EMPLOYER FREE SPEECH DURING ORGANIZATION DRIVES
AND DECERTIFICATION CAMPAIGNS

by

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ABSTRACT

One of the most contentious issues within the area of Industrial Relations is the right of an employer to express his opinions directly to his employees concerning unions. This doctrine of "Employer Free Speech" has been the subject of much debate and was the subject of amendments to the Labour Code in B.C. in 1977.

This study will examine how this problem is dealt with in British Columbia and use for comparison purposes the jurisdictions of Ontario, Canada and the United States.

The first chapter examines the philosophy behind the doctrine and the actual provisions dealing with free speech in the Labour Statutes of the four jurisdictions. A brief overview of other unfair labour practices will also be included to put our discussion in context.

The second chapter of the thesis will deal with actions taken during an organizational campaign. The general guidelines established in each jurisdiction will be discussed and then a review of specific kinds of behaviours will be undertaken. This part will then deal with a discussion of the 1977 Amendments to the British Columbia Code.

Chapter three will focus on employer interference during the decertification process and compare the differing philosophies of the four jurisdictions.

The final section of the thesis contains the observations and recommendations of the author.
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CHAPTER I

The Doctrine of Employer Free Speech

A. Philosophy

In a democracy, one of the most cherished freedoms is that of freedom of expression. It is in many ways the cornerstone upon which our society is built and it has been inscribed in some of our most sacred documents; in the United States this right is enshrined in the constitution by way of the First Amendment; in Canada, it is set out in the Bill of Rights. The former declares that "Congress shall make no law ... abridging the freedom of speech ...". The latter declares that "There has existed and shall continue to exist ... the following human rights and fundamental freedoms, of speech ...".

However, some restrictions on this absolute freedom do exist in our laws; an individual is restricted from defaming the character of another; a person cannot threaten another with words; a person cannot shout "fire" in a crowded theatre to cause a panic. It is clear that these restrictions must exist. Absolute conditions simply do not fit a world in which humans operate. Everything must be looked at within the context in which it occurs.

Nowhere is this necessity of attention to context so obvious as in industrial relations. It is an area in which peoples' opinions are based on some very deep philosophical positions; yet their behaviour has day to day ramifications. It is not often that our philosophies are so directly tested by reality.
This enshrined right of freedom of speech often finds itself in conflict with another freedom which has really become recognized only in this century, that is, the freedom of association.

This freedom is the fundamental premise upon which our Labour Codes is written. It is with this right clearly in mind that one must read the provisions of our labour statutes. They are designed to give effect and meaning to the right to organize.

It is a right which has been recognized by the International Labour Organization. In Article 2 of its 87th Convention, it is explicitly set out that workers and employers "shall have the right to establish ... and join organizations of their own choosing ...".¹

The potential conflict of the doctrines of freedom of speech and freedom of association gives rise to the subject matter of this paper which is, of course, employer free speech. The extremes of the two schools of thought take either the view that an employer should be able to say anything he wishes, at any time and under any circumstances or the position that the freedom of association is so fragile that employers must be completely silenced.

The most famous judicial expression of the attempt to balance these doctrines is one by Judge Learned Hand of the 2nd Circuit Court of the United States.

The privilege of "free speech", like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed

be without it; but is is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The (National Labour Relations) Board is vested with the power to measure these two factors against each other - words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.2

This profound statement is a recognition of the difficulty of balancing these interests of free speech and informed judgment on a practical level.3 There must be an "accommodation of the employer's claim to state its case on the one hand, with the immunity under the Labour Relations statutes of employees and unions from management interference and influence on the other."4 In terms of union organizations, this balance is critical. In this thesis, we shall examine how various jurisdictions deal with the problem.

2 N.L.R.B. v. Federbush 121 F2d 954. (C.A. 2d Cir) (1941) at p. 957.


4 Labour Relations Law, Industrial Relations Centre, Queen's University, 2nd edition, 1974, at p. 2.
B. Unfair Labour Practices in General

In granting the freedom of association to the employees, the Labour Codes thereby automatically impose a number of restrictions upon an employer. For example, an employer must bargain collectively once a union has acquired bargaining rights; he cannot lock out his employees without meeting the statutory requirements; he must negotiate a clause in the collective agreement for the settlement of grievances. These are only some of the restrictions placed on an employer but these are sufficient to demonstrate that his absolute freedom has been curtailed.

As one can see from the above examples, unfair labour practices can and do occur during the period of a union's organizational campaign, during collective bargaining, during the administration of a collective agreement and during decertification attempts. This paper will focus on the restrictions placed upon an employer during both the organizational campaign and the decertification process. The latter as we shall see in Part III involves many of the concepts contained in the discussion of the former.

We will further limit ourselves to a discussion of the restrictions related to his right of free speech during these periods. However, to put our discussion of this right into context, we must briefly outline the other restrictions which are also placed upon an employer and which, in fact, frequently overlap the limitation on free speech. These include:

(1) The refusal to employ an individual because he is a
member of a trade union. 5

(2) the discrimination against any person in regard to employment or any condition of employment because he is a trade-unionist. 6

(3) the imposition of any condition in an employment contract which restricts his rights to be a member of a union (e.g., "yellow dog" contracts). 7

(4) the dismissal, discharge, suspension, transferring, laying off or disciplining of an employee because he is a union member or is participating in the promotion, formation or administration of a trade union. 8

(5) the institution of a wage increase or alteration of any terms of employment to discourage an employee from becoming or continuing to be a trade union member. 9

(6) the use of professional strike breakers. 10


6B.C. Code Sec. 8(2)(a); Ontario Code Sec. 58(a); Canada Code Sec. 184(3)(a); U.S. Code Sec. 8(a)(3).

7B.C. Code Sec. 8(2)(b); Ontario Code Sec. 58(b); Canada Code Sec. 184(3)(b).

8B.C. Code Sec. 3(2)(c) and (a); Ontario Code Sec. 58(c); Canada Code Sec. 184(3)(c), (e) and (f); U.S. Code Sec. 8(a)(4).

9B.C. Code Sec. 3(2)(c).

10B.C. Code Sec. 3(2)(d).
(7) the giving of financial or any other support by the employer to the union.

(8) any activity amounting to coercion or intimidation.\(^1\)

As the reader can readily determine, there is a substantial agreement among the jurisdictions as to the undesirability of this type of behaviour on the part of the employer. These are things which an employer simply cannot do.\(^2\) There is less agreement in the area of freedom of speech.

The question of employer free speech evokes many responses, some of them based primarily on emotion, from persons on each side of the issue. The arguments in favour of some limitation on communication would include the following:

(1) The employee is in such an economically dependent position that any communication from the employer will have an impact far beyond its real weight. Further, the more emotional the message, the greater the effect.

(2) The employee's right to association is totally beyond the concern of the employer as it is essentially a question to be resolved between the employee and the union or unions involved.

\(^1\) B.C. Code Secs. 3(1) and 50; Ontario Code Secs. 56 and 12; Canada Code Sec. 184(1); U.S. Code Sec. 8(a)(2).

\(^2\) B.C. Code Secs. 3(2)(c) and 5; Ontario Code Sec. 16; Canada Code Sec. 186; U.S. Code Sec. 8(a).

\(^3\) The reader is referred to Appendix I for the complete list of these provisions in each of the jurisdictions.
(3) The employer has had an opportunity to "communicate" with the employee throughout the employment relationship and any communication made during an organization or decertification bid is more likely to consist either directly or indirectly of threats, promises and the like rather than representations of reality.

The arguments put forward in favour of an employer's right to communicate include the following:

(1) The employees are, after all, employees of the company and as such, the employer is vitally interested in their welfare and hence the outcome of any event dealing with trade union representation involves him directly.

(2) The employees should be informed of all their legal rights and the employer is in a position to ensure that the union has not mis-informed the employees. In fact, in many cases, the employer is actually approached by the employees for information concerning his rights under the law.

(3) The employees have the right to all "the facts" and the employer should be in a position to express those opinions which may shed light on the arguments against unionization in general.

(4) The employer may truly distrust or fear unions and should be able to express that opinion in a free society.

(5) The employer may fear that a union will not represent his employees in a fair and just manner and he should
be able to communicate his concerns to the employees.

(6) The employer must be in a position to explain the economic consequences of unionization to the employees in terms of competitive position, long-run growth and the firm's continued existence. These consequences may in fact fall upon the workers or the company or both.

Given this background of the arguments related to employer free speech, let us now turn our attention to the specific provisions in the Labour Codes of the four jurisdictions.

C. Code Provisions Related to Employer Free Speech

In terms of restricting employer free speech, there are two types of provisions which can be invoked. The first is a restriction against various kinds of coercion and intimidation; the second deals with general interference with union activities. It is our intention here in the introduction to merely set out the existing provisions of the Codes and to save our analysis and discussion for later in the paper.

(1) Coercion and Intimidation

In the first instance, an employer is not permitted to do anything which will intimidate or coerce an employee from being a member of a union or in exercising any of his rights under a Labour Code. This type of provision is contained in each of the other jurisdictions.14

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14 B.C. Code Secs. 3(2)(c) and 5; Ontario Code Sec. 61; Canada Code Sec. 186; U.S. Code Sec. 8(a).
This restriction against coercion and intimidation applies to any person, employer or union under the British Columbia, Ontario and Canadian statutes. Any activity, including speeches, which is openly coercive or intimidating will be in violation of the acts.

The type of behaviour which has been prohibited as intimidation or coercion is also normally found to be in contravention of the other provision (where these exist) against interference in the affairs of a union, etc.

Even the other provisions which seem to give the employer some freedom to express himself, clearly indicate that this right does not extend to coercion, intimidation, threats or reprisals, promises or undue influence. 15

(2) Interference

There are also prohibitions against interference, in general, in the various acts and it is in the interpretation of these that the jurisdictions have set out their individual philosophies. 16

In order for there to be a violation of one of these provisions, it is possible that the interference may result from either the substance of any remarks or from the context in which they are made.

The restrictions are worded as basically prohibiting any participation or interference by the employer in the formation or administration of the trade union.


16 B.C. Labour Code Secs. 3(1), 3(2)(c), Ontario Labour Relations Act Secs. 56 and 58; Canada Labour Code Sec. 184(1); U.S. Labour Code Sec. 8(a) and (c).
This is, in effect, the wording of Section 184 of the Canada Labour Code. The Ontario Act, on the other hand, although containing a virtually identical provision, has an additional clause to the effect that "nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence." (Sec. 56)

The American National Labour Relations Act similarly prohibits interference with, restraint of or coercion upon employees but "The expressing of any views, arguments or opinion or the dissemination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labour practice under any provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit." (Sec. 8)

When the British Columbia Labour Code came into force in 1974, it contained two sections explicitly dealing with this issue. The first section (Sec. 3(1)) contained the traditional restriction against any interference with or participation in the formation or administration of a trade union. However, the Code also contained a further restriction against interference with the "lawful concerted action by employees for the purpose of obtaining collective representation". (Sec. 3(2)(f). As we shall see later in the paper, the combined effect of these two provisions was substantial. In 1977, the Social Credit government deleted the second of these provisions (Sec. 3(2)(f) and in fact added a section to the effect that nothing in the Act should be interpreted as to limit the right of an employer "to communicate to an employee a statement of fact of opinion reasonably held with respect to the employer's business." (Sec. 3(2)(g).
Therefore, we will now proceed to an examination of each of the jurisdictions for the general guidelines employed in assessing employer behaviour during the organizational campaign and then go on to deal with their treatment of specific types of behaviour.
CHAPTER II
Organizational Campaigns

A. General Approaches in Each Jurisdiction

(1) **United States**

The doctrine of employer free speech has undergone many changes in the United States. The philosophies of the governments and the National Labour Relations Boards have changed over time and hence in describing the American position, a slightly historical approach is required.

The First Amendment certainly has affected how the Courts and to a lesser extent, the National Labour Relations Board (N.L.R.B.) have interpreted the various sections of the *Wagner Act* (1935) and the subsequent amendments in the *Taft-Hartley Act* (1947).

During the period immediately following the enactment of the *Wagner Act* (1935-41), the Board held that virtually any statement by an

17 The reader is particularly referred to the material listed below for concise discussions dealing with the history of N.L.R.B. decisions:


employer would amount to coercion and thereby be in violation of the Act. The prevailing sentiment was that which was expressed by Justice Hand in the *Federbush* case which was quoted above.

The issue of employer free speech did not reach the U.S. Supreme Court however until the *Virginia & Electric Power*\(^{18}\) case of 1941 and when it did, the Court struck a blow for free speech and established some parameters as to what would be permitted. The Court indicated that there were many effective methods both vocal and nonvocal by which an employer could influence his employees and that employees are particularly susceptible as even "slight suggestions as to the employer's choice between unions may have telling effects upon men who know the consequences of incurring that employer's strong displeasure".\(^{19}\)

However, the Supreme Court did declare that the employers had a right to speak which was guaranteed by the constitution. The employer had the right to take any side of a controversial issue he wished and mere expression of opinion, standing alone and not coercive in itself, was entitled to constitutional immunity.

The Court maintained that an unfair labour practice existed only if the employer, in the totality of his conduct, had behaved coercively. Isolated incidences of expression of opinion were not *per se* prohibited. The N.L.R.B., having been somewhat restricted by this "totality of conduct" doctrine, instituted the "captive audience" doctrine in the *Clark Brothers*\(^{20}\) case in 1946. In that case, the employer had addressed the


\(^{19}\)Ibid., at p. 477.

\(^{20}\)70 N.L.R.B. 802 (1946).
employees on working time concerning the ills of unions and had invoked the protection of the First Amendment.

The N.L.R.B. held:

"The expressing of any views, argument, or opinion, or the dissemination thereof, controlled the manner in which the employees were to occupy their time. The only way the employees could have avoided hearing the speeches would have been for them to leave the premises, which they were not at liberty to do during working hours ..."

The compulsory audience was not, as the record shows, the only avenue available to the respondent for conveying to the employees its opinion of self-organization. It was not an inseparable part of the speech, any more than might be the act of a speaker in holding physically the person whom he addresses in order to assure his attention ... we must perform our function of protecting employees against that use of the employer's economic power which is inherent in his ability to control their actions during working hours."21

It was at this time that the government decided to step back into the labour scene and in the Taft-Hartley Act (which amended the Wagner Act), Congress not only increased the restrictions on various types of union behaviour but it explicitly set out to insure that the right of free speech was properly protected.

In doing so, it passed into law Section 8(c) which had the effect of undermining the "captive audience" theory which the N.L.R.B. had just instituted in the Clark Brothers case.

Section 8(c) reads:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labour practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

21 Ibid., at p. 804-5.
The right of speech was then protected by the Constitution and Section 8(c) of the Taft-Hartley Act and these statutory safeguards have remained up to the present time.

The N.L.R.B., however, remained undaunted. In order to keep some control over employers' speeches, the Board developed the concept of "laboratory conditions". In the General Shoe\textsuperscript{22} case, the Board indicated that in election proceedings, its function was "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible\textsuperscript{23} in order to ascertain what the true wishes of the employees were. In cases where such conditions did not exist, another election would be ordered.

The effect of this new doctrine, then, was to remove "the setting aside of elections due to the inability of the employees to exercise their free choice" from the scope of Section 8(c) of the Act.

The next step for the N.L.R.B. was taken in the Bonwit Teller case wherein the "captive audience" doctrine was given new life. In that case, the employer maintained a no-solicitation rule (i.e., no union organizers on company premises at any time) but before the representation vote, the company's president had delivered an anti-union address to the employees. The N.L.R.B. held that in refusing to grant the union equal time, the company had acted in a manner that the "statute does not intend us to license"\textsuperscript{24}

\textsuperscript{22}77 N.L.R.B. 124 (1948).
\textsuperscript{23}Ibid., at p. 127.
\textsuperscript{24}96 N.L.R.B. 608 (1951) at p. 612.
Furthermore, they noted:

There is, in addition, an even more fundamental consideration - wholly apart from the Respondent's disparate use of the no-solicitation rule - which justifies the result we reach. We believe that the right of employees, guaranteed by Section 7 of the Act, freely to select or reject representation by a labour organization necessarily encompasses the right to hear both sides of the story under circumstances which reasonably approximate equality.\(^{25}\)

The Clark Brothers doctrine had thus returned in a more modern guise.

However, the emphasis was once again to swing to unfettered freedom of speech. In a number of cases\(^ {26}\) during the Eisenhower administration, the N.L.R.B. came down on the side of an employer who had openly expressed his anti-union feelings. In a particularly explicit manner, the Board expressed its position in the Livingstone Shirt case:

A basic principle directly affecting any consideration of this question is that Section 8(c) of the Act specifically prohibits us from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labour practice. Therefore, any attempt to rationalize a proscription against an employer who makes a privileged speech must necessarily be rested on the theory that the employer's vice is not in making the speech but in denying the union an opportunity to reply on company premises. But to say that conduct which is privileged gives rise to an obligation on the part of the employer to accord an equal opportunity for the union to reply under like circumstances, on pain of being found guilty of unlawful conduct, seems to us an untenable basis for a finding of unfair labour practices ... \(^ {27}\)

\(^{25}\)Ibid.

\(^{26}\)Livingstone Shirt 107 N.L.R.B. 400 (1953); Peerless Plywood 107 N.L.R.B. 427 (1953); Chicopee Manufacturing 107 N.L.R.B. 106 (1953).

\(^{27}\)Supra, footnote (26) at pp. 405-406.
There were some indications of N.L.R.B. intention to intervene in extreme cases. It would no longer consider employer statements against the entire background of an employer's conduct but it would consider such statements in the context in which they were made.28

In the early 1960's with the advent of the Kennedy Administration, the philosophy of N.L.R.B. once again changed. The content of the employer speech became less important; it was the context which mattered. What were considered predictions in the 1950's became the threats of the 1960's.

The "laboratory conditions" doctrine was resuscitated and given force in the **Dal Tex Optical** case:

Even a cursory reading of those portions of the speeches of the Employer's president demonstrates that they were couched in language calculated to convey employees the danger and futility of their designating the Union. After listing some of the existing benefits, he queries whether they wanted 'to gamble all of those things', stated that if required to bargain he would do so on 'a cold-blooded business basis' so that the employees 'may come out with a lot less than you have now', and emphasized his own control over wages. This was a clear cut, readily understandable threat that the Employer would bargain 'from scratch' as though no economic benefits had been given, and the employees would suffer economic loss and reprisal.29

Therefore, conduct which violated Section 8(a)(1) was automatically deemed to interfere with the exercise of an employee's free choice although it would not constitute an unfair labour practice under Section 8(c).


29 137 N.L.R.B. 1782 (1962) at 1785; see also **Ideal Baking Company** 142 N.L.R.B. 875 (1963).
This position was reinforced in the Lord Baltimore Press case a year later in which the Board indicated that threats to "use the delaying processes of the law to the fullest intent possible to thwart the policies of the Act"\textsuperscript{30} would when combined with economic threats destroy the laboratory conditions.

In 1966, the Supreme Court continued its practice of reinforcement of the constitutional rights of the employer. In the Linn\textsuperscript{31} case the majority allowed the employer wide latitude in expressing his opinion even if that opinion was "intemperate, abusive and inaccurate". It noted that "representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumours, vituperations, personal accusations, misrepresentations and distortions. Both labour and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."\textsuperscript{32}

The most recent stage of the American development of the doctrine of free speech occurred in another decision of the Supreme Court in the Sinclair\textsuperscript{33} case in 1969 (one of the four cases which are generally referred to as the Gissell case). In that decision the Court (in a divided judgment) actually tightened the requirements in the test of laboratory conditions to require precise accuracy of the employer's statements. It was in this case that the Supreme Court explicitly dealt with the concept of undue

\textsuperscript{30}142 N.L.R.B. 328 (1963) at p. 329.


\textsuperscript{32}Ibid., at p. 58.

"An employer's rights cannot outweigh the equal rights of his employees to associate freely ... And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up the intended implications of the latter that might be more readily dismissed by the more disinterested ear."\textsuperscript{34}

In summary, the present position of the N.L.R.B. is that it will act when a number of employer practices have combined to create an atmosphere of intimidation. Individually, certain actions may have been relatively harmless (and therefore acceptable) but in the aggregate they amount to coercion.

A combination of threats of reprisals, coercive interrogation, promises of benefits, surveillance of union members, and persuasion of employees to sign anti-union cards will create the kind of atmosphere that the Board must seek to nullify.\textsuperscript{35}

It has been held that "exaggerations, inaccuracies, half-truths, name calling, and minor misstatements, while not condoned, will not be grounds for setting aside an election. In the course of a sharply contested campaign some parties have, in their zeal, resorted to propaganda which attacks the character of another party."\textsuperscript{36} However, it is well settled that the Board does not ordinarily pass judgment on such campaign statements and "will set aside elections only if coercion, fraud, or campaign

\textsuperscript{34}Ibid., at p. 617.

\textsuperscript{35}Guyan Valley Hospital 198 N.L.R.B. 107 (1972)

trickery is shown.\(^3^7\)

There has been much debate as to the actual effects of employer comments on employee attitudes. It has generally been assumed that such comments would indeed have some bearing on the employees but a recent study by Julius Getman and Stephen Goldberg\(^3^8\) has resulted in a serious questioning of this hypothesis.

In seeming response to the results of this study, the N.L.R.B. decided in the recent Shopping Karts\(^3^9\) case to allow employers even greater leeway and explicitly reversed the position the Board had taken in previous cases.

There is some question as to whether this decision will stand the test of time but if it does, the employer in the United States will clearly benefit from more latitude in what he may express. The Board notes,

> Despite the many difficulties in administering the Hollywood Ceramics rule, we, too, would nevertheless choose to continue to adhere to it if we shared the belief that employees needed our "protection" from campaign misrepresentations. However, we do not find this to be the case. For our fundamental disagreement with past Board regulation in this area lies our unwillingness to embrace the completely unverified assumption that misleading campaign propaganda will interfere with employees' freedom of choice. Implicit in such an assumption is a view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered.

\(^{3^7}\)E.g., Calcor Corporation, 106 N.L.R.B. 539 (1953) at 541-542; Higgins, Inc., 106 N.L.R.B. 845 (1953) at 846, fn. 2; Georgia Pacific Corporation, 199 N.L.R.B. 240 (1972).


\(^{3^9}\)228 N.L.R.B. no. 190; 1977 C.C.H. par. 18047 at p. 29974.
by the self-serving campaign claims of the parties. If these postulates had any validity 20 years ago at the time of Gummed Products, they are surely anachronisms today. We decline to join those who would continue to regulate on the basis of such assumptions notwithstanding "improvements in our educational processes, and despite the fact that our elections have now become almost commonplace in the industrial world so that the degree of employee sophistication in these matters has doubtless risen substantially during the years of this Act's existence ..." Rather, we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.40

Even before the Shopping Karts decision, the American approach was not a total prohibition of argumentative discussion; it was a restriction on coercion;41 an employer in the U.S. does retain the right to offer his opinion as long as it does not constitute coercion or intimidation.42

The combination of the Constitution and Section 8(c) of the Taft-Hartley Act have combined to insure the employer some right of free speech. The reader must of course remember that these protections apply to other areas of labour relations in the United States (e.g., information picketing) and thus any positive or negative comparison to Canadian law must await an examination of the entire scope of the labour legislation in each jurisdiction.

40 Ibid., C.C.H. at p. 29976.
41 Groendyke Transport, Inc., v. N.L.R.B., 530 F2d 137 (1976)
(2) **Ontario**

In Ontario, there is in Section 56 of their Labour Relations Act an explicit statement which confers the right of free speech on an employer provided that it does not include coercion, intimidation, threat, promises, or undue influence.\(^{43}\)

Despite this statutory provision, the Ontario Board is fully conscious of the effect of employer interference. It has held that, "in view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act."\(^{44}\) The test which the Board uses in determining whether the influence has exceeded acceptable standards was originally laid out in the *Savage Shoe* case in which the Board held that:

... regard must be had to the whole speech and the circumstances under which it was made. In the present case there is nothing which, in our opinion, can be said to be coercive in the conduct of the respondent company, nor has anything occurred which could be said to have impaired the ability of the employees to evaluate the speech to such an extent that their free desires could not be determined in a secret vote.\(^{45}\)

Until recently, the Ontario Board had permitted the employer considerable latitude. In assessing whether behaviour by the employer is

\(^{43}\) This amendment was added in 1960 to what was then Section 48.

\(^{44}\) *Piggott Motors, 1961 Ltd.* (1962), 63 C.L.L.C. par. 16264.

\(^{45}\) (1960), 60 C.L.L.C. 888 at p. 889.
unacceptable, the Board will view all the circumstances of a particular case. In isolation, the individual acts may not be serious enough to merit prohibition but when the employer's conduct is viewed in its totality, the intimidation may become apparent. For example, a speech by the employer, which by itself would not violate the doctrine of free speech, when combined with other events such as the subsequent appearance of a petition and its open circulation during working hours may be part of the evidence which will lead the Board to conclude that unwarranted interference has occurred and to attempt to remedy the situation. This is, in effect, the totality of conduct test.\(^4\) Numerous statements regarding job security and employment benefits, the conduct of a poll among employees to determine their views and the offer of assistance to employees in cancelling their membership in the union when taken together would also have the effect of being coercive on the employees.\(^5\)

However, there certainly is some latitude for employer involvement under the Ontario Code. If an employer wishes to make factual statements (e.g., that the union instead of the individual would deal with the employer) he is free to do so.

The Board expressed the opinion that employees are aware of the fact that employers generally do not look with favour upon union organizations and any unemotional statements to that effect should not unduly


influence the employees. This is in fact the reasonable man test and in the absence of coercion, intimidation or threats, a reasonable man, in the opinion of the Board, would not be affected.

Recent decisions by the Ontario Board may indicate that a toughening of standards is forthcoming, however.

In the Winson Construction Limited case the Board held that mere interference by an employer is sufficient to violate Section 56. It noted that "mere interference by an employer in the selection of a trade union by employees is sufficient to constitute an offense". The wording used by the Board indicates that any interference will unfavourably be viewed but the facts of the case do indicate that the employer did participate in such a way (the origination of an opposing petition) that it could be described as intimidation in any event.

And in June, 1977, in the Dylex case, the Board held that an employer had contravened the Act through the use of a combination of meetings with the employees, showcase displays, posters and letters to the employees. There were references to lack of job security, the possibility of the loss of benefits in a negotiated contract and the threats of loss of employment should a strike ensue. When all this was viewed together, there was little doubt that employer interference had occurred.

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50Dylex Limited [1977] 2 Canadian L.R.B.R. 171; File No. 1500-76-R (Ont.).
Finally in September 1977, the Ontario Board dealt with Section 56 in the context of the Viceroy Construction Company\textsuperscript{51} case. After acknowledging that the employer's position is very dominant due to his freedom to advance, preserve, impede or terminate the employment of an individual, the Board indicated that two employer letters and attached clippings containing references to the possibility of lengthy strikes, the unavailability of employment insurance, the loss of jobs, the right of the employer to hire new employees and the possibility of plant closure all combined to create an intimidating posture.

It seems that the Ontario jurisprudence has become more meaningful to the British Columbia situation with the introduction of the new amendments in B.C. Although the proposals are not identical to the Ontario provisions, extensive reference can be made to the latter jurisdiction in attempting to clearly define the parameters of our revised sections.

(3) Canada

The Canada Labour Code contains provisions against participation in interference with a trade union [Sec. 184(1)(a)], provisions against intimidation [Sec. 184(1)(e)], and a general restriction against coercion and intimidation (Sec. 196).

The Canadian Code seems to be theoretically in between the positions of the original provisions in the B.C. Code and that of the Ontario Act. It does not contain the equivalent of Sec. 56 of the Ontario Act which seems to guarantee some rights of free speech; but neither does it

\textsuperscript{51}[1978] 1 Canadian L.R.B.R. 22.
contain the general bar previously found in Section 3(2)(f) of the B.C. 

The landmark case under the Federal statute has been that of Taggart 
Service Ltd. In that case the Board, in deciding the meaning of Section 
184(a), adopted the strict view of the Ontario Labour Relations Board which 
had been expressed in the Sub Tube and Wolverine Tube cases in the early 1960's. 

In their decision, the Canada Board laid down the following stan-

dards:

"An employer may express his views and give facts 
in appropriate manner and circumstances on the 
issues involved in representation proceedings in 
so far as these directly affect him and has the 
right to make appropriate reply to propaganda 
directed against him in relation thereto. However, 
he should bear in mind in so doing the force and 
weight which such expression of views may have upon 
the minds of his employees and which derive from 
the nature and extent of his authority as employer 
over his employees ... He should take care that 
such expressions of views do not constitute and 
may not readily be construed by his employees to 
be an attempt by means of intimidation, threats, 
or other means of coercion to interfer with their 
freedom to join a trade union of their choice or 
to otherwise select a bargaining agent of their 
own choice."

It is interesting to note that in our previous discussion of the 
American cases, a great deal of the analysis was concerned with the 
treatment of the guarantee of free speech under the First Amendment to

52(1964), 64 (3) CLLC 683.
53supra at footnote (48)
54(1963), 63 CLLC 1226.
55supra at footnote (52) at pp. 687-8.
their constitution. The Canadian Board, however, in the Taggart decision did not even mention the provisions of our Bill of Rights which had been enacted four years earlier.  

In fact, the provision related to free speech was not mentioned until 1975 when in the decision in City and Country Radio Ltd., the Board examined the implications of that Act. The facts of the case indicate that the employer had often directly and indirectly indicated his negative attitude toward unions, he had addressed a "captive audience, he had dismissed a number of pro-union employees and he had circulated memos to the employees.

In its reasons the Board expressed the opinion that its decision in Taggart was the correct approach and that there was no incompatibility between it and the provisions of the Bill of Rights. In the Board's opinion, the provisions of Section 184 of the Labour Code of Canada "can be sensibly construed and applied so that it does not abrogate, abridge or infringe the terms ... of the Bill of Rights, (specifically) the freedom of speech of an employer".

The employer is free to express his opinion and give facts "insofar as these directly affect him and to make appropriate reply to propaganda directed against him". However, this defense must not turn into uncalled

56 Canadian Bill of Rights, 1960 S.C. c. 44.
58 Ibid., at p. 7.
59 Ibid., at p. 7.
for intervention and interference.

The Board has indicated subsequently that the employer may also "accurately publicize the existing terms and conditions of employment ... but may not make or imply any promises ...".\(^{60}\)

The Board therefore seems to perceive the employer's role as one of a purveyor of facts; but the instant that interpretation or prediction appear in his comments or actions the employee has probably overstepped the bounds of the Code.

Under the Canada Code, there is some room for an employer to speak particularly in the case where repudiation of exaggerations and falsehoods is required. However, the Board has explicitly\(^ {61}\) acknowledged the power of the employer in the employment relationship and seems prepared to adopt limitations similar to those employed in Ontario.

(4) **British Columbia - Previous Legislation**

When the present Labour Code was enacted in 1973, the authors of the Legislation had the benefit of the existence of many of the decisions discussed above. The formulation of the provisions related to employer free speech and indeed the entire code was therefore done with a precise purpose in mind.

Similarly, in its interpretation of the statute, the B.C. Labour Board itself has often referred explicitly to decisions in other jurisdictions and in many cases adopted those theories which it felt made good


\(^{61}\)Ibid., at p. 551.
sense for labour relations in British Columbia.62

It should be noted that the B.C. Code differed from the other statutes in two ways. First of all, the existence of Section 3(2)(f) seemed to indicate that the legislature has intended to go beyond the other jurisdictions in restricting virtually any kind of employer activity. As a result, the Board interpreted this position very broadly.

This broad-ranging provision was added to the Code in the 1973 revision and the message it addresses to employers is quite simple. It is up to the employees alone whether to choose collective representation through a trade-union. Employers must adopt a neutral, "stand-offish" position. If an employer gets actively involved, there is always a risk of coercive influence on the employees, though this is sometimes difficult to detect and to prove. The legislative policy adopted in 1974 is to bar employer interference of any kind in the group efforts of employees to achieve collective bargaining.63

Secondly, this extreme position seemed to be reinforced by the absence from Section 3(1) of the Code of a clause such as that contained in the corresponding section in Ontario (Sec. 56) and establishes that "nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises, or undue influence".

There is also Section 5. Although identical to provisions restricting coercion and intimidation in other jurisdictions, the B.C. Board has indicated it will interpret this restriction very broadly. It has noted that "... these prohibitions on "coercion", "interference", "participation", "promises", etc., place very broad restraints on any kind of employer

62 Gibraltar Mines, B.C.L.R.B. Decision No. 16/75.
63 Langley Advance B.C.L.R.B. Decision No. 139/74; Beechwood Construction Ltd., B.C.L.R.B. Decision No. 32/77.
involvement in union organizational campaigns".64

In theory, the restrictions contained in Section 3(1), 3(2)(c), 3(2)(f), and 5 were all encompassing. The classic statement of the doctrine was set out in the second decision of the new Board in 1974 in the Forano case. The Board indicated therein that due to the dependence of the employee on the employer for his economic well-being, "comments and predictions which might seem innocuous in a political campaign take on a very different hue when voiced by a management".65 Therefore there is a great risk that any statements made by management will be in contravention of these sections and thus the employer is admonished to "remain an interested bystander (and) to resist the temptation to become an active partisan in a campaign against a union."66

The Forano case also sets out the proposition that an employer cannot indicate any preference between unions which are competing for the support of the employees.

In the Beechwood decision, the Labour Board reiterated these basic sentiments and put a slightly different light on its position.

As has been noted on many occasions in the context of employer free speech arguments, the audience of employees is a captive one and particularly vulnerable to the overtones underlying such comments. Reasoned debate is preluded by an appreciation of the employer's wishes and anticipation of the consequences that may follow from exposing a viewpoint at odds with that position. That is not free speech nor any form of debate which can assist an employee

64 Forano Limited, B.C.L.R.B. Decision No. 2/74 at p. 10.
65 Ibid.
66 Ibid.
in making an informed decision. That is why the legislative policy of the new Code is to bar employer influence of any kind when employees are seeking certification.\textsuperscript{67}

The case appears to indicate that there appears to be room for reasoned debate but because of the employer's position and vested interest he must be precluded from participating in that debate in any manner whatsoever.

Therefore, in the absence of the 1977 amendments, the employer was greatly restricted and was probably limited to refutation of gross misrepresentations of fact and statements of legal fact. However, even in making these comments, he had to be extremely circumspect. For all practical purposes, the doctrine of employer free speech was non-existent in British Columbia.

However, before administering the final rites we should make two very important observations. First of all, the 1977 amendments may have given new life to the right of employer free speech. Secondly, even if something is held to be a violation of the strict wording of the Code, it is the remedial action taken by the Board which is most critical. Both of these areas will be examined in depth later in the paper, but the reader should keep them in mind as he reviews the next section.

B. Specific Behaviour

In this next section of the paper, we will look at some kinds of behaviour which have been the occasion of complaints related to the free speech doctrine.

\textsuperscript{67}\textit{supra}, at footnote (63) at p. 24.
It is important to note that these are treated within each jurisdiction within the framework discussed above. This analysis is merely to show how these general theories have been applied in specific cases.

(1) Harassment, Intimidation and Surveillance

In British Columbia, intimidation and harassment at work to the point that an employee quit his job will constitute a violation of both Section 5 and Section 3(2)(c) as well as being considered tantamount to a dismissal which violates Section 3(2)(a) and (d) of the Code.

Similarly any aggressive behaviour and undisciplined comments which would have the effect of making an employee feel he is being intimidated or harassed are strictly prohibited by Section 5. For example in the Reddi Gas case, the manager screamed and yelled at an employee and continually broke promises he had made to her and the B.C. Board felt that in those circumstances that behaviour constituted an unfair labour practice.

Inflexibility or intransigence on the part of the employer may also constitute intimidation if they occur in a particular context. The Board found an unfair labour practice in the Robinson Little case where the employer reacted to the union's organizational attempts with sarcasm, censure, heavy handed tactics, continuous criticism and increased job surveillance. This critical attitude and watchfulness when combined with

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69 Reddi Gas B.C.L.R.B. Decisions Nos. 33/74 and 112/74.
70 Robinson Little B.C.L.R.B. Decision No. 21/75.
invitations to the staff to his home, abusive statements, his monitoring of phone calls and repeated questioning of the employees all combined to create a violation of the Code.

Close surveillance of conversations and activities of union organizers has also been found to constitute coercion in B.C.\textsuperscript{71} and in the United States.\textsuperscript{72} In the Speed Queen case in the United States, the employer engaged in surveillance, not out of simple curiosity, but based on a desire to observe the union and other concerted activity of his employees and the N.L.R.B. found this to be coercive.\textsuperscript{73}

Intimidation within the industrial relations framework means any behaviour which causes the employee to be concerned with his job security. This can be accomplished in many ways but the common ingredient in these different kinds of behaviour seems to be a demonstration of power resulting from economic superiority in the work relationship. The total dependency of the employee on the employer must have been emphasized to such a degree that the employee might refrain from acting in accordance with his true wishes and even his legal rights.

It is interesting to compare this concept with that of intimidation under the Criminal Code of Canada.\textsuperscript{74} Under Section 381 of that Statute, intimidation is defined so as to include using violence or threats of

\textsuperscript{71}Ibid.

\textsuperscript{72}Guyan Valley Hospital, supra at footnote (35); Stone & Webster Engineering Corp. v. N.L.R.B., 536 F2d 461(1976); N.L.R.B. v. Armcor Industries, 535 F2d 239 (1976).

\textsuperscript{73}Speed Queen, 192 N.L.R.B. 998 (1971).

punishment to persons or their property, persistently following persons (including on a highway), hiding property of people or besetting and watching a dwelling place or residence. In virtually all of these cases, there is either a direct or indirect implication of physical violence. Although these are certainly included under the Labour Code, the concept of intimidation in labour matters is certainly broader than that envisaged by Section 381.

Many employers however would probably be quite interested in reading Section 382 of the Criminal Code. It states the following:

OFFENCES BY EMPLOYERS.
382. Everyone who, being an employer or the agent of an employer, wrongfully and without lawful authority

(a) refuses to employ or dismisses from his employment any person for the reason only that the person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing, in a lawful manner, their interests and organized for their protection in the regulation of wages and conditions of work,

(b) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to a trade union, association or combination to which they have a lawful right to belong, or

(c) conspires, combines, agrees to arranges with any other employer or his agent to do anything mentioned in paragraph (a) or (b),

is guilty of an offence punishable on summary conviction.
1953-54, c. 51, s. 367.

Although this section exists in the Code, it is certainly not been used as a method of dealing with cases of employer free speech. To be charged with being in violation of the Criminal Code the employer would, I am sure, have to engage in activities which would constitute physical
threats or outright violence. The authorities have no great desire to get involved in labour matters and would hesitate to do so unless the violation of Section 382 would also involve a violation of other sections, e.g., assault and battery. The trend in industrial relations is to remove matters from the courts. It is particularly true that the criminal courts, with their added burden of proof, the available sanctions and their formality, is hardly the ideal stage on which to settle dicey union-management problems.

Intimidation, in tort, lies somewhere between the labour and criminal concepts. It certainly involves more than physical threats and now includes actual or threatened breaches of contract and statutory violations but to qualify as a tortious act, "the misbehaviour would have to be quite serious and actual damages would have to be provable". The distinction in theory between what constitutes intimidation in tort as opposed to that under the Labour Code is not that significant but in practice it would be a question of degree and the Labour Board would be prepared to deal with behaviour that the Courts would overlook.

(2) Promises of Improved Conditions of Employment

An indication from the employer that future negotiations will be much easier if the union does not get in, has been held to violate Section 3(2)(c) of the B.C. Code. Promises of potential stock options or


76 McCoy Bros. Ltd., B.C.L.R.B. Decision No. 9/77.

77 Fairmont, Supra see footnote (68).
increased wages are similarly prohibited under the Code. In fact, the mere calling of meetings to discuss potential improvements in the conditions of employment is an unfair labour practice.\footnote{Cam Chain, B.C.L.R.B. Decision No. 138/74.}

In Ontario, statements to an employee implying potential wage increases should the union lose the representation vote have repeatedly been held to constitute undue influence which would affect the employee's ability to express his true feelings concerning union representation.\footnote{Beachwood, supra see footnote (63).}

The N.L.R.B.\footnote{Gestetner Canada Ltd. [1971] OLRB Rep. 62; see also Hostess Food Products Ltd. [1975] OLRB Rep. 218; Martel and Sons Lumber Ltd. [1972] OLRB 811; Sun Tube [1962] OLRB Rep. 28; Seven Up Company Ltd. [1970] OLRB Rep. 198.} and the Canada L.R.B.\footnote{Amcor Industries, supra at footnote (72); United Aircraft 534 F2d 422 (1975); Ideal Baking Company, supra at footnote (29).} have also gone on record as being opposed to this type of interference.

Direct promises of future economic benefit seems to be one area in which all the Boards agree. After this type of behaviour by the employer, it is felt that an enlightened free choice by the employees is virtually impossible.

(3) \textbf{Threats of Reprisals}

(a) \textbf{Plant Closure}

One of the most common (and threatening) tactics used by employers
is the threat to either move the plant or shut down operations if a union is certified. The practice of the Boards vary somewhat in the face of such utterances.

Threats to discontinue operations or to move a plant to another location (e.g., Oregon) have been held to be violations of both Section 5 and Section 3(2)(c) of the B.C. Code. The Board is clearly on record as viewing this behaviour as coercive and intimidating as well as undoubtedly constituting interference.

In the United States, a distinction has been drawn between a comment to the effect that the employer may have to cease operations and one to the effect that he would definitely do so in the face of a successful certification drive.

In the Mylan Sparta decision (1948) the N.L.R.B. stated that "a prophecy that unionization will ultimately lead to loss of employment is not coercive where there is no threat that the respondent will use its economic power to make its prophecy come true". It is a distinction that is very fine, to say the least, and one that even under the best of circumstances would be very hard to draw, but it is one that we may have to

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83 McCoy Bros. Ltd., supra at footnote (76).
84 Cam Chain, supra at footnote (78).
85 In order to protect himself, the employers should concentrate on the facts of particular situations, not the dire consequences of unionism.
87 78 N.L.R.B. 1144, (1948); see also N.L.R.B. v. TRW Semi Conductors Inc. [(CA-9; 56 LC #12299 (1967)].
confront in B.C. given the 1977 amendments to the Labour Code.

In the "pro-employer" years of the mid 1950's, the N.L.R.B. gave the employer a great deal of latitude in making these types of statements and tended to characterize them as "nothing more than predictions of the possible impact of wage demands upon the employer's business". 88

In 1961, the N.L.R.B. reversed its position and held that such statements constitute more than just loose predictions because of the very real fear of the employees concerning the loss of their jobs and hence are prohibited. 89 Similarly, the prediction of the inevitability of a strike and the dire consequences thereof, namely, violence and loss of jobs, is coercive and intimidating. 90

To escape sanctions by the N.L.R.B., it seems that the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

In the mid 1960's, the Courts of Appeal in the U.S. in the face of evidence of clearly intimidating threats to shut down the plants in the event of union certification (as opposed to mere predictions of economic problems if the union came in), held that the N.L.R.B. was correct in finding that unfair labour practices had been committed. In the Gissel Case in 1969,

88Chicopee Manufacturing 133 N.L.R.B. 131 (1953).
89Somisma Inc., supra at footnote (26).
the Supreme Court seemed to set down very restrictive guidelines for speeches of this nature. In fact, however, there have been many N.L.R.B. decisions since that time permitting some discussion of the possibility of economic difficulties.

In Ontario, threats concerning bankruptcy or the closing of a plant are generally prohibited, and the mere fact that the threats are veiled and can only be discovered after a careful analysis of what was said will not excuse the employer.

In the Viceroy Construction case, the Board noted:

Fire, flood and other external conditions may also cause plants to close, but the employer has chosen to put before the eyes of its employees the example of a plant closing for the alleged purpose of destroying a union. The resulting suggestion, however factual, that some employers are prepared to destroy employees' jobs in order to destroy their union is an object lesson not wasted on employees of normal sensitivity. It is a statement by example that could reasonably be perceived by the employees as a clear threat to their jobs.

It should be noted that the Labour Boards in dealing with the free speech provisions have not spent any time at all in attempting to draw distinctions between the meanings of threats and intimidation. It is sufficient to observe that there is considerable overlap between the two.

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91 supra at footnote (33).
92 N.L.R.B. v. Automotive Controls Corp. (AC-10; 1969) 59 LC #13223; Gary Aircraft Corp. [1971] CCH N.L.R.B. #23004; many other examples are discussed in 1972 CCH Para 5020.
94 supra at footnote (51).
95 Ibid., p. 27.
(b) Other Economic Sanctions

Other types of threats which are basically prohibited include the possibility of lay-offs, shorter working hours, the loss of job security or other benefits and the blacklisting of union supporters.

Such threats of economic reprisals when clearly made would constitute violations of the Codes in each of the jurisdictions. In the Wolverine Tube case, the Ontario Board noted that oral and written statements by the employer revealed "veiled but plainly unmistakeable suggestions ... that the continuance of present wages, working conditions, steady employment and pension benefits will be threatened if the union if voted in."

Threats to the effect that the employer would refuse to bargain with the union and would use legal manoeuvering as a delay in doing so are also prohibited.

96 General Mills Canada Ltd. File No. 7411-74-R (Ont.); Mink Dayton Inc. 166 N.L.R.B. 604 (1967).
97 Ibid.
98 Sun Tube, supra at footnote (48); Taggart Service Ltd., supra at footnote (52); Wolverine Tube, supra at footnote (54); Serv-Air Inc. v. N.L.R.B. (CA-10), 57 LC #12,425 (1968).
100 Mylan Sparta, supra at footnote (87); Guyan Valley, supra at footnote (35); Ancor Industries, supra at footnote (72).
101 Wolverine Tube, supra at footnote (54).
The Canadian Boards view this type of behaviour as the corollary to promises to increase benefits. In fact, threats of reprisals are probably even more intimidating and are viewed with great alarm in each jurisdiction. The N.L.R.B. seems to be more open-minded in assessing the impact of such speeches.

To constitute the tort of intimidation, the action must be a decisive as opposed to an incidental or trivial factor in the procurement of specific behaviour. Further the action itself must be illegal for the threat of doing something that one is allowed to do is not tortious.\textsuperscript{103} However, even if some behaviour would technically constitute a tort, it has not been the practice heretofore for the parties to proceed by way of court action. One of the reasons I suspect for this pattern is the inappropriateness of traditional court remedies to solve the real problem.

(4) Interrogation of Employees

One of the most interesting areas related to the question of employer free speech is the issue of whether an employer is able to make inquiries of his employees concerning events of an organizational campaign. Often during such a campaign, an employer will wish to find out what really is happening around the plant and will question his employees.

It is clear that the B.C. Board does not look kindly on this type of behaviour. In the Buckley case\textsuperscript{104} where the manager called in two employees and "grilled them extensively" concerning the union's activities, it was

\textsuperscript{103}Fleming, supra at footnote (75) at p. 613-614.

\textsuperscript{104}Buckley Vally Forest Products B.C.L.R.B. Decision No. 17/76.
felt that this was an overt act which gave the appearance of opposition to the union organizing activity and as such should be prohibited. Similarly, where an employer visits an employee at his home to find out "where we stood" and the employee then submits his resignation from the union, it will be concluded that the interrogation has obviously intimidated the employee\(^1\) and has violated Section 3(2)(c) and Section 5.

The interrogation can be either in writing (questionnaires) or oral and still constitute interference with union activity.\(^2\)

It appears that there may be room, even in B.C., for an innocent questioning of an employee about what generally is happening but any direct questions concerning his own opinions or his membership status will lead the Board to conclude that the employer is interfering.\(^3\)

In the United States, interrogation of employees concerning union membership and activities, which when viewed in the context in which the interrogation occurred, falls short of coercion or intimidation is now lawful. The mere fact that an interrogation is done in a systematic and organized manner does not in itself impart a coercive character to the questioning.\(^4\)

However, the calling of employees into the office to interrogate them concerning not only their own but also others' membership and activities without any legitimate explanation for the interrogation or any assurance

\(^{105}\) Kidd Bros., supra at footnote (68).

\(^{106}\) Langley Advance, supra at footnote (63).

\(^{107}\) Cam Chain, supra at footnote (78).

\(^{108}\) Blue Flash Express 109 N.L.R.B. 591 (1954); Guyan Valley Hospital, supra at footnote (35).
against reprisal would constitute coercion. 109

In the U.S. to constitute coercion, the interrogation must meet certain severe standards. These include:

(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees (e.g. who are the ring leaders? or who has joined?) or was the information sought quite general as to the majority status of the union (e.g. how is the union doing?, or are the employees for the union?)

(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?

(5) Truthfulness of the reply. (If the answers given were incorrect that would constitute evidence of fear). 110

The N.L.R.B. has even set out the safeguards the employer should observe in polling employees for their views:

(1) the poll must be for the purpose of determining the truth of a union claim of a majority; and

(2) the purpose of the poll must be communicated to the workers; and

(3) the employer must assure the employees there will be no reprisals; and

(4) it must be by secret ballot; and

(5) there must be no other unfair labour practices committed. 111

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109 Syracuse Color Press 103 N.L.R.B. 377 (1953) enforced in N.L.R.B. v. Syracuse Color Press, 2nd Circ. 209 F 2d 596 (1954); Guyan Valley Hospital, supra at footnote (35); Speed Queen, supra at footnote (73).


Normally, the N.L.R.B. has found interrogation practices to constitute coercion if management has also employed other doubtful tactics along with the questioning. However, one single and isolated instance of interrogation or casual remark, although designed to interfere with the employees free choice, has been held to be insufficient to prevent the exercise of an employee's freedom of choice. Similarly, every remark by an employer to an employee with whom he deals on a day to day basis concerning union sympathy and activity is not coercion. To be safe, the interrogation should take place for legitimate purposes and with assurances of non-reprisal.

Interrogations which due to the surrounding circumstance constitute coercion or intimidation are prohibited under the Ontario and Canadian statutes as well.

(5) Institution of a Petition

While strictly not part of the free speech doctrine, the circulation of a petition by an employer which solicits anti-union support borders on expression of opinion and hence will be treated here.

112 See for example: Armcor Industries 535 F2d 239; N.L.R.B. v. United Aircraft, supra at footnote (81); N.L.R.B. v. Townhouse TV and Appliances Inc. 531 F2d 826 (1976).


116 Sun Tube, supra at footnote (48).

117 Taggart Service, supra at footnote (52).
In B.C., the Board has held that the employer should not behave in this manner and not be an active participant in the solicitation of employee dissatisfaction. However, the mere fact that an employer is aware that a petition is being circulated by a group of employees and does nothing to stop it is not an unfair labour practice.

In the other jurisdictions, management's participation in the circulation of a petition has been found to merely serve to undermine the purpose of the petition (e.g., to request a vote even though a majority of the employees have signed union cards) rather than to constitute an activity which affects the exercise of their free choice. However, if the employees are intimidated or coerced into signing, this would be viewed in a very different light.

The Ontario Board seems to have taken a strong stand. In the Winson Construction Ltd. case, it was held that employer involvement in the origination, preparation or circulation of a petition was a contravention of Section 56 and thereby an unfair labour practice.

(6) The Holding of a Meeting

The holding of a meeting by the employer to discuss union organization has been prohibited in British Columbia under the bar against any

118 Langley Advance, supra at footnote (63); Forano, supra at footnote (64).
119 Quadra Mfg. B.C.L.R.B. Decision No. 97/74.
120 Rubbermaid Canada Ltd. (1967) OLRB 336; New Ontario Dynamics Ltd. (1975) OLRB 845.
121 supra at footnote (49).
interference whatsoever (Section 3(1)). It should be noted that the old Section 3(2)(f) was also used to restrict this type of behaviour. It seems that the Board would hold this an unfair labour practice regardless of the contents of the actual statements made at the meeting. To say anything (which is a distinct possibility at a meeting) is to interfere. The Board seems to view the mere presence of management as interference. In most cases, it is also found to be coercive. For example, in the Kidd Brothers case,\textsuperscript{122} when the employer and his lawyer attended at the strike vote for the ostensible purpose of ensuring it would be carried out fairly and impartially, the Board found their attendance to be coercive. In that case there was also a number of other unfair labour practices present but this behaviour in itself would undoubtedly meet with the disapproval of the Board.

In Ontario, the Board seems to prefer to deal with the effects of the meeting. It views anything which results from such an event with great suspicion. For example, the Board will often dismiss employee petitions which originate following a meeting with management.\textsuperscript{123}

In New Ontario Dynamics Ltd.,\textsuperscript{124} the Board noted that "... such meetings convey the anti-union sentiments of the management regardless of their content and, because of this, tend to taint the following efforts of

\textsuperscript{122}supra at footnote (68); see also Fairmont B.C.L.R.B. Decisions Nos. 56/75 and 64/76.


\textsuperscript{124}supra at footnote (120).
employees who decide to oppose the application. In fact the very formality of holding such meetings demonstrates an employer's concern, and may, in the eyes of other employees, align with management those employees subsequently circulating a petition."

The repeated use of a "captive audience" technique when combined with other coercive practices will constitute an unfair labour practice in Ontario. This policy was established as early as 1960 in the Savage Shoe case and has been reiterated on many occasions. In 1975, the Board stated:

The employees could not avoid hearing Mr. Young's message and the applicant trade union was not afforded equal opportunity to reply. More importantly, the content of the Monday address was not a neutral recitation of fact or a specific response to propaganda emanating from the trade union but an apocalyptic prediction based upon pure speculation. Because of Young's position and the fact that his speculations were tied to job loss and the bankruptcy of the respondent, we find that the speech was capable of unduly influencing employees assembled to listen to it. We emphasize that this was not a reasoned address delivered in the course of a secret ballot representation vote but rather a string of catastrophic predictions followed by the public circulation of a document.

In fact, the convening of "captive audiences" when combined with other coercive practices may lead the Board to automatically certify the union because the true wishes of the employees would not be disclosed by a vote.

125 Sun Tube, supra at footnote (48)
126 supra at footnote (45).
127 supra at footnote (120).
128 May Department Store 136 N.L.R.B. 797 (1962).
In the United States, the captive audience doctrine operates to the effect that if the employer wishes to address the employees in a captive audience setting, then equal time must be afforded the union. Therefore, the mere holding of meetings is not prohibited per se.

In the *May Department Store* case of 1962, the N.L.R.B. reaffirmed the *Bonwit Teller* rule to the effect that if there is a no solicitation rule in effect at the employer's place of business, then his use of a captive audience merely gives rise to an obligation to give the union equal time.

However, the N.L.R.B. will look at the contents of what was said and the other circumstances (including that it was a captive audience) as to whether coercion was present.

An adjunct to the captive audience doctrine is the Names and Addresses policy. In 1969, the Supreme Court finally settled that the N.L.R.B. has the power to require the names and addresses of all employees in the proposed bargaining unit be given to the union. This allows each party equal access to the voters in the case where the N.L.R.B. has ordered a representation election thereby further offsetting to some degree, the benefits that can be granted in addressing a captive audience. The section dealing with this policy was repealed from the B.C. Code and will be dealt with below in the section on remedies.

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129Ibid.
130supra at footnote (24).
The Canadian Board does not seem to be concerned with open addresses to the employees (it will of course review the context and content of their meeting) but it appears to take a very dim view of the use of the captive audience technique. In the City and Country Radio\textsuperscript{132} case, the Board indicated its concern with the fact that the employee does not have the option of turning off the employer. When this is combined with any other suspicious behaviour, there is likely to be a finding of an unfair labour practice.

A particularly interesting decision was recently handed down by the Canada Board in a case where the employer, a bank manager, had a very emotional and tearful "encounter session" with his employees upon discovering that there was a movement to unionize afoot in the branch. However, the manager reconvened the group later in the day, apologized for his remarks, indicated that the employees were free to do as they wished and that he did not wish to violate the provisions of the Labour Code. The Board appeared as touched by the later meeting as the employees had been by the first one and dismissed the unfair labour practice charges even though the anti-union employees had used the employer's stationery, facilities and postage meter albeit without management's knowledge. This, however, is obviously a very odd fact pattern and it would not be the safest approach for other employers to follow.

(7) \textit{Propaganda}

Once again, the B.C. Board has prohibited any behaviour on the part of management related to the expression of their opinions concerning unions.

\textsuperscript{132} supra at footnote (132).
Naturally, this includes what is known as "election propaganda" during an organizational campaign.

However, the N.L.R.B. and the Ontario Board are far more permissive. In Ontario the test is whether the propaganda would be considered by the average employee in the context that it was made as ordinary electioneering propaganda or whether it would have the effect of impeding the ability of the employees to express their true wishes and thus destroy the effect of a representation vote. The Board has indicated that it will give the employer some leeway for it does not wish to "police election campaigns or to consider the truth or falsity of campaign literature or speeches unless the ability of the employees to evaluate (it) ... is impaired".

In one case, the employer sent two letters to the employees but these did not contain what could be considered coercive statements. The Board held that in the absence of any intimidation, they would not police or censor propaganda. That was the task of the opposing party. Exaggeration, inaccuracies, partial truth, name-calling, and falsehoods may be excused as legitimate election tactics as long as they were not so misleading so as to present the exercise of the employees' free choice.

In reaffirming its position (originally taken in the Savage Shoes Ltd. case) that regard must be had to all the circumstances of the case,

133 Valley City Manufacturing Co., supra at footnote (46).
135 Alcan Building, supra at footnote (48).
136 supra at footnote (45).
the Board noted in *Alcan Building* that the employees must be credited with a modicum of common sense:

"While the material published by the respondent may be open to challenge on the grounds of accuracy or exaggeration and may, when viewed by ardent supporters of the trade union, be interpreted as highly objectionable falsehoods and name-calling, because of the sensitivity of such supporters to any such activity on the part of an employer, we are of the view, however, that these statements, when viewed by the average employee, would be accepted as normal election propaganda to be expected from an employer. Such employees have the benefit of the leaflets distributed by the applicant union which counter-balance to a large degree the statements made by the respondent. We are of the view that the average employee has the mental capacity and the necessary experience to assess this type of propaganda in a proper way and would not be unduly influenced thereby."

A statement by the employer to the effect that wage parity with another company is impossible because of the different levels of competition in the industries is permitted under the Ontario Code. The Board will not pay attention to either the most gullible voter or the one of firm convictions. If the statements are obviously propaganda, they could not be said to interfere with the free expressions of the voters.

The American position is essentially that election propaganda is permissible and the N.L.R.B. will only intervene if the material constitutes coercion or intimidation.

However, to the extent that this propaganda may have some effect,

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137 *supra*, at footnote (48) at pp. 807-8.
138 *Hostess Food Products*, *supra* at footnote (80).
139 *Stauffer-Dobie Manufacturing*, *supra* at footnote (134); *Savage Shoes*, *supra* at footnote (45).
both the Ontario and American acts place time restrictions on such
electioneering and these will be examined below in Subsection 9.

(8) Movies

One very interesting aspect of election campaigning is the use of
movies to persuade the voters. Two movies, "And Women Must Weep," and,
"A Question of Law and Order," have been subjects of complaint before the
Board in the United States.

The movie, "And Women Must Weep" was described by the N.L.R.B. in the
Plochman-Harrison case:

This movie, based upon the above letters, was
ostensibly a true account of the Potter-Brumfield
strike. It was, however, a dramatized production
rather than a documentary film. The staging,
acting, and direction were performed by persons
skilled in this medium. The competence of the
cast and the excellence of the production resulted
in a moving story of callous union leaders, a
helpless employer, unfortunate victims, including,
as a climax, the above-mentioned incident involving
the infant, violence, fear, and hatred in an
unnecessary strike for no justifiable reason.140

And further in the Mason Co. case:

I have no doubt that among audiences of working men
and women, as well as others, "And Women Must Weep"
is emotionally overpowering. It pictures a labour
dispute as one in which Americanism, religion,
family, motherhood, and innocent childhood are arrayed
on one side, and goons, brutes, and murderers on the
other or pro-union side.141

"A Question of Law and Order" is described in Ideal Baking Company142 case:

140 N.L.R.B. 130 (1962) at p. 131.
142 supra at footnote (29).
Briefly, the film shows various scenes of mass picketing and attending violence, including physical beating of various persons attempting to enter a plant being picketed, stoning and overturning of cars, and other damage. At one point, the scene shows a person lying, apparently unconscious, in a street. The film closes with the narrator's plea for law enforcement in cases involving labour violence, and with additional scenes of violence, presumably in the course of labour disputes.

In the Plochman case, the N.L.R.B. (despite a strong dissent) felt that the movie ("Women") constituted part of a scenario which in total amounted to an unfair labour practice. The employer had also resorted to inflammatory speeches and pamphlets which when combined with the emotional reactions to this very dramatic film resulted in "misrepresentation which exceeded the bounds of permissible campaign propaganda ...".\(^{143}\)

It took a similar position in Ideal Baking Company where the movie (Law and Order) was shown "as a final tactic" at a company-sponsored dinner for the employees and their families the night before the election. After the Board again found that the film "And Women Must Weep" violated the Act in the Southwire Company\(^{144}\) case, the employer appealed. The Court of Appeal reversed the decision on technical grounds and indicated the Board could not simply forbid the film to be used on all occasions regardless of the circumstances.

In the Speed Queen case, the N.L.R.B. has attempted to doom once again the film. After reviewing the Court of Appeal's decision in Southwire, the Board held that the circumstances of that specific case before the Board was such that the showing of the film was "coercive, constituting a threat of reprisal or force ... (such that the employees could) anticipate

\(^{143}\) supra at footnote (140) at p. 133.

\(^{144}\) 159 N.L.R.B. 394 (1966).
disastrous economic and social effects and danger to the physical well-being of themselves and members of their families."

However, more recently, the Board has reversed its position. In three decisions, namely Harveswille Rolling Mill, Heckethorn Manufacturing Co. and Litho Press, they indicated that the mere showing of the film in the absence of any other objectionable conduct will not violate the Act and that all other decisions which are inconsistent with this policy are overruled.

For the time being, that is where the case rests. As far as these particular films are concerned, they are now very outdated and it is suspected ineffective. That may in part explain the Board's position in allowing their presentation. A new and more effective film may not be treated as kindly.

(9) Time Restrictions

Before proceeding to an analysis of the Federal and B.C. Legislation, we should note that the U.S. and Ontario further restrict the rights of the employer (and the union) for a period immediately preceding the representation vote.

In Ontario, the Board has the power to direct that no propaganda or electioneering can occur for the 72-hour period immediately before the vote.

\[145\] \textit{supra} at footnote (73).
\[146\] 204 N.L.R.B. No. 42 (1973).
\[147\] 208 N.L.R.B. No. 46 (1974).
and will normally do so. This strict prohibition is then virtually absolute and any violation of it (regardless of the quality or the likely effect of the propaganda) may bring severe remedies (such as the holding of a new vote). 149

The reason for this rule was set out in Rogers Majestic 150 and has been cited on a number of occasions: 151

"Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures or influences as the voting day approaches. The Board's view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he shall vote." 152

In cases where the rule has been broken accidentally (e.g. mail was delayed unexpectedly) the Board may overlook the violation if in its opinion, no serious harm was done. There is, however, a heavy onus on the violator to prove it was accidental and did not have serious repercussions. 153

The union was unable to prove convincingly that it had undertaken such precautions in the Regional Municipality of Halton 154 case and the Board held that it had posted the letters at its own peril. Similarly, if

150 DLS 7 - 1382.
151 supra at footnote (54) at p. 1228.
the eventual vote is overwhelming, it is unlikely the Board would be overly concerned with an incidental violation of this restriction. Where a unintentional violation does exist and the other party (e.g., employer or rival union) could easily act to correct it, they must do so and not simply "wait in the bush" in the hopes of overturning an unfavourable vote on a legal technicality.155

In the U.S. there is a similar restriction known as the Peerless Plywood rule. The employer is not permitted to issue election propaganda within 24 hours of the election on company time. The rule is explicit in establishing that: "Employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within twenty-four hours before the scheduled time for conducting an election to be set aside whenever valid objections are filed."156

The effect of these prohibitions is of course to limit last minute assaults when the other side is denied a full opportunity to contest the points made. It is certainly a useful device but does not, in our opinion, really solve the major questions before us.

(10) Conclusions

When judging these individual types of behaviour, each of the Boards will in effect look at the totality of the conduct of the employer. Even in B.C., although each of the above courses of action is in theory an unfair

156 supra at footnote (26); see also Mallory Capacitor Company, 167 N.L.R.B. 647 (1967).
labour practice, we suggest that it is the degree to which the totality of conduct interferes with the union that will determine the specific remedy imposed.

It should also be noted that the Boards seem to apply an objective rather than a subjective test in their characterization of this type of behaviour. The issue is whether the activity might have had an effect.

It should be noted that in many cases the occurrence of an unfair labour practice will merely give rise to an informal intervention by the Board. In many cases, tactics such as those discussed in this section will occur inadvertently and rather than stamping the employer as a violator of the legislation, the Board will be satisfied to see the offending behaviour stopped without the necessity of a formal order. The B.C. Board certainly is in favour of playing its role in a mediative way whenever possible in any type of dispute under the Code. Of course in some situations, the employer is cognizant of his wrong-doing and the Board will have to deal with the problem in a more formal manner. We are now ready to proceed to a discussion of the remedies available and when they will be used in each of the jurisdictions.

C. Remedies

(1) General

One of the critical areas related to employer free speech that has not been emphasized in discussions and articles is that of the remedial

157 Please refer to Appendix 2 for the actual provision in the legislation of each of the jurisdictions.
powers of the various Boards. It is one thing to declare that some activity is unacceptable; it is a totally different thing to do something about it. The mere fact that something is an unfair labour practice may not dissuade an employer; only an effective remedy will do that.

The real difficulty is in arriving at a remedy that will effectively dissuade the employer as well as protect the employees' rights to exercise their free choice. The employment of extreme remedies which would guarantee absolutely no interference of any kind under any circumstances would simply not be equitable in many instances. Conversely, inadequate remedies would render even very strict restrictions quite meaningless. Therefore, a balance must be struck not only by a careful wording of the actual restrictive provisions but also by having a reasonable and effective group of remedies available.

(2) Cease and Desist Order

The most basic remedy available to each of the Boards is the cease and desist order. This remedy is most appropriate when the violation of the Code is an on-going effort or in cases where an incident is likely to occur again. If the employer violates a cease and desist order, he is then liable in two ways; in the first place, he has contravened the Code again and secondly, he has disregarded an order of the Board which could then result in increased sanctions and ultimately in British Columbia to a filing of the order in the Supreme Court Registry. The order than becomes an order of that Court, contempt of which could lead to fines and even

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158 B.C. Code, Sec. 8 (4)(a); Ontario Code, Sec. 79(4)(a); Canada Code, Sec. 189; Taft Hartley Act, Sec. 10(a) & (c).
imprisonment.

However, as noted above, before branding an employer as recalcitrant by issuing a cease and desist order, the Board will attempt to solve the problem through mediation. If this is unsuccessful and the employer does not promise to comply, then the Board will issue an order and the "stigma" will be attached. Such an occurrence, while not of any concern to some employers, can be very damaging to others who are attempting to undermine a union's campaign and wish to appear responsible in doing so. An order of the Board directed against him may jeopardize their position in the eyes of the employees.

Unfortunately, however, these orders are effective only in limited circumstances. If an employer has knowingly or flagrantly violated the Code, it is doubtful how much impact a cease and desist order would have on him. He may either be willing to take his chances with the Board in order to attempt to beat the union for financial reasons or because in his "enlightened self-righteousness" he feels that it is his duty to crush creeping unionism. In these cases the order really has very little deterrent effect.

This remedy is a post facto mechanism to abort existing violations and is most useful against innocent but erring employers. Situations where there are continuous breaches of the Code would require the union to return to the Labour Board and seek other remedies.

Further an employer who is willing to face the wrath of the Board could engage in a campaign which is characterized by suddenness and brevity. In fact, in many cases, this would be the most effective type of campaign and to discourage this type of behaviour from occurring the Board must have available other remedies under the Code.
(3) Ordering of a Representation Vote

In cases where more than 45% but less than 55% of a bargaining unit have signed up, a representation vote is normally required. However, a vote can be required in two other circumstances. First of all, a new vote may be held where a prior rate is unlikely to have indicated the true wishes of the employees, i.e. less than 55% of eligible employees cast ballots.

Secondly, even in cases where more than 55% of the employees have signed up, if the Board is convinced that the signatures do not express the true wishes of the members, the Board can order a vote under Section 43(1).

The holding of a new vote is predicted on the assumption that the effects of the employer's practices have disappeared and the employees now feel they can honestly express their free will. The more serious and intimidating the behaviour of the employer, the longer it will have an effect on the minds of the workers. It does seem reasonable to conclude that the longer the period between votes, the more likely it is that the coercion has become remote. However, this time delay may in fact work to the employer's advantage in that the union organizers may lose interest, the pro-union workers may leave (with management's blessings) and/or the entire issue of union representation may lose its appeal.

This is not to say that the above will happen in every case but we should be aware of the problems inherent in the use of this remedy. It can be effective in some circumstances and in many situations it may have the effect of nullifying the employer's actions. There are as has been pointed out, however, disadvantages as well as advantages to the passage of time.

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159 B.C. Code, Sec. 43(2).
160 B.C. Code, Sec. 45(4).
As well as requiring a new vote at a later date, the Board may also combine this order with other corrective action. For example, during this period, the employer can be prohibited from making any remarks whatsoever concerning the election. 161 This area is covered more fully in the next section.

The Board will employ these types of directions in situations where a cease and desist order is not sufficient primarily due to the possibility of continued violations. The Board would also have to be of the opinion that more serious remedies are not appropriate inasmuch as the effects of the employer's behaviour can be counter-balanced by the passage of time and minor corrective surgery. Therefore, in cases where even a lengthy time delay will not, in the opinion of the Board, provide for a truly free expression of the will of the employees, more serious measures will be adopted.

(4) Corrective Action

The British Columbia and Ontario Acts confer upon their respective Boards the power "to rectify the act" which constituted the unfair labour practice. 162 The Taft-Hartley Act allows the N.L.R.B. to "take such affirmative action ... as will effectuate the policies of this Act." 163

These provisions offer a great deal of latitude to the Boards in effecting the purposes of the Codes. To limit effectively the perpetra­tions of unfair labour practices upon the employees, the Boards will have to exercise their creativity under these sections increasingly.

161 Forano, supra at footnote (64); Cannery B.C.L.R.B. Decision No. 57/74; Cam Chain, supra at footnote (78); Fairmont, supra at footnote (68).
162 B.C. Code, Sec. 8(4)(b); Ontario Code, Sec. 79(4)(b).
163 Taft-Hartley Act, Sec. 10(c).
The B.C. Board has used corrective action in situations where an employer has unfairly influenced his employees (through speeches and other actions). The Board in those cases ordered a vote to be held after a certain period of time and in the interim permitted the union:

1. to address the employees on the company premises;
2. to hand out literature at the meeting;
3. to return one more time before the vote to distribute further information.

The B.C. Board has also indicated by way of obiter that a monetary award could be appropriate in cases where any other remedial order would be ineffective and/or would be disobeyed.\(^{164}\)

Another remedial power that has been employed is an order for the employer to deliver to the union a complete list of names, addresses and telephone numbers of the employees in the proposed unit. The original version of the B.C. Labour Code did not contain any express provisions related to this area, but in 1975, an amendment to the Code added the following section:

\[\text{S.4(2). Where, in an application in writing to the board, a trade-union declares that it intends, for the purposes of section 39(1), to attempt to persuade the employees of a unit to join a trade-union, the board may direct that the employer of those employees deliver to the trade-union a complete list of names, addresses and telephone numbers of the employees in the intended unit, or both, as requested by the trade-union. 1975, C. 33, S. 3.}\]

This new section did not enjoy an overly long life and was subsequently deleted from the Code by the amendments in 1977. However, there

\[\text{C.L.R.A. v. I.B.E.W., B.C.L.R.B. Decision No. 75/76 at p. 38.}\]
is nothing in the Code which expressly prohibits the Board from granting this type of remedy under its general authority in Section 8(4)(b) "to rectify" an unfair labour practice. Hence, such an award could still be forthcoming in situations where the Board would feel it is appropriate. To determine when this would be likely, one can refer to the decisions of the Board dealing with the old Section 4(2)(b).

In the British Columbia Railway Company\(^{165}\) case, the Board dealt at some length with this issue. The Board had received objections from the employees that this was "classified information" or that they did not wish to be bothered at home by union organizers. Objections from the employer included that this section was designed only to provide this information before a certification. Application had been made and in any event that as this was a discretionary remedy, the Board should follow that policy even if the section did not read precisely that way. Their argument was that, as this was a section designed to facilitate the unions persuading the employees to vote for certification, it only made sense to grant it prior to the certification.

The Board discussed these objections at some length and concluded that there were a number of circumstances that would make this type of order a useful technique. In cases where there may be employees whose existence is unknown to the union, e.g. in industry-wide bargaining situations, or a large and geographically dispersed membership, a lack of knowledge concerning their status may unfairly prejudice the vote or even if a certification is granted, affect the relationship between the trade union and the "ignored

\(^{165}\)B.C.L.R.B. Decision No. 20/76.
members" after the vote.

However, the Board did not make such an order as a matter of course. The union's organizational campaign must have been an "imminent reality" and not merely a ploy by the union to acquire the lists without doing any prior groundwork.

By adopting this policy the Board essentially followed the policy of the N.L.R.B. in the United States. In the U.S., where elections are the normal method of obtaining certification and the employers, as we have seen, do have considerably more latitude in expressing their opinion, the requirement to furnish the union with this information is quite commonplace.

After quoting at length from the Excelsior Underwear case in the U.S., the B.C. Board expressed the opinion that this remedy would still be valuable here in the circumstances outlined above. Therefore, it would seem at this time that the Board would have the authority to issue such an order under Section 8(4)(b) but only in the event that an unfair labour practice has been committed and that it felt that the union's access to this information would effectively counter-balance that breach of the Code.

(5) Make Whole Remedy

One of the more creative approaches taken under the rectification provisions has been the "make whole" remedy. The essence of this remedy is to restore the situation to that which would have existed but for the unfair labour practice. It should remove the benefits to be gained from stalling or other related tactics. This type of order is most effective

\(^{167}(1966)\) CCH N.L.R.B. Para. 20,180.
where there has been repeated or flagrant violations of the Acts. The ob-
jective of order is to give "effective redress for a statutory wrong ... to compensate the party wronged and withhold from the wrong-doer the fruits 
of its violation." 168

When one also looks at the broad powers conferred by Section 27 and 
particularly by the amendments in Section 28 of the B.C. Code, it is appar-ent that the Board's remedial powers are extensive enough to support these 
orders.

The Board itself notes:

The legislative policy underlying this expansion of 
the Board's remedial authority has at least two 
dimensions: first to establish a wider range of 
alternative remedies in the law and to eliminate any 
artificial restrictions on the type of remedy which 
may be ordered; and secondly, to provide the Board, 
which is the chief agency for giving effect to the 
law, with a general mandate to design and apply 
remedies which will respond to the needs of the par-
ticular labour relations dispute or problem in hand. 
(See Debates of the Legislative Assembly (Hansard) 
5th Session, June 25, 1975, especially at pp. 3973 
to 3975). 169

In the United States where this remedy originated, the N.L.R.B. 
has ordered the employer to reimburse the union and the Board for litigation 
expenses, mail copies of the Board's notice to each employee or give the 
union access to the union's bulletin board. 170

In the U.S. the N.L.R.B. has ordered the union to be "made whole" 
by requiring the employer, in certain circumstances to compensate the union


169 Kidd Bros., supra at footnote (68) at p. 322.

for lawyer's fees, litigation expenses and extraordinary organizational costs.\footnote{171} The N.L.R.B. in the Ex-Cello-0\footnote{172} case remedied an employer's refusal to bargain by ordering the latter to compensate all employees to the extent that they would have received wages and benefits if the employer had bargained, i.e. not committed the unfair labour practices.

The two major cases in which the B.C. Board has adopted this remedy involved a great deal more than "employer free speech". In both cases the employer had also committed numerous unfair labour practices (e.g. dismissal of employees, failure to bargain in good faith) and had not properly obeyed previous orders of the Board.

The purpose of this remedy according to Paul Welier, former Chairman of the B.C. Board, is two-fold. It expands the type of relief a union can expect if illegally frustrated by an employer and secondly, it acts as a strong "dissincentive" for the employers to violate the code.\footnote{173}

In the Kidd Bros. case, the Board made extensive reference to its letter decision in the Robinson Little case and then summarized the situation when a "make whole" remedy would issue:

\begin{quote}
The result of this conduct has meant that the Union has never obtained the rights and status it should have obtained with certification. Because of the Employer's contraventions, the Union's efforts have been a futile exercise, whereas the Employer through its contraventions has achieved the objective it has obviously desired from the outset. The Employer has
\end{quote}


\footnote{172}\footnote{173}185 N.L.R.B. 107 (1970).

\footnote{173}In an interview published in the Vancouver Sun, August 9, 1977.
fought off, waited out and ultimately defeated the Union's presence and support among its employees. In sum, the original choice by the majority of employees, in favour of collective bargaining through trade-union representation, has been totally aborted by the persistent illegal conduct of the Employer. In these circumstances, a cease and desist order which merely required the Employer to comply with the Code in the future would be of no more remedial value than the previous orders. In the words of the Court in Tiidee #1, the Employer has already harvested the "fruits of its violations". Moreover, it would not in our view be consistent or in furtherance of the objects and policies of the Code as set out in S. 27. In particular, it would not enhance the objects set out in S. 27(1)(b) since it would merely freeze the status quo and thus give encouragement to an employer who would engage in unfair labour practices for the purpose of avoiding "the practice and procedure of collective bargaining between employers and trade-unions as the freely chosen representatives of employees". For these reasons, the Board has concluded that this case is an appropriate one for the issuance of a "make whole" order. 174

In Kidd Bros., the Board noted that it was using this remedy because the employees' support for the union could not be recaptured. 175

The Board may order that a union be compensated for expenses where certification had been achieved by the union but then lost due to the employer's action which had been directly responsible for the loss of support among the employees. 176 It may also be used in a situation where the union fails even to unilaterally obtain a certification. However, this "make whole" remedy is not automatic; it is only inevitable where the employers use such unfair tactics that this type of order is the inevitable compensation for the union's futile efforts and expenses. 177

174 Kidd Bros., supra at footnote (68) at pp. 324-5.
175 Ibid.
176 Ibid.
177 Fairmont, supra at footnote (68).
It must be remembered that we are discussing a remedy and not the imposition of a penalty. To this end, the violation of the Code must have resulted in losses to the union which can objectively be assessed.

In Kidd Bros. the B.C. Board has ordered the employer to pay $5,000 to reimburse the union for the payment of lawyer's fees, litigation expenses and organizational expenses which were directly attributable to the Employer's misconduct. More recently, Robinson Little was ordered to pay the following:

(1) $7,892.67 for collective bargaining and organization expenses incurred by the union during its representation of Kamloops workers between December 1, 1974 and September 30, 1976;

(2) $12,965.65 for legal costs incurred by the union during the dispute;

(3) $22,885 to the eight fired workers;

(4) $4,500 to the attorney-general's department;

(5) In addition, there is an amount still to be determined that was absorbed by the union in its work on the chain's constitutional challenge.

This remedy is undoubtedly very effective but obviously will only be used in extreme cases and when the violations of the code have been frequent and extensive.

(6) Automatic Certification

In the case of unfair labour practices, one of the severest and most effective disincentives would be the automatic certification of the union in the face of the commission of such action by the employer. The effect of
this remedy would be to discourage employers from using these tactics by removing the benefits of this unlawful conduct. 178 We will now examine how this remedy is handled in each jurisdiction.

(a) British Columbia

The B.C. Code contains provisions for the granting of automatic certification where the Labour Board feels it is appropriate. Section 43(3) states:

Notwithstanding any other provision, where the board is satisfied that a representation vote is unlikely to disclose the true wishes of the employees, the board may certify or refuse to certify that trade-union as the bargaining agent for the unit without directing that a representation vote be taken; but the board may impose such conditions as it considers necessary or advisable upon the trade-union, and, if the conditions are not substantially fulfilled to the satisfaction of the board within twelve months from the date of certification, or within such lesser period of time as the board may order, the certification shall be deemed to be cancelled. 1973 (2nd Sess.), C. 122, S. 43.

Section 8(4)(e) states:

S. 8(4) Where, on inquiry, the board is satisfied that an employer, trade-union, or other person is doing, or has done, any of the acts prohibited by section 3, 4, 5, 6, or 7, the board ...

(e) may, if the employees affected by the order are seeking trade-union representation, certify or refuse to certify the trade-union, notwithstanding that, by reason of an act prohibited by section 3, 4, 5, 6, or 7, the true wishes of the employees cannot be ascertained; but the board may impose such conditions as it considers necessary or advisable upon the trade-union, and, if the conditions are not substantially fulfilled to the satisfaction of the board within twelve months from the date of the certification, or within such lesser period of time as the board may order, the certification shall be deemed to be cancelled.

178 Forano, supra at footnote (64).
Although the sections appear similar, there are in fact differences. Section 43(3) would seem to apply in cases where a representation vote would otherwise be appropriate; for example, if between 45-55% of the unit have signed union cards and the Board feels that for whatever reason a vote would not indicate the true wishes of the employees then this section could be invoked. Section 8(4)(e) on the other hand, can be used in cases where there has been a finding of an unfair labour practice, i.e., a violation of Sections 3, 4, 5, 6 or 7. It is with this section that we are concerned in this paper.

In the case of an automatic certification order under Section 8, the Board may impose any conditions it considers necessary or advisable upon the trade union.

For example, in cases where the Board is concerned about the level of trade union commitment, it might issue as a condition of the certification order, a requirement that the union hold regular meetings with the employees or constitute a special committee to pay particular attention to that local.

The mere fact that an unfair labour practice has been committed is not automatic grounds for certification or decertification. This remedy will be warranted only if the employer's actions were serious enough to obscure the true wishes of the employees. For example, if a company's only breach of the Code is the initiation of a wage increase while certification was pending, a certification will not be granted. Similarly, the fact

180 Consumer Pallet, B.C.L.R.B. Decision No. 37/74.
181 Quadra, supra at footnote (119).
that employees leave their jobs during working hours to attend a union meeting is not sufficient grounds for a decertification of the union. Even if the union had been involved in the activity and thus been in breach of Section 4 of the Code, decertification would not be the proper remedy.\textsuperscript{182}

The Board has historically held that this remedy would only be used if it felt that the union's organizational drive had some momentum and a majority was very likely.\textsuperscript{183} Therefore, they would not make an order unless a significant group of the employees have been signed up\textsuperscript{184} and therefore the Board must make an informed judgment about the choice the employees would have made if these tactics had not been used.\textsuperscript{185}

The actions of the employer must sufficiently influence his total number of employees to the extent that their true wishes cannot be determined.\textsuperscript{186} Where there is some doubt, the Board would look at the ballots to determine the extent of the union's support and if the vote was clearly anti-union, the Board would not order certification.\textsuperscript{187} With all these restrictions, it is not surprising that this remedy has not been used very often.

\textsuperscript{182} Utah Mines, B.C.L.R.B. Decision No. 40/74.  
\textsuperscript{183} Forano, supra at footnote (64).  
\textsuperscript{184} Sandman Inn, B.C.L.R.B. Decision No. 23/75; Cam Chain, supra, at footnote (78).  
\textsuperscript{185} Forano, supra at footnote (64).  
\textsuperscript{186} Reddi Gas, supra at footnote (69).  
\textsuperscript{187} Ibid.
In fact, in the years 1976, 1977 and 1978, the B.C. Board granted only two such automatic certifications.\textsuperscript{188} Of course, it should be noted that in some cases where such applications have been made, the unions have succeeded in ultimately acquiring the required signatures to obtain the certification under Section 45 or 43(3).

The Board has indicated\textsuperscript{190} it may take a different approach to applications for immediate certification under Section 8(4)(e). In the Beechwood\textsuperscript{191} case, an address by the employer to a captive audience was deemed to be interference under Sections 3(1) and 3(2)(f) which require a stance of strict neutrality on his part. In discussing the ensuing application under Section 8(4)(e), the Board seems to indicate that they will look more favourably on these applications in the future to make this section a "working reality".

The Board will now apply the following tests:

"In the future a union applying under Section 8(4)(e) need not demonstrate that the employees' wishes cannot feasibly be determined by a secret ballot because of employer unfair labour practices. Where as here, persons do not become employees because of employer hiring practices and an organizational campaign is frustrated as a result, the Board will entertain a Section 8(4)(e) application."\textsuperscript{192}

And further,

\textsuperscript{188} There were a total of 17 requests in 1978, 25 requests in 1977 and 18 in 1976, according to the Annual Reports of the Labour Relations Board in those years.

\textsuperscript{189} Of the sixty applications under Section 8(4)(e), 28 of those resulted in certification under Section 45 or 43(3).

\textsuperscript{190} Beechwood, supra at footnote (63).

\textsuperscript{191} Ibid.

\textsuperscript{192} Ibid., at p. 31.
"The test will not require the union to demonstrate that majority support would have been "very likely". Such a test is not only exceedingly difficult to meet but can encourage an employer to take drastic action early in the campaign. Rather, the Board will inquire whether it is reasonable to assume that the Union would have achieved majority support in the absence of employer interference. That judgment will depend not only on the actual stage of the sign-up drive but the nature of the employer interference and the likely effects it had on the employee constituency. Section 8(4)(e) will only become a meaningful feature of the Code if, like Section 3, it serves to preserve the employee freedoms of Section 2; it can only do so if the focal point of its application involves not only an assessment of the momentum of the organizational drive, but a realistic appraisal of the likely effects of the conduct of the employer.

The Board will also concern itself, as did the Forano Panel with the prospects for successful representation (based on a nucleus of membership support) of the employees if the union is certified."

The grounds are now there for widespread use of this remedy. Certainly if it is employed, the price an employer may potentially have to pay for an unfair labour practice could be a significant deterrent.

The Board has repeatedly said that the beneficiaries of this section are to be the employees, not the union. It is to be used where the Board feels the workers would have opted for the union if they had not been influenced by the employer. It will not be used to merely punish an employer for his conduct or even to appease an injured union. This remedy was not to be used as a tool for union organization; the union must basically do its own organizational work.

The certification will only be issued if there is a base from which to engage in meaningful collective bargaining so that certification would

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193 Ibid., at p.31-2.
not be just a futile gesture.

(b) **Ontario**

In Ontario, a 1975 amendment changed the section of the Code dealing with automatic certification.

The old section read:

If the Board is satisfied that more than 50 percent of the employees in the bargaining unit are members of the trade union and that the true wishes of the employees are not likely to be disclosed by a representation vote, the Board may certify the trade union as bargaining agent without taking a representation vote. Labour Relations Act, R.S.O. 1960, C. 202, S. 7(5).

Under the old test, it was necessary for the Board to find that an unfair labour practice had been committed. It was also true that the fact that an unfair labour practice was committed did not automatically result in the certification of the union.

The test the Board would employ was clearly enunciated in the Underwood Manufacturing case where it was held that if the employer's actions were likely to result in the employees submerging their desire to actively support the applicant, then a representation vote was unlikely to disclose their true wishes.

However, in reality, the effect of this section was that normally the reason that the true wishes would not be expressed was due to some intimidating or coercive behaviour by the employer. The wording of the section permitted the Board to avoid discussions of whether a particular action did or did not constitute an unfair labour practice and they could

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merely state that in their opinion, an expression of free choice was unlikely. In effect, we suggest it were indirectly stamping the behaviour with the character of an unfair labour practice.

The amended section now reads (as Sec. 7a):

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining unit found by the Board pursuant to Section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

1975 S.O. Chapter 76, Sections 4(3) and 5.

For the Board to accede to the request for automatic certification under this section, it must be satisfied:

(a) that the respondent employer contravened the Act; and

(b) that the contravention was such that the true wishes of the employees are not likely to be ascertained; and

(c) that the applicant trade union has membership support adequate for the purpose of collective bargaining in the appropriate bargaining unit.

The first test of course now means that an unfair labour practice must be committed. In theory, this is a change from the old section but we suggest that this was in fact what was required under the old section.

The second test indicates that the Board must be convinced "by some objective measure that the contravention of the Act, whether by an

overt act or subtly subterfuge is so perverse that the likelihood of a meaningful expression of employee views is lost". 196 It is clear that the Board will require an extremely serious case of employer misbehaviour before it concludes that the exercise of free will has been suppressed to such an extent that a vote is meaningless.

In the Winson Construction Limited case, the Board observed that the test to be used was that on the balance of probabilities the employer's behaviour had "such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it". 197 This, of course, can be a most difficult decision in a situation where the facts are not overwhelmingly one-sided.

The third part of the test in Ontario requires that the Board be of the opinion that enough workers wish to be represented (despite the employer's action) that the issuance of the certification would not be a totally futile exercise.

As in B.C., this remedy of automatic certification is not a vehicle to "evade the consequences of a vote but as a substitute where a vote is rendered nugatory by the employer's wrongdoings". 198

(c) United States

In the United States, the general practice is for a union to secure

196 Ibid., at p. 252.
197 Supra at footnote (49) at p. 719.
bargaining rights by winning a representation election. Either party may petition the N.L.R.B. to hold an election and if a majority favours the union, then a certification is granted.\footnote{199} Under the Taft Hartley Act, this is the only method of obtaining certification.

A company can extend voluntary recognition to a union on the basis of signed membership cards or other evidence but is is necessary that the union have in fact majority support in order to avoid a violation of Sections 8(a)(1) and 8(a)(2) of the Act (i.e., employer participation, dominance or interference). In this case, the union has status only as an uncertified agent of the employees.\footnote{200}

However, a third method has arisen which is known as an N.L.R.B.-issued bargaining order. The U.S. Supreme Court in the Gissel\footnote{201} decision of 1969 settled the issue to the effect that the Board could certify in a situation where the union has demonstrated (by cards, etc.) that they have a majority but that a fair election would be impossible due to the unfair labour practices of the employer.

The Gissel\footnote{202} case identified three categories of unfair labour practices.\footnote{203} The first set are characterized by such "outrageous and pervasive" unfair labour practices that the coercive effects cannot be eliminated by the use of traditional remedies in that a fair election could

\footnote{199}{\textit{U.S. Code}, Section 9.}
\footnote{201}{\textit{Supra} at footnote (33).}
\footnote{202}{\textit{Ibid.}}
\footnote{203}{Pettibone, Jon E., "Sec. 10(J) Bargaining Orders in Gissel Type Cases", \textit{Labour Law Journal}, Vol. 26, October 1976, p. 648 at 653.}
not be held.\textsuperscript{204}

Under this heading the Board will not require that the union show that it did in fact have the support of a majority of the employees at some point.\textsuperscript{205}

The Board can certify a union where a majority could not be shown due to the "flagrant and atrocious" practices of the employer which included interrogation and surveillance which amounted to coercion and intimidation.

The practices which the N.L.R.B. has found to fall into this category include the discharges of a significant number of employees,\textsuperscript{206} the threat of closing the plant,\textsuperscript{207} and excessively coercive interrogation, inducements and threats.\textsuperscript{208}

In these serious cases, the Board will order the employer to bargain either before any vote is taken\textsuperscript{209} or after the union has lost an election\textsuperscript{210} when it is obvious that the union's support has been destroyed.

With the exception of such extreme cases as \textit{J. P. Stevens}, however, it appears that the Board will in practice still require the union to show

\begin{itemize}
  \item \textsuperscript{204}\textit{Meat Cutters Local 576 v. N.L.R.B.} 89 LRRM 3124 (1975).
  \item \textsuperscript{205}\textit{J. P. Stevens v. N.L.R.B.} 441 F2d 514 (1971).
  \item \textsuperscript{206}\textit{Gissel, supra} at footnote (33); \textit{Welcome American Fertilizer Co.} 179 N.L.R.B. 217 (1969).
  \item \textsuperscript{207}\textit{Gissel, supra} at footnote (33).
  \item \textsuperscript{208}\textit{Mallow Plating Works Inc.} 193 N.L.R.B. 600 (1971); \textit{J. P. Stevens & Co. v. N.L.R.B.}, supra at footnote (205).
  \item \textsuperscript{209}Joy Silk Mills Inc. 85 N.L.R.B. 1239 (1949).
  \item \textsuperscript{210}Berne1 Foam Products Company 146 N.L.R.B. 1277 (1964).
\end{itemize}
it did have majority support at one time. The effect of this practice is to make the line between the first and second categories very difficult to discern.

The second category under Gissel is less serious offences which the Board still feels has undermined the majority position of the employer. To use a bargaining order, however, the Board must establish that the union had majority support at one point.211

The Court noted,

In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of enduring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that the employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.212

Under this category it seems that a bargaining order will issue when there are serious threats of economic reprisals relating to employment. The actual discharge of employees,213 the threat of discharge or plant closure214 and promises of significant benefits215 are examples where there is a long-lasting effect and a bargaining order will be issued.

211 See McDowell, D. and Huhn, K., supra at footnote (200) at p. 173-8; See also: Gresmac Corp. 205 N.L.R.B. 1108 (1973); Peerless of America Inc. v. N.L.R.B. 484 Fd 1108 (1973).

212 Gissel, supra at footnote (33) at p. 614.

213 Fotomat Corp. 202 N.L.R.B. 59 (1973); D. M. Rotary Press 208 N.L.R.B. 366 (1973); - It should be noted that the smaller the unit, the more coercive the discharge is likely to be considered.


This second category, however, is really only an adaptation of the procedures which are used under Section 45 in B.C. and Section 7(3) in Ontario that will permit certification without a vote if a majority of the employees are signed up. In these jurisdictions, a vote would not even be necessary and the issue of loss of union support would only arise if employees who were opposed to the union petitioned to the Boards. In that event, the Boards would likely insist they use the decertification procedures available under the Codes (Section 52 in B.C.; Section 49(2) in Ontario). It should be noted, however, that the decertification cannot occur in the first ten months (and in some cases, even longer in Ontario) after the certification.

The third class of behaviour under Gissel (minor or less extensive violations which constitute minimal interference) will not give rise to a bargaining order and the aggrieved party will have to rely on other remedies and then win the representation election.

D. 1977 Amendments to the Labour Code of British Columbia

As noted above, in September 1977, a number of amendments to the Code were passed by the Social Credit government. Some of these have a direct application to the doctrine of employer free speech and can be

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216 In the U.S. in the absence of an unfair labour practice a vote must be held even if a majority has been signed up - Linden Lumber v. N.L.R.B. 419 U.S. 301 (1974).

217 Strusknes Construction, supra at footnote (111); in this case, the employer conducted an illegal poll without any intention of undermining the union.

218 The full text of the amendments to Section 3 is attached as Appendix III.
summarized as follows:

(1) the removal of existing Sections 3(2)(a) and (f)\textsuperscript{219}

(2) the removal of the phrase "by any other means" from Section 3(2)(c)

(3) the addition of a phrase in Section 3(2) to the effect that nothing in the Act shall be so interpreted as to limit or otherwise affect the right of the employer ...

(g) to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business ...

The removal of Section 3(2)(a) really has very little effect because the former Section 3(2)(d) - (which became 3(2)(a)) really accomplishes the same thing.

The removal of Section 3(2)(f) in its entirety and the phrase "by any other means" from Section 3(2)(c) seems to indicate that the legislature was attempting to move toward limiting the Board to finding violations which are specifically cited in the Act. There can also be a case made for the proposition that the legislators wish to concentrate on specific threatening or coercive acts rather than on general activity that may result in intimidation in the indirect sense of dissuasion. In other words, the purpose of the amendment may be to prohibit behaviour that is clearly and openly identified as being unacceptable and not other kinds of activity which might be subjectively assessed as involving some degree of influence. Section 3(2)(c) is now apparently more closely aligned with Section 5 which restricts coercion and intimidation.

\textsuperscript{219}The former Section 3(2)(d) has become Section 3(2)(a).
It certainly appears that the legislature by the introduction of Section 3(2)(g) has attempted to give the employer some right to express his opinions.

The Labour Board will at some point be required to set out new guidelines for employers. To a very limited extent the employer was able to respond to inaccuracies and misstatements under the previous sections and this right has probably been extended. In practical terms, the amendments have seemed to give clear legislative approval to the proposition that the employer does have an interest in organizational campaigns and should be free to express his thoughts but this freedom has been explicitly limited to facts and opinions that:

(1) relate to the employer's business and
(2) are reasonably held.

By implication, it would seem that employer comments must relate to his own business and those concerning unions in general, a particular union or officers thereof are not to be permitted.

Further, even opinions about his business must be reasonably held and it will undoubtedly be an objective test which will be applied. It is unlikely that the Board will accept objectively unreasonable opinions merely because they were made by an extremist who honestly believed in their accuracy.

Although these amendments would appear to have opened the doors for some employer activity and thus of course the resultant onslaught of litigation, that has not been the case, at least to this point in mid 1979. One must also remember, of course, that the general prohibitions in Section 3(1) still exist and the Board could also use these to limit virtually any behaviour.
It seems that the treatment of employer free speech in B.C. may very well be setting on common ground with that of the Ontario and Canada Labour Boards. In the future it is likely that guidance from decisions of those Boards will be sought in establishing and constantly redefining the actual parameters of the doctrine in British Columbia.
CHAPTER III
Decertification

A. Introduction

Each of the jurisdictions also have provisions in their Labour Codes which enable disappointed employees democratically to remove a union if a majority of the membership feel they are not being properly represented. In each case, a procedure has been designed to enable the employees to express their true wishes concerning representation. The decertification process, however, offers another opportunity to an employer to actively participate in the development of our social institutions.

In this section of the paper, we will deal with the restraints which have been placed on employers who attempt to participate at this point either through instigation or indirect encouragement of the decertification.

B. The American Approach

Under Section 9 of the National Labour Relations Act, any employee or group of employees may file a petition which alleges that the certified union is no longer representative of the employees. The Labour Board, after investigating the facts, will determine whether to uphold or dismiss the application. From the strict wording of the Act, it is clear that the employer is not permitted to file such a petition with the Board and if he does so, the petition will be ineffective.

However, the real problems arise in situations where the employer's actions are more indirect. Initially, the N.L.R.B. took the view that an employer should remain completely neutral as the decertification process
was for the benefit of and must be conducted solely by the employees. Any interference by the employer then was grounds for denial of the certification petition. The Board had, in effect, interpreted the restriction on who could file the petition to apply to the entire decertification process.

In those earlier cases, the type of behaviour which was held to contravene the Act included:

(1) The giving of advice to the employees and/or the preparation of the petition by the employer.\(^{220}\)

(2) The physical presence of the employer or management at the time employees are asked to sign the decertification petition.\(^{221}\)

(3) The use of the employer's attorney to represent the interests of the employees in the preparation of the petition or at the actual hearing.\(^{222}\)

(4) The circulation of the petition on company time and property while denying the union representative access to the employees under similar circumstances.\(^{223}\)

In each of these situations, the Board took the position that the employer was attempting to do indirectly what he could not do directly, that is, file the petition to remove the union himself.

\(^{220}\)Consolidated Blenders Inc. 118 N.L.R.B. 545 (1957); Bond Stores Inc. 116 N.L.R.B. 1929 (1956); Gold Bond Inc. 107 N.L.R.B. 1059 (1954).

\(^{221}\)Consolidated Blenders, supra at footnote (220).

\(^{222}\)Consolidated Blenders, ibid.; Bond Stores Inc., supra at footnote (220); Gold Bond Inc., supra at footnote (220).

\(^{223}\)Consolidated Blenders, supra at footnote (220).
However, in the late fifties, the N.L.R.B. altered its position. It adopted the view that employer participation, while potentially an unfair labour practice, was an administrative matter and was not litigable in the decertification proceedings. This was in conflict with many of its earlier decisions and the Board ultimately decided the matter in Union Manufacturing Company.

The Board stated that it would continue its long-standing policy of not reviewing petitions merely because it is alleged that there was supervisory influence exerted. However, the Board noted that its recent decisions had cast some doubt upon its position concerning the issue of "employer initiation or instigation of, or assistance in the filing of a decertification petition".

The Board then went on to establish the following principles:

We have carefully considered and reappraised the relative advantages and disadvantages of retaining, as an exception to the general rule, the practice of allowing issues of employer instigation of, or assistance in, the filing of the decertification petition to be litigated in the representation proceedings. It is our opinion that the same factors which weigh against permitting litigation of unfair labour practice matters in other types of representation cases are present, and should likewise prevail, in decertification cases. If there is a basis for alleging employer responsibility for the filing of a decertification petition, the Board's complaint procedures provide a forum in which such an issue may be properly litigated, and an appropriate remedy obtained. At the same time, valid decertification petitions may be processed with a minimum of complication and delay.

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224 Georgia Kraft Company 120 N.L.R.B. 806 (1958); Park Drug Company (1959) 122 N.L.R.B. 878.
226 Ibid., at p. 1634.
Accordingly, we herein enunciate the Board policy to exclude from decertification cases any evidence of employer participation in the institution of the proceeding, whether the alleged evidence pertains to showing of interest or to employer responsibility for the filing of the petition.\[227\]

By adopting this position, the Board effectively established procedural roadblocks to complicate the filing of a complaint concerning employer interference. In effect, a union could lose the vote and be decertified and then have to file a separate complaint of an unfair labour practice. Practically, besides being a nuisance, the ensuing time delay certainly does not argue well for the union's changes of maintaining membership support which after all, is even more critical than the nature of any remedial action taken by the Board.

The net effect then of this position is to treat the decertification problem in the same way as employer interference during the initial organizational campaign. As we have seen in the earlier part of the paper, the employer in the United States is able under the doctrine of free speech to vigorously participate in an attempt to defeat the union.

The basic philosophy of the N.L.R.B. favours this both in terms of its interpretation of the Labour Relations Act and its reluctance to invoke remedies which truly discourage unacceptable behaviour. The same types of campaign propaganda such as interrogations and suggestions of reprisals can often be employed during the period preceding a decertification vote and the process is subject to the same kinds of abuses.

This situation differs quite dramatically from that taken by the Labour Boards in Canada. It is to these that we will now turn our attention.

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\[227\] Ibid. at p. 1634.
C. Ontario

The Labour Relations Act of Ontario also contains a provision which allows a dissatisfied membership to remove its representation from their position.

Section 49(3) of the Act states:

"Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and where not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause (j) of subsection 2 of section 92 that they no longer wish to be represented by the trade union, and not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union on their behalf be terminated."

However, before the Ontario Board issues a decertification order under this section, it requires that the application meet some fairly rigid tests.

First of all, the intent of the employees must be clearly to decertify the union and any reasonable doubt as to the actual meaning of the wording of any documentation will be fatal to the petition. This is not to say that the Board will be overly legalistic in determining the true meaning of the words, but there must be no question in the Board's mind that the rank and file could have misinterpreted the document.

In the Armbro Materials and Construction Ltd. case, the Board reviewed situations where it had rejected petitions:

15. This Board has on numerous occasions in the past addressed itself to deficiencies in the preamble to petitions in both certification and termination proceedings. The Board has rejected petitions in the form of signatures on separate slips of paper later pasted to a page bearing the preamble (N.D. Applegate Ltd. [1963] OLRB Rep. May 104); in the form of signatures on sheets of paper that remain separate from the "preamble" or formal statements of intention (Ray's Haulage Ltd. [1963] OLRB Rep. Feb. 497 and Bennett & Wright Limited [1965] OLRB Rep. Nov. 514); in the form of two sheets of paper where the preamble appears on the first sheet and the second sheet was signed before the first was drafted and attached to it (Presland Iron & Steel Ltd. [1966] OLRB Rep. 817); in the form of one or more pages where the signatures were placed upon them prior to the inserting of the preamble (DeVilbiss (Canada) Ltd. (Barrie) [1960] OLRB Rep. Nov. 285 Boyle-Midway (Canada) Limited [1966] OLRB Rep. Dec. 697); (Francon Ltd. Ottawa [1970] OLRB April 71 and Arbo Leather Co. Ltd. [1970] OLRB Nov. 855); where the wording of the preamble gives rise to confusion between the local and the international union (Patrick McKeon and Other Employees of Hiram Walker & Sons Limited [1973] OLRB Rep. Nov. 603); where at the time of circulation the petition bore only a preliminary sentence that the applicant was the signatories representative and the preamble was inserted later (Wilson-Munroe Company [1973] OLRB Rep. 647); where some signatures were obtained prior to the insertion of the preamble and some after and the evidence was unreliable as to the precise point in time when the preamble was inserted (U.B.A. Chemical Industries Limited [1975] OLRB Rep. Mar. 198.231

However, despite these extreme examples, it should be made clear that the Board is not bound by any strict formal requirement concerning the form the documents and of course, the parties are always free to adduce additional evidence to prove whether or not the signatures indicate a sincere desire for the termination of bargaining rights. 232

Secondly, it must be shown that the employees will not only be aware of the actual meaning of the document but also that it would actually be

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231 Ibid. at para. 15.
used to support a decertification application. 233

Further, there is the strict requirement that the expression of discontent be voluntary. Any evidence of coercion or force will render the application ineffective and in many cases, the Board has demanded very clear proof that the actual manner of obtaining the signatures was beyond reproach. 234

It should be observed at this point that the Ontario Board has indicated that due to the fact that there must be a one year period from the date of certification before a decertification application can be presented, it is less inclined "to draw references adverse to the voluntariness of the statement filed" 235 in support of decertification. Therefore, very isolated and insignificant events will not cause the Board to dismiss a petition. 236

However, it is the intent to which this voluntariness is affected by employer interference which is the focus of the Board's attention in the cases with which we are concerned.

As early as 1962, the Ontario Board in the Piggott 237 case indicated that it would review applications for termination of representation using the same criteria it applied in the certification procedure. It

233 Westinghouse Canada Limited, supra at footnote (229).
237 Supra at footnote (44).
indicated that some employers would still not really accept the right of employees to join trade unions and inferred that interference could likely occur as easily after certification as soon as there was any sign that the union was weakening.

Therefore, in reviewing a petition for decertification, the Board said that it would be concerned with establishing that the wishes of the employees were freely expressed and that the employer did not bring to bear direct or indirect influence upon them.

The Board is particularly concerned that the origination, preparation and circulation is not done in such a manner that it is "... reasonable and likely to be construed by the employees as an open invitation to proclaim their loyalty to their employer by signing the petition."  

The Board has indicated that due to the responsive nature of the employer/employee relationship an employee is peculiarly susceptible and what would otherwise be quite innocuous behaviour may be sufficient to taint the petition.

A very blatant case of interference which would be clearly unacceptable is the delivery of a very strong speech to a captive audience by a principle of the company.  

In a case where an employer has taken a very hard although legal anti-union stance during the existence of the union, the fact that the decertification petition was addressed to the employer will be sufficient to convince the Board that the document submitted did not reflect the true

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238 Peel Block Co. Ltd. (1963) 63 CLLC #16, 277 at p. 1157.
wishes of the employees. The custody of the document throughout the period it is being signed is given great importance by the Board.

In another case, the fact that the manager of the company requested an employee to find out what the other employees thought even though he explained they had total freedom to choose, that his secretary drafted and typed the petition and that it was given to the President of the Board of Directors to deliver to the Board was sufficient to cause the Board to dismiss the application.

In the *York Condominium Corporation No. 77* case, the Board summarized its own tests:

... c) The person circulating the petition cannot discuss it with the employer;

d) The person circulating the petition should not obtain signatures within sight of a member of management;

e) Every signature on the petition must be witnessed and such witness must testify before the Board on matters relating to the preparation of the petition, the obtaining of the signatures and the circulation of the document in question;

f) The petition must not leave the person's hand who circulates it - if it does, then the person it is given to must appear before the Board to give evidence;

h) The person circulating the petition must not arrange for time off with pay to attend the Board hearing;

i) Should the person circulating the petition have any member of management sign it for whatever reason (even if the member of management believes he or she is in the bargaining unit) then all signatures

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secured subsequent to that of the member of management are disregarded by the Board, and the petition may be rejected altogether;

j) The person circulating the petition is subject to rigorous cross-examination by the Board on questions pertaining to the origination, preparation and circulation of the petition. 244

However, in the absence of any other interference the mere fact that an employer refers to counsel will not incur the wrath of the Board. 245 Of course, it should be noted that the employer would be wise to refer the employees to lawyers who do not represent the company.

Similarly, although foremen are management personnel, their questioning of the employees to "satisfy their own natural curiosity about occurrences in the workplace" will not constitute grounds for dismissing the petition unless the employees would, given the surrounding circumstances, interpret the questioning as managerial interference. 246

The Board has also refused to dismiss an application merely because a management member of the bargaining unit was instrumental in the application for termination. 247 In that case, however, the employer had voluntarily recognized the union and had in no way interfered with the decertification.

Needless to say, the line here is very narrow and such behaviour will more often than not be fatal to the employer unless it can be clearly shown that no reasonable employee would believe that management was in any way involved.

244 Ibid., at p. 644.
247 Canadian Food and Allied Workers Local Union 633 [1974] 1 Canadian LRBR 96.
The Board has also indicated that a decertification application is "not necessarily tainted by prior involvement in a petition in opposition to the certification of the trade union."\(^{248}\)

D. Canada

The Canada Labour Relations Board adopts much the same approach as their Ontario counterpart. The provision relating to decertification is found in Section 138 of the Canada Labour Code and the Board is equally hesitant to approve an application where there is any evidence of employer interference.

The kinds of behaviour of which the Canada Board has explicitly disapproved include the following:

1. Senior Management personnel meeting with the employees to "impress upon them that it was in their interest to resign immediately."\(^{249}\)

2. The circulation of the decertification petition on company premises during working hours.\(^{250}\)

3. The submission of many of the letters of resignation from the union directly to the employer.\(^{251}\)

Each of these actions is evidence that management either directly or indirectly approved of or in fact encouraged the employees to resign.


\(^{250}\) Ibid.

\(^{251}\) Ibid.
from the union. In cases where the behaviour is sufficiently serious, a representation vote would not indicate the true wishes of the employees and the federal Board will dismiss the application.

E. British Columbia

The British Columbia Labour Code contains the following provision relating to decertification:

52.(1) Where, at any time after a trade-union has been certified for a unit of employees, the board is satisfied, after such investigation as it considers necessary or advisable, that the trade-union has ceased to be a trade-union, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification.

(2) Where ten months have elapsed after the certification of a trade-union, and after such investigation as the board considers necessary or advisable, which may include the taking of a vote of the employees in the appropriate bargaining unit, the board is satisfied that the trade-union has ceased to represent a majority of the employees in the unit, it may cancel the certification.

(3) Where the certification of a trade-union as bargaining agent is cancelled under section 36 of this section, any collective agreement between the trade-union and the employer of the employees in the unit in respect of which the certification is cancelled is void.

Subsection 2 is the critical part of this section and it is upon it that we will focus our attention.

In one of its decisions, the Labour Board compared this section with its predecessor in the Labour Relations Act. Section 12(10)(b) of that Act permitted decertification only if the "trade union had ceased to represent the employees in the unit" and therefore a cancellation of the certification would occur only if there was no evidence that the union
was representing the employees in any way.\textsuperscript{252}

The test under the present code is that the union must no longer represent a majority of the employees. Therefore, the test is more concrete and the Board has workable criteria on which to base a decertification decision. The Board has indicated that it will not hesitate "to cancel certifications in those circumstances where it is clear that unions have lost majority support and are unable to meet their obligations to employees remaining in the bargaining unit."\textsuperscript{253}

It should also be noted that the decertification provision in British Columbia leaves it to the discretion of the Board whether to decertify or not. Unlike Ontario, where the wording of the Act requires the Board must hold a vote if 45\% of the employees request it and then must be bound by the results of that vote, the British Columbia Code permits the Board greater leeway.\textsuperscript{254} It is true that the Ontario Board is able to exercise its discretion indirectly by the requirement of voluntariness but there does appear to be greater statutory justification for the British Columbia Board to exercise its discretion in any particular case.

It seems that during the first two or three years of the Board's existence (1974-76), it was particularly reluctant to grant decertifications.\textsuperscript{255} This was undoubtedly due to the realization that decertification

\textsuperscript{252} Kootenay Savings Credit Union B.C.L.R.B. #54/77; [1978] 1 Canadian LRBR 40.

\textsuperscript{253} Ibid., at p. 45.

\textsuperscript{254} See Kootenay Credit Savings Union, ibid.; Hiram Walker and Sons [1974] 1 Canadian LRBR 517.

\textsuperscript{255} For example, see: Wagner Engineering B.C.L.R.B. Decision No. 98/74; Medieval Inns B.C.L.R.B. Decision No. 122/74.
orders would encourage more employer interference in the future and also that the unions needed time to establish themselves under the new Code.

In one case, Wagner Engineering, the Board in response to a decertification petition actually varied the certification order so that a portion of those previously in the bargaining union could attain trade union status. 256

However, recent decisions indicate that its reluctance is not quite as strong and decertifications will be granted in cases where there is nothing more than very circumstantial evidence of employer interference. 257

The Board will, however, refuse to decertify where the application is being used as an indirect method of accomplishing something which is inconsistent with other sections of the Code. For example, a very frequent problem arises where the employees wish to change affiliations and instead of using the "raiding" section (S. 39-2), they will attempt to use Section 52. In those cases, the Board will dismiss the application. 258

Another case where a conflict has occurred is where there is a decertification application immediately following the imposition of a first contract by the Board under Section 70 of the Code. The Board has indicated that to decertify the union at that point when the whole purpose of the first contract provisions is to give the parties an opportunity to develop a satisfactory relationship would be in direct contradiction to the overall objectives of the Code. 259

256 Supra at footnote (255).
257 See the reasoning in Kootenay Savings Credit Union, supra at footnote (252).
258 See, for example, Hiram Walker and Sons, supra at footnote (254).
The Board will also refuse to decertify where there is evidence of employer interference. There would seem to be a much stricter approach to interference during decertification than during the organizational campaign. Although what is actually labelled as interference by the Board would probably not differ substantially between these periods; differences in terms of the results of the behaviour could be very significant. For example, slight or minor interference during an organizational campaign may well lead to informal wrist slapping or at worst, a cease and desist order to the employer. However, the same activity, even if quite ineffectual during a decertification campaign, may well cause the Board to deny a subsequent application. In the case of decertification, the number of available remedies is limited and the Board must either totally ignore the activity or deal with it quite harshly.

They have indicated that they will adhere to the following policy:

As indicated previously, this Board is not adverse to cancelling certifications: however, it is inclined to move deliberately, for experience has revealed a significant incidence of employer interference in the process. Interference from this quarter can constitute improper influence and distort or obscure the true wishes of the employees concerned. ... Evidence of such improper influence will almost invariably abort an application for decertification.\(^{260}\)

Therefore, the existence of employer behaviour which is likely to "heighten the anxieties of certain of the employees involved and render suspect their subsequent endorsement of the decertification application"\(^ {261}\)

\(^{260}\) Kootenay Savings Credit Union, supra at footnote (252) at p. 45.

\(^{261}\) Ibid., at p. 46.
will be grounds for dismissal of the petition.

Similarly, ongoing conduct which has prevented the union from solidifying its support during the period when it has represented the workers which has ultimately led to a decertification request will be grounds for dismissal of the application.

Specifically, the Labour Board has identified certain types of behaviour as constituting interference which is serious enough to result in a dismissal of the decertification application. These include:

(1) An implication by the employer that the presence of the union is preventing an imminent wage increase;\(^{262}\)

(2) The clandestine interrogation of the employees by the employer or his agent;\(^{263}\)

(3) A continuing refusal to bargain in good faith with the union which leads to discontent among the rank and file;\(^{264}\)

(4) The use by the dissident employees of counsel who normally acts for the employer;\(^ {265}\)

(5) The payment by the employer of some of the expenses incurred by the group of employees seeking decertification;\(^ {266}\)

(6) The attendance by the employer or senior management at a

\(^{262}\) *Dominion Directory*, supra at footnote (259).

\(^{263}\) *Kootenay Savings Credit Union*, supra at footnote (252).

\(^{264}\) *Imperial Optical*, B.C.L.R.B. Decision No. 65/76; *Kidd Bros.*, supra at footnote (68); *Dominion Directory*, supra at footnote (259).

\(^{265}\) *London Drugs*, B.C.L.R.B. Decision No. 149/74.

\(^{266}\) *Imperial Optical*, supra at footnote (264); *London Drugs*, supra at footnote (265).
meeting of the employees called to discuss the decertification issue; 267

(7) The alteration of the company's payroll by including employees of the non-union company on the payroll of the union company to increase the base for a decertification petition; 268

(8) Apparent favouritism shown by management to employees who were known to be anti-union by dealing with them outside the terms of the collective agreement; this could include the payment of higher wages, better working conditions, or promises of advancement; 269

(9) The creation of impediments to frustrate the union's attempts to communicate with the employees. 270

As was the case with the Ontario decisions, the Board will not hold the employer responsible for the statements of a management employee if it is abundantly clear that he is speaking of his own accord and that it can in no way be interpreted as interference by the employer. 271

It should be noted in conclusion that if the evidence clearly indicates that the employees truly wish to have the union decertified, then

267 Ibid.
268 Western Steak, B.C.L.R.B. Decision No. 124/74.
269 Imperial Optical, supra at footnote (264).
270 Ibid.
271 Rotary Pie, B.C.L.R.B. Decision No. 143/74.
the Board will do so. They have made it clear that they will not dismiss the application purely to punish the employer for his indiscretions where there is virtually no support left among the membership.\footnote{Labour Relations Board of Sask. v. Her Majesty the Queen on the Relation of F. W. Woolworth Co. Ltd. and Agnes Slabick et al. [1956], S.C.R. 82; Fine Arts Dental Laboratories Limited, B.C.L.R.B. Decision No. 20/77; Dominion Directory, supra, at footnote (259).}

The Board has made it clear that the union does "not have a property right in its certification which ensures perpetuation of that certification even after the employees it seeks to represent no longer desire that representation".\footnote{Imperial Oil Ltd., B.C.L.R.B. Decision No. 45/77 at p. 9.} In the absence of employer interference or conflict with other provisions of the Code, the decertification application will be approved.
CHAPTER IV
Observations and Conclusions

A. General

The major objective in this area of employer free speech is to strike a balance between the rights of the employer to express his opinion and the goal of permitting the employees to exercise their right to organize without undue influence from their employers. The four jurisdictions we have reviewed each take a different approach to the problem although the Canadian, Ontario and British Columbia codes seem to be settling on fairly common ground.

The American approach to this problem is quite different but that is in keeping with the general approach to management - labour problems south of the border. There is more of a confrontation setting within the American legislation and it is readily apparent in the area of employer free speech. Each side is free to express opinions even if they are exaggerated and then an open contest or formal battle, i.e., a vote, is held to determine the outcome. The American approach also tends to be more ad hoc in terms of judging the acceptability of any behaviour. In Canada there is a tendency to indicate more explicitly which restrictions are to be observed and then to moderate their application through judicious use of remedial powers. To attempt to import the entire American approach to the problem of employer free speech to Canada would involve not simply an amendment to one or two sections of the Code but also a restructuring of the entire framework in which it must operate.

North of the border, there are also more restrictions placed on
the employer. This undoubtedly results from an effort to discourage the parties from practicing open antagonism toward each other during organizational campaigns. The fear, of course, is that overt hostilities at that time would lead to poorer relations throughout the collective bargaining relationship which might develop.

As we have mentioned above, the amendments to the British Columbia Labour Code bring that legislation a little closer to the Ontario and Canadian viewpoints. It is now our intention to deal with possible approaches to the question of employer free speech in light of the experiences in each of the jurisdictions and to make recommendations concerning their usefulness. This is considered relevant as the B.C. Board still has not had the occasion to outline the limitations it will impose through its interpretation of Section 3(2)(g).

B. The Burden of Proof

As the Board wrestles with the problem of where the substantive law in this area should come to rest, the parties themselves have to deal with the problem of proving the contents of complaints under the Code.

In cases such as this, where the subject is the mental attitude of individuals, the burden of proof is a very onerous one, in theory, at least. It has been suggested that it may be advisable for the legislature (by further revision to the Code similar to the requirement in Section 8(6) in dismissal cases) or the Board (through interpretation) to reverse the burden of proof to require the employer to prove that his

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274 Jordan, D., "Employer Free Speech", an unpublished paper prepared for Professor P. Gall of the Faculty of Law at the University of British Columbia, 1977.
statements did not interfere with the ability of the employees to express their true feelings rather than to require the employees or the union to prove that interference did exist. The shift of the burden may act as a further restriction on overanxious employers who might feel that the new amendments have given them total freedom of expression.

While this might reemphasize the fact that employer interference is not to be treated favourably by the Board, there is some question as to whether such an amendment would have any practical effect in terms of effecting decision where violations have been charged.

In discussing the effect of Section 8(6) in dismissal cases, Professor Hickling noted:

Even in other cases, since the true reasons for an employer's actions often lie exclusively within his knowledge or means of knowledge, the Board may be expected to call upon him to produce evidence of a substantial nature from which his innocence of anti-union motivation can be inferred, once the union has established a prima facie case. In other jurisdictions, it has not proved very difficult for a union, in a discipline or discharge case, to persuade the boards that when an employer's action was taken against the background of contemporaneous union activity, he ought to produce a satisfactory explanation of it. It is difficult to assess what difference the reversal of the onus in relation to charges under S. 3(2)(d) has had in practice. It seems likely that in most, if not all, of the cases so far reported the decision would have been the same in any event. It is easy to exaggerate the importance of the change, though in marginal cases it will make a difference. At some stage in the future the legislature may see fit to reorganize and recast Section 3. It seems strange that the legal onus in a discharge or discipline case should be on the

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Hickling, M. A., Developments in Labour Law (1975), published by the Centre for Continuing Education, University of British Columbia, Vancouver, B. C. at pp. 34-35.
employer if the charge is framed in terms of S. 3(2)(d), but not when the self same conduct is the basis of alleged contraventions of S. 3(2)(a), (b) or (c).

In this writer's opinion, a formal reversal of the burden of proof would certainly be a logical step but the actual effect of that change might well be only cosmetic.

C. Restricting the Style of Communication

There is a concern about the "emotional" impact of any communication from the employer because this is the factor which ordinarily interferes with the exercise of a free and enlightened choice by the employee. A number of restrictions designed to lessen that impact are in place in other jurisdictions and there are others which the writer feels should be considered, although to our knowledge they have not been employed elsewhere.

(i) Alternative Methods of Communication

(a) Restrictions on the Use of the "Captive Audience" Technique

A captive audience as such is normally a very receptive one, for whatever reason, be it interest, fear or a combination of the two. The Board's choices in this area are essentially to continue to view this technique as essentially coercive or intimidating or permit its use in limited circumstances. For example, if a company wished to address its workers it may, provided that equal time be given to the union to do so (either at that meeting or at a different time).

It would seem that the latter approach which is occasionally used in the United States would not fit into the overall framework of industrial relations in Canada. As observed above, the legislation, both
federal and provincial, tends to avoid confrontation politics whenever possible and the use of organized confrontations seems to be inimical to the philosophical underpinnings of the Labour Codes in Canada.

(b) Controlled Meetings

Another possibility would be to restrict an employer's communication about an organization campaign to a controlled meeting. If the employer wished to express his opinions, he could request the Labour Relations Board to call and supervise a meeting in which both he and the union could address the employees concerning the benefits and disadvantages of unionization. Hopefully, in such a setting, there would be less potential for coercive and intimidating behaviour.

There are a number of obvious problems with this approach. First of all, it would be a very time-consuming chore and the Labour Board has enough to do. Even if the budget could be found to supply the manpower, this forum could offer the parties a chance to see "what they could get away with" with the result that the very thing that is to be prevented is actually encouraged.

Furthermore, although the Board would have a better "feel" for the circumstances of the communication, the actual decision as to whether certain statements actually contravened the Code would still be most difficult.

(c) Written Submissions

In our opinion, one of the most reasonable and practical solutions would be for the Board to restrict permissible communication (under Section 3(2)(g)) to written submissions either by way of letter or public
notice. In that way, much of the emotional impact which accompanies these interpersonal opinions will be diffused. Employers who honestly feel they should have the right to communicate and that they merely wish to "give the employees the facts" should not be adverse to this suggestion. In this way, any reasonable facts and opinions could be expressed with a clear conscience, the employee would be exposed to "both sides of the story" and the concern of employers in this regard would be overcome.

Similarly, the union's concern about subtle and oppressive influence would be partially alleviated by the "cold" nature of the communication. If any "heat" did in fact exist, it would also be obvious to third parties, including the Labour Relations Board. This approach has the added advantage of there not being any confusion over the actual contents of the opinions which were expressed should a violation of the Code be alleged.

(d) LRB Documents

One of the criticisms about existing restrictions that is often expressed by employers is that the employees have no simple mechanism for becoming aware of their rights. To a great extent, this is a legitimate concern. One should never lose sight of the fact that one of the objectives of labour legislation is the protection of the individual employee from not only the employer but also, in some cases, the union. It is submitted that one of the cornerstones upon which this protection can be built is the knowledge that individuals are aware of their rights.

The Labour Boards in Canada have basically accepted the premise that employers should not be party to this dissemination of information because of their vested interest in the outcome of the organization drive.
The unions also have vested interests and in some cases, they may be contrary to the wishes of individual employees. What is required is a system which ensures the employees are aware not only of their basic rights but also the limits within which they may exercise their freedom of choice.

Therefore, it would be advisable for the Labour Board and/or the Department of Labour to develop a written document which clearly and concisely outlines the legal ramifications of various developments in an organizational or decertification drive. When either of these is underway, this document could be posted in places where employees will readily see it. The approach should be entirely factual and the kind of information which could be contained therein would include:

- the fact that employees are not required to join the union;
- the fact that if more than 55% of the employees in the appropriate unit sign union cards, then a vote will not be held and the union will be automatically certified;
- the fact that if the union does not obtain the signature of at least 45% of the employees, then the certification will be unsuccessful;
- the fact that if the union signs up between 45% and 55% of the employees then a vote by secret ballot will be held;
- the fact that if a vote is held, it is the majority of those who vote that determine the result; and
- the fact that decertification cannot be accomplished until 10 months have elapsed from the granting of certification.

In this way, there will be certainty that the employee has access to the information and just as important, that the information is correct.
In this way, another of the employers' legitimate concerns will have been removed.

(ii) The Timing of the Communication

If opinions of some nature are indeed now permissable under Section 3(2)(g), the Board should limit the time period in which these opinions can be given. Restrictions which are used elsewhere include combinations of the following:

- only on free time, i.e., not during regular working hours;
- only for a specific two or three weeks during the organizational campaign;
- not during a specified period preceding a vote (e.g., two weeks, 72 hours or 24 hours).

It is our opinion that the most practical approach would be to forbid any communication whatsoever within one week of the vote. There are two advantages to this approach; firstly, the one-week period is long enough to allow time for sufficient reflection and secondly, should a minor inadvertent breach occur (such as flyers being circulated for a short time after the restricted period begins which has happened constantly in Ontario), the damage will likely be minimal and will not require the Board to take the remedial steps which may have been required if information had been communicated very close in time to the actual vote. There is, of course, the potential for abuse, in that one of the parties may take advantage of the other's required silence and get in some last minute politics. If it is not serious enough for the Board to take drastic measures, some minor influence may be effected. Therefore, the Labour Board must realize that the silent party has no time or opportunity to
counter and therefore any violations must be met with effective remedies.

D. Extensions of the Principle of Corrective Action

In the section on corrective action, we discussed methods by which the Board has attempted to make amends to unions which have been victimized by an employer's unfair labour practices. As we noted, this is perhaps the area in which creativity could be put to use in order to effectively discourage employer misbehaviour.

However, the creativity is bounded by legality, in the sense that the Board cannot go beyond their powers, and effectiveness, in that the Board must choose remedies that are fair and will be compiled with. For example, some cases the Board has implied that it would be prepared to order employers to open for business. It is interesting to speculate how far the B.C. Board would be willing to go in policing this type of remedy for it is a type of "specific performance" order which is more difficult to effect when an aspect of personal performance is required.

E. Use of Automatic Certification

In the opinion of many trade economists, this is the only really effective remedy. Despite the observations of the Board in the Beechwood decision that it would be used more frequently, there is little evidence yet to support this.

One of the other effects of this remedy is that in some circumstances it may require the subsequent use of further remedial powers. In B.C.,

276 Robinson Little, supra at footnote (70); Intermountain Industries Limited, B.C.L.R.B. Decision No. 179/74; British Columbia Distillery Company, B.C.L.R.B. Decision No. 24/75.

277 Supra at footnote (193).
the Board has the power to help the union attempt to solidify its support through the imposition of a first collective agreement under the Code (Section 70-72). It is used when an employer has refused to bargain with a union in the hope of encouraging dissatisfaction with the union and thereby further eroding its already tentative support. In cases where automatic certification is appropriate due to the apparent inability of the employees to express their true opinion, it is likely that the employer would continue his resistance by subsequently refusing to bargain in good faith.

By imposing a collective agreement upon the parties, the Board would thereby give the union some time to gain some support and thus a basis upon which to deal with the recalcitrant employer. The imposition of a first agreement, however, is an attempt to put the parties where they would have been in the absence of the employer's activity. In cases where the union's support has been effectively destroyed, the remedy of automatic certification would be of no value and there must be recourse to other remedies such as the "make whole" doctrine. The "make whole" remedy is an attempt to restore the situation to what it was before the unfair labour practice occurred. The distinction is similar to that of the concept of damages in contracts and damages in torts.

In the U.S., it appears that the N.L.R.B. cannot force the parties to adopt terms of a contract. However, they are in a position to order

278 Kidd Bros., supra at footnote (68).
compensation to the employees by which method they can reduce the mone-
tary "losses" of the employees.

The imposition of a collective agreement is an extreme remedy
inasmuch as it further restricts the rights of the parties to make their
own agreements. However, there may realistically be few other options
if the illusion of equality of the parties is to become a reality. It
should be observed, however, that if the Board does increase its use of the
remedy of automatic certification, it may also have to deal more frequently
with the issue of whether to employ their power to impose first collective
agreements.
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APPENDIX I

Unfair Labour Practice Provisions

A. British Columbia; Labour Code of British Columbia

B. Ontario; Labour Relations Act of Ontario

C. Canada; Canada Labour Code

D. United States; Labour Management Relation Act, 1947 (Taft-Hartley Act)
Appendix I

A. British Columbia

Unfair labour practices.

3. (1) No employer, and no person acting on behalf of an employer, shall participate in or interfere with the formation or administration of a trade-union or contribute financial or other support to it; but an employer may, notwithstanding anything contained in this section, permit an employee or representative of a trade-union to confer with him during working-hours, or to attend to the business of the trade-union during working-hours, without deduction of time so occupied in the computation of the time worked for the employer and without deduction of wages for the time so occupied.

(2) No employer, and no person acting on behalf of an employer, shall

(a) refuse to employ or to continue to employ any person, or discriminate against any person in regard to employment, or any condition of employment, because the person is a member or officer of a trade-union; or

(b) impose any condition in a contract of employment seeking to restrain an employee from exercising his rights until this Act; or

(c) seek by intimidation, by dismissal, by threat of dismissal, or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms of employment, or by any other means, to compel or to induce an employee to refrain from becoming, or continuing to be, a member or officer or representative of a trade-union; or

(d) discharge, suspend, transfer, lay off, or otherwise discipline an employee for the reason that the employee

   (i) is, or proposes to become, or seeks to induce any other person to become, a member or officer of a trade-union; or

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

(e) use, or authorize or permit the use of, a professional strike breaker or an organization
of professional strike breakers; or

(f) interfere with lawful concerted action by employees for the purpose of obtaining collective representation,

but, except as expressly provided, nothing in this Act shall be interpreted to affect the right of an employer to suspend, transfer, lay off, or discharge an employee for proper cause. 1973 (2nd Sess.), c. 122, s. 3.

5. No person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a trade-union. 1973 (2nd Sess.), c. 122, s. 5.

B. Ontario

UNFAIR PRACTICES

Employers, etc., not to interfere with unions.

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence. R.S.O. 1970, c. 232, s. 56.

Unions not to interfere with employers' organization.

57. No trade union and no person acting on behalf of a trade union shall participate in or interfere with the formation or administration of an employers' organization or contribute financial or other support to an employers' organization. R.S.O. 1970, c. 232, s. 57.

Employers not to interfere with employees' rights.

58. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the
person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any rights under this Act. R.S.O. 1970, c. 232, s. 58.

Employers not to interfere with bargaining rights.

59. (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

Trade unions not to interfere with bargaining rights.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them. R.S.O. 1970, c. 232, s. 59.

Intimidation and coercion.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act. R.S.O. 1970, c. 232, s. 61.
C. Canada

UNFAIR PRACTICES

Employer interference 184. (1) No employer and no person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

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

Exception. (2) An employer is deemed not to contravene subsection (1) by reason only that he

(a) in respect of a trade union that is the bargaining agent for a bargaining unit comprised of or including employees of the employer,

(i) permits an employee or representative of the trade union to confer with him during working hours or to attend to the business of the trade union during working hours without any deduction from wages or any deduction of time worked for the employer,

(ii) provides free transportation to representatives of the trade union for purposes of collective bargaining, the administration of a collective agreement and related matters, or

(iii) permits the trade union to use his premises for the purposes of the trade union; or

(b) contributes financial support to any pension, health or other welfare trust fund the sole purpose of which is to provide pension, health or other welfare rights or benefits to employees.

Prohibitions relating to employers 184. (3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment or any term or
condition of employment, because the person

(i) is a member of a trade union,
(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,
(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,
(iv) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part,
(v) has made an application or filed a complaint under this Part, or
(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred upon him by this Part;

(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is not prohibited by this Part;

(d) deny to any employee any pension rights or benefits to which the employee would be entitled but for

(i) the cessation of work by the employee as the result of a lockout or strike that is not prohibited by this Part, or
(ii) the dismissal of the employee contrary to this Part;

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from
(i) testifying or otherwise participating in a proceeding under this Part;
(ii) making a disclosure that he may be required to make in a proceeding under this Part, or
(iii) making an application or filing a complaint under this Part;

(f) suspend, discharge or impose any financial or other penalty on a person employed by him, or take any other disciplinary action against such a person, by reason of that person having refused to perform an act prohibited by this Part; or

(g) bargain collectively for the purpose of entering into a collective agreement or enter into a collective agreement with a trade union in respect of a bargaining unit, if another trade union is the bargaining agent for that bargaining unit.

Prohibitions 185. No trade union and no person acting on behalf of a trade union shall

(a) seek to compel an employer to bargain collectively with the trade union if the trade union is not the bargaining agent for a bargaining unit that includes employees of the employer;

(b) bargain collectively for the purpose of entering into a collective agreement or enter into a collective agreement with an employer in respect of a bargaining unit, if that trade union or person knows or, in the opinion of the Board, ought to know that another trade union is the bargaining agent for that bargaining unit;

(c) participate in or interfere with the formation or administration of an employers' organization;

(d) except with the consent of the employer of an employee, attempt, at an employee's place of employment during the working hours of the employee, to persuade the employee to become, to refrain from becoming or to cease to be a member of a trade union;
(e) require an employer to terminate the employment of an employee because he has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union;

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to him in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to him in a discriminatory manner the standards of discipline of the trade union;

(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of his having refused to perform an act that is contrary to this Part; or

(i) discriminate against a person in regard to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a pecuniary or other penalty on a person, because he

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that he may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part.

General prohibition. 186. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

Complaints to the Board. 187. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that an employer, a person acting on behalf
of an employer, a trade union, a person acting on behalf of a trade union or an employee has failed to comply with section 148, 184, or 185.

(2) Subject to this section, a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complaint knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) Subject to subsection (4), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 185(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure

(i) that has been established by the trade union, and

(ii) to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to him, or

(ii) has not, within six months from the date on which the complainant first presented his grievance or appeal pursuant to paragraph (a), dealt with his grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days from the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.

D. United States

UNFAIR LABOR PRACTICES. SEC. 8. (a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents --
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage [the employees of any employer] any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a [concerted] refusal in the course of [their] his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [], or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or [any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person] to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 []; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [;]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; [and]

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed [.]; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with
a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargain-
ing representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accor-
dance with this Act any other labor organization and a ques-
tion concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commence-
ment of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organiza-
tion, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the repre-
sentative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorpora-
ting any agreement reached if requested by either party, but such
obligation does not compel either party to agree to a proposal or re-

duire the making of a concession: Provided, That where there is in

effect a collective-bargaining contract covering employees in an

industry affecting commerce, the duty to bargain collectively shall also

mean that no party to such contract shall terminate or modify such con-

tract, unless the party desiring such termination or modification --

(1) serves a written notice upon the other party to the contract

of the proposed termination or modification sixty days prior

to the expiration date thereof, or in the event such contract

contains no expiration date, sixty days prior to the time it

is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose

of negotiating a new contract or a contract containing the

proposed modifications;

(3) notifies the Federal Mediator and Conciliation Service within

thirty days after such notice of the existence of a dispute,

and simultaneously therewith notifies any State or Territorial

agency established to mediate and conciliate disputes within

the State or Territory where the dispute occurred, provided

no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike

or lockout, all the terms and conditions of the existing

contract for a period of sixty days after such notice is given

or until the expiration date of such contract, whichever occurs

later:

The duties imposed upon employers, employees, and labor organizations by

paragraphs (2), (3), and (4) shall become inapplicable upon an interven-

ing certification of the Board, under which the labor organization or

individual, which is a party to the contract, has been superseded as or

ceased to be the representative of the employees subject to the pro-

visions of section 9(a), and the duties so imposed shall not be con-

strued as requiring either party to discuss or agree to any modification

of the terms and conditions contained in a contract for a fixed period,

if such modification is to become effective before such terms and condi-

tions can be reopened under the provisions of the contract. Any employee

who engages in a strike within the sixty-day period specified in this

subsection shall lose his status as an employee of the employer engaged

in the particular labor dispute, for the purposes of sections 8, 9, and

10 of this Act, as amended, but such loss of status for such employee

shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organiza-

tion and any employer to enter into any contract or agreement, express

or implied, whereby such employer ceases or refrains or agrees to cease

or refrain from handling, using, selling, transporting or otherwise

dealing in any of the products of any other employer, or to cease doing

business with any other person, and any contract or agreement entered
into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:

Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce" and "any person" when used in relation to the term "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, that nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area:

Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*

* Section 8(f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705(b) provides:

Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.
APPENDIX II

Remedial Sections

A. British Columbia
B. Ontario
C. Canada
D. United States
Appendix II

A. British Columbia

Inquiry into unfair labour practices.

8. (1) Where there is a complaint in writing to the Board that an employer, or a trade-union, or any other person is committing an act prohibited by section 3, 4, 5, 6, or 7, the Board shall serve a notice of the complaint on the person against whom the complaint is made and on any other person affected thereby.

(2) The Board may appoint an officer of the Department of Labour to inquire into the complaint and endeavour to effect a settlement of the matter complained of, and the officer shall report the results of his inquiry and endeavours to the board.

(3) Where no appointment is made under subsection (2), or where the officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint.

(4) Where, on inquiry, the board is satisfied that an employer, trade-union, or other person is doing, or has done, any of the acts prohibited by sections 3, 4, 5, 6, or 7, the Board

(a) may make an order directing the employer, trade-union, or other person to cease doing the act;

(b) may, in the same order or in a subsequent order, direct any employer, trade-union, or other person to rectify the act;

(c) may include a direction to reinstate and pay to an employee a sum equal to the wages lost by reason of his discharge, suspension, transfer, or lay-off contrary to clause (d) of subsection (2) of section 3;

(d) may, in the same order, or in a subsequent order, direct the employer not to increase or decrease rates of wages, or alter any term or condition of employment of the employees affected by the order for a period not exceeding thirty days without the written permission of the Board, and the Board may extend such an order for a further period not exceeding thirty days; and
(e) may, if the employees affected by the order are seeking trade-union representation, certify or refuse to certify the trade-union, notwithstanding that, by reason of an act prohibited by section 3, 4, 5, 6, or 7, the true wishes of the employees cannot be ascertained; but the Board may impose such conditions as it considers necessary or advisable upon the trade-union, and, if the conditions are not substantially fulfilled to the satisfaction of the Board within twelve months from the date of the certification, or within such lesser period of time as the Board may order, the certification shall be deemed to be cancelled.

(5) If, in the opinion of the Board, the complaint is without merit, the Board may reject the complaint at any time.

(6) On an inquiry by the Board into a complaint under clause (d) of subsection (2) of section 3, the burden of proof that he did not contravene clause (d) lies upon the employer. 1973 (2nd Sess.), c. 122, s. 8; 1974, c. 87, s. 22; 1974, c. 107, s. 6; 1975, c. 33, s. 5.

B. Ontario

Certification where Act contravened.

7a. Where an employer or employers' organization contravene his Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union certify the trade union as the bargaining agent of the employees in the bargaining unit.

ENFORCEMENT

Inquiry by labour relations officer to inquire into any complaint alleging a contravention of this Act.

Duties (2) The labour relations officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.
Report.

(3) The labour relations officer shall report the results of his inquiry and endeavours to the Board.

Remedy for discrimination.

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or

(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

Burden of proof.

(4a) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization. 1975, c. 76, s. 21(1).
(5) Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such. R.S.O. 1970, c. 232, s. 79(5).

(6) Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection 1. R.S.O. 1970, c. 232, s. 79(6); 1975, c. 76, s. 21(2).

C. Canada

189. Where, under section 188, the Board determines that a party to a complaint has failed to comply with section 148, 184 or 185, the Board may, by order, require the party to comply with that section and may

(a) in respect of a failure to comply with paragraph 148(b), by order, require an employer to pay to any employee compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee;
(b) in respect of a failure to comply with paragraph 184(3)(a), (c) or (f), by order, require an employer to

(i) reinstate any former employee affected by that failure as an employee of the employer, and

(ii) pay to any employee or former employee affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee;

(c) in respect of a failure to comply with paragraph 184(3)(e), by order, require an employer to rescind any disciplinary action in respect of and pay compensation to any employee affected by the failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any pecuniary or other penalty imposed on the employee by the employer;

(d) in respect of a failure to comply with paragraph 185(f) or (h), by order, require a trade union to reinstate or admit an employee as a member of the trade union; and

(e) in respect of a failure to comply with paragraph 185(g), (h) or (i), by order, require a trade union to rescind any disciplinary action in respect of and pay compensation to any employee affected by the failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any pecuniary or other penalty imposed on the employee by the trade union.

D. United States

PREVENTION OF UNFAIR LABOR PRACTICES. SEC. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. Provided, That the Board is empowered
by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, sec. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations
and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its
findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court
of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period [...]: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction
of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (2)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1).
APPENDIX III

1977 Amendments to Section 3 of Labour Code of B.C.

MINISTER OF LABOUR

BILL

No. 89

Labour Code of British Columbia
Amendment Act, 1977

2. Section 3(2) is repealed and the following substituted:

(2) No employer, and no person acting on behalf of an employer, shall

(a) discharge, suspend, transfer, lay off, or otherwise discipline an employee, or refuse to employ or continue to employ a person, or discriminate against a person in regard to employment, or a condition of employment, for the reason that the person

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

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

(b) impose a condition in a contract of employment seeking to restrain an employee from exercising his rights under this Act, or

(c) seek by intimidation, by dismissal, by threat of dismissal, or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms of employment, to compel or to induce an employee to refrain from becoming, or continuing to be, a member or officer or representative of a trade-union, or

(d) use, or authorize or permit the use of, a professional strike breaker or an organization of professional strike
breakers, or

(e) refuse to agree with a trade-union, certified as the bargaining agent for his employees under this Act who have been engaged in collective bargaining with a view to concluding their first collective agreement, that all employees in the unit, including those who may not be members of the trade-union, but excluding those exempted under section 11, will pay union dues from time to time to the trade-union,

but, except as expressly provided, nothing in this Act shall be so interpreted as to limit or otherwise affect the right of the employer

(f) to suspend, transfer, lay off, or discharge an employee for proper cause, or

(g) to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business, or

(h) to make any change in the operation of the employer's business reasonably necessary for the proper conduct of that business.