* departments - including employee interchange, team processes, overlapping, shared duties would militate towards inclusion in one unit. {Island Medical}

- For instance, in a subsequent certification, must be considered that the *initial* certification likely would have failed if the two groups were functionally integrated. {Costco}

- For instance, an assembly line spanning multiple departments would likely require a single bargaining unit. {Island Medical}

- For instance, employee interchange need not be daily, but must be more often than holiday relief. {Can-Am}

- For instance, employees that straddle departments may be excluded or included in the bargaining unit to ensure viability of process. {Can-Am}

v. *Geography* - employees physically separated often develop separate communities of interest; may be overcome through regular interchange of employees between sites. {Island Medical}

- For instance, a single classification will be certified only where it happens to be the majority of bargaining unit members at a geographical location, or the industry begs application of the foothold principle. {Island Medical}

- For instance, geographically close Costco locations (Grandview and Burnaby) militate towards OBU certification. {Costco}

vi. *Certification versus merger or variation* - upon subsequent applications for certification, the following factors enter consideration - if they militate against certification, the variation considerations apply (see variation, below). Could also allow for joint council of unions under **s. 20** and **s. 41.**

- *The practice and history of the current collective bargaining scheme* - considered only upon subsequent certifications. {Island Medical}

  - For instance, a mere promise to collaborate between bargaining units, unsubstantiated by evidence, not sufficient to satisfy industrial stability. {Costco}

- *The practice and history of collective bargaining in the industry or sector* - upon subsequent certifications. {Island Medical}

  - For instance, retail food industry allows for location-by-location certification, but where corporately linked bargaining done provincially. {Costco}

ii. *Application for certification,* ***s. 18(1)***

1. *Overview* - in order to apply for certification, union must establish that it has support of 45% or greater of employees in the bargaining unit through signed membership cards.

2. *Card requirements,* ***Labour Relations Regulation***

   a. *Contents,* ***s. 3*** - cards must be signed, dated at time of signature, and must state that "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."

   b. *Timing* - must be signed within 90 days of application for certification, or otherwise continuing support must be evidence by dues payments in that time period.

   c. *Revocation,* ***s. 4*** - support may be revoked by written statement delivered on or before the day of application for certification.

3. *Historically* - if membership card support exceeded 55% then union would gain immediate certification; support between 45%-55% means a vote; support less than 45%, certification denied. Now a representation vote is required wherever card support exceeds 45%

iii. *Representation vote,* ***s. 24(1)***

1. *Overview* - for certification to be granted, union must establish that it has support of majority of employees in the bargaining unit, safety margin of 55% or greater in secret ballot vote (secrecy required in all such votes by **s. 39** of the *Code);* additionally, 55% or greater must participate in the voting.

iv. *Variation of certification,* ***s. 142***

1. *Overview* - union or employer can apply to vary certification to add new group or employee to classification; usually made by unions. {Olivetti}

2. *Process*

   a. *Union* - seeking to expand the scope of the bargaining unit must demonstrate that it has majority support amongst the new employees rather than simply majority support within the proposed new unit; must also satisfy considerations

      i. For instance, a unit representing manufacturing employees that wishes to add trucking employees to its representation must show a majority among the *new* employees, and not the agglomerated unit (manufacturing *and* trucking employees) to succeed. {Olivetti}

   b. *Employer* - may apply under **s. 35(3)** to reconsider the appropriate bargaining unit to determine whether newly acquired businesses should be reconciled/merged into existing CBA operations.

   c. *Considerations*

      i. *Inappropriateness* - determination that one or more bargaining units is no longer appropriate. {Island Medical}

      ii. *Appropriateness* - Determination of what would constitute "an appropriate" bargaining unit, employing all six community of interest factors (see certification - *Island Medical test,* above); {Island Medical}

      iii. *Instability* - evidence of potential or actual industrial instability. {Island Med-

ical}

iv. For instance, more than speculative unrest, but this does not have to be profoundly serious. Includes multiple strikes, illegal stoppages, etc. {Island Medical}

2. *Voluntary recognition*

a. *Overview* - unions may be voluntary recognized as exclusive bargaining units by employers. In such circumstances, absent evidence of employer domination (or other disqualifying features) the Board will recognize a collective agreement between such parties.

b. *Security of tenure* - once a collective bargaining agreement is completed, an uncertified union is protected against untimely raids under **s. 19(1)**, and subject to strict requirements for revocation of bargaining rights set out in **s. 33** by operation of **s. 34**. (see revocation, below)

c. *Issues*

i. *Duty to negotiate in good faith* - employers have not duty to negotiate in good faith with an uncertified union until after the first collective bargaining agreement is completed. This reflects reality: most employers are opposed to organization, will not voluntarily recognize.

ii. *"Bargaining agent" provisions* - terms which apply only to "bargaining agents" do not apply to voluntarily recognized unions.

1. For instance, **s. 55(1)(a)** which allows for imposition of first collective agreement through arbitration is inapplicable to voluntarily recognized unions.

iii. *Employer domination* - voluntarily recognized unions are always subject to challenge that they are employer dominated.

1. For instance, where representative employees were selected by the employer, negotiations held in private, employees not privy to the substance of negotiations. {Delta Hospital}

iv. *Not representative* - where the collective agreement negotiated by the uncertified union is conducted without formal support, in secrecy, the Board may find that it is not representative. While the agreement is still valid, security of tenure does not apply. {Delta Hospital}

1. For instance, where the representative employees were selected by the employer, negotiations held in private. {Delta Hospital}

4. <u>*Unfair labour practices* **- s. 6**</u>

a. *Overview* - structured so that **s. 6(1)** prohibits employer interference with or retaliation for union organizing activities of its employees; subsections provide specific examples.

b. *Rationale* - employees are entitled to freedom of choice about whether they wish to have a union represent them as their bargaining agent, and about which union they wish to support; therefore, employer must hold itself aloof from these matters.

c. *Assumptions* - premised on the idea that employees are susceptible to employer influence (due to financial dependence) and that this will be misused by employers. {City & Country}

d. *Applicability* - applies to sanctions against individuals or groups of employees, and can even apply to closure

of business; other than s. 6(3)(b), apply at *all times* during the employer/employee relationship. {National Bank}

e. *Employer ULPs*

i. *Overview* - employees have a fundamental right to organize per **s. 4(1)** of the *Code*. Various other provisions serve as mechanisms to protect this right: including employer ULPs (though ULPs serve other purposes as well. Also, see common employer / doublebreasting, above - not ULP, but similar).

ii. *Employer favour between competing organizations*

1. *Overview* - under **s. 6(1)**, it is an unfair labour practice for an employer to promote one of two competing unions - this constitutes interference with employee choice of own representation. {Western Saw}

a. For instance, the employer cannot promote in-house organization versus an outside union; interference *per se*, doubly so when the latter is dependent. {Western Saw}

b. For instance, employer cannot supply one union with an employee list and encourage employees to choose that organization. {Excel Electric}

c. For instance, employer cannot create or facilitate anti-union employee association by allowing use of bulletin boards or dues check-offs. {Rempel Bros.}

2. *Intentionality not required* - *a*ll that is required to constitute interference is that an employer's conduct has the effect of improperly interfering with protected activity when judged from an objective standpoint. {Convergys}

iii. *Prohibited communications of employer*

1. *Overview* - governed primarily by **s. 6(3)(d), s. 9, s. 8.** The latter grants the employer a general right to express their views, subject to certain limitations. {Cardinal}

2. *Rationale* - relates to the perceived vulnerability of employees, imbalance of power in employee/employer relationship. Thus, the prohibition in **s. 9** against intimidation/coercion to join/refrain from joining a union (though in that regard, duplicates s. 6 - s. 9 more applicable to union communications).

3. *Context of communications* - Inquiry into whether statement is permissible must take entire context of the communication into account; therefore, either impermissible form or impermissible content or combination of both may run afoul. {Convergys} Method of communicating may be coercive regardless of content. {RMH}

a. *Maturity of relationship* - communications occurring at the certification stage will be closely scrutinized, while those in a mature collective bargaining relationship will be less closely so. {SELI}

i. For instance, where a union is certified, less protection is warranted, as there is no question of protecting access to collective bargaining. {SELI}

b. *Captive audience meetings* - held on work premises during work hours, no pay deduction, attendance either compulsory or "voluntary" (but to be absent would be to out oneself as a union supporter; management in attendance; discussion of terms and conditions of employment, unions, etc. *Attract greater scrutiny under s. 6, s. 9, s. 8.* {Cardinal}

i. For instance, statements that would be otherwise permissible may constitute ULP in a captive audience meeting. {Cardinal}

c. *Written communications* - preferable, as this mode reduces emotional impact of captive audience meetings, ensures that both views are expressed (by allowing for contemporaneous criticism of material); there is also a record of the employer communications. *Attract less scrutiny.* {Cardinal}

i. For instance, statements that would be impermissible in a captive audience meeting may be acceptable in a written letter. {Cardinal}

d. *Other forms* - gifts may be improper where they constitute inducements, under s. 6(1); further, an intrusive mode of communication may also be problematic, even where the message would otherwise be acceptable. {RMH}

i. For instance, frisbees, water bottles, etc. are not sufficient benefits to constitute inducements of themselves, but ULP where contain improper messaging. {RMH}

ii. For instance, projectors exhibiting images which employees must either view or actively turn away from may improperly pressure. {RMH}

4. *Original limitation under* ***s. 8*** - previously, the limitations in s. 9 and s. 6 did not prevent the employer from communicating statements of fact or opinion reasonably held with respect to the employer's business; absent coercion, intimidation, undue influence. {Cardinal}

a. *Standard* - "strict neutrality" in communication for employers; best means of avoiding falling afoul was to remain an interested bystander. Statements may be persuasive without running afoul, however. {Cardinal}

i. For instance, cannot undertake a "full blown election style campaign against a union." {Cardinal}

ii. For instance, statement of reasonably held fact may affect employee wishes, but absent coercion, would yet be permissible. {Cardinal}

iii. For instance, could make statements about economics of business, or correct union misstatements, but couched in neutral terms. {Cardinal}

iv. For instance, employer can not provide misleading information calculated to or actually damaging bargaining agent. {Cardinal}

b. *Application* - this does not constitute a bar on communications unrelated to the business; rather, s. 8 provided an exception to s. 6 / s. 9, allowing for statements to interfere with employee wishes where these constituted reasonably held facts/opinions about the business. Statements about other subjects are yet subject to s. 6 and s. 9, however. {Cardinal}

1. *Definition of business* - includes the statutory regime, economic and business climate, competitors; does not include union membership, unions, etc. {Cardinal}

2. For instance, statements concerning unions are not related to "business" and therefore not allowed under s. 8; however, if such statements do not run afoul of s. 6 or s. 9, then they are allowable. {Cardinal}

3. For instance, as undue influence included, need not be direct intimidation, but could include beneficial consequences. {Convergys}

5. *Present limitation under* ***s. 8*** - presently, s. 9 and s. 6 do not prevent the employer from making communications on any subject, absent coercion or intimidation. Undue influence no longer a factor. {Convergys}

   a. *Standard* - no longer "strict neutrality" - now must merely avoid intimidation, coercion, threats. Intention was to expand right of employers to communicate. {Convergys}

      i. For instance, a threat is found where employer threatened employees with dismissal for disclosing contact info of other employees. {Convergys}

      ii. For instance, a threat that a client might break a contract with an employer due to unionization is not a direct or implicit threat under s. 8. {Convergys}

   b. *Application* - therefore, can now express views broadly, regardless of relation to the "business", and these views can affect employee wishes re: union, so long as the statements are absent coercion and intimidation. However, must be "genuinely held" - subjective, rather than objective. {Convergys}

      i. For instance, previously a statement about the union would run afoul; or a statement about the business not reasonably held would run afoul; now each allowable, subject to above limitations. {Convergys}

      ii. For instance, direct threat is a prerequisite for conduct to be considered coercive or intimidating; however, need not prove that anyone was actually coerced; measured on reasonable effect. {Convergys}

      iii. For instance, where employer had communicated extensive financial info to union, could on that basis genuinely believe that union knew that closure of the project was a possibility, ergo open to communicate this. {SELI}

iv. *Alteration of terms and conditions of employment by employer*

1. *Overview* - there are two types of prohibition against t&c alteration: the general ULP and statutory freezes.

   a. *General ULP,* ***s. 6(3)(d)*** **-** at any point in the relationship, employer is barred from unilaterally altering conditions/terms of employment in a manner which could interfere with union activity. Bars both beneficial (carrot) and punitive (stick): each interferes w/ organization. {Exchange Parts}

      i. *Application* - requires operation compliant with "business as usual", but does not require board approval for any deviation; changes must accord with **s. 6(4)(b)** re: proper conduct of business. {SFU}

         1. For instance, where SFU practice was to revise wages annually for all instructions, would run afoul where this was not done because employees had applied for certification. {SFU}

   b. *Statutory freezes* - temporally specific, protects against *all* unilateral alterations (even those which do not interfere with union or organizing activity) during times when organization is particularly vulnerable. However, may still apply for alteration to the board under **s. 45(3)** in case

of a first collective agreement, or upon agreement of the parties under **s. 45(2)**.

i. ***Certification protection, s. 32*** - applies once the application for certification is rendered, and continues until the determination of the certification. All changes require board approval.

ii. ***Bargaining protection, s. 45*** - applies once certification is granted, and continues for fourth months. Allows for breathing space for bargaining. All changes require board approval.

v. *Discipline or penalty imposed by employer*

1. *Overview* - under **s. 6(3)(a)**, it is an unfair labour practice to dismiss employees for organization activities. Under **s. 6(3)(b)** the same applies for other modes of discipline. However, employers retain the right to discipline for misconduct, or to reduce workforce for business reasons under **s. 6(4).** (see also dispute resolution - discipline for such actions outside of ULP/organizing context)

2. *Inquiry* - must determine whether discipline was motivated by organizing activity or for some other reason. Per **s. 14(7)**, the burden lies with employer on BOP. Absent proof establishing that discharge was ordered (1) for other reasons and (2) not tainted by anti-union animus, it will run afoul of **s. 6(3)(a).** {Barrie Examiner}

   a. *Proper cause standard, **s. 45(4)*** - lies between common law (just cause) and collective agreement (just and reasonable cause). Employer may discharge or discipline for proper cause, which requires that there be a rational connection between misconduct and response. {White Spot}

   b. *Distinction from arbitral standard* - at arbitration (post-agreement), use just and reasonable cause rather than proper cause, **s. 84(1)**; standard and inquiry similar, but arbitration shows less deference. Pre-certification, reluctance to supplant employer's decision unless no reasonable relationship exists. {White Spot}

   c. *Contextual approach* - must not limit inquiry just to the discipline at hand, but all the circumstances. {Chesire}

3. *Considerations* - not truly separate inquiries, as the impropriety of the cause may also raise suspicions concerning the lack of anti-union animus.

   a. *Proper cause* (see also: dispute resolution - discipline for non-ULP context)

      i. *Overview* - reasonable relationship between employee misconduct and the disciplinary response. {Chesire}

      ii. *Proper cause necessary, but not sufficient* - merely showing proper cause for discipline not enough; must show action was not tainted by anti-union animus. {Lakes}

      iii. *Trust and responsibility* - greater trust and responsibility vested in employee, more a discharge is warranted for misconduct. {White Spot}

         1. For instance, the taking of two drinks of wine without employer permission did not undermine the trust relationship. {White Spot}

      iv. *Prejudicial effect* - the extent to which the employer's business has been damaged or under-

mined through the misconduct. {White Spot}

1. For instance, the taking of two drinks of wine from an employer that regularly gives free wine to employees causes minimal loss. {White Spot}

v. *Mitigating factors* - contrition, also isolated incidents and impulsive acts less serious than repeated or premeditated acts. {White Spot}

1. For instance, two instances of taking drinks of wine over two days during stressful organizing period is not serious. {White Spot}

vi. *Seriousness of misconduct* - the proportionality of the disciplinary action to the misconduct alleged is an indicator of motive. {Lakes}

1. For instance, firing an above-average employee with an excellent work record for a minor non-physical altercation would draw suspicion. {Barrie Examiner}

vii. *Performance and history of employee* - where employee has history of performance and lack of disciplinary record, militates for ULP. {Barrie Examiner}

1. For instance, above-average employee with little or no disciplinary record, firing would be to employer detriment, good reason to give worker a second chance, indicates that a message is being sent. {Barrie Examiner}

viii. *Investigation of cause* - where employer rushes to worst possible judgments without investigation, this raises suspicions re: motive. {Lakes}

1. For instance, by failing to interview or investigate the source of information which an employee brought to employer's attention. {Lakes}

b. *Discipline untainted*

i. *Overview* - employer must also show that the discipline was entirely untainted by anti-union animus, and that it acted in good faith. {Chesire}

ii. *Timing of dismissal* - dismissal at a critical time in the certification process, or other time with symbolic gravity is suspect. {Lakes}

1. For instance, the firing of an employee during a contentious organization drive would be suspect. {White Spot}

iii. *Knowledge of employee's union activities* - if the employee can show that it was not aware or did not suspect union activity, then the motive cannot have been tainted. {Lakes}

1. For instance, employer might assume that an employee who also works at a unionized competitor is involved with a union, but this does not mean that the employer is aware of organization activity. {Focus}

iv. *Pattern of anti-union conduct* - where employer has shown prior behaviour suggesting anti-union animus, this militates for ULP. {Barrie Examiner}

1. For instance, by interviewing employees concerning union activities, changing policies, hinting about career-limiting moves. {Barrie Examiner}

v. *Lack of candour concerning conduct* - where employer exhibits lack of candour concerning anti-union activities, this militates for ULP. {Barrie Examiner}

1. For instance, by refusing to acknowledge that certain activities were designed to undermine organization; any lack of candour raises doubts as to the genuineness of reasons provided. {Barrie Examiner}

vi. *Failure to bargain in good faith / failure to disclose information,* ***s. 11, s. 54(1)***

1. *Overview* - notice to bargain triggers a duty under **s. 47(1)** to bargain in good faith, and **s. 11** holds that it is a ULP to fail to satisfy this condition. **s. 54(1)** sets out informational requirements which must be met to bargain in good faith (see collective bargaining - duty to bargain in good faith).

f. *Union ULPs*

i. *Prohibited communications of union*

1. *Overview* - ***s. 9*** - prevents persons from using coercion or intimidation to induce a person to become or refrain from becoming a union member. **s. 64** allows for expressions of support and sympathy falling short of picketing. {Delta Hotels}

2. *Rationale* - decision as to whether or not to join a union belongs to employee, who should be free to make up own mind.

3. *Hands-off approach* - inapt union communication generally occurs in "raid" situations, where two unions competing against each other; in such a circumstance, as unionization is given, restrained approach is taken; competing propaganda campaigns are expected {Delta Hotels}

a. For instance, greater deference is given in give-and-take of oral discussion as opposed to writing, as the former may become heated. {QM} - contrast with employer communications, where the opposite approach is taken.

b. For instance, letter from established union to employees concerning raiding union states that it is employer dominated and that the employer will lose business from 340,000 union affiliates; not a threat, merely repeating lawful policies which may be adopted.. {Delta Hotels}

c. For instance, intimidation or coercion dismissed where the party making the threat had no power to carry it out; neither party has authority to lay off employees, therefore threat of lost jobs meaningless. {Delta Hotels}

ii. *Organization at workplace*

1. *Overview* - ***s. 7(1)*** - unfair labour practice for a union or anyone acting on its behalf to attempt to organize workers on the employer's premises *during working hours.* Allows for organization outside of work hours on premises (eg. lunch) or by persons not acting on union's behalf.

2. *Exception* - ***s. 7(2)*** - Board may order entry to employer premises for purpose of organization where employees reside on said property - grants "equal access" to that which would be had were the employees not to reside there. {Blackcomb}

a. For instance, where employees reside in apartment buildings owned by the employer at the base of Blackcomb mountain. {Blackcomb}

3. *Additional restrictions* - where a satisfactory business reason is given, additional prohibitions may be imposed, though violations will not amount to ULPs.

g. *Remedies for ULPs*

i. *Overview* - ***s. 14, s. 133*** - Board has broad remedial powers under these sections; s. 14 relates specifically to ULP remedies. Breadth allows for consideration of economics and psychology, reasons for violation, etc. - designed to avoid boilerplate approaches.

ii. *Enforcement of remedies* - **s. 135** allows for orders to be filed with BCSC and therefore be enforceable through that Court - FTC leads to contempt of court. **s. 158** creates summary offence for failing to observe **s. 14/s.133** orders.

iii. *Considerations*

1. *Overview* - determine the extent of the damage caused by the ULP, and thereby assist in determining the form of the remedy. {National Bank}

2. *Compensatory* - remedies must not be punitive, and any monetary relief is to be compensatory only. {RadioShack} Therefore, ULP which causes no injury will not be due any remedy. {Kidd}

a. For instance, a trust fund set up to assist organization elsewhere within the bank was punitive; ULP (closure of branch) was not related to this end. {National Bank}

3. *Psychological effects* - consequences of ULP weightier where causing such consequences, such as dissuasion from organizing activity. {National Bank}

a. For instance, closure of branch sent message that those who unionize will be given "no quarter" - chilling effect, requires rectification. {National Bank}

4. *Temporality* - the timing of the ULP, such as whether it occurred during a period of enhanced vulnerability for organization campaign. {National Bank}

a. For instance, where branch closure timed in a void between statutory freezes in Machiavellian manner, using technical legality to commit unlawful violation implies greater harm. {National Bank}

5. *Novelty* - the mere fact that a remedy is novel does not make it unreasonable. {White Spot}

iv. *Forms of remedy*

1. *Overview* - to large extent dictated by the nature of the ULP, however, the entirety of the employer's conduct, including history of ULPs, are relevant. {Cardinal}

2. *Arbitration of first collective agreement,* ***s. 55***

a. *Overview* - board may order parties to arbitration for imposition of first collective agreement; though s. 55 can apply absent ULP, may also be imposed as a remedy for ULPs where appropriate. Question is not one of public interest, but rather one of good faith. {London Drugs}

i. For instance, will not be imposed where it has no chance of succeeding, such as where employees were fired, not reinstated in contrary to court order. {Kidd}

ii. For instance, s. 55 does not apply merely because negotiations have broken down leading to a long strike or public inconvenience. {London Drugs}

b. *Reluctance* - consists of a trial marriage b/w parties, but unsuccessful history - rarely, if ever, does s. 55 lead to a second CBA. {London Drugs}

c. *Criteria* - non-exhaustive, presence of any may be sufficient to trigger s. 55:

i. *Bad Faith* - or surface bargaining; {London Drugs}

ii. *Recognition* - employer conduct which demonstrates a refusal to recognize the union; {London Drugs}

iii. *Justification* - adoption of an uncompromising bargaining position without reasonable justification; {London Drugs}

iv. *Efforts* - failure to make reasonable and expeditious efforts to conclude a collective agreement; {London Drugs}

v. *Unrealistic demands* - or expectations arising from either intentional conduct or from inexperience; {London Drugs}

vi. *Dispute* - bitter and protracted dispute in which it is unlikely the parties will be able to reach an agreement. {London Drugs}

3. *Rectification orders* - ***s. 14(4)(b)***

a. *Overview* - for instance, an order to issue a letter retracting false statements; any action necessary to rectify the act (though see provision of correct information below re: raid context). Also subject to limitations. {National Bank}

i. For instance, cannot compel a party to utter opinions that do not reflect their understanding of affairs. {National Bank}

ii. For instance, can compel a party to publish findings and conclusions of a labour tribunal, where this is connected to the ULP. For instance, if ULP involved publishing in newspaper by employer, then employer may have to publish result of Board decision in newspaper to rectify. {White Spot}

4. *Reinstatement,* ***s. 14(4)(c). s. 133(1)(b)***

a. *Overview* - when disciplinary action - discharge, suspension, layoff, transfer constitutes a ULP, employer may be directed to reinstate employee and pay back lost wages - a remedy not available under common law. {RadioShack}

i. For instance, only applicable where the employer is still operating; does not avail where the business is closed. {National Bank}

5. *Damages,* ***s. 133(1)(d)***

a. *Overview* - Board may make an order setting a monetary value of injury or loss, which the other party must pay.

i. For instance, through ULP, union incurred expenses, such as legal fees, which it would not have otherwise encountered. Therefore, employer liable. {Kidd}

6. *Make-whole,* ***s. 133(1)(f)***

a. *Overview* - Board may make any order or proceed in any other manner consistent with purpose of the *Code* that it deems appropriate; as fully compensatory as possible, but limited by practical considerations. {National Bank}

i. For instance, union provided with list of employee names, allowed to hold organization meetings during work, allowed to post union materials on bulletin board in order to assist with collective bargaining. {National Bank}

ii. For instance, after closure of one location and resumption at another, employer ordered either to return to original location, or to apply collective agreement at new location. {Humpty Dumpty}

iii. For instance, after move of location for partially legitimate business purpose, move permitted, union rights not extended, but employees given access to jobs at new sites without loss of seniority/benefits. {Westinghouse}

iv. For instance, unlikely that the Board has jurisdiction to order resumption of business operations; never before ordered in North America. {National Bank}

v. For instance, employer not bargaining in good faith may be directed to withdraw certain proposals and adjust its bargaining position in certain manner. {Buhler}

7. *Cease and desist,* ***s. 14(4)(a)***

a. *Overview* - order directing that the person whose conduct was impugned cease doing the wrongful act. Commonly awarded in conjunction with some other remedy. Most common for breaches of duty to bargain in good faith.

b. For instance, Board may declare that employer involved in spreading false rumours, photographing organizing activity, etc. is not negotiating in good faith, therefore direct that the employer begin to do so. {RadioShack}

8. *Remedial certification,* ***s. 14(4)(f)***

a. *Overview* - where *but for* ULP the union would likely have obtained majority support, certification is the appropriate remedy. Should be a close call situation; conditions may attach under **s. 134**. {Cardinal}

i. For instance, certification denied in *Klassen* because the representation vote was overwhelmingly against union representation. {Klassen}

b. *Considerations include*: {Cardinal}

i. *Prior support* - level of membership support prior to and subsequent to the employer's unfair labour practice; {Cardinal}

ii. *Seriousness of the employer interference* - and the reasonable effect assessed objectively of

that interference on employees; {Cardinal}

iii. *Temporality* - point or stage in the organizational drive of the employer's interference (eg. to determine vulnerability); {Cardinal}

iv. *Proportion of support* - if less than a majority of employees are members of the trade union, whether there is adequate or sufficient support to conduct collective bargaining; {Cardinal}

v. *Totality* - of the conduct of the employer; {Cardinal}

vi. *Specific nature* - of the employer and the employees. {Cardinal}

9. *Provision of correct information*

a. *Overview* - in "raid" situations where the ULP constitutes provision of inflammatory or incorrect information, parties must solve their own disputes by providing corrected information in response. {Delta Hotels}

i. For instance, in a union raid situation, remedy for misstatements of fact is for the aggrieved party to provide correct info to employees. {Delta Hotels}

5. <u>*Collective bargaining*</u>

a. *Overview* - once a union is certified, the employer has a duty to bargain in good faith, disclosure significant information until a collective agreement is in force. May use economic sanctions to bargain, however.

b. *Notice* - if there is no collective agreement in force, **s. 45(1)(a)** allows either side to give notice to bargain at any time; if there is a collective agreement, **s. 46** allows for notice to be given four months previous to expiry.

c. *Duty to bargain in good faith,* ***s. 47(1)***

i. *Overview* - the employer must bargain in good faith with the union; to do otherwise is a ULP, via **s. 11** (see ULP remedies, above).

ii. *Rationale* - worry is that the employer will merely go through the motions of negotiation in order to wait out the union until it can be decertified. Therefore, in circumstances of initial CBA, this is more worrisome; in subsequent CBAs, less so, as union will clearly continue as representative. {Noranda}

iii. *Process*

1. *Contextual assessment* - not a duty to bargain in good faith on certain topics, but rather the nature of the overall stance. Further, as stated in rationale, will apply more scrutiny on first CBA than in subsequent CBAs. {Pulp&Paper}

a. For instance, employer entitled to refuse to discuss with union a single issue, such as pension benefits for retired workers, so long as overall negotiation is in good faith. {Pulp&Paper}

2. *Restrained approach* - Board must differentiate between *surface* bargaining (prohibited) *and* hard bargaining (expected); each side in CBA may rely on its economic strength in strike or lockout to force the other to make concessions. {Noranda}

a. *Must avoid shifting focus* - if the board delved too deeply into the negotiations, participants

would shift focus from trying to reach agreement to trying to create best record for arbitration; undermines process. {Noranda}

b. For instance, where employer states intention to make concession, receives concession from union as a result, but then offers no tangible change in position, this is hard bargaining, but not a ULP. {Noranda}

c. For instance, writing a letter to employees which contains distortions of fact or exaggerations of opinion during a heated CBA dispute is not a violation of s. 11. {Noranda}

3. *Neo-Boulwarism / surface bargaining* - Board will not allow the maintenance of an intractable position, going through motions of negotiations, or direct negotiations with employees - effectively, actions which undermine the role of the union as negotiator. {Noranda}

a. For instance, tendering a proposal which is predictably unacceptable is *not* sufficient to draw an inference of surface bargaining on its own. {RadioShack}

b. For instance, where it is common knowledge that a clause would be unacceptable to any union operating in an industry, then to refuse the clause would be bad faith - such as a grievance arbitration clause. {Royal Oak}

c. For instance, where an employer refuses to provide reasons, dismisses proposals out of hand, and repeatedly threatens to shut down the business, may not be in good faith. {Buhler}

iv. *Duty to disclose significant information,* ***s. 54(1)***

1. *Generally* - employer which withholds factual data which a union needed to intelligently appraise a proposal on the bargaining table is not operating in good faith. CBA will only be acceptable where based on truth, not ignorance or deception - otherwise, violation of good faith. **s. 11**. {Noranda}

a. For instance, where company states that it will discuss the details of fringe benefit costs at a meeting, but then subsequently refuses to do so, implies not in good faith. {Noranda}

b. For instance, where employer offers CBA at union's industry standard, union denies but declines to give reasons, not negotiation in good faith - must have full and frank discussion. {Jackman}

2. *Notice of significant changes* - as parties will be bound for considerable time period under CBA, must be made aware of significant changes which would alter negotiations. Timing of events may raise presumption that non-disclosure used intentionally to gain advantage. {Bathurst Packaging}

a. *Included information* - centred on a bad faith rationale - unsolicited disclosure is exceptional, and will only run afoul of s. 11 where it constitutes mala fides conduct, eg. misrepresentation. Of course, timing and fundamental nature may strongly indicate that this occurred. {Bathurst Packaging}

b. For instance, where employer plans to close plant shortly after renewing CBA, union should be made aware so as to discuss this fully in negotiation. {Bathurst Packaging}

3. *Procedure* - other jurisdictions have common law requirements (below), under **s. 54(1)** employers must disclose any "measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies."

a. *Honest answers* - when a trade union asks a question, the employer is subject to a duty to answer

honestly. {Western Canada Steel}

b. *De facto decisions* - employer is subject to a duty to disclose voluntarily any significant decisions that have reached a de facto stage. No duty to disclose plans which haven't reached the de facto decision stage. {Western Canada Steel}

i. *Presumption* - if a key decision regarding job security is made shortly after a collective agreement is reached, the inference may arise that the decision had reached the de facto stage during collective bargaining or that the employer is deliberately manipulating the timetable of the decision in order to avoid the duty to disclose. {Western Canada Steel}

d. *Economic and other bargaining sanctions*

i. *Overview* - each side in a CBA negotiation may apply economic sanctions to the other, through form of strike or lockout, in order to gain advantage in the *negotiation* process. Once negotiated, however, these sanctions are prohibited until the CBA expires {Noranda}

ii. *Peace obligation,* ***s. 57***

1. *Overview* - neither side may strike or lockout during the term of a collective agreement; under **s. 84**, every CBA must have a mechanism for final settlement of disputes without need for resort to economic sanction - generally, arbitration.

iii. *Reserved rights principle*

1. *Overview* - employer may make any change to the CBA, including to t&c, except for where limited by the CBA. Where the CBA is silent, and changes made in good faith, employers may act. This means unions must anticipate all conceivable acts of employer, ensure they are accounted for in CBA.

a. For instance, CBA designed to give rights to employees they would not otherwise have; therefore, if not conferred by CBA, then these are rights which employees *do not* have. {Ritchie}

b. For instance, if CBA silent on mandatory drug testing, then employer can introduce unilaterally; union cannot arbitrate, as there is no dispute concerning CBA itself.

iv.*Strike actions*

1. *Overview,* ***s. 1*** - two part definition, (1) conduct that adversely affects production or services (2) which is prompted by some form of collective understanding; broad, includes refusals, slowdowns, and work-to-rule campaigns. (see also: essential services, below)

2. *Status,* ***s. 1(2) -*** striking workers remain employees within the meaning of the *Code*, and cannot be fired or disciplined for legal strike behaviour. Under **s. 62**, continue to receive benefits other than pension benefits so long as the union tenders premium payments. Employer can still discipline during a strike, but conduct would be closely scrutinized for anti-union animus under s. 6 (see ULP).

3. *Requirements*

a. *No CBA in force,* ***s. 57, s. 59(1)*** - the collective agreement must have expired, but some bargaining must have taken place between the sides.

b. *Majority vote,* ***s. 60(1), s. 60(3)(a)***- a majority of the workers in the unit must have (1)

voted in favour of a strike (2) within the preceding 3 months.

c. *Written notice,* **s. 60(3)(b)(i), (ii), (iii), s. 75** - written notice must have been given to the employer and the Board, 72 hours *ahead* of the strike. The length of notice may be increased in the case of perishable property under **s. 56** and **s. 60(4)**; once a strike has *commenced*, written notice must have been given to the Labour Relations Board, **s. 75**.

d. *Mediator,* **s. 60(3)(b)(iv)** - if a mediator was appointed, 48 hours must have elapsed since the union is advised that the mediator has "reported out" to the Board - it follows that any strike after a mediator has been appointed is illegal.

4. *Exceptions to mid-term strike prohibition*

a. *Health or safety stoppages*

i. *Overview,* **s. 63(3)(a) -** conduct is not considered a strike where it is necessary for health and safety of employees - requires good faith belief on part of employees, as well as reasonable grounds for the belief. {Northwood Pulp}

b. *Non-affiliation clauses*

i. *Overview,* **s. 63(3)(b)** - conduct that would otherwise fall within the definition of strike, will be excused if it is based upon a non-affiliation clause in the collective agreement. Generally found in construction industry; workers are entitled to refuse to work alongside non-union workers.

c. *Honouring picket line*

i. *Overview,* **s. 1** - acts or omissions of employees that occur as a direct result of lawful picketing (eg. refusal to cross a picket line) are not considered a strike - though depending on CBA, refusing employee may be disciplined for such activity.

d. *Political protest*

i. *Overview,* **Charter s. 2(b)** - while previously a strike had to be aimed at compelling employer to make concessions (therefore not a strike to undertake political protest), this requirement was repealed in 1984; SCC held that legislation can limit collective bargaining concerns. {Health Employers Assoc.}

v. *Picketing*

1. *Overview,* **s. 1 -** attending at or near a place of business, or employment for the purpose of persuading persons not to enter, do business, etc.

2. *Identifying employer*

a. *Divisions,* **s. 65(8)** - for the purposes of picketing, separate divisions of the employer's company are considered "complete strangers" (unless they prove otherwise through allied actions). Onus is on the employer to show that the divisions are separate and distinct, however.

i. For instance, the concrete division and the cement division were considered separate employers for the purposes of picketing; therefore, for a striking concrete division worker to picket a

cement division site, there has to be some other justification. {LaFarge}

ii. *Considerations*

1. *Subject to common control and direction, or autonomous?*

a. Level of supervision by the parent over the divisions. {Ellwood}

b. Authority of the divisions to authorize expenditures for inventory and capital items. {Ellwood}

c. Authority of the parent to restructure the nature of the business of the division or a product line of the division. {Ellwood}

d. Authority of the parent to make operational decisions affecting production and personnel at the division(s). {Ellwood}

e. Authority of the parent over labour relations and personnel matters, including collective bargaining, grievances, and arbitrations. {Ellwood}

f. Authority of the parent to set policies with regard to sales, advertising, marketing and pricing of the divisions' products or services. {Ellwood}

2. *Significant interrelationship and functional integration?*

a. Whether the operations of the divisions are vertically or horizontally integrated. {Ellwood}

b. Whether there is an interchange of work, machinery or personnel. - whether there are common premises, facilities, or equipment. {Ellwood}

c. Whether the divisions perform the same or similar services or produce the same or similar products. {Ellwood}

d. Whether the divisions service the same or similar customers. {Ellwood}

e. Nature of the financial, accounting, and payroll arrangements employed by the divisions.

f. Presence of an arms-length relationship in dealings among the divisions. {Ellwood}

g. Competition among the divisions for customers or contracts. {Ellwood}

3. *Location of picketing*

a. *Overview* - while other jurisdictions have resort to common law, codified in BC. Generally, only occur at the place where the employees work and should not be permitted to disrupt the operations of neutral, third party, employers and employees.

b. *Primary site picketing,* ***s. 65(3)***

i. *Overview* - work site of the employees who are on strike (or locked out). Can encompass remote work sites, such as delivery or loading locations as well. Picketing presumptively allow-

able. {LaFarge}

ii. *Criteria*

1. *Work at location* - first, the member performs work at the location; any work of any significance sufficient to make out this criteria {LaFarge}

    a. For instance, sufficient to make out that the D. performs any work-related task to the benefit of employer, such as picking up concrete powder in truck. {LaFarge}

2. *Control and direction* - work is under the control and direction of the employer; requires only that the work be related to employer's operations - for instance, if employer determines the method of work, nature of work, performance, sufficient. {LaFarge}

    a. For instance, it is enough that the employer directed an employee to attend the facility for the purposes of picking up concrete powder in truck. {LaFarge}

3. *Integral and substantial* - work is an integral and substantial part of the employer's operation; must not be fleeting or fortuitous, but have some ongoing presence; if revenue is generated and the work is performed on a regular basis. {LaFarge}

    a. For instance, no single person's work may be "integral" to a large enterprise; this refers to the nature of the operation, not single person's contribution. {LaFarge}

4. *Lockout or strike* - site or place is a site or place of a lawful strike or lockout (see strike and lockout actions, above and below, respectively). {LaFarge}

c. *Secondary site picketing,* ***s. 65***

i. *Overview* - any other location other than a primary site. Picketing presumptively prohibited, except for where either of two exceptions is made out.

ii. *Rationale* - uninvolved third party is not at fault, and is not in any position to be able to settle the dispute between the parties. {Hiram Walker}

iii. *Exceptions*

1. *Transferred work site exception,* ***s. 65(4)***

    a. *Overview* - site where the employer is performing work that prior to the strike or lockout was done at the primary site. Picketing allowable with board approval. Rarely invoked due to ban on replacement workers (see replacement workers, below).

2. *Allied work sites,* ***s. 65(2)***

    a. *Overview* - site of a "neutral" employer whose conduct in relation to the strike had rendered them an ally of the struck employer. Picketing allowable with board approval.

    b. *Rationale* - by providing that employer with assistance in resisting the strike, is not really uninvolved in the primary dispute, is no longer a neutral third party. {Hiram Walker}

c. *Criteria,* ***s. 65(3),(4)***

i. *General* - assists employer in lockout or in resisting lawful strike, performs work or provides goods that would be furnished by the employer but for the lockout or strike. *Lawful* to assist employer, but may be picketed. {Hiram Walker}

- For instance, definition is awkward, because where Hiram Walker employees go on strike, product will be replaced by Seagrams, who thus fall within s. 65(4) despite being competitors, not allies. However, s. 65(4) not necessary. {Hiram Walker}

ii. *Deviation from norm* - not all assistance permits picketing - only that which exceeds normal, "business as usual" operations. {Hiram Walker}

- For instance, by stockpiling Hiram Walker product in advance of a strike action, Liquor Branch brought itself within s. 65(3) as ally - unusual to do so. {Hiram Walker}

iii. *Confers benefit* - must determine whether the impugned activity conferred a benefit to the employer (whether the ally benefitted as well is irrelevant) and whether this benefit is sufficient to justify serious repercussion of picketing. {Hiram Walker}

- For instance, stockpiling product lent employer benefit of retaining market share, revenues. Regardless of whether this was in ally's benefit as well, question focuses on *employer* benefit. {Hiram Walker}

iv. *Ability to refuse* - the ally must be able to refuse the assistance which is rendered, otherwise should not be subject to repercussion. {Hiram Walker}

- For instance, a company which is dependent on BC Hydro to operate its business; Hydro on strike, party permits supervisors to perform repair work; while this is of some assistance, the party acted out of its own vital interests, rather than to assist Hydro. {Hiram Walker}

d. *Common site picketing,* ***s. 65(7)***

i. *Overview* - occurs where a primary, transferred, or allied picketing site is shared with a truly neutral operation. {Sovereign}

ii. *Process*

1. *Restriction short of prohibition* - where a neutral party is present at a lawful picketing site, the Board must restrict the picketing in such a manner that it affects only the operation of the primary employer, unless to do so so would *de facto* prohibit picketing. Emphasis on third party protection. {Sovereign}

a. For instance, may restrict picketing to one location so as to allow the third party unimpeded access through another entrance. {Mitchell}

b. For instance, may restrict picketing entirely for a short period of time to allow for gas and water connections to be made to third party's building (where union installers would otherwise refuse to cross picket line). Usually, struck employer not allowed to

conduct work for duration of order. {Gama}

2. *Appropriate regulation* - where to restrict picketing so that it only effects the primary employer would be to effectively prohibit picketing, the Board instead has discretion to regulate the picketing as it deems appropriate. Emphasis on protection of the right to picket. {Sovereign}

   a. *Relationship between parties* - if the third party is continuing to do business with the struck employer, must consider that members are entitled to persuade this to cease by means of picketing. {Kelowna}

      i. However, this seems like a means of evading the allied party requirements (particularly business as usual) elsewhere in the *Code.*

      ii. For instance, where the struck party has paid for the third party's deficits, capital improvements relating solely to third party's operations, and there is coordination between employees, the relationship is not neutral; functionally integrated. {Kelowna}

   b. *Nature of industry* - economic pressure is key to picketing. While in business, works well due to revenue stoppage, municipalities continue to generate tax revenue despite strike or picket. Therefore, reliant on other pressure points (public concern re: lack of garbage pickup). Balance must be preserved in regulation of picketing. {Kelowna}

      i. For instance, if third party regatta are entitled to relief from picketing, this will greatly assist the employer in its lockout by dissipating pressure; therefore, no order can be made which respects balance in collective bargaining. {Kelowna}

4. *Picketing and the Charter*

   a. *Overview* - success Supreme Court under *Charter* **s. 2(b)** as picketing found to be expressive behaviour which garners protection of freedom of expression. However, Beetz, in dissent, held that picketing was a "signal" to action, therefore not truly discourse. {Dolphin} this became important in subsequent cases. Ultimately, *Dolphin* was overruled by Pepsi-Cola.

   b. *Leafletting is not picketing* - definition of "picketing" contained in s. 1(1) of the Code is overly broad and infringes the guarantee of freedom of expression contained in s. 2(b) to the extent that it restricts consumer leafletting. {KMart}

      i. *Rationale* - workers, particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. Further, leafletting does not have a signalling effect, unlike picketing, which leads to impeding of public access to goods/services, but rather merely persuades public through increasing the level of discourse. {KMart}

      ii. *Result* - trade union and its members are free to communicate information to the public with regard to a labour dispute, except in a manner which may constitute picketing. This does not include leafletting generally; however, must analyze activity on a case by case basis. {KMart}

      iii. *Differentiating between leafletting and picketing*

         1. *Pre-Pepsi "signal effect" analysis*

            a. *Impeding access* - consumers must retain the ability to choose either to stop and read

the material or to ignore the leafleter and enter the neutral site unimpeded. {KMart}

i. For instance, the suggestion that consumers would be intimidated or impeded by the site of a few individuals distributing leaflets is not convincing. {KMart}

ii. For instance, while there was reduced custom during this period, there was evidence that people did gain access to the store, and no evidence to indicate that reduced custom was not actually caused by the contents of the leaflets. {Sony}

b. *Apt message* - message conveyed by the leaflet was accurate, not defamatory or otherwise unlawful, and did not entice people to commit unlawful or tortious acts; {KMart}

c. *Targeting* - although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only; {KMart}

i. For instance, leaflet made by theatre projectionists aimed at Sony, parent company of Cineplex Odeon, did not clearly state that the dispute was with the latter; however, hard to envision any circumstance an inaccurate statement would be sufficient. {Sony}

d. *Coercive or unlawful* - the manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful or tortious; did not involve a large number of people so as to create an atmosphere of intimidation; {KMart}

i. For instance, groups of between 30 and 50 members leafletting outside of a Sony Store did not create an atmosphere of intimidation. {Sony}

e. *Impeding third parties* - activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to the neutral sites. {KMart}

2. *Post-Pepsi "bright line" analysis*

a. *Overview* - while previous analysis focused on whether there was a signal effect, an attempt to cause union members or members of the public not to do business, this analysis calls for difficult evidentiary judgments. Therefore, change required. {Overwaitea}

b. *Leaflet exemption* - possible to do so by exempting the handing out of leaflets from regulation, while continuing to regulate forms of "conventional picketing" (such as the carrying of placards and signs, etc.). Does away with overwrought analysis, substituting this with predictability in labour relations. Must still meet KMart criteria, however. {Overwaitea}

c. *Political picketing* - "bright line" does not explicitly apply to political picketing; therefore, signal effect analysis still applies to political picketing where the activity could be perceived as a picket-like protest. {Canfor}

i. For instance, placard-protest of government bill at site of employer's mill has strong signalling effect, which can be inferred from its effect; therefore, absent evidence that the behaviour was *not* picketing, it is deemed unlawful picketing. Does not refer to leafletting, however. {Canfor}

c. *Picketing is lawful where not wrongful conduct* - following Pepsi, SCC resiles from position in *KMart, Sony, Dolphin*, instead approaching wrongful conduct doctrine, in which it held that picketing is lawful unless it is tortious or criminal. This would of course subsume leafletting activity. {Pepsi}

i. *Open to regional restriction* - legislatures must respect the *Charter* value of free expression and be prepared to justify limiting it. But subject to this broad constraint, they remain free to develop their own policies governing secondary picketing and to substitute a different balance than the one struck in this case. {Pepsi}

ii. In light of this proviso, BC Board appears to take the position that *Pepsi* only applies where there is not a comprehensive legislative framework in place (at least until there is an s. 2(b) challenge launched against s. 65 limitations).

vi. *Lockout actions*

1. *Overview,* **s. 1** - closing a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his or her employees, done to compel his or her employees or to aid another employer to compel his or her employees to agree to conditions of employment. (see also: essential services, below)

2. *Requirements*

a. *No CBA in force,* **s. 57, s. 59(1)** - the collective agreement must have expired, but some bargaining must have taken place between the sides.

b. *Majority vote,* **s. 61(1), s. 61(3)(a)** - in a circumstance involving multiple employers, a majority of the employers must have (1) voted in favour of a lockout (2) within the preceding 3 months.

c. *Written notice,* **s. 61(3)(b)(i), (ii), (iii), s. 75** - written notice must have been given to the union and the Board, 72 hours *ahead* of the strike. The length of notice may be increased in the case of perishable property under **s. 56** and **s. 61(4)**; once a strike has *commenced*, written notice must have been given to the Labour Relations Board, **s. 75**.

d. *Mediator,* **s. 61(3)(b)(iv)** - if a mediator was appointed, 48 hours must have elapsed since the union is advised that the mediator has "reported out" to the Board - it follows that any lockout after a mediator has been appointed is illegal.

vii. *Replacement workers*

1. *Overview* - contest becomes one of who can bear the loss of income the longest; presupposes that the withdrawal of labour will mean the cessation of the employer's operation and hence income. Not always the case, particularly with small employers; this tips the balance in employer favour, thus statutory intervention necessary.

2. *Historical restrictions* - previously, no restrictions on using existing workers to “fill the gap” left by striking workers, and further, could use replacement workers other than (1) professional strike breakers (those whose business it was to break strikes) and (2) permanent replacement workers (those who would be granted recall preference.

3. *Current restrictions*

a. *Overview* - broadly worded, prohibits employer from using *any replacement workers* under **s. 68**. Further, prohibits compelling any person to perform struck work under **s. 68(2)** and prohibits any future discrimination from having done so under **s. 68(3).** The same applies to workers in other places of employer's operations, **s. 68(1)(b), (c)**.

b. *Exception* - subject to override by the essential services provision in s. 72. If required to maintain essential service, replacement workers provision is not applicable. {Compass} (see also: essential services, below).

viii. *Last offer votes,* ***s. 78***

1. *Overview* - union bargaining committee determines whether to submit proposal to membership for voting, and can do so with a recommendation to reject. However, employer may force submission to the bargaining unit under **s. 78.**

2. *Requirements*

a. *Union not on strike,* ***s. 78(1) -*** so long as a strike (or lockout) has not begun, the employer may compel the employees in the unit to vote on the last offer. In the event of an affirmative vote, the result is a binding collective agreement, via **s. 78(3)**.

b. *Union on strike,* ***s. 78(6) -*** a vote on the last offer may be ordered during the course of a strike (or lockout) where the *Minister* considers that it is in the *public interest*. In the event of an affirmative vote, the result is a binding collective agreement, via **s. 78(3)**.

3. *HRC considerations* - last-offer votes may run afoul of HRC where they are discriminatory; this is problematic, as the vote is put to the majority without permission or intervention of the union bargaining committee. {SELI} (see HRC, above)

ix. *Essential services,* ***s. 72***

1. *Overview* - employers and unions must maintain certain essential services when job action is taken. Services related to the health, safety, welfare of, or provision of educational programs to BC residents. Employers are compelled to provide services, unions must allow members to perform services.

2. *Designation of essential services,* ***s. 72*** - under direction of the Minister, Board may designate essential services when a labour dispute poses a threat; must identify facilities and level of service required to quell the threat.

a. *Mediation* - there is a significant public interest in ensuring that collective bargaining within the essential services context is as efficacious as possible. Thus, absent willingness to resort to mediation, would be forced to resort to blunt and cumbersome tool of arbitration. {Compass}

b. *Variation* - while designations are fluid, determined by the Board they may only be altered where there are new circumstances which have arisen. Will not be applied where to do so would undermine the mediation process, unless necessary to quell threat. {Central Hear}

i. For instance, acquisition of additional information by an outside body justifying a variation is not new circumstances, but rather an additional opinion on existing circumstances. {Central Heat}

3. *Centrality of* ***s. 72 -*** health, safety, and welfare of the residents of British Columbia is a larger, soci-

etal concern which transcends the collective bargaining focus and concerns of most of the rest of the Code. {Compass}

a. For instance, where this provision comes into conflict with other portions of the *Code*, result must favour the protection of essential services provision by the employer. {Compass}

b. For instance, the while s. 68 restricts the use of replacement worker, in the essential services context it is more important to ensure that services are provided effectively. {Compass}

4. *Equal pressure* - the Board must ensure that the essential services are maintained in a manner which ensures the maximum disruption to the employer's operation, while putting out of work the maximum number of employees, to ensure maximum pressure and thereby achieve a CBA. {Central Heat}

6. *Duty of fair representation,* ***s. 12***

a. *Overview* - the most important obligation placed on the union; unions may not act in a manner which is arbitrary, discriminatory or in bad faith when representing employees, as per **s. 12** of the *Code.* Union members may bring a complaint against the union to the Board where they feel DFR has been violated. (see also, dispute resolution - DFR procedure, below).

b. *Applicability* - as the the union is the exclusive bargaining agency for the bargaining unit, the duty of fairness
is owed to all employees in the bargaining unit, regardless of whether they are trade union members.

c. *Limits of representation* - fair representation does not mean universal representation. Therefore, union may choose not to advance a grievance due to a lack of merit, etc. - this is not breach of DFR, but rather judicious use of union resources.

d. *Actions in negligence* - the applicability of DFR is limited to the procedures provided by the code (eg. complaint to Board). Negligence and other actions are extinguished by virtue of **s. 12**. {Mulherin}

e. *Breach of duty of fair representation*

i. *Representation in bad faith*

1. *Overview* - representation with (1) an improper purpose or representation with (2) an intention to deceive the employee. {Judd}

a. *Improper purpose* - where the union has acted in a way that hampers the interests of an employee out of bad faith, conspiracy with employer, or irrelevant purpose (eg. personal hostility). {Judd}

i. For instance, improper purpose where grievance not advanced because of personal hostility between union officer and the grievor. {Judd}

ii. For instance, proper purpose where grievance not advanced because of a judicious consideration of the merits of the claim, effects on other employees, etc. {Judd}

b. *Intention to deceive* - addresses dishonesty; while not all lies should draw Board scrutiny, where dishonesty directly affects the quality of representation, this is not consistent with DFR. {Judd}

i. For instance, if union mistakenly files grievance after time limit has lapsed, then lies to employee by saying that there is no case to cover the mistake, DFR breach. {Judd}

ii. *Discriminatory representation*

1. *Overview* - unequal treatment based on race or sex or any of the other prohibited grounds set out in the *Human Rights Code*. Such issues *may also involve HRT*, Board will not adjudicate until HRT decision rendered. {Judd} (see also: human rights code - enforcement)

   a. For instance, discriminatory representation where union decides not to advance grievance because grievor is of a certain gender, race, etc., esp. where others would not be so treated. {Judd}

   b. For instance, allowable representation where union decides not to advance grievance because there
   are relevant considerations advancing that distinction, such as a weaker case. {Judd}

2. *Issues* - arises either where the union participates in the formulation of a discriminatory rule, or where it fails to accommodate an employee based on prohibited ground under HRC **s. 13(1).** Duty to accommodate either in formulation, or in ensuring that discrimination does not continue. {Renaud}

   a. For instance, while employer discriminates through creation of work shift that requires work on sabbath day for Adventists, union furthers discrimination by refusing to accept employer's accommodation through creation of Sunday-Thursday shift. {Renaud}

iii. *Arbitrary representation*

1. *Overview* - any conduct which is not based on course of reason or exercise of judgment. Therefore, DFR breached where there is a lack of investigation, consideration of merits, and a reasonable decision making process generally. {Judd}

2. *Requirements to avoid breach of DFR* - not literally "arbitrary" in that there may be some legitimate reasons for the decision. Rather, must meet the following criteria to avoid arbitrariness:

   a. *Seriousness of issue* - not a requirement itself; rather, moderates scrutiny to which requirements are subject: with increasing seriousness to employee, increasing scrutiny applied to union. {Judd}

   b. *Adequate investigation* - union takes adequate steps to ensure that necessary information is in its possession, although this recognizes that the information may already be in union's possession. {Judd}

      i. For instance, where union considered some issues, but carelessly ignored a central issue which could have resulted in successful grievance, may fall afoul. {Judd}

   c. *Reasoned decision* - decision must be based on reason, must be rationally connected to the considerations which led to it, with reference to previous similar situations, credibility of persons involved, balancing interests of bargaining unit members, etc. {Judd}

   d. *Lack of blatant or reckless disregard* - not an indictment of poorly handled issues, but rather ensuring that carelessness does not approach unacceptable levels. Not as high as a lawyer, for instance. {Judd}

f. *DFR in context*

i. *DFR in collective bargaining*

1. *Overview* - while **s. 12** prohibits collective bargaining in a manner which violates DFR, this is not

violated where interests of certain employees are advanced, others subjugated through a reasoned process of collective bargaining. {Klaudt}

2. *Authority to negotiate* - must have discretion to make concessions and accept advantages which, in the light of all relevant considerations, will best serve interests of parties represented. {Klaudt}

    a. For instance, a minor concession affecting one group may allow for a major benefit for another; not for Board or courts to second guess the weighing or negotiating process to this end. {Klaudt}

3. *Standard* - wide range of reasonableness must be given to bargaining representatives, subject always to complete good faith and honesty of purpose in the exercise of its discretion. {Klaudt} Must also note that it will be impossible for a union to fully satisfy all of the interests present in the bargaining unit. {Judd}

    a. For instance, while lump sum retroactive benefit applied to all employees other than those on long-term disability, this was not a breach of DFR, as union weighed interests with respect to bargaining priorities, evidence did not indicate *mala fides* or dishonesty. {Klaudt}

ii. *DFR in grievance procedure*

1. *Overview* - under **s. 84(2),** every collective agreement must have a grievance procedure to settle disputes without work stoppage - arbitration, as set out in **s. 89.** Previous to reaching arbitration, parties retain sole responsibility for resolution of the dispute.

2. *Problematic areas for DFR* - as the union, not the employee, determines whether to proceed to arbitration, and all actors in the grievance process are subject to considerable contextual pressures, numerous means for DFR breach to occur in grievance context (see grievance process, below).

    a. *Union power to pursue or reject claims* - administration of CBA involves group interests which union may represent against wishes of particular employees; the ability to settle or drop cases which have little merit is critical to *quid pro quo* with management (who will then be reasonable in conceding claims which are well founded). {Rayonier}

        i. For instance, even where employee willing to fund arbitration, this still costs the employer money, and therefore undermines credibility of union re: quid pro quo. {Rayonier} Union must speak with one voice in order to effectively deal with employer. {Judd}

        ii. For instance, employee participation in this process is limited to providing evidence and bringing the complaint to the attention of the union. {Judd}

        iii. For instance, while individuals have argued that they should have recourse to *neutral* adjudication of their complaints (eg. not subject to union sentiment, particularly where the complaint involves balancing interests b/w employees), this has been generally rejected. {Rayonier}

        iv. *Considerations*

            1. *Seriousness* - how critical is the subject matter of the grievance to the interest of the employee concerned? {Rayonier}

            2. *Merit* - how much validity does claim appear to have, either under the language of the agreement or the available evidence of what has occurred, and how carefully has the union investigated these? {Rayonier}

3. *Precedent* - what has been the previous practice respecting this type of case and what expectations does the employee reasonably have from the treatment of earlier grievances? {Rayonier}

4. *Interests* - what contrary interests of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them? {Rayonier}

    a. For instance, where there are two opposing interpretations of CBA, open to the union to select one which it feels best represents interests of employees. {Judd}

5. *Resources* - important that union be able to direct its resources so that they are able to achieve maximum effect. {Judd}

    a. For instance, spending tens of thousands of dollars to arbitrate a claim worth only several hundred dollars does not achieve this. {Judd}

7. <u>*Resolution of disputes*</u>

a. *Nature of the DFR procedure,* ***s. 13***

i. *Overview,* ***s. 13*** **-** Board must assess merits of DFR complaint to determine whether a violation of **s. 12** has occurred, and if so, must disclose that complaint to parties, who may then respond to complaint. Following this, the matter will either be set down for hearing or dismissed.

ii. *Nature of DFR* - union cannot choose when it will and will not be bound by the duty of fair representation. Duty is ever present as long as the Union holds the certification for the employees in the bargaining unit. {Caddy}

iii. *Balancing* - as with the grievance process, there are concerns with weighing the interests of one group of employees against those of another group. {Caddy}

    1. For instance, where an employee/shop steward, G is terminated for making an anonymous telephone call to a third party reporting rumours concerning the conduct of another union member, C (and then lying about it), would be a DFR for the union to represent G's interests over C's - in this case, by proceeding with G's grievance. {Caddy}

    2. For instance, arbitrary not to properly investigate G's conduct, particularly as shop steward, and also discriminatory to favour G's claim over C's interests absent reason to do so. {Caddy}

b. *Nature of the grievance process*

i. *Context of grievance*- grievances not approached as discrete events, but take into account larger context, current pressures and trends in the relationship between union and employee. Given conflicting interests and pressures, many ways through which union can breach DFR.

    1. For instance, relationships between parties (employee-supervisor, steward-manager, union-employer), history of disputes, citations for safety infractions (etc.), backlog of grievances, track record. Context may pressure any number of agents to act in a certain way.

ii. *Types of grievance* - most are individual, but CBA may allow for group grievances (similar individual grievances) and policy/union grievances (matter of general interest, no individual member yet affected),

the latter generally being a claim for declaratory relief.

iii. *Time limits* - failure to comply with CBA time limits on grievance might mean that the arbitrator has no jurisdiction to hear dispute; depends on interpretation, although the Board may dismiss application where there has been an unreasonable delay causing prejudice, under **s. 89(e),(f).**

1. For instance, while "shall" is mandatory language, this does not render time limits mandatory in the absence of express language to that end; may yet be directory.

2. For instance, failure to meet time limits for reply does not mean that the grievance succeeds, but rather that the initiating party may proceed to the next step.

3. *Process under* ***s. 89(e)***

a. How forcefully the parties have expressed the binding effect of the time limits in the agreement? {Pacific Forest}

b. Did the breach of the time limit take place in the early or later stages of the grievance procedure? {Pacific Forest}

c. The length of the delay? {Pacific Forest}

d. Whether there is a reasonable explanation for the delay? {Pacific Forest}

e. The seriousness of the grievance? {Pacific Forest}

f. Prejudice to the other party? {Pacific Forest}

g. Any other factors? {Pacific Forest}

c. *Nature of the arbitration process*

i. *Overview* - ultimately, the decision whether to pursue or not to pursue a matter to arbitration is the union's decision to make, critical as it involves major expenditure of union resources.

ii. *Nature of board* - common format is "tripartite" arbitration board which consisted of a nominee of each of the parties and a chairperson.

iii. *Appeal of arbitration decisions*

1. *LRB,* ***s. 99*** - under this section, arbitration decisions may be appealed to the Board where (1) award is inconsistent with principles in the *Code* or other *Act* dealing with labour relations or (2) that a fair hearing was or will be denied. Discretionary, reserved for significant decisions.

2. *BCCA,* ***s. 100*** - under this section, arbitration decisions may be appealed to the BCCA where the matter is a question of general law outside of those specified in **s. 99** (above).

3. *BCSC/BCCJ,* ***s. 101*** **-** despite privative clause holding that arbitration decisions are final, they are indeed reviewable and subject to *certiorari*, etc.

d. *Nature of the disciplinary process,* ***s. 84(1)***

i. *Overview,* ***s. 84(1)*** - outside of the organizing process (see ULP - discipline) employers may discipline

employees where there is a just and reasonable cause for doing so. Imposition of such discipline may be the subject of a grievance, however.

ii. *Nature of discipline under CBA*

1. *Process* - where there is an immediate safety issue or where contemplating possibility of termination, some employers suspend employees pending investigation. This allows for additional opportunity to complete investigation before taking final step. {Lifestyle}

2. *Severance* - employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions, such as absence without leave for five days; lay-off without recall for one year. {William Scott}

3. *Tenure* - expectation of continued employment absent reasons for severance (above); significant benefits accrue to this position, including vacation, sick leave, seniority, etc. Therefore, severance is more important under CBA than under common law.

4. *Spectrum of discipline* - as a result of the above, employer not limited to one disciplinary response, but rather a broad spectrum of sanctions, allowing for progressive escalation towards discharge. Thus, the reasonable and just cause test: {William Scott}

   a. *Just cause* - has the grievor provided the employer with just cause to impose some form of discipline? {William Scott}

   b. *Excessive penalty* - was the penalty imposed excessive in all of the circumstances of the case? {William Scott} Did the employer provide any apparent reason as to why the employment relationship could not be restored? {BCCCU} Considerations: {Stelco}

      i. *Nature of misconduct* - seriousness, premeditated or spur of the moment, intentional. {Stelco}

         1. For instance, verbal abuse is more serious when accompanied by a threat, or a physical assault. {Lifestyle}

         2. For instance, verbal abuse is *less* serious when directed at fellow employees, more serious when directed at authority figures or at clients. {Lifestyle}

         3. For instance, certain language would be acceptable on a shop floor, but not in a retirement facility; further, there is a difference between behaviour in view of public/clients versus behind closed doors. {Lifestyle}

         4. For instance, momentary responses borne of frustration are less culpable than premeditated acts, continuous patterns of vilification. {Lifestyle}

      ii. *Employer conduct* - previous enforcement, progressive discipline, penalties for similar conduct, notice that conduct would provide cause, failure to permit employee explanation. {Stelco}

         1. For instance, absent a "three strikes" policy (which would itself be questionable under review), no justification for quantum leap in severity from suspension to termination where employee merely swears at another employee. {Lifestyle}

         2. For instance, while discipline must be progressive, depending on the severity of initial in-

cident, it need not start with the least punitive penalty. {Lifestyle}

3. For instance, employer must allow for opportunity of employee to give version of events before, not after the imposition of discipline. {Lifestyle}

4. For instance, “culminating incidents” may warrant higher than normal penalties for minor offences due to grievor’s record - not always justifying discharge, however. {Lifestyle}

5. For instance, it is reasonable to expect staff that they treat each other with civility in a retirement facility. {Lifestyle}

6. For instance, sending an employee a letter upon suspension warning that failure to live up to expectations will lead to termination does not establish notice that conduct would provide cause. {Lifestyle}

iii. *Employee considerations* - length of service, disciplinary record, work record, impact on employee ("unique hardship"), apology. {Stelco}

1. For instance, evidence that the employee had been singled out for arbitrary or harsh treatment would be relevant to this end. {Lifestyle}

2. For instance, the rehabilitative potential of the employee should be considered in disciplining employee. {Lifestyle}

3. For instance, apology which equivocates and shifts blame to the other party is likely to have little positive bearing on the apt penalty.

c. *Appropriate substitution* - what penalty should be substituted as just and equitable? {William Scott}